SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 11/22/06

DEPT. WEM

HONORABLE JOHN L. SEGAL	JUDGE	ELMA MORA AVA FRASER	DEPUTY CLERK CRT ASST ELECTRONIC RECORDING MONITOR
HONORABLE	JUDGE PRO TEM		
NONE	Deputy Sheriff	NONE	Reporter

8:30 am SC090220

C. ITOH MIDDLE EAST E.C.
VS
INTERNET CORP. FOR ASSIGNED NAM

Plaintiff Counsel: no appearances

Defendant Counsel:

NATURE OF PROCEEDINGS:

The Court now rules on Defendant's Demurrer to Complaint argued and taken under submission on November 20, 2006 as reflected in the Ruling on Submitted Matter filed and incorporated herein by reference.

Plaintiff's application to appear as counsel PRO HAC VICE of Mark F. Rosenberg granted. Order granting verified application to appear as counsel PRO HAC VICE of Mark F. Rosenberg signed and filed.

Clerk to give notice via U.S. Mail.

CLERK'S CERTIFICATE OF MAILING/
NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 11/22/06 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

Date: November 22, 2006

John A. Clarke, Executive Officer/Clerk

MINUTES ENTERED
11/22/06
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 11/22/06

HONORABLE JOHN L. SEGAL JUDGE | ELMA MORA DEPUTY CLERK | DEPT. WEM

HONORABLE JUDGE PRO TEM | AVA FRASER CRT ASST | ELECTRONIC RECORDING MONITOR

NONE Deputy Sheriff | NONE Reporter

8:30 am SC090220

C. ITOH MIDDLE EAST E.C. Plaintiff Counsel
VS
INTERNET CORP. FOR ASSIGNED NAM Defendant Counsel

no appearances

NATURE OF PROCEEDINGS:

By: _____
ELMA MORA

SULLIVAN & CROMWELL
ATTORNEY FOR PLAINTIFF
1888 CENTURY PARK EAST
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JONES & DAY
ATTORNEY FOR DEFENDANT
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SUITE 4600
LOS ANGELES, CA 90013-1025

MINUTES ENTERED
11/22/06
COUNTY CLERK

RULING ON SUBMITTED MATTER – DEPT. M

NOVEMBER 22, 2006 CALENDAR NUMBER:

NATIONAL UNION FIRE INS. CO. V. PEOPLE'S REPUBLIC OF CONGO

CASE NO. SC 090220

Although it's hard to tell from the papers, this is a demurrer. Not a motion for summary judgment, not a motion to quash, not a trial on the merits. And on demurrer, the court assumes that the plaintiff's allegations are true, even if it turns out that discovery proves the plaintiff's allegations are untrue. See Construction Protective Services, Inc. v. TIG Specialty Ins. Co., 29 Cal. 4th 189, 193 (2002).

This is a creditor's suit. Plaintiff C. Itoh Middle East E.C. (Bahrain) through real party in interest National Union Fire Insurance Company of Pittsburgh, PA filed this action seeking to execute upon a California judgment that plaintiff obtained against the People's Republic of the Congo. "[W]hen a third person possesses or controls property in which a judgment debtor has an interest or is indebted to the judgment debtor, the judgment creditor may bring an action against the third person to apply the property or debt to satisfaction of the creditor's money judgment. This action commonly is referred to as a creditor's suit." Evans v. Paye, 32 Cal. App. 4th 265, 276 (1995); see Code Civ. Proc. §701.210. Specifically, plaintiff seeks to levy on the Congo's country code internet domain name, ".cg." Complaint, ¶ 5. Plaintiff claims that the Congo's country domain name .cg is owned by the Congo, located in the United States, and possessed by the entity that serves as the registrar for "top level domains," defendant Internet Corporation for Assigned Names and Numbers ("ICANN").

