

No. 16-55693

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DOTCONNECTAFRICA TRUST,

Plaintiff/Appellee,

v.

**INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS, *et al.***

Defendant/Appellant.

On Appeal from the United States District Court
for the Central District of California, No. 2:16-CV-00862-RGK
The Honorable R. Gary Klausner

APPELLANT'S OPENING BRIEF

Craig E. Stewart
JONES DAY
555 California Street, 26th Floor
San Francisco, CA 94104
Telephone: (415) 626-3939

Jeffrey A. LeVee
Rachel T. Gezerseh
Charlotte Wasserstein
JONES DAY
555 South Flower Street
Fiftieth Floor
Los Angeles, CA 90071.2300
Telephone: (213) 489-3939

Attorneys for Defendant/Appellant
INTERNET CORPORATION
FOR ASSIGNED NAMES AND
NUMBERS

CORPORATE DISCLOSURE STATEMENT

The Internet Corporation for Assigned Names and Numbers has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

The district court granted a preliminary injunction based on what the court has now acknowledged was a clear factual error. Then, the court denied reconsideration based on a new but equally erroneous rationale. In the meantime, the court's injunction denies the entire continent of Africa the benefit of a new .AFRICA Internet generic top-level domain name ("gTLD"). This Court should reverse the preliminary injunction.

Plaintiff DotConnectAfrica Trust ("DCA") is a disappointed applicant for the .AFRICA gTLD. It has sued the Internet Corporation for Assigned Names and Numbers ("ICANN"), claiming that ICANN erroneously denied its application. The dispute in the case centers on whether DCA satisfied the requirement that at least 60% of the governments in the affected region (here, the African continent) support or do not object to its application. DCA asserted that it fulfilled this requirement because the African Union Commission ("AUC"), which represents all countries in Africa except Morocco, supposedly endorses its application.

However, as DCA knew full well when it submitted its application, the AUC had told DCA two years earlier that it does not endorse DCA's application. Instead, the AUC endorses the competing applicant ZA Central Registry ("ZACR"). Based on the AUC support, among other support, and because ZACR met all of the other requirements to be designated the operator of .AFRICA,

ICANN entered into a registry agreement with ZACR to operate the .AFRICA gTLD.

Despite the lack of AUC support for its application, DCA sought, and the district court granted, a preliminary injunction that blocks the delegation of .AFRICA pending the conclusion of the suit. The district court now acknowledges, however, that its original ground for that injunction was a mistake. The court erroneously believed that ICANN found in 2013 that DCA had the requisite 60% governmental support, and that ICANN was therefore bound to treat that requirement as being satisfied. In fact, the 2013 determination to which the court pointed pertained to ZACR's application, not DCA's application. It is undisputed that ICANN has never concluded that DCA has the required governmental support or non-opposition; even DCA has not argued that ICANN concluded that DCA has the needed support. As the district court now recognizes, “[b]oth parties agree that Plaintiff did not pass the geographic name evaluation.” 1 ER 22-23.

Despite acknowledging its mistake, however, the district court did not vacate the injunction. Instead, it ruled that the injunction was still proper because, even apart from the court's mistake, the court concluded that it was still “reasonable to infer” that the Independent Review Process Panel (“IRP Panel”) “found” that ICANN must treat DCA as having demonstrated the required governmental

support. 1 ER 23. This ruling, however, was no more correct than the court's original ruling. As a threshold matter, even apart from the lack of merit in DCA's underlying claim, the Court should have held that DCA's suit is barred by a Covenant Not to Sue to which DCA agreed when it submitted its application. The district court ruled that there are "serious questions" about the enforceability of the Covenant Not to Sue under a California statute that prohibits limits on liability for "willful injury" to another. That ruling, however, was a misapplication of the law. Denying an application to operate a gTLD, even if "intentional" or erroneous, is not inflicting "willful injury" on another within the statute's meaning.

Moreover, even if the Covenant Not to Sue did not bar this suit altogether, the injunction was still improper. As a matter of law, it cannot be "inferred" that the IRP Panel ruled that DCA could simply bypass the governmental support or non-objection requirement. The IRP Panel's decision contains no such ruling. In fact, the IRP Panel expressly disclaimed any such ruling, and the uncontroverted evidence shows that DCA did not have the requisite, documented governmental support or non-objection. The district court did not discuss any of this evidence, which undermines its ruling and requires that the injunction be reversed. Because DCA failed to raise "serious questions" in its favor, the preliminary injunction should have been denied.

Additionally, DCA failed to establish irreparable harm and failed to show that the balance of harms is in DCA's favor. DCA asserted, and the district court mistakenly agreed, that any delegation of .AFRICA allowing ZACR to operate the gTLD would be irrevocable and would forever foreclose DCA from becoming the designated operator, even if DCA were to prevail in this lawsuit. This is incorrect. Top-level domain names can be and frequently are transferred to a different operator. The district court similarly erred in discounting the strong public interest in the prompt delegation of .AFRICA, so that consumers, businesses, and governmental entities throughout the African continent can begin enjoying its public interest benefits.

DCA's disappointment that its application to operate .AFRICA did not garner the required governmental support or non-objection from the African continent, and therefore did not pass evaluation, is no basis for enjoining ICANN from proceeding with the successful applicant. Nor is it a ground for depriving the African public of the benefit of a new top-level domain while DCA tries to litigate. The district court's grant of a preliminary injunction should be reversed.

JURISDICTIONAL STATEMENT

The district court has subject matter jurisdiction because DCA is a citizen of a foreign state and ICANN is a citizen of California. 28 U.S.C. § 1332(a); 28 U.S.C. § 1441(a); *see also Lively v. Wild Oats Mkts., Inc.*, 456 F.3d 933, 942 (9th

Cir. 2006) (“the forum defendant rule embodied in [28 U.S.C.] § 1441(b) is a procedural requirement, and . . . a waivable non-jurisdictional defect”). This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

The district court entered its preliminary injunction order on April 12, 2016. 1 ER 40-47. ICANN timely filed its notice of appeal on May 11, 2016. 1 ER 4-39; Fed. R. App. P. 4(a)(1)(A). The district court denied reconsideration of its preliminary injunction order on June 20, 2016. 1 ER 21-24. ICANN amended its notice of appeal on June 27, 2016 to include the district court’s denial of the reconsideration motion. 1 ER 2.

STATEMENT OF ISSUES

1. Did the district court err in ruling that “serious questions” exist as to whether the Covenant Not to Sue that bars lawsuits by disappointed applicants is an invalid limitation of liability for “willful” injury?
2. Did the district court err in ruling that DCA showed that “serious questions” exist on its claim that ICANN improperly concluded that DCA had not demonstrated that its application had the required governmental support?
3. Did the district court improperly conclude that DCA was faced with irreparable harm and that the balance of interests favored enjoining delegation of .AFRICA while DCA litigates its claim?

STATEMENT OF THE CASE

A. ICANN And The New gTLD Program.

ICANN is a California non-profit public benefit corporation that oversees the technical coordination of the Internet’s domain name system (“DNS”) on behalf of the Internet community, ensuring the DNS’s continued security, stability and integrity. 4 ER 730; *Name.Space, Inc. v. Internet Corp. for Assigned Names & Nos.*, 795 F.3d 1124, 1127–28 (9th Cir. 2015). The DNS’s essential function is to convert numeric IP addresses into easily-remembered domain names that permit users to find specific websites, such as “uscourts.gov” and “ICANN.org.” 4 ER 730. The portion of a domain name to the right of the last dot (in these examples, “.gov” and “.org”) is known as a generic top-level domain (“gTLD”). *Name.Space, Inc.*, 795 F.3d at 1127; 4 ER 730.

Throughout its history, ICANN has sought to expand the number of gTLDs to promote consumer choice and competition. 4 ER 730. Indeed, “[i]ntroducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest” is one of the core values set forth in ICANN’s Bylaws. 6 ER 1202. In 2012, ICANN launched the “New gTLD Program” application round, in which it invited interested parties to apply for the creation of a new gTLD and to be designated as the operator of that gTLD. As the operator, the applicant would be responsible for managing the assignment of names within

the gTLD and maintaining the gTLD's database of names and IP addresses.

Applicants must demonstrate, among other things, that they have the significant technical and financial capability needed to operate a gTLD. 4 ER 635.

In connection with the New gTLD Program, ICANN published an Applicant Guidebook ("Guidebook"), which prescribes the requirements for new gTLD applications to be approved, and the criteria by which they are evaluated. 4 ER 688-89. The Guidebook was developed in a years-long, bottom-up process in which numerous versions were published for public comment and revised based on comments received from the public. 4 ER 688-89. DCA participated in this process: its CEO was actively involved in the ICANN community, and, as a member of ICANN's Generic Names Supporting Organization, she "helped develop the rules and requirements for the New gTLD Program." 4 ER 684. DCA also submitted a written public comment regarding the Guidebook, expressing its support for the New gTLD Program. 4 ER 689, 692-97.

Module 6 of the Guidebook sets forth the terms and conditions that all applicants, including DCA, acknowledged and accepted by submitting a gTLD application. 4 ER 635. Among those terms is a Covenant Not to Sue, which bars lawsuits against ICANN arising out of its evaluation of any new gTLD application:

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. . . .

6 ER 1193.

Module 6 also makes clear that ICANN has absolute discretion to “determine not to proceed with any and all applications for new gTLDs.” 6 ER 1193. Other portions of the Guidebook reiterate that principle: “ICANN’s Board of Directors has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community.” 6 ER 1191-92.

Although all gTLD applicants agreed not to file lawsuits against ICANN related to their applications, applicants are not left without recourse. ICANN’s Bylaws provide for several accountability mechanisms to ensure that ICANN operates in accordance with its Articles of Incorporation (“Articles”), Bylaws, policies and procedures. 4 ER 731-32, 6 ER 1206-15. One such mechanism is a reconsideration request, which, pursuant to ICANN’s Bylaws, may be used to

challenge ICANN Board action alleged to have been undertaken “without consideration of material information” or with “reliance on false or inaccurate material information,” or may be used to challenge staff action alleged to contravene ICANN’s established policies. 4 ER 731-32, 6 ER 1206-11. Another is a request for an independent review process (“IRP”), under which an aggrieved applicant can ask independent panelists to evaluate whether an action of ICANN’s Board was inconsistent with ICANN’s Articles and Bylaws. 4 ER 731-32, 6 ER 1211-15.¹

B. DCA’s Application For .AFRICA.

The launch of the New gTLD Program resulted in 1,930 applications for approximately 1,400 unique new gTLDs. Included in these applications were competing applications by DCA and ZACR to operate a new .AFRICA gTLD. 4 ER 730-31.² By submitting their applications, DCA and ZACR (like all other applicants) agreed to abide by all of the provisions in the Guidebook, including the Covenant Not to Sue and all of the above-identified terms, conditions, procedures, and policies. 4 ER 635. In addition, all applicants (including DCA and ZACR)

¹ In response to public comments, ICANN modified the language of the Covenant Not to Sue to clarify that these accountability mechanisms would be available to applicants in the New gTLD Program just as they are available to any community member who meets the standing requirements of the relevant accountability mechanism. 4 ER 689-90.

² See also Program Statistics, <https://newgtlds.icann.org/en/program-status/statistics#stats-string-similarity>.

understood that there was no guarantee that their applications would prevail, especially since, in many cases, there were more than one, and often several, applicants for the exact same new gTLD, such as .AFRICA.

The Guidebook requires that an applicant for a gTLD that represents the name of a geographic region (such as .AFRICA) provide documentation of support or non-objection from at least 60% of the governments in that region. 5 ER 929-30. The Guidebook further provides that a Geographic Names Panel established by a third-party vendor will verify the relevance and authenticity of an applicant's documentation of support or non-objection. 5 ER 930-32.

DCA submitted its application in June 2012. It claimed that it had the required governmental support because its application was purportedly supported by the African Union Commission ("AUC"). 4 ER 636-37, 6 ER 1312. The AUC is the secretariat for the African Union, in which every African nation except Morocco is a member. 3 ER 527-28; *see also* 2 ER 233. As supposed documentation of the AUC's support of DCA, DCA submitted a letter it had received from the AUC in 2009. However, in April 2010 (over two years before DCA submitted its application), the AUC sent DCA a letter that formally withdrew the AUC's support for DCA. 3 ER 529, 4 ER 636-37, 6 ER 1314. Accordingly,

when DCA submitted its application, DCA lacked the support from the African governments that the Guidebook requires.³

The AUC withdrew its support for DCA in advance of an August 7, 2010 grant of authority the AUC received from the various African Communication and Information Technology ministers to “set up the structure and modalities for the Implementation of the dotAfrica project.” 2 ER 230-31, 3 ER 529, 533-37. In its April 16, 2010 letter withdrawing its support of DCA’s application, the AUC explained that it “no longer endorse[d] individual initiatives” and “in coordination with the Member States . . . [would] go through [an] open [selection] process.” 3 ER 529. Exercising the authority the African ministers had conferred upon it on August 7, 2010, the AUC launched an open request for proposals (“RFP”) to identify which entity the AUC would endorse. 3 ER 529. DCA was invited to participate in the RFP process but chose not to do so. 3 ER 529-30.

At the conclusion of that RFP process, the AUC formally endorsed ZACR’s application because it had “prevailed in the RFP process.” 3 ER 529. This

³ DCA also submitted a letter from the United Nations Economic Commission for Africa (“UNECA”). But UNECA later made clear that its letter was not, in fact, a formal endorsement of DCA’s application pursuant to the terms of the Guidebook. 4 ER 637, 653-54. In clarifying that its letter “cannot properly be considered a ‘letter of support’ within the context of ICANN’s requirements,” UNECA noted that it is “neither a government nor public authority and therefore is not qualified to issue a letter of support for a prospective applicant.” *Id.*

endorsement, however, was subject to ZACR's passing the evaluation and contention procedures set forth in the Guidebook. *See* 2 ER 231, 3 ER 529-30.

C. DCA's Challenge To ICANN's Acceptance Of The Governmental Advisory Committee's Advice.

Separate and apart from the governmental support (or non-objection) requirement for applications for geographic name gTLDs, the Guidebook provides that ICANN's Governmental Advisory Committee ("GAC") may issue advice to ICANN concerning any application for a new gTLD. 5 ER 1008-09. The GAC is composed of members of national governments and distinct economies and may advise ICANN on "concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues." 5 ER 1008-09; *see also* 6 ER 1254. If the GAC issues "consensus advice" against a particular application, the Guidebook provides that this advice creates a "strong presumption for the ICANN Board that the application should not be approved." 5 ER 1009.

On April 11, 2013, the GAC issued "consensus advice" that DCA's application should not proceed. 3 ER 621. At the time the GAC issued this advice, DCA's application had passed all required reviews with the important exception of the Geographic Names Review, which had not yet been completed. 4 ER 814. In accordance with the Guidebook, DCA had an opportunity to respond to the GAC's advice, which it did, and the Board considered that response. 4 ER 739-51. On

June 4, 2013, the Board accepted the GAC's advice, which had the effect of halting the processing of DCA's application at that moment, before completion of the Geographic Names Review. 4 ER 733, 739-51.

Pursuant to the terms of the Guidebook, DCA later submitted an IRP request challenging the Board's acceptance of the GAC's advice. 4 ER 762-824. DCA argued that the advice was not in fact "consensus" advice (as defined in the Guidebook), because at least one GAC member allegedly had dissented and because the AUC had purportedly influenced the decision improperly. 4 ER 785-86. Echoing the arguments it makes in the present litigation, DCA also asserts that ICANN discriminated in favor of ZACR and against DCA by assisting the AUC in preparing its endorsement letter for ZACR and by then accepting that endorsement, but not accepting the AUC's purported endorsement of DCA (*i.e.*, the 2009 letter that the AUC withdrew in 2010, two years before DCA filed its application for .AFRICA, a fact which DCA failed to mention when it submitted its application). 4 ER 784-85.

The IRP Panel found in DCA's favor in a "Final Declaration" issued on July 9, 2015. 4 ER 823. But it did so only on the narrow procedural ground that, in accepting the GAC's advice, ICANN had not acted with the requisite "transparency" or "in a manner designed to ensure fairness." 4 ER 806-07. The IRP Panel quoted testimony that it said showed that the GAC "made its decision

without providing any rationale and primarily based on politics and not on potential violations of national laws and sensitivities.” 4 ER 805. It concluded that, rather than defer to the GAC’s unexplained advice, ICANN should have “investigate[d] the matter further.” 4 ER 814. The IRP Panel also concluded that DCA had not been given an opportunity to “make its position known or defend its own interests *before* the GAC reached consensus on the GAC Objection Advice”—and the IRP Panel faulted ICANN for not “tak[ing] any steps to address this issue.” 4 ER 807 (emphasis added).

Importantly, the IRP Panel expressly declined to rule on any of the “other criticisms and other alleged shortcomings of the ICANN Board identified by DCA.” 4 ER 815. Thus, the IRP Panel did not address—let alone decide—whether DCA had satisfied the 60% government support or non-objection requirement or whether DCA had secured the AUC’s endorsement.

Indeed, in the IRP, DCA expressly sought an order requiring ICANN to give DCA an additional 18 months “to negotiate with African governments *to obtain the necessary endorsements.*” 4 ER 788 (emphasis added). In seeking this relief from the IRP Panel, DCA admitted that it lacked those necessary endorsements or documented non-objection at the time of the IRP proceeding, and would need to “obtain” such endorsements to proceed through the application process. Reflecting the narrow procedural nature of its ruling, however, the IRP Panel did not grant

this request. Instead, it recommended only that ICANN “continue to refrain from delegating the .AFRICA gTLD and permit [DCA’s] application to proceed through the remainder of the new gTLD application process.” 4 ER 814-15, 818.

ICANN’s Board promptly considered and adopted each of the IRP Panel’s recommendations. On July 16, 2015, the Board resolved to “continue to refrain from delegating the .AFRICA gTLD,” “permit [DCA’s] application to proceed through the remainder of the new gTLD application process,” and “reimburse DCA for the costs of the IRP.” 4 ER 733, 739-51.

D. The Processing Of DCA’s Application.

By July 31, 2015, ICANN had returned DCA’s application to processing. 4 ER 637-38. The next step in that process, as outlined in the Guidebook, was for the Geographic Names Panel to determine whether DCA had sufficiently documented that it had the required 60% support or non-objection from the countries of Africa. 6 ER 1353-54.

In 2013, when DCA’s application was placed on a “Will Not Proceed” status following the Board’s acceptance of the GAC Advice not to proceed with the application, the Geographic Names Panel had been preparing to send DCA “clarifying questions” regarding the documentation DCA had submitted in support of its application. 4 ER 637. After the Board accepted the IRP Declaration and DCA’s application was returned to processing precisely where it had left off, as the

IRP Panel had recommended, the Geographic Names Panel sent the clarifying questions to DCA. 6 ER 1342-51, 1356-65. The questions explained that the purported letter of support DCA had provided from the AUC did not meet the Guidebook's requirements, and asked DCA to provide an updated letter. 6 ER 1350-51.⁴

DCA did not provide an updated letter from the AUC when asked because it could not do so—the AUC did not support DCA, and supported ZACR. Instead, it took the position that the documentation it submitted with its application in 2012—the AUC's 2009 letter that DCA knew full well the AUC had withdrawn in 2010—was sufficient. 4 ER 638-39. Accordingly, on October 13, 2015, ICANN issued an Initial Evaluation Report notifying DCA that its application had not passed Geographic Names Review, but that DCA was eligible for an “Extended Evaluation” as defined in the Guidebook. 4 ER 638, 6 ER 1353-54.

In the Extended Evaluation, the Geographic Names Panel again sent DCA clarifying questions explaining that the 2009 AUC letter that DCA had submitted was insufficient and requesting an updated letter. 5 ER 930-32, 6 ER 1356-57.

⁴ Moreover, 17 African governments had submitted GAC “early warning” statements presenting their objections to DCA's application, which included the concern that DCA's application failed to meet the Guidebook's “minimum requirements” and interfered with the AUC's transparent RFP process in which DCA opted not to participate. 3 ER 539-617. Those minimum requirements include the 60% governmental support or non-objection requirement that DCA ultimately could not satisfy.

Again, DCA did not provide an updated letter and took the position that the 2009 letter was sufficient. 4 ER 638.

If the AUC had in fact supported DCA's application, it would have been a simple matter for DCA to provide the requested documentation. However, the record is uncontroverted that the AUC did not support DCA's application. As discussed above (pp. 10-13), following its RFP process, the AUC decided to endorse ZACR, and in July 2013, the AUC informed ICANN of that support. 2 ER 230-31. Eliminating any doubt on the question, the AUC wrote again to ICANN in September 2015 to confirm its "official position in this matter" that ZACR's application "is the only application endorsed and supported by the AUC and hence African member states." 2 ER 235. The AUC made clear that 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." 2 ER 235.

Faced with DCA's inability to demonstrate the requisite support or non-objection of 60% of the African governments, ICANN issued an Extended Evaluation Report on February 17, 2016, which notified DCA that its application had not passed the Geographic Names Review and, thus, would not proceed.

4 ER 639, 6 ER 1367. As provided in the Guidebook, ICANN stopped processing DCA's application. 4 ER 639, 5 ER 930-32.

On March 3, 2016, ICANN's Board voted to proceed to move toward delegation of .AFRICA to be operated by ZACR, which had successfully completed all stages of processing. 4 ER 639. ICANN previously entered into a registry agreement with ZACR, and is now nearly prepared to delegate the .AFRICA gTLD for operation by ZACR. 4 ER 639, 741.⁵

E. Complaint.

DCA filed this suit against ICANN on January 20, 2016, in Los Angeles County Superior Court. 7 ER 1569. After the Superior Court denied DCA's request for a temporary restraining order that ICANN not be permitted to proceed with the delegation of .AFRICA, ICANN timely removed the case to the court below, invoking the court's diversity jurisdiction. 7 ER 1568-1656. DCA thereafter filed a First Amended Complaint, adding ZACR as a defendant along with ICANN. 7 ER 1538-67. DCA asserts claims for breach of contract, intentional and negligent misrepresentation, fraud and conspiracy to commit fraud, unfair competition, negligence, intentional interference with contract (against

⁵ ICANN enters into a registry agreement with a prevailing applicant for a new gTLD that authorizes the applicant to operate the applied-for gTLD. Pursuant to that agreement, the new gTLD is then separately delegated into the root zone. *See Name.space, Inc.*, 795 F.3d at 1127.

ZACR only), confirmation of IRP Declaration, as well as three claims for declaratory relief. 7 ER 1551-65. The gist of each of the claims is that ICANN wrongly disregarded its Guidebook and the IRP Declaration in deciding to enter into a registry agreement with ZACR to operate .AFRICA rather than DCA.

F. Preliminary Injunction Motion.

On March 1, 2016, DCA moved for a preliminary injunction. 7 ER 1509-35. The motion was expressly based only on DCA's Ninth Cause of Action, which seeks a declaration that ICANN is required to "follow" the IRP Declaration and "allow[] DCA's application to proceed through the remainder of the [new gTLD] application process." 7 ER 1523, 1525 ("DCA only moves for a preliminary injunction under its ninth cause of action against ICANN for declaratory relief").

DCA argued that it was likely to prevail on this cause of action because ICANN had supposedly "refused to follow the IRP ruling" by purportedly "plac[ing] DCA back to the start of the application" process rather than permitting it to proceed through the "remainder" of the process. 7 ER 1526.

As for irreparable harm, DCA argued that, once .AFRICA was delegated for operation by ZACR or a different party, the "rights to .AFRICA cannot be issued again" even in the event of a subsequent ruling in DCA's favor in this litigation. 7 ER 1527-28. As for the third and fourth prongs of the test, DCA argued that the balance of the equities and the public interest factors weighed in its favor because

“fair and transparent application processing” should be the paramount concern.

7 ER 1529.

ICANN opposed the motion on the ground that DCA had not demonstrated any likelihood of success on the merits because: (1) DCA’s suit is barred by the Covenant Not to Sue in the Guidebook; and (2) without regard to the Covenant Not to Sue, ICANN fully complied with the IRP Panel’s decision. ICANN also argued that DCA had not demonstrated irreparable harm, and that the balance of the equities and the public interest weighed against the issuance of an injunction.

G. District Court’s Order.

On April 12, 2016, the district court granted DCA’s motion for a preliminary injunction. 1 ER 40-47; *see also* 4 ER 752-53. The court ruled that “serious questions” exist as to the enforceability of the Covenant Not to Sue because, in the court’s view, California Civil Code section 1668 invalidates any contract that exempts a person from responsibility for its “intentional” conduct. 1 ER 44. The court asserted that the evidence “suggests” that ICANN’s conduct was sufficiently “intentional” because, after the IRP Declaration, ICANN sent clarifying questions to DCA regarding the 60% government support or non-objection requirement. 1 ER 44. Citing to what it mistakenly identified as the Initial Evaluation Report for DCA’s application (but was actually the Initial Evaluation Report for ZACR’s application), the court asserted that DCA had already passed the Geographic

Names Panel review before the IRP Declaration (which in fact it had not). 1 ER 44; *see also* 1 ER 22. Thus, the court concluded, ICANN's clarifying questions amounted to an improper "second evaluation" of that issue in contravention of the IRP decision. 1 ER 44.

Based on the same reasoning, the court also found that DCA had raised "serious questions" on the merits of the Ninth Cause of Action. The court asserted that "ICANN's July 2013 initial evaluation report found that [DCA's] endorsement letters have 'met all relevant criteria in Section 2.2.1.4.3 of the Applicant Guidebook'" (which, again, was actually the Initial Evaluation Report for ZACR's application). 1 ER 45. Accordingly, the court ruled, there were serious questions as to "whether DCA's application should have proceeded to the delegation stage following the IRP Decision." 1 ER 45.

The court's ruling, however, was premised on an admitted factual mistake. The Initial Evaluation Report to which the court cited was not on DCA's application but was instead the Initial Evaluation Report for ZACR's application. 6 ER 1353-54; 1 ER 44 (court citing ZACR's Initial Evaluation Report). ICANN had not issued an Initial Evaluation Report for DCA's application before the IRP Panel issued its Declaration because DCA's application for .AFRICA had not yet concluded the Geographic Names Review evaluation. Thus, ICANN had made no finding as to whether DCA did or did not have the requisite documented

governmental support or non-objection. As discussed above (p. 16), ICANN did not issue its Initial Evaluation Report on DCA's application until October 13, 2015, after the IRP Panel issued the Declaration, after the ICANN Board had accepted in full the recommendations in the IRP Declaration, and after ICANN had returned DCA's application to processing. That Initial Evaluation Report concluded that DCA had not properly documented the required support or non-objection; and ICANN never found otherwise.

As to the threat of irreparable harm, the court ruled the DCA faced irreparable harm because “.AFRICA can be delegated only once,” and “only one entity can operate .AFRICA.” 1 ER 46. The court also concluded that money damages could not “fully compensate” DCA for losing the opportunity to operate .AFRICA. 1 ER 46.

With respect to the public interest, Moctar Yedaly, the head of the Information Society Division of the AUC's Infrastructure and Energy Department, submitted a declaration asserting the African Union's strong interest in the prompt launching of the .AFRICA gTLD. He explained that the .AFRICA initiative is “fully endorsed by the African Union and has widespread support across the continent” in part because it “will enable governments, business and civil society to build brands, promote development, and establish long-term relationships with this market.” 3 ER 528-29. This was the only evidence before the court regarding

the interests of the affected African nations; DCA offered no contrary evidence. The court, however, gave “little weight” to this expression of interest because it believed the AUC’s support for ZACR created a “conflict of interest.” 1 ER 46-47. The court concluded without any evidence that, contrary to the AUC’s view as the representative of the African governments, the African community has a greater interest in having the delegation of .AFRICA delayed until DCA’s challenge to the “fairness of the process” is eventually adjudicated. 1 ER 47.

H. ZACR’s Motion To Dismiss And Motion For Reconsideration.

Although ZACR was named as a defendant, it was not served with the complaint until after the briefing on the preliminary injunction had been completed, and thus did not participate in that briefing.

On April 26, 2016, ZACR moved to dismiss the complaint as to ZACR for failure to state a claim. *See* 7 ER 1665. On June 14, 2016, the court granted ZACR’s motion. 2 ER 48-52. It ruled that: (1) the complaint did not allege any false representations by ZACR, intent to induce reliance, or reasonable reliance by DCA; (2) DCA’s intentional interference claims failed because ZACR was alleged only to have successfully sought to have the .AFRICA gTLD delegated to it; (3) DCA’s claim under California Unfair Competition Law failed because it relied on the same inadequate allegations as DCA’s other claims; and (4) DCA’s claim for declaratory relief against ZACR failed because DCA had alleged no valid

underlying substantive claim against ZACR and because DCA's rights vis-à-vis ZACR with respect to the .AFRICA gTLD could be adjudicated in DCA's action against ICANN. 2 ER 48-52.

While its motion to dismiss was pending, ZACR also moved for reconsideration of the preliminary injunction order (*see* 6 ER 1165)—a motion in which ICANN joined (2 ER 197-98). ZACR argued that reconsideration was warranted because the district court's order included two key factual errors. First, the court had erroneously found that DCA's application had passed the Geographic Names Review prior to the conclusion of the IRP proceeding. Second, ZACR noted that the court erred in finding that .AFRICA "can be delegated only once." 1 ER 46. In fact, as ZACR explained in its motion, gTLDs can be and often are transferred from one operator to another after initial delegation. 2 ER 97.

On June 20, 2016, the district court denied the motion to reconsider. 1 ER 21-24. It first ruled that the motion was moot as to ZACR, given the court's intervening order dismissing ZACR from the case. 1 ER 21. Treating the motion as having been filed solely by ICANN, the court acknowledged that it had erred in concluding that DCA had passed the Geographic Names Review. 1 ER 22-23. The court concluded, however, that "there still exists serious questions going to whether Plaintiff had acquired a sufficient number of endorsements to have passed the geographic names evaluation phase in the first instance." 1 ER 23. The court

did not refer to a single piece of evidence that it believed showed that DCA had the requisite endorsements—and it did not discuss the uncontroverted evidence showing that the AUC did not endorse DCA. Instead, it referred only to the IRP Panel’s statement that ICANN’s actions and inactions with respect to DCA’s application “were inconsistent with the Articles of Incorporation and Bylaws of ICANN.” 1 ER 23. Relying solely on this statement, the court concluded that, “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.” 1 ER 23. The court thus concluded that its earlier error “was not determinative” and that DCA had still shown “serious questions” on the merits of its claim. 1 ER 23.

The court also rejected ZACR’s arguments regarding irreparable injury and the balance of harms. It said that ICANN had not argued in opposition to DCA’s preliminary injunction motion that .AFRICA could be re-delegated in the event DCA prevailed. 1 ER 23. And it erroneously asserted that, even if ZACR had not been served before the preliminary injunction motion brief was complete, there was a “substantial question” whether ZACR should have filed an opposition to the motion anyway and raised the re-delegation point. 1 ER 23. In any event, the court ruled that, even if .AFRICA could be re-delegated or transferred, DCA would

still suffer irreparable harm from “loss of business funding, etc.” while the case is being litigated. 1 ER 23.

SUMMARY OF ARGUMENT

Each step of the district court’s ruling was erroneous. In finding the Covenant Not to Sue unenforceable, the court erred as a matter of law in interpreting section 1668 as applying to an “intentional” denial of an application for an Internet top-level domain name. Section 1668 prohibits exemptions of liability for “willful injury to the person or property of another.” Denying a gTLD application is not such an infliction of “willful injury,” even when the denial was allegedly “intentional” and even when the applicant tacks on allegations that the denial was “groundless” or “preconceived.” Applying section 1668 in this circumstance is not only unsupported by the statutory language, but would impermissibly frustrate the valid purpose of the Covenant Not to Sue in preventing the new gTLD application process from becoming mired in an endless parade of lawsuits filed by disappointed applicants.

Separate and apart from the Covenant Not to Sue barring the action in its entirety, the district court erred in finding “serious questions” on the merits of DCA’s claim. The court’s original ground for issuing the preliminary injunction admittedly was premised on factual error. And the court’s substitute rationale is directly contrary to the unambiguous language of the IRP Declaration. The court

inferred that the IRP Declaration stated that DCA must be treated as having satisfied the governmental support or non-objection requirement. But the IRP Panel made no such ruling. In fact, the IRP Declaration explicitly said it was not deciding that question. As a matter of law, it was error for the court to “infer” that the IRP Declaration decided something that it expressly disavowed. That “inference” is particularly improper given that the record is clear that DCA did not—and does not—have the support (or non-objection) required to pass the Geographic Names Review.

Even though a reversal of the preliminary injunction is warranted based on DCA’s failure to demonstrate any likelihood of success on the merits alone, the district court also erred in finding irreparable harm to DCA, and in weighing the relative interests. DCA did not establish that, if it were to prevail in this action, the .AFRICA gTLD could not be transferred to it or that it would suffer irreparable injury in the interim. In addition, the district court improperly declined to give any weight to the strong interests of consumers, businesses, and governments throughout Africa in enjoying the benefits of the .AFRICA gTLD.

ARGUMENT

I. STANDARD OF REVIEW.

This Court reviews an order granting a preliminary injunction for abuse of discretion. *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 quotation marks omitted). “The district court’s interpretation of the underlying legal principles . . . is subject to de novo review.” *Id.*

II. THE COURT’S RULING THAT THE COVENANT NOT TO SUE IS LIKELY UNENFORCEABLE IS LEGALLY ERRONEOUS.

The district court erroneously “found serious questions as to the enforceability” (1 ER 44) of the Covenant Not to Sue on account of California Code of Civil Procedure section 1668. Neither section 1668 nor any other legal principle bars the enforceability of the Covenant Not to Sue.

A. The District Court Erroneously Held That Section 1668 Bars Enforceability When “Intentional” Conduct Is Alleged.

Section 1668 invalidates contracts that “exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another.” Cal. Civ. Code § 1668.⁶ The district court ruled that this section applies because “the alleged conduct giving rise to [Plaintiff’s declaratory relief] claim is intentional.” 1 ER 44. In concluding that this standard was met, the court asserted that the

⁶ The statute also invalidates contracts that release claims for a “violation of law, whether willful or negligent.” Cal. Civ. Code § 1668. The district court did not rely on this portion of the statute. Nor is there any basis for arguing that the provision applies here, given that DCA does not allege in its Ninth Cause of Action that ICANN violated any “law.”

evidence “suggests” that ICANN “intended to deny DCA’s application based on pretext” because ICANN asked “clarifying questions” of DCA after it had supposedly already determined that DCA had the required governmental support. 1 ER 44.

As noted, the court was mistaken as a factual matter—DCA never demonstrated that it had the required governmental support, ICANN never concluded that it had done so, and the IRP Panel never determined that ICANN must consider DCA as having met that requirement. However, even apart from the court’s mistaken factual premise, the district court erred in finding that any such conduct amounts to the “fraud, or willful injury to the person or property of another” encompassed by section 1668. At most, it comprises an alleged breach of contract, which cannot support the application of section 1668 as a matter of law.

1. The District Court’s Analysis Of Section 1668 Contravenes Settled Case Law.

Courts have interpreted section 1668’s phrase “willful injury to the person or property of another” to mean more than merely intentional conduct, but instead “intentional wrongs.” *Frittelli, Inc. v. 350 N. Canon Drive, LP*, 202 Cal. App. 4th 35, 43 (2011) (“Ordinarily, the statute invalidates contracts that purport to exempt an individual or entity from liability for future *intentional wrongs and gross negligence.*”) (emphasis added) (citations omitted). *Food Safety Net Servs. v. Eco Safe Sys. USA, Inc.*, 209 Cal. App. 4th 1118 (2012), is directly on point. There, the

cross-complainant alleged that the cross-defendant food safety equipment tester employed “slovenly procedures which seemed to be slanted towards a preconceived conclusion.” *Id.* at 1125. Despite these allegations, the court held that a limitation of liability clause in the parties’ contract was enforceable and barred not only the plaintiff’s claim for breach of contract but also plaintiff’s “bad faith” claim. *Id.* at 1125–27, 1130.

DCA’s allegations here fail for the same reason: adding allegations of bad faith or “preconceived” outcomes is not enough to show “willful injury” within the meaning of section 1668. *See also Grayson v. 7-Eleven, Inc.*, No. 09-cv-1353-GPC (WMC), 2013 U.S. Dist. LEXIS 40462, at *18 (S.D. Cal. Mar. 21, 2013) (an “intentional wrong” is “required by California case law” in order for section 1668 to render an exculpatory provision unenforceable); *Calvillo-Silva v. Home Grocery*, 19 Cal. 4th 714, 729 (1998) (“[W]illful misconduct . . . ‘involves a more positive intent actually to harm another or to do an act with a positive, active and absolute disregard of its consequences.’ . . . While the word ‘willful’ implies an intent, the intention must relate to the misconduct and not merely to the fact that some act was intentionally done.”) (citations omitted), *disapproved of on other grounds by Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826 (2001).

These decisions reflect the basic principle that allegations underlying a breach of contract claim, without more, cannot support applying section 1668 to

invalidate a limitation of liability clause, even when the breach is asserted to be intentional. “Section 1668 reflects the policy of this state to look with disfavor upon those who attempt to contract away their legal liability to others *for the commission of torts.*” *Blankenheim v. E. F. Hutton & Co.*, 217 Cal. App. 3d 1463, 1471 (1990) (emphasis added). Courts finding that section 1668 invalidates provisions exempting breaches of contract from liability have done so only where an *additional*, wrongful act was also alleged. *Navcom Tech., Inc. v. Oki Elec. Indus. Co.*, No. 5:12-CV-04175-EJD, 2014 U.S. Dist. LEXIS 32159, at *30 (N.D. Cal. Mar. 11, 2014) (“even when a plaintiff pleads only breach of contract and does not assert a tort cause of action, a court may refuse to enforce a limitation of liability provision *if it will serve to insulate a party from damages resulting from its own fraudulent acts.*”) (emphasis added); *Civic Ctr. Drive Apartments Ltd. P’ship v. Sw. Bell Video Servs.*, 295 F. Supp. 2d 1091, 1106 (N.D. Cal. 2003) (ruling “a limitation of liability provision may be unenforceable if it is in violation of public policy, *even if* the plaintiff asserts only a breach of contract claim” in case where plaintiff also alleged and provided evidence of “fraudulent concealment”).

Courts’ constructions of similarly worded statutes also show the error of the district court’s finding that mere “intentional” conduct falls within the scope of section 1668. For instance, California Insurance Code § 533 provides: “An

insurer is not liable for loss caused by the *wilful act* of the insured.” *See Davidson v. Welch*, 270 Cal. App. 2d 220, 233 (1969) (“Similar considerations apply in the determination of what contracts are prohibited under the provisions of section 1668 of the Civil Code” and section 533). Courts interpreting that provision have held that the “willful act” contemplated by the Legislature is “something more blameworthy than the sort of misconduct involved in ordinary negligence, and something more than the mere intentional doing of an act constituting such negligence.” *Russ-Field Corp. v. Underwriters at Lloyd’s*, 164 Cal. App. 2d 83, 96 (1958); *see also Clement v. Smith*, 16 Cal. App. 4th 39, 47–48 (1993) (only a *knowing* breach of contract comprised a “willful act” under the meaning of section 533).⁷

2. The District Court’s Analysis Of Section 1668 Harms The Public Interest.

In addition to being inconsistent with statutory language, the district court’s application of section 1668 runs roughshod over the important purposes served by the Covenant Not to Sue.

The Guidebook is not merely a contract between two parties. It was adopted through a public comment process to govern the thousands of applications ICANN

⁷ Moreover, section 1668 should be interpreted even more narrowly than section 533, because section 1668 covers only “willful injury to the person or property of another,” as compared with the broader “willful act” covered by section 533.

received and must evaluate—including competing applications for the same gTLD such as those of DCA and ZACR here. The Covenant Not to Sue ensures that the processing of these applications does not get ensnared in endless litigation as hundreds of disappointed applicants bring the inevitable lawsuits claiming that ICANN violated their rights. As ICANN explained below:

ICANN is a non-profit public benefit corporation and lacks the resources to defend against potentially numerous lawsuits in jurisdictions all over the world initiated by applicants that might want to challenge the results of the community-designed new gTLD application process. ICANN anticipates that, absent a broad waiver and limitation of liability in the application terms and conditions, rejected or unsuccessful applicants could initiate frivolous and costly legal actions in an attempt to challenge legitimate ICANN decisions, and possibly delay further the successful rollout of the new gTLD program.

4 ER 690.

Section 1668 is addressed to fraud and willful injuries. There is no reason to believe it was intended to prevent a non-profit public benefit corporation such as ICANN from adopting a process that delineates the manner in which its decisions on thousands of applications may be challenged. Moreover, that process was adopted after lengthy public comment, including input from DCA. Preventing an avalanche of lawsuits by disappointed applicants is particularly important given the valuable benefits that result from programs like the New gTLD Program. The delegation of new gTLDs promotes consumer choice, and the fact that nearly two thousand applications to operate nearly 1,400 new gTLDs were submitted reflects

the widespread anticipation of the high consumer demand for the new gTLDs. It also reflects the fact that applicants knew there was a possibility that their applications may not pass evaluation, particularly since in many instances, more than one applicant applied for the exact same new gTLDs. 4 ER 732. The New gTLD Program also promotes the international character of the Internet, because the new gTLDs include internationalized domain name gTLDs (*i.e.*, gTLDs in non-Latin scripts, such as Chinese or Arabic). 4 ER 731. Indeed, DCA itself recognizes these benefits, as it submitted a written public comment regarding the Guidebook, expressing its support for the New gTLD Program and detailing the benefits the .AFRICA gTLD would confer upon the people of the African continent. 4 ER 693.

If DCA's argument here were accepted, the Covenant Not to Sue could become dead letter—and the important purposes it serves frustrated. In virtually every case in which a disappointed applicant sues after its application is denied, the applicant can be expected to assert that the denial was “pretextual” or “preconceived”—especially if the applicant knows that such allegations are the key to avoiding the Covenant Not to Sue. The applicant will presumably point to some piece of evidence ICANN allegedly ignored, or some procedural rule ICANN allegedly violated, and assert that ICANN's conduct was so egregious that it shows bad intent and a “willful” plan to harm the applicant.

The likelihood of such challenges being made is heightened by the fact that (as in this case) two or more applicants are often competing for the same gTLD. In such situations, one applicant will necessarily prevail over the others applying for the same gTLD. Indeed, an applicant may not prevail even if it has satisfied all of the requirements specified in the Guidebook. In such situations, the disappointed applicant will be highly motivated to find some basis for challenging ICANN's action. Even if those challenges ultimately prove to be groundless (as in this case), the damage will be done if the Covenant Not to Sue is not enforced at the outset of the suit, and the case is allowed to proceed into expensive and time-consuming discovery, which is precisely what the Covenant Not to Sue was intended to avoid.

This case illustrates the problem. The uncontroverted evidence is that DCA did *not* have the AUC's endorsement when DCA submitted its application and that, without the AUC's endorsement, DCA lacked the required governmental support or non-objection to pass the Geographic Names Review. It is also beyond dispute that ZACR had the required governmental support, because the AUC explicitly endorsed ZACR's application. As shown below, the district court was unable to articulate any viable ground for finding that ICANN acted improperly.

Nevertheless, DCA is suing ICANN because ZACR's application rather than DCA's prevailed. If DCA's unsupported allegations are deemed sufficient to find "intentional" conduct that voids the Covenant Not to Sue (contrary to established

case law), the result will be an avalanche of lawsuits and the public benefits of new gTLDs being delayed while the parties slug it out in the courtroom.

The cases cited above interpreting section 1668 as requiring not merely “intentional” conduct, but rather a “willful injury to the person or property of another,” protect against this result. A party cannot use section 1668 to evade a valid limitation of liability simply by alleging that the other party misapplied requirements like those found in the Guidebook, even if the misapplication is alleged to be without basis. A decision on an application to operate a gTLD, even an erroneous one, is not inflicting a “willful injury” on another. It is merely the exercise of an obligation to evaluate whether the applicant has met the specified requirements.

Here, the AUC supports only ZACR’s application, and not DCA’s. 2 ER 230-31, 235-36. Yet years later, the rights to operate .AFRICA are tied up in litigation, while consumers, businesses, and governments in Africa are being deprived of its benefits. This is precisely the circumstance that the Covenant Not to Sue was intended to prevent.

As a matter of law, the district court should have given effect to the Covenant Not to Sue. DCA has no right to disregard the Covenant Not to Sue that it accepted when it submitted its application.

B. DCA’s Proposed Alternative Grounds For Invalidating The Covenant Not To Sue Lack Merit.

DCA alternatively argued below that the Covenant Not to Sue should be invalidated on the grounds of unconscionability or procurement by fraud. The district court declined to reach these arguments given its ruling on section 1668. 1 ER 44. These arguments lack merit in any event, and do not provide an alternative basis for affirming the district court’s ruling. *See Coszalter v. City of Salem*, 320 F.3d 968, 979 (9th Cir. 2003) (declining to affirm on a ground the lower court had not reached while recognizing that appellate courts have the “power to affirm on any ground supported in the record”).

1. The Covenant Not To Sue Is Not Unconscionable.

A party seeking to avoid a written release on unconscionability grounds must show that the release is both procedurally and substantively unconscionable. *McCaffrey Grp., Inc. v. Superior Court*, 224 Cal. App. 4th 1330, 1348 (2014). The court must apply a “sliding scale” analysis, such that the “more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.” *Id.* (citation and quotation marks omitted); *see also Mission Viejo Emergency Med. Assocs. v. Beta Healthcare Grp.*, 197 Cal. App. 4th 1146, 1159 (2011). Unconscionability is a question of law decided by the court. *Am. Software, Inc. v. Ali*, 46 Cal. App. 4th 1386, 1391 (1996).

(a) The Covenant Not To Sue Is Not Procedurally Unconscionable Because DCA Was Not Surprised Or Oppressed By It.

The procedural unconscionability analysis “addresses the circumstances of contract negotiation and formation, focusing on oppression and surprise due to unequal bargaining power.” *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 232 Cal. App. 4th 1332, 1347 (2015). Neither “oppression” nor “surprise” took place here. To start, the sophistication of the contracting party weighs heavily against a finding that any oppression took place. *Appalachian Ins. Co. v. McDonnell Douglas Corp.*, 214 Cal. App. 3d 1, 26–27 (1989) (finding exculpatory contract clauses were not unconscionable and noting contracting party was a “large, sophisticated corporation”); *Marin Storage & Trucking, Inc. v. Benco Contracting & Eng’g, Inc.*, 89 Cal. App. 4th 1042, 1056 (2001) (rejecting procedural unconscionability argument in part because contracting party was “sophisticated”); *Grand Prospect Partners, L.P.*, 232 Cal. App. 4th at 1352 (same).

DCA is unquestionably a sophisticated entity. Like all qualified applicants for gTLDs, DCA is a business entity that was required to and did demonstrate that it possesses, among other things, the significant technical and financial wherewithal required to operate a gTLD registry (and pay a \$185,000 application fee). 4 ER 635; *see also* 5 ER 932-33. DCA’s CEO, Sophia Bekele Eshete, has been “active in the DNS” industry, has an MBA and has worked for Bank of

America and PricewaterhouseCooper. 4 ER 683-686. In these circumstances, DCA can hardly claim to have been “oppressed” into agreeing to a contractual provision that it had ample sophistication to comprehend, as a business entity with a CEO who has been deeply involved in the development of the New gTLD Program.

Nor does DCA claim to have been “surprised” by the Covenant Not to Sue, which was a conspicuous and well-publicized provision of the Guidebook. Surprise involves the extent to which the challenged terms are buried in a lengthy contract drafted by the party seeking to enforce them. *Performance Team Freight Sys., Inc. v. Aleman*, 241 Cal. App. 4th 1233, 1247 (2015). Far from claiming that it was surprised by a hidden provision, DCA admits it was aware of the Covenant Not to Sue, as it claims that provision led it to “believe that the IRP process provided for real redress through the IRP in lieu of court review.” 7 ER 1534. The Covenant Not to Sue was not buried, rather it was highlighted in the Guidebook provisions (through capitalization and formatting) and was adopted along with the other Guidebook provisions after numerous versions were posted for public comment. 4 ER 689. Significantly, DCA’s CEO “helped develop the rules and requirements for the New gTLD Program” and submitted a written comment regarding a draft version of the Guidebook. 4 ER 683-86. Given its involvement in the New gTLD Program as a whole (4 ER 689), DCA cannot argue now that it

was “surprised” by the Covenant Not to Sue contained therein. *See Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 1322 (2005) (finding that merchant could not claim to be surprised by a credit card application term because “it is reasonable to expect even an unsophisticated businessman to carefully read, understand, and consider all the terms of an agreement affecting such a vital aspect of his business,” and finding no procedural unconscionability); *Bigler v. Harker Sch.*, 213 Cal. App. 4th 727, 737 (2013) (finding no procedural unconscionability to arbitration provision in school enrollment contract where parents “did not complain to the [school] administration that the arbitration provision was unfair or attempt to negotiate its deletion from the terms” despite having agreed to “the same document for their three children”). Given that neither surprise nor oppression is present here, as a matter of law DCA’s agreement to the Covenant Not to Sue was not procedurally unconscionable.

(b) The Covenant Not To Sue Is Not Substantively Unconscionable Because It Does Not Shock The Conscience.

Nor is the Covenant Not to Sue substantively unconscionable. “With a concept as nebulous as “unconscionability” it is important that courts not be thrust in the paternalistic role of intervening to change contractual terms that the parties have agreed to merely because the court believes the terms are unreasonable. The terms must shock the conscience.” *Morris*, 128 Cal. App. 4th at 1323 (quoting *Am.*

Software, Inc., 46 Cal. App. 4th at 1391). DCA argued that the Covenant Not to Sue is substantively unconscionable for one and only one reason: it does not release any claims ICANN might have against DCA, and thus purportedly “absolves ICANN of all wrongdoing – and provides no benefit to applicants.” 7 ER 1534. That argument does not withstand scrutiny, because the mere fact that a release is allegedly one-sided cannot support a finding of substantive unconscionability. “Unconscionability turns not only on a ‘one-sided’ result, but also on an absence of ‘justification’ for it . . . a contract is largely an allocation of risks between the parties, and therefore . . . a contractual term is substantively suspect if it reallocates the risks of the bargain in an objectively unreasonable or unexpected manner.” *Walnut Producers of Cal. v. Diamond Foods, Inc.*, 187 Cal. App. 4th 634, 647 (2010) (citations omitted). Here, the Covenant Not to Sue has a well-founded justification, which ICANN has explained: “ICANN’s decision to include the Covenant Not to Sue reflected its reasoned determination regarding the sort of risk, including financial, to which ICANN—a non-profit public benefit corporation—should reasonably subject itself as part of the New gTLD Program.” 4 ER 690.

More specifically, without the Covenant Not to Sue, “unsuccessful applicants could initiate frivolous and costly legal actions in an attempt to challenge legitimate ICANN decisions, and possibly delay further the successful

rollout of the new gTLD program.” 4 ER 690. Courts have routinely upheld release provisions justified by reasoning that expresses legitimate business needs such as avoiding a flood of costly litigation. *See, e.g., Ambler v. BT Ams. Inc.*, 964 F. Supp. 2d 1169, 1177 (N.D. Cal. 2013) (deeming one-sided contract clause enforceable and not unconscionable because it had “a legitimate business justification”); *Correa v. Firestone Complete Auto Care*, No. C 13-03123 CW, 2013 U.S. Dist. LEXIS 169012, at *10 (N.D. Cal. Nov. 25, 2013) (enforcing contract clause requiring certain claims to be adjudicated in state administrative process “because business justification exists” for it, and therefore “the substantive unconscionability is minimal”).

For these reasons, the Covenant Not to Sue was not substantively or procedurally unconscionable.

2. The Covenant Not To Sue Was Not Procured By Fraud.

DCA argued that the Covenant Not to Sue was procured by fraud because ICANN purportedly represented that the IRP process was binding, and then allegedly did not adhere to the IRP Declaration in this case. 7 ER 1534. This argument fails for two reasons. *First*, DCA does not identify any representation (let alone a false one, and let alone a *knowingly* false one) that ICANN made to it regarding the purportedly binding nature of IRP declarations. DCA cites only to Module 6 of Guidebook, which does not address the issue. 7 ER 1534. This

omission is fatal to any argument that the Covenant Not to Sue was procured by fraud. *See Wilkins v. Nat'l Broad. Co., Inc.*, 71 Cal. App. 4th 1066, 1081 (1999) (“a knowingly false representation by the defendant” is one element of a claim for fraud).

Second, the argument is based on a faulty factual premise that ICANN did not comply with the IRP Declaration. To the contrary, ICANN *did* comply with the IRP Declaration in all respects, as discussed below. As such, DCA cannot have been harmed by any statements ICANN purportedly made regarding whether IRP declarations are binding. ICANN’s Board specifically voted to adopt the recommendations in the IRP Declaration in their entirety, rendering moot any question as to whether (as a more general matter) the Board views IRP declarations to be automatically binding.

Given that the Covenant Not to Sue is not unconscionable, and was not procured by fraud, the district court’s ruling that section 1668 bars the enforceability of the Covenant Not to Sue should be reversed.

III. EVEN IF THE SUIT IS NOT BARRED, THE DISTRICT COURT ERRED IN FINDING SERIOUS QUESTIONS ON THE MERITS AND IN EVALUATING THE LIKELIHOOD DCA WILL SUFFER IRREPARABLE HARM.

The foregoing shows that the preliminary injunction should be reversed on the basis of the Covenant Not to Sue alone, which bars DCA’s claim without regard to whether DCA’s claims otherwise have merit or whether DCA has shown

irreparable harm. Nevertheless, the court's rulings on these latter issues are also erroneous, which independently requires reversal.

A. The District Court Erred In Finding Serious Questions As To The Merits of DCA's Ninth Cause of Action.

In both its admittedly mistaken original ruling and its later ruling denying reconsideration, the district court reached the same erroneous conclusion—that “serious questions” exist concerning whether ICANN was required after the IRP Declaration to treat DCA as having satisfied the government endorsement requirement. In its original ruling, the court incorrectly believed that ICANN itself had *already* decided, before the IRP was even filed, that DCA had passed the Geographic Names Review. In its later order, the court determined it was “reasonable to infer” that the IRP Panel had mandated that ICANN find the governmental support requirement satisfied, regardless of what ICANN itself had concluded or not concluded on that issue. However, the court did not need to infer anything. All the court had to do is read the IRP Declaration and realize that its inference was incorrect. The IRP Declaration contains no mandate whatsoever that ICANN find the governmental support requirement satisfied. To the contrary, the IRP Panel expressly disclaimed making any such ruling. The district court's second ruling was thus no more valid, or factually accurate, than its first.

The district court relied on the IRP Panel's statement that ICANN acted contrary to its Articles of Incorporation and Bylaws in accepting the GAC's advice.

1 ER 23. The court erred, however, in not considering the basis upon which the IRP Panel reached that conclusion. According to the IRP Panel, ICANN acted improperly because the GAC “did not act with transparency or in a manner designed to insure fairness” (4 ER 804), because “the GAC made its decision without providing any rationale and primarily based on politics and not on potential violations of national laws and sensitivities” (4 ER 805), because ICANN should have “investigate[d] the matter further before rejecting DCA Trust’s application” (4 ER 814), and because “DCA Trust was never given any notice or opportunity . . . to make its position known or defend its own interest before the GAC reached consensus.” 4 ER 807.

Nowhere did the IRP Panel conclude that DCA had received the required 60% governmental support or non-objection or that ICANN was precluded from finding that DCA lacked such support or non-objection. Instead, the sole bases for the IRP Panel’s determination set forth in the IRP Declaration were the procedural points just described—lack of transparency, lack of investigation, and lack of opportunity for DCA to participate in the GAC’s decision-making process. And to eliminate any doubt that it was not deciding any other issue, the IRP Panel expressly declared that, although DCA had raised other issues, the IRP Panel “[did] 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 shortcomings of the

ICANN Board identified by DCA Trust.” 4 ER 815. The district court’s order is irreconcilable with the IRP Panel’s unambiguous statement. In effect, the district court ruled that the IRP Panel did precisely what the IRP Panel said it was not doing. This Court should reverse that ruling. A court may not permissibly infer that a decision means something that the decision expressly disavows. *In re Ellett*, 254 F.3d 1135, 1140 (9th Cir. 2001) (rejecting “interpretation” of Court’s decision that “directly conflicts with the Court’s actual holding”); *Oregon v. Ashcroft*, 368 F.3d 1118, 1129 (9th Cir. 2004) (rejecting an “interpretation of the text” of a statute that “conflicts with the statute’s plain language”).

The district court’s newest rationale is also contrary to the IRP Panel’s recommendation that ICANN should “permit DCA Trust’s application to proceed through the *remainder* of the new gTLD application process.” 4 ER 817 (emphasis added). In its earlier ruling, the district court had correctly interpreted this recommendation as meaning that ICANN should resume considering DCA’s application at the stage to which the application had progressed before it was halted in June 2013. 1 ER 44-45. That is why it was important to the court’s prior ruling that the court conclude (erroneously as it turned out) that DCA’s application had passed the Geographic Names Review before ICANN stopped processing it. The premise of the district court’s current ruling, however, is the opposite. The court now says that it is “reasonable to infer” that the IRP Declaration directed

ICANN to resume considering the application, not at the stage at which it has previously progressed (*i.e.*, the Geographic Names Review), but at a later phase to which all parties and the court now agree it had never progressed (*i.e.*, the delegation phase).

The IRP Declaration directly contradicts this asserted inference, which should never have been made in the first instance. And, making this inference contradicts DCA's own request in the IRP proceeding that it be given an additional 18 months to try to obtain the required governmental support (or non-objection) to pass the Geographic Names Review. The IRP Panel did not grant even that extension request, let alone rule that DCA could skip past this fundamental requirement for an application that seeks to use the name of a geographic region such as the continent of Africa.

If the IRP Panel had intended to recommend that ICANN let DCA's application proceed directly to the delegation phase, it could have said so. If the IRP Panel had intended to say that ICANN should treat DCA as having satisfied the 60% government support (or non-objection) requirement, it would have been simple for it to say that as well. But it said neither of these things. Instead, it recommended only that ICANN allow DCA's application to proceed through the "remainder" of the application process—which is exactly what ICANN did. The

court erred in concluding that there was any question—let alone a “serious question”—about the propriety of ICANN’s action.

The district court perhaps mistakenly believed that the IRP Panel’s determination regarding the GAC advice, and the 60% governmental support (or non-objection) requirement, are the same thing and can be shown by the same evidence. In fact, however, the GAC advice process is wholly distinct from the governmental support (or non-objection) required at the Geographic Names Review stage, and a gTLD application must satisfy the 60% requirement and may, separately, be subject to GAC advice. The GAC advice process is governed by section 3.1 of the Guidebook and is an independent mechanism by which governments that are members of the GAC can raise concerns regarding a given application. In particular, such GAC advice can create a “strong presumption” against an application when there is a consensus among the GAC members against it. The outcome of this GAC advice process, however, does not displace the separate requirement during Initial Evaluation, found in section 2.2.1.4.3 of the Guidebook, that an applicant for a gTLD that represents a geographic region show that its application had properly documented support (or properly documented non-objection) from 60% of the affected governments in that region. Even where no GAC advice is given against an application, the applicant must still meet this separate requirement—and governments can express their support for, or objection

to, a given application without any need to reach a consensus with other governments.

Here, the IRP Declaration essentially disregarded the GAC advice relating to DCA's application. That meant, practically speaking, that DCA did not face the "strong presumption" under the Guidebook that its application should not proceed. So long as it met the 60% government support or non-objection requirement, and satisfied the other prerequisites, its application could proceed to the next phase of processing. But it first had to meet those requirements. Critically, DCA has never demonstrated that it attained the required level of governmental support (or non-objection)—and its failure to make that showing is not excused by whatever defects the IRP Panel thought may have existed in the unrelated GAC advice process.

Recognizing that it needed to show that the AUC supported its application, DCA argued below that section 2.2.1.4.3 of the Guidebook barred the AUC from withdrawing the letter of support it sent DCA in 2009. This argument, which the district court did not adopt, is groundless. Section 2.2.1.4.3 was not in the Guidebook in 2010 when the AUC withdrew its letter.⁸ Even if it had been in force, it does not purport to require a government to continue to support an

⁸ See April 2011 discussion draft of Guidebook, § 2-18, <https://archive.icann.org/en/topics/new-gtlds/draft-rfp-redline-15apr11-en.pdf>

application that, for whatever reason, the government has decided it no longer wishes to support. To the contrary, it merely describes one circumstance in which support may be withdrawn: “*It is also possible* that a government may withdraw its support for an application at a later time, *including* after the new gTLD has been delegated, if the registry operator has deviated from the conditions of original support or nonobjection.” 5 ER 929-39 (emphasis added). Further, even if it could be considered prescriptive, nothing in the provision suggests that it was intended to apply to a withdrawal of support that occurred years before the applicant even submitted its application.

In short, the district court’s ruling that DCA has raised “serious questions” on its Ninth Cause of Action is unsupportable. It is irreconcilable with the IRP Declaration and is contrary to the undisputed evidence. This Court should reject it.

B. The District Court Erred in Finding Irreparable Harm or That the Balance of Harms Favors DCA.

The foregoing shows that DCA failed to show any reasonable likelihood of prevailing on its Ninth Cause of Action. For that reason alone, it was error to grant a preliminary injunction, without regard to any claim by DCA of irreparable harm or any weighing of public and private interests. *Pimentel v. Dreyfus*, 670 F.3d 1096, 1111 (9th Cir. 2012) (reversing order granting preliminary injunction because plaintiff had not shown fair chance of success on the merits, holding “[a]lthough the other *Winter* factors may tip in her favor and in fact remain

unchallenged, ‘at an irreducible minimum the moving party must demonstrate a fair chance of success on the merits, or questions serious enough to require litigation’”) (citation omitted).

Even if consideration of irreparable harm or any weighing of interests were warranted, the district court erred in evaluating those issues as well.

1. DCA Did Not Establish That It Would Be Irreparably Harmed.

The district court concluded that “DCA will suffer irreparable harm because .AFRICA can be delegated only once.” 1 ER 46. That, however, is simply and practically not true. gTLD’s can be, and frequently have been, transferred to another operator after initial delegation. 2 ER 97. DCA argued below that such a transfer may only occur when the prior operator’s contract has expired. 2 ER 97. But that also is not true. 2 ER 97. There is simply no support in the record for any argument that .AFRICA could not or would not be transferred to DCA if DCA were to prevail in this litigation and somehow establish its right to be the operator.

The district court declined to consider this evidence because it viewed ZACR’s motion to reconsider as being moot upon ZACR’s dismissal from the case, and because ICANN did not itself raise the argument when it earlier opposed DCA’s motion for a preliminary injunction. But ZACR retains a valid interest in seeking to have the injunction vacated, whether or not it is a defendant in the case.

See Hilao v. Estate of Marcos, 94 F.3d 539, 544 (9th Cir. 1996) (non-party has standing to challenge injunction if bound by its terms); *In re Piper Funds, Inc., Institutional 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.”). Further, given the public interest implicated by the injunction and the lack of any genuine dispute that .AFRICA could be transferred to a different operator, it makes little sense to perpetuate an injunction on grounds that are demonstrably not true.

The district court alternatively ruled that “re-delegation” was irrelevant because DCA would lose business funding in the interim. 1 ER 23. This ruling was presumably based on DCA’s assertion 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.” 2 ER 99. Any claim for lost business funding, however, could be remedied by money damages, and thus cannot support injunctive relief as a matter of law. *See Amylin Pharms., Inc. v. Eli Lilly & Co.*, 456 F. App’x 676, 678 (9th Cir. 2011) (affirming denial of preliminary injunction because “harm that is fully compensable through money damages . . . does not support injunctive relief”). Beyond that, DCA’s only support for that argument is the conclusory assertion of its founder, unsupported by any facts. Such *ipse dixit* is not a sufficient basis upon which to issue a preliminary injunction, particularly in a case

like this in which the injunction prevents the successful launch of a domain name that will benefit businesses, consumers, and governmental entities across the entire African continent. *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (holding that “[s]peculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction . . . a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief” and reversing district court’s order granting preliminary injunctive relief on this basis) (citation omitted); *see also Rubin ex rel. NLRB v. Vista Del Sol Health Servs., Inc.*, 80 F. Supp. 3d 1058, 1100 (C.D. Cal. 2015) (“Nor does speculative injury constitute irreparable harm sufficient to warrant granting a preliminary injunction. . . . [the plaintiff] must proffer probative evidence that the threatened injury is imminent and irreparable.”).

2. The District Court Erroneously Assessed The Balance of the Equities And Where the Public Interest Lies.

The district court similarly erred in its balancing of the equities. The court concluded that the equities tipped in DCA’s favor because .AFRICA can be “delegated only once” and thus, absent an injunction, DCA’s “opportunity to obtain the rights to .AFRICA would be forever gone.” 1 ER 46. As just discussed, however, DCA faces no such risk.

Also erroneous was the district court’s ruling that ICANN would suffer no harm if delegation were delayed. ICANN’s Bylaws mandate it to enhance the

global interoperability of the Internet and to promote competition through the registration of domain names. 6 ER 1201-02. ICANN's Bylaws also require it to "act with speed that is responsive to the needs of the Internet" and to "duly tak[e] into account governments' or public authorities' recommendations." 6 ER 1202. These core functions are impaired when ICANN is prevented from proceeding with delegating a new gTLD that represents an entire continent, that will benefit businesses and consumers throughout the continent, and that has the explicit backing of every country on the continent.

Aside from ICANN's interest, the court improperly evaluated the broader public interest. The court stated that the public interest favored the preliminary injunction because the public has an interest in a "fair and transparent application process." 1 ER 46. The court erred, however, in giving weight only to that interest (which assumes that DCA will prevail) and in disregarding the public's strong interest in the prompt delegation of new gTLDs and the economic and other benefits they bring. As discussed above (p. 17), the record here is uncontroverted that the governments of Africa believe that prompt delegation of .AFRICA will result in widespread benefits to "governments, business and civil society" throughout the African continent. 3 ER 528-29. The African governments fully endorse delegation of .AFRICA for ZACR to operate, and believe the issuance of a

preliminary injunction and the accompanying delay in the launch of .AFRICA frustrates these interests. 3 ER 530-31.

The declaration the AUC submitted in this case is a powerful reflection of the public interest of the continent of Africa, yet the district court essentially ignored it, viewing the AUC as having a “conflict” in expressing these interests because it supports ZACR’s application. 1 ER 46-47. But that is akin to saying that voters have a conflict in expressing the public interest that the results of an election be implemented promptly simply because the voters were the ones that voted. The AUC is not a private, partisan participant in the application process. It represents the very African governments whose support is required for an applicant to be successful, because the .AFRICA gTLD is for their continent. In asserting a strong interest in prompt delegation of .AFRICA and the harm that will result from delay, the AUC is thus expressing the interest of the public, as its relevant representative.

In addition, the court’s evaluation of the public interest was again infected by its error in assuming that .AFRICA can be delegated only once. The court asserted 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 by which it was delegated.” 1 ER 47. The court thus treated the issue as an “either-or” proposition. That was error.

Because the operation of .AFRICA can be transferred to DCA if it were to prevail, litigating the fairness of the delegation of .AFRICA for operation by ZACR and allowing the public to enjoy the benefits of .AFRICA while that litigation is pending are not mutually exclusive.

* * * * *

In short, the district court's ruling was erroneous at every turn. The court improperly refused to give effect to the Covenant Not to Sue, which bars this suit at the outset. And, even if the Covenant Not to Sue could be properly evaded, the court erred in finding the existence of serious questions in DCA's favor and in its rulings regarding the relative harms. It was therefore error to grant the preliminary injunction.

CONCLUSION

The court's Order finding the Covenant Not to Sue unenforceable and granting the preliminary injunction should be reversed.

Dated: June 29, 2016.

Respectfully submitted,

JONES DAY

By: /s/ Jeffrey A. LeVee
Jeffrey A. LeVee

Attorneys for Defendant/Appellant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND
NUMBERS

STATEMENT OF RELATED CASES

ZACR appealed from the district court's June 20, 2016, order denying reconsideration of the court's order granting a preliminary injunction in favor of DCA, and the district court's April 12, 2016 order granting the preliminary injunction. *See* ER 1668. ZACR's appeal, No. 16-55894, is related to this appeal.

**CERTIFICATE OF COMPLIANCE PURSUANT TO
CIRCUIT RULE 32-1**

I certify that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 13,111 words.

Dated: June 29, 2016

Respectfully submitted,

JONES DAY

By: /s/ Jeffrey A. LeVee
Jeffrey A. LeVee

Attorneys for Defendant/Appellant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND
NUMBERS

STATUTORY ADDENDUM

Cal. Civ. Code § 1668

Contracts contrary to policy of law

All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing: APPELLANT’S OPENING BRIEF AND EXCERPTS OF RECORD – VOLUMES 1 THROUGH 7, with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 29, 2016. Under said practice, the CM/ECF users were electronically served.

Executed on June 29, 2016, at Los Angeles, California.

By: s/ Jeffrey A. LeVee
Jeffrey A. LeVee

Attorneys for Defendant/Appellant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS