

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **16-CV-00862 RGK (JCx)** Date June 20, 2016

Title ***DotConnectAfrica Trust v. Internet Corporation for Assigned Names and Numbers & ZA Central Registry***

Present: The Honorable R. GARY KLAUSNER, U.S. DISTRICT JUDGE

Sharon L. Williams (Not Present) Deputy Clerk	Not Reported Court Reporter / Recorder	N/A Tape No.
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Attorneys Present for Plaintiffs:

Not Present

Attorneys Present for Defendants:

Not Present

Proceedings: (IN CHAMBERS) Order re: Defendants Motion for Reconsideration re Order on Motion for Preliminary Injunction (DEs 85 and 86)

I. FACTUAL BACKGROUND

On February 26, 2016, Plaintiff DotConnectAfrica Trust (“Plaintiff”) filed a First Amended Complaint (“FAC”) against Defendants Internet Corporation for Assigned Names and Numbers (“ICANN”), and ZA Central Registry (“ZACR”) (collectively “Defendants”). The action arises out of a dispute involving the delegation of rights related to the .Africa top-level domain.

On March 4, 2016, the Court granted Plaintiff’s Ex Parte Application for TRO, enjoining ICANN from issuing the .Africa top-level domain until the Court decided Plaintiff’s Motion for Preliminary Injunction. On April 12, 2016, the Court granted Plaintiff’s Motion for Preliminary Injunction, keeping the injunction in place until resolution of the action.

On April 26, 2016, ZACR filed a Motion to Dismiss all claims asserted against it. On May 6, 2016, ZACR filed the current Motion for Reconsideration regarding the Court’s Order re Preliminary Injunction. ICANN joined this motion on May 10, 2016. Since then, the Court has granted ZACR’s Motion to Dismiss in its entirety, thereby extinguishing ZACR’s role a party to the action. Therefore, the Court **denies as moot** ZACR’s motion for reconsideration, and addresses the motion only as it pertains to ICANN.

Upon review ICANN’s arguments, the Court **denies** ICANN’s motion.

II. JUDICIAL STANDARD

Federal Rule of Civil Procedure 59(e) governs a motion to reconsider a preliminary injunction, and Federal Rule of Civil Procedure 54(b) governs a motion to vacate or dissolve a preliminary injunction. *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1124 (9th Cir. 2005). While a motion made under Rule 59(e) seeks to relitigate the issues underlying the original preliminary injunction, a motion made under Rule 54(b) seeks relief from inequities that arise after the original order. *Id.* Therefore, a Rule 54(b) motion requires new or changed circumstances that have arisen after the court granted the injunction. *Id.* Here, ICANN does not raise any new or changed circumstances that have arisen after the Court's April 12, 2016 Order re Preliminary Injunction. Therefore, the standards of Rule 59(e) and its corresponding Local Rule 7-18 apply.

Relief under Rule 59(e) is appropriate if the court "(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *Dixon v. Wallowa Cty.*, 336 F.3d 1013, 1022 (9th Cir. 2003) (internal citation omitted). Additionally Local Rule 7-18 states that a motion for reconsideration may be made only on the following grounds:

(a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

III. DISCUSSION

ICANN moves for reconsideration on the following grounds: (1) the Court made an erroneous factual finding that impacts its determination of the merits; and (2) Plaintiff misrepresented facts regarding irreparable injury. ICANN further argues that even if the Court maintains the injunction, it should order Plaintiff to post a bond. For the following reasons, the Court finds ICANN's arguments unavailing.

A. Erroneous Finding of Fact

ICANN argues, and Plaintiff concedes, that the Court made an erroneous finding of fact in its Order re Preliminary Injunction ("Order"). However, based on consideration of the corrected facts, the Court finds its determination of the merits unchanged.

After the IRP conducted its investigation, it issued a declaration stating that ICANN should "permit [Plaintiff's] application to proceed through the remainder of the new gTLD application process." (Eschete Decl. Ex. 1 (IRP Panel Decl. at 62).) In response, ICANN resumed Plaintiff's application at the Geographic Names Panel. A key issue in the parties' dispute is whether ICANN violated the IRP Declaration by not allowing the application to resume at a point after the geographic names evaluation phase.

In its Order, the Court stated, "[b]ecause ICANN found [Plaintiff's] application passed the geographic names evaluation in the July 2013 initial evaluation report, the Court finds serious questions in [Plaintiff's] favor as to whether [Plaintiff's] application should have proceeded to the delegation stage following the IRP decision." (Order at 6.) Both parties agree that Plaintiff, in fact, did not pass the

geographic name evaluation process. Rather, the evidence relied on by the Court shows that ZACR passed the geographic name evaluation. Therefore, the Court erred.

Nonetheless, upon reconsideration of the facts and evidence, there still exists serious questions going to whether Plaintiff had acquired a sufficient number of endorsements to have passed the geographic names evaluation phase in the first instance. In the IRP Declaration, the panel stated that “both the actions and inactions of the Board with respect to the application of [Plaintiff] relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN.” (IRP Panel Decl. at 61.) At this stage of litigation, it is reasonable to infer that the IRP Panel found that ICANN’s rejection of Plaintiff’s application at the geographic names evaluation phase was improper, and that the application should proceed to the delegation phase.

The Court finds that the error in its factual finding was not determinative to its ultimate conclusion that there are serious questions going toward Plaintiff’s likelihood of success on the merits.

B. Irreparable Injury

ICANN states that the Court found irreparable injury in Plaintiff’s favor by erroneously relying on Plaintiff’s representation that .Africa can be delegated only once. ICANN now argues that a gTLD, including .Africa, *can* be redelegated, and in fact, ICANN’s 2013 manual provides step-by-step instructions on how to perform a redelegation. ICANN’s argument fails.

As an initial matter, ICANN failed to make this argument in its opposition to Plaintiff’s Motion for Preliminary Injunction. ICANN does not state that this fact was unknown or unavailable to ICANN prior to the Court’s issuance of the injunction, nor is there reason to believe it can. On this basis alone, ICANN’s argument fails.¹

Even if the Court considered this argument, however, there is still adequate evidence provided by Plaintiff (i.e., loss of business funding, etc.) to find irreparable injury on the part of Plaintiff. Therefore, the Court’s finding regarding balance of the hardships also remains unchanged.

C. Posting of Bond

Federal Rule of Civil Procedure 65(c) states that a court may issue a preliminary injunction only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.

Again, ICANN failed to make any argument or showing of costs or damages in its initial opposition to Plaintiff’s Motion for Preliminary Injunction. ICANN cannot use a motion for reconsideration for a second bite at the apple. Moreover, even in its current motion, ICANN does not introduce any costs or damages it will suffer if it is found to have been wrongfully enjoined.²

¹ The Court notes that even if ZACR was still in the action, there is a substantial question as to whether ZACR’s failure to even attempt to submit an opposition places it in the same situation as ICANN. It is undisputed that although ZACR was officially served with the complaint a week after the opposition briefing deadline had already passed, ZACR knew of Plaintiff’s motion well before that time. From the time ZACR had been served to the time the Court issued the injunction, three weeks had elapsed. At no time during this period did ZACR attempt to oppose Plaintiff’s motion.

² All evidence of costs and damages were submitted by ZACR. Even if ZACR was still a party to the action, there are substantial questions as to whether ZACR’s stated damages are unavoidable, and whether ZACR’s lost profits are too speculative to form the basis for security.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** ICANN's Motion Reconsideration.

IT IS SO ORDERED.

Initials of Preparer _____ : _____