In its demurrer, defendant argues that the court does not have jurisdiction over .cg, the Congo's country code top level domain, under the Foreign Sovereign Immunities Act ("FSIA") because .cg is not property, .cg is not located in the United States, and .cg is not used for commercial activity. Defendant also argues that the first cause of action fails to state facts sufficient to constitute a cause of action for a creditor's suit under Section 708.210 of the Code of Civil Procedure because the Congo does not have ownership of .cg, cg is not property, and .cg cannot be assigned or transferred.

Defendant's requests for judicial notice are denied in part and granted in part.

Defendant's Request for Judicial Notice Nos. A, D-I and Defendant's Supplemental Request for Judicial Notice Nos. C and D are denied. Defendant's Supplemental Request for Judicial Notice No. B is granted as to filing and existence only. Defendant's Request for Judicial Notice Nos. B and C and Defendant's Supplemental Request for Judicial Notice No. A are granted. See Evid. Code § 452(c); E. H. Morrill Co. v. State of California, 65 Cal. 2d 787, 794-95 (1967); Mendez v. Pacific Gas & Elec. Co., 155 Cal. App. 2d 192, 195 (1953).

The court has jurisdiction under the Foreign Sovereign Immunities Act.

The FSIA "provides the sole basis for obtaining jurisdiction over [property of] a foreign state in the courts of this country." Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989). The FSIA sets forth certain exceptions to the general rule of a foreign nation's immunity to suit in the courts of the United States, even when the foreign nation has waived immunity to enforcement actions. A court in the United States may only assume jurisdiction over the foreign nation if one of the FSIA's enumerated exceptions applies. Corzo v. Banco Central de Reserva del Peru, 243 F.3d 519, 522 (9th Cir. 2001).

In order to execute against the property of a foreign nation in satisfaction of a money judgment, a plaintiff must not only show that the foreign state has waived its immunity from attachment in aid of execution, but also that it is seeking to attach (1) property of the foreign nation (2) located in the United States (3) that is used for commercial activity in the United States. 28 U.S.C. § 1610(a). Only after a plaintiff has met the jurisdictional prerequisites may a court determine the substantive viability of a claim for execution under Section 708.210.

The complaint alleges that "the Congo has waived any and all rights to sovereign immunity, both with respect to its obligation under the Contract and enforcement of Plaintiff's rights through seizure, attachment or execution of assets of any nature." Complaint, ¶ 9. For purposes of the demurrer, ICANN does not dispute plaintiff's contention that the Congo waived immunity.

The complaint adequately pleads that .cg is property.

The complaint alleges that "Internet domain names constitute valuable property," and gives examples of Tuvalu leasing the rights to its ".tv" domain name and Laos selling its rights to ".la" name. Complaint, ¶ 6. The complaint also alleges that "Domain names, including country domain names, are valuable property." Id. ¶ 46; see also infra. On demurrer, the court accepts these allegations as true.

The complaint adequately pleads that .cg is located in the United States.

The complaint alleges that .cg is "located in the United States." Complaint, ¶ 7. "Domain names are owned by their individual owners, but are in the possession of the registrar that controls them." Id., ¶ 47. "ICANN is the registrar for the 'top level' of domains . . . and controls the answers given by the 'root servers' to the initial query . . . . The country domain name '.cg' is therefore located for execution purposes at ICANN's headquarters in Marina del Rey." Id., ¶ 48. On demurrer, the court accepts these allegations as true.

Defendant contends that the location of a country code top level domain is at the registry, not at the management of the root servers. See Demurrer, 11:20-28. The cases cited by defendant, however, Globalsantafe Corp. v. Globalsantafe.com, 250 F. Supp. 2d 610, 623 (E.D. Dist. Va. 2003), and NBC Universal, Inc. v. NBCUNIVERSAL.COM, 378 F. Supp. 2d 715

(E.D. Va. 2005), are trademark cases under the Anticybersquatting Consumer Protection Act ("ACPA"), which by its terms does not apply to top level domains. Coca-Cola Co. v. Purdy, 382 F.3d 774, 784 (8th Cir. 2004). Moreover, the NBC Universal case holds that the "ACPA confers jurisdiction in the judicial district in which the domain name registrar, domain name registry, or other domain name authority . . . is located." NBC Universal, 378 F. Supp. 2d at 716 n.1 (emphasis added). In any event, plaintiff does not allege that the registry is located outside the United States.

The complaint adequately pleads that .cg is used for commercial activity.

The phrase "commercial activity" is defined by the FSIA as meaning "either a regular course of commercial conduct or a particular commercial transaction or act." 15 U.S.C. §1603(d). The complaint alleges that "the '.cg' name is and has been used by the Congo for commercial purposes in the United States." Complaint, ¶7. The complaint further alleges that "through its delegee Interpoint, the Congo has marketed and leased to numerous United States companies, for 225 Euros per year, the right to utilize Internet subdomain names ending in '.cg.' A list of 50 subdomains leased to U.S. customers is attached [to the complaint] as Exhibit 15, and there are likely many more. Congo, as the owner of '.cg,' has the right to lease for profit an infinite number of subdomain names to U.S. and other customers ending '.cg'." Complaint, ¶ 7. On demurrer, the court accepts these allegations as true. Whether, as defendant argues, this "business practice is far too trivial to serve as a basis for finding that the .cg cc TLD is being 'used for' commercial activity," Demurrer at 12:10-11, cannot be determined at the pleadings stage.

Plaintiff's allegations state a creditor's claim.

Ownership

Section 708.210 of the Code of Civil Procedure provides: "If a third person has possession or control of property in which the judgment debtor has an interest or is indebted to the judgment debtor, the judgment creditor may bring an action against the third person to have the interest or debt applied to the satisfaction of the money judgment." Section 654 of the Civil Code provides: "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code, the thing of which there may be ownership is called property." Section 655 of the Civil Code provides: "There may be ownership of all inanimate things which are capable of appropriation or of manual delivery . . . of all obligations . . . trademarks and signs . . . and of rights created or granted by statute."

The complaint alleges that the "Congo, as the owner of '.cg,' has the right to lease for profit an infinite number of subdomain names to U.S. and other customers ending '.cg.'" Complaint, ¶ 7. The complaint further alleges that the "'.cg' country domain name is the property of the Congo, and is in ICANN's possession." Id. ¶ 57. "Domain names are owned by their individual owners, but are in the possession of the registrar that controls them." Id. ¶ 47.

"ICANN recognizes that country domains, like '.cg' are owned by the countries to which they correspond." Id. ¶ 50. On demurrer, the court accepts these allegations as true. [1]

Property

The complaint alleges that .cg is property that may be owned. See Complaint, ¶¶ 6, 46; Civil Code § 654. .cg is an inanimate thing capable of appropriation under Section 655 of the Civil Code.

In California the "word 'property' has been subjected to innumerable and various definitions. Courts have said that the word 'property' is 'all-embracing so as to include every intangible benefit and prerogative susceptible of possession or disposition.'" Downing v. Municipal Court, 88 Cal. App. 2d 345, 350 (1948) (citations omitted). It includes "any valuable right or interest protected by law." Id. In Kremen v. Cohen, 337 F.3d 1024 (9th Cir.), cert. denied, 539 U.S. 915 (2003), the Ninth Circuit explained that California law applies a three-part test to determine whether a property right exists. "First, there must be an interest capable of precise definition; second, it must be capable of exclusive possession or control; and third, the putative owner must have established a legitimate claim to exclusivity." Id. at 1030. Kremen cited to G.S. Rasmussen & Associates, Inc. v. Kalitta Flying Service, Inc., 958 F.2d 896 (9th Cir. 1992), which warned against defining a property interest too narrowly:

> The district court's unwillingness to recognize a property interest here because it could not fit it into an intellectual property pigeonhole elevates nomenclature over substance. While we occasionally find it useful to refer to certain types of property as real, personal, intellectual or intangible, these labels have little substantive significance in determining whether a property right exists. The key question is not whether we can find a category of property into which the right fits, but whether there is any reason, in public policy or otherwise, we should deny a party the full benefit of its efforts where exclusive rights are reasonably easy to define and protect. Id. at 903 n.14.

Applying the Kremen factors to plaintiff's allegations, .cg is an interest capable of precise definition. As in Kremen, the complaint here alleges that like other forms of property, country code top level domains are valued, bought and sold, often for millions of dollars. Complaint, ¶46. The complaint further alleges that .cg is capable of exclusive possession or control: "The property at issue, the Congo's '.cg' domain name, is possessed and controlled by ICANN." Complaint, ¶ 16. And the complaint alleges that "the Congo's right to its '.cg' domain name have been granted," which is sufficient to establish a legitimate claim to exclusivity.

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[1] In Je Ho Lim v. The .TV Corporation International, 99 Cal. App. 4th 684 (2002), the Court of Appeal appeared to have little difficulty in stating that a country owns the rights to the top-level country code domain name. See id. at 687 ("DotTV registers Internet domain names for a fee. It acquired the top-level domain name 'tv' through an agreement with the island nation of Tuvalu, which owns the rights to that geographic designation.") (emphasis added.).

Lockheed Martin Corp. v. Network Solutions, Inc., 194 F.3d 980 (9th Cir. 1999), cited by defendant, determined on summary judgment that a TLD registry is a service. See id. at 984-85. The court did not hold that a TLD is solely a "service." Lockheed, a summary judgment case, dealt with contributory service mark infringement, not garnishment.

One state court has held that despite being intangible property, domain names are not subject to garnishment. The majority opinion of the Supreme Court of Virginia in Network Solutions, Inc. v. Umbro International, Inc., 529 S.E.2d 80 (2000), held that "a domain name registration is the product of a contract for services between the registrar and registrant. A contract for services is not 'a liability' as that term is used in § 8.01-511 and hence is not subject to garnishment." Id. at 86 (emphasis added). Umbro, however, was decided under Virginia law, not California law. As the Umbro court stated, "garnishment, like other lien enforcement remedies authorizing seizure of property, is a creature of statute unknown to the common law . . . ." Id. In light of California's broad definition of property and the Umbro court's narrow focus on the contractual nature of domain name registration, Umbro is distinguishable. See J. Moringiello, Seizing Domain Names to Enforce Judgments: Looking Back to the Future, 72 U. Cin. L. Rev. 95, 108 (2003) ("It is wrong to cite Umbro for the proposition that a domain name is not property. The court simply said that a domain name did not constitute a 'liability' for the purpose of the Virginia garnishment statute.").

Assignability/Transferability

Under section 695.030(a) of the Code of Civil Procedure, "property of the judgment debtor that is not assignable or transferable is not subject to enforcement of a money judgment." The complaint alleges that "The Congo's '.cg' Internet domain name . . . can readily be transferred to Plaintiff by ICANN." Complaint, ¶ 38. The complaint further alleges that the "ability of ICANN, as the registrar of country domain names, to control their transfer is demonstrated by, among other things, ICANN's recent transfer of (i) Iraq's country domain name to the delegee of Iraq's new government, and (ii) Afghanistan's country domain name to the delegee of Afghanistan's new government." Id. ¶ 49. On demurrer, the court accepts these allegations as true. In addition, the fact that the Department of Commerce may have to approve any assignment or transfer does not make .cg unassignable or non-transferable.

Plaintiff's request for leave to file a surreply is denied.

For these reasons, defendant's demurrer is overruled. Defendant is to answer within ten days. The case is stayed twenty days to allow defendant to file an appropriate petition in and seek a stay from the Court of Appeal. Pursuant to Section 166.1 of the Code of Civil Procedure, the court finds that defendant's motion involves a controlling question of law as to which there are substantial grounds for difference of opinion, and that appellate resolution of the issues raised by the motion may materially advance the conclusion of the litigation. The clerk is to give notice.