SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL DISTRICT

DEPARTMENT 53

DOTCONNECTAFRICA TRUST;	Case No.: BC607494
Plaintiff,	Hearing Date: February 3, 2017
vs.	Time: 8:30 a.m.
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, et al.;	**ORDER RE:**
	PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION
Defendants.	

Plaintiff DOTCONNECTAFRICA TRUST'S motion for a preliminary injunction is DENIED. The court has considered, very carefully, the excellent arguments of counsel. The tentative ruling will remain the ruling on the motion.

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

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

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1   information technology education in Africa and providing a continental Internet domain name to

2   provide access to internet services for the people of Africa. Defendant ZA Central Registry, NPC

3   ("ZACR") also applied to be the operator of .Africa. ZACR is a South African non-profit

4   company which was formed to promote open standards and systems in computer hardware and

5   software.

6   The competition for the .Africa gTLD came down to DCA and ZACR. In 2013,

7   ICANN's Government Advisory Committee ("GAC") issued advice that DCA's application

8   should not proceed due to issues with regional endorsements. ICANN rejected DCA's

9   application based on the GAC advice, while ZACR's application continued. Thereafter, DCA

10   challenged ICANN's decision and filed a request for review by an Independent Review Process

11   ("IRP") Panel, a form of alternative dispute resolution provided for by the ICANN bylaws.

12   On July 9, 2015, the IRP Panel issued a "Final Declaration" finding in favor of DCA and

13   concluding that ICANN should "continue to refrain from delegating the .Africa gTLD and permit

14   DCA Trust's application to proceed through the remainder of the new gTLD application

15   process." In July 2015, ICANN placed DCA's application back in the geographic names

16   evaluation phase. ICANN later concluded that DCA's application was insufficient to proceed

17   past this phase.

18   In January 2016, after learning that ICANN would reject its application, DCA filed suit

19   against ICANN. ICANN then removed the case to the Central District of California. While this

20   case was pending before the district court, DCA moved for and was granted a temporary

21   restraining order and subsequently a preliminary injunction, enjoining ICANN from delegating

22   the rights to .Africa until the case was resolved. ZACR filed a motion to reconsider the

23   preliminary injunction order which ICANN joined. The motion for reconsideration was denied.

24   On October 19, 2016, the district court remanded the case to this Court due to lack of

25   jurisdiction.

26   Upon remand, DCA moved for the same preliminary injunction that the district court

27   previously entered—an order enjoining ICANN from issuing the .Africa gTLD until this case has

28   been resolved. DCA initially sought this relief under its ninth cause of action for declaratory

1 relief. A hearing on this motion was held on December 22, 2016 and the matter was argued at

2 length. The Court denied the motion.

3 DCA now moves again for the same preliminary injunction. The instant motion is

4 substantially the same as the motion which was denied on December 22, 2016. The only

5 meaningful difference is that DCA now moves under alternative causes of action: its second and

6 fifth causes of action for intentional misrepresentation and unfair business practices. The motion

7 is opposed by Defendant ICAAN and by intervenor ZACR.

8

9 **EVIDENCE**

10 ICANN's evidentiary objections are overruled.

11 DCA's evidentiary objections are overruled.

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13 **LEGAL STANDARD**

14 "As its name suggests, a preliminary injunction is an order that is sought by a plaintiff

15 prior to a full adjudication of the merits of its claim." (White v. Davis (2003) 30 Cal.4th 528,

16 554.) "[A]n order granting or denying a preliminary injunction does not amount to an

17 adjudication of the ultimate rights in controversy. Its purpose is to preserve the status quo until

18 the merits of the action can be determined." (Socialist Workers etc. Committee v. Brown (1975)

19 53 Cal. App. 3d 879, 890-91 (citations omitted).)

20 "In determining whether to issue a preliminary injunction, the trial court considers: (1)

21 the likelihood that the moving party will prevail on the merits and (2) the interim harm to the

22 respective parties if an injunction is granted or denied. The moving party must prevail on both

23 factors to obtain an injunction." (Pittsburg Unified School District v. S.J. Amoroso Construction

24 Co., Inc. (2014) 232 Cal.App.4th 808, 813-814.) "The trial court's determination must be guided

25 by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on

26 one, the less must be shown on the other…" (Church of Christ in Hollywood v. Superior Court

27 (2002) 99 Cal.App.4th 1244, 1251-52.) "The ultimate goal of any test to be used in deciding

28 whether a preliminary injunction should issue is to minimize the harm which an erroneous

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1   interim decision may cause." (White, supra, 30 Cal.4th at p. 554.) The burden is on the party

2   seeking injunctive relief to show all elements necessary to support issuance of a preliminary

3   injunction. (O'Connell v. Superior Court (2006) 141 Cal.App.4th 1452, 1481.)

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5   **DISCUSSION**

6   A. <u>Interim Harm to the Parties</u>

7   "To obtain a preliminary injunction, a plaintiff ordinarily is required to present evidence

8   of the irreparable injury or interim harm that it will suffer if an injunction is not issued pending

9   an adjudication of the merits." (White, supra, 30 Cal.4th at p. 554.) "In evaluating interim harm,

10 the trial court compares the injury to the plaintiff in the absence of an injunction to the injury the

11 defendant is likely to suffer if an injunction is issued." (Shoemaker, supra, 37 Cal.App.4th at

12 633.)

