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NAMES AND NUMBERS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

DOTCONNECTAFRICA TRUST,

Plaintiff,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, *et al*.,

Defendant.

CASE NO. BC607494

Assigned for all purposes to
Hon. Howard L. Halm

RESPONSE TO DCA'S SUPPLEMENTAL CLOSING TRIAL BRIEF AND TO DCA'S RESPONSE TO ICANN'S REPORT FOLLOWING THE COURT'S REQUEST THAT THE PARTIES MEET AND CONFER REGARDING STIPULATION FOR SEPARATE JUDGES TO HEAR PHASES OF TRIAL; DECLARATION OF ERIN L. BURKE

Complaint Filed: January 20, 2016
Jury Trial Date: August 22, 2018

Hearing: July 20, 2018
Time: 1:30 p.m.

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I. INTRODUCTION

Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") submits this response to the briefs submitted by Plaintiff DotConnectAfrica Trust ("DCA") on the issue of whether separate judges can rule on various portions of a bifurcated trial.[1] Most importantly, DCA fails to refute California case law that clearly establishes that, when an interlocutory judgment is rendered by one judge, any successor judge is obligated to hear the evidence *de novo* and render his or her own decision on all issues prior to entering a final judgment, unless the parties stipulate otherwise. For this reason, ICANN urges the Court ***not*** to hear closing argument on Phase One of the trial in order to defer these issues to the new judge who will be sitting in this Department following Judge Halm's retirement. Indeed, if there is ***any*** doubt as to whether a final ruling by Judge Halm would be subject to reversible error, that doubt counsels against the issuance of such a ruling—and, here, there is ***substantial*** doubt that Judge Halm can issue a binding ruling on Phase One of the trial.

ICANN and ZACR do not stipulate to having two different judges preside over the two phases of this trial. The law is clear (and this Court's initial understanding of the issue was correct): absent a stipulation of the parties, separate judges cannot oversee the phases of a bifurcated trial. California Rules of Court, rule 3.1591 ("Rule 3.1591") does ***not*** change this analysis: Rule 3.1591 "recognizes that different judges ***may*** hear different phases of a trial, an alternative that always has been available ***upon the stipulation of the parties***;" and, if the parties so stipulate, the rule "provides guidance for the manner in which successive judges shall prepare their statements of decision and the final judgment." *European Beverage, Inc. v. Superior Court*, 43 Cal. App. 4th 1211, 1215 (1996). Thus, Rule 3.1591 should not be misconstrued as authorizing this Court to decide Phase One absent stipulation by the parties. Instead, Phase One should proceed anew before the successor judge.

[1] Intervenor ZA Central Registry ("ZACR") joins in on this response.

II. BACKGROUND

On May 26, 2017, ICANN moved for summary judgment, arguing in part that DCA's claims were barred by the doctrine of judicial estoppel. (Declaration of Erin L. Burke ("Burke Decl.") ¶ 2.) The motion came before the Court on August 9, 2017, during which the Court issued a ruling bifurcating the trial pursuant to California Civil Code Section 597 ("Section 597"), and setting the Phase One judicial estoppel trial. (*Id*. ¶ 3.) The Phase One trial took place on February 28 and March 1, 2018, and closing arguments were scheduled for May 22, 2018, after several continuances due to the Court's and counsels' schedules. (*Id*. ¶ 4.)

On May 22, Judge Halm announced that he was retiring effective August 3, 2018, less than three weeks before the scheduled start of the August 22 Phase Two trial. (Id. ¶ 6.) The Court also expressed its understanding that, absent stipulation by the parties, California law requires the same judge to preside over all phases of a bifurcated trial and, therefore, this Court might not be authorized to issue a decision on Phase One. (*Id*.) The Court asked that the parties meet and confer as to whether they would stipulate to a different judge presiding over Phase Two. (*Id.*) The Court continued the closing argument to June 1 and asked that the parties inform the Court on May 31 whether they had reached a stipulation. (*Id*.)

