DEPARTMENT 53 LAW AND MOTION RULINGS

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Case Number: BC607494 **Hearing Date:** December 22, 2016 **Dept:** 53

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES – CENTRAL DISTRICT
DEPARTMENT 53

DOTCONNECTAFRICA TRUST;

Plaintiff,

vs.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, et al.;

Defendants.
Case No.: BC607494

Hearing Date: December 22, 2016

Time: 8:30 a.m.

[TENTATIVE] ORDER RE:

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff DOTCONNECTAFRICA TRUST'S motion for a preliminary injunction is GRANTED.

BACKGROUND

This action involves the award and delegation of the generic top-level domain name ("gTLD") ".Africa." Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") is a California not-for-profit public benefit corporation that oversees the technical coordination of the Internet's domain name system. In 2012, ICANN launched the "New gTLD program," in which it invited interested parties to apply to be designated the operator of their chosen gTLD. The operator would manage the assignment of names within the gTLD and maintain its database of names and IP addresses.

In March 2012, Plaintiff DotConnectAfrica Trust ("DCA") applied to ICANN for the delegation of the .Africa gTLD. DCA was formed with the charitable purpose of advancing information technology education in Africa and providing a continental Internet domain name to provide access to internet services for the people of Africa. Defendant ZA Central Registry, NPC ("ZACR") also applied to be the operator of .Africa. ZACR is a

South African non-profit company which was formed to promote open standards and systems in computer hardware and software.

The competition for the .Africa gTLD came down to DCA and ZACR. In 2013, ICANN's Government Advisory Committee ("GAC") issued advice that DCA's application should not proceed due to issues with regional endorsements. ICANN rejected DCA's application based on the GAC advice, while ZACR's application continued. Thereafter, DCA challenged ICANN's decision and filed a request for review by an Independent Review Process ("IRP") Panel, a form of alternative dispute resolution provided for by the ICANN bylaws.

On July 9, 2015, the IRP Panel issued a "Final Declaration" finding in favor of DCA and concluding that ICANN should "continue to refrain from delegating the .Africa gTLD and permit DCA Trust's application to proceed through the remainder of the new gTLD application process." (Bekele Decl. ¶10, Ex. 1 at ¶133.) In July 2015, ICANN placed DCA's application back in the geographic names evaluation phase. ICANN later concluded that DCA's application was insufficient to proceed past this phase.

In January 2016, after learning that ICANN would reject its application, DCA filed suit against ICANN. ICANN then removed the case to the Central District of California. While this case was pending before the district court, DCA moved for and was granted a temporary restraining order and subsequently a preliminary injunction, enjoining ICANN from delegating the rights to .Africa until the case was resolved. ZACR filed a motion to reconsider the preliminary injunction order which ICANN joined. The motion for reconsideration was denied. On October 19, 2016, the district court remanded the case to this Court due to lack of jurisdiction.

DCA now moves for the same preliminary injunction that the district court previously entered—an order enjoining ICANN from issuing the .Africa gTLD until this case has been resolved.

EVIDENCE

ICANN's evidentiary objections are overruled.

DCA's evidentiary objections are overruled.

DCA's request for judicial notice is granted.

LEGAL STANDARD

"As its name suggests, a preliminary injunction is an order that is sought by a plaintiff prior to a full adjudication of the merits of its claim." (White v. Davis (2003) 30 Cal.4th 528, 554.) "[A]n order granting or denying a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. Its purpose is to preserve the status quo until the merits of the action can be determined." (Socialist Workers etc. Committee v. Brown (1975) 53 Cal. App. 3d 879, 890-91 (citations omitted).)

"In determining whether to issue a preliminary injunction, the trial court considers: (1) the likelihood that the moving party will prevail on the merits and (2) the interim harm to the respective parties if an injunction is granted or denied. The moving party must prevail on both factors to obtain an injunction." (Pittsburg Unified School District v. S.J. Amoroso Construction Co., Inc. (2014) 232 Cal.App.4th 808, 813-814.) "The trial court's determination must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other…" (Church of Christ in Hollywood v. Superior Court (2002) 99 Cal.App.4th 1244, 1251-52.) "The ultimate goal of any test to be used in deciding whether a preliminary injunction should issue is to minimize the harm which an erroneous interim decision may cause." (White, supra, 30 Cal.4th at p. 554.) The burden is on the party seeking injunctive relief to show all elements necessary to support issuance of a preliminary injunction. (O'Connell v. Superior Court (2006) 141 Cal.App.4th 1452, 1481.)

