DEPARTMENT 53 LAW AND MOTION RULINGS

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Case Number: BC607494 **Hearing Date:** August 09, 2017 **Dept:** 53

DOTCONNECT AFRICA TRUST vs. INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS , et al.; BC607494, AUGUST 9, 2017

[~~TENTATIVE~~] ORDER RE: ICANN'S MOTION FOR SUMMARY JUDGMENT

Defendant Internet Corporation for Assigned Names and Numbers' motion for summary judgment is **GRANTED IN PART** AND **DENIED IN PART**.

BACKGROUND

This action involves the award and delegation of the generic top-level domain name ("gTLD")[1] ".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." 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 asserts causes of action for: (1) breach of contract; (2) intentional misrepresentation; (2) negligent misrepresentation; (4) fraud and conspiracy to commit

fraud; (5) unfair competition (violation of Cal. Bus. & Prof. Code § 17200); (6) negligence; (7) intentional interference with contract; (8) confirmation of IRP award; (9) declaratory relief; (10) declaratory relief; and (11) declaratory relief.

ICANN now moves for summary judgment, arguing that the entire action is barred by a covenant not to sue and judicial estoppel. DCA opposes.

EVIDENTIARY OBJECTIONS

DCA's evidentiary objections are overruled.

DISCUSSION

A. Legal Standard

"[A] motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (CCP §437c (c).) A defendant moving for summary judgment must show either: "that one or more elements of the cause of action … cannot be established"; or "that there is a complete defense to that cause of action." (CCP § 437c(p)(2).) To prevail, the defendant need not "conclusively negate" a required element of the plaintiff's claim; "all that is required is a showing that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Wall St. Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1176 (internal quotations omitted).)

The moving party bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) If the moving party carries this burden, the burden shifts to the opposing party to make a prima facie showing that a triable issue of material fact exists. (*Id.*)

B. Covenant Not to Sue

ICANN argues that the entire action is barred because DCA acknowledged and accepted a covenant not to sue and release (the "Covenant") which bars all the claims in the FAC because they "arise out of, are based upon, or are in [some] way related to, any action, or failure to act, by ICANN" in connection with ICANN's review, investigation or verification of, or its decision not to, approve or recommend DCA's application. DCA argues in opposition that the Covenant is unenforceable under Cal. Civ. Code § 1668 and because it is both procedurally and substantively unconscionable. The Court considers each of these arguments in turn.

a. *Cal. Civ. Code § 1668*

Cal. Civ. Code § 1668 states: "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." ICANN argues that this section does not apply to the Covenant because ICANN is not exempt from responsibility under the Covenant: instead, a complaining party may use alternative dispute resolution mechanisms, of which ICANN used two, winning one. (SUF 18). ICANN further argues that it did not cause a "willful injury" to DCA in its denial of DCA's application.

DCA, on the other hand, argues that the alternative dispute resolution mechanisms provided for in alternative to judicial remedies by ICANN's bylaws are limited to determining whether ICANN "acted consistently with the provisions of the Articles of Incorporation and Bylaws." (SUF 70.) DCA further argues that, by excluding "any and all claims" arising out of ICANN's processing of applications, it necessarily bars claims for fraud or intentional injury arising out of the process.

The Court finds that acts of fraud or those that cause "willful injury" do not arise out of ICANN's processing of applications in that they are extra-procedural: they are not related to the processing itself, but are acts that take ICANN outside of the process governed by its bylaws. Moreover, the Court finds that claims reviewable in the alternative mechanisms provided for in the bylaws do not exclude fraud claims, as committing fraud and causing willful injury certainly is not consistent with ICANN's Articles of Incorporation and Bylaws. Therefore, the Court does not find the Covenant unenforceable as it does not exclude claims for fraud or acts causing willful injury. What this means in this case, therefore, is that any claims that do not lie in fraud or willful injury are barred by the Covenant. Those that do, are not. The first cause of action for breach of contract, sixth cause of action for negligence, eighth cause of action for confirmation of IRP reward, ninth cause of action for declaratory relief, and eleventh cause of action for declaratory relief, are thus barred by the Covenant. The second, third, fourth, fifth, seventh, and tenth causes of action, all of which relate to fraudulent actions or those causing willful injury, are not.