ICANN, DCA, and ZACR met and conferred but did not reach a stipulation. (*Id*. ¶ 7.) On May 30, ICANN filed a Report informing the Court that the parties did not reach a stipulation and confirming the Court's understanding that California law requires the same judge to preside over all phases of a bifurcated trial. (*Id*. ¶ 8.) The same day, DCA filed a Supplemental Closing Trial Brief Regarding Mistrial setting forth its contrary position. (*Id.*) On May 31, DCA also filed a Response to ICANN's Report. (*Id*. ¶ 9.) The parties jointly contacted the Court on May 31, affirming that they had not reached a stipulation. (*Id.*) The Court set a hearing date for the parties' recent submissions on the issue of whether the Court could decide Phase One and a new judge could decide Phase Two for July 20, 2018. (*Id.*) The Court also set closing argument for July 20, should the Court find that it can decide Phase One. (*Id.*)

On June 11, 2018, ICANN and ZACR moved *ex parte* for an order vacating or continuing the Phase Two trial date arguing, *inter alia*, that the case law supported that Phase One would

need to be retried before a new judge, making it unlikely that Phase Two could proceed on August 22. (*Id.*¶ 10.) The Court continued the *ex parte* application hearing to July 20, and indicated that, contrary to its prior position, it now understood California law, in particular Rule 3.1591, to allow different judges to preside over different phases of a bifurcated trial. (*Id.*)

Rule 3.1591 provides that, in bifurcated actions, "[i]f the other issues are tried by a different judge or judges, each judge must perform all acts required by rule 3.1590 as to the issues tried by that judge and the judge trying the final issue must prepare the proposed judgment."[2] Cal. R. Ct. 3.1591(b). As discussed more fully below, Rule 3.1591 is ***only*** applicable where the parties have stipulated that different judges can preside over different phases of a bifurcated trial—here, the parties have not so stipulated. (Burke Decl. ¶ 7.)

III. ARGUMENT

A. RULE 3.1591 APPLIES ONLY WHERE THE PARTIES HAVE STIPULATED THAT DIFFERENT JUDGES MAY HEAR DIFFERENT PHASES OF A BIFURCATED TRIAL.

Rule 3.1591 should not be misconstrued as authorizing this Court to decide Phase One absent stipulation by the parties. This exact argument was rejected by the court in *European Beverage*. (Burke Decl. ¶ 12, Ex. B.)

In *European Beverage*, the court considered whether to declare a mistrial in the bifurcated action because the judge who presided over the first phase was no longer available to hear the second phase. 43 Cal. App. 4th at 1213. The respondent relied on former Rule 232.5 (now Rule 3.1591) as authority that different judges can hear different phases of a bifurcated trial, even without stipulation by the parties. *Id*. at 1215. The court of appeal expressly rejected this argument, finding instead that "absent a waiver or stipulation to the contrary, a party is entitled to have the same judge try all portions of a bifurcated trial that depend on weighing evidence and issues of credibility." *Id*. at 1213. In so doing, the court held that Rule 3.1591 "does not undermine the right of a party to have the same judge hear all the evidence and decide the facts of

[2] Rule 3.1591 was formerly Rule 232.5. The only difference between Rule 3.1591(b) and the former Rule 232.5 is that Rule 3.1591 changes "shall" to "must." The substance of the rules are otherwise the same. (*See* Burke Decl. ¶ 11, Ex. A.)

the case." *Id*. at 1215. Rather, Rule 3.1591 "recognizes that different judges ***may*** hear different phases of a trial, an alternative that always has been available ***upon the stipulation of the parties***;" and, if the parties so stipulate, the rule "provides guidance for the manner in which successive judges shall prepare their statements of decision and the final judgment." *Id*.

Here, ICANN and ZACR do not stipulate to having different judges preside over different phases of the bifurcated trial. Accordingly, Rule 3.1591 does not apply.