DISCUSSION

A. Effect of the District Court's Preliminary Injunction Order

DCA argues that the preliminary injunction entered by the district court remains valid. However, DCA cites to no authority holding that a district court's orders are binding after a remand for lack of jurisdiction. The authority relied on by DCA is not directly on point as it pertains to the effect of pleadings following remand. (See Laguna Vill., Inc. v. Laborers' Internat. Union of N. Am. (1983) 35 Cal.3d 174, 181 ("Adoption of the federal pleadings filed in this case would avoid the needless waste of time, effort and expense…"); Ayres v. Wiswall (1884) 112 U.S. 187, 189 ("It will be for the state court, when the case gets back there, to determine what shall be done with pleadings filed … during the pendency of the suit in [federal court]").)

Case law provides that "any judgment or order rendered by a court lacking subject matter jurisdiction is 'void on its face.'" (Varian Med. Sys., Inc. v. Delfino (2005) 35 Cal.4th 180, 196; see also In re Establishment Inspection of Hern Iron Works, Inc. (9th Cir. 1989) 881 F.2d 722, 726-727 ("If a court order issues without personal or subject matter jurisdiction … the original order is deemed a nullity").) Thus, it appears that the district court's preliminary injunction order is no longer valid.

B. Interim Harm to the Parties

"To obtain a preliminary injunction, a plaintiff ordinarily is required to present evidence of the irreparable injury or interim harm that it will suffer if an injunction is not issued pending an adjudication of the merits." (White, supra, 30 Cal.4th at p. 554.) "In evaluating interim harm, the trial court compares the injury to the plaintiff in the absence of an injunction to the injury the defendant is likely to suffer if an injunction is issued." (Shoemaker, supra, 37 Cal.App.4th at 633.)

The evidence reflects that the potential harm to DCA significantly outweighs any harm to Defendants. DCA's mission is to provide a continental Internet domain name to provide access to internet services for the people of Africa by acting as the registry for the .Africa gTLD. (Bekele Decl. ¶3.) DCA does not act as the registry for any other gTLDs and has not applied to act as the registry for any other gTLD. (Bekele Decl. ¶5.) If .Africa is delegated to ZACR before this case is resolved, DCA's mission will be seriously frustrated, funders will likely pull their support due to the uncertainty involved in the re-delegation process, and DCA will likely be forced to stop operating. (Bekele Decl. ¶¶6-7.) ZACR, on the other hand, is the single largest domain name registry on the African continent. (Masilela Decl. ¶3.) At the same time that ZACR applied for the .Africa gTLD, it also applied for and obtained the .CapeTown, .Joburg, and .Durban gTLDs, and these gTLDs have been launched to the Internet public. (Masilela Decl. ¶4.)

ZACR contends that the granting of an injunction will cause it great harm because it is incurring significant financial costs with no attendant benefits as a result of the delay in delegation of the .Africa gTLD. Specifically, ZACR asserts that its costs are running at approximately $16,632 per month. (Masilela Decl. ¶11.) ZACR also contends that it has suffered lost opportunity costs estimated to be in the amount of $15.5 million. (Masilela Decl. ¶12.) The lost opportunity costs are highly speculative. Further, it appears that the alleged monthly sunk costs are the result of ZACR's decision to enter into a registry agreement with ICANN shortly after DCA initiated the IRP Panel review. (See Bekele Decl. ¶10, Ex. 1, p.3 at ¶14.) It was certainly foreseeable at this time that there would be a delay in the delegation of the .Africa gTLD if DCA prevailed. Moreover, it is unclear why ZACR continues to incur these costs and has failed to mitigate its damages. It appears that, rather than seeking to minimize its potential harm, ZACR has made a calculated decision to continue incurring expenses in anticipation of prevailing in this action.

ZACR argues that the public interest strongly favors denying the injunction because, if the injunction is granted, African citizens will continue to be deprived of having their own unique gTLD. (See Vo v. City of Garden Grove (2004) 115 Cal.App.4th 425, 435 (courts consider "the degree of adverse effect on the public interest or interests of third parties the granting of the injunction will cause").) However, the public interest in having the .Africa gTLD properly awarded through a fair and transparent application process outweighs

concerns about the delay in the availability of the .Africa gTLD. There is no evidence demonstrating that the African or international community will be harmed by waiting for a fair and proper delegation determination.

The Court finds that the balance of the interim harm weighs in favor of granting the requested preliminary injunction.

C. Likelihood of Success on the Merits

A preliminary injunction must not issue unless it is "reasonably probable that the moving party will prevail on the merits." (San Francisco Newspaper Printing Co., Inc. v. Sup.Ct. (Miller) (1985) 170 Cal.App 3d 438, 442.) The "likelihood of success on the merits and the balance-of-harms analysis are ordinarily 'interrelated' factors in the decision whether to issue a preliminary injunction." (White, supra, 30 Cal.4th at 561.) "The presence or absence of each factor is usually a matter of degree, and if the party seeking the injunction can make a sufficiently strong showing of likelihood of success on the merits, the trial court has discretion to issue the injunction notwithstanding that party's inability to show that the balance of harms tips in his favor." (Id.)

Here, DCA moves for a preliminary injunction under its ninth cause of action for declaratory relief, which seeks a declaration from the Court that it is entitled to proceed through the remainder of the .Africa gTLD application process as expressed by the IRP Panel findings.

i. DCA's Release of Claims against ICANN

As an initial matter, ICANN contends that DCA is unlikely to prevail on the merits because, among the terms and conditions that DCA acknowledged and accepted by submitting a gTLD application, was a covenant barring all lawsuits against ICANN arising out of its evaluation of new gTLD applications (the "Covenant"). The Covenant provides:

Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's or an ICANN Affiliated Party's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION.
(Bekele Decl. Ex. 3 at §6.6.)

DCA contends that the Covenant is unenforceable because it violates Civil Code §1668, it is unconscionable, and it was procured by fraud.

Civil Code §1668 provides: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

Section 1668 is not strictly applied. (Farnham v. Superior Court (Sequoia Holdings, Inc.) (1997) 60 Cal.App.4th 69, 74.) For example, "contractual releases of future liability for ordinary negligence, as well as contractual indemnity provisions, insurance contracts, and other limitations on liability are generally enforceable." (Id. at 71.) "Conversely, however, contractual releases of future liability for fraud and other intentional wrongs are invariably invalidated." (Id.)

Here, the Covenant on its face encompasses every claim that arises from ICANN's actions including fraud and

intentional violations of law. (See Baker Pac. Corp. v. Suttles (1990) 220 Cal.App.3d 1148, 1154-1155 (holding that a covenant not to sue that released "any and all claims of every nature" was void as against public policy because it "clearly includes a release from liability for fraud and intentional acts").)

ICANN argues that the conduct alleged here does not amount to fraud or willful injury because DCA challenges only ICANN's processing and consideration of a gTLD application. However, Plaintiff's operative pleading includes claims for intentional and negligent misrepresentation, and fraud and conspiracy to commit fraud. Moreover, the declaratory relief cause of action that is the subject of the instant motion arises from ICANN's alleged intentional and fraudulent conduct.

The Covenant is also arguably unconscionable. "Unconscionability consists of both procedural and substantive elements. The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power. Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided." (Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev. (US), LLC (2012) 55 Cal.4th 223, 246 (internal citations omitted).) There is no indication that DCA had any opportunity to negotiate the conditions of the application process or the terms of the Covenant. Given that ICANN is the only organization in the world that assigns rights to gTLDs, the bargaining power heavily favored ICANN. Further, the Covenant is a one-sided agreement in that it exempts any and all claims against ICANN but does not require ICANN to give up any right to sue DCA.

The Court finds that the Covenant is likely to be found unenforceable. Thus, DCA's likelihood of success on the merits is unaffected by the existence of the Covenant.

ii. Whether DCA's Application was Properly Rejected

The IRP Panel ruled that: "both the actions and inactions of the Board with respect to the application of DCA Trust relating to the .Africa gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN." (Bekele Decl. ¶10, Ex. 1 at ¶148.) The IRP panel then recommended that ICANN "continue to refrain from delegating the .Africa gTLD and permit DCA Trust's application to proceed through the remainder of the new gTLD application process." (Bekele Decl. ¶10, Ex. 1 at ¶149.) In July 2015, ICANN placed DCA's application back in the geographic names evaluation phase but ultimately concluded that the application was insufficient to proceed past this phase.

