B302739

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

DotConnectAfrica Trust,
Appellant,
v.
Internet Corporation for Assigned Names and Numbers, et al.,
Respondent.

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

RESPONDENT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS LATE-FILED APPEAL

Jeffrey A. LeVee (State Bar No. 125863)
Erin L. Burke (State Bar No. 186660)
Erica L. Reilley (State Bar No. 211615)
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 Respondent
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

OTHER AUTHORITIES

INTRODUCTION

ICANN's motion to dismiss set forth a straightforward argument for why the superior court clerk's October 3, 2019 service of a filed-endorsed copy of the Final Judgment and accompanying certificate of mailing in one envelope triggered DCA's 60-day deadline to appeal under Rule 8.104(a)(1)(A).[1] DCA failed to meet that deadline, and not once does DCA claim that its counsel did not receive or was confused by the contents of the clerk's mailing. Rather, DCA now misconstrues case law and argues a host of strained technicalities and diversions in an attempt to avoid dismissal of its untimely appeal. DCA's arguments contravene settled law, and ICANN's motion should be granted.

THE CLERK'S MAILING MET ALL REQUIREMENTS OF RULE 8.104 AND TRIGGERED DCA'S 60-DAY DEADLINE TO APPEAL

Rule 8.104(a)(1)(A) plainly provides that, for the 60-day deadline to appeal to be triggered, a superior court clerk may serve "a document entitled 'Notice of Entry' of judgment or a filed-endorsed copy of the judgment, showing the date either was served" and that "[t]he proof of service establishes the date that the 60-day period under subdivision (a)(1)(A) begins to run." (Cal. Rules of Court, rule 8.104(a)(1)(A) & Advisory Com. com., Cal. Rules of Court, rule 8.104.) California case law provides that a clerk's proof of service may be attached or may accompany the document served.

[1] ICANN uses here all the same defined terms and abbreviations as it used in its motion to dismiss. DCA's opposition to ICANN's motion to dismiss is cited to as "Opp."

(See, e.g., *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 905; *In re Marriage of Lin* (2014) 225 Cal.App.4th 471, 476 ["Under the court rules, the deputy clerk's proof of service triggers the start of the 60-day filing period when it accompanies a file-stamped copy of the judgment."]; see also Judge Moore and Thomas, Cal. Civil Practice - Procedure (Thomson Reuters 2019) § 37:4 ["Party or clerk service may be by any method permitted under the Code of Civil Procedure. [Cal. Rules of Court, rule 8.104] To trigger the 60 day appeal period service of a notice of entry or a file-endorsed copy of the judgment must be accompanied by proof of service. The rules set forth above for triggering the 60 day appeal period apply equally to a party and the court clerk."].)

DCA does not dispute that it received a single envelope that contained a filed-endorsed copy of the final judgment and an accompanying certificate of mailing from the superior court clerk showing an October 3, 2019 date of service. (Opp. at p. 10.) Nor does DCA suggest that the contents of the clerk's mailing were in any way unclear (and they were not, in any event). Taken together, these facts should end the inquiry into whether DCA's 60-day deadline to appeal was triggered by the clerk's mailing (yes) and whether DCA's notice of appeal filed on the 61st day was timely (no).

In its 34-page opposition, DCA misconstrues numerous cases, engages in unsound hyper-technicalities, and makes unprofessional and unwarranted attacks on ICANN. For example, DCA argues at length that ICANN has "violated its duties to this Court" (Opp. at

pp. 26–27) by not having raised that there is a requirement that the service date be reflected on the "four corners" of the judgment or that the clerk's certificate of mailing was not properly attached under *Alan*. As explained below, however, a review of the cases DCA cites quickly reveals that it is DCA, not ICANN, that has misrepresented the law. Neither the text of Rule 8.104 nor any of the cases cited by DCA require, or *even suggest*, that the date of service be stamped on the face page or the "four-corners" of the appealable order, or that a proof of service be attached or included in any certain manner or that it be consecutively paginated with the document served.

Rather, the superior court clerk's October 3, 2019 mail service of a filed-endorsed copy of the Final Judgment with an accompanying proof of service satisfies the requirements of Rule 8.104(a)(1)(A) and renders untimely DCA's notice of appeal filed on the 61st day. Accordingly, ICANN's motion to dismiss the appeal should be granted.

DCA MISREPRESENTS THE SUPREME COURT'S HOLDING IN *ALAN*[2]

DCA's claim that ICANN's motion "necessarily fails" under the Supreme Court's holding in *Alan* (Opp. at p. 18) is immediately dispelled upon a closer look at the facts of that case.

In *Alan*, the Court held that a clerk's mailing of two nonappealable documents together did not trigger a deadline to

[2] DCA also misunderstands the doctrine of waiver by arguing that ICANN has waived its right to respond to the arguments made

appeal under Rule 8.104(a)(1)(A). (*Alan, supra*, 40 Cal.4th at p. 902.) There, the clerk, in an "idiosyncratic manner," mailed the parties a filed-stamped statement of decision, and a minute order that was not filed-stamped, stating that the ruling was made and mailed by the clerk to the parties. (*Id.* at p. 898.) The Court held that neither document was appealable, as statements of decision are generally not appealable and the minute order at issue was not filed-stamped, and that these two documents were not intended to incorporate one another and thus could not be read together to somehow satisfy the requirements of Rule 8.104(a)(1)(A). (*Id.* at pp. 902, 905.) In so concluding, the Court expressed concern that litigants should not be required to glean and make assumptions in combining various such documents in order to determine when a deadline to appeal is triggered. (*Ibid*.) In interpreting Rule 8.104(a)(1)(A), the Court reasoned that the rule requires a single document—"either a 'Notice of Entry' so entitled or a filed-stamped copy of the judgment or appealable order—that is sufficient in itself to satisfy all of the rule's

---

in DCA's response. (Opp. at pp. 27-28.) Every case upon which DCA relies for its contention involves waiver of completely new or inconsistent arguments in a reply brief or waiver of arguments in an opening brief on appeal. (*Ibid*.) The waiver rule, however, is inapplicable when a party is replying to new legal arguments made in a respondent's opposition. (See, e.g., *Singh v. Lipworth* (2005) 132 Cal.App.4th 40, 43, fn. 2 [noting that "points raised for the first time in a reply brief (other than those which are strictly responsive to arguments in the respondent's brief) are waived"]; *Fratessa v. Roffy* (1919) 40 Cal.App. 179, 188 [finding that the rule against new arguments in closing briefs is "hardly applicable" when arguments are made to rebut those raised in the opposition brief].)

conditions, including the requirement that the document itself show the date on which it was mailed." (*Id.* at p. 905.)

In its opposition, DCA conveniently omits the remainder of the Court's discussion regarding the treatment of proofs of service (see Opp. at p. 20), which is most relevant here:

> That having been said, *we see no reason why the clerk could not satisfy the single-document requirement by attaching a certificate of mailing* to the file-stamped judgment or appealable order, or to a document entitled "Notice of Entry." Obviously a document can have multiple pages. But the rule 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 p. 905, italics added.) Thus, DCA misleadingly attempts to analogize *Alan* to this case by arguing that the Court held that "different titles, different paginations, and plainly separate documents" did not satisfy the single-document requirement. (Opp. at p. 20.) The *Alan* Court made no such blanket rulings about "titles" or "paginations." The two documents at issue in *Alan*—neither of which was actually appealable or included a proof a service—required a litigant to conduct guesswork and glean from them that a duty to appeal had been triggered. (*Alan, supra*, 40 Cal.4th at pp. 898, 902.) The Court thus concluded that it did not matter if the clerk mailed the two unincorporated documents in the same envelope or even if the clerk had physically attached the two documents together; the documents did not satisfy the requirements of Rule 8.104(a)(1)(A). (*Id*. at pp. 898, 905.) *Alan*'s holding does not

contradict dismissal under the straightforward facts here, which involve the clerk's service of a filed-endorsed copy of the Final Judgment accompanied by a certificate of mailing demonstrating the date of service.

DCA'S "AVALANCHE" OF CASES APPLYING *ALAN* ARE ALL LIKEWISE INAPPOSITE

The "avalanche" of "on-point precedents" that DCA claims support a "single-document requirement" (Opp. at p. 7) are each distinguishable and inapposite.

For example, DCA relies upon *Bi-Coastal Payroll Servs., Inc. v. Cal. Ins. Guarantee Association* (2009) 174 Cal.App.4th 579 (Opp. at pp. 14–15), where the issue was whether a minute order accepting an earlier-filed stipulated judgment was a notice of entry of judgment. (*Bi-Coastal, supra*, 174 Cal.App.4th at pp. 582, 586-589.) Similar to the reasoning in *Alan*, the court concluded that the clerk did not serve a document entitled "Notice of Entry," and the minute order not only was not filed-stamped, but also was not appealable. (*Ibid.*) Thus, the minute order did not meet the requirements of Rule 8.104(a)(1)(A). (*Ibid.*) *Bi-Coastal*'s facts plainly are not analogous to the facts here.

DCA next asserts that *M'Guinness v. Johnson* (2015) 243 Cal.App.4th 602 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*." (Opp. at p. 20.) Not so. DCA's quoted language was, in fact, the court's summary of the issue presented, not the holding. (See *M'Guinness, supra*, 243 Cal.App.4th at p. 611.) The court's actual

holding was that "the file-endorsed copy of the order cannot be read in conjunction with a separate document—the 'corrected proof of service'—to satisfy the requirements of rule 8.104(a)(1)(A)." (*Id.* at p. 612.) Although neither the opinion nor the parties' briefs make clear exactly how the "corrected proof of service" was served, it stands to reason that the "corrected proof of service" was served and mailed *separately* from the appealable order. (Reply Decl. of Erica L. Reilley ISO Respondent's Motion to Dismiss ("Reilley Reply Decl."), Exs. H-K.) Indeed, the record shows that the clerk filed and mailed two different proofs of service—the first one inadvertently omitted the date of service, and the "corrected" one had the date of service included. (*Id.*, Exs. H, I.) It is logical to infer from these facts that the corrected proof was sent as a separate mailing: If the error in the first proof had been identified prior to it actually being mailed out, the clerk could have simply corrected the error and exchanged the proof, rather than follow it with a "corrected" proof. In fact, the Rutter Guide, in a summary immediately following a portion DCA quoted in its opposition (at p. 20), confirms that inference: "*M'Guinness v. Johnson* (2015) 243 CA4th 602, 610-612, 196 CR3d 662, 667-669—deadline not triggered by court clerk's service of filed-endorsed copy of order considered in conjunction with *separately-served* 'corrected proof of service' of copy." (Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2019) ¶ 3:42.1), italics added.) Here, there is no dispute that the clerk mailed together *in a single envelope* a filed-endorsed copy of the Final Judgment and an accompanying proof of service. (Opp. at p. 10.) Therefore, contrary to DCA's contentions, *M'Guinness* does not

present "virtually identical circumstances" (Opp. at p. 17) to those at issue here.

Finally, DCA selectively quotes from *Maldonado v. Epsilon Plastics, Inc.* (2018) 22 Cal.App.5th 1308, where this Court found that the clerk did not "serve a file-endorsed copy of the judgment showing the date it was served." (Opp. at p. 18.) But DCA fails to acknowledge that in the sentences immediately following DCA's quoted language, this Court explains that the mailing at issue did not contain a proof of service *at all*, and that, in an earlier proceeding, the trial court had even questioned whether the judgment was part of the mailing. (*Maldonado*, *supra*, 22 Cal.App.5th at p. 1338.) Similarly, DCA cites to *In re Marriage of Lin* (2014) 225 Cal.App.4th 471, another case where the clerk did not include a proof of service at the time of mailing, and the court understandably concluded that the clerk's *later* proof of service could not be used retroactively to show that Rule 8.104(a)(1)(A) had been satisfied. (*Id.* at pp. 475–476.) As such, *Maldonado* and *In re Marriage of Lin* are inapposite to the facts here.[3]

