

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 16-5505 PA (ASx) Date July 26, 2016

Title Ruby Glen, LLC v. Internet Corp. for Assigned Names & Numbers

Present: The Honorable PERCY ANDERSON, UNITED STATES DISTRICT JUDGE

Stephen Montes Kerr

None

N/A

Deputy Clerk

Court Reporter

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

None

None

Proceedings: IN CHAMBERS — COURT ORDER

Before the Court is an Ex Parte Application for Temporary Restraining Order (“Application for TRO”) filed by plaintiff Ruby Glen, LLC (“Plaintiff”). Plaintiff seeks to temporarily enjoin defendant Internet Corporation for Assigned Names and Numbers (“ICANN”) from conducting an auction for the rights to operate the registry for the generic top level domain (“gTLD”) for .web. Currently, that auction is set for 6:00 a.m. on July 27, 2016. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument.

Plaintiff applied to ICANN in 2012 to operate the registry for the .web gTLD. Because other entities also applied to operate the .web gTLD, ICANN’s procedures require all of the applicants, what are referred to as “contention sets,” to first attempt to resolve their competing claims, but if they cannot do so, ICANN will conduct an auction and award the rights to operate the registry to the winning bidder. According to Plaintiff, one of the competing entities, Nu Dotco, LLC (“NDC”) is unwilling to informally resolve the competing claims and has instead insisted on proceeding to an auction. Plaintiff asserts that it learned on June 7, 2016, that NDC has experienced recent changes in its management and ownership since it initially submitted its application to ICANN but that NDC has not provided ICANN with updated information as required by ICANN’s application requirements. Specifically, the email from NDC’s Jose Ignacio Rasco stated:

The three of us are still technically the managers of the LLC, but the decision goes beyond just us. Nicolai [Bezsonoff]^{1/} is at [Neustar, Inc.] full time and no longer involved with our TLD applications. I’m still running our program and Juan [Diego Calle] sits on the board with me and several others. Based on your request, I went back to check with all the powers that be and there was no change in the response and [we] will not be seeking an extension.

(Docket No. 8, Decl. of Jonathon Nevett, Ex. A.)

^{1/} According to Plaintiff, Bezsonoff was identified on NDC’s ICANN application as NDC’s “secondary contact.”

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Plaintiff alleges that it requested that ICANN conduct an investigation regarding the discrepancies in NDC's application beginning on June 22, 2016 and requested a postponement of the auction. At least one other applicant seeking to operate the .web registry has also requested that ICANN postpone the auction and investigate NDC's current management and ownership structure. ICANN denied the requests on July 13, 2016, and stated that "in regards to potential changes of control of Nu DOT CO LLC, we have investigated the matter and to date we have found no basis to initiate the application change request process or postpone the auction." Plaintiff and another of the applicants then submitted a request for reconsideration to ICANN on July 17, 2016. ICANN denied the request for reconsideration on July 21, 2016.

Plaintiff, relying on the Court's diversity jurisdiction, filed this action in this Court on July 22, 2016. According to the Complaint, Plaintiff "is a limited liability company, duly organized and existing under the laws of the State of Delaware and operated by an affiliate located in Bellevue, Washington." (Compl. ¶ 4.) The Complaint alleges that ICANN "is a nonprofit corporation, organized and existing under the laws of the State of California, with its principal place of business in Los Angeles, California." (*Id.* ¶ 5.) Plaintiff asserts claims for: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) negligence; (4) unfair competition pursuant to California Business and Professions Code section 17200; and (5) declaratory relief. Plaintiff filed its Application for TRO at the same time it filed its Complaint.

As an initial matter, the Court notes that the Application for TRO fails to satisfy the requirements for a valid Ex Parte Application. Specifically, under Local Rule 7-19.1, an attorney making an ex parte application has a duty to give notice by making reasonable good faith efforts to orally advise counsel for the other parties, if known, of the proposed ex parte application, and "to advise the Court in writing of efforts to contact other counsel and whether any other counsel, after such advice, opposes the application or has requested to be present when the application is presented to the Court." Here, Plaintiff did not notify the Court in writing of its efforts to notify opposing counsel of the Application for TRO or if ICANN intended to file an Opposition. These violations of the Local Rules are themselves sufficient to deny Plaintiff's Application for TRO. See Standing Order 6:5-7 ("Applications which fail to conform with Local Rules 7-19 and 7-19.1, including a statement of opposing counsel's position, will not be considered."). Additionally, Plaintiff did not submit a proposed order with the Application for TRO as required by Local Rule 7-20. See Local Rule 7-20 ("A separate proposed order shall be lodged with any motion or application requiring an order of the Court, pursuant to L.R. 52-4.1."). Finally, the Application for TRO was not accompanied by a proof of service as required by Local Rule 5-3.1. Indeed, according to ICANN, as of July 25, 2016, Plaintiff had not served ICANN with the Complaint or Application for TRO. Had ICANN not filed its Notice of Intent to File Opposition, the Court would have denied the Application for TRO as a result of these procedural deficiencies and violations of the Local Rules. See, e.g., Reno Air Racing Ass'n, Inc. v. McCord, 452 F.3d 1126, 1131 (9th Cir. 2006) ("[C]ourts have recognized very few circumstances justifying the issuance of an ex parte TRO [without notice]."). Despite these violations of the Local Rules, the Court will address the merits of Plaintiff's Application for TRO because ICANN filed an Opposition. Future violations of the Local Rules, this Court's Orders, or the Federal Rules of Civil Procedure may result in the striking of the offending documents or the imposition of sanctions.

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The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction. See Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co., 887 F. Supp. 1320, 1323 (N.D. Cal. 1995). “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” Winter v. Natural Resources Defense Council, 555 U.S. 7, 20, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008). “A preliminary injunction is an extraordinary remedy never awarded as of right.” Id. The Ninth Circuit employs a “sliding scale” approach to preliminary injunctions as part of this four-element test. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011). Under this “sliding scale,” a preliminary injunction may issue “when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff’s favor,” as long as the other two Winter factors have also been met. Id. (internal citations omitted). “[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, 1867, 138 L. Ed. 2d 162 (1997).

Plaintiff’s breach of contract, breach of the implied covenant of good faith and fair dealing, and negligence claims are all based on provisions in ICANN’s bylaws and the ICANN Applicant Guidebook stating, for instance, that ICANN will make “decisions by applying documented policies neutrally and objectively, with integrity and fairness,” that ICANN will remain “accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness,” and that no contention set will proceed to auction unless there is “no pending ICANN accountability mechanism.” Plaintiff’s unlawful business practices act and declaratory relief claims allege that a covenant not to sue contained in the ICANN Application Guidebook is invalid and unlawful under California law. That release states:

Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN’s or an ICANN Affiliated Party’s review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant’s gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION . . .

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Even if, as Plaintiff contends, this release is not valid, and Plaintiff could therefore be considered likely to prevail on its unlawful business practices and declaratory relief claims, the potential invalidity of the release — an issue the Court does not reach — is a separate issue that is not related to the propriety of proceeding with the auction for the .web registry. As a result, those claims, and Plaintiff’s likelihood of success on them, are not relevant to Plaintiff’s Application for TRO and do not provide a basis for enjoining the .web auction.

In its Opposition to the Application for TRO, ICANN contends that Plaintiff has not established the requisite likelihood of success on the merits or irreparable harm to justify the issuance of the preliminary injunctive relief it seeks. Specifically, ICANN has provided evidence that it has conducted investigations into Plaintiff’s allegations concerning potential changes in NDC’s management and ownership structure at each level of Plaintiff’s appeals to ICANN for an investigation and postponement of the auction. During those investigations, NDC provided evidence to ICANN that it had made no material changes to its management and ownership structure. Additionally, ICANN’s Opposition is supported by the Declarations of Nicolai Bezsonoff and Jose Ignacio Rasco, who declare under penalty of perjury that there have been no changes to NDC’s management, membership, or ownership since NDC first filed its application with ICANN.

Based on the strength of ICANN’s evidence submitted in opposition to the Application for TRO, and the weakness of Plaintiff’s efforts to enforce vague terms contained in the ICANN bylaws and Applicant Guidebook, the Court concludes that Plaintiff has failed to establish that it is likely to succeed on the merits, raise serious issues, or show that the balance of hardships tips sharply in its favor on its breach of contract, breach of the implied covenant of good faith and fair dealing, and negligence claims. Moreover, because the results of the auction could be unwound, Plaintiff has not met its burden to establish that it will suffer irreparable harm in the absence of the preliminary injunctive relief it seeks. The Court additionally concludes that the public interest does not favor the postponement of the auction.

Finally, the Court notes that Plaintiff’s Complaint has not adequately alleged a basis for this Court’s jurisdiction. Jurisdiction may be based on complete diversity of citizenship, requiring all plaintiffs to have a different citizenship from all defendants and for the amount in controversy to exceed \$75,000.00. See 28 U.S.C. § 1332; Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373, 98 S. Ct. 2396, 2402, 57 L. Ed. 2d 274 (1978). To establish citizenship for diversity purposes, a natural person must be a citizen of the United States and be domiciled in a particular state. Kantor v. Wellesley Galleries, Ltd., 704 F.2d 1088, 1090 (9th Cir. 1983). Persons are domiciled in the places they reside with the intent to remain or to which they intend to return. See Kanter v. Warner-Lambert Co., 265 F.3d 853, 857 (9th Cir. 2001). “A person residing in a given state is not necessarily domiciled there, and thus is not necessarily a citizen of that state.” Id. A corporation is a citizen of both its state of incorporation and the state in which it has its principal place of business. 28 U.S.C. § 1332(c)(1); see also New Alaska Dev. Corp. v. Guetschow, 869 F.2d 1298, 1300-01 (9th Cir. 1989). Finally, the citizenship of a partnership or other unincorporated entity is the citizenship of its members. See Johnson v. Columbia Props. Anchorage, LP, 437 F.3d 894, 899 (9th Cir. 2006) (“[L]ike a partnership, an LLC is a citizen of every state of which its owners/members are citizens.”); Marseilles Hydro Power, LLC v. Marseilles Land & Water Co., 299 F.3d 643, 652 (7th Cir. 2002) (“the relevant citizenship [of an LLC] for

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diversity purposes is that of the members, not of the company”); Handelsman v. Bedford Village Assocs., Ltd. P’ship, 213 F.3d 48, 51-52 (2d Cir. 2000) (“a limited liability company has the citizenship of its membership”); Cosgrove v. Bartolotta, 150 F.3d 729, 731 (7th Cir. 1998); TPS Utilicom Servs., Inc. v. AT & T Corp., 223 F. Supp. 2d 1089, 1101 (C.D. Cal. 2002) (“A limited liability company . . . is treated like a partnership for the purpose of establishing citizenship under diversity jurisdiction.”).

The Complaint fails to establish that the parties are completely diverse. Specifically, by failing to identify and allege the citizenship of its own members, Plaintiff, a limited liability company, has not properly alleged its own citizenship. Accordingly, the Court is unable to ascertain whether it may exercise subject matter jurisdiction over this action. Without Plaintiff having adequately alleged a proper jurisdictional basis, the Court would not grant Plaintiff’s Application for TRO even if Plaintiff had otherwise satisfied the requirements for injunctive relief.

Despite Plaintiff’s failure to properly allege the Court’s subject matter jurisdiction, a district court may, and should, grant leave to amend when it appears that subject matter jurisdiction may exist, even though the complaint inadequately alleges jurisdiction. See 28 U.S.C. § 1653; Trentacosta v. Frontier Pacific Aircraft Industries, Inc., 813 F.2d 1553, 1555 (9th Cir. 1987). Therefore, the Court grants Plaintiff leave to amend the Complaint to attempt to establish federal subject matter jurisdiction. Plaintiff’s First Amended Complaint, if any, is to be filed by August 8, 2016. The failure to file a First Amended Complaint by that date or to adequately allege the Court’s jurisdiction may result in the dismissal of this action without prejudice.

For all of the foregoing reasons, the Court concludes that Plaintiff is not entitled to the injunctive relief it seeks. The Court therefore denies the Application for TRO.

IT IS SO ORDERED.