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ASSIGNED NAMES AND NUMBERS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RUBY GLEN, LLC ,

Plaintiff,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Defendant.

Case No. 2:16-cv-5505 PA (ASx)

Assigned for all purposes to the Honorable Percy Anderson

OPPOSITION TO MOTION FOR LEAVE TO TAKE THIRD PARTY DISCOVERY OR, IN THE ALTERNATIVE, MOTION FOR THE COURT TO ISSUE A SCHEDULING ORDER

[[Proposed] Order filed concurrently herewith]

Hearing Date: November 28, 2016
Hearing Time: 1:30 p.m.
Courtroom: 15

I. INTRODUCTION

Plaintiff Ruby Glen, LLC's ("Plaintiff's") Motion for Leave to Take Third Party Discovery or, in the Alternative, Motion for the Court to Issue a Scheduling Order ("Motion"), should be denied. There is no good cause to take expedited discovery given that a dispositive motion is pending. Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") recently moved to dismiss all claims against it, for both failure to state a claim and on the grounds that the covenant not to sue bars all of Plaintiff's claims. In addition, ICANN also moved to dismiss based on Plaintiff's failure to include third party Nu Dotco LLC ("NDC") as a necessary party. Therefore, it is uncertain whether this lawsuit will proceed and, if it does, who will be parties, thereby making early discovery unduly burdensome and possibly unnecessary. Moreover, any purported benefit to Plaintiff does not outweigh the prejudice to ICANN of engaging in expedited discovery. Finally, Plaintiff's Motion mischaracterizes ICANN's declination to engage in a discovery conference by insinuating that ICANN is acting inconsistently with the Federal Rules of Civil Procedure. In fact, ICANN is in full compliance with the Federal Rules of Civil Procedure given that no scheduling conference has been set, no scheduling order is in effect, and it is premature to confer while ICANN's motion to dismiss is pending.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed its Complaint on July 22, 2016 (ECF No. 1), and filed its First Amended Complaint ("FAC") on August 8, 2016. (ECF No. 23). Plaintiff's allegations arise out of a July 2016 auction in which NDC submitted the top bid, thereby moving closer to entering into a registry agreement with ICANN to operate the .WEB gTLD. Thereafter, non-party Verisign, Inc. ("Verisign") disclosed an agreement it has with NDC under which NDC has agreed that, if it eventually enters into an agreement with ICANN to operate .WEB, then NDC will submit a request to ICANN that the agreement be transferred to Verisign.

On October 26, 2016, ICANN moved to dismiss the FAC first under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, second on the grounds that the covenant not to sue bars all claims, and third under Federal Rule of Civil Procedure 12(b)(7) for failure to join NDC, a necessary party, as prescribed by Federal Rule of Civil Procedure 19 ("Rule 19"). (ECF No. 30). On the same date, Plaintiff filed the present discovery Motion in which it seeks leave to propound discovery on third parties NDC and Verisign on an expedited basis, or in the alternative, for this Court to enter a scheduling order.

III. LEGAL STANDARD

Under Federal Rule of Civil Procedure Rule 26(d), formal discovery does not commence until after the parties have engaged in a discovery conference, unless a party demonstrates good cause for expedited discovery. *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002); *Am. LegalNet, Inc. v. Davis*, 673 F. Supp. 2d 1063, 1067 (C.D. Cal. 2009). Good cause exists only "where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party." *Semitool, Inc.*, 208 F.R.D. at 276 (denying plaintiff's request to take expedited third party discovery for failure to demonstrate good cause); *Am. LegalNet, Inc.*, 673 F. Supp. 2d at 1067, 1071 (denying plaintiff's motion for expedited discovery where the plaintiff failed to show good cause).

IV. ARGUMENT

A. THERE IS NO GOOD CAUSE TO PERMIT PLAINTIFF LEAVE TO TAKE THIRD PARTY DISCOVERY ON AN EXPEDITED BASIS.

Plaintiff seeks leave to take discovery on an expedited basis and on a schedule accelerated far beyond what is contemplated in the Federal Rules. Plaintiff's request should be denied for two reasons.

First, there is no good cause to allow Plaintiff leave to take the discovery it

seeks on an expedited basis while ICANN's motion to dismiss is pending. Courts have refused to permit discovery where, as here, the pleadings have not yet closed. *Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 608 (D. Nev. 2011) (staying discovery pending resolution of a motion to dismiss where the motion was "potentially dispositive of the entire case [and] Plaintiff does not claim that it needs any discovery to oppose the motion"); *In re Flash Memory Antitrust Litig.*, No. C 07-0086 SBA, 2007 U.S. Dist. LEXIS 95869, at *27−28 (N.D. Cal. Dec. 24, 2007) (declining to permit discovery before amended operative complaint is filed, on the grounds that "with no operative complaint . . . there are no claims by which relevance of requested discovery may be measured"). The Ninth Circuit has recognized that the purpose of a motion to dismiss is to enable challenges to the legal sufficiency of a complaint ***without bearing the expense of discovery***. *See Rutman Wine Co. v. E & J Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) (affirming pre-discovery dismissal because "[i]t is sounder practice to determine whether there is any reasonable likelihood that plaintiffs can construct a claim before forcing the parties to undergo the expense of discovery"); *Tradebay, LLC*, 278 F.R.D. at 608. Further, the Ninth Circuit has held that "discovery at the pleading stage is ***only*** appropriate where factual issues are raised by a Rule 12(b) motion," which is not applicable here. *Ministerio Roca Solida v. U.S. Dept. of Fish & Wildlife*, 288 F.R.D. 500, 502 (D. Nev. 2013) (emphasis added) (citing *Wagh v. Metris Direct, Inc.* 363 F.3d 821, 829−30 (9th Cir. 2003), *overruled on other grounds by Odom v. Microsoft Corp.*, 486 F.3d 541 (9th Cir. 2007)).

The case of *In re Graphics Processing Units Antitrust Litigation* is instructive. It stands for the proposition that where a pending motion may obviate the need for any discovery whatsoever, the court should deny requests for early discovery. *In re Graphics Processing Units Antitrust Litig.*, Nos. C 06-07417 WHA, 1826, 2007 U.S. Dist. LEXIS 57982, at *12−13 (N.D. Cal. July 24, 2007).

In that case, the plaintiffs sought early discovery while the defendants' motions to dismiss were pending, but the court denied plaintiffs' request based on the general principle that "adjudicating the motions to dismiss will shed light on the best course for discovery" and noting that "[o]ur immediate circumstances omit any compelling need for prompt discovery." *Id*. at *24. The same is true here, as ICANN's pending motion to dismiss on the grounds that the FAC fails to state a claim and a covenant not to sue bars Plaintiff's claims may well obviate the need for any discovery from third parties or ICANN.

Moreover, as ICANN argued in its motion to dismiss, Plaintiff failed to join NDC, a necessary party to the litigation. (Mot. to Dismiss at 22−25, ECF No. 30). Even if the Court grants Plaintiff leave to amend to join NDC, the instant discovery Motion would be mooted in part, given that NDC would then be a party to the action and subject to discovery requests as are all parties. Therefore, the expedited discovery Plaintiff seeks is premature, given that the Court has not yet determined whether all necessary parties have been joined in the litigation. *AF Holdings LLC v. Does*, 2012 WL 974933, at * 5 (E.D. Cal. Mar. 21, 2012) (denying plaintiff's request for expedited discovery from a third party on the grounds that, "[a]ssuming plaintiff has a good faith basis for its claims, plaintiff can name [third party] as a defendant, serve him with process, hold the Rule 26(f) conference, and conduct any discovery necessary"). Accordingly, Plaintiff's Motion should be denied given the pending, dispositive motion to dismiss that also could affect which parties are involved.

Second, any theoretical benefit to Plaintiff does not outweigh the prejudice to ICANN and others, as discussed below. Demands for otherwise premature discovery may only be granted "where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party." *Semitool, Inc.*, 208 F.R.D. at 276. Here, Plaintiff argues that

expedited discovery is necessary because Plaintiff ***may*** file a motion for a preliminary injunction at some unidentified point in the future.[1] But, the possibility that Plaintiff may file such a motion, and the possibility that early discovery may aid Plaintiff in supporting such a motion does not equate to good cause, particularly in light of the prejudice to ICANN, NDC, and any other third party. If the Motion were granted, and even if discovery was not aimed at ICANN, ICANN would still incur the unnecessary expense of participating in the expedited discovery by reviewing documents produced by third parties and attending depositions of third parties, all before the pleadings have closed and before the parties are definitively established. Similarly, NDC, perhaps Verisign, and any other third parties will be subject to unnecessary or overbroad discovery that may be irrelevant or useless if ICANN's motion to dismiss is granted. Moreover, if NDC, and possibly Verisign, is subject to discovery before its inclusion in the lawsuit, those entities' discovery responses may differ and have to be revised if they are joined to the lawsuit as parties because discovery standards applicable to non-parties and parties differ substantially. There is little, if any, compelling need for third party discovery from NDC, Verisign, or any other third party on an expedited basis, and nothing prevents Plaintiff from seeking such discovery during the ordinary course of litigation and after the pleadings and parties are set. Therefore, given that neither the pleadings nor the parties to the litigation are presently set, and given that the prejudice to ICANN, NDC, and other third parties outweighs any theoretical benefit to Plaintiff, there is no good cause to permit expedited discovery.

[1] As Plaintiff explains in its Motion, one of the factors courts consider in determining whether good cause for expedited discovery exists is whether a preliminary injunction is pending. (Mot. at 5, ECF No. 32). By Plaintiff's own admission, the standard is whether the injunction is ***pending***, not whether a motion for a preliminary injunction is contemplated and may be filed on some unspecified date.

B. THERE IS GOOD CAUSE TO DELAY ENTRY OF A SCHEDULING ORDER.

Plaintiff's request that this Court issue a scheduling order is likewise premature. Federal Rule of Civil Procedure 16(b) provides that a judge may delay issuing a scheduling order if he or she "finds good cause for delay." Fed. R. Civ. P. 16(b)(2). There is good cause here for the Court to delay issuing a scheduling order for many of the reasons already enumerated. A scheduling order is unnecessary and premature at this procedural juncture, where the pleadings have not closed and the parties have not been established. ICANN's motion to dismiss may moot the need for any scheduling order; or, in the alternative, ICANN's motion to dismiss may result in joining NDC in this lawsuit, rendering it more efficient and logical to delay issuing a scheduling order until all parties are joined. Accordingly, given that both the pleadings and the parties are presently in flux, good cause exists to delay issuing a scheduling order that may in fact be wholly unnecessary.

C. PLAINTIFF MISCHARACTERIZES ICANN'S DETERMINATION THAT A RULE 26(F) CONFERENCE WOULD BE PREMATURE AT THE PRESENT JUNCTURE.

Plaintiff's claims regarding ICANN's "refusal" to confer with Plaintiff mischaracterizes both ICANN's position and its obligations under Federal Rule of Civil Procedure 26(f) ("Rule 26(f)"). Under Rule 26(f), the parties are required to confer regarding discovery "as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b)." Fed. R. Civ. P. 26(f)(1). It is not practicable for the parties to confer regarding discovery at this procedural stage, where there is a pending motion to dismiss for failure to state a claim and failure to join a necessary party—one of the very entities from which Plaintiff seeks expedited discovery. It would be highly inefficient to confer with Plaintiff regarding discovery for a matter which should be dismissed in its entirety for the reasons set forth in ICANN's motion to dismiss. (Mot. to Dismiss). If the lawsuit proceeds, ICANN believes NDC should be a

party, and it should participate in discovery planning. Furthermore, neither a scheduling conference nor a scheduling order is presently set, as previously mentioned. Accordingly, the Rules do not require ICANN to engage in a Rule 26(f) conference at this procedural juncture, and ICANN has legitimate reasons for declining to do so prematurely. As such, Plaintiff's suggestions that ICANN acted improperly in declining to engage in a premature Rule 26(f) conference (*see* Mot. at 1, 4, ECF No. 32) are misplaced.

V. CONCLUSION

For the foregoing reasons, Plaintiff's request to take expedited third party discovery or, in the alternative, for the entry of a scheduling order must be denied.

Dated: November 7, 2016

JONES DAY

By: */s/ Eric P. Enson*
Eric P. Enson

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