13   Notably, DCA has not provided any new evidence of harm that was not considered by the

14 Court in the prior motion for preliminary injunction. DCA contends that, if .Africa is delegated

15 to ZACR before this case is resolved, DCA's mission will be seriously frustrated, funders will

16 likely pull their support, and DCA will likely be forced to stop operating. (Bekele Decl. ¶¶34-

17 35.) This harm is highly speculative and fails to account for the possibility of re-delegation.

18   The .Africa gTLD can be re-delegated to DCA in the event DCA prevails in this

19 litigation. This is not disputed by DCA. Instead, DCA argues, without supporting evidence, that

20 the procedure for gTLD re-delegation is uncertain. But the evidence reflects that re-delegation is

21 not uncommon and has occurred numerous times. (Atallah Decl. ¶13.) Indeed, ICANN has an

22 established procedure for re-delegating a gTLD, which is set forth in a published manual.

23 (Masilela Decl. I, Ex. I.) Accordingly, there is no potential for irreparable harm to DCA. Further,

24 it appears that any interim harm to DCA can be remedied by monetary damages, as requested in

25 DCA's Complaint. (See Thayer Plymouth Ctr., Inc. v. Chrysler Motors Corp. (1967) 255

26 Cal.App.2d 300, 306 ("if monetary damages afford adequate relief and are not extremely

27 difficult to ascertain, an injunction cannot be granted").)

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1   In contrast to the speculative nature of DCA's harm, ZACR presents evidence in the form

2   of a detailed spreadsheet prepared by its finance section demonstrating that ZACR is incurring

3   significant financial costs with no attendant benefits as a result of the delay in delegation of the

4   .Africa gTLD. (Masilela Decl. ¶11-12, Ex. F.)

5   The public interest also weighs in favor of denying the injunction because the delay in the

6   delegation of the .Africa gTLD is depriving the people of Africa of having their own unique

7   gTLD. (See Vo v. City of Garden Grove (2004) 115 Cal.App.4th 425, 435 (courts consider "the

8   degree of adverse effect on the public interest or interests of third parties the granting of the

9   injunction will cause").) Although the public also has an interest in having the .Africa gTLD

10   properly awarded through a fair and transparent application process, this concern does not apply

11   to the interim harm analysis because, in the event that DCA ultimately prevails in this action, the

12   gTLD can be re-delegated.

13   The Court finds that the balance of the interim harm weighs in favor of denying the

14   preliminary injunction.

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16   B. Likelihood of Success on the Merits

17   A preliminary injunction must not issue unless it is "reasonably probable that the moving

18   party will prevail on the merits." (San Francisco Newspaper Printing Co., Inc. v. Sup.Ct. (Miller)

19   (1985) 170 Cal.App 3d 438, 442.) The "likelihood of success on the merits and the balance-of-

20   harms analysis are ordinarily 'interrelated' factors in the decision whether to issue a preliminary

21   injunction." (White, supra, 30 Cal.4th at 561.) "The presence or absence of each factor is usually

22   a matter of degree, and if the party seeking the injunction can make a sufficiently strong showing

23   of likelihood of success on the merits, the trial court has discretion to issue the injunction

24   notwithstanding that party's inability to show that the balance of harms tips in his favor." (Id.)

25   However, this does not mean that a trial court may grant a preliminary injunction on the basis of

26   the likelihood-of-success factor alone when the balance of hardships dramatically favors denial

27   of a preliminary injunction. (Id.; see also Yu v. Univ. of La Verne (2011) 196 Cal.App.4th 779,

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787 (a trial court's order denying a motion for preliminary injunction should be affirmed if the trial court correctly found the moving party failed to satisfy either of the factors).)

Here, as discussed above, the balance of hardships clearly favors denial of the preliminary injunction. In any event, DCA has not made a sufficient evidentiary showing to establish that it is likely to prevail on the merits.

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.

DCA contends that the Covenant is unenforceable because it violates Civil Code §1668, it is unconscionable, and it was procured by fraud. However, a federal district court recently rejected these same arguments and dismissed a gTLD applicant's lawsuit against ICANN on the sole ground that the Covenant bars all "claims related to ICANN's processing and consideration of a gTLD application." (Ruby Glen, LLC v. Internet Corp. 2016 WL 6966329, at *4 (C.D. Cal. Nov. 28, 2016).) The court stated: "the Court concludes that the covenant not to sue is, at most, only minimally procedurally unconscionable. The Court also concludes that the covenant not to sue is not substantively unconscionable or void pursuant to California Civil Code section 1668.
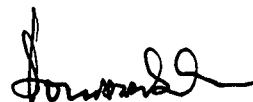
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1 | Because the covenant not to sue bars Plaintiff's entire action, the Court dismisses the FAC with

2 | prejudice." (Id. at *5.)

3 | For the reasons set forth in the <u>Ruby Glen</u> order, it appears that the Covenant is

4 | enforceable. If the Covenant is enforceable, DCA's claims against ICANN for fraud and unfair

5 | business practices are likely to be barred. As a result, DCA cannot establish that it is likely to

6 | succeed on the merits.

7 | For the foregoing reasons, the Court finds that DCA has not met its burden of showing

8 | the elements necessary to support issuance of a preliminary injunction. DCA's motion for a

9 | preliminary injunction is denied.

10 | ICANN is ordered to provide notice of this ruling.

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12 | DATED: February 3, 2017

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16 | Howard L. Halm
  Judge of the Superior Court

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