DEPARTMENT 53 LAW AND MOTION RULINGS

Tentative rulings are sometimes, but not always, posted. The purpose of posting a tentative ruling is to to help focus the argument. The posting of a tentative ruling is not an invitation for the filing of additional papers shortly before the hearing.

Case Number: BC607494 **Hearing Date:** August 01, 2018 **Dept:** 53

DOTCONNECTAFRICA TRUST vs. INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS , et al.; BC607494; AUGUST 1, 2018

[~~TENTATIVE~~] ORDER RE: *EX PARTE* APPLICATION OF DEFENDANT INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS TO VACATE OR CONTINUE TRIAL DATE

✓ Defendant ICANN's Application to Vacate or Continue Trial Date is **GRANTED**. ~~Phase II trial date of August 22, 2018 is VACATED~~. The Court, on its own motion, enters a mistrial as to Phase I.

Cont'd to a CMC and TC for 8:30AM on Sept-25, 2018.

BACKGROUND

Trial Phase One, on the issue of the affirmative defense of judicial estoppel, took place on February 28 and March 1, 2018. Closing arguments are scheduled for August 1, 2018. However, as a result of this Court's unavailability to hear Trial Phase Two, this Court requested that the parties meet and confer regarding a stipulation to allow a different judge to preside over Phase Two. The parties were unable to reach a stipulation. On June 11, 2018, Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") applied *ex parte* for an order vacating or continuing the trial date. The Court also ordered the parties to submit briefing on the issue of whether this Court could or should issue a Statement of Decision on Phase One, based on the understanding that California law requires the same judge to preside over all phases of

a bifurcated trial. Having reviewed the parties' respective briefs, the Court issues the following ruling.

DISCUSSION

ICANN submits that because there is no stipulation by the parties to have different judges preside over the two phases of trial, this Court should refrain from deciding Phase One and issuing its Statement of Decision. ICANN cites to *European Beverage v. Superior Court* (1996) 43 Cal.App.4th 1211 in support of its position. In *European Beverage,* the Court of Appeal found 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 p. 1213.) In doing so, the Court of Appeal 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 the case." (*Id.* at p. 1215.) Rather, Rule 3.1591 "recognizes that different judges may hear different phases of a trial" and that upon stipulation, Rule 3.1591 "provides guidance for the manner in which successive judges shall prepare their statements of decision and the final judgment." (*Ibid.*)

Plaintiff DotConnectAfrica Trust ("DCA") argues that *European Beverage* is inapposite because it was a bifurcated bench trial, and therefore, a stipulation would have been required for two separate judges to preside over the case. In the present case, Phase Two is to be a jury trial, and so a different judge in Phase Two would not be a fact finder and would not implicate any party's right to have the same judge hear all the evidence and decide the facts of the case. However, DCA does not cite to any authority wherein two different judges appropriately presided over a bifurcated bench/jury trial. The Court finds that the more accurate reading of the scope of Rule 3.1591 was the reading advanced in *European Beverage*. The rule recognizes that there may be situations where different judges hear different phases of trial, but the rule is not, in of

itself, authority for the underlying proposition. The only authority proffered by either party is *European Beverage*, and the Court finds that the holding in *European Beverage* is unambiguous: absent a stipulation or waiver, the same judge must try all portions of a bifurcated trial that depend on weighing evidence and issues of credibility.

Moreover, the Court finds ICANN's argument concerning the interlocutory nature of a Phase One Statement of Decision persuasive. As held in *European Beverage*, "[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." (*Id.* at p. 1214.) Rulings on affirmative defenses are interlocutory when they require further action by the courts, such as a trial on the merits. (*See Jacobs-Zorne v. Superior Court* (1996) 46 Cal.App.4th 1064, 1071 [deeming order granting summary adjudication on affirmative defense to be interlocutory]; *see also* Code Civ. Proc. 597 [providing that a decision on an affirmative defense is in favor of a plaintiff, trial of the other issues "shall thereafter be had...and judgment shall be entered thereon in the same manner and with the same effect as if all the issues in the case had been tried at one time"].)

DCA cites to *Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467 in support of its position that a mistrial should not be declared. However, in *Valentine*, the Court of Appeal reaffirmed the central holding in *European Beverage* that where there has been an interlocutory judgment subject to modification prior to entry of final judgment, "it is a denial of due process for a new judge to render final judgment without having heard all the evidence." (*Id.* at p. 1480.) The distinction in *Valentine* was that the trial court there "in substance [] determined as a matter of law from the special verdicts on fraud and strict liability that those causes of action had been

conclusively resolved and adjudicated...." (*Ibid.*) Further, "[t]he decision on those causes of action was not subject to further modification[.]" (*Ibid.*; *see also Rose v. Boydston* (1981) 122 Cal.App.3d 92, 96 [interlocutory judgment left "substantial issues...undecided"].) In the instant case, the Court's ruling on the judicial estoppel issue is interlocutory because further action is required by the Court before the entry of final judgment. In this case, a trial on the merits is required. Therefore, because a Statement of Decision for Phase One would necessarily be an interlocutory order, and because the parties have not stipulated to having the case be heard by two different judges, the Court finds that a mistrial is in order.

CONCLUSION

Based on the foregoing, ICANN's Application to Vacate or Continue Trial Date is **GRANTED**. ~~Phase II trial date of August 22, 2018 is **VACATED.**~~ The Court, on its own motion, enters a mistrial as to Phase I.

Court set a CMC + FSC for 8:30am Sept - 25, 2018. Current trial + FSC dates are vacated

ICANN is ordered to provide notice of this ruling.

DATED: August 1, 2018

Hon. Howard L. Halm

Judge of the Superior Court

08/08/2018