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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF LOS ANGELES – CENTRAL**

DOTCONNECTAFRICA TRUST, a Mauritius Charitable Trust,

Plaintiff,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, a California Corporation; ZA CENTRAL REGISTRY, a South African non-profit company; and DOES 1-50, inclusive;

Defendant.

[Assigned for all purposes to:
Hon. Howard L. Halm Dep't 53]

Case No.: BC607494

**PLAINTIFF DCA'S BRIEF REGARDING CALIFORNIA RULE OF COURT RULE 3.1591**

Date: July 20, 2018
Time: 1:30 p.m.
Dep't.: 53

## I. INTRODUCTION

Plaintiff DotConnectAfrica Trust ("DCA") submits this brief pursuant to Judge Halm's suggestion on a May 31, 2018 call with the parties that the parties consider whether California Rule of Court Rule 3.1591 indicates that Judge Halm can decide the judicial estoppel phase of trial without causing a mistrial, and in reply to ICANN's Response to DCA's Supplemental Closing Brief. Rule 3.1591 clearly contemplates that more than one judge can preside over a bifurcated trial. ICANN's arguments to the contrary are unavailing. Although ICANN has the opportunity to present all evidence relating to its affirmative judicial estoppel defense to Judge Halm, and will have the opportunity to ask Judge Halm to clarify any ambiguities in his tentative ruling, ICANN desperately wants another judge to hear its case again. DCA posits that this is not because ICANN is really concerned with due process issues but because ICANN wants another chance to dispose of DCA's case entirely, having seen that Judge Halm is inclined to allow it to proceed. Accordingly, for the reasons described in more detail below, DCA requests that Judge Halm hear and decide closing arguments in the judicial estoppel trial on July 20, 2018.

## II. STATEMENT OF FACTS

On May 26, 2017, ICANN moved for summary judgment, arguing in part that DCA's claims were barred by the doctrine of judicial estoppel. The Court denied that ruling. 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). Phase One of the trial took place from February 28-March 1, 2018. Closing arguments were initially set for March 26, 2018 but were postponed twice by the Court. Closing arguments were then set for May 7, 2018 but were again postponed due to illness of lead counsel for DCA.

On May 22, 2018, when the parties appeared for the re-scheduled Phase One closing arguments, the Parties were informed that Judge Halm was retiring on August 3, 2018, and therefore would not be able to preside over an August 22, 2018 jury trial. The Court set a new hearing date for June 1, 2018 for Phase One closing arguments in order to allow the Parties

time to consider whether they wanted Judge Halm to issue a decision on Phase One. The Court noted that there was a question as to whether two separate judges presiding over the bench trial and the jury trial would be grounds for a mistrial.

Before June 1, 2018 both parties filed briefs on the issue and disagreed on whether Judge Halm should decide Phase One. Accordingly, on May 31, 2018 Judge Halm held a teleconference with both parties and informed them that the hearing on June 1, 2018 would not go forward so as to allow the Court time to consider the arguments the parties made in their briefs. The Court extended the hearing to July 20, 2018. On the same call the Court also indicated that the parties should consider whether California Rule of Court 3.1591 illuminated the issue. For the reasons described in detail below, Rule 3.1591further supports DCA's position that Judge Halm can rule on Phase One without causing a mistrial.

## III. RULE 3.15919 SUPPORTS DCA'S POSITION THAT JUDGE HALM CAN PROPERLY DECIDE ONLY THE FIRST PHASE OF TRIAL

California Rule of Court Rule 3.1591(a), entitled "Separate trial of an issue," indicates that a trial can be bifurcated. Rule 3.1591(b) indicates that separate phases of a bifurcated trial addressing separate factual issues may be tried by different judges: "[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." Thus, Rule 3.1591(b) permits Judge Halm to decide Phase One and the facts relating to judicial estoppel, while a second judge may preside over the jury trial on the merits regarding factual issues and render judgment in the entire case after the completion of both phases of trial.

ICANN incorrectly contends that this rule applies only in the case of a stipulation between the parties. In support of this argument it cites to *European Beverage, Inc. v. Superior Court*, where the Court states that the rule "recognizes that different judges may hear different phases of a trial, an alternative that always has been available upon the stipulation of the parties." *See European Beverage*, 43 Cal. App. 4th 1211 at 1215 (1996). However, the trial in *European Beverage* was a bifurcated bench trial. In that case, a stipulation would have been required for two separate judges to preside over the case. However, the instant case is not a bifurcated bench

trial. The judge during the second phase will not be a fact finder and thus no party's right "to have the same judge hear all the evidence and *decide the facts* of the case" is being violated. *Id.* at 1215. Neither *European Beverage* nor Rule 3.1591(b) references a stipulation under the present circumstances, nor is one required in this case.

Accordingly, the applicable procedural rules indicate that Judge Halm can properly decide the first phase of trial even if a second judge presides over the jury phase of trial.

## IV. THE COURT'S DECISION ON THE FIRST PHASE OF TRIAL WOULD NOT BE AN INTERLOCUTORY JUDGMENT

As an initial matter, ICANN is incorrect in asserting that the Court's decision on its special defense of judicial estoppel pursuant to California Code of Procedure section 597 would be an interlocutory judgment. Section 597 itself only mentions interlocutory judgments in the context of the defense of another action pending: "where the defense of another action pending or a demurrer based upon subdivision (c) of Section 430.10 is sustained (and no other special defense is sustained) an interlocutory judgment shall be entered in favor of the defendant pleading the same to the effect that no trial of other issues shall be had until the final determination of that other action, and the plaintiff may appeal from the interlocutory judgment in the same manner and within the same time as is now or may be hereafter provided by law for appeals from judgments."

In fact, the case that ICANN cites to in support of the proposition that an order from a trial of a defense under section 597 is an interlocutory judgment, says that a decision for plaintiff, as Judge Halm has indicated by his tentative that he is contemplating, is not a judgment at all:

> When, as in the present case, the answer sets up special defenses not involving the merits of plaintiff's cause of action but constituting a bar to the prosecution thereof, and the decision of the court is in favor of the plaintiff, ***the action is in the same status it would have been had the special defenses not been pleaded, -- and a judgment should not be rendered or entered***. The action then proceeds to trial on the issues made by the complaint and the other defenses pleaded, -- and, on their determination, a judgment is rendered and entered. In such event the decision of the court on the special defenses tried and all rulings on the trial of them are deemed excepted to and, by the express language of section 597, may be reviewed on motion for a new trial or upon an appeal from the judgment.

*Woodhouse v. Pacific E. R. Co.*, 112 Cal. App. 2d 22, 25 (1952) (internal citations and quotations omitted) (emphasis added). ICANN also cites *Gavin v. YMCA of Metro L.A.*, which is distinguishable because it involved the bench trial of a special defense where the court found in favor of the defendant – the court also makes no reference to the judgment rendered in that case as "interlocutory." *Gavin*, 106 Cal. App. 4th 662 (2003). None of the other cases ICANN cites are instructive as they did not involve bench trials of special defenses.[1]

*European Beverage* is inapposite for the same reason – it does not involve the bench trial of an affirmative defense. The interlocutory judgment at issue in *European Beverage* was a determination of a plaintiff's ownership interest. Furthermore, *European Beverage* was in the context of a bifurcated bench trial.

The Appellate Court's decision in ***Valentine v. Baxter Healthcare Corp.***, 68 Cal. App. 4th 1467 (1999) is instructive as to why *European Beverage*'s findings do not apply to the circumstances in the instant case. *Valentine* involved a personal injury case that went to a jury trial twice. At the close of the first trial, the jury returned defense verdicts on strict liability and fraud. *Valentine*, 68 Cal. App. 4th at 1475. On the negligence claim, the jury found hung on the issue of causation. *Id.* The trial court found that the several causes of action were severable, and entered what it referred to as an "interlocutory judgment" in favor of the defendant on the fraud and strict liability causes, but declared a partial mistrial on negligence. *Id.* After a second jury hung on the issue of causation, the court declared a mistrial and on the defendant's motion, directed entry of judgment in favor of Baxter as a matter of law. *Id.*

The appeal followed denial of the plaintiffs' motion for new trial. The plaintiff argued that she had been denied the right to have a decision upon the facts from the jury that hears the evidence and cited to *European Beverage* in support of her argument. *Id.* at 1479. The Appellate

[1] ICANN's cite to *Connetto v. Morrison,* No. BS118649, 2011 WL 10657335, is particularly problematic as it is an unpublished Superior Court decision with no precedential value. *Harrott v. County of Kings* 25 C4th 1138, 1148 (2001). Furthermore, the Court of Appeal would be required to disregard such a decision by the California Rules of Court Rule 8.1115. In addition to being irrelevant because it does not deal with section 597, *Connetto* is irrelevant because it concerned the finalizing of one judge's tentative ruling by another judge. Judge Halm will have the opportunity to finalize his own tentative decision before his retirement.

Court in *Valentine* noted that in *European Beverage* the court held that:

> absent a waiver or stipulation, a party is entitled to have the same judge try all phases of a bifurcated trial that depend on weighing evidence and determining credibility. If that judge is unavailable, a mistrial is in order. The court relied on the concept 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 1479-80. The *Valentine* Court distinguished the circumstances there from *European Beverage* by stating:

> To reiterate, although the trial court in this case said it was entering "interlocutory judgment," in substance it 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 in [the defendant's] favor, and reserved entry of judgment pending further consideration of the negligence count, all in accordance with sections 624 and 628. The decision on those causes of action was not subject to further modification and thus there was no denial of due process in having the remaining cause of action tried by another jury.

*Id*. at 1480.

The key to the finding in *European Beverage* is that the judgment after the first phase of trial was subject to modification and both phases required the judge to weigh evidence and determine credibility. Here, like in *Valentine*, Judge Halm's ruling will not be subject to modification. If Judge Halm follows his tentative ruling, he will be ruling as a matter of law and conclusively, that DCA's causes of action should move forward in a jury trial on the merits.

## V. DCA'S DECLARATORY RELIEF CLAIM IS INDEPENDENT OF THE JUDICIAL ESTOPPEL PHASE OF TRIAL

DCA's declaratory relief claim is unrelated to the first phase of trial. ICANN acknowledges that the first phase of trial was brought pursuant to section 597. Therefore, by definition, the judicial estoppel issue is one "not involving the merits of the plaintiff's cause of action." *See* section 597. Therefore, ICANN's assertion that "[e]vidence 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" is incorrect. DCA will be required to affirmatively prove its case on the merits during Phase Two by presenting evidence to the jury during Phase Two. The jury, as the

trier of fact during Phase Two, will issue verdicts based on the evidence presented during Phase Two.

Furthermore, the fact that the judge during Phase Two will need to issue a ruling on DCA's declaratory relief claim does not transform Phase Two into a bench trial. The jury is still the trier of fact in that phase and the judge will be constrained in ruling on the declaratory relief claim by the jury's findings of fact.

## VI. CONCLUSION

For the foregoing reasons, DCA respectfully requests that Judge Halm hear closing arguments on July 20, 2018 and make a decision on the judicial estoppel phase of trial.

Dated: July 13, 2018

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