

Multiple Documents

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

COMMERICAL CONNECT, LLC
1418 South 3rd Street
Louisville, Kentucky 40208

Plaintiff

VS.

INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS

Defendant


SERVE: C T CORPORATION SYSTEM
818 WEST SEVENTH ST STE 930
LOS ANGELES CA 90017

CIVIL ACTION NO.
3:16-CV-00012-JHM

**MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY
INJUNCTION**

Pursuant to Fed. R. Civ. P. 65, the Plaintiff, Commercial Connect, LLC, by counsel, hereby moves this Court to issue a Temporary Restraining Order and Preliminary Injunction requiring Defendant the Internet Corporation for Assigned Names and Numbers to cancel or indefinitely postpone the January 27th, 2016 New Generic Top-Level Domain Name auction for “.shop”. In support of this motion, Commercial Connect relies upon the attached memorandum.

Respectfully submitted,


Paul R. Schurman, Jr.

Avery & Schurman, P.L.C.
115 N. Watterson Trail
Louisville, KY 40243
(502) 244-3153
Counsel for Plaintiffs

The Plaintiff will suffer irreparable injury if the “.shop” gTLD application is auctioned off to the highest bidder on January 27, 2016. The Plaintiff now brings this action to enjoin ICANN from proceeding with the “.shop” auction.

BACKGROUND

In 1998, ICANN was established to manage key aspects of the internet infrastructure, including the coordination of the global internet’s system of unique identifiers—1) domain names; 2) internet protocol addresses; and 3) protocol port and parameter numbers. Inherent to the management of domain names, ICANN set out to establish a process of introducing new generic top-level domains (“gTLDs”) to promote consumer choice and competition. Over time, ICANN expanded the DNS from the original six gTLDs (“.com”; “.org”; “.net”; “.edu”; “.gov”; and “.mil”) to 22 gTLDs and approximately 250 country-code TLDs (“ccTLDs”).

In 2005, the Generic Names Supporting Organization (“GNSO”), ICANN’s DNS policy-making arm, began to develop a process for introducing new gTLDs. In 2008, ICANN’s Board of Directors adopted 19 specific GNSO policy recommendations for the implementation of a new gTLD program. A key component of the new policy recommendations was the process by which parties (or, prospective applicants) could apply to become the designated “Registry Operator” charged with “the technical operation of the TLD, including all of the names registered in that TLD.”

The GNSO set forth its new gTLD program’s application criteria in a document it called the Applicant Guidebook. Upon the ICANN Board’s approval of the Applicant Guidebook in 2011, the new gTLD program was officially launched.

The Applicant Guidebook was intended to provide prospective applicants for new gTLDs to understand the application process as well the objective and measurable criteria that would be used in that application process. Through the adoption of the Applicant Guidebook, ICANN established a set of principles, including the following:

“A set of technical criteria must be used for assessing a new gTLD registry applicant to minimise the risk of harming the operational stability, security and global interoperability of the Internet.”

Among the core GNSO recommendations adopted by ICANN was the following recommendation regarding the gTLD application process:

“ICANN must implement a process that allows the introduction of new top-level domains. The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.”

After receiving over 1900 applications, the gTLD Applicant System (“TAS”) closed on May 30, 2012. The final version of the Applicant Guidebook was made available to gTLD applicants on June 4, 2012, five days after the 2012 TAS had closed.

In addition to general application procedures, ICANN’s new gTLD program Applicant Guidebook set forth a complex Dispute Resolution Procedure (“DRP”) designed to resolve disputes between applicants. Specifically, the Applicant Guidebook set forth the grounds upon which one applicant could object to the application of another applicant. Relevant to this action is the “String Confusion Objection,” which refers to “the objection that the string comprising the potential gTLD is confusingly similar to an existing top-level domain or another string applied for in the same round of applications.”

The Applicant Guidebook provided that applications containing identical or similar gTLD strings would be categorized by an ICANN panel in groups known as “Contention Sets.” The Applicant Guidebook established that the International Centre for Dispute Resolution would serve as the Dispute Resolution Service Provider (“DRSP”) for String Confusion Objections within Contention Sets. The Applicant Guidebook established that each dispute resolution proceeding, including those involving String Confusion Objections, would be administered by a panel of three experts constituted by the DRSP, and in accordance with the DRSP’s rules and Applicant Guidebook dispute resolution procedure. The Applicant Guidebook further provided that in the event that the Applicant Guidebook dispute resolution procedure conflicted with the DRSP’s rules, the Applicant Guidebook procedure “shall prevail.”

One measure of criteria to be applied in the Contention Set stage of the dispute resolution process is the “Community Priority Evaluation” (“CPE”). The Applicant Guidebook directed that applicants in a given Contention Set may participate in the CPE, where an ICANN-appointed panel would score applicants based on metrics concerning the extent to which an applicant represents a recognized “community.” In the event that the Contention Set cannot be resolved through Community Priority Evaluation, or any prior String Similarity related proceeding, the right to operate the gTLD in question proceeds to an ICANN-facilitated auction.

COMMERCIAL CONNECT APPLIES TO OPERATE “.SHOP”

The Plaintiff, Commercial Connect, L.L.C., offers domain name registry services to the e-commerce market. In 2000, Commercial Connect began the application process to operate a top-level domain (“TLD”) name registry, to wit: “.shop”. Commercial

Connect was formed under the laws of the Commonwealth of Kentucky. Commercial Connect's corporate headquarters is located at 1418 S. 3rd Street, Louisville, Kentucky 40208.

In 2000, ICANN opened an application process for the ".shop" TLD.. At that time, Commercial Connect began the application process to operate the ".shop" TLD. By operating the ".shop" registry, Commercial Connect sought to provide uniform oversight to e-commerce merchant registrars. Commercial Connect completed its application and paid a \$50,000.00 application fee in 2000. Commercial Connect's original application was never approved nor was it rejected by ICANN. Instead, ICANN informed Commercial Connect that its original application would be held until the next round of consideration for TLD applications to be held in 2004.

In 2004, ICANN determined that Commercial Connect lacked the necessary "significant community sponsor" to be considered in that application round, and that Commercial Connect would have to wait until the next round expected to take place in 2006. Despite assurances to the contrary, ICANN did not commence a TLD application round in 2006. Instead, ICANN commissioned its GNSO to overhaul the TLD process.

With the promise of "fairness, transparency and non-discrimination" in the adoption of the Applicant Guidebook, Commercial Connect was eager to participate in ICANN's new gTLD application round. Executives from Commercial Connect participated in over 30 ICANN-hosted meetings concerning the new gTLD program in order to fine-tune its own application.

Commercial Connect paid \$185,000.00 to participate in the new gTLD program application process from 2012 to 2013. After ICANN's TAS closed in May, 2012,

Commercial Connect filed objections to 21 applications on the basis of String Confusion. Per the Applicant Guidebook, Commercial Connect's application was placed in a Contention Set with other applicants. The String Similarity Disputes were commenced before the ICDR in 2013. In order to participate in ICDR's String Similarity Dispute proceedings, Commercial Connect paid \$6000.00 for the expert mediators and \$2850.00 in administrative fees per dispute, totaling \$179,850.00.

ICANN & ICDR FAILED TO FOLLOW gTLD PROCEDURES

Despite ICANN's assurances that applications for new gTLD's would be evaluated with respect to the principles of "fairness, transparency and non-discrimination," both the application processes and the related dispute resolutions procedures were fraught with a lack of transparency. ICANN retained unqualified evaluators as panel members tasked with reviewing the ".shop" applications. These evaluators failed to apply objective criteria in the application process.

The lack of measurable and objective criteria resulted in inconsistent application decisions across the gTLD application process, necessitating the institution of lengthy and costly dispute resolution proceedings. Members of the expert panels tasked with evaluating "String Similarity" components of the gTLD applications failed to apply ICANN's pre-published criteria. Members of the expert panels tasked with Commercial Connect's CPE were unqualified, having no relevant experience in the e-commerce community.

ICANN's malfeasance, mismanagement, and failed oversight in both the application process and the dispute resolution process, has resulted in ICANN's designation that the ".shop" gTLD rights will be sold at auction.

ARGUMENT

1. Legal Standard

The same legal standard applies to both a temporary restraining order and preliminary injunction. *Forsyth County v. U.S. Army Corps of Eng'rs*, 633 F.3d 1032, 1039 (11th Cir. 2011). In order to prevail on a motion for a temporary restraining order and preliminary injunction, the Court must analyze: "(A) the moving party's "likelihood of success on the merits;" (B) "the irreparable harm which could result" to the movant without the relief requested; (C) "the possibility of substantial harm to others;" and (D) "the impact on the public interest." *Schenck v. City of Hudson*, 114 F.3d 590, 593 (6th Cir.1997).

II. Commercial Connect is Likely to Prevail on the Merits

The Plaintiff's claim against ICANN is straightforward: ICANN misrepresented its gTLD application process in order to induce registry operators to partake in the process, and then failed to honor its explicit and implicit obligations to those applicants.

By and through the publication of its Applicant Guidebook, ICANN made representations and promises concerning the process by which gTLD applications would be evaluated and processed. The representations and promises concerning the gTLD application evaluation and process made by ICANN were not fulfilled as the application process proceeded. By its acts and omissions, ICANN was aware that the representations made in the Applicant Guidebook were false and/or misleading.

ICANN was aware that the representations made in the Applicant Guidebook would induce applicants like the Plaintiff to enter the gTLD application process. Commercial Connect justifiably relied upon ICANN's representations when it entered the

2012 gTLD application process. As a result of its justifiable reliance upon ICANN's misrepresentations, Commercial Connect has suffered significant economic damages in excess of \$170,000.00.

ICANN developed a contractual relationship with Commercial Connect whereby Commercial Connect paid valuable consideration to ICANN in exchange for the right to participate in ICANN's New gTLD Application Process. ICANN outlined its contractual obligations in its Applicant Guidebook. ICANN breached its contractual obligations when it failed to apply the pre-published application process as provided in the Applicant

In addition, there was an implied covenant of good faith and fair dealing that existed between ICANN and Commercial Connect when the parties entered into the contractual relationship of the gTLD application process. ICANN breached the covenant of good faith and fair dealing when it acted in a way that deprived Commercial Connect of the benefits of the agreement as set forth in the Applicant Guidebook, namely, a gTLD application, evaluation, and selection process founded on the principles of fairness, transparency, and non-discrimination.

III. Commercial Connect will Suffer Irreparable Harm Without the Request Relief

Breaches by ICANN, compounded by ICDR's own breach, has completely stalled the gTLD application and evaluation process for the ".shop" gTLD. On October 30, 2015, ICANN declared that the ".shop" contention set must proceed to auction on January 27, 2016. Applicants remaining in the contention set will be forced to bid on the right to operate the ".shop" registry.

Being the first applicant to apply for the right to operate the ".shop" registry in 2000, Commercial Connect believes that without the material breaches by both ICANN

and ICDR, Commercial Connect would have received the contract to operate the “.shop” registry outright. If the “.shop” gTLD is sold at auction, Commercial Connect will suffer irreparable injury in the total loss of its ability to operate the “.shop” registry.

As registry operators are solely responsible for the operation of a gTLD under ICANN’s guidelines, Commercial Connect has no adequate remedy at law if the “.shop” gTLD is sold at auction to receive compensation for the loss of potential revenue.

IV. There is a High Possibility of Harm to the Interests of Others & Harm to the Public Interest

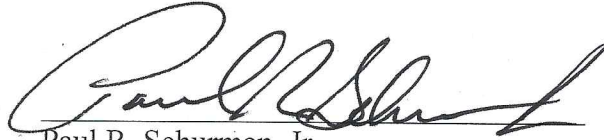
While Commercial Connect is the only plaintiff to this action, there are other applicants awaiting the result of the January 27 “.shop” auction. Registry operation agreements between ICANN and registry operators are somewhat equivalent to internet monopolies, as only *one* registry operator may operate any given gTLD.

The winner of the “.shop” auction will secure the exclusive right to operate the “.shop” gTLD. By allowing the auction to occur, ICANN has obliterated its core mission of awarding registry operator agreements to those registry operators best equipped to manage any given gTLD. Instead, the highly-coveted “.shop” gTLD registry operator agreement will *literally* go to the “highest bidder.” This not only harms the interests of the applicants, it harms the general “health” of the internet e-commerce community.

CONCLUSION

For the reasons set out above, Commercial Connect respectfully requests this Court to issue a temporary restraining order and preliminary injunction to enjoin ICANN from proceeding with the “.shop” auction on January 27, 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Paul R. Schurman, Jr.", written in a cursive style.

Paul R. Schurman, Jr.
Avery & Schurman, P.L.C.
115 N. Watterson Trail
Louisville, KY 40243
(502) 244-3153
Counsel for Plaintiffs

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Plaintiff

VS.

INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS

Defendant

AND

INTERNATIONAL CENTRE FOR DISPUTE
RESOLUTION

Defendant

CIVIL ACTION NO.
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PROPOSED ORDER

On the Motion of the Plaintiff, through counsel, pursuant to Federal Civil Rule of Procedure 65, and the Court having considered the Motion and the Complaint, and it appearing to the Court after due deliberation, the Defendant Internet Corporation for Assigned Names and Numbers is hereby restrained and enjoined from proceeding with the January 27th, 2016 auction of the gTLD “.shop.”

JUDGE, WESTERN DISTRICT OF KENTUCKY

DATE:

Prepared by:

Paul R. Schurman, Jr.
Avery & Schurman, P.L.C.
115 N. Watterson Trail, Suite 101
Louisville, Kentucky 40243
(502) 244-8099
Counsel for Plaintiff