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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

NAME.SPACE, INC.,

Plaintiff,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Defendant.

Case No. CV 12-8676-PA

Assigned for all purposes to Honorable Percy Anderson

MEMORANDUM IN SUPPORT OF ICANN'S EVIDENTIARY OBJECTIONS TO THE DECLARATION OF PAUL GARRIN SUBMITTED BY NAME.SPACE IN OPPOSITION TO ICANN'S MOTION FOR SUMMARY JUDGMENT

[ICANN's Reply Memorandum in Support of ICANN's Motion for Summary Judgment; Declarations of Louis Touton and Jeffrey A. LeVee; and ICANN's Memorandum in Opposition to Name.space's Rule 56(d) Application Filed And Served Concurrently Herewith]

Hearing Date: Feb. 25, 2013
Hearing Time: 1:30 pm
Hearing Location: 312 N. Spring St.

INTRODUCTION

At issue in ICANN's converted motion for summary judgment is whether the release executed by name.space in connection with its 2000 Application to ICANN for 118 TLDs bars the claims asserted by name.space in this lawsuit. In opposing that motion, name.space submitted the declaration of its founder and Chairman, Paul Garrin. (*See* ECF No. 40.) Mr. Garrin's declaration contains several statements concerning Mr. Garrin's subjective intent at the time he executed the 2000 Application and its release. Because California has long held that a party's subjective intent at the time a contract is executed is ***irrelevant*** to contract interpretation and cannot create an issue of fact for purposes of defeating summary judgment, ICANN objects to the admissibility of Mr. Garrin's self-serving declaration.

ARGUMENT

In an attempt to disregard the clear and unambiguous language in the release and save name.space's claims, name.space submitted the declaration of its founder and Chairman, Paul Garrin. Mr. Garrin's declaration contains several self-serving statements concerning his subjective intent and understanding at the time he executed the 2000 Application. Specifically, Mr. Garrin states as follows:

> name.space [never] intended the release language included in the 2000 Application to relate to any future TLD application rounds or to anything other than ICANN's consideration of the 2000 Application. That was my understanding when I signed it. I did not intend the agreement to have the meaning that ICANN now tries to attach to it….

(Declaration of Paul Garrin (ECF No. 40), ¶ 9.)

That these statements are irrelevant and inadmissible is not in question. Because California adheres to the "objective theory" of contract interpretation, Mr. Garrin's subjective intent or understanding is irrelevant to the interpretation of the release language contained in the 2000 Application and cannot create an issue of fact for purposes of defeating summary judgment. *Founding Members of the*

Newport Beach Country Club v. Newport Beach Country Club, Inc., 109 Cal. App. 4th 944, 956 (2003) ("*Founding Members*") ("The parties' undisclosed intent or understanding is irrelevant to contract interpretation."); *see also Vaillette v. Fireman's Fund Ins. Co.*, 18 Cal. App. 4th 680, 690 (1993) ("The true, subjective, but unexpressed intent of a party is immaterial and irrelevant"); *Winet v. Price*, 4 Cal. App. 4th 1159, 1167 (1992) (one side's "uncommunicated subjective intent as to the meaning of the words of the contract" is irrelevant to contract interpretation).

In *Founding Members*, the Court of Appeal examined and applied the principles of contract interpretation to construe a "right of first offer" contained in the governing regulations of a country club. 109 Cal. App. 4th 944. In opposing summary judgment, the plaintiff submitted several declarations that set forth each declarant's intent and understanding at the time the right of first offer was executed. The Court of Appeal found that the declarations were "irrelevant [and inadmissible] under the objective theory of contracts" because "undisclosed statements regarding intent or understanding … are irrelevant to contract interpretation…." *Id*. at 960 (citing *Winograd v. American Broadcasting Co.*, 68 Cal. App. 4th 624, 632 (1998)).

Likewise, in *Zalkind v. Ceradyne, Inc*., 194 Cal. App. 4th 1010 (2011), the Court of Appeal found that the trial court correctly sustained the defendant's objections to a declaration submitted by the plaintiff in opposition to summary judgment. *Id*. at 1022 n.2. The Court of Appeal found that the declaration expressed the plaintiff's "subjective understanding of the meaning" of the contract language at issue and affirmed the objection because "[i]t is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation." *Id*.

Thus, whether or not Mr. Garrin intended the release to apply to future TLD application rounds is irrelevant, inadmissible, and does not create an issue of fact concerning the scope of the release. *Founding Members*, 109 Cal. App. 4th at 956.

CONCLUSION

California subscribes to the objective theory of contract interpretation. The release language contained in name.space's 2000 Application sets forth the parties' objective intentions, and any effort by name.space to argue that the terms of the 2000 Application do not comport to its intentions or understanding of the agreement should not be permitted. Mr. Garrin's declaration is inadmissible.

Dated: February 11, 2013

JONES DAY

By: /s/ Jeffrey A. LeVee
Jeffrey A. LeVee

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INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS