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: August 22, 2019 Time: 10:00 a.m. **TENTATIVE DECISION ON BIFURCATED TRIAL (PHASE ONE) ON AFFIRMATIVE DEFENSE OF JUDICIAL ESTOPPEL**

On January 20, 2016, plaintiff DotConnectAfrica Trust ("DCA") filed its complaint in this action against defendant Internet Corporation for Assigned Names and Numbers ("ICANN"). On February 26, 2016, DCA filed a First Amended Complaint ("FAC") against defendants ICANN and ZA Central Registry, which alleges cause of action for (1) breach of contract, (2) intentional misrepresentation, (3) 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.

On August 9, 2017, the court granted defendant ICANN's motion for summary judgment on the first, sixth, eighth, ninth, and eleventh causes of action on the ground that they are barred by a covenant not to sue, waiver, and release provision ("Covenant") in ICANN's gTLD Applicant Guidebook (Ex. 2, p. 334, § 6). (Order Re: ICANN's Motion for Summary Judgment, filed August 9, 2017, pp. 5, 10.) The court denied ICANN's motion for summary judgment as to

the second, third, fourth, fifth, and tenth causes of action because the Covenant is not enforceable as to those claims pursuant to Civil Code section 1668 since they are based on alleged fraud or willful injury to the property of another. (Civ. Code, §1668 ["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."].) (August 9, 2017 Order, pp. 5, 10.) However, the court ordered that the court would hold a bifurcated court trial on the issue of defendant ICANN's affirmative defense of judicial estoppel as to the remaining causes of action. (August 9, 2017 minute order.)

On February 6, 7, and 8, 2019, the court conducted a nonjury trial on phase one of a bifurcated trial on the issue of defendant ICANN's affirmative defense of judicial estoppel.

After each party rested its case and the presentation of evidence was completed on February 8, 2019, the court ordered the parties to present closing arguments by written briefs to be filed and served no later than March 1, 2019. On March 1, 2019, the parties filed their closing argument briefs.

After considering the pleadings, evidence, and arguments presented by the parties, the court hereby announces its tentative decision on the trial of this matter, and makes the following findings, rulings, and orders on the claims and issues presented for trial. This tentative decision is the court's proposed statement of decision, subject to a party's objection under subdivision (g) of California Rules of Court, rule 3.1590.

DEFENDANT ICANN'S EVIDENTIARY OBJECTIONS TO PLAINTIFF DCA'S CLOSING TRIAL BRIEF

On March 28, 2019, defendant ICANN filed "Defendant ICANN's Evidentiary Objections to Plaintiff DCA's Closing Trial Brief and [Proposed] Order." The court orders that document stricken as unauthorized because it violates the court's order that closing arguments are to be submitted by written briefs, not to exceed 20 pages, no later than March 1, 2019. (February 8, 2019 minute order.) ICANN's evidentiary objections to DCA's closing trial brief are closing arguments that are untimely and which exceed the 20-page limit on closing argument briefs since ICANN previously filed a 20-page closing argument brief on March 1, 2019.

DISCUSSION

Defendant ICANN contends that plaintiff DCA's remaining causes of action in the FAC are barred by the doctrine of judicial estoppel because, in a prior proceeding called an Independent Review Process ("IRP") it instituted against ICANN, DCA asserted repeatedly that it cannot sue ICANN in court in any way related to DCA's application for the generic top-level domain .AFRICA because of the Covenant, and DCA prevailed on that position numerous times in the IRP proceeding.

"The doctrine of judicial estoppel, sometimes called the doctrine of '"preclusion of inconsistent positions"' [citation], '"precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] The doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies. [Citation.] Application of the doctrine is discretionary.'" [Citation.]'" (*Blix Street Records, Inc. v. Cassidy* (2010) 191 Cal.App.4th 39, 47 [citing *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986].) "The doctrine 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.'" (*Blix Street Records, Inc. v. Cassidy, supra,* 191 Cal.App.4th at p. 47 [citations and internal quotations omitted].)

"Judicial estoppel is an equitable doctrine to protect against fraud on the courts. It has been said that '[b]ecause of its harsh consequences, the doctrine should be applied with caution and limited to egregious circumstances.'" (*Id.* at p. 47 [citations omitted].) "Judicial estoppel may be based on a position taken by a party or party's legal counsel." (*Id.* at p. 48 [citation omitted].)

1. First Factor: The Same Party Has Taken Two Positions

In the IRP proceeding, DCA made numerous statements to the IRP Panel that, because of the Covenant, it could not sue ICANN in court for acts or omissions with respect to DCA's application.

First, to support its argument that the IRP should allow document discovery, DCA stated in its April 20, 2014 letter brief to the IRP Panel that "these proceedings will be the first and last opportunity that DCA Trust will have to have its rights determined by an independent body." (Ex. 39, p. 2; Stipulation of Facts for Judicial Estoppel Trial, filed January 17, 2019 ("Stip."), Fact 29.)

Second, to support its argument for extended briefing and a hearing with live witness testimony, DCA stated in its May 5, 2014 Submission on Procedural Issues: "It is critical to understand that ICANN created the IRP as an alternative to allowing disputes to be resolved by courts. By submitting its application for a gTLD, DCA agreed to eight pages of terms and conditions, including a nearly page-long string of waivers and releases. Among those conditions was the waiver of all its rights to challenge ICANN's decision on DCA's application in court. For DCA and other gTLD applicants, the IRP is their only recourse; no other remedy is available." (Ex. 15, p. 14, ¶ 22; Stip., Fact 24.)

Third, to support its request that the IRP Panel apply a *de novo* review standard, DCA's attorney stated to the IRP Panel: "Now, what I think should inform your decision about an objective standard review, or what we might call 'a de novo standard review,' is the following: This is the only opportunity that a claimant has for independent and impartial review of ICANN's conduct, the only opportunity." (Ex. 35, p. 22:16-22.) DCA's attorney further stated to the IRP Panel: "We cannot take you to Court. We cannot take you to arbitration. We can't take you anywhere. We can't sue you for anything." (Ex. 36, p. 30:2-5.)

Fourth, to support its request for a declaration that the IRP is binding, DCA stated in its May 29, 2014 letter brief to the IRP Panel: "[A]s a condition of applying for a gTLD, DCA unilaterally surrendered *all of its rights to challenge ICANN in court or any other forum outside of the accountability mechanisms in ICANN's Bylaws.* As a result, the IRP is the sole forum in which DCA can seek independent, third-party review of the actions of ICANN's Board of Directors. If the Panel were to determine that this IRP was non-binding, DCA would effectively be deprived of any remedy." (Ex. 17, pp. 2-3 [emphasis in original].)

Fifth, in support of its request for emergency interim relief in the IRP proceeding, DCA stated in its request: "DCA has aright to be heard in a meaningful way in the only proceeding available to review the ICANN Board's decisions." (Ex. 11, p. 18.)

Sixth, in support of its request that ICANN pay DCA's costs in the IRP proceeding, DCA stated in its July 1, 2015 letter brief to the IRP Panel that the IRP process "is the only independent accountability mechanism available to parties such as DCA." (Ex. 31, p. 3.)

In contrast to the position taken by DCA in the IRP, DCA has now taken the position that it can sue ICANN in court for acts or omissions with respect to DCA's application by filing this lawsuit against ICANN. Thus, the court finds that DCA has taken two positions on this issue.

2. Second Factor: The Positions Were Taken in Judicial or Quasi-Judicial Proceedings

As discussed above, in this lawsuit, DCA has taken the position that it can sue ICANN in court for acts or omissions with respect to DCA's application. Thus, DCA's second position was clearly taken in a judicial proceeding.

But DCA and ICANN dispute whether DCA's first position was taken in a quasi-judicial proceeding. ICANN contends that the IRP proceeding was a quasi-judicial proceeding. DCA contends that it was not.

For judicial estoppel to apply, the "prior inconsistent assertion need not be made in a court of law" (*People ex rel. Sneddon v. Torch Energy Servs., Inc.* (2002) 102 Cal.App.4th 181, 189), but can be made in a "'quasi-judicial' proceeding . . ." (*Nada Pacific Corp. v. Power Eng'g and Mfg.* (N.D. Cal. 2014) 73 F.Supp.3d 1206, 2016). As DCA points out in its closing argument brief, while there is no clear definition of what qualifies as "quasi-judicial," courts usually require that the proceeding have "the formal hallmarks of a judicial proceeding such as: the ability to call witnesses, the swearing of an oath of truthfulness by the parties, and a neutral party presiding over the hearing." (*Tri-Dam v. Schediwy* (E.D. Cal. Mar.7, 2014) No. 1:11-CV-01141-AWI-MJS, 2014 WL 897337, at *6.)

Here, the evidence establishes that the IRP proceeding had all of the hallmarks of a quasi-judicial proceeding, which DCA does not dispute except for the issue of whether the IRP was

binding. The IRP was conducted pursuant to ICANN's Bylaws, the *International Dispute Resolution Procedures* ("ICDR Rules") of the International Centre for Dispute Resolution ("ICDR"), the *Supplementary Procedures for ICANN Independent Review Process*, and the procedural orders issued by the IRP Panel. (Stip., Fact 12.) The ICDR is the international division of the American Arbitration Association. (Stip., Fact 12.) The IRP Panel consisted of three panelists, one appointed by each of the parties, and a third appointed by the ICDR, to hear the dispute. (Stip., Fact 13.) During the IRP proceedings, the parties conducted discovery through the exchange of documents, and the parties submitted written briefs and written witness declarations to the IRP Panel. (Stip., Facts 14, 15.) The IRP included a two-day evidentiary hearing, at which both parties made opening statements, closing arguments, and called witnesses who testified under oath, including cross-examination by the IRP Panel and the other party's counsel. (Stip., Facts 16, 17.) The IRP Panel determined, consistent with DCA's arguments to the IRP Panel, that its decisions on procedural issues and on the merits of the case were binding on the parties. (Ex. 18, p. 32, ¶ 131; Stip., Fact 34.)

In its closing argument brief, DCA relies on *Nada Pacific Corp. v. Power Eng'g and Mfg., supra,* 73 F.Supp.3d at p. 2016, to support its argument that the IRP proceeding was not a quasi-judicial proceeding. In *Nada*, the district court found that the Dispute Review Board proceeding at issue in that case "had many of the hallmarks of a judicial or quasi-judicial-proceeding: it was adversarial; the parties submitted briefs making arguments and citing to evidence; the parties could respond to each other's arguments; the parties could submit the opinions of experts; etc." (*Ibid.*) But the court found that "it lacked the most important hallmark – the ability to make a decision" and that it "was limited to issuing a nonbinding (albeit written) recommendation that [the parties] could accept or reject." (*Id.* at p. 2017.) Thus, the court concluded that the proceeding was not quasi-judicial and did not justify invoking judicial estoppel. (*Id.* at p. 2017.)

Here, by contrast, the IRP Panel could and did make a decision as to whether ICANN had acted inconsistently with its Bylaws, Articles of Incorporation, the New gTLD Applicant Guidebook. (Ex. 4, p. 15, Art. IV, § 3.11(c) ["The IRP Panel shall have the authority to . . .

declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws[.]"]; Ex. 4, p. 17, Art. IV, § 3.21 ["The declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value."]; Ex. 33, p. 61, ¶ 148.) The IRP Panel determined that its decisions were binding. (Ex. 18, p. 32, ¶ 131; Stip., Fact 34.) Finally, the IRP Panel exercised its authority by making a decision on the merits of the dispute regarding the ICANN Board's actions: "[T]he Panel declares 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." (Ex. 33, p. 61, ¶ 148.)

DCA argues that, because the ICANN Board had to vote on the IRP Panel's recommendations, the IRP was not a quasi-judicial proceeding. The court disagrees. Whether ICANN's Board was required to vote to take action to implement the IRP Panel's recommendations does not change the fact that the IRP Panel's decision was binding on both parties. (Ex. 18, p. 32, ¶ 131; Stip., Fact 34.) Moreover, the fact that a vote by the Board may be required to effectuate organizational action does not undermine the quasi-judicial nature of the proceeding that led to that vote.

DCA also argues that, because the July 2015 ICANN Board Resolution contained additional resolutions about actions other than the recommendations specifically set forth in the IRP Panel's Final declaration, the ICANN Board did not treat the Final declaration as binding. The court disagrees. The Board Resolution cannot change the fact that the IRP Panel's decision was binding on the parties. (Ex. 18, p. 32, ¶ 131; Stip., Fact 34.) Moreover, the additional language in ICANN's Resolution was not inconsistent with the IRP Panel's Final Declaration.

The court therefore finds that the IRP was a quasi-judicial proceeding for purposes of applying the doctrine of judicial estoppel.

For the reasons set forth above, the court finds that both the first and second positions were taken by DCA in judicial or quasi-judicial proceedings.

3. Third Factor: The Party Was Successful in Asserting the First Position

The court finds that, as a result of DCA's assertions that it could not sue ICANN because of the Covenant, the IRP Panel ruled in DCA's favor on the seven issues discussed above: (1) DCA's request for document discovery, (2) DCA's request for extended briefing, (3) DCA's request for live witness testimony at the IRP hearing, (4) DCA's request for a *de novo* standard of review, (5) DCA's request for a declaration that the IRP is binding, (6) DCA's request for emergency interim relief, and (7) DCA's request for an award of its costs in the IRP proceeding. The evidence demonstrates that, in ruling on these issues in DCA's favor, the IRP Panel relied on and adopted DCA's position that it could not sue ICANN because of the Covenant.

For example, in ruling that it had the power to interpret and determine IRP procedure, the IRP Panel stated: "The avenues of accountability for applicants that have disputes with ICANN do *not* include resort to the courts. Applications for gTLD delegations are governed by ICANN's Guidebook, which provides that applicants waive all right to resort to the court: [quoting Covenant]." (Ex. 18, p. 10, ¶ 39.) The IRP Panel then stated: "Thus, assuming that the foregoing waiver of any and all judicial remedies is valid and enforceable, the ultimate 'accountability' remedy for applicants is the IRP." (Ex. 18, p. 10, ¶ 40.) The Panel went on to conclude at the end of the document: "*Based on the foregoing* and the language and content of the IRP Procedure, the Panel issues the following procedural directions: (i) The Panel orders a reasonable documentary exchange . . . ; (ii) The Panel permits the Parties to benefit from additional filings and supplemental briefing going forward . . . ." (Ex. 18, p. 18, ¶ 130 [emphasis added].) In the next paragraph, the Panel stated: "*Based on the foregoing* and the language and content of the IRP Procedure, the Panel concludes that this Declaration and its future Declaration on the merits of this case are binding on the Parties." (Ex. 18, p. 18, ¶ 131 [emphasis added].)

The IRP Panel repeated the same language about applicants that have disputes with ICANN not having resort to the courts because of the Covenant when it granted DCA's request to have witnesses appear and give live testimony at the IRP hearing (Ex. 32, pp. 5-6, 9, ¶¶ 15, 37 ["*Based on the above*, the Panel requires all three witnesses in the IRP to be physically present at

the hearing . . ." (emphasis added)]), and when it concluded that it would apply a *de novo* standard of review in the IRP proceeding and awarded DCA its costs in the IRP, as DCA had requested (Ex. 33, pp. 22, 62, ¶¶ 72, 73, 76, 150).

The court therefore finds that DCA was successful in asserting in the IRP proceeding the first position that, because of the Covenant, it could not sue ICANN.

4. Fourth Factor: The Two Positions Are Totally Inconsistent

The court finds that the two positions taken by DCA are totally inconsistent. As ICANN asserts in its closing argument brief: "DCA's lawsuit against ICANN is totally and logically inconsistent with DCA's first position that it could not sue ICANN. . . . . DCA's repeated arguments that it cannot sue ICANN in any way related to its application, followed by DCA's lawsuit against ICANN specifically related to its application, are two positions that are irreconcilable and mutually exclusive." (ICANN's Post-Trial Brief (Judicial Estoppel Bench Trial), filed March 1, 2019, p. 21:8-14.) The court agrees with ICANN's analysis on this issue.

5. Fifth Factor: The First Position Was Not Taken as a Result of Ignorance, Fraud, or Mistake

The court finds that the first position (that DCA could not sue ICANN in court for acts or omissions with respect to DCA's application because of the Covenant) was not taken by DCA as a result of ignorance, fraud, or mistake.

First, as set forth above in the court's discussion of the first factor, the evidence establishes that DCA made at least seven separate statements to the IRP Panel taking the position that, because of the Covenant, DCA could not sue ICANN in court in any way related to DCA's application. Thus, the first position was not taken by DCA in an isolated or off-the-cuff remark by DCA or its attorneys made out of ignorance or mistake, but instead in repeated statements made at different times throughout the IRP procedure as a consistent strategic position adopted by DCA to support its requests that the IRP Panel rule in its favor on seven separate issues. There is no indication from the evidence presented that DCA took the first position as a result of ignorance, fraud, or mistake. (*See Blix Street Records, Inc. v. Cassidy, supra,* 191 Cal.App.4th at p. 47 ["There is no indication that [plaintiff] took the first position – that the contract was

enforceable – as a result of ignorance, fraud, or mistake."]; *Bucar v. Ahmad* (2016) 244 Cal.App.4th 175, 188 ["Appellants made no showing that their stipulation to arbitrate, with knowledge and consent of their former attorney, was the result of fraud, ignorance, or mistake."].)

Second, DCA argues that it "was ignorant or mistaken as to the scope of the litigation waiver." (Plaintiff DCA's Closing Trial Brief, filed March 1, 2019, p. 12:7-8.) But "[t]he law is clear that legal advice and ignorance of the law are not defenses to judicial estoppel." (*Galin v. Internal Revenue Service* (D. Conn. 2008) 563 F. Supp.2d 332, 341; *see also Carr v. Beverly Health Care & Rehab. Servs., Inc.* (N.D. Cal. Nov. 5, 2013) No. C-12-2980 EMC, 2013 WL 5946364, at *6 [for purposes of judicial estoppel, "'ignorance of the law is no excuse.' Particularly where, as here, [plaintiff] was represented by counsel . . ."].) Moreover, the evidence establishes that DCA's CEO, Sophia Bekele, submitted a public comment from DCA's email address to ICANN on Module 6 of the gTLD Applicant Guidebook in 2009 – three years before DCA submitted its application – in which she noted that the Covenant might be unenforceable: "In many legal jurisdictions forgoing the right to sue or challenge another party (in this case ICANN on application issues) is illegal in itself. . . . . [¶] Not sure if enforceable." (Ex. 60; February 6, 2019 Reporter's Transcript of Proceedings, p. 73:18; February 7, 2019 Reporter's Transcript of Proceedings, pp. 236:28-237:24, 238:26-243:21.)

Third, DCA also argues that its first position was taken as a result of ignorance or mistake because, at the time DCA took that position in the IRP proceeding, DCA was not aware that the court (Judge Halm) in this lawsuit would later find that the Covenant did not bar claims for fraud or willful injury to property. But, as ICANN argues in its closing argument brief: "Whether DCA was unaware that a subsequent court might find the Covenant unenforceable as to certain types of claims is irrelevant to judicial estoppel, as *Blix* makes clear. *See Blix*, 191 Cal. App. 4th at 49-51. In *Blix*, the parties represented to the court that they had reached a settlement, and based on that representation, the court dismissed the case. *Id.* One of the parties thereafter retained new counsel, who claimed the settlement was unenforceable. *Id.* The court of appeal held that, even though the settlement was possibly unenforceable as a matter of law, the party

was judicially estopped from denying the settlement's enforceability because the party had represented to the trial court that the case had settled, resulting in the trial court dismissing the case. *Id.* At 51. Thus, DCA did not need to be correct that the Covenant barred lawsuits against ICANN in order for it to be estopped from taking an opposite position at a later date." (ICANN's Post-Trial Brief (Judicial Estoppel Bench Trial), filed March 1, 2019, pp. 17:17-18:7.) The court agrees with ICANN's analysis of this issue.

Finally, the fact that DCA's statements made in support of the first position in the IRP proceeding were made by DCA's attorneys also does not establish ignorance or mistake on the part of DCA. As set forth above, "[j]udicial estoppel may be based on a position taken by a party or party's counsel." (*Blix Street Records, Inc. v. Cassidy, supra,* 191 Cal.App.4th at p. 48.)

CONCLUSION

For the reasons set forth above, the court finds that DCA's successfully taking the first position in the IRP proceeding and gaining significant advantages in that proceeding as a result thereof, and then taking the second position that its totally inconsistent in this lawsuit, presents egregious circumstances that would result in a miscarriage of justice if the court does not apply the doctrine of judicial estoppel to bar DCA from taking the second position in this lawsuit. The court therefore exercises its discretion to find in favor of ICANN, and against DCA, on ICANN's affirmative defense of judicial estoppel and to bar DCA from bringing or maintaining its claims against ICANN alleged in the FAC in this lawsuit.

The court orders ICANN to give notice of this ruling and to lodge and serve a proposed judgment.

IT IS SO ORDERED.

DATED: August 22, 2019

Robert B. Broadbelt III
Judge of the Superior Court