B. THE LAW IS CLEAR THAT THE SAME JUDGE MUST HEAR PHASES ONE AND TWO OF THIS BIFURCATED TRIAL.

1. Phase One Will Result in an Interlocutory Ruling and Would Be Vacated in Light of this Matter's Procedural Posture.

If this Court proceeds to make a ruling on its Phase One findings, the resulting interlocutory judgment will necessarily be vacated by the successor judge, as required by California law. DCA does not deny that a ruling on Phase One would result in an interlocutory judgment. Rather, DCA argues that whether the judgment is interlocutory is "irrelevant" and incorrectly asserts that the law "only requires that the same judge decide all bench trials and that the same jury decide all jury trials in a matter." (DCA Response to ICANN Brief, p. 1.) DCA is wrong. The fact that a ruling on Phase One is interlocutory *is* a relevant inquiry and, in fact, determinative on its own.

As presented in ICANN's previously filed Report, California case law is clear:

> Where there has been an ***interlocutory judgment*** rendered by one judge, and that judge becomes unavailable to decide the remainder of the case, ***a successor judge is obliged to hear the evidence and make his or her own decision on all issues,*** including those that have been tried before the first judge, ***unless the parties stipulate otherwise***.

European Beverage, 43 Cal. App. 4th at 1214 (emphasis added) (citing *Rose v. Boydston*, 122 Cal. App. 3d 92, 97 (1981) (holding that when a judge entered an interlocutory judgment and left substantial issues undecided, the judgment was not final in any respect, and any successor judge would be obliged to hear the evidence and make his own decision on all issues before entering a final judgment, unless otherwise stipulated)); *see also David v. Goodman*, 114 Cal. App. 2d 571, 574-75 (1952) (reversing successor judge's adoption of findings in an interlocutory judgment

entered after a 10 day, 16 witness trial because the parties were entitled to a retrial of the entire case before one judge). This language is not tethered to whether both portions of a bifurcated trial are before a judge, a jury, or both. The Appellate Court's reasoning was clear and plainly applicable to this matter:

> An interlocutory judgment is subject to modification at any time prior to the entry of a final judgment. It is considered a ***denial of due process*** for a new judge to ***render a final judgment without having heard all of the evidence.***

European Beverage, 43 Cal. App. 4th at 1214 (emphasis added).

The *European Beverage* reasoning is especially relevant here. In August 2017, this Court ordered a bifurcation under Section 597 to first make a determination on ICANN's judicial estoppel defense. (*See* Burke Decl. ¶ 3.) Section 597 specifically emphasizes that, when a ruling on an affirmative defense in a bifurcated trial is in favor of the plaintiff, the remaining issues should be tried and the final judgment shall be entered in the same manner and with the same effect as if all the issues in the case had been tried at one time. Civ. Proc. Code § 597. If this Court proceeds to make a ruling on its Phase One findings on an affirmative defense, it would result in an interlocutory judgment—it would not be a final determination of the rights of the parties. *Woodhouse v. Pac. Elec. Ry. Co*., 112 Cal. App. 2d 22, 25-26 (1952) (holding that an order resulting from a trial of a defense under Code of Civil Procedure section 597, and before a trial of the merits, is interlocutory); *see also Gavin W. v. YMCA of Metro. L.A.*, 106 Cal. App. 4th 662, 669 (2003)("An order resulting from the trial of a special defense under Code of Civil Procedure section 597 is nonappealable, but is properly challenged on appeal from the final judgment."). Thus, the Phase One findings could not only be modified by a successor judge, he or she would also need to interpret and, as explained below, make additional findings to ultimately determine the parties' rights in a final judgment. Such a result is what the court in *European Beverage* intended to prevent, absent stipulation by the parties.[3]

As such, the crux of the inquiry—as relevant to the facts here—is the interlocutory nature of a Phase One ruling. The trial court's ruling in *Connetto v. Morrison*, No. BS118649, 2012 WL

[3] These circumstances also explain why the court in *European Beverage* held that Rule

8133573 (Cal. Super. Ct. Jan. 27, 2012) (unpublished) is instructive. (*See* Burke Decl. ¶ 13, Ex. C.) There, a judge issued a tentative decision following a bifurcated bench trial on one cause of action and days later was appointed to become a federal judge. The party whose first cause of action was the subject of the bench trial brought a motion for mistrial when the successor judge was assigned. The respondents made the very same argument DCA attempts to invoke here—*i.e.*, that *European Beverage* involved a bench trial for both phases while the second phase in the *Connetto* trial was to be heard by a jury, not the judge.[4] (*Connetto v. Morrison*, No. BS118649, 2011 WL 10657335 (Cal. Super, Ct. July 15, 2011), Burke Decl. ¶ 14, Ex. D.) But respondents' arguments did not hold *any* weight with the court. Applying *European Beverage* and its progeny, the court found that a mistrial was necessary simply based on the fact that the judgment resulting from the bench trial was interlocutory.

The court in *Connetto* recognized that the bench trial was just "the first step in a series of proceedings that will determine the claims." 2012 WL 8133573, at *2. The moving party had four other causes of action remaining, and other parties had their own claims. The court emphasized:

> In addition the witnesses, events and facts addressed in the [tentative] decision are intertwined with the claims of the remaining parties. These ***witnesses and facts will undoubtedly arise in subsequent trial proceedings*** that will address the ownership claims of the other parties. The ***judge who presides over the subsequent proceedings should have the latitude to make independent findings and credibility determinations***, without any legal or practical influence of the [tentative] decision.

2012 WL 8133573, at *2 (emphasis added). Similarly here, many of the same facts and witnesses will arise in Phase Two during the trial of Plaintiffs' remaining claims, ICANN's remaining

3.1591 does not change the law that the same judge must preside over all phases of a bifurcated trial.

[4] Respondents also argued that Rule 3.1591 "clearly shows that different judges can try different phases of a trial without violating any party's due process rights." 2011 WL 10657335, at 9.

defenses, and ZACR's rights in intervention. The successor judge will need to weigh evidence and determine issues of credibility that were presented in Phase One.

As the Phase One ruling would necessarily result in an interlocutory judgment and the parties do not stipulate to have two different judges hear each phase, the inquiry ends there. Accordingly, ICANN requests that the Court resolve the issue at this juncture, in the interest of equity and conserving judicial resources, and allow both phases to proceed before a successor judge.

2. Phase Two Will Require the Court to Make Various Determinations, Arising from Both Factual and Evidentiary Issues From Phase One.

Consistent with the reasoning above, both phases of this case should be heard by the same judge on two additional grounds: (i) there currently are additional non-jury issues, such as declaratory relief, for a successor judge to determine; and (ii) a Phase One ruling would likely leave open evidentiary determinations that should only be made by the judge who heard the evidence from Phase One.

First, there are non-jury issues for the successor judge to decide—including, at a minimum, the remaining cause of action for Declaratory Relief—which *would* necessarily require a ruling from the successor judge.[5] DCA's claim for declaratory relief seeks "judicial declaration" (Compl. ¶ 132) and would necessitate the Court to "weigh evidence and issues of credibility" including about issues and witnesses that were presented before Judge Halm. The successor judge will also have to enter a final judgment in the matter, based in part on the interlocutory judgment issued by Judge Halm (if the Court proceeds on Phase One). California courts make clear that this is not proper—another judge "has no right to predicate his order upon something which has not occurred before him; upon evidence the admissibility of which he has not passed upon, and upon testimony the weight and value of which he has not measured by the appearance, the narration and the manner of testifying of the witnesses present in person before

[5] ICANN and ZACR reserve their rights to challenge the propriety of this cause of action. But as of now, it remains in the case and thus renders DCA's argument that only a "jury trial" remains specious.

him." *Hughes v. De Mund*, 96 Cal. App. 365, 369 (1929) (quoting *In re Williams*, 52 Cal. App. 566, 569 (1921)).

Second, while Phase Two will primarily be a jury trial, the successor judge will nonetheless be required to make evidentiary rulings, factual findings and credibility determinations, and eventually enter a final judgment based on Phase One evidence. In its briefing, DCA ignores the argument that litigants are "entitled to a decision upon the facts of a case from the judge who hears the evidence . . . . [Litigants] cannot be compelled to accept a decision upon the facts from another judge." *David*, 114 Cal. App. 2d at 574 (directing the trial court to try all phases of the case *de novo* where the first judge passed away after making an interlocutory ruling declaring a partnership agreement was null and void); *see also Rose*, 122 Cal. App. 3d at 97-98.

Evidence heard and decisions by the first judge in a bifurcated trial would necessarily have to be interpreted and applied by the successor judge both to preside over the second phase of the trial and to enter a final judgment under Section 597. That point is illustrated by at least one pre-trial issue here, which is whether and to what extent DCA will be able to introduce and argue issues that were resolved by or occurred before the IRP. Extensive evidence and witness testimony regarding the IRP were already presented during Phase One. ICANN and DCA almost certainly would have different views about what was in fact litigated during the IRP, what constitutes a "finding" by the IRP Panel, and the relevance of any pre-IRP conduct to the remaining claims in the case. (Burke Decl. ¶ 5.) ICANN and ZACR expect motions *in limine* and evidentiary arguments before the Phase Two judge regarding what evidence can be presented to the jury during Phase Two.

The Phase Two judge would therefore be making decisions—decisions that will shape the scope and potential outcome of Phase Two—without having heard any of the previously presented evidence those rulings will necessarily be based upon. This outcome violates California law, and deprives ICANN and ZACR of due process.

3. DCA's Arguments and Case Law Are Inapposite and Do Not Support Their Position.

DCA's argument that the law "only requires that the same judge decide all bench trials and that the same jury decide all jury trials in a matter" (DCA Response to ICANN Brief, p. 1) is not supported by law. As discussed above, the relevant inquiry here is whether Phase One would render an interlocutory judgement.

DCA relies heavily on *People v. Espinoza*, 3 Cal. 4th 806 (1992) which is both procedurally and factually inapposite. *Id*. at 828. In that case, a criminal defendant appealed his denial of an automatic application for modification of a jury verdict imposing the death penalty. The defendant claimed that a substitution of judges in a ***guilt phase of a capital murder prosecution*** violated his ***Sixth Amendment right to a jury trial***.[6] The court's analysis of this claim was strictly pursuant to principles under the Sixth Amendment. The Court found that the Sixth Amendment was intended to prevent oppression by the government by providing a jury trial and a neutral judicial officer. Under these principles, the Court merely found that a midtrial substitution of a judge did not even implicate this constitutional right because there was no claim that the substituted judge was not impartial. The Court did not make any further holdings or findings that are applicable here.

Most of the cases DCA cites actually support ICANN's position. *See McAllen v. Souza*, 24 Cal. App. 2d 247, 251 (1937) (granting trial *de novo* was proper after initial judge died because for an interlocutory judgment, "any findings or conclusions made at the time of entry thereof were subject to change or modification at the time of entry of the final judgment" and thus, "in the absence of consent or waiver, . . . no other judge may render a valid judgment without a trial *de novo*"); *In re Sullivan*, 143 Cal. 462, 468 (1904) (a decision must be rendered by the judge "who presided at the hearing and examination upon the petition, and who therefore heard the evidence and saw the witnesses"); *Reimer v. Firpo*, 94 Cal. App. 2d 798, 801-802 (1949) (granting a mistrial when initial judge became justice of the District Court of Appeal

[6] The substitution of judges there was allowed under Penal Code Section 1053, which is specific to criminal proceedings and allows substitution after the commencement of trial if the initial judge dies, becomes ill, or is unable to proceed with trial. *Espinoza*, 3 Cal. 4th at 828. DCA cannot, and does not, cite to any analogous authority applicable to civil actions.

because "[t]he successor of a trial judge has no authority to decide or make findings of fact in a case not tried by him").

Finally, putting aside the fact that no case law supports its argument, DCA also is incorrect when it assumes that Phase Two is solely a jury trial. As discussed above, DCA still maintains a cause of action for declaratory relief against ICANN, which will be decided by the judge presiding over Phase Two, assuming the cause of action survives throughout trial. Accordingly, this Court should refrain from deciding Phase One of this bifurcated trial because such a decision would be contrary to established California law.

IV. CONCLUSION

ICANN and ZACR do not stipulate to have different judges preside over the two phases of this trial. Accordingly, Phase One cannot proceed before Judge Halm.

Dated: July 9, 2018

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Dated: July 9, 2018

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