---

[3] The remaining cases on which DCA relies (Opp. at pp. 23-24) are similarly distinguishable. In *Thiara v. Pacific Coast Khalsa Diwan Society* (2010) 183 Cal.App.4th 51, the court held that the party's service of the filed-endorsed appealable order *without* an accompanying proof of service did not satisfy Rule 8.104. In *InSyst, Ltd. v. Applied Materials, Inc.* (2009) 170 Cal.App.4th 1129, the court held that the trial court's emailed *link* to where the filed-endorsed judgment could be accessed did not satisfy Rule 8.104. And in *Sunset Millennium Associates, LLC v. Le Songe, LLC* (2006) 138 Cal.App.4th 256, the court held that a document that stated "notice of entry" on page 13 of 14 did not satisfy Rule 8.104.

DCA'S OTHER EFFORTS TO AVOID DISMISSAL THROUGH VARIOUS DIVERSIONS ARE UNAVAILING

Desperate to save its untimely appeal, DCA makes a host of attacks on the clerk's October 3 mailing aimed at introducing ambiguity and confusion where there was—and is—none.

The Envelope's Post-Mark Does Not Alter the Service Date. DCA argues that the envelope's October 4, 2019 post-mark date creates "serious ambiguity" regarding the service date. (Opp. at pp. 8–9, 30, 33–34.) It does not. It is undisputed that the proof of service (not the envelope post-mark) triggers the 60-day deadline to appeal under Rule 8.104(a)(1)(A). (Advisory Com. com., Cal. Rules of Court, rule 8.104.) Moreover, under the Code of Civil Procedure section 1013a, subdivision 4, the date the clerk of the court "places the document for collection and mailing" as shown on the proof of service is the date on which service is deemed to have occurred, unless the post-mark date is *more than* one day after the date of deposit for mailing contained in the certificate. (See also *Staten v. Heale* (1997) 57 Cal.App.4th 1084, 1087.) Here, the post-mark date on the envelope was *not* more than one day after the date on the clerk's certificate of mailing (Opp. at pp. 8–9, 30, 33–34), and thus DCA's argument fails.[4]

---

[4] DCA attempts to argue that the clerk here did not state on the proof of service that the Final Judgment was "filed-endorsed" but rather was the "original filed/entered" judgment. (Opp. at p. 31.) Notwithstanding that there is no practical difference between the two here (there is no *entered* copy of the Final Judgment that is not filed-endorsed), Rule 8.104 does not require that a clerk's proof of service state that the judgment it is serving is filed-endorsed, and

The Trial Court's Order That ICANN Provide Notice of Entry of Judgment Does Not Trump the Triggering Events of Rule 8.104. DCA contends that because the trial court ordered ICANN to provide notice of entry of the judgment, ICANN's October 10 notice should control the 60-day deadline to appeal. (Opp. at pp. 6, 11.) Although the trial court ordered ICANN to provide notice, which ICANN did, the court did not, *by any means*, "order[] only one form of service under Rule 8.104(a)," as DCA argues. (Opp. at p. 13.) More importantly, whether the court ordered any party to provide service is immaterial because it cannot trump the express language of Rule 8.104. As explained in ICANN's motion (at pp. 3-4), Rule 8.104 specifically accounts for the possibility that both a party and the clerk might serve a triggering document and requires "the earliest of" those triggering documents to dictate the deadline to appeal.[5]

---

there is no dispute that the Final Judgment served by the clerk here was filed-endorsed. These facts make the case upon which DCA relies, *Keisha W. v. Marin M.* (2014) 229 Cal.App.4th 581, irrelevant because, there, the court was concerned with a *party's* service and concluded that there was no evidence that the order that was served was in fact filed-endorsed because the proof of service did not so state.

[5] DCA tries to impugn the clerk's October 3 service of the filed-endorsed copy of the Final Judgment because it "had no obligation at all to serve the final judgment." (Opp. at p. 14.) Whether the clerk was obligated to serve is irrelevant under Rule 8.104(a)(1)(A). What matters is that the clerk *did* properly serve the final judgment in compliance with all the requirements of Rule 8.104, which triggered DCA's 60-day deadline to appeal.

The October 4 Date Stamp in the Left Margin of ICANN's Served Copy of the Judgment Is Irrelevant. DCA contends that the standalone date stamp on the left margin of the copy of the judgment served by ICANN that reads "10/04/2019" also creates "serious ambiguity." (Opp. at pp. 8, 30, 33–34.) Notably, the stamp does not suggest that the document was "served" on 10/04/2019—it is merely a date stamp. More importantly, the filed-endorsed copy of the Final Judgment served by the clerk on October 3—which is the only filed-endorsed copy relevant here—does *not* have that date stamp. (Reilley Reply Decl., Ex. L.) Indeed, it is common current practice in the Los Angeles County Superior Court that such date stamps are placed on documents when the clerk processes a filing and scans it into the court's electronic database (Reilley Reply Decl., ¶ 5), which likely was done here following the clerk's service of the documents. As DCA itself acknowledges, ICANN served its notice of entry of judgment using the electronic copy of the Final Judgment from the superior court's docket (Opp. at p. 11), which was entirely appropriate. That version of the Final Judgment and the date stamp on it are irrelevant here, however. It is the filed-endorsed copy of the Final Judgment and the accompanying proof of service mailed by the clerk on October 3 that control and render DCA's appeal untimely.[6]

[6] ICANN attached the electronic copy of the final judgment (pulled from the trial court's docket) to its motion to dismiss this appeal for ease and because the date stamp in the margin is of no significance. For completeness, ICANN is attaching the face page of the hard copy of the filed-endorsed Final Judgment served by the

THE AMBIGUITY PRINCIPLE CANNOT SAVE DCA'S UNTIMELY APPEAL

DCA attempts to invoke the principle that ambiguities generally should be resolved in favor of permitting a right to appeal, but that principle is not applicable here. Courts only cautiously apply this principle where it serves to protect appellants in cases of true ambiguity, not to appease appellant's purported confusion of a triggering document under Rule 8.104 or erase avoidable mistakes. (See *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 674.)

In *Hollister*, the appellant filed its notice of appeal one day late, triggered by service of notice of entry of an order denying a motion for a new trial. The Supreme Court rejected the appellant's assertions that its untimely filing should be excused because it was confused by being served a formal court order that was dated two days after the notice of entry indicated the order had been entered. (*Hollister, supra*, 15 Cal.3d at p. 674.) The *Hollister* Court emphasized that the ambiguity principle had actually been applied only where there had been a "clear conflict" in the evidence of whether a document complied with Rule 8.104 so as to trigger the deadline to appeal. (*Id.* at p. 668 [distinguishing the case before it from *Slawinski v. Mocettini* (1965) 63 Cal.2d 70, where there had been "a clear conflict between the permanent minutes of the court and a formal order of denial subsequently issued" regarding when the appealable

---

clerk on October 3, where (for all the reasons just discussed) there is no date stamp on the left margin. (Reilley Reply Decl., Ex. L.)

order had been entered and that "clear conflict" was resolved in appellant's favor].)

In other words, the *Hollister* Court rejected the notion that failing to file a notice of appeal by the deadline triggered by a document that meets all of the requirements of Rule 8.104 can be excused based on the appellant's purported confusion: When a notice of appeal "has not in fact been filed within the relevant jurisdictional period—and when applicable rules of construction and interpretation fail to require that it be deemed in law to have been so filed—the appellate court, absent statutory authorization to extend the jurisdictional period, lacks all power to consider the appeal on its merits and must dismiss, on its own motion if necessary, without regard to considerations of estoppel or excuse." (*Id*. at p. 674.)

None of the cases DCA cites in support of its ambiguity argument hold any differently. And they also do not actually invoke the ambiguity principle to permit an untimely appeal; rather, they conclude that the purportedly triggering document did *not* comply with Rule 8.104 (on distinguishable facts), which renders each of them inapposite.

For example, in *Montgomery Ward & Co., Inc. v. Imperial Casualty & Indemnity Co.* (2000) 81 Cal.App.4th 356, 372-373, the court concluded that the deadline to appeal was 180 days after entry of judgment, which the appellant satisfied, because there was nothing in the record that confirmed that the clerk had in fact mailed

the cross-appellant a copy of the filed-endorsed judgment, which would have triggered a 60-day deadline under Rule 8.104(a)(1)(A).

In *M'Guinness*, *supra*, 243 Cal.App.4th at pp. 611-612, as discussed above, the corrected proof of service that was "served separately" from the copy of the filed-endorsed judgment did not comply with Rule 8.104(a)(1)(A). (Reilley Reply Decl., ¶ 2 & Exs. H, I.) Similarly, in *Bi-Coastal*, *supra*, 174 Cal.App.4th at pp. 582, 586-589, the appellant was served a minute order that was not entitled "Notice of Entry" of judgment and was not filed-endorsed, and thus did not comply with Rule 8.104(a)(1)(A).

Equally distinguishable is DCA's citation to *In re Marriage of Mosley* (2010) 190 Cal.App.4th 1096. There, the filed-endorsed copy of the appealable order was misplaced by the clerk and thus not entered into the court record or available in a publicly accessible location for at least five months after the date of entry, which meant there was no actual evidence that the order had been entered that would be sufficient to trigger the 60-day deadline. (See *id*. at pp. 1104-1105.)

Finally, in *Citizens for Civic Accountability v. Town of Danville* (2008) 167 Cal.App.4th 1158, the issue was whether the older version of Rule 8.104(a)(1)(A) allowed email service by the clerk. The court there refused to interpret the Rule's requirement for "mail" service to include "e-mail" service, reasoning that to do so "would create a trap for the unwary." (*Id.* at p. 1164.)

In other words, notwithstanding DCA's cherry-picked sound bites from these cases, none of the cases upon which DCA relies *actually* invoked the ambiguity principle to save an appeal that otherwise would have been untimely due to service of a triggering document that complies with Rule 8.104(a)(1)(A). Rather, they each conclude, under distinguishable circumstances, that there was no compliance with the rule and thus the 60-day deadline to appeal was not triggered.

Here, it is uncontested that the superior court clerk served a filed-endorsed copy of the Final Judgment with an accompanying proof of service stating that the document was served on October 3, 2019. (Opp. at pp. 10-11.) DCA does not contend that it was confused by the contents of the mailing or to which documents the clerk's proof of service referred (Opp. at pp. 10-11; see also Ethan Brown Decl. ISO Opp.),[7] and even then, under *Hollister*, if DCA actually had been confused, that confusion still would not warrant invocation of the ambiguity principle to excuse DCA's untimely notice of appeal.

[7] It is curious that DCA filed its notice of appeal on December 3—only one day after the deadline triggered by the clerk's October 3 mailing and several days before the deadline that would have been triggered by ICANN's October 10 notice. This timing suggests that DCA was in fact operating with an understanding that the clerk's October 3 mailing governed its time to appeal, but that DCA made a miscalculation in identifying the actual deadline.

CONCLUSION

ICANN's motion to dismiss DCA's untimely appeal should be granted.

Dated: January 8, 2020

Respectfully submitted,

JONES DAY

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

Attorney for Defendant-Respondent
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

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 4,110 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: January 8, 2020

Respectfully submitted,

JONES DAY

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

Attorney for Defendant-Respondent
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS