Nos. 16-55693, 16-55894

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOTCONNECTAFRICA TRUST,
Plaintiff-Appellee,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,
Defendant-Appellant,

DOTCONNECTAFRICA TRUST,
Plaintiff-Appellee,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,
Defendant,

and

ZA CENTRAL REGISTRY, NPC
Appellant.

On Appeal From the United States District Court
For the Central District of California, Los Angeles
Case No. 2:16-cv-00862-RGK-JC
The Honorable R. Gary Klausner

APPELLANT ZA CENTRAL REGISTRY, NPC'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant Fed. R. App. P. 26.1, Appellant ZA Central Registry, NPC states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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I.

INTRODUCTION

The district court issued an order granting a preliminary injunction that is predicated upon a series of errors. The order should be reversed and vacated.

This appeal arises out of a lawsuit involving the award and delegation of the generic top-level domain name ("gTLD"), .Africa. In 2012, defendant/ appellant Internet Corporation for Assigned Names and Numbers ("ICANN") put out for public bid the opportunity for internet domain name operators to apply for new gTLDs, including ".Africa". The competition came down to two African-based entities, appellant ZA Central Registry, NPC ("ZACR") and plaintiff-appellee DotConnectAfrica Trust ("DCA"). As set forth in ICANN's Guidebook governing this new gTLD process, a necessary criteria for the award of .Africa was that an applicant demonstrate that at least 60% of the governments in the affected region (Africa) support the application. ZACR had the full support of all 53 member states of the African Union Commission ("AUC") and the support of Morroco. DCA was unable to demonstrate the requisite support. This was because the AUC had previously put out a request for proposal ("RFP") and selected ZACR as the applicant it would support; DCA chose not to participate in the AUC's RFP process. Yet, DCA pressed forward, based upon an alleged 2009 "endorsement" letter from the AUC. But, the AUC expressly repudiated that letter in 2010 – two

years before the 2012 new gTLD application process even began. And, the AUC made clear throughout the application process that it did not support DCA's application, and that ZACR was "the only application officially endorsed by the AUC and hence African member states." Thus, DCA submitted its application knowing full well that it could not meet the necessary criteria to be awarded .Africa. When ICANN ultimately rejected DCA's application in 2016 for failing to meet the required country support, DCA filed this lawsuit against ICANN and, later, added ZACR as a defendant.

After filing the instant lawsuit, DCA moved the court for a preliminary injunction to prevent ICANN from delegating .Africa to ZACR. DCA set a briefing schedule knowing full well that it had not yet served ZACR with the complaint in South Africa. With briefing limited to submissions by DCA and ICANN, the district court granted DCA's request for a preliminary injunction. It did so based upon a series of key factual errors, including a significant mistake in which the court erroneously believed that DCA had already satisfied the requirement for government support in the region. This erroneous finding was the predicate for the district court's conclusion that DCA had demonstrated a likelihood of success on the merits. After ZACR entered the case, it filed a motion to vacate/ reconsider the court's preliminary injunction order based upon this and other errors, including DCA's false assertion that it would suffer irreparable harm

without an injunction because .Africa could be delegated only once. In fact, the record is undisputed that a gTLD can be redelegated from one operator to another, and ICANN has done so on dozens of occasions. ICANN subsequently joined ZACR's motion.

Yet, in denying ZACR's motion to vacate/ reconsider the preliminary injunction, the district court erroneously held that the motion was "moot" as to ZACR because the court had granted ZACR's motion to dismiss a few days before. In so ruling, the district court ignored long settled law that non-parties impacted by an injunction have standing to challenge the order. Instead, the court held that it would only consider the motion as one for reconsideration filed by ICANN. And while acknowledging its error in stating that DCA had passed the geographic names process (an error that even DCA conceded), the district court then committed an even more egregious error by ruling that it was immaterial because it could "infer" that an alternative dispute resolution panel in 2013 had already determined that DCA had met the 60% government support requirement. In fact, as addressed more fully below, the record indisputably shows just the opposite: the Independent Review Process ("IRP") Panel referenced by the district court refused DCA's request that DCA be "deemed" to have met the required 60% government support.

Thus, the district court erroneously maintained the injunction even though: (1) DCA can show no possibility of success on the merits because DCA cannot satisfy the Guidebook requirement that it demonstrate support from at least 60% of the countries in Africa; (2) DCA cannot meet its burden of showing irreparable harm because the evidence shows that its original submission to the district court was untrue when it suggested that .Africa could not be redelegated; and (3) the balance of harms shows that the harm to ZACR and the people of Africa, who continue to be denied access to .Africa, far outweigh any alleged harm to DCA. Finally, the district court should have considered ZACR's alternative request that DCA post a bond pursuant to Federal Rule of Civil Procedure 65(c).

On this record, the district court's order should be reversed and the preliminary injunction vacated.

II.

JURISDICTIONAL STATEMENT

The district court has subject matter jurisdiction over DCA's claims because DCA and ZACR are foreign entities and ICANN is a citizen of California. 28 U.S.C. § 1332(a). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1).

The district court entered its preliminary injunction order on April 12, 2016. ER 40-47. ICANN filed its original notice of appeal on May 11, 2016. ER 25-39.

ZACR, which had not been properly served with the lawsuit in South Africa until after the briefing on the preliminary injunction was complete, filed its motion to vacate/ reconsider the preliminary injunction order on May 6, 2016. ER 199-220. ICANN joined ZACR's motion on May 10, 2016. ER 197-98. The district court denied the motion on June 20, 2016. ER 21-24. ZACR filed its separate notice of appeal on June 24, 2016. ER 1675. ICANN amended its notice of appeal on June 27, 2016 to include the district court's denial of the reconsideration motion. ER 2. This Court consolidated the appeals on July 18, 2016. ER 1669-70.

III.

STATEMENT OF ISSUES

1. In granting and maintaining the preliminary injunction order, did the district court err in ruling that ZACR's motion was moot?

2. In granting and maintaining the preliminary injunction order, did the district court err in ruling that DCA showed a likelihood of success on the merits, given that the undisputed record shows that DCA did not (and does not) have the requisite government support in Africa required for delegation of the .Africa gTLD?

3. In granting and maintaining the preliminary injunction order, did the district court err in ruling that DCA had demonstrated irreparable harm when the

undisputed record shows that the basis for DCA's assertion – that the .Africa gTLD can only be delegated once – is incorrect?

4. In granting and maintaining the preliminary injunction order, did the district court err in failing to properly take into account the harm to ZACR and the people of the African continent and thus erroneously conclude that the balance of equities weighed in DCA's favor?

5. In granting and maintaining the preliminary injunction order, was the district court required to consider ZACR's alternative request that DCA post a bond?

IV.

STATEMENT OF THE CASE

A. The Parties

ICANN is a California non-profit public benefits corporation that oversees the Internet domain name system ("DNS") throughout the world. ER 730; *Name.Space, Inc. v. Internet Corp. for Assigned Names & Nos.*, 795 F.3d 1124, 1127-28 (9th Cir. 2015). Among other things, ICANN is responsible for delegating generic top-level domains (for example, ".com," ".org," ".edu"). ER 730.

ZACR is a South African non-profit company with its principal place of business in Midrand, South Africa. ER 224. ZACR was originally formed in 1988

under the name UniForum S.A. *Id*. . In 1995, ZACR was assigned the administration rights for the South African domain name, "co.za". *Id*. ZACR has registered over 1 million co.za domain name registrations – or about 95% of the total registrations for ".za." *Id*. Due to its well-known reputation for independence and neutrality, as well as technical competence and operational excellence, ZACR is the largest domain name registry on the African continent. *Id*.

DCA is a nonprofit organization established under the laws of the Republic of Mauritius, with its principal place of business in Nairobi, Kenya. ER 1540. Although DCA's CEO has been involved in the ICANN community for many years (ER 683-85), DCA itself states that its primary function was to compete for the .Africa gTLD. ER 755.

B. The New .Africa gTLD

ICANN formally launched a "New gTLD Program" in 2012. ER 635. Under this new program, applicants were invited to apply to become the operators of proposed new gTLDs. *Id*. If selected, an application would be responsible for managing the assignment of names within the gTLD and maintaining the gTLD's database of names and IP addresses. *Id*. Applicants had to demonstrate sufficient technical and financial capability to operate a gTLD. *Id*.

In the Applicant Guidebook ("Guidebook"), ICANN made clear that if a new gTLD included the name of a geographic region, an application would need to

provide documentation showing support from at least 60% of the governments in the region. ER 928. Further, the criteria made clear that no more than one objection from a government or public entity associated with the geographic area would be permitted. *Id*.

C. ZACR's Application for .Africa

In 2012, ZACR submitted its application with the full support of all African Union member states. ER 225, 527-30. The AUC, which serves as the Secretariat of the African Union, officially endorsed ZACR by letter dated April 4, 2012. ER 55-56. The only nonmember state, Morocco, provided its own separate letter of support for ZACR on March 28, 2012. ER 233, 527-28. The AUC reiterated its support of ZACR throughout the application process. ER 230-31, 632-33, 235-36.

ZACR received the support of the African Union only after the AUC publicized a request for proposal in 2011.[1] ER 225, 235-36, 1465-67, 529. This was an open bid process. In so doing, the AUC announced that it was only going to support one applicant. ER 529, 225. Yet, DCA chose not to participate in this RFP process. ER 529, 226. Thus, by prevailing in the RFP process, ZACR became the only AUC-supported applicant for the .Africa gTLD. *Id*.

[1] It had been well known that ICANN was considering a new gTLD program, including .Africa. It was in anticipation of this new gTLD program that the AUC decided to hold an RFP to support a qualified application as a result of a mandate from African ICT Ministers. ER 529.

Having successfully completed each of ICANN's requirements to operate the .Africa gTLD, ZACR and ICANN entered into a Registry Agreement on March 24, 2014. ER 226. Although the Registry Agreement runs for 10 years, ICANN still has not been able to delegate .Africa to ZACR. *Id*.

D. DCA's Application for .Africa

At the time DCA submitted its application for .Africa in 2012, it did **not** have the required support of the African governments. ER 1314. Indeed, the record is undisputed that DCA never had the support of 60% of the African countries at any time during the actual application process. ER 1314, 632-33, 235-36. In support of its application, DCA purported to rely upon a 2009 letter from the AUC. ER 1312. However, the AUC expressly withdrew this earlier "endorsement" of DCA by written letter in April 2010 – almost two years ***before*** ICANN even opened the new gTLD application process in 2012. ER 1314. In fact, the AUC has repeatedly explained in writing that DCA did not, and does not, have the support of the AUC for the .Africa gTLD. ER 1314, 632-33, 235-36. As set forth in a September of 2015 letter to ICANN, the AUC reiterated: "To be clear, the application submitted by ZA Central Registry (ZACR) . . . is the only application officially endorsed and supported by the AUC and hence African member states . . . Any reliance by DCA in its application . . . proclaiming support or endorsement by the AUC must be dismissed. The AUC does not support the

DCA application and, if any such support was initially provided, it has subsequently been withdrawn with full knowledge of DCA even prior to the commencement of ICANN's new gTLD application process." ER 235-36.

E. The IRP Process and Findings

DCA's application was halted in 2013 when ICANN's Government Advisory Committee ("GAC") issued "consensus advice" that DCA's application should be halted. ER 637. The GAC is a committee made up of government officials from throughout the world who provide input to ICANN's Board of Directors. ER 731, 1482. Based upon this GAC advice, ICANN determined that DCA's application should not proceed. ER 637, 1484.

Thereafter, DCA challenged ICANN's decision and filed a request for review by an Independent Review Process ("IRP") Panel.[2] ER 762-824. During the IRP process, DCA argued, among other things, that ICANN's reliance on the GAC "consensus" advice was improper because of supposed undue influence by the AUC. ER 785-786. At the time that DCA's application was halted in 2013, DCA's application was pending before ICANN's Geographic Names Panel which, independently, as a third party contractor, determines the level of government support in a region. ER 637. The Geographic Names Panel is separate from the

[2] The IRP is a form of alternative dispute resolution provided for by the ICANN Bylaws. ER 731-32.

GAC. *Id.* At the time of the IRP, DCA's application had not passed the Geographic Names Panel. *Id*.

Importantly, DCA acknowledged during the IRP proceeding that it lacked the required support of the African governments. ER 816. In issuing its final ruling, the IRP Panel noted that DCA expressly requested a finding that DCA "be granted a period of no less than 18 months to obtain Government support as set out in the [Guidebook] and interpreted by the Geographic Names Panel, or accept that the requirement is satisfied as a result of the endorsement of DCA Trust's application by UNECA." ER 816.

In its "Final Declaration" issued on July 9, 2015, the IRP Panel ruled in favor of DCA on the limited procedural basis that the GAC consensus advice lacked transparency. ER 806-07. Essentially, the IRP panel expressed concern that ICANN should have "investigate[d] the matter further" before halting DCA's application. ER 814. However, notwithstanding DCA's request that the IRP panel make findings of wrongdoing between ICANN and ZACR, the IRP panel expressly declined to make any such findings. ER 815. Further, the IRP panel did not grant DCA's request that it be given additional time to obtain the necessary government support within Africa, and similarly declined to "deem" this requirement as having been satisfied. ER 822-24. Rather, the IRP panel recommended only that ICANN allow DCA's application to proceed back through

the process. ER 822-23 (ICANN should "continue to refrain from delegating the .AFRICA gTLD and permit [DCA's] application to proceed through the remainder of the new gTLD application process.") ICANN's Board abided the recommendation and, in July 2015, placed DCA's application back to the precise point in the process where it had been halted – the Geographic Names Panel. ER 637-38.

F. DCA's Inability to Meet the Requirement for .Africa

As mandated by ICANN's Guidebook, the Geographic Names Panel is operated by a third party vendor retained by ICANN. It verifies the relevance and authenticity of an applicant's documentation to meet the requirement that it have the support of at least 60% of the governments, and no more than one objection by a government, in a geographic region. ER 928.

Here, the third party vendor determined that DCA failed to submit the required documentation demonstrating that it had 60% support.[3] ER 638, 1353-54. When confronted with follow-up questions to address this fundamental deficiency, DCA was unable to comply because it was relying on an outdated and expressly repudiated AUC letter. ER 638, 1367. As a consequence, on October 13, 2015, ICANN issued an Initial Evaluation Report advising DCA that its application had

[3] It should also be noted that ICANN received 17 "Early Warning Notices" from individual African countries raising significant concerns about DCA's application. ER 226, 246-324.

not passed the Geographic Names Review, but that DCA was eligible for an "Extended Evaluation" as provided for in the Guidebook. ER 638, 1353-54.

The Extended Evaluation resulted in the same problem. After sending DCA a letter advising that the 2009 AUC letter was insufficient given that the AUC expressly repudiated its support, DCA failed to provide any additional information. ER 638.

That the governments of Africa did not support DCA's application is undisputed, as set forth in an AUC letter dated September 29, 2015:

> To be clear, the application submitted by ZA Central Registry (ZACR) . . . is the only application officially endorsed by the AUC and hence African member states. The AUC officially endorsed the ZACR application in our letter dated 4 April 2012, which was followed by our letter of support dated 2 July 2013.
>
> ***
>
> Any reliance by DCA in its application . . . proclaiming support or endorsement by the AUC must be dismissed. The AUC does not support the DCA application and, if any such support was initially provided, it has subsequently been withdrawn with the full knowledge of DCA even prior to the commencement of ICANN's new gTLD application process.

ER 235-36.

Similarly, the United Nations Economic Commission for Africa ("UNECA"), one of the five regional commissions set up by the United Nations to promote the economic and social development of its member states, wrote to

ICANN on September 21, 2015 to advise that, contrary to DCA's statements, UNECA was not qualified to support DCA's application:

> [UN]ECA as a United Nations entity is neither a government nor a public authority and therefore is not qualified to issue a letter of support for a prospective applicant . . . It is [UN]ECA's position that the August 4, 2008 letter to Ms. Bekele cannot be properly considered as a "letter of support or endorsement" within the context of ICANN's requirements and cannot be used as such.

ER 1321-23.

Without the requisite support of the African governments, DCA could not meet ICANN's Guidebook requirements. Accordingly, on February 17, 2016, ICANN notified DCA that its application would not proceed. ER 639, 1367. Thereafter, on March 3, 2016, ICANN's Board voted to proceed with the delegation of .Africa to ZACR, which had properly completed all stages of processing. ER 639.

G. DCA's Lawsuit and Service on ZACR

DCA filed its initial Complaint in the Los Angeles Superior Court on January 20, 2016. ER 1569. In that initial Complaint, DCA only named ICANN as a defendant. After the Superior Court denied DCA's request for a temporary restraining order precluding ICANN from delegating .Africa, ICANN removed the initial Complaint to the federal district court on February 8, 2016. ER 1568-1656. On February 26, 2016, DCA filed a First Amended Complaint adding ZACR as a co-defendant with ICANN. ER 1538-67. DCA asserted claims for breach of

contract, intentional and negligent misrepresentation, fraud and conspiracy to commit fraud, unfair competition, negligence, intentional interference with contract, confirmation of the IRP Declaration, and three claims for declaratory relief. ER 1551-65. Only four of these claims were asserted against ZACR: (1) fraud and conspiracy to commit fraud; (2) declaratory relief; (3) intentional interference with contract; and (4) California Business and Professions Code section 17200. ER 1558-63.

On March 9, 2016, DCA filed a motion requesting permission to serve ZACR via a special mail service in South Africa. ER 1729-31. The district court granted that request on March 10, 2016. ER 1727-28. On March 22, 2016, DCA served ZACR with the operative complaint in South Africa (ER 1724) – but only *after* DCA and ICANN had completed briefing the preliminary injunction papers, as addressed below.

H. The Preliminary Injunction Motion

On March 1, 2016, DCA filed a motion for preliminary injunction. ER 1509-35. DCA's motion for preliminary injunction was predicated only on its Ninth Cause of Action, which sought a declaration that ICANN "follow" the IRP Declaration and "allow . . . DCA's application to proceed through the remainder of the [new gTLD] application process." ER 1523, 1525. DCA argued that it was likely to prevail because ICANN "refused to follow the IRP ruling," and allegedly

placed "DCA back to the start of the application" process rather than permitting it to proceed through the "remainder" of the process. ER 1526.

With respect to irreparable harm, DCA asserted that if ICANN delegated .Africa to ZACR then the "rights to .AFRICA cannot be issued again," even if the district court were ultimately to rule in favor of DCA. ER 1527-28. DCA further suggested that the balance of equities and public interest factors favored an injunction because of the importance of "fair and transparent application processing." ER 1529.

ICANN filed its opposition on March 14, 2016. Among other things, ICANN proffered evidence showing that DCA had no likelihood of success on the merits because: (1) DCA's lawsuit is barred by the Covenant Not to Sue in the Guidebook; and (2) ICANN fully complied with the IRP Panel's decision. ICANN also noted that DCA failed to demonstrate irreparable harm, and that the balance of equities and public interest weighed against granting the motion.

DCA filed its reply in support of the preliminary injunction motion on March 21, 2016.

I. The District Court's Preliminary Injunction Ruling

On April 12, 2016, the district court, without oral argument, granted DCA's motion for preliminary injunction. First, the district court held that "serious

questions" were raised as to the enforceability of the Covenant Not to Sue,[4] and DCA's likelihood of success. Specifically, the court ruled that "[b]ecause ICANN found DCA's application passed the geographic names evaluation in the July 2013 evaluation report, the Court finds serious questions in DCA's favor as to whether DCA's application should have proceeded to the delegation stage following the IRP Decision." ER 45.

Second, the district court ruled that DCA had established the threat of irreparable harm and the balance of equities because ".AFRICA can be delegated only once," and "only one entity can operate .AFRICA." ER 46. The district court also concluded that money damages could not "fully compensate" DCA for losing the opportunity to operate .Africa. ER 46.

Third, with respect to public interest factors, the district court focused on the need for the "fair and transparent application process that grants gTLD rights." ER 46. The district court accorded "little weight" to the declaration submitted by the AUC outlining the ongoing harm to the African people. ER 46-47. Without citing to any evidence, the district court announced that the concerns presented by the representative of the African people should be dismissed because, in the court's

[4] The district court's ruling on the Covenant Not to Sue is fully addressed in ICANN's opening brief, filed on June 29, 2016.

view, the "AUC's relationship with ZACR . . . creates a conflict of interest." ER 47.

J. ZACR's Motion to Dismiss

As noted above, ZACR was not served in South Africa with the operative complaint until after the briefing on the preliminary injunction had been completed. On April 26, 2016, ZACR moved to dismiss for failure to state a claim. *See* ER 1665. On June 14, 2016, the district court granted ZACR's motion to dismiss. ER 48-52.

The district court held that DCA's complaint was deficient as to ZACR because: (1) the fraud and conspiracy to commit fraud claim failed to allege false representations by ZACR, intent to induce reliance, or reasonable reliance by ZACR; (2) the intentional interference claim was only predicated upon conduct showing that ZACR sought to successfully prevail in the competition for .Africa; (3) the 17200 claim failed for the same reasons as the other claims; and (4) the declaratory relief claim failed because DCA had not alleged any viable substantive claims against ZACR, and any need for declaratory relief could be adjudicated against ICANN. ER 48-52. The district court did not address DCA's request for leave to amend. ER 48-52.

K. ZACR's Motion for Reconsideration

On May 6, 2016, ZACR filed a motion to vacate/ reconsider the preliminary injunction order. ER 199-220. ICANN filed a joinder to that motion on May 10, 2016. ER 197-98. ZACR asserted that reconsideration was warranted for at least the following reasons:

(1) The district court's ruling was predicated upon a key factual error that infected the district court's analysis of DCA's likelihood of success Specifically, the district court erroneously concluded that DCA had passed the Geographic Names Panel when, in fact, all parties concede it had not. Because, on a corrected record, DCA could not demonstrate support from 60% of the governments within Africa, ZACR argued that DCA had no likelihood of success on the merits. ER 214-15.

(2) The district court's ruling was further predicated upon the erroneous assumption, induced by DCA's improper assertion in its moving papers, that DCA would suffer irreparable harm without the injunction because .Africa "can be delegated only once." As set forth in ZACR's moving papers and supporting declarations, including a declaration from ICANN's President, the transfer of a gTLD is not only feasible but has occurred on dozens of occasions. ER 96-97, 215-16, 228, 326-338, 63-81, 83-92.

(3) In evaluating the balance of harms, the district court's prior ruling necessarily failed to take into account the significant harm to ZACR. On an augmented record, ZACR proffered evidence showing that the delay in delegation was costing it approximately $20,000 per month, and the estimated lost opportunity costs through May 1, 2016, exceeded $15 million. ER 226-27, 54-55, 1750-52. ZACR further noted that approximately $5.5 million of that lost opportunity cost would have been earmarked for a charity for the public interest in Africa. ER 227. Further, ZACR's papers provided additional support for the significant and ongoing harm to the people of Africa as they continue to be deprived of the .Africa gTLD. ER 218-19, 227, 632-33.

(4) Finally, ZACR argued that, at a minimum, DCA should be required to post a significant bond. ER 219-20.

On May 16, 2016, DCA filed its opposition conceding that the district court had erred in finding that DCA had passed the Geographic Names Panel. ER 1705. However, DCA argued, albeit without proper evidentiary support, that the error was not material because it "should have passed" the geographic names evaluation process. ER 1705-06. And while further conceding that redelegation of the .Africa gTLD might be a "technical" possibility, DCA sought to sidestep the district court's review by suggesting that, apart from the Geographic Names Panel error, the other points raised in ZACR's motion should be discarded on procedural

grounds. ER 1710, 1713-14. Essentially, DCA suggested that even though ZACR had not been served until after DCA and ICANN had completed briefing the motion for preliminary injunction, ZACR might have sought leave to participate before the district court issued its ruling on April 12, 2016. ER 1710, 1713-14.

In its reply filed on May 23, 2016, ZACR highlighted the significant concessions made by DCA as to the errors underlying the district court's injunction ruling. ER 1690-1700. ZACR further observed that DCA created the timing issues that it was now complaining about. ER 1699-1700. When DCA chose to add ZACR as a party defendant to the First Amended Complaint, DCA knew that ZACR was a South African non-profit company, knew (or should have known) that South Africa is not a signatory to the Hague Convention, and knew that service would take time. ER 1699-1700. It was DCA that set the briefing schedule on the preliminary injunction. And while the district court issued an order on March 10, 2016 allowing for special service on ZACR in South Africa, DCA chose not to serve ZACR until March 22, 2016 – the day after briefing was complete on the preliminary injunction motion. ER 1699-1700.

L. The District Court's Denial of the Motion to Vacate/Reconsider

On June 20, 2016, the district court, without oral argument, issued its ruling denying the motion to vacate/ reconsider the preliminary injunction order. ER 21-24. As a threshold matter, the court ruled that the motion was moot as to ZACR

because of its intervening order granting ZACR's motion to dismiss. ER 21. Therefore, treating the motion as having been filed by ICANN alone, the court acknowledged the error in finding that DCA had passed the Geographic Names Panel. ER 22-23. However, the court held that "there still exists serious questions going to whether Plaintiff had acquired a sufficient number of endorsements to have passed the geographic names evaluation process in the first instance." ER 23. In so ruling, the district court did not cite to any evidence supporting such an assertion, and never addressed the undisputed evidence showing that the AUC did not endorse DCA's application. ER 1314, 632-33, 235-36, 526-30. The district court instead referenced only the IRP panel's statement that ICANN's actions as to the GAC proceeding "were inconsistent with the Articles of Incorporation and bylaws of ICANN." ER 23. The court then concluded, "at this stage of the litigation, it is reasonable to infer that the IRP Panel found that ICANN's rejection of Plaintiff's application at the geographic names evaluation phase was improper, and that the application should proceed to the delegation phase." ER 23. The court ruled that its earlier error "was not determinative" and that DCA had still shown "serious question" as to the merits. ER 23.

The district court, again relying on its threshold ruling that the motion as to ZACR was moot, then rejected the irreparable harm and balance of equities arguments. The court noted that ICANN had not argued in its original motion that

.Africa could be redelegated. ER 23. The court further suggested, without deciding the issue, that "even if ZACR was still in the action, there is a substantial question" as to whether the court should consider ZACR's opposition due to the timing of its brief. ER 23. The court concluded that even if the evidence correcting the state of the record of irreparable harm was considered, "there is still adequate evidence provided by Plaintiff (i.e., loss of business funding, etc.) to find irreparable injury on the part of Plaintiff." ER 23. The court also posited in a footnote, without providing any analysis or deciding the issue, that "[e]ven if ZACR was still a party to the action, there are substantial questions as to whether ZACR's stated damages are unavoidable, and whether ZACR's lost profits are too speculative to form the basis for security." ER 23.

V.

STANDARD OF REVIEW

This Court applies an abuse of discretion standard in reviewing an order granting a preliminary injunction. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009). The order "should be reversed if the district court based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Id*. (internal quotes omitted). Similarly, this Court reviews an order denying a motion to vacate a preliminary injunction and the determination as to the appropriateness of the security required by Rule 65(c) for abuse of discretion.

Credit Suisse First Boston Corp. v. Grunwald, 400 F.3d 1119, 1126 n. 7 (9th Cir. 2005) (order denying motion to dissolve injunction reviewed for abuse of discretion); *Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009) (determination of appropriateness of bond reviewed for abuse of discretion). A district court abuses its discretion when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact. *ACF Indus. v. Cal. State Bd. Of Equalization*, 42 F.3d 1286, 1289 (9th Cir. 1994). Where the district court bases its decision on an erroneous legal standard, this Court reviews *de novo* any underlying issues of law. *Grunwald*, 400 F.3d 1126, n. 7.

A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7, 22 (2008). A plaintiff seeking a preliminary injunction must establish: (1) likelihood of success on the merits; (2) likelihood of suffering irreparable harm in the absence of the preliminary relief; (3) the balance of equities between the parties tips in favor of the plaintiff; and (4) the injunction is in the public interest. *Id*. at 20.

This Court also utilizes a "sliding scale" test to address the propriety of a preliminary injunction. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). Under that formulation, a preliminary injunction is appropriate 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." *Id*. (citation omitted). However, this Court has also made clear that all four prongs of the *Winter* test must be met. *Id*. at 1135. Moreover, a plaintiff "must establish that irreparable harm is likely, not just possible, in order to obtain a preliminary injunction." *Id*. at 1131 (citing *Winter*). *See also* Moore's Federal Practice 13-65, ¶ 65.22.

VI.

SUMMARY OF ARGUMENT

The district court's rulings granting and maintaining the preliminary injunction were clearly erroneous.

First, as a threshold matter, the district court erred in failing to consider ZACR's motion to vacate/ reconsider the preliminary injunction order. Whether a party defendant or not, the law is clear that ZACR, which is directly impacted by the order, has standing to challenge the injunction.

Second, the district court erred in finding "serious questions" as to the merits of DCA's claim. The entire basis for the district court's ruling on the merits was predicated upon a factual error – that DCA had passed the Geographic Names Panel. The district court, while acknowledging its original error, has now made an even more egregious error by "inferring" that the IRP Panel must have intended for DCA's application to bypass the geographic names evaluation phase and "proceed

to the delegation phase." ER 23. In fact, the record shows just the opposite – the IRP Panel expressly rejected DCA's request on this very issue. Thus, as a matter of law, it was error for the district court to "infer" a ruling that the IRP expressly disavowed. It is especially problematic because the record is undisputed that DCA has never had the support of the AUC at any point during this application process. Yet, the district court's ruling repeatedly ignores the preference of the sovereign governments representing the people of Africa.

Third, the district court erred in finding that DCA would suffer irreparable harm without the injunction. The record evidence shows that DCA's assertion on this point was false. ICANN has the power to redelegate the .Africa gTLD in the event DCA prevails in the litigation. Therefore, DCA cannot meet the legal standard for irreparable harm.

Fourth, the district court erred in failing to undertake the required analysis for the balance of equities. Under controlling case law, the district court was required to at least consider the harm to ZACR. Similarly, the district court erred when it failed to properly consider the evidence of harm to the African people, and instead disregarded the declaration submitted by the representative of the AUC.

Finally, the district court failed to properly consider whether DCA should be required to post a bond. An evaluation is normally mandatory under Federal Rule

of Civil Procedure 65(c) and here, at a minimum, a bond should have been required.

VII.

ARGUMENT

A. The District Court Erred In Failing to Consider ZACR's Motion

As a threshold matter, the district court erred in denying ZACR's motion to vacate/ reconsider the preliminary injunction as moot. Specifically, the district court held that since it had granted ZACR's motion to dismiss a few days earlier, ZACR's role as a party had been "extinguished," and therefore its analysis of the motion would be limited "only as it pertains to ICANN." ER at 21. This ruling was in error.[5] Any person or entity affected by a preliminary injunction can seek an order modifying or vacating it, including a party to whom the injunction was not initially directed. *United States v. Bd. of School Comm'rs. of City of Indianapolis*, 128 F.3d 507, 511 (7th Cir. 1997); see *also* William W. Schwarzer, *et al*., Federal Civil Procedure Before Trial ¶ 13:213, at 13-115.

Thus, where, as here, a non-party continues to be impacted by the scope of the preliminary injunction order, the law is clear that the non-party – like ZACR – has standing to challenge the injunction. *See e.g, Hilao v. Estate of Marcos*, 94

[5] DCA itself never argued that ZACR would lack standing if the district court granted ZACR's motion to dismiss.

F.3d 539, 544 (9th Cir. 1996) (non-party has standing to challenge injunction if bound by its terms); *see also NAACP v. N. Hudson Reg'l Fire & Rescue*, 707 F. Supp. 2d 520, 544 (D.N.J. 2010) (interested third party rights of intervenors should be considered because appellate court "takes into account the possibility of harm to other interested persons from the grant or denial of the injunction") (citing cases). ZACR further has standing as a dismissed party to challenge the injunction on appeal. *See Brown v. Bd. of Bar Examiners*, 623 F.2d 605, 608 (9th Cir. 1980) (party dismissed from action entitled to appeal where injunctive relief granted against their interest); *see also In re Piper Funds, Inc. Inst. Gov't Income Portfolio Litig.*, 71 F.3d 298, 301 (8th Cir. 1995) ("A nonparty normally has standing to appeal when it is adversely affected by an injunction.") By refusing to consider the motion as to ZACR, the district court improperly sidestepped the very serious issues raised by ZACR – the party most directly impacted by the Court's preliminary injunction order (apart from the people of Africa as addressed below).

Nor is there merit to the district court's passing observation in a footnote that "even if ZACR was still in the action, there is a substantial question" as to whether ZACR filed its motion in a timely manner.[6] ER 23. First, as a matter of law, there is no time limit with respect to a motion to vacate or dissolve a preliminary

[6] Although the district court raised the timeliness question, it should be noted that it made no actual finding on this point. ER 23.

injunction under Fed. R. Civ. P. 54(b). *Grunwald*, 400 F.3d at 1123-24. Second, even if ZACR's motion had been treated as a motion for reconsideration of the Court's Order granting the preliminary injunction, ZACR timely filed within the 28 days mandated by Fed. R. Civ. P. 59(e). The district court issued its ruling on April 12, 2016, and ZACR filed its motion on May 6, 2016.

Finally, the implication that ZACR was dilatory is simply without basis. DCA waited to serve ZACR in South Africa until March 22, 2016 – the day after all briefing had been submitted on DCA's preliminary injunction motion. ER 1724. With no business operations or other ongoing connections to California, ZACR understandably needed time to assess its legal rights, including a potential challenge to personal jurisdiction. The district court issued its preliminary injunction ruling on April 12, 2016. ER 40-47. By April 29, 2016, ZACR's counsel held the required meet and confer with DCA's counsel to advise that ZACR would be filing a motion to vacate/ reconsider the preliminary injunction order. ER 222. Pursuant to Central District Local Rule 7-3, ZACR then had to wait an additional seven days before filing its motion on May 6, 2016. Under the circumstances, the time frame for ZACR's filing was eminently reasonable.[7]

[7] DCA's suggestion to the contrary is specious. It was DCA that set the time frame for the preliminary injunction hearing. It was DCA that withheld serving ZACR with the complaint until after the briefing had been complete. And it was DCA that provided inaccurate information to the court, as addressed more fully below, that required ZACR to file the motion in the first instance.

B. The District Court Erred In Finding Serious Questions As to DCA's Likelihood of Success on the Merits

The district court has repeatedly erred in finding that DCA has a likelihood of success on the merits. In its April 12, 2016 ruling, the district court misread the record when it asserted that DCA had already passed the Geographic Names Panel. ER 45. All parties, including DCA, concede that the district court's ruling was erroneous. ER 1705. The cited reference in the district court's original decision actually reflects that ZACR, not DCA, passed the Geographic Names Panel. ER 1495-96. This error was critical because the undisputed record shows that DCA never had the support of 60% of the African countries at any time during the actual application process for the .Africa gTLD. ER 1314, 235-36, 632-33, 526-31. Without that support, DCA cannot meet the express requirements of the Guidebook (ER 928), and therefore DCA has no likelihood of succeeding on the merits.

When presented with this key misstatement, the district court acknowledged the error. ER 22-23. But then, in its June 20, 2016 ruling, the district court committed an even more egregious error. The district court ruled that DCA still had a likelihood of success on the merits because, "… it is still reasonable to infer that the IRP Panel found that ICANN's rejection of Plaintiff's application at the geographic names evaluation phase was improper, and that the application should

proceed to the delegation phase." ER 23. The record makes clear that this "inference" is wrong.

First, the district court's ruling assumes a timeline that is expressly contradicted by the evidence. At the time DCA's application was halted in 2013, the record is undisputed that the Geographic Names Panel had not yet completed its evaluation of DCA's support within Africa. ER 637. Thus, contrary to the district court's finding, the IRP Panel could not have adjudicated "ICANN's rejection of Plaintiff's application at the geographic names evaluation phase" – ICANN's rejection did not occur until February 2016, ***more than 6 months after the IRP Panel had issued its Final Declaration on July 9, 2015***. ER 638-39.

Second, the district court's "inference" is also expressly contradicted by the IRP Panel's July 9, 2015 ruling. In paragraph 119 of the IRP Final Declaration, the Panel noted that DCA expressly requested a finding that DCA "be granted a period of no less than 18 months to obtain Government support as set out in the [Guidebook] and interpreted by the Geographic Names Panel, or accept that the requirement is satisfied as a result of the endorsement of DCA Trust's application by UNECA." ER 816. The IRP Panel declined to rule on DCA's request and limited its ruling to the GAC transparency issue. ER 822-24. In so doing, the IRP Panel rejected DCA's request to address other issues, stating that "[the Panel] does not find it necessary to determine who was right, to what extent and for what

reasons in respect to the other criticisms and other alleged shortcoming of the ICANN Board identified by DCA Trust." ER 815. Thus, the express language of the IRP Panel's ruling repudiates the type of inference that the district court erroneously suggests can be gleaned from the Final Decision.

In the end, the district court's ruling simply cannot be squared with the undisputed factual record. The record exhaustively shows that, throughout this application process, DCA never had the necessary 60% support of the governments within the African Union. ER 1314, 235-36, 632-33, 526-31. The AUC repeatedly made its views clear on this – noting yet again in September 2015 that only ZACR has the support of the "AUC and hence member African member states," while "[t]he AUC does not support the DCA application." ER 235-36. DCA's reliance on a letter from UNECA has been similarly repudiated. ER 1321-23. DCA has no likelihood of prevailing on the merits. *Winter*, 555 U.S. at 22. Accordingly, the district court's preliminary injunction order should be vacated.

C. The District Court Erred in Finding That DCA Would Suffer Irreparable Harm

In its original ruling on the likelihood of irreparable harm, the District Court relied upon DCA's incorrect statement that ".Africa can be delegated only once." ER 46. ZACR pointed out in its motion that this finding was erroneous because DCA's representation was false. The redelegation of a gTLD is not only

technologically feasible, but ICANN has actually done so over 40 times from one registry operator to another. ER 97, 63-81, 83-92. As ICANN's President explained in a declaration supporting ZACR's motion, "[a] transfer or assignment of a gTLD such as .Africa is possible, feasible and consistent with ICANN's previous conduct." ER 97. Indeed, ICANN previously published a manual with step-by-step instructions outlining the process for redelegating a gTLD like .Africa. ER 228, 325-38.

Notwithstanding this overwhelming evidence showing that the predicate for the district court's earlier ruling was in error, and that DCA cannot demonstrate a likelihood of irreparable harm (*Cottrell*, 632 F.3d at 1131), the district court stood by its erroneous ruling. ER 23. The district court noted that ICANN had not raised the redelegation point in its initial papers, and maintained the view that since ZACR had been dismissed from the litigation it lacked standing to make the argument. *Id.* However, as addressed above, the district court's ruling as to ZACR's standing was in error. ZACR is constrained by the injunction and retains a valid interest in seeking to have the injunction vacated. [8]

[8] It was in the discussion of irreparable harm that the district court observed in a footnote that "even if ZACR was still in the action, there is a substantial question as to whether ZACR's failure to even attempt to submit an opposition places it in the same situation as ICANN." ER 23. First, as noted above, ZACR has standing regardless of whether it is a party or non-party. Second, and as stated more fully

The district court's only observation on the merits was to suggest that even if .Africa could be redelegated, "there is still adequate evidence provided by Plaintiff (i.e., loss of business funding, etc.) to find irreparable injury on the part of Plaintiff." ER 23. This too is wrong as a matter of law. The court appears to rely upon the conclusory statement by DCA's principal that "[i]f .AFRICA is delegated to ZACR before this case is resolved[,] DCA will likely be forced to stop operating due to a lack of funding." ER 99. Case law is clear that such a conclusory assertion cannot constitute irreparable injury sufficient to support the granting of a preliminary injunction. *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) ("[s]peculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction"); *see also Rubin ex rel. NLRB v. Vista Del Sol Health Servs., Inc.*, 80 F. Supp. 3d 1058, 1100 (C.D. Cal. 2015) (speculative injury is not enough to support a preliminary injunction; plaintiff must proffer probative evidence that the threatened injury is imminent and irreparable). Further, DCA's suggestion that it might lose funding is not sufficient to support injunctive relief. *See Los Angeles Mem'l Coliseum Comm'n v. NFL*, 634 F.2d 1197, 1202 (9th Cir. 1980) (economic injury not sufficient for irreparable harm); *Amylin Pharms., Inc. v. Eli Lilly & Co.*, 456 F. App'x 676, 678 (9th Cir.

herein at 29-30, ZACR's motion was timely – whether evaluated as a motion to vacate (no time limit) or a motion to reconsider (28 days).

2011) (affirming denial of preliminary injunction because "harm that is fully compensable through money damages . . . does not support injunctive relief"); 13-65 Moore's Federal Practice ¶ 65.22 n.5.

Because the record is unequivocal that the district court's ruling on irreparable harm is predicated upon an untrue statement proffered by DCA, the injunction should be vacated.

D. The District Court Erred In Its Assessment of The Balance of Harms

In its original ruling on the balance of harms, the district court also relied upon DCA's erroneous assertion that .Africa could only be designated once, and that "[DCA"s] opportunity to obtain the rights to .Africa would be forever gone." ER 46. The district court's original ruling was in error because, as stated more fully above, .Africa can be redelegated. ER 97, 228, 325-38, 62-92.

In its June 20, 2016 ruling, the district court observed that as between DCA and ICANN, it believed that DCA's potential "loss of business funding, etc." was still sufficient to support its original finding on the balance of hardships. ER 23. The district court's ruling was in error because the district court failed to properly take into account the harm to ZACR notwithstanding case law holding that the impact on all parties, and even affected non-parties, must be considered. *See*, *e.g.*, *Los Angeles Mem'l Coliseum*, 634 F.2d at 1203 (mandating that in evaluating

preliminary injunction court must evaluate harm to defendant); *Atari Corp. v. Sega of America, Inc.*, 869 F. Supp. 783, 792 (N.D. Cal. 1994) (holding that harm to affected third party companies must be taken into account in either balancing the harms or weighing the public interest). ZACR has incurred, and will continue to incur, great financial costs with no attendant benefits while this litigation ensues.[9] ZACR proffered evidence of $15 million in lost opportunity costs, including $5.5 million that would be given to charity to benefit online development within Africa. ER 226-27, 54-55, 1750-52. Additionally, ZACR is incurring ongoing costs of approximately $20,000 per month related to marketing and maintaining the visibility of the .Africa project. ER 226, 54, 1750-52. Where, as here, the evidence, properly considered, makes clear the harm to ZACR outweighs the harm to DCA, the injunction should be vacated. *See MacDonald v. Chicago Park Dist.*, 132 F.3d 355, 361, 363 (7th Cir. 1997) (vacating preliminary injunction because harm to defendant outweighed impact on plaintiff); *Atari*, 869 F. Supp. at 792 (harm to defendant and non-parties outweighs harm to plaintiff); *ATCS Int'l LLC v. Jefferson Contracting. Corp*., 807 F. Supp. 2d 516, 519 (E.D. Va. 2011) (finding

[9] Once a gTLD is delegated it starts increasing in value. ER 227. The gTLD is at its lowest value prior to delegation and increases as the number of second level domain delegations (e.g., xyz.africa) increases. *Id.* If DCA prevails, and ICANN ultimately were to redelgate .Africa from ZACR to DCA, DCA will suffer no irreparable harm because it will actually inherit a more valuable gTLD without incurring the cost to develop it. *Id*.

that the balance of equities and public interest did not weigh in favor of preliminary relief where non-parties would be harmed).

E. The Court Erred In Failing To Properly Consider the Interests of the People of Africa

The same error – that .Africa can be delegated only once – also infected the district court's evaluation of whether the public interest would be served by the injunction. The district court determined that it would be "more prejudicial to the African community, and the international community in general, if the delegation of .Africa is made prior to a determination on the fairness of the process." ER 46-47. The district court's analysis is flawed for at least four reasons.

First, as fully addressed above, the court's fundamental assumption that redelegation is not possible is wrong.

Second, the court's concern about a lack of transparency is without evidentiary support. The predicate for this litigation, and the reason ICANN ultimately rejected DCA's application, is because DCA could not meet the Guidebook requirement that DCA have support from at least 60% of the countries in the geographic region. ER 928, 637-39, 225-26. This threshold requirement was known to DCA – and all applicants – from the outset of ICANN's launch of the "New gTLD Program" in 2012. ER 928. DCA has known at all times that it

lacked the proper support of the AUC; accordingly, there is no lack of transparency.[10]

Third, the district court erred in according virtually no weight to the declaration submitted by the AUC, in which a top official charged with information technology for the continent explained the ongoing harm to the African people as a result of the delay in the delegation of .Africa. ER 526-31. There was no basis for the district court to find that the AUC had a "conflict" simply because it supports ZACR's application.[11] Indeed, case law provides that under the act of state doctrine, a district court should give deference to the official position of foreign state representatives. *See, e.g.*, *Int'l Ass'n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354, 1360 (9th Cir. 1981) (act of state doctrine applied to commercial activities of OPEC because, notwithstanding

[10] It should be noted that DCA misleadingly suggested to the district court that the IRP Panel findings support a lack of transparency as related to DCA's rejection by the Geographic Names Panel. The IRP Panel discussed transparency only with regard to the acceptance of GAC advice. ER 800-15. The panel did not find that the Geographic Names Panel acted, erred, or lacked transparency – and could not because, as noted, DCA's application had not completed processing at the time of the IRP. ER 637.

[11] As noted, the AUC decided to hold an RFP to support a qualified applicant for .Africa. ER 529, 225-26. The AUC announced at the time that this was an open bid process but that it would only support one applicant. *Id*. DCA was well aware of the RFP. ER 1314. And it is undisputed that DCA chose not to participate in that process. ER 529, 225-26.

allegations of price fixing, "courts must proceed cautiously to avoid an affront to [foreign] sovereignty.")

Fourth, the district court erred in refusing to consider ZACR's evidence of public harm. ZACR provided evidentiary support for why the delay in delegating .Africa continues to deprive the African people of a domain name that would add value to products, business and interests in Africa. ER 530-31, 227, 632-33. Importantly, ZACR also submitted evidence that a significant portion of the revenues received from .Africa will be directed to a charitable foundation to support various African domain name and internet-related developmental projects. ER 227, 530-31. ZACR projects that the delay in delegating the .Africa gTLD has prevented a projected $5.5 million in revenues that would have been earmarked for this charitable foundation. *Id.*

In short, the record shows that the district court erred in failing to properly take into account the harm to the people of Africa. The ongoing delay in delegating .Africa is causing real and negative consequences to the African people – which are now exacerbated by the preliminary injunction ruling.

F. The District Court Failed to Properly Assess Whether DCA Was Required To Post A Bond

Although ZACR maintains that the injunction should be vacated, the district court also failed to properly address ZACR's alternative request that DCA be

required to post a bond. Instead, the court ruled that ICANN had not raised the argument in its initial papers, and that ICANN "provided no evidence of costs or damages it will suffer if it is found to have been wrongfully enjoined." ER 23. However, ZACR provided evidence of significant harm. Accordingly, because ZACR retained standing to challenge the preliminary injunction (*see* discussion *supra* at 27-29), the district court should have properly addressed ZACR's request. *See, e.g.*, *Timken v. U.S.*, 569 F. Supp. 65, 82-83 (Ct. Int'l Trade 1983) (holding that, pursuant to FRCP 65(c), nonparty intervenor directly impacted by injunction has standing to seek security).[12]

Had the district court engaged in an analysis under Federal Rule of Civil Procedure 65(c), the record is clear that, if the injunction were maintained, DCA should have been required to post a significant bond. While the district court maintains discretion in setting the bond amount, courts generally excuse a bond only in "exceptional cases." *Frank's GMC Truck Ctr., Inc. v. General Motors Corp.*, 847 F.2d 100, 103 (3d Cir. 1988) (bond is "almost mandatory"). This is not an exceptional case.

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[12] The case law is sparse on this issue. However, the equitable considerations set forth in *Timken* apply with equal force here. *Timken*, 569 F. Supp. at 82-83 (holding that nonparty with interest "is entitled to security where, as here, it is plainly evident that it will have suffered a compensable loss -- the use of the monies held by the government as duties -- in the event the government [party defendant] is found to have been wrongfully enjoined.") Here, the record is undisputed that the district court's preliminary injunction directly impacts ZACR.

ZACR has proffered evidence of estimated losses based upon the projected number of likely domain name registrations for the first 2 years after delegation, and estimated revenue based on those numbers, minus costs and income tax. ER 226-27, 54-55, 1750-52 This is entirely proper under the controlling case law. *See Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc.*, 16 F.3d 1033, 1039 (9th Cir. 1994) (affirming award to defendant of entire bond amount set at $15 million by district court); *Netlist Inc. v. Diablo Techs., Inc.*, No. 13-cv-05962-YGR, 2015 U.S. Dist. LEXIS 3285, at *39-40 (N.D. Cal. Jan. 12, 2015) (bond required based on estimate of lost net profits due to preliminary injunction).[13] Moreover, DCA itself submitted evidence suggesting that it may be unable to pay a cost bill in the event defendants ultimately prevail – thereby further warranting the necessity of a bond. ER 99. In this circumstance, if this Court does not vacate the injunction, then DCA should be required to post significant security.

[13] In a footnote, the district court observed (as noted) that "[e]ven if ZACR was still a party to the action, there are substantial questions as to whether ZACR's stated damages are unavoidable, and whether ZACR's lost profits are too speculative to form the basis for a security." ER 23. The court's observation is not supported by the evidentiary record or the controlling case law that expressly provides that a security is based upon the defendant's estimated lost profits.

VIII.

CONCLUSION

The district court erred in denying ZACR's motion to vacate/ reconsider the preliminary injunction order. The record shows that DCA failed to satisfy any of the requirements for a preliminary injunction. Accordingly, the district court's order should be reversed and the preliminary injunction vacated.

Dated: July 22, 2016

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellant ZACR submits that ICANN's appeal, No. 16-55693, is related to this appeal. ICANN's appeal and the instant appeal arise out of the same case in the district court and both ICANN and ZACR appeal from the same orders. These cases were consolidated by order of this Court on July 18, 2016. ER 1669-71. Appellant ZACR is not aware of any other related cases.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,717 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App.P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013's 14-point font Times New Roman.

Dated: July 22, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2016, I electronically filed the foregoing document described as ***APPELLANT ZA CENTRAL REGISTRY, NPC'S OPENING BRIEF*** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Melinda Quiane
Melinda Quiane