

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **16-CV-00862 RGK (JCx)** Date June 14, 2016

Title ***DotConnectAfrica Trust v. Internet Corporation for Assigned Names and Numbers & ZA Central Registry***

Present: The Honorable R. GARY KLAUSNER, U.S. DISTRICT JUDGE

Sharon L. Williams (Not Present) Deputy Clerk	Not Reported Court Reporter / Recorder	N/A Tape No.
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Attorneys Present for Plaintiffs:

Not Present

Attorneys Present for Defendants:

Not Present

Proceedings: (IN CHAMBERS) Order re: Defendant ZACR's Motion to Dismiss (DE 80)

I. INTRODUCTION

On February 26, 2016, Plaintiff DotConnectAfrica Trust ("Plaintiff") filed a First Amended Complaint ("FAC") against Defendants Internet Corporation for Assigned Names and Numbers ("ICANN"), and ZA Central Registry ("ZACR") (collectively "Defendants"). The FAC alleges the following claims against ZACR: (1) Claim 4: Fraud & Conspiracy to Commit Fraud; (2) Claim 5: Unfair Competition (Violation of Cal. Bus. & Prof. Code. § 17200); (3) Claim 7: Intentional Interference with Contract; and (4) Claim 10: Declaratory Relief (that the registry agreement between ZACR and ICANN is null and void and that ZACR's application does not meet ICANN standards). This action arises out of a dispute involving the delegation of rights related to the .Africa top-level domain.

Currently before the Court is ZACR's Motion to Dismiss. For the following reasons, the Court **grants** the motion.

II. FACTUAL BACKGROUND

The following facts are alleged in the Complaint.

Defendant ICANN is the sole organization worldwide that assigns rights to Generic Top-level Domains ("gTLDs"). In 2011, ICANN approved the expansion of the number of gTLDs available to eligible applicants as part of its 2012 Generic Top-Level Domains Internet Expansion Program ("New gTLD Program"). ICANN invited eligible parties to submit applications to obtain the rights to these

various gTLDs. In March 2012, Plaintiff submitted an application to ICANN to obtain the rights to the .Africa gTLD. Plaintiff paid ICANN the mandatory application fee of \$185,000. On February 17, 2014, Defendant ZACR also submitted an application for .Africa.

A. Geographic Name Applications and the Governmental Advisory Committee

ICANN's Applicant Guidebook contains an overview of the application process. According to the Guidebook, applicants for geographic gTLDs must obtain endorsements from 60% of the national governments in the region and no more than one written objection from the relevant governments or public authorities associated with the region. Plaintiff obtained endorsements of the United Nations Economic Commission for Africa ("UNECA") in August 2008 and the African Union Commission ("AUC") in August 2009. In 2010, however, AUC sent a letter informing Plaintiff that it had "reconsidered its approach" and "no longer endorses individual initiatives in this matter related to continental resource." (FAC ¶ 24, ECF No. 10.) The Guidebook states that a government may withdraw its endorsement only if the conditions of its endorsement have not been satisfied. Contrary to ICANN's contentions, Plaintiff maintains that the AUC letter did not formally withdraw its endorsement of Plaintiff because AUC did not have conditions on its endorsement.

On behalf of ICANN, InterConnect Communications ("ICC") performs string similarity and geographic review during the initial evaluation stage of the gTLD application process. ICC explained to ICANN that if the endorsements of regional organizations like AUC and UNECA were not applied toward the 60% requirement, neither Plaintiff nor Defendant ZACR would have sufficient geographic support. ICANN decided to accept endorsements from both AUC and UNECA. During its initial evaluation, the ICC was required to inform applicants of any problems with their endorsements. The ICC failed to inform Plaintiff of any such problems. Therefore Plaintiff assumed that its endorsements from AUC and UNECA were sufficient.

In 2011, AUC itself, attempted to obtain the rights to .Africa by requesting ICANN to include .Africa in the list of Top-Level Reserved Names, which would have made .Africa unavailable for delegation under the New gTLD Program. In March 8, 2012, ICANN explained to AUC that ICANN could not reserve .Africa for AUC's use. However, ICANN explained, AUC could "play a prominent role in determining the outcome of any application" for .Africa as a public authority associated with the continent by (1) filing one written statement of objection, (2) filing a community objection, or (3) utilizing the Governmental Advisory Committee ("GAC") to combat a competing application. (FAC ¶ 69, ECF No. 10.) The Governmental Advisory Committee ("GAC") is an internal committee that considers applicants and provides advice related to governmental concerns. Under ICANN's rules, the GAC can recommend that ICANN cease reviewing an application if all of the GAC members agree that an application should not proceed because an applicant is sensitive or problematic. Membership on the GAC is open to representatives of all national governments. AUC became a GAC member in June 2012, apparently on the advice of ICANN.

Because AUC could not obtain .Africa directly through ICANN, AUC contracted with ZACR in March 2014. In exchange for AUC's endorsement, ZACR would assign to AUC all rights relating to .Africa upon its delegation to ZACR. Subsequently, because of AUC's interest in ZACR's application for .Africa, AUC used its influence as a GAC member to campaign against Plaintiff's application. In June 2013, ICANN accepted the GAC's advice and rejected Plaintiff's application for lacking the requisite endorsements. This decision was made amid Plaintiff's objection that several members of the GAC had conflicts of interest and that Kenya was unrepresented at the GAC meeting. Contrary to ICANN's contentions, Plaintiff maintains that the lack of unanimous support within the GAC rendered the decision to suspend Plaintiff's application improper.

Plaintiff further argues that, if ICANN applied the GAC's rationale for rejecting Plaintiff's

application equally to ZACR, ZACR's application should have failed as well. Specifically, applying the same standards, ZACR did not have sufficient country specific endorsements to meet ICANN's requirements: (1) only five of the purported endorsement letters from specific African governments referenced ZACR by name; and (2) ZACR filed support letters in which African governments generally endorsed AUC's "Reserved Names" initiative without specifically referencing ZACR. ZACR presumably passed the 60% threshold requirement based on the same regional endorsements that the GAC used to derail Plaintiff's application. Nonetheless, ZACR passed the initial evaluation and entered into the delegation phase with ICANN.

B. The Independent Review Process

As a means to challenge ICANN's actions with respect to gTLD applications, ICANN provides applicants with an independent review process ("IRP"). The IRP is arbitration comprised of an independent panel of arbitrators. In October 2013, Plaintiff sought an IRP to review ICANN's processing of its application, including ICANN's handling of the GAC opinion. In its decision, the IRP Panel found against ICANN as follows: (1) ICANN's actions and inactions with respect to Plaintiff's application were inconsistent with ICANN's bylaws and articles of incorporation; and (2) ICANN should refrain from delegating .Africa and permit Plaintiff's application to proceed through the remainder of the evaluation process.

Plaintiff asserts that ICANN did not act in accordance with the decision, which was binding. Instead of allowing Plaintiff's application to proceed through the remainder of the application process (i.e. the delegation phase), ICANN restarted Plaintiff's application from the beginning and re-reviewed its endorsements. In September 2015, during the second review, ICANN issued clarifying questions regarding Plaintiff's endorsements, which it did not raise during the initial evaluation of these same endorsements. The Plaintiff requested an extended evaluation, hoping to gain insight on what was wrong with its application. Rather than providing clarification, ICANN merely restated the same questions – allegedly as a pretext to deny Plaintiff's application – then denied Plaintiff's application in February 2016. Soon thereafter, ICANN began the process of delegating .Africa to ZACR.

On March 4, 2016, the Court issued a Temporary Restraining Order to prevent ICANN from delegating .Africa to ZACR. On April 12, 2016, the Court granted Plaintiff's Motion for Preliminary Injunction and enjoined ICANN from delegating the rights to .Africa until this case is resolved.

III. JUDICIAL STANDARD

"A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Under Rule 12(b)(6), a party may move to dismiss for failure to state a claim upon which relief can be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2004)). A court deciding a Rule 12(b)(6) motion must accept as true all factual allegations in the complaint, but need not accept mere legal conclusions or bare recitations of the elements of a claim. *Twombly*, 550 U.S. at 555. A claim is facially plausible when there are sufficient factual allegations, viewed in the light most favorable to the plaintiff, to draw a reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal*, 556 U.S. at 678; *Barker v. Riverside Cnty. Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009).

IV. DISCUSSION

ZACR moves to dismiss each of the four claims Plaintiff has asserted against it. The Court addresses each claim in turn.

A. Claim 4: Fraud and Conspiracy to Commit Fraud

To state a claim for fraud, a plaintiff must allege (1) a false representation; (2) knowledge of the falsity; (3) intent to induce reliance; (4) justifiable reliance; and (5) resulting damage. *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996). Moreover, allegations of fraud must meet the heightened pleading requirement of Federal Rule of Civil Procedure 9(b). Rule 9(b) requires a party to state with particularity the circumstances constituting fraud. *See Vess v. Ciba-Geigy Corp USA*, 317 F.3d 1097, 1107 (9th Cir. 2003). This standard requires a plaintiff to state the time, place, and content of the alleged misrepresentation and explain why the statement is false or misleading. *In re GlenFed*, 42 F.3d 1541, 1547-48 (9th Cir. 1994).

Here, with respect to ZACR, Plaintiff alleges the following: (1) ZACR and AUC conspired to obtain the .Africa rights (FAC, ¶¶27 and 91); (2) ZACR stated that AUC should not endorse Plaintiff because it was not a community organization, even though Plaintiff need not be a community organization to apply (FAC, ¶ 28); (3) ZACR represented that it was applying for .Africa on behalf of the African community, but instead submitted a “standard” application (FAC, ¶¶ 31, 85, and 92); (4) ZACR misrepresented to ICANN that it had (a) the requisite number of government endorsements, and (b) the requisite financial capability to operate as a gTLD operator (FAC, ¶ 32); (5) ZACR and AUC caused the GAC to advise against Plaintiff’s application (FAC, ¶ 44); and (6) ZACR violated the rules and procedures for acquiring the delegation rights (FAC, ¶¶ 87 and 91).

Upon review, the Court finds the allegations fail to state a claim for fraud. Specifically, the allegations fail to support either a false representation, intent by ZACR to induce Plaintiff’s reliance on any false representations, or Plaintiff’s justifiable reliance on those representations. Therefore, the Court **grants** ZACR’s motion as to this claim.

B. Claim 7: Intentional Interference With Contract

Intentional interference with contract requires the following elements: (1) a valid contract between the plaintiff and a third party; (2) defendant’s knowledge of this contract; (3) defendant’s intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damages. *Quelimane Co. v. Stewart Title Guar. Co.*, 19 Cal. 4th 26, 55 (1998).

The FAC alleges that the Guidebook constituted a contract between Plaintiff and ICANN. (FAC ¶ 109.) Plaintiff alleges that ICANN breached this contract by (1) improperly advising AUC on how to defeat other .Africa applications; (2) preventing Plaintiff’s application from proceeding through the review process; (3) failing to abide by the results of the IRP process; (4) failing to permit competition for .Africa by abusing its regulatory authority in its differential treatment of ZACR; (5) working with an independent evaluator to ensure that ZACR passed a crucial evaluation process; (6) failing to conduct the necessary due diligence into recommendations and decisions by its own advisory councils; and (7) sending steady messages to ICANN’s Board that it must ensure that nothing interferes with the delegation of .Africa to ZACR. (FAC, ¶¶ 67-70.) As to ZACR’s conduct, Plaintiff sets forth the allegations discussed in Section IV.A., above. Even if Plaintiff adequately alleges a breach of contract by ICANN, the allegations related to ZACR’s merely show conduct intending to induce ICANN to delegate the .Africa rights to ZACR. As to intentionally inducing a breach or disruption of the contract in the manner alleged above, the allegations of ZACR’s conduct fall short of supporting this claim.

The Court **grants** ZACR’s motion as to this claim.

C. Claim 5: Unfair Competition (§17200)

Plaintiff’s §17200 claim is based on the “conduct alleged [in the FAC that] constitutes unlawful, unfair, or fraudulent business acts or practices.” (FAC, ¶ 97.) Upon review of the allegations, the Court finds no alleged conduct distinct from those purportedly giving rise to the other claims asserted against ZACR. As discussed above, Plaintiff’s allegations fail to adequately state any of the other substantive claims for relief set forth in the FAC. Therefore, the Court finds that Plaintiff’s Unfair Competition claim fails as well.

The Court **grants** ZACR’s motion as to this claim.

D. Claim 10: Declaratory Relief

In its tenth claim, Plaintiff seeks declarations from the Court that (1) the registry agreement between ZACR and ICANN be declared null and void; and (2) that ZACR’s application does not meet ICANN’s standards.

It is well-established that declaratory relief requires the existence of an actual, present controversy over a proper subject. *Otay Land Co. v. Royal Indem. Co.*, 169 Cal. App. 4th 556, 552 (2008). In determining whether this standard has been met, a court must evaluate the nature of the rights asserted by the plaintiff. Those assertion of rights must follow some recognized or cognizable legal theories related to subject matter properly before the court. *Id.* at 563. As an equitable form of remedy, a claim for declaratory relief is not a stand-alone claim, but rather depends upon whether the plaintiff states some other substantive basis for liability. *Glue-Fold, Inc. v. Slautterback Corp.*, 82 Cal. App. 4th 1018,

As a threshold matter, Plaintiff has failed to state any other substantive basis for liability against ZACR. The claim for declaratory relief fails on this basis alone. Additionally, however, the Court finds Plaintiff’s first request against ZACR (*i.e.*, that the Court declare the registry agreement null and void) unnecessary, as a favorable ruling on its claims against ICANN will result in the relief it seeks. As to the second request (*i.e.*, that the Court declare that ZACR’s application does not meet ICANN’s standards), the Court finds that regardless of the existence of a separate substantive basis for liability, there is an insufficient nexus between the relief requested and the alleged wrongful conduct.

The Court **grants** ZACR’s motion as to this claim.

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS** ZACR’s Motion to Dismiss.

IT IS SO ORDERED.

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Initials of Preparer