ICANN cites *Ruby Glen, LLC v. Internet Corp. for Assigned Names & Numbers* and states that the district court there found the Covenant was enforceable. (2016 WL 6966329 *1 (CD Cal. Nov. 28, 2016.) The court there stated: "Because the covenant not to sue only applies to claim related to ICANN's processing and consideration of a gTLD application, it is not clear that such a situation would ever create a possibility for ICANN to engage in the type of intentional conduct to which [Section 1668] applies." (*Id.* at *4.) However, upon further review and reflection, the Court reads that, in that case, the plaintiff was not making any claims for fraud, willful injury, or gross negligence. (*Id.*) Indeed, the court later stated: "*[I]n the circumstances alleged in the FAC*, and based on the relationship between ICANN and Plaintiff, section 1668 does not invalidate the covenant not to sue." (*Id.*) The court does not, therefore, consider a

situation such as the one here where DCA in fact alleges fraudulent conduct. Accordingly, the case is inapposite to the facts at bar.

b. *Unconscionability*

DCA also argues that the Covenant should not apply because it is procedurally and substantively unconscionable. Procedural unconscionability concerns the manner in which the contract was negotiated and the parties' circumstances at that time. It focuses on the factors of oppression or surprise. (*Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1329.) Substantive unconscionability focuses on the terms of the agreement and whether those terms are "overly harsh or one-sided." (*See Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1145.)

> In general, California law allows oppression to be established in two ways. First, and most frequently, oppression may be established by showing the contract is one of adhesion. . .. In the absence of an adhesion contract, the oppression aspect of procedural unconscionability can be established by the totality of the circumstances surrounding the negotiation and formation of the contract. The circumstances relevant to establishing oppression include, but are not limited to (1) the amount of time the party is given to consider the proposed contract; (2) the amount and type of pressure exerted on the party to sign the proposed contract; (3) the length of the proposed contract and the length and complexity of the challenged provision; (4) the education and experience of the party; and (5) whether the party's review of the proposed contract was aided by an attorney. . ..
>
> The California Supreme Court has defined the term "contract of adhesion" to mean (1) a standardized contract (2) imposed and drafted by the party of superior bargaining strength (3) that provides the subscribing party only the opportunity to adhere to the contract or reject it.

(*Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.* (2015) 232 Cal.App. 4th 1332, 1348-1350) (internal quotations and citations omitted.)

"Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be so one-sided as to 'shock the conscience.'" (*Carmona, supra*, 226 Cal.App.4th at 85 (quotations and citations omitted).) "The paramount consideration in assessing [substantive] unconscionability is mutuality." (*Id.* (brackets in original).)

DCA argues that the Covenant was unconscionable because the Guidebook containing it was not negotiated, allows ICANN to change the terms of the application and alternative dispute resolution process, and is one-sided in that it does not require ICANN to waive court remedies.

In this regard, the Court agrees with the analysis in *Ruby Glenn*. The court there found that "even if the [Covenant] is a contract of adhesion, the nature of the relationship between ICANN and [the plaintiff] the sophistication of [the plaintiff], the stakes involved in the gTLD application process, and the fact that the [Guidebook] is the implementation of [ICANN] Board-approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period, militates against a conclusion that the [Covenant] is procedurally unconscionable." (2016 WL 6966329 at *5) (internal quotations omitted.) Furthermore, ICANN "is accountable to the Internet community for operating in a manner consistent with its Bylaws and Articles of Incorporation." (*Id.*) (internal quotations omitted.) Similarly, DCA, like the plaintiff in *Ruby Glenn* "is a sophisticated entity that paid a $185,000 fee to participate in the application process." (*Id.*)

Moreover, as the court in *Ruby Glenn* points out, "[w]ithout the [Covenant], any frustrated applicant could, through the filing of a lawsuit, derail the entire system

developed by ICANN to process applications for gTLDs. ICANN and frustrated applicants do not bear this potential harm equally. This alone establishes the reasonableness of the [Covenant]." (*Id.*) To the extent, therefore, that the Court finds above that the Covenant is not barred by Section 1668 as to claims not lying in fraud or for "willful injury," so too does the Court find that the Covenant is not barred as to those claims for unconscionability.

C. Judicial Estoppel

ICANN also argues that the FAC is barred in its entirety because DCA argued in the IRP process that the IRP decision was binding because it was the sole forum to challenge ICANN's actions as applicants waive their right to sue in the judicial system. (SUF 41.) ICANN contends that, by making this argument in the IRP forum, DCA is now estopped from holding a contrary position, which is that the IRP was not the sole forum to seek independent review.

Judicial estoppel applies when "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (*Jackson v. Cty. of Los Angeles* (1997) 60 Cal.App.4th 171, 183.) "Judicial estoppel is an extraordinary remedy that should be applied with caution." (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 85-86.) Even where all elements are present, its application is discretionary. (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co.* (2005) 36 Cal.4th 412, 422.)

DCA, in opposition, argues that the position it took before the IRP is not "totally inconsistent" with its position now. It states that it never took the position that the waiver was valid or enforceable, but that *if* the waiver was enforceable, IRP must

"provide a final and binding resolution of disputes between ICANN and persons affected by its decisions. (AMF 122.) Thus, DCA argues, it has consistently maintained that it is wrong for ICANN to be "effectively judgment proof" (AMF 122) and that DCA should be able to seek "final and binding" adjudication against ICANN (*Id.*)

The evidence is unclear whether DCA ever voiced its position that the waiver was void and unenforceable. Neither party points to direct evidence in the record of DCA arguing that the waiver was enforceable or otherwise. The portion of DCA's response to the panel's questions merely states that the IRP decision must be binding for ICANN not to be "effectively judgment-proof." (*Id.*) DCA does not qualify its position by arguing the decision must be binding only if the Covenant is enforceable. (*See id.*)

While ICANN argues there "is no evidence" DCA's position was taken due to mistake or ignorance, DCA argues the burden is on ICANN to produce evidence of intent or bad faith. Indeed, *Kelsey v. Waste Management of Alameda County* held that because the moving party there "failed to provide evidence negating the possibility that [opposing party's] failure . . . was the result of ignorance or mistake, it [had] not met its burden on summary judgment of showing that there is a complete defense to" the causes of action. ((1999) 76 Cal.App. 4th 590, 599.) Given the caution required in applying the "extraordinary remedy" of judicial estoppel, the Court, in its discretion, denies ICANN's request to apply it here.

D. Fraud or Willful Injury

The only remaining question, therefore, is whether there is a triable question of material fact regarding whether ICANN committed fraud or caused "willful injury" in denying DCA's application. DCA argues that ICANN committed fraud and caused "willful injury" by intentionally rejecting DCA's application based upon pretext and by

not telling DCA that it could ignore the IRP findings. DCA states that, had it known ICANN would choose ZACR's application regardless of what DCA did, and the fact that the IRP process "had no teeth," it would not have gone through the lengthy and expensive process of applying. (AMF 77, 78 and AMF 24.)

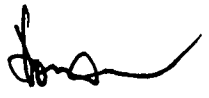
The Court finds DCA raises a triable question of material fact as to whether ICANN committed fraud by indicating it would follow its Bylaws and Articles of Incorporation and the IRP's decision in processing application. DCA points to evidence that ICANN subjected DCA to an extra set of questioning regarding its endorsements, and denied its application based on the pretextual reason that its responses to this questioning were insufficient. (Bekele Decl. ¶ 22-4, Exs. 10-12.) The pretext, DCA argues, is evident, when viewed in light of ICANN continuing to process ZACR's application despite its lacking endorsements in order to meet ICANN's requirements. (AMF 82-83.) DCA also submits evidence that ICANN ghostwrote an endorsement for ZACR. (AMF 84.) The Court cannot, therefore, find as a matter of law that ICANN did not defraud DCA by stating on the one hand it would follow its Bylaws and Articles of Incorporation in processing DCA's application, while on the other hand giving preference to ZACR's application throughout the process.

CONCLUSION

For the foregoing reasons, ICANN's motion for summary judgment is denied as to the second, third, fourth, fifth, ~~seventh,~~ and tenth causes of action. The motion is granted as to the remaining causes of action.

DCA to provide notice of this Order.

DATED: August 9, 2017



08/11/2017

Howard L. Halm

Judge of the Superior Court

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[1] Examples of gTLDs are .com, .gov, and .org