The main issue that is in contention is whether DCA's application met ICANN's geographic endorsement standards. ICANN required that applicants for the rights to a geographic gTLD obtain endorsements from 60% of the region's national governments, and no more than one written statement of objection to the application from relevant governments in the region and/or public authorities associated with the region. (Bekele Decl., Ex. 3 at §2.2.1.4.4.) Pursuant to the new gTLD Guidebook, an endorsement letter was evaluated on the following criteria:

The letter must clearly express the government's or public authority's support for or non-objection to the applicant's application and demonstrate the government's or public authority's understanding of the string being requested and its intended use.

The letter should also demonstrate the government's or public authority's understanding that the string is being sought through the gTLD application process and that the applicant is willing to accept the conditions under which the string will be available, i.e., entry into a registry agreement ICANN requiring compliance with consensus policies and payment of fees.

(Bekele Decl., Ex. 3 at §2.2.1.4.3.)

The evidence reflects that, as part of its application, Plaintiff obtained the endorsements of the African Union Commission ("AUC") and the United Nations Economic Commission for Africa ("UNECA"). These entities

were approved as endorsers by ICANN and they are representative of more than 60% of the nations in Africa.

The only issue that ICANN had with respect to DCA's endorsements related to the criterion that the endorsement letters should demonstrate the public authority's understanding that the string is being sought through the gTLD application process and that the applicant is willing to accept the conditions under which the string will be available. Significantly, a plain reading of the Guidebook's language reveals that this specific criterion was discretionary, whereas the other criteria were mandatory. Moreover, DCA's endorsement letters from the AUC and UNECA state, respectively, "your organization is applying for delegation of a regional identifier top level domain – '.africa' from the Internet Corporation for Assigned Names and Numbers…," and "your organization is applying to the Internet Corporation for Assigned Names and Numbers (ICANN) for the delegation of the regional identifier top level domain – 'africa.'" (Bekele Decl. ¶¶19, 21, Exs. 6, 8.) This language appears to be sufficient to demonstrate the endorsing body's understanding that the gTLD was being sought through ICANN's gTLD program. It also can be implied from this language that the endorsers understood that DCA would have to adhere to ICANN's policies after the gTLD was awarded. Therefore, there is reason to question the legitimacy of ICANN's purported reason for denying DCA's application.

In opposition, ICANN and ZACR emphasize that AUC's support of DCA was withdrawn. However, the evidence reflects that, prior to DCA commencing litigation, ICANN never claimed that DCA's endorsements were invalid because they had been withdrawn. Indeed, ICANN processed DCA's application based on those endorsements. It appears that ICANN knew that any purported withdrawal of the endorsements was ineffective. This is why ICANN focused on other technical issues with the endorsement letters in denying DCA's application.

Based on the evidence presented, it can reasonably be inferred that the reasons for denying DCA's application were pretextual and that ICANN, which improperly entered into a registry agreement with ZACR while the IRP review was pending, denied DCA a fair evaluation process because it had predetermined that it would award the gTLD to ZACR. Accordingly, the Court finds that DCA has demonstrated a reasonable probability that it will prevail on the merits.

DCA's motion for a preliminary injunction is granted.

D. Bond Requirement

If a preliminary injunction is granted, the court must require an undertaking (CCP § 529), or allow a cash deposit in lieu thereof (CCP § 995.710). The bond is to cover any damages to the defendant caused by issuance of the injunction, if it is finally determined that plaintiff was not entitled to the injunction. (CCP § 529; see Abba Rubber Co. v. Seaquist (1991) 235 Cal.App.3d 1, 14 ("the trial court's function is to estimate the harmful effect which the injunction is likely to have on the restrained party, and to set the undertaking at that sum.").)

ZACR argues that the bond amount should be set at more than $15 million. However, this amount is based on speculative lost profits and is predicated on the validity of the registry agreement that it entered into with ICANN. The Court is inclined to require DCA to post a bond in an amount that represents an estimate of ZACR's actual damages. The Court will determine the appropriate bond amount at the hearing.

DCA is ordered to provide notice of this ruling.

DATED: December 22, 2016

Howard L. Halm
Judge of the Superior Court
