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INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

SNAPNAMES.COM INCORPORATED, an Oregon corporation,

Plaintiff,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, a California corporation;

Defendant.

CASE NO. BC 324782

Assigned for all purposes to
Judge Emilie H. Elias

Complaint Filed: November 18, 2004

COMPENDIUM OF NON-CALIFORNIA AUTHORITIES IN SUPPORT OF DEFENDANT INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS' DEMURRER TO PLAINTIFF'S COMPLAINT

[Filed Concurrently With Defendant ICANN's Demurrer To Plaintiff's Complaint]

Date: February 10, 2005
Time: 8:45 a.m.
Dept.: 3

Pursuant to California Rule of Court 313(h), defendant Internet Corporation for Assigned Names and Numbers hereby submits copies of the following non-California authorities in support of their demurrer:

TAB	AUTHORITY
A	*Dotster, Inc. v. Internet Corporation for Assigned Names and Numbers*, 296 F. Supp. 2d 1159 (C.D. Cal. 2003)
B	*Knapp v. Penfield*, 256 N.Y.S. 41 (N.Y. Sup. Ct. 1932)
C	*Marin Tug & Barge, Inc. v. Westport Petroleum, Inc.*, 271 F.3d 825, 832 (9th Cir. 2001)

DATED: January 7, 2005

JONES DAY

By: Jeffrey A. LeVee
Jeffrey A. LeVee

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

EXHIBIT A

296 F.Supp.2d 1159
296 F.Supp.2d 1159
(Cite as: 296 F.Supp.2d 1159)

C
Motions, Pleadings and Filings

United States District Court,
C.D. California.

DOTSTER, INC., etc., et al.
v.
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, etc.

No. CV 03-5045-JFW(MANx).

Nov. 12, 2003.

Background: Registrars brought action alleging that administrator of Internet's domain name system would be in breach of registrar accreditation agreements (RAA) if it approved amendment to its agreement with Internet registry allowing implementation of product that would permit consumers, through registrars, to claim lapsed domain names.

Holdings: On registrars' motion for preliminary injunction, the District Court, Walter, J., held that:
(1) registrars would not suffer irreparable injury as result of product's approval, and
(2) registrars failed to demonstrate likelihood of success.
Motion denied.

West Headnotes
[1] Injunction ⇐138.37
212k138.37 Most Cited Cases
Registrars would not suffer irreparable injury as result of approval by administrator of Internet's domain name system of amendment to its agreement with Internet registry allowing implementation of product that would permit consumers to claim lapsed domain names, and thus registrars were not entitled to preliminary injunction barring implementation of product, even if product was likely to reduce demand for registrars' wait-listing services to reserve domain names in secondary domain name market, and registrars' damages might be limited under registrar accreditation agreements (RAA), where monetary award could compensate registrars for potential loss of revenue, and there was no specific or admissible evidence as to dilution of goodwill or harm to reputation.
[2] Injunction ⇐138.37
212k138.37 Most Cited Cases
Registrars failed to demonstrate likelihood of success on their claim that approval by administrator of Internet's domain name system of amendment to its agreement with Internet registry allowing implementation of product that would permit consumers to claim lapsed domain names would violate their registrar accreditation agreements (RAA), and thus registrars were not entitled to preliminary injunction barring implementation of product, despite RAA provision requiring consensus among parties before administrator could act, where RAA did not impose any obligation upon administrator to act by consensus if its actions did not seek to compel registrar action, registrars would not be under any obligation to offer product to their customers, and implementation of product had potential to benefit registries, registrars who did not currently offer wait-listing services, and public.
***1160** Aaron M. McKown, Kathleen O. Peterson, Preston Gates & Ellis, Irvine, CA, Jeffery W. Ring, Stuart M. Brown, Preston Gates & Ellis, Portland, OR, Benjamin E. Soffer, Perkins Coie, Santa Monica, CA, for Plaintiff.

Emma Killick, Eric P. Enson, Jeffrey A. LeVee, Jones Day, Los Angeles, CA, for Defendant.

PROCEEDINGS (IN CHAMBERS): ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

WALTER, District Judge.

On September 8, 2003, Plaintiffs Dotster, Inc., Go Daddy Software, Inc., and eNom, Incorporated

(collectively, "Plaintiffs") filed a Motion for Preliminary Injunction. On September 15, 2003, Defendant Internet Corporation for Assigned Names and Numbers ("ICANN" or "Defendant") filed its Opposition. On September 22, 2003, Plaintiffs filed a Reply. The Motion came regularly for hearing on October 20, 2003. After hearing oral argument on the Motion, the Court took the matter under submission. After reviewing the moving, opposing, and reply papers and hearing oral argument, the Court rules as follows:

I. *Facts and Procedural History*

ICANN is a not-for-profit corporation organized in 1998. Pursuant to a series of agreements with the United States Department of Commerce, ICANN is responsible for administering certain aspects of the Internet's domain name system. As part of its responsibilities, ICANN accredits companies known as "registrars" that make Internet domain names available to consumers. Each registrar enters into an identical Registrar Accreditation Agreement ("RAA") with ICANN which permits the registrar the right to use domain names in a particular domain, such as ".com" or ".net." Registrars, in turn, accept requests for domain names from their customers and register those domain names with the appropriate Internet registry.

ICANN also enters into separate Registry Agreements with Internet registries. Each top level domain name--such as .com, .net, or .org--is operated by a single registry. A registry maintains information on each name registered in its domain and insures that each name registered in its domain is unique. Registries offer a variety of services that, for example, permit consumers to check if a particular name within its domain has been registered and, if so, the expiration date for this registration. Verisign, Inc. ("Verisign") is the registry for .com and .net domains and it is responsible for registering names on these domains in accordance with its Registry Agreement with ICANN. Because Verisign is prohibited from accepting requests for domain names directly from consumers, Verisign only accepts and registers domain names received from registrars.

Plaintiffs are three of over 170 registrars, who have entered into identical RAAs with ICANN. Halloran Decl., ¶ 15 & Ex. 2. In exchange for a fee negotiated with their customers, Plaintiffs register ***1161** domain names, and all registrant contact information, with the appropriate registry. Plaintiffs also offer a variety of other services, such as web hosting, web page design, e-mail, and internet utilities. Each domain name registration lasts one or two years and consumers are given the option to renew their registration at the end of that term. At present, all domain names that are not renewed, and, therefore, have expired, are first deleted and then become available for a new registration. Currently, there are approximately fifty registrars, including Plaintiffs, who compete in the secondary domain name market which focuses on the registration of deleted domain names. Each of these registrars, including Plaintiffs, have developed their own technology which attempts to identify and register a particular domain name for their customers as soon as it is deleted from the registry. The wait-listing products offered by Plaintiffs permit customers, who want to register a particular domain name that is already registered to someone else, to sign up and pay a fee to the Plaintiffs for the chance to obtain that domain name if it is deleted in the future. Plaintiffs cannot guarantee that they will be able to register a deleted domain name for their customers because several registrars may have sold the chance to obtain the very same deleted domain name to different customers and only one of those registrars will be able to successfully register that name for their customer.

In late 2001, Verisign proposed a new product called Wait List Service ("WLS") which will compete with the wait-listing products offered by Plaintiffs. If customers choose to participate in WLS, a person wishing to register a currently-registered domain name would purchase a subscription for the opportunity to register that domain name in the event the existing domain registration expires within the subscription period. There will be only one subscription accepted for each currently-registered domain name. Each subscription would last for one year with the option to renew. If a domain name is not renewed by its current owner, the individual who purchased a subscription will become the new registrant of the domain name. WLS will only be offered to consumers through registrars, such as Plaintiffs, and Verisign will charge the registrar a fee, which

would be no higher than $24 for a one-year subscription, for each domain name. All registrars would have the option to participate in WLS at the same price and there will be no restrictions on the price that the registrars can charge their customers.

Contrary to the current system, domain names that are subject to a WLS subscription would never be deleted from the registry when the original registration expired. If a registered domain name is not renewed, and is to be deleted from the registry, Verisign would check to see whether a subscription exists for the name and, if so, would automatically register the name to the customer. Because Plaintiffs current technology is predicated on the actual deletion of the domain name from the registry, Plaintiffs allege that WLS will deprive them of the opportunity to register a deleted name. The proposed WLS will only impact a portion of Plaintiffs' secondary domain name business because names that were not subject to a WLS subscription and those in TLDs other than .com and .net would continue to be deleted from the registries and would be available for registration by the Plaintiffs. In addition, the proposed WLS will have no affect on how new domain names are initially registered by the Plaintiffs.

Plaintiffs filed their Complaint on July 16, 2003, alleging claims for breach of contract and declaratory relief. Plaintiffs allege that ICANN will be in breach of various provisions of their RAA if it approves an amendment to the registry ***1162** agreement between ICANN and Verisign allowing the implementation of WLS. Although Plaintiffs are not parties to the Registry Agreement between ICANN and Verisign, Plaintiffs are seeking a preliminary injunction to prevent ICANN from taking any further steps to facilitate or encourage implementation of WLS by Verisign, including, but not limited to, further steps to negotiate or execute an amendment to the Registry Agreement between ICANN and Verisign which governs the registration of domain names for . com and .net domains.

II. ***Legal Standard***

"A preliminary injunction is appropriate where plaintiffs demonstrate 'either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in [their] favor.' " *Southwest Voter Registration Education Project v. Shelley,* 344 F.3d 914, 917 (9th Cir.2003) (*citing Clear Channel Outdoor Inc. v. City of Los Angeles,* 340 F.3d 810, 813 (9th Cir.2003) (*quoting Walczak v. EPL Prolong, Inc.,* 198 F.3d 725, 731 (9th Cir.1999))). "The district court must also consider whether the public interest favors issuance of the injunction." *Id.* (*citing Fund for Animals, Inc. v. Lujan,* 962 F.2d 1391, 1400 (9th Cir.1992)). These are not separate tests, but the opposite ends of a single continuum. *Rodeo Collection, Ltd. v. West Seventh,* 812 F.2d 1215, 1217 (9th Cir.1987) (*citing San Diego Committee Against Registration and the Draft v. Governing Board of Grossmont Union High School Dist.,* 790 F.2d 1471, 1473 n. 3 (9th Cir.1986)). "Under any formulation of the test, the moving party must demonstrate a significant threat of irreparable injury." *Arcamuzi v. Continental Air Lines, Inc.,* 819 F.2d 935 (9th Cir.1987) (*citing Oakland Tribune, Inc. v. Chronicle Publishing Co.,* 762 F.2d 1374, 1376 (9th Cir.1985)).

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing,* carries the burden of persuasion." *Mazurek v. Armstrong,* 520 U.S. 968, 972, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) (*quoting* 11A C. Wright, A. Miller, & M. Kane, Federal Practice & Procedure, § 2948, pp. 129-30 (2d ed.1995)) (emphasis in *Mazurek*). However, a preliminary "injunction is not a preliminary adjudication on the ultimate merits." *Sierra On-Line, Inc. v. Phoenix Software, Inc.,* 739 F.2d 1415, 1423 (9th Cir.1984). "[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." *University of Texas v. Camenisch,* 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981); *see also Sierra On-Line,* 739 F.2d at 1423 (for preliminary relief, the court need only find a probability that necessary facts will be established, not that such facts actually exist).

III. ***Discussion***

A. Plaintiffs Have Failed To Demonstrate Irreparable Injury Or That The Balance Of Hardships Tips Sharply In Their Favor.

Plaintiffs have failed to demonstrate either the possibility of irreparable injury or that the balance of hardships tips sharply in their favor. "Regardless of how the test for a preliminary injunction is phrased, the moving party must demonstrate irreparable harm." *American Passage Media Corporation v. Cass Communications, Inc.*, 750 F.2d 1470, 1473 (9th Cir.1985). Irreparable injury is an injury that is not remote or speculative, but actual and imminent and for which monetary damages cannot adequately compensate. *Jayaraj v. Scappini*, 66 F.3d 36, 39 (2d Cir.1995). "Speculative injury does not constitute irreparable ***1163** injury sufficient to warrant granting a preliminary injunction." *Caribbean Marine Services Company, Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir.1988) (*citing Goldie's Bookstore, Inc. v. Sup. Ct.*, 739 F.2d 466, 472 (9th cir.1984)).

1. Plaintiffs Have Failed To Demonstrate Irreparable Injury.

[1] The Court finds that Plaintiffs have not demonstrated irreparable injury. Plaintiffs' alleged damages are speculative and any damage incurred can be compensated by money damages. Plaintiffs essentially contend they will be damaged financially because "[c]ustomers will be more likely to use the proposed WLS than" Plaintiffs' wait-listing services to reserve domain names in the secondary domain name market. Declaration of Thomas Bennett ("Bennett Decl."), ¶ 26; *see, also,* Second Declaration of Clint Page ("Page Decl."), ¶ 3; Declaration of Paul Stahura "(Stahura Decl."), ¶ 12; and Declaration of Robert Parsons ("Parsons Decl."), ¶ 8. Plaintiffs also contend they will have to increase their customer service staffs to differentiate themselves from other registrars and to answer an increased number of customer questions about WLS. *See, e.g.,* Parsons Decl., ¶ 9; and Bennett Decl., ¶ 29. Because a monetary award can compensate Plaintiffs for this potential loss of revenue, these injuries do not constitute irreparable injury. [FN1] *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1202 (9th Cir.1980) (*quoting Sampson v. Murray*, 415 U.S. 61, 90, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended ... are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.")); *Cotter v. Desert Palace, Inc.*, 880 F.2d 1142, 1145 (9th Cir.1989) (injuries compensable by money damages are not usually deemed irreparable). In addition, Plaintiffs' argument that their damages are capped at the amount of accreditation fees paid by the Plaintiffs to ICANN pursuant to Subsection 5.7 of the RAA does not change the result. If Plaintiffs entered a disadvantageous contract, they must suffer the consequences. *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3rd Cir.1995) (*citing* 11A Wright, Miller & Kane, *Federal Practice & Procedure*, § 2947 (2d Ed.1995)) ("If the harm complained of is self-inflicted, it does not qualify as Irreparable."); *Ventura County Christian High School v. City of San Buenaventura*, 233 F.Supp.2d 1241, 1253 (C.D.Cal.2002) (*citing Caplan*, 68 F.3d at 839).

> FN1. Moreover, Plaintiffs' potential loss of revenue is speculative. Plaintiffs claim that a significant part of their business results from cross-sales of products to customers and if Plaintiffs cannot attract new customers through the secondary domain name market, those cross-selling opportunities will disappear. *See, e.g.,* Stahura Decl., ¶ 13. However, Plaintiffs ignore the fact that all registrars will be able to offer WLS to existing and potential customers. If Plaintiffs decide to offer WLS and continue to offer their wait-listing services for domain names not affected by WLS, Plaintiffs will be able to exploit these cross-selling opportunities.

Plaintiffs also argue that they will suffer irreparable injury as a result of damage to their goodwill and reputation. However, Plaintiffs present no specific or admissible evidence as to dilution of goodwill or harm to reputation. [FN2] Although the loss of goodwill ***1164** and reputation are important considerations in determining the existence of irreparable injury, there must be credible and admissible evidence that such damage threatens Plaintiffs' businesses with termination. [FN3] *American Passage Media Corporation v. Cass Communications, Inc.*, 750 F.2d 1470, 1473 (9th Cir.1985) ("Without a sufficient showing that

these contracts threatened [plaintiff's] existence, any loss in revenue due to an antitrust violation is compensable in damages"); *Metromedia Broadcasting Corporation v. MGM/UA Entertainment Co., Inc.*, 611 F.Supp. 415, 426 (C.D.Cal.1985) (no irreparable injury where existence not threatened). In this case, there is no evidence indicating that Plaintiffs' businesses will not survive the implementation of WLS or that they will not be able to continue to offer their wait-listing services in the secondary domain name market.

FN2. Plaintiffs offer the inadmissible conclusions of their own executives that if WLS is implemented, Plaintiffs' goodwill and reputation will be damaged due to an anticipated decrease in sales. *See,* Parsons Decl., ¶¶ 6-9 (loss of revenue due to implementation of WLS will cause drop in customer service, which will harm Go Daddy's reputation); Page Decl., ¶ ¶ 3-6 (Dotster's reputation will be harmed by loss of success of NameWinner technology); Stahura Decl., ¶¶ 12-14 (Plaintiff eNom is a "significant competitor" in the secondary domain market and this reputation will be harmed by the implementation of WLS because WLS will cause eNom to have fewer sales with its wait-listing service, Club Drop); and Bennett Decl., ¶¶ 27-30 (Dotster's reputation will be harmed by the loss of success of NameWinner technology). Such conclusory statements cannot support a finding of irreparable injury for the issuance of a preliminary injunction. *American Passage Media Corporation,* 750 F.2d at 1473 (9th Cir.1985) (declarations of plaintiff's executives detailing the disruptive effect of defendant's exclusive contracts on plaintiff's business could not support the issuance of a preliminary injunction because they were "conclusory and without sufficient support in facts."); *Goldie's Bookstore, Inc. v. Sup. Ct.*, 739 F.2d 466, 472 (9th Cir.1984) (reversing issuance of preliminary injunction where district court had determined that plaintiff "would lose goodwill and 'untold' customers" because the finding was not based on any factual allegations and was speculative).

FN3. Although Plaintiffs' losses, if any, may be reflected in the secondary domain name area of their business, Plaintiffs have not presented any evidence that quantifies or compares those potential losses with other areas of their business. In this regard, Plaintiffs do not even argue that those potential losses would be of such a magnitude that their entire business is threatened with potential ruin. Plaintiffs' failure to present such evidence probably is due to the fact that the wait-listing services represent a relatively new part of their business. For example, Plaintiff Go Daddy Software, Inc. was founded in 1997, but did not start offering its wait-listing service, DomainAlert, until April 2003. Parsons Decl., ¶¶ 3 & 5. There is no evidence that all, or even a significant portion of, Go Daddy Software, Inc.'s goodwill and reputation are based on a service it has only been offering for seven months. *New Pacific Overseas Group (USA) Inc. v. Excal International Development Corp.*, 1999 WL 285493, *6 (S.D.N.Y.1999) (*citing Jack Kahn Music Co. v. Baldwin Piano & Organ Co.*, 604 F.2d 755, 763 (2nd Cir.1979)) (no finding of irreparable injury "where a company has not been in business long enough for good will to be created.").

2. Plaintiffs Have Failed To Show The Balance Of Hardships Tips Sharply In Their Favor.

The Court finds Plaintiffs have failed to demonstrate that the balance of hardships tips sharply in their favor. The record is devoid of any evidence that the Plaintiffs will suffer irreparable injury if the injunction is denied. By contrast, the issuance of an injunction would seriously jeopardize ICANN's ability to effectively coordinate the technical and related policy issues for the domain name system as mandated by ICANN's agreements with the Department of Commerce.

B. *Plaintiffs Have Not Demonstrated Either A*

Likelihood of Success On, Or Serious Questions Going To, The Merits.

[2] Plaintiffs have failed to demonstrate either a likelihood of success on, or ***1165** serious questions going to, the merits of their claims. *Johnson v. California State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir.1995) (*quoting Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 675 (9th Cir.1984)) (the "irreducible minimum" required under any formulation of the preliminary injunction standard is a "fair chance of success on the merits."). Plaintiffs allege that ICANN will be in breach of various provisions of the RAA if it approves an amendment to the Registry Agreement between ICANN and Verisign, permitting the implementation of WLS without complying with the Consensus Policies requirement of Subsection 4.1 of the RAA.

Subsection 4.1 of the RAA, the only section of the RAA that sets forth any consensus policy requirement, states:

> 4.1 *Registrar's Ongoing Obligation to Comply with New or Revised Specifications and Policies.* During the Term of this Agreement, Registrar *shall comply with* the terms of this Agreement on the schedule set forth in Subsection 4.4, with:
> 4.1.1 new or revised specifications (including forms of agreement to which Registrar is a party) and policies established by ICANN as Consensus Policies in the manner described in Subsection 4.3, ... (emphasis added).

The Court finds that Subsection 4.1 only applies in situations where ICANN seeks to compel registrar action without amending the RAA. There is nothing in this provision that imposes any obligation upon ICANN to act only by consensus where its actions do not seek to compel registrar action. Registrars may elect to offer WLS to their customers but they will be under no obligation to do so. Because implementation of WLS will not impose any obligation on the registrars or in any manner amend their RAAs with ICANN, it is unlikely that Plaintiffs will be able to prove that the consensus policy provision of Subsection 4.1 of the RAA is applicable and, therefore, that ICANN breached the RAA by not following that provision.

Because Subsection 4.1 is the only section of the RAA that sets forth a Consensus Policy requirement, the Court rejects Plaintiffs' argument that Subsection 4.2 [FN4] imposes an independent obligation on ICANN to develop a consensus policy anytime the allocation of domain names is affected. The Court finds that the plain language of Subsection 4.2 merely enumerates or describes a variety of topics for which ICANN *may* compel registrar action through the adoption of new or revised specifications and policies. However, there is nothing in this provision that creates an independent obligation or requires the implementation of a consensus policy any time domain allocation is affected. [FN5]

> FN4. 4.2 *Topics for New and Revised Specifications and Policies.* New and revised specifications and policies may be established on the following topics: ...
> 4.2.4. principles for allocation of Registered Names (e.g., first-come/first-served, timely renewal, holding period after expiration).

> FN5. The Court rejects Plaintiffs suggestion that ICANN is required to obtain registrar consensus before it can enter into any agreement with a third party that might affect domain name allocation. If the Court adopted this interpretation, the registrars would effectively have the power to veto any contract that affected their economic interests.

The Court also rejects Plaintiffs' argument that ICANN breached Subsection 2.3 of the RAA. The plain language of Subsection 2.3 makes it clear that the obligations imposed on ICANN under that section do not apply to matters falling outside the RAA. Because the implementation of WLS does not affect a right or obligation of Plaintiffs under the RAA or otherwise require ***1166** an amendment to the RAA, its implementation falls outside the scope of the RAA. It is unlikely that Plaintiffs will be able to prove that the provisions of Subsection 2.3 are applicable and, therefore, that ICANN breached those provisions of the RAA. Accordingly, even if Plaintiffs could demonstrate the requisite showing of irreparable harm, they have failed to demonstrate either probable success on, or serious questions going to, the merits of their claims and, thus, their

request for a preliminary injunction should be denied under any formulation of the standard for issuance of a preliminary injunction.

C. The Public Interest Does Not Favor Issuance of a Preliminary Injunction.

"In cases where the public interest is involved, the district court must also examine whether the public interest favors the plaintiff." *Fund for Animals v. Lujan,* 962 F.2d 1391, 1400 (9th Cir.1992) (*citing Caribbean Marine Services Co. v. Baldrige,* 844 F.2d 668, 674 (9th Cir.1988) *and Northern Alaska Environmental Center v. Hodel,* 803 F.2d 466, 471 (9th Cir.1986)). "The public interest inquiry primarily addresses impact on non-parties rather than parties." *Sammartano v. First Judicial Court, in and for County of Carson City,* 303 F.3d 959, 974 (9th Cir.2002). While the effect on the public interest was, at one time, part of the balance of hardships analysis, the Ninth Circuit has held that this factor "is better seen as an element that deserves separate attention in cases where the public interest may be affected." *Id.* at 974. In this case, the proposed preliminary injunction would interfere with the comprehensive scheme devised by the Department of Commerce to administer the Internet. *See, e.g., Bellingrath-Morse Foundation v. Bellsouth Telecommunications, Inc.,* 884 F.Supp. 472, 478-79 (S.D.Ala.1995) (against public interest to interfere with comprehensive system to redesign area code system used throughout United States). Such interference should not be undertaken lightly.

Moreover, as the parties agreed, the public's interest is affected in this case as consumers of Internet domain names. In the current secondary domain market, consumers have no guarantee of acquiring a soon-to-be-deleted registered domain name. Instead, consumers must pay a fee to one or more of the registrars who offer a wait-listing service for the right to compete with approximately fifty other individuals to register the same domain name if that domain name is deleted. However, after WLS goes into effect, consumers will pay one fee to a registrar and they will be guaranteed that they will become the new registrant of the domain name if it is deleted. Additionally, because all registrars will be able to offer WLS, registrars will have to compete against each other in other ways--such as offering additional services, competitive pricing, and/or improved customer service--that will increase the options available to and the value received by consumers. It would appear that because all of the approximately 170 registrars would be able to offer WLS to consumers, as opposed to the approximately 50 that currently offer their own wait-listing services now, the options available to consumers of Internet domain names could greatly increase. Accordingly, it appears that the implementation of WLS has the potential to benefit registries, registrars who do not currently offer wait-listing services, and, most importantly, the public. Therefore, the Court finds that the public interest supports denying Plaintiffs request for a preliminary injunction.

1167 IV. *Conclusion

For all the foregoing reasons, Plaintiffs' Motion for Preliminary Injunction is **DENIED**.

IT IS SO ORDERED.

296 F.Supp.2d 1159

Motions, Pleadings and Filings (Back to top)

- 2:03CV05045 (Docket)
  (Jul. 16, 2003)

END OF DOCUMENT

EXHIBIT B

256 N.Y.S. 41
143 Misc. 132, 256 N.Y.S. 41
(Cite as: 143 Misc. 132, 256 N.Y.S. 41)

C

Supreme Court, New York County, New York, Trial Term.

KNAPP
v.
PENFIELD et al.

March 17, 1932.

Action by Dorothy Knapp against Ann Wainwright Penfield and others.

Judgment for defendants.

West Headnotes

[1] Torts ⇐12
379k12 Most Cited Cases
Persons, in protecting their contractual rights, may invade another's, where former's interest is equal or superior.

[2] Torts ⇐12
379k12 Most Cited Cases
One financing play and her representative, both sharing in profits, held not liable for damages for interference with actress' contract by having compelled producer to substitute different actress.

****42 *133** Samuel Hoffman, of New York City, for plaintiff.

O'Brien, Malevinsky & Driscoll, of New York City (Moses L. Malevinsky, of New York City, of counsel), for defendants.

HAMMER, J.

This action is by plaintiff, an actress, for damages, compensatory and punitive or exemplary, for interference by the defendants with her contractual status resulting in her discharge. In 1923 the plaintiff was the winner of a national beauty contest for young women, and awarded the title Miss America. Previously she had won a preliminary contest in this state and was awarded the title Miss New York. Miss America, a full figure statue in the nude, was sculptured by Howard Chandler Christie. Plaintiff 'in bathing costume' was the model. Professionally her beauty has been exploited by advertisement and press agent in the reference to her as 'the most beautiful girl in the world.' Concededly, she is fair of face, form, and figure.

Although so advertised and exploited, plaintiff does not give an impression of sophistication or calculating worldliness, but that of education, culture, and refinement. Plaintiff testified that she had been featured in several sketches, but admitted she had never before starred or played a leading part in a musical show, nor, as an actress, had she done more than ordinary dancing, the singing of a mediocre number, or the speaking of a few lines in a feature act. It appeared that whatever she did as an actress was merely incidental to, and afforded an opportunity for, the exhibition of her attractiveness as a professional beauty.

The defendant Penfield, who has died since the trial of this action, an elderly lady over eighty years of age, of high social position, ****43** great wealth, and culture, the widow of a former United States ambassador, was desirous of aiding the defendants Bagby and Johnson in promoting their reputations as musical composers. Through and in the name of her agent and alter ego, defendant Evelyn Hubbell, she entered into a contract with the defendant ***134** Earl Carroll, the theatrical producer, to prepare, develop, and produce the defendants' Bagby and Johnson's musical compositions, among them the theme song to be sung by the heroine in the musical theatrical play 'Fioretta.' There were then four parties to the contract, the financier, the two authors, and the producer. The contract (Plaintiff's Exhibit 3) provided that Mrs. Penfield would advance $250,000 to finance the preparation, development, and production by Carroll. This amount, with 5 per cent. interest, was to be repaid from, but only in the event of, net profits. Carroll received a salary of $1,000 per week. Bagby and Johnson were to receive royalties. The net profits,

if earned, were to be divided in equal quarterly shares. Carroll's corporation, the defendant Vanities Producing Corporation, of which he was president, but in which the others were neither officers, directors, nor stockholders, was the agency, although not a party to the contract, used for the production of 'Fioretta.' Under a standard run of the play Actors' Equity Association contract, plaintiff was employed by Vanities Producing Corporation, through Carroll, at a salary of $1,000 per week to play Fioretta Pepoli, the star role or leading part. Plaintiff was not equal to singing the theme song or dancing as the heroine's part was originally cast, and the part was recast by Carroll to exhibit her physical attraction and beauty. Leading parts which were played by other stars at large salaries were accordingly required to support the recasted part of the heroine and were limited in the exhibition of their own talents. The defendant Hubbell, acting for Mrs. Penfield, protested that the role required a star who could sing and dance, and that plaintiff could not sing, dance, or act up to the part, and demanded that plaintiff be replaced by such star and other stars provided with appropriate parts. Carroll did not comply with the demand, and Mrs. Penfield, through the defendant Hubbell, brought an action against Carroll for an injunction requiring him to replace the plaintiff by an artist equal to the part, alleging that, for the purpose of serving his own personal ends and those of the said Dorothy Knapp, he so constructed the whole performance that she might be featured in said play to her advantage, exploitation, and glorification, and thus seriously impaired and jeopardized said Hubbell's (Penfield's) investment in the play. Thereupon Carroll discharged plaintiff, but paid the balance of her salary under the contract, and ****44** obtained another actress for the part. The play was not a financial success, and there were no net profits.

[1][2] It would seem under the circumstances that such defendants were acting within their own rights, and did not wrongfully cause an injury to plaintiff. Procuring the breach of a contract in the ***135** exercise of an equal or superior right is acting with just cause or excuse, and is justification for what would otherwise be an actionable wrong. A party to a contract ordinarily has the right to perform and to have same performed without interference by a nonparty or stranger. Such interference, unless privileged, justified or excusable, is an actionable wrong arising out of the invasion of the party's right to freedom from interference with the contract and performance thereunder. Persons acting for the protection of contract rights of their own which are of an equal or superior interest to another's contractual rights may invade the latter with impunity. Mrs. Penfield's interest was equal and superior to the interest of the plaintiff. Her large financial investment provided not only the common enterprise of the four parties to the original contract out of which came their respective rights and obligations, but also the employment of and benefit to plaintiff and other stars and numerous other persons. The continuance of the enterprise and of the benefits depended upon the success of the play, without which the Penfield investment was lost. The right of the plaintiff was subordinate to that of said defendants, whose contract was paramount to plaintiff's. Without defendants' contract, plaintiff would not have the employment under her contract with Vanities Producing Corporation. The very money which paid her agreed compensation arose out of defendants' prior agreement with Carroll. The performance or breach of the terms of the prior contract by the defendants imposed no obligation on, and gave no rights to, plaintiff. Any she had came from her contract of employment. The employment by Carroll, however, of an artist not equal to the heroine's role or part would be a breach by him of his prior agreement with the other individual defendants. The defendant Hubbell also had a financial interest in the play. She was to receive part of Mrs. Penfield's quarter of the net profits. By reason of that, in addition to her duty to Mrs. Penfield, her principal, she had a right to interfere which was privileged. The plaintiff's interest in her contractual status and her right to freedom from interference with her performance of the contract therefore were invaded with impunity by the defendants in protecting contract rights of their own which were of an equal or superior interest. Such interference was privileged, excusable, ****45** and justified, and legal malice accordingly may not be assumed. While under the circumstances motives are unimportant, the evidence here shows no actual malice.

The plaintiff suffered no financial loss, since she received all the money or compensation to which under the contract she was entitled. The right or interest of the plaintiff, if any, offended ***136** was

then a merely dignitary interest of personality, and no damages, even nominal, may be awarded.

After considering all the evidence, I am convinced that plaintiff is not entitled to damages either compensatory or nominal, or to exemplary or punitive damages. No question of abatement or of substitution of legal representative for defendant Penfield has been presented. The trial by stipulation was without jury, but as if present, and verdict is directed for defendants. Plaintiff may have exception, thirty days' stay of execution, and sixty days to make a case on appeal.

143 Misc. 132, 256 N.Y.S. 41

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EXHIBIT C

271 F.3d 825
271 F.3d 825, 2002 A.M.C. 2391, 1 Cal. Daily Op. Serv. 9659, 2001 Daily Journal D.A.R. 12,053
(Cite as: 271 F.3d 825)

H
Briefs and Other Related Documents

United States Court of Appeals,
Ninth Circuit.

MARIN TUG & BARGE, INC., as Owner of the Barge Marin Tenor, Plaintiff,
and
Jeffrey L. Mudgett; Susan Mudgett, Plaintiffs-Appellants,
v.
WESTPORT PETROLEUM, INC.; Shell Oil Products Company, Defendants-Appellees.

No. 99-17154.

Argued and Submitted Sept. 13, 2000
Filed Nov. 14, 2001

Operator of barges engaged in transportation of petroleum brought suit against oil company, based on company's sale to operator of substandard fuel containing an excess of harmful abrasives, and added claim for intentional interference with prospective economic advantage after oil company in response to suit refused to either contract with operator or allow its oil to be carried on operator's barges. The United States District Court for the Northern District of California, Claudia Wilken, J., granted summary judgment to oil company on tortious interference claim. After its request for certification of question of state law, 238 F.3d 1159, was declined, the Court of Appeals, Berzon, Circuit Judge, held that under California law, as predicted by Court of Appeals, oil company did not commit tort of intentional interference with prospective economic advantage by refusing to deal with operator after suit was brought, even though it allegedly acted with purpose of interfering with operator's resort to the courts to settle dispute.

Affirmed.

West Headnotes

[1] Federal Courts ⇐392
170Bk392 Most Cited Cases
Where request for certification of state law is declined, federal court must predict as best it can what the state's highest court would do in such circumstances.

[2] Federal Courts ⇐802
170Bk802 Most Cited Cases
Where district court resolved the matter on summary judgment, Court of Appeals draws all reasonable inferences in favor of nonmovant.

[3] Torts ⇐10(1)
379k10(1) Most Cited Cases

[3] Torts ⇐27
379k27 Most Cited Cases
Under California law, plaintiff who brings suit for intentional interference with prospective economic advantage must plead and prove as part of its case-in-chief that the defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself.

[4] Torts ⇐10(1)
379k10(1) Most Cited Cases
Elements of tort of intentional interference with prospective economic advantage are (1) an economic relationship between the plaintiff and another, containing a probable future economic benefit or advantage to plaintiff, (2) defendant's knowledge of the existence of the relationship, (3) defendant's intentional conduct designed to interfere with or disrupt the relationship, (4) actual disruption, and (5) damage to the plaintiff as a result of defendant's acts, which are (6) wrongful by some legal measure other than the fact of interference itself.

[5] Torts ⇐10(3)
379k10(3) Most Cited Cases
Under California law, as predicted by Court of Appeals, oil company which had been sued by operator of barges engaged in transportation of petroleum products, based on sale to operator of substandard fuel containing an excess of harmful abrasives, did not commit tort of intentional interference with prospective economic advantage

when in response to suit it engaged in lawful action of refusing unilaterally to either contract with barge operator or allow its oil to be carried on operator's barges, even though oil company allegedly acted with purpose of interfering with operator's resort to the courts to settle dispute.

[6] Torts ⇦10(1)

379k10(1) Most Cited Cases

Under California law, tort of intentional interference with prospective economic advantage was not intended broadly to limit individuals or commercial entities in choosing their commercial relationships, whatever their motives in doing so might be--unless those motives are independently unlawful.

[7] Torts ⇦10(1)

379k10(1) Most Cited Cases

Under California law, core of intentional interference business torts is interference with an economic relationship by a third-party stranger to that relationship, so that an entity with a direct interest or involvement in that relationship is not usually liable for harm caused by pursuit of its interests.

***826** Jeff Mudgett, Gig Harbor, Washington, for the real parties in interest and the plaintiffs-appellants.

Michael K. Johnson, Lewis, D'Amato, Brisbois & Bisgaard, San Francisco, California, for the defendants-appellees.

Appeal from the United States District Court for the Northern District of California; Claudia Wilken , District Judge, Presiding. D.C. No. CV-96-04313-CW.

Before: GRABER, FISHER and BERZON, Circuit Judges.

BERZON, Circuit Judge:

Jeffrey and Susan Mudgett (the "Mudgetts") appeal the district court's grant of summary judgment against them in their action for intentional interference with prospective economic advantage. We affirm.

***827 I.**
Background

At the time the events underlying this case occurred, the Mudgetts were the owners and operators of Marin Tug and Barge, Inc., a small barge company that transports petroleum products in and around the San Francisco Bay. This litigation arises from Shell Oil's contamination of one of Marin Tug's barges, the Marin Tenor. The Tenor moved "bunker fuel," i.e., oil used in fueling ships' engines, to waiting ships. Because the diesel engines that power the receiving ships are highly sensitive to abrasives, bunker fuel must meet certain specifications regarding aluminum and silicon oxide content. (Aluminum and silicon oxide are used as catalysts in the refining process.)

Pursuant to a contract between Marin Tug and fuel broker Westport Petroleum, the Tenor was loaded with marine fuel oil at Shell's Martinez refinery. It turned out that there were large amounts of alumina and silica in Shell's delivery line. The oil loaded onto the Tenor was substandard, or "off-specification," because it contained an excess of harmful abrasives. Unaware of the contamination, the Tenor delivered the fuel as planned to the receiving ship, the OOCL Japan, and soon thereafter transported another load of fuel from a Chevron Oil refinery to the vessel Direct Eagle. A few days later, Marin Tug learned that the fuel delivered to the Direct Eagle was contaminated, and two days after that, believing the Tenor was the source of the contamination, took the barge out of service.

In a series of communications over the following weeks, Marin Tug notified Westport that it (Marin Tug) considered Westport liable for contaminating the Tenor and thought it necessary to clean the Tenor fully. Westport indicated its preference that, instead of full cleaning, Marin Tug attempt a less costly "flushing" experiment. [FN1] Marin Tug agreed, and two flushing voyages were completed.

> FN1. "Flushing" involves repeated loading and unloading of fuel in order to stir up and remove contamination.

Westport then hired the firm of Matthews, Matson & Kelly to analyze for metal content samples of the fuel carried on the flushing voyages. The Matthews firm concluded that the contaminants remaining in the Tenor had been sufficiently diluted

by flushing to permit the barge to return to service. A second survey company, however, using a different sampling method, showed higher levels of contaminants than those found by the Matthews firm.

After receiving these results, Marin Tug informed Westport that it planned to remove the Tenor's pumps and prepare for cleaning, a measure Marin Tug deemed necessary in the light of laboratory analyses showing deposits of alumina and silica still in the Tenor's bottoms. Westport objected, contending that the flushing had diluted the contamination enough to allow safe transportation of fuel. Westport therefore refused to bear the costs of Marin Tug's unilateral decision to clean the barge. Marin Tug's dock staff nonetheless undertook the cleaning process between August 1 and August 20, 1996; the barge did not operate during that period. Afterward, the Tenor was sold to a third party.

On November 27, 1996, Marin Tug filed an Admiralty Limitation of Liability or Exoneration complaint in federal district court. [FN2] On the same day, Marin Tug commenced ***828** a civil action against Shell Oil and Westport, raising various contract and tort claims.

> FN2. OOCL filed a claim and answer in the limitation proceeding, seeking more than $3 million in damages for harm to its vessel Japan resulting from the contaminated fuel. On January 9, 1998, Judge Wilken exonerated Marin Tug and forever discharged it from all liability arising from the contamination.

After the civil action was filed, Shell refused to have further business dealings with Marin Tug and prohibited Marin Tug from loading fuel at Shell's Martinez refinery. The effect of Shell's refusal to deal was not only that Shell would no longer contract with Marin Tug but also that Marin Tug could no longer do business with third-party fuel brokers and consumers who otherwise would have hired it to transport Shell oil.

In response to Shell's refusal to deal, Marin Tug amended its complaint to allege intentional interference with prospective economic advantage, [FN3] claiming that "Shell's action is an attempt to force Marin Tug and Barge to dismiss this litigation." [FN4]

> FN3. The amended complaint also alleged intentional interference with contractual relations, a claim not at issue in this appeal.
>
> FN4. In May of 1997, when Marin Tug and Barge was sold to a new owner, the company assigned its pending claims to Jeffrey and Susan Mudgett.

Shell thereupon moved for partial summary judgment, maintaining that the refusal to deal was for legitimate business reasons and therefore is not actionable under California law.

The evidence submitted in support of this contention included a letter dated two months after Marin Tug filed suit against Shell. In that letter, Daniel R. Trufino, Jr., wrote:

> Shell has no desire to "destroy" Marin Tug and Barge. However, we do not choose to expose Shell to the possibility of additional unfounded claims.
>
> We continued to accept Marin vessels at [our] Martinez [facility], both directly and as a carrier for third parties, until you chose to file and serve your suit against Shell. Since that time, we have advised anyone who attempted to send a Marin vessel to Martinez that we no longer accepted Marin Vessels. This is strictly a business decision and not at all based on the characteristics or suitability of the vessels.
>
> .... This was a decision made solely by Shell as a result of the unsatisfactory relationship that has developed between our two companies. Shell has made no effort to influence attitudes or actions of third parties in their potential dealings with Marin Tug so long as Shell Martinez is not involved.

In further explanation of its actions, Shell submitted a declaration from Trufino stating that Shell refused to deal with Marin Tug only after "Marin chose to pursue its claims in court without first attempting to reach a reasonable commercial resolution," leading Shell to choose "not to expose [itself] to the possibility of further unreasonable conduct. To do this it was necessary to refuse Marin vessels at the dock as well as not contract directly [with Marin Tug] for transportation." The

Trufino declaration noted, as an example of Marin Tug's unreasonable behavior, that Marin Tug had presented a claim for nearly $680,000 at a settlement meeting "with a minimal explanation of some calculations, but ... no supporting documentation."

The Mudgetts countered with a declaration asserting that Shell had offered to end the boycott if Marin Tug dropped the lawsuit. Additionally, the Mudgetts noted (1) that the dispute over payment for the cleaning, including accusations that Marin Tug was being unreasonable, long pre-dated the instigation of the lawsuit, yet the boycott started only after the lawsuit was ***829** filed; and (2) the $680,000 settlement offer--which the Mudgetts maintain was adequately explained--was made after Shell announced that it would not permit Marin Tug to carry its oil, and so could not have been a basis for that decision. Additionally, the Mudgetts noted that oil sold or purchased by Shell Oil can be moved on barges hired by either the buyer or seller; by refusing to allow Marin Tug to carry its oil, consequently, Shell was not simply refusing to contract with Marin Tug but was preventing others from doing so where transportation of Shell oil was involved. From these facts, the Mudgetts maintained, a trier of fact could infer that Shell's motive was to wield its economic power in the local oil transportation market so as to induce Marin Tug to dismiss the action or, failing that, to punish the barge company for undertaking the litigation.

The district court granted partial summary judgment in favor of defendants with regard to the Mudgetts' claims of intentional interference. [FN5] Although it recognized that it was the filing of the lawsuit that triggered Shell's refusal to ship on Marin Tug's barges, the district court held that the boycott was not retaliatory, because "each of the reasons Shell proffered as to why it boycotted Marin Tug is consistent with its purported desire to limit its liability and its belief that Marin Tug was being commercially unreasonable." The court went on to hold that even if Shell did act in retaliation for the lawsuit, the refusal to deal would not establish wrongfulness, a necessary element of the tort of intentional interference with prospective economic advantage in California. *See Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal.4th 376, 45 Cal.Rptr.2d 436, 902 P.2d 740 (1995). [FN6]

FN5. The contract and tort claims not resolved by the partial grant of summary judgment were the subject of a bench trial, after which the district court awarded the Mudgetts $38,612.62 in actual damages, holding Westport and Shell jointly and severally liable for breach of contract and negligent trespass, respectively. The Mudgetts appealed that judgment, arguing that the district court erroneously rejected certain theories of liability and that the court's calculation of the Mudgetts' damages was incorrect. By unpublished memorandum disposition, we affirmed in part, reversed in part, and remanded for the district court to consider whether the Mudgetts were entitled to additional damages.

FN6. Throughout this case, both parties have treated California law as applicable to the intentional interference issue.

The Mudgetts appealed the district court's order, arguing that the "wrongfulness" element of the tort had indeed been satisfied. Because the decisions of the Supreme Court of California provide no controlling precedent on this issue, we certified to that court the following question:

> Is it "wrongful" for purposes of the tort of intentional interference with prospective economic advantage for a defendant in a civil lawsuit to refuse to deal with the plaintiff in that suit when the following circumstances exist: (1) the refusal to deal precludes not only business between the plaintiff and the defendant but also a substantial amount of business between the plaintiff and third parties who do business with the defendant; (2) the refusal to deal is intended to coerce the plaintiff to abandon or settle the lawsuit; and (3) the defendant has sufficient economic power that the refusal to deal could indeed have that effect?

Marin Tug & Barge, Inc. v. Westport Petroleum, Inc., 238 F.3d 1159, 1160 (9th Cir.2001).

[1] The state supreme court declined our request for certification. Accordingly, ***830** we must "predict as best we can what the California Supreme Court would do in these circumstances." *Pacheco v. United States*, 220 F.3d 1126, 1131 (9th

Cir.2000).

II.
Analysis

1. ***Shell's Motive***

[2] Because the district court resolved the matter on summary judgment, we draw all reasonable inferences in favor of the Mudgetts. *Block v. City of Los Angeles,* 253 F.3d 410, 421 (9th Cir.2001). After doing so, we conclude that a trier of fact could reasonably infer that Shell's motive in refusing to load its oil on Marin Tug barges was retaliatory. (We use the word "retaliatory" here and elsewhere in this opinion in the sense that the parties in this case and the district court have used it, that is, to mean actions intended either to induce Marin Tug to drop its lawsuit or to punish the company for having brought it.)

There was some evidence that Shell offered to resume shipping in Marin Tug's barges if Marin dropped the lawsuit. There was also evidence--including the fact that the boycott began right after the lawsuit began and long after the dispute arose, as well as Shell's out-of-sequence reliance on post-boycott proposals as an explanation for the refusal to deal--from which one could find that Shell's explanation of its motives was pretextual and that the real motive was to retaliate for the filing of the lawsuit against it. We therefore do not subscribe to the district court's assessment that there were no material facts in dispute, and that the Mudgetts therefore failed to meet their burden on summary judgment with regard to whether Shell's motive was retaliatory. We conclude instead that, resolving all factual disputes and drawing all inferences against Shell (the moving party), one could infer that Shell's refusal to deal was carried out either in order to induce Marin Tug (and later the Mudgetts) to abandon this lawsuit or to impose punishment for bringing it. So we must decide whether Shell committed the tort of intentional interference of prospective economic advantage by doing a perfectly lawful thing--refusing unilaterally either to contract with Marin Tug or to allow its oil to be carried on Marin Tug barges--because it did so with the purpose of interfering with Marin Tug's resort to the courts to settle a dispute.

2. ***Intentional Interference with Prospective Economic Advantage***

To answer that question, we begin by surveying the relevant principles of California law, indistinct as they are (as we shall soon see).

[3][4] In *Della Penna,* the California Supreme Court ("the Court") recounted the complicated history of the tort of intentional interference with prospective economic advantage. 45 Cal.Rptr.2d 436, 902 P.2d at 743-51. [FN7] The Court noted that nearly a majority of state supreme courts, following the lead of the Oregon Supreme Court in *Top Service Body Shop, Inc. v. Allstate Insurance Co.,* 283 Or. 201, 582 P.2d 1365 (Or.1978), had in recent years abandoned the prima facie tort approach to the intentional interference tort--under which the defendant had to prove a privilege or justification for interfering with the prospective business dealings of third parties--in favor of an approach placing the burden on the plaintiff to prove wrongful or improper behavior. *Della Penna,* 45 Cal.Rptr.2d 436, 902 P.2d at 746-47. Recognizing that "the law usually takes care to draw lines of legal liability in a way ***831** that maximizes areas of competition free of legal penalties," the California Court decided to embrace a general approach similar to that pioneered by the Oregon Supreme Court in *Della Penna,* 45 Cal.Rptr.2d 436, 902 P.2d at 750-51. Henceforth, the Court announced, a plaintiff "must plead and prove as part of its case-in-chief that the defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was *wrongful by some legal measure other than the fact of interference itself.*" [FN8] *Id.* at 751 (emphasis added).

> FN7. Other state court opinions have covered much the same ground. *See, e.g., Top Serv. Body Shop Inc. v. Allstate Ins. Co.,* 283 Or. 201, 582 P.2d 1365 (1978); *Kutcher v. Zimmerman,* 87 Hawai'i 394, 957 P.2d 1076 (1998).
>
> FN8. The remaining elements of the tort, which are not at issue in this appeal, are: (1) an economic relationship between the plaintiff and another, containing a probable future economic benefit or advantage to plaintiff, (2) defendant's knowledge of the existence of the relationship, (3)

> defendant's intentional conduct designed to interfere with or disrupt the relationship, (4) actual disruption, and (5) damage to the plaintiff as a result of defendant's acts. *Della Penna,* 45 Cal.Rptr.2d 436, 902 P.2d at 743 n. 1.

The Court's majority did not go beyond that very general conclusion, despite a lengthy, careful, and thoughtful concurrence by Justice Mosk arguing for more precision. [FN9] Expressly declining to define the contours of the "wrongful" element, the Court stated that

> FN9. Justice Mosk maintained, among other things, that the historical focus of the tort of interference with prospective economic advantage on the interfering party's motive was wrongheaded; instead, "motive is altogether immaterial," 45 Cal.Rptr.2d 436, 902 P.2d at 757 (Mosk, J., concurring), and "[o]ur focus should be on objective conduct and consequences ... [and] with such conduct and consequences as are unlawful," *id.* at 760-761.

> the case, if any, to be made for adopting refinements to that element of the tort-requiring the plaintiff to prove, for example, that the defendant's conduct amounted to an independently tortious act, or was a species of anticompetitive behavior proscribed by positive law, or was motivated by unalloyed malice-can be considered on another day, and in another case.

Id. at 741.

Subsequent decisions from the California Courts of Appeal have set forth interpretations of the "wrongful" standard that appear to be in conflict. *Compare PMC, Inc. v. Saban Entm't, Inc.,* 45 Cal.App.4th 579, 52 Cal.Rptr.2d 877, 891 (1996) (" 'Defendant's liability may arise from improper motives or from the use of improper means.' ") (quoting *Top Serv. Body Shop,* 582 P.2d at 1371), *with Arntz Contr. Co. v. St. Paul Fire & Marine Ins. Co.,* 47 Cal.App.4th 464, 54 Cal.Rptr.2d 888, 895 (1996) ("[O]ur focus for determining the *wrongfulness* of ... intentional acts should be on the defendant's objective conduct, and evidence of motive or other subjective states of mind is relevant only to illuminating the nature of that conduct."); *see also Korea Supply Co. v. Lockheed Martin Corp.,* 90 Cal.App.4th 902, 109 Cal.Rptr.2d 417, 427 (2001) (endorsing Justice Mosk's position in concurrence in *Della Penna* that motive is irrelevant). One other reported California appellate case expressly refused to take sides in this dispute, instead considering the facts before it under all possible standards and concluding that the tort was not made out under any of them. *See LiMandri v. Judkins,* 52 Cal.App.4th 326, 60 Cal.Rptr.2d 539, 546-47 (Ct.App.1997). As these diverse decisions indicate, the precise type of wrongfulness necessary to trigger liability for intentional interference with prospective economic advantage remains very much an unresolved question in California.

3. ***The Principles Applicable Here***

[5] It is therefore with some trepidation that we tread into this area of California ***832** tort law. Looking at that law as a whole, however, including cases decided before *Della Penna;* concentrating on results as well as reasoning; and considering not only intentional interference with prospective economic advantage but also related areas such as the protection accorded employees for discharges against public policy, we conclude that the plaintiffs here cannot make out a case.

California law points toward three principles that, taken together, undergird that conclusion:

[6] *First,* even before *Della Penna,* during the period when the California law of intentional interference with prospective economic advantage placed a less stringent burden on plaintiffs, it was clear with regard to refusals to deal in particular that,

> "in the absence of prohibition by statute, illegitimate means, or some other *unlawful* element, a defendant seeking to increase his own business may ... refuse to deal with [the plaintiff] or threaten to discharge employees who do, or even refuse to deal with third parties unless they cease dealing with the plaintiff, all without incurring liability."

A-Mark Coin Co. v. General Mills, Inc., 148 Cal.App.3d 312, 195 Cal.Rptr. 859, 867 (1983) (emphasis added) (quoting PROSSER, THE LAW OF TORTS § 130, at 954-55 (4th ed.1971)). *A-Mark Coin* does not speak directly to whether a

defendant is insulated from liability when the refusal to deal is intended to coerce the plaintiff to drop or settle a lawsuit. But it does establish, as a background principle, that the tort of interference with prospective economic advantage was not intended broadly to limit individuals or commercial entities in choosing their commercial relationships, whatever their motives in doing so might be--unless those motives are independently unlawful. [FN10]

> FN10. Although, as far as we are aware, no California court has addressed this precise question, the lawfulness of a refusal to deal in retaliation for bringing suit was long ago tested in another jurisdiction, with results favorable to Shell. In *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (2d Cir.1962), the United States Court of Appeals for the Second Circuit rejected plaintiff's argument that such refusal amounted to a prima facie tort (under the old mode of applying this tort), remarking that "a company is free to select its business relations in its own interest." *Id.* at 872 (internal citation and quotation marks omitted).

[7] *Second,* and closely connected to that background principle, California law has long recognized that the core of intentional interference business torts is interference with an economic relationship by a third-party *stranger* to that relationship, so that an entity with a direct interest or involvement in that relationship is not usually liable for harm caused by pursuit of its interests. *Della Penna,* 45 Cal.Rptr.2d 436, 902 P.2d at 750; *Hamro v. Shell Oil,* 674 F.2d 784, 790 (9th Cir.1982); *Exxon Corp. v. Superior Court,* 51 Cal.App.4th 1672, 60 Cal.Rptr.2d 195, 205 (1997).

Third, although *Della Penna* itself [FN11] and some California cases since then have not ruled out the possibility that a malicious motive or one otherwise against general public policy could be sufficient to establish the "wrongful" element of the tort, *see LiMandri,* 60 Cal.Rptr.2d at 546 (citing *Willard v. Caterpillar, Inc.*, 40 Cal.App.4th 892, 48 Cal.Rptr.2d 607 (1995)); *PMC, Inc.*, 52 Cal.Rptr.2d at 891, there are no post-*Della Penna* cases that actually found liability on the basis that the defendant merely had a wrongful motive. By contrast, in the two cases in which reliance on ***833** a wrongful motive might have made a difference, the California appellate courts adopted Justice Mosk's view in his *Della Penna* concurrence that motive, standing alone, is entirely irrelevant. *Arntz Contracting Co.*, 54 Cal.Rptr.2d at 895 (holding that "bad thoughts are no tort" and that "our focus for determining the *wrongfulness* of those intentional acts should be on the defendant's objective conduct," (citing *Boyson v. Thorn,* 98 Cal. 578, 33 P. 492 (1893), and Justice Mosk's concurrence in *Della Penna); Korea Supply Co.*, 109 Cal.Rptr.2d at 427).

> FN11. *Della Penna* left open the possibility that an act "motivated by unalloyed malice" could satisfy the "wrongful" element. *Della Penna,* 45 Cal.Rptr.2d 436, 902 P.2d at 741.

The reasoning and results of those post-*Della Penna* California appellate cases that have actually had to confront the question of the pertinence of bad motive appear to us to be a significant indicator of how the California Supreme Court will ultimately rule if and when it confronts the issue. Further, strong policy considerations counsel that conclusion. Unless the wrongfulness inquiry is limited to those motives or species of malice already proscribed by established legal principles--racial discrimination, for example--parties would be without clear guidelines as to whether any particular manifestation of ill-will would suffice. The result would be uncertainty as to how to tailor conduct in order to avoid liability. [FN12]

> FN12. *Arntz Contracting Co.* and *Korea Supply Co.* both can be read as proscribing *any* reliance on motive as independently meeting the "wrongful" element of the tort, but neither involved a situation in which there was a motive specifically proscribed by positive law.

Modern jurisprudence does in many instances, it is true, turn liability on motive. [FN13] Justice Mosk's concurring opinion in *Della Penna,* which exhibits a general suspicion of judicial assessments of motivation (*see id.* at 759-760), is in that respect

out of keeping with a wide body of contemporary law, and may well overstate the dangers and difficulties of relying on motive as the basis for finding conduct unlawful. In the many instances where unlawful motive is the basis for sanctioning behavior, however, the forbidden motive is generally a specific one, proscribed by a particular statute, regulation, or constitutional provision, not one derived from general judicial perceptions of public policy. The citizenry thereby has notice of which motives are unlawful and can accordingly govern its behavior.

> FN13. *See, e.g.,* Unruh Civil Rights Act, California Civil Code § 51, and cases under it, including *Jackson v. Superior Court,* 30 Cal.App.4th 936, 36 Cal.Rptr.2d 207 (1994) (holding that a business owner stated a cause of action under the Unruh Act by alleging that, when he sought to accompany clients to transact their business inside a bank, he was denied admittance to the bank because of his race); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (barring otherwise legal employer actions, such as discharge, when made on the basis of race or sex); *Washington v. Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) (requiring proof of discriminatory intent in equal protection cases).

Developments in the California law of tortious wrongful discharge demonstrate the force of this distinction between generalized proscription of bad motives or motives inconsistent with public policy on one hand and specifically proscribed motives on the other. *Gantt v. Sentry Ins.,* 1 Cal.4th 1083, 4 Cal.Rptr.2d 874, 824 P.2d 680 (1992), held that "an employee who was terminated in retaliation for supporting a coworker's claim of sexual harassment may state a cause of action for tortious discharge against public policy...." *Id.* at 1085, 4 Cal.Rptr.2d 874, 824 P.2d 680. In so holding, *Gantt* did not rely on judicially defined notions of public policy as the basis for discovering forbidden motives for discharges, for it recognized that a generalized notion of public policy "is ***834** notoriously resistent to precise definition." *Id.* at 1094, 4 Cal.Rptr.2d 874, 824 P.2d 680. Instead, *Gantt* found that retaliation for refusal to testify untruthfully or to withhold testimony regarding employment discrimination is a misdemeanor under a specific California statute and held the discharge tortious for that reason. Although the California Supreme Court later broadly expanded the sources of positive law that can inform the wrongful discharge against public policy tort to include, for example, regulations grounded in legislative enactments, *see Green v. Ralee Engineering Co.,* 19 Cal.4th 66, 78 Cal.Rptr.2d 16, 960 P.2d 1046 (1998), the Court continued to express concern with delimiting the scope of the anti-public policy motives that can support the wrongful termination tort, " 'lest [courts] mistake their own predilections for public policy which deserves recognition at law.' " *Green* at 1049, *citing Hentzel v. Singer Co.,* 138 Cal.App.3d 290, 188 Cal.Rptr. 159 (1982).

We conclude that if faced with the issue, the California Supreme Court would either eliminate motive, standing alone, as a basis for the wrongfulness element of the tort of intentional interference with prospective economic advantage or, more likely, import into the tort a limitation on motive-based causes of action similar to the one used under *Gantt* and its progeny.

4. ***Application to This Case***

Shell's refusal to deal was wrongful, say the Mudgetts, because it interfered with the Mudgetts' constitutionally protected right to petition government for redress of grievances and was contrary to California's public policy favoring judicial resolution of disputes over self-help remedies. [FN14] Applying the standards derived above to the facts at hand, we conclude the Mudgetts cannot on these grounds make out the requisite showing of wrongfulness.

> FN14. Appellants do not adequately put forward any other basis for finding wrongfulness. The Mudgetts vaguely suggest for the first time in their supplemental brief that Shell's actions may constitute "independent tort grounds" that meet the wrongfulness requirement. This contention, however, comes too late, *see Arpin v. Santa Clara Valley Transp. Agency,* 261 F.3d 912, 919 (9th Cir.2001), and, in any event, is entirely too indistinct

> for us to entertain: All we are told is that Shell's actions "contain elements of deceit, misrepresentation, defamation, intimidation, obstruction, coercion and fraud." Some of the terms listed describe common law torts, some do not, and "contain[ing] elements of" a tort does not make a course of conduct tortious.

Shell's actions were, at bottom, simply a refusal to deal with Marin Tug, and therefore presumptively valid, under *A-Mark,* absent some *unlawful* element. We are not dissuaded from this conclusion by the fact that in some instances the actual contracts were between Marin Tug and the buyer, not with Shell. Such contracts, no less than those in which Marin Tug contracted directly with Shell, required direct, active involvement by Shell--the loading of Shell oil onto Marin Tug's barges. Because the economic relationship between Marin Tug and the buyer of any Shell oil shipped on Marin Tug's barges depends on Shell's cooperation, Shell is not easily characterized as a stranger to that relationship. Further, as the underlying dispute that gave rise to this lawsuit demonstrates, Shell and Marin Tug had a mutual economic interest in delivering the oil safely and cleanly, and were dependent upon each other to do so. In this situation, there is nothing wrongful under California law about the *means* Shell chose to advance its interests, a simple refusal to deal with Marin Tug or to load its oil on Marin Tug's barges.

The Mudgetts' intentional interference claim depends entirely, then, upon a showing that Shell acted with a wrongful ***835** motive. Our inquiry into California law predicted, however, that the California Supreme Court may accept the position advocated in Justice Mosk's concurrence in *Della Penna* (and by two post-*Della Penna* court of appeal opinions) that motive is entirely irrelevant to the tort. If so, the Mudgetts' cause of action would necessarily fail.

The Mudgetts' cause of action would also fail if California law instead adopted the alternative approach discussed above, limiting "wrongful" motives to those proscribed by some constitutional, statutory, regulatory or other determinable legal standard. [FN15] The Mudgetts correctly point out that unimpeded access to the courts is a value constitutionally protected from governmental impairment, often protected by law from private impairment (as illustrated by *Gantt*), and favored by public policy. The Mudgetts fail, however, to demonstrate that the refusal by Shell--a private party--to deal with Marin Tug in order to influence or punish Marin Tug's lawsuit against it is proscribed by any statute, constitutional provision, or other independent source of legal principles.

> FN15. We need not determine precisely which sources of law California would recognize as proper bases for finding a wrongful motive, as the Mudgetts point to *no* established legal rule generally forbidding a private party to act with the motive of retaliating for the filing of a lawsuit.

CONCLUSION

We conclude that the district court properly granted summary judgment to Shell on its alternative ground that even if retaliatory, Shell's refusal to deal with Marin Tug was not "wrongful" in the sense required to make out the California tort of intentional interference with prospective economic advantage.

AFFIRMED.

271 F.3d 825, 2002 A.M.C. 2391, 1 Cal. Daily Op. Serv. 9659, 2001 Daily Journal D.A.R. 12,053

Briefs and Other Related Documents (Back to top)

- 2000 WL 33994703 (Appellate Brief) Appellants' Reply Brief (Apr. 12, 2000)Original Image of this Document (PDF)

- 2000 WL 33994701 (Appellate Brief) Westport Petroleum, Inc. and Shell Oil Company's Answering Brief (Mar. 29, 2000)Original Image of this Document (PDF)

- 2000 WL 33994702 (Appellate Brief) Appellants' Opening Brief (Feb. 14, 2000)Original Image of this Document (PDF)

- 99-17154 (Docket) (Oct. 12, 1999)

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 555 West Fifth Street, Suite 4600, Los Angeles, California 90013.

On January 7, 2005, I caused to be served the document described as:

COMPENDIUM OF NON-CALIFORNIA AUTHORITIES IN SUPPORT OF DEFENDANT INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS' DEMURRER TO PLAINTIFF'S COMPLAINT

on the interested parties in this action.

_X_ **BY (U.S. MAIL).** I placed _____ the original __X__ a true copy thereof enclosed in sealed envelope(s) to the addressee(s) as follows:

Shaye Diveley
Attorney at Law
111 Sutter Street, Suite 700
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Executed on January 7, 2005, at Los Angeles, California.

Elba Alonso de Ortega
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