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:** December 13, 2017 **Dept:** 53

DOTCONNECT AFRICA TRUST vs. INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS , et al.; BC607494, DECEMBER 13, 2017

[TENTATIVE] ORDER RE: DEFENDANT ICANN'S MOTION FOR PROTECTIVE ORDER

Defendant ICANN'S motion for protective order is **DENIED**.

BACKGROUND

On October 4, 2017, Plaintiff DotConnectAfrica Trust ("DCA") served Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") with a deposition notice for ICANN Board Member Mike Silber ("Silber"). ICANN moves for a protective order against the enforcement of the deposition notice on the grounds that it poses an undue burden on Silber as it seeks testimony that is irrelevant to DCA's remaining causes of action and because it seeks documents that are cumulative and duplicative of prior discovery. DCA opposes the motion.

LEGAL STANDARD

Any party may obtain discovery by taking the oral deposition of any person, including any party to the action. (CCP §2025.010.) "The statute authorizing the taking of depositions to be used in pending trials should be liberally construed to the end that a litigant in a pending action may be afforded a reasonable opportunity to procure available testimony in support of his cause." (*Moran v. Sup. Ct.* (1940) 38 Cal.App.2d 328, 334.)

On the other hand, Code of Civil Procedure section 2025.420, subdivision (a) authorizes parties, deponents or other affected natural persons to move for a protective order. Among other things, a protective order may direct that a deposition not be taken at all. (*Id*., § 2025.420, subd. (b)(1).) A motion for protective order must be accompanied by a declaration setting forth facts demonstrating a reasonable and good faith attempt to meet-and-confer with the deposing counsel to resolve the dispute without the Court's intervention.

(*Id*., §§ 2016.040, 2025.420, subd. (a).) The moving party must also demonstrate "good cause" for the relief sought. (*Id*., § 2025.420, subd. (b); *Nativi v. Deutsche Bank Nat'l Trust Co.* (2014) 223 Cal.App.4th 261, 318.)

DISCUSSION

ICANN argues that the deposition notice is defective on its face because it notices the deposition in Los Angeles while Silber resides in South Africa. Beyond this defect, ICANN argues that Silber's testimony is irrelevant to DCA's remaining causes of action. First, ICANN argues that any allegations that Silber had a conflict of interest when casting this vote have already been resolved by a neutral third party, who found no substantiation for DCA's claims. Second, Mr. Silver's vote as an ICANN Board member to accept ICANN's Governmental Advisory Committee's ("GAC") advice to stop processing DCA's application for .AFRICA was immaterial as the Board's vote was unanimous. Third, any issue DCA had with Silber's conflict of interest is moot as DCA, after challenging the vote through ICANN's Independent Review Process ("IRP"), was reinstated for consideration for .AFRICA. Fourth, ICANN argues, Silber's purported conflict of interest has no bearing on DCA's fraud claims.

In opposition, DCA argues that it seeks to depose Silber to determine the extent of any influence he may have had over the ICANN Board in ruling against DCA's application, and the extent of ICANN's investigation into Silber's conflict of interest. DCA alleges that Silber had a conflict of interest because he was formerly a director of DCA's competitor for .Africa, and at the time of the vote was Treasurer and Director of the .za Domain Name Authority, which was in a business relationship with the competitor and officially endorsed the competitor's application to ICANN. DCA argues that the information Silber can share goes directly to the heart of DCA's claims for fraud and negligent misrepresentation in that ICANN, DCA asserts, had decided from the beginning of the process, to improperly reject DCA's application, and instead chose the competitor's application to succeed. DCA also seeks to depose Silber as a Board member for insight into the decision-making process of the Board.

ICANN's arguments in reply are mostly arguments on the merits of the action supported by ICANN's submission of evidence on the merits, rather than on the relevance of Silber's proposed deposition to DCA's remaining claims. In short, ICANN argues that the evidence shows at this time that DCA's application would have been rejected in the end anyway, so Silber's testimony is no longer relevant. However, the Court finds, as

DCA argues, that Silber can testify to matters directly relevant to DCA's claims, as they remained following the Court's order on ICANN's motion for summary judgment in August 2017 ("The Court cannot, therefore, find as a matter of law that ICANN did not defraud DCA by stating on the one hand it would follow its Bylaws and Articles of Incorporation in processing DCA's application, while on the other hand giving preference to ZACR's application throughout the process"), both as an ICANN Board Member then and now, and as someone who may have had a conflict of interest given his alleged ties with ZACR, DCA's competitor, and may have influenced ICANN during the entire application process.

ICANN also argues that the deposition notice contains twenty-five requests for production that are almost entirely duplicative of those propounded on ICANN, and thus Silber should not be compelled to produce these documents. DCA has indicated it does not desire any duplication of documents. The Court thus orders Silber to produce any non-duplicative documents. Silber may object individually to the production of any particular documents on the grounds of duplication.

CONCLUSION

For the foregoing reasons, ICANN's motion for a protective order is DENIED. The parties are to work out among themselves where to conduct the deposition.

DCA is ordered to provide notice of this Order.

DATED: December 13, 2017

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Howard L. Halm

Judge of the Superior Court