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INTERNET CORPORATION FOR ASSIGNED
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

REPORT FOLLOWING THE COURT'S REQUEST THAT THE PARTIES MEET AND CONFER REGARDING STIPULATION FOR SEPARATE JUDGES TO HEAR PHASES OF TRIAL; REQUEST TO VACATE THE JUNE 1, 2018 HEARING AND AUGUST 22, 2018 TRIAL DATE AND SET A CASE MANAGEMENT CONFERENCE; DECLARATION OF AMANDA PUSHINSKY

[[Proposed] Order Filed Concurrently Herewith]

Complaint Filed: January 20, 2016
Jury Trial Date: August 22, 2018
CMC: June 1, 2018
Time: 1:30 p.m.

INTRODUCTION

On May 22, 2018, the Court advised counsel for the parties that he was retiring effective August 3, 2018, shortly before "Phase Two" of the trial in this matter was supposed to begin. The Court stated that it understood the law to be that, absent a stipulation of the parties, separate judges cannot oversee the phases of a bifurcated trial, meaning that the parties should not present their closing argument on the Phase One Judicial Estoppel trial absent a stipulation.

California law is, in fact, clear that, absent stipulation, parties are entitled to have the same judge oversee all phases of a bifurcated trial. Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") and Intervenor ZA Central Registry ("ZACR") do not agree to have two different judges preside over the two phases of this trial. Accordingly, ICANN and ZACR request that the Court vacate the June 1, 2018 hearing and August 22, 2018 Phase Two trial date, and set a Case Management Conference in late August 2018 so that this matter may proceed before the new judge assigned to Department 53.

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 due to DCA's repeated assertion that it was unable to sue ICANN during the Independent Review Process ("IRP") DCA and ICANN engaged in prior to DCA filing this lawsuit. (Declaration of Amanda Pushinsky ("Pushinsky Decl.") ¶ 2.) On August 9, 2017, the Court issued a ruling bifurcating the trial, and setting a February 28, 2018 bench trial on the threshold issue of whether DCA's claims were barred by the doctrine of judicial estoppel (Phase One). (*Id.* at ¶ 3.) Testimony and offering of evidence for Phase One of the trial took place on February 28-March 1, 2018. (*Id.* ¶ 4) Phase Two of the trial on DCA's remaining fraud claims and ICANN's remaining affirmative defenses, if necessary following a Phase One ruling, is currently set for August 22, 2018. (*Id.*)

On May 22, 2018, when the parties appeared for Phase One closing arguments, Judge Halm informed the Parties that he was retiring on August 3, 2018, and therefore would not be able to preside over an August 22, 2018 jury trial, if required. (*Id.* at ¶ 6.) The Court informed the parties that litigants are entitled to have the same judge try all phases of a bifurcated trial, and

therefore the parties must stipulate to having two different judges preside over both phases of the trial if the parties wished to conclude Phase One before Judge Halm. (*Id.*) The Court then set a tentative date of June 1, 2018 for closing arguments in order to allow the parties time to consider whether they would stipulate to have two different judges preside over the two phases of trial if the second phase was required. (*Id.*)

After meeting and conferring, ICANN and ZACR do not agree to have different judges preside over the two phases of this trial, and will not enter into any such stipulation. (*Id.* at ¶ 7.) Accordingly, ICANN and ZACR request that the Court: (i) vacate the June 1, 2018 hearing date on the Phase One trial; (ii) vacate the August 22, 2018 date for the Phase Two trial; and (iii) set a Case Management Conference on or about August 22, 2018 so that the new judge assigned to Department 53 can hear from the parties and set a schedule for the conclusion of this litigation.

ARGUMENT

A. THE SAME JUDGE MUST HEAR BOTH PHASES BECAUSE PHASE ONE WILL RESULT IN AN INTERLOCUTORY JUDGMENT.

Under California law, litigants are entitled to have the same judge preside over both phases of a bifurcated trial. *European Beverage, Inc. v. Superior Court*, 43 Cal. App. 4th 1211 (1996). The court in *European Beverage* held that "[w]here there has been an interlocutory judgment rendered by one judge, and that judge then 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 had been tried before the first judge, unless the parties stipulate otherwise." 43 Cal. App. 4th at 1214; *see also David v. Goodman*, 114 Cal. App. 2d 571, 574-75 (1952) (*David*) (reversing successor judge's adoption of findings in an interlocutory judgment because the parties were entitled to a retrial of the entire case before one judge). To find otherwise, as the *European Beverage* court reasoned, would be "considered a denial of due process for a new judge to render a final judgment without having heard all of the evidence." 43 Cal. App. 4th at 1214.

An interlocutory judgment is defined to be a judgment "where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of

the parties." *Griset v. Fair Political Practices Comm'n*, 25 Cal. 4th 688, 698-99 (2001) (holding that a superior court ruling denying a writ of mandate was a final judgment because it "disposed of all issues in the action . . . it completely resolved plaintiffs' allegation . . .."). In other words, for any order where there are issues for further consideration and "if further judicial action is required for a final determination of the rights of the parties," the decision is interlocutory. *Jacobs-Zorne v. Superior Court*, 46 Cal. App. 4th 1064, 1070 (1996).

If this Court proceeds to make a ruling on its Phase One findings, the ruling would result in an interlocutory judgment because Phase One will determine an affirmative defense, and may not dispose of the entire case. *See* Civ. Proc. Code § 597[1]; *Woodhouse v. Pac. Elec. Ry. Co.*, 112 Cal. App. 2d 22, 25-26 (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) (same); *Jacobs-Zorne*, 46 Cal. App. 4th at 1071 (holding that an order granting summary adjudication dismissing defendants' claim and affirmative defense was interlocutory because there was a trial on the merits following the summary adjudication). Without the parties' stipulation, the successor judge would have to vacate the Phase One ruling and rehear evidence to make his or her decision on the matter. This would be aligned with how California courts proceed under such circumstances: without reviewing the evidence *de novo*, a successor judge cannot enter a final judgment or make findings in a case where issues are subject to modification or remain undetermined by the previous judge. *See Hughes v. De Mund*, 96 Cal. App. 365 (1929).

In *Connetto v. Morrison*, No. BS118649, 2012 WL 8133573 (Cal. Super. Ct. Jan. 27, 2012) (unpublished), following a bifurcated bench trial on one cause of action, the original judge issued a tentative decision 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. Applying *European Beverage* and its progeny, the court found that a mistrial was necessary, even if the tentative order was deemed finalized, because the

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[1] The Court ordered the Phase One trial pursuant to this statute. *See* Pushinsky Decl. ¶ 3, Ex. A (August 9, 2017 Transcript at 32:20-22).

judgment was interlocutory. The court 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 actions remaining and "[i]n 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." *Id.*

Because any ruling on Phase One would be an interlocutory ruling, the parties would need to stipulate to have two different judges hear each phase. As there is no stipulation here, the Court must allow both phases to proceed before the judge who will be assigned to this matter.

B. THE SAME JUDGE MUST HEAR BOTH PHASES BECAUSE PRESIDING OVER PHASE TWO WILL REQUIRE THE JUDGE TO MAKE FACTUAL FINDINGS BASED ON PHASE ONE EVIDENCE.

Further, it is highly likely that any ruling from Phase One will leave open factual determinations that can **only** be made by the fact finder who heard the evidence from Phase One. Accordingly, both Phases of the trial should be presided over by the same judge.

It is well established 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 v. Boydston*, 122 Cal. App. 3d 92, 97-97 (1981); *Hughes*, 96 Cal. App. at 368 ("Where a case is tried by the judge, and the issues remain undetermined by him, his successor cannot decide, or make findings in the case, without a trial *de novo*[.]")

Here, while the Phase Two judge will not be the ultimate fact finder (because Phase Two is a jury trial) on most of the remaining causes of action, the Phase Two judge will nonetheless be required to make factual findings and determinations based on Phase One evidence. By way of example, this Court has issued a tentative ruling on Phase One holding that DCA's conduct met

the elements of judicial estoppel, and that DCA was therefore "precluded from litigating claims already litigated before the IRP Panel on which the IRP Panel made findings." (May 4, 2018 Tentative Ruling (Pushinsky Decl. ¶ 5 Ex. B).) If the parties were to conclude Phase One before Judge Halm, and Judge Halm issued a ruling similar to this tentative, that ruling will necessarily need to be interpreted by the Phase Two judge. ICANN and DCA almost certainly would have different views about what was in fact litigated during the IRP, and what constitutes a "finding" by the IRP Panel. Those differing views will result in multiple motions *in limine* and arguments before the Phase Two judge regarding what evidence should be presented to the jury during Phase Two based on the Phase One ruling.

Any ruling by the Phase Two judge regarding what evidence or claims are precluded from Phase Two based on a Phase One ruling will necessarily rely on factual determinations on these and other issues. But the Phase Two judge will not have heard any evidence regarding the IRP, the claims litigated before the IRP Panel, or any of the evidence that led to the Phase One ruling. The Phase Two judge would therefore be making judgments – judgments that will shape the scope and potential outcome of Phase Two – *without having heard any of the evidence those rulings will be based on.* This outcome violates California law, and deprives ICANN and ZACR of due process.

There is also currently a remaining cause of action for Declaratory Relief, which (if it survives through trial) would require the new judge to issue a decision. Moreover, findings of fact made by a judge on equitable issues are binding on a jury later deciding legal issues. *Hoopes v. Dolan*, 168 Cal. App. 4th 146, 155 (2008) (allowing first fact finder's factual determination to bind the second "minimizes inconsistencies," "avoids giving one side two bites of the apple," and "prevents duplication of effort"). Thus, no matter how it is viewed, any decision on the Phase One issue will necessarily have an effect on the continued proceedings, and therefore all parts of the case must be heard by the same judge.

C. THE SAME JUDGE MUST HEAR BOTH PHASES DUE TO THE HIGH RISK OF REVERSIBLE ERROR.

Even if this Court finds that its decision on judicial estoppel is not (either in full or in part)

an interlocutory judgment, the Court should still defer ruling on the judicial estoppel issue because of the extreme risk that the Court's decision would be deemed to violate California law once a different judge was assigned to Phase Two of the trial. ICANN has found no case law that supports a conclusion that two judges may preside over different phases of a bifurcated trial, absent stipulation by the parties, merely because the first phase is a bench trial and the second phase is a jury (or hybrid) trial. Absent any clearly definitive case law, the risk of reversible error in proceeding to judgment on the judicial estoppel phase is high and overwhelms any other consideration.[2] Accordingly, because ICANN and ZACR do not stipulate to have a different judge preside over Phase Two, this Court should not issue any final decisions on Phase One.

CONCLUSION

Because ICANN and ZACR do not stipulate to have different judges preside over the two phases of this trial, Phase One cannot proceed before Judge Halm. ICANN and ZACR accordingly request that the Court vacate the June 1, 2018 hearing date. Additionally, because Phase One will not conclude prior to Judge Halm's retirement, and because the new judge in Department 53 will need time to familiarize her or himself with the case before proceeding to trial, and may have to repeat Phase One of the trial, Phase Two cannot go forward on August 22, 2018.

ICANN and ZACR therefore further request that the Court vacate the August 22, 2018 trial date so that the parties do not have deadlines associated with a trial that cannot happen on August 22, 2018, and set a Case Management Conference on August 22, 2018 or as soon thereafter as Department 53's calendar permits.

[2] On May 25, 2018, DCA's counsel emailed ICANN's counsel to argue that there was case authority to support the proposition that two separate judges could preside over Phases One and Two of this trial. ICANN's review of that case law indicated that none of the cases DCA cited were on point, much less dispositive. Further, DCA has not explained why the cases cited in this memorandum do not compel a single judge to preside over both phases of the trial.

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Dated: May 30, 2018

JONES DAY

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

Counsel for Defendant Internet Corporation For Assigned Names And Numbers

Dated: May 30, 2018

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