

No. 16-55693; No 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, et al.**

*Defendant/Appellant*

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**DOTCONNECTAFRICA TRUST**

*Plaintiff/Appellee,*

v.

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

*Defendant/Appellant*

and

**ZA CENTRAL REGISTRY, NPC**

*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

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**APPELLEE DOTCONNECTAFRICA TRUST'S  
ANSWERING BRIEF**

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**CORPORATE DISCLOSURE STATEMENT**

DotConnectAfrica Trust has no parent corporation and no publicly held company owns 10% or more of its stock.

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## INTRODUCTION

Plaintiff/Appellee DotConnectAfrica Trust (“DCA”) is an African entity formed for the purpose of obtaining the .Africa generic top-level domain (“gTLD”) from the only organization in the world that controls the delegation of gTLDs, Defendant/Appellant Internet Corporation for Assigned Names and Numbers (“ICANN”). By contract with the United States Department of Commerce, ICANN is charged with the obligation to administer the assignment of Internet names and addresses in a “fair” and “transparent” manner. In order to obtain .Africa, and as per ICANN’s rules, DCA spent years collecting the endorsements from various governments and non-governmental organizations and preparing its application. DCA was the first applicant to obtain endorsements. DCA also paid the \$185,000 non-refundable application fee that ICANN requires from all gTLD applicants, on top of the significant money and time spent obtaining the endorsements. However, at every turn, ICANN favored the only other applicant, ZA Central Registry (“ZACR”), even when it meant that ICANN had to break its own rules and go out of its way to guide ZACR through the application process.

Specifically, ICANN’s the Governmental Advisory Committee (the “GAC”) advised ICANN to reject DCA’s application without providing any rationale, as mandated by the applicant Guidebook. DCA appealed ICANN’s acceptance of the GAC advice through ICANN’s Independent Review Process (“IRP”), an arbitration

operated by the International Centre for Dispute Resolution of the American Arbitration Association. The IRP Panel was comprised of respected former judges and scholars: The Honorable William J. Cahill (Ret.) (who replaced the Honorable Richard C. Neal (Ret.) after his passing), Babak Barin, and Professor Catherine Kessedjian. While the IRP was pending, DCA learned that ICANN nonetheless intended to sign an agreement with ZACR delegating the rights to the .Africa gTLD three days later. DCA contacted ICANN that day and asked ICANN to refrain from taking any further action with respect to .Africa. The next day – and two days before ICANN had initially planned any action with ZACR - ICANN took the penultimate step to delegating .Africa to ZACR by signing its agreement with ZACR, intentionally disregarding DCA's request and the pending IRP. The IRP Panel condemned this move and ordered ICANN to refrain from taking any further steps to delegate .Africa until the conclusion of the IRP.

The Panel conducted a thorough review of the facts and concluded in a 63-page ruling that ICANN violated its own Bylaws in its handling of the GAC advice and instructed ICANN to send DCA through the *remainder* of the application process.

But, instead of sending DCA to the next part of the application process, ICANN, ignored the IRP Panel's ruling (which it argued repeatedly was non-binding in any event), and re-reviewed DCA's endorsements. ICANN ultimately denied

DCA's application after arguing that it did not have the required endorsements, even though DCA had endorsement letters from the African Union Commission ("AUC") and the United Nations Economic Commission for Africa ("UNECA"). Indeed, ZACR has passed the endorsement round on the basis of its endorsement from AUC so this treatment was transparently discriminatory and biased and contrary to ICANN rules. Only later, after ICANN rejected DCA's application and its wrongful rejection of DCA's application was patent, ICANN tried to belatedly justify the rejection by arguing that the AUC had "withdrawn" its endorsement. But, ICANN's rules only allow endorsement withdrawals where a condition to the endorsement has been broken. There were no conditions whatsoever to the AUC's endorsement of DCA. To make matters worse, the AUC's purported withdraw was signed only by a lower level official and not the Chairman's office which executed the original endorsement. Moreover, the AUC's purported "withdrawal" of its endorsement came only because ZACR agreed to serve as the AUC's proxy in obtaining the .Africa gTLD for itself: ZACR agreed to transfer the gTLD rights to the AUC after obtaining it. Thus, the purported withdrawal was plainly self-serving and improper on its face, in addition to being disallowed by ICANN rules. In short, ICANN (1) re-evaluated DCA's endorsements in violation of the IRP Panel's ruling, (2) rejected it for a reason entirely inconsistent with its decision on ZACR's competing application in violation of its own rules and policies, and then (3) tried to justify that

improper action through yet another pretextual ground that was also foreclosed by ICANN's own rules and policies.

Given the grossly one-sided and unfair process in which ICANN effectively disregarded the ruling from its own IRP process, DCA was forced to file suit. After, yet again, being refused any assurance from ICANN that it would hold off on any delegation of .Africa, per the IRP Panel's ruling, at its upcoming ICANN meeting that weekend, DCA sought a temporary restraining order ("TRO") and preliminary injunction ("PI") from the district court because it expected ICANN to delegate .Africa to ZACR at that meeting. However, after DCA filed its TRO papers but before the district court issued any order, ICANN tried to make another end run around the legal process by holding an unscheduled emergency board meeting on the eve of the TRO decision, resolving to delegate .Africa to ZACR in an attempt to render the district court action moot. This serves as yet another stark indication of the lengths ICANN is prepared to go to slant its process in ZACR's favor and treat DCA's application in an unfair and discriminatory fashion. Nonetheless, the trial court granted the TRO and DCA's motion for a PI and later denied ZACR's motion for reconsideration of that ruling. ICANN and ZACR appealed those decisions.

ICANN and ZACR press three primary points on appeal: First, ICANN argues that DCA's case is barred by a broad prospective release (the "Covenant Not to Sue"), which ICANN mandates all applicants sign. The Covenant Not to Sue

forecloses all legal action against ICANN, even for willful wrongdoing. Second, ICANN and ZACR contend that the district court made certain factual errors, largely based upon one admitted error the district court deemed immaterial to the outcome on reconsideration. Third, ICANN and ZACR contend based on arguments not presented in opposition to the original motion for PI that DCA would not suffer irreparable harm. None of these arguments support overturning the district court's considered decisions to grant the PI and deny the motion for reconsideration.

The district court's reasoning regarding the Covenant Not to Sue is sound. The district court found that a prospective release in the applicant Guidebook was "[o]n its face... 'against the policy of the law'" and therefore did not protect ICANN from this litigation. California law prohibits any party from excluding claims for intentional wrongdoing – such as intentional misrepresentation, negligent misrepresentation, fraud, negligence, or unfair competition – and the Covenant Not to Sue does exactly that. Even if the Covenant Not to Sue were not void on its face, it would still not preclude the declaratory relief claim at issue in the PI because, as the trial court noted, the declaratory relief claim is based on alleged intentional and wrongful conduct. ICANN cannot argue that its IRP provides redress because ICANN refuses to recognize IRP Panel decisions as binding, and the IRP is permitted only to evaluate the limited question of whether ICANN violated its own Articles of Incorporation, Bylaws, policies and procedures. Without any possibility

of legitimate redress, ICANN's Covenant Not to Sue is void as a matter of law and contrary to well-established public policy.

The trial court was also correct and certainly well within its considerable discretion in issuing the PI and denying the motion for reconsideration. DCA established all elements necessary for the district court to enter a PI enjoining Appellant ICANN from improperly delegating the gTLD .Africa until the resolution of this case. The district court found "serious questions" as to the merits that DCA was likely to succeed on its claim that ICANN improperly rejected DCA's application for the .Africa gTLD for its favored candidate ZACR. Neither ICANN nor ZACR have shown that the district court abused its discretion or based its rulings on material errors.

With regard to the trial court's ruling on the "serious questions" as to the merits of the declaratory relief claim, ICANN and ZACR argue that DCA never had the requisite regional endorsements. However, DCA established in the IRP that ICANN improperly rejected its application, and the district court noted in its order on the motion for reconsideration that "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." ICANN initially instructed Interconnect Communications ("ICC"), the organization ICANN contracted with to evaluate the parties' regional

endorsements, not to consider endorsements from the non-governmental entity, the AUC. Both ZACR and DCA were endorsed by the AUC. If ZACR did not have the purported support from the AUC, ZACR could not have passed the regional endorsement evaluation. The ICC recommended that ICANN accept the AUC and UNECA as endorsers and send clarifying questions to both DCA and ZACR or to the AUC. However, ICANN ceased reviewing DCA's application after the GAC advice – the decision which led to the IRP Panel's ruling against ICANN. ICANN accepted the AUC endorsement from ZACR but then refused to accept the same endorsement for DCA. ICANN also failed to send DCA clarifying questions, which would have alerted DCA to ICANN's contentions regarding its endorsements, until after the IRP. ICANN's subsequent attempt to justify its rejection of DCA's application based on the AUC's purported withdrawal fails because, under ICANN rules, endorsements cannot be withdrawn unless conditions to them are violated.

Additionally, ZACR's original AUC endorsements had problems that ICANN ignored. The endorsements ZACR originally submitted from the AUC did not even mention ZACR. Later, to help ZACR's application pass, ICANN ghostwrote another AUC endorsement letter for ZACR. Prior to ZACR's application, the AUC requested that ICANN place .Africa on a reserved list so that the AUC could control .Africa directly, a move ICANN rejected, after DCA pointed out it would violate ICANN's rules. Undeterred by ICANN's rejection, the **AUC then agreed to**

**endorse ZACR's application, predicated on ZACR's agreement to transfer all the rights to .Africa to the AUC if it were awarded the gTLD, as evidenced on the face of ZACR's application.** ZACR is the AUC's proxy and any endorsement of ZACR by the AUC is really just an endorsement of itself. The AUC's later endorsement of ZACR is an end run around this decision and plainly a self-interested attempt by the AUC to control .Africa itself. **Both ICANN and ZACR fail to acknowledge this undisputed relationship in their opening briefs.** The country-specific endorsements ZACR submitted generally as qualifying did not even mention ZACR and are thus plainly ineffective.

At bottom, DCA sought to enforce the IRP ruling that ICANN processes its application through the *remainder of* the application process. DCA argued that ICANN failed to follow that ruling when it reconsidered DCA's endorsements, rejected DCA's application on pretext, and then tried to justify that rejection by pointing to a purported withdrawal of the endorsement that was not permitted by ICANN rules. Moreover, the withdrawal letter from the AUC was not written by the same AUC representative that wrote the endorsement, included ambiguous language, and was sent to ICANN, without any response from ICANN noting that it constituted a withdrawal until ICANN used this as a post-IRP justification for DCA's rejection. Therefore, the district court properly recognized that DCA

demonstrated a serious question as to whether ICANN improperly rejected DCA's application, and based its rulings on that well-supported finding.

In granting the PI, the trial court recognized and acknowledged these facts, but cited to incorrect evidence in one instance explaining its decision. But the incorrect evidence was not material, as the district court held upon reconsideration, and the other evidence the district court considered was grounds enough to grant the PI. Second, the Appellants argue that the district court's finding that there was irreparable harm was based on the incorrect assertion that a gTLD cannot be re-delegated. However, while re-delegation may be possible as a technical matter, its practical difficulty, if not impossibility, is supported by the fact that *ICANN never argued re-delegation was possible in its opposition to the PI*. In any event, DCA has presented evidence that even if re-delegation were theoretically possible, DCA would fail if .Africa were first delegated to ZACR.

Additionally, ICANN failed to present any evidence of irreparable harm to itself or the public in general. Instead, ICANN submitted a declaration from a representative of the AUC, concluding that the domain would promote development in Africa. The district court gave little weight to the declaration because the AUC is biased in favor of ZACR, its proxy applicant. Therefore, ICANN presented no credible evidence of harm to itself or the public at large. The district court agreed

with DCA, holding that the proper delegation of .Africa was more important to the public than the biased, conclusory claims put forth by ICANN.

Finally, ZACR's arguments regarding everything except for the district court's single factual error are untimely. ZACR knew of the motion for the PI weeks before moving for reconsideration and to vacate, but chose not to appear or argue in the first instance. ZACR asserts that DCA purposefully delayed in serving ZACR and set the briefing schedule to exclude ZACR. In fact, DCA sought assurance from ICANN that the .Africa domain would not be delegated at ICANN's annual meeting, set to take place days after. ICANN refused, and thus DCA was forced to file both the motion for a PI and apply *ex parte* for a temporary restraining order. Although ZACR is headquartered in South Africa, a nation not party to The Hague Convention, DCA was able to serve ZACR with the complaint and PI motion by special order of the court *weeks before* the district court issued the PI.

Before ZACR moved for reconsideration and to vacate the PI, ZACR moved to dismiss the complaint. The district court granted ZACR's motion to dismiss prior to ruling on its motion for reconsideration and to vacate, and held its arguments moot. The district court also noted 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. It is undisputed that although ZACR was officially served with the complaint a week after the opposition briefing

deadline had passed, ZACR knew of Plaintiff's motion well before that time. From the time ZACR had been served to the time the Court issued the injunction, three weeks had elapsed. At no time during this period did ZACR attempt to oppose Plaintiff's motion." The district court considered ZACR's arguments however, because ICANN had joined in the motion, and submitted no briefing on its own behalf. The district court nonetheless denied the motion to reconsider and vacate.

DCA succeeded in the IRP, succeeded with its application for a TRO and with its motion for a PI and succeeded on reconsideration. The district court (and previously the IRP Panel) recognized the brazen and improper actions of ICANN throughout this entire process, correctly granted and affirmed on reconsideration the PI, and both of those rulings should be upheld so that .Africa's delegation can be properly evaluated by the district court in only a few months' time. The district court's orders should be affirmed on all counts.

## **STATEMENT OF ISSUES**

1. Did the district court properly exercise its discretion in ruling that "serious questions" exist as to whether the Covenant Not to Sue is invalid on its face as an exclusion of liability for fraud, intentional acts, and negligence?

2. Did the district court properly exercise its discretion in ruling that DCA showed "serious questions" as to its claim that ICANN improperly and arbitrarily rejected DCA's application?

3. Did the district court properly exercise its discretion in ruling that DCA presented evidence of irreparable harm, ICANN presented no evidence of irreparable harm, the balance of interests favored DCA, and that the public interest in properly awarding the .Africa gTLD is superior?

4. Did the district court properly exercise its discretion in denying ZACR's motion to reconsider and refusing to vacate the preliminary injunction?

## **STATEMENT OF THE CASE**

### **A. ICANN**

ICANN is a California non-profit established for the benefit of the Internet community and tasked with carrying out its activities in conformity with relevant principles of law and through open and transparent processes. ER 763. ICANN is the only organization in the world that assigns rights to gTLDs. It effectively yields monopolistic power and forces gTLD applicants to play by its self-serving rules. ER 1516. ICANN has a special, unique, and publicly important function as the steward of a highly valuable international resource. ER 768.

ICANN's Bylaws, allegedly guide the decisions and actions of ICANN: (a) preserve and enhance the operational stability of the Internet; (b) employ open and transparent policy development mechanisms that promote well-informed decisions; (c) make decisions by applying documented policies neutrally and objectively with integrity and fairness; and (d) remain accountable to the Internet community through

mechanisms that enhance ICANN's effectiveness. ER 1201-1202. Furthermore, ICANN's own Bylaws state that it shall not apply its standards inequitably or single out any particular party for disparate treatment. ER 1203. Its Bylaws also state that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner." ER 770. ICANN is accountable to the Internet community for operating in a manner consistent with its Bylaws and Articles of Incorporation as a whole. ER 1203. ICANN acknowledges that it was granted its authority, pursuant to a series of agreements with the United States government. ER 730.

### **B. The gTLD Program**

In 2012, ICANN launched the "New gTLD Program" and invited parties to apply for various new gTLDs. Appellant's Opening Brief [ICANN] at 6, No. 16-55693 (June 29, 2016) ("ICANN's Open. Brief"). In order to submit an application for a gTLD, all applicants were required to agree to the terms of the gTLD Applicant's Guidebook (the "Guidebook") (ER 756) and applicants were also required to submit a non-refundable \$185,000 application fee. ER 903.

### **C. The Covenant Not to Sue**

The Guidebook terms DCA was forced to concede to upon submitting its gTLD application contained the Covenant Not to Sue:

"Applicant hereby releases ICANN...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...in connection with ICANN's or an ICANN Affiliated Party's review of this application, investigation or verification, and 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." ER 1193.

ICANN implies that applicants can seek redress through its IRP, but ICANN treats the IRP Panel's decisions as advisory, and not binding, and there is also no recourse for appealing an IRP Panel's decision. ER 1797. As such, ICANN shields itself entirely from accountability and precludes any real redress to applicants. ER 1768. Moreover, the IRP Panel only reviews actions "inconsistent with the Articles of Incorporation or Bylaws" – allowing ICANN to engage in any intentionally wrongful conduct without consequence, so long as it adheres to its Articles of Incorporation and Bylaws in doing so. *Id.*

ICANN states that the Guidebook (including the Covenant Not to Sue) was the process of negotiation with gTLD applicants. ICANN's Open. Brief, *supra* at 32-33. This is not true. ICANN rejected all comments addressing the language of the Covenant Not to Sue, although the comments ICANN received indicated its illegal, unenforceable nature. ER 1769. ICANN's own GAC stated: "**The exclusion**

**of ICANN liability.... provides no leverage to applicants to challenge ICANN’s determinations.... The covenant not to challenge and waiver...is overly broad, unreasonable, and should be revised in its entirety.”**). ER 715. Even with this admonition from its own committee, ICANN refused to revise the Covenant Not to Sue.

#### **D. DCA and the Top-Level Domain Application**

DCA an independent, non-profit and non-partisan African organization that is based in Mauritius, with its registry operations in Kenya, was formed with the charitable purpose of advancing information technology education in Africa and providing a continental Internet domain name to allow the people of Africa access to internet services. ER 763. DCA’s CEO, Sophia Bekele, has spent time as an advisor to ICANN’s new gTLD program and was champion for the causes of the global Internet Domain Name (IDN) policy for the international community. In March 2012, DCA applied to ICANN for the delegation of the .Africa top-level domain name in its 2012 General Top-Level Domains Internet Expansion Program (the “New gTLD Program”). *Id.*

ICANN required that applicants for the rights to a geographic gTLD such as .Africa obtain endorsements from 60% of the national governments in the region, with no more than one written statement of objection to the application from relevant governments in the region and/or public authorities associated with the region. ER

927. DCA obtained the endorsements of the AUC and UNECA. ER 1312 and 1316. DCA was the first to obtain official endorsements for .Africa. Not until after the initial evaluation process, did ICANN argue that the AUC had withdrawn its endorsement, in an apparent last ditch effort to invalidate DCA's application.

In April 2010, the AUC wrote to inform DCA that it had "reconsidered its approach in implementing the subject Internet Domain Name (.Africa) and no longer endorses individual initiatives in this matter[.]" However, the letter did not expressly withdraw its endorsement of DCA. ER 1314. ICANN's statement that DCA failed to disclose this letter in its application is false. DCA disclosed its existence and explained its belief that it was not valid. ER 1771. From March 2012 to June 2013, ICANN considered and evaluated DCA's application notwithstanding this disclosure, making clear that ICANN did not itself consider the withdrawal valid. Had it, DCA's application would have immediately failed.

At no time until after it had rejected DCA's application, did ICANN assert that the AUC had properly "withdrawn" its endorsement. Even so, Section 2.2.1.4.3 of the Guidebook states that a governmental entity may only withdraw its endorsement if "*the registry operator has deviated from the conditions of original support or non-objection.*" ER 930 (emphasis added). There were no conditions on the AUC or UNECA endorsements to DCA. ER 1312 and 1316. This rule is necessary because otherwise an applicant could spend valuable resources collecting

endorsements, only to become disqualified at the last minute because a country pulls an endorsement for political reasons or reasons of self-interest, such as was the case with the AUC/ZACR application. ER 1764. Few entities would be willing to make the investment necessary to apply for a gTLD if their groundwork could be invalidated at such a whim. Additionally, the purported withdrawal letter came from an individual, Moctar Yedaly, and not from the AUC Chairman's office which granted the endorsement. ER 1715.

**E. ZACR and the AUC's Top Level Domain Application**

The AUC tried to withdraw its support of DCA because it wanted the .Africa gTLD for itself. The AUC attempted to directly obtain the rights to .Africa in 2011 by requesting that ICANN include .Africa in the List of Top-Level Reserved Names. ER 1332. If that happened, the .Africa gTLD and its equivalent in other languages would be unavailable for delegation under the ICANN New gTLD Program and the AUC be able to delegate .Africa to a registry of its choosing. DCA protested that this would not be in compliance with the gTLD guidelines.

ICANN then denied the AUC's request to reserve .Africa but assisted ZACR in obtaining .Africa as the AUC's proxy. ER 1333. In violation of its duties to act independently, ICANN explained to the AUC in a letter exactly how to combat a competing application using the GAC process. (*Id.*) In exchange for the AUC's endorsement, ZACR agreed to allow the AUC to "retain all rights relating to

dotAfrica TLD, including...intellectual property...other rights to the registry databases...and the right to re-designate the registry function.” ER 1391. The AUC also had other motives for favoring ZACR. The members of the AUC committee formed to choose who to endorse for the .Africa gTLD were individuals who were also members of other organizations affiliated with ZACR. ER 758.

ZACR represented that it was applying for the .Africa gTLD on behalf of the “African community.” ER 1544. However, it failed to submit the required application for a “community” applicant, which is a term of designation and differentiation for gTLDs. ER 1390. Nevertheless, ICANN processed ZACR’s “standard” application. ZACR also made multiple misrepresentations to ICANN to edge DCA out including that it had the large number of qualifying endorsements from individual African governments sufficient to meet the 60% threshold under ICANN rules. ER 784.

In an apparent attempt to bolster its legitimacy over that of DCA, ZACR claims to be the “largest domain registry” on the African continent. However, this position is questionable as the registry CentralNic, the back-end operator for DCA Trust, has many clients across the African continent and is one of the top-ranked registries in the world. Moreover, ZACR’s overlapping management and control with DNServices, its registrar, the AUC, and the South African government call into question its ability to operate as an independent and transparent registry given the

numerous conflicts of interest under which it operates.

**F. The Geographic Names Panel and InterConnect Communications**

ICANN contracted with a private company, ICC, to perform a review of geographic name applications as ICANN's Geographic Name Panel. ER 1470. The ICC warned that if ICANN did not accept endorsement letters from regional authorities like the AUC and UNECA, ZACR's application would fail. ER 521. ICANN asserted during the IRP that it had taken both the AUC and UNECA endorsements into account in evaluating DCA's application. ER 798. However, had ICANN actually taken the AUC and UNECA endorsements into account before the controversial GAC advice, DCA's application would have passed ER 521 and 759. Instead ICANN apparently stopped the initial evaluation for ZACR until the GAC advice was in effect. ICANN conspired to accept ZACR's alleged endorsements, which for the most part did not even mention ZACR by name, as sufficient while disregarding Plaintiff's endorsements, although at the time, ICANN presented no arguments that the AUC's endorsements for DCA had been withdrawn, although they knew about the purported withdrawal letter.

**G. The Governmental Advisory Committee**

ICANN has a GAC whose purpose, according to ICANN's Bylaws, is to "consider and provide advice on the activities of ICANN as they relate to concerns of governments." ER 1524. The AUC became a member of the GAC in 2012,

apparently on the advice of ICANN. ER 1333-34. Having given the AUC instructions on how to use GAC proceedings to derail DCA, ICANN then allowed the AUC to use the GAC as a vehicle for the issuance of advice against DCA's application by DCA's only competitor for .Africa, the AUC through ZACR. *Id.*

Under ICANN's rules, the GAC can recommend that ICANN cease reviewing an application if *all* of the GAC members agree that an application should not proceed because an application is sensitive, violates national law or is problematic. ER 790-96 and 1506-07. However, not all of the members of the GAC agreed that DCA's application should be stopped. Kenya's representative was not even present at the GAC meeting when the advice was issued, but ICANN nonetheless allowed the AUC (through Alice Munyua) to make a statement on Kenya's behalf denouncing DCA's application, even though the current Kenya GAC advisor wrote to the GAC chairperson to inform her that he objected to a GAC consensus advice on .Africa. ER 1776.

Moreover, the GAC gave no indication that it considered the DCA's application pursuant to the required ICANN standard. ER 805-06 (“[T]he GAC made its decision without providing any rationale and **primarily based on politics** and not on potential violations of national laws and sensitivities.”) [emphasis added]. In June 2013, the New gTLD Program Committee (“NGPC”) nevertheless accepted the GAC's advice. ER 806. ICANN ceased review of DCA's application

on the basis of the GAC advice while ZACR's application continued. ER 784, 806, and 1495-96. ICANN could have reconsidered this decision under its rules but refused to do so. ER. 763 and 1206-07.

Meanwhile, ZACR passed the initial evaluation and entered into the contracting phase with ICANN. ER 1495-96. ZACR did not have sufficient country specific endorsements to meet the ICANN requirements for geographic gTLDs. ER 522-23. ZACR filed purported support letters endorsing the AUC's "Reserved Names" initiative, along with declarations made by the AUC regarding its intention to reserve .Africa for its own use as evidence of such support. ER 1391. Only five of the letters submitted by ZACR from African governments actually referenced ZACR by name. ER 759. Despite these limitations, ICANN passed ZACR's application. ER 1494-96.

#### **H. The Independent Review Process**

ICANN purports to provide applicants with an independent review process, as a means to challenge ICANN's actions with respect to a gTLD application. ER 1014 and 1193. The IRP is an arbitration, operated by the International Centre for Dispute Resolution of the American Arbitration Association, comprised of an independent panel of arbitrators. ER 1014. Nevertheless, although not disclosed in its applicant Guidebook, ICANN refuses to recognize the IRP Panel's holding as binding. ER 732 and 1797.

In August 2013, after ICANN refused to reconsider its rejection of DCA's application based on the flawed GAC advice, DCA informed ICANN of its intent to seek relief through the IRP. ER 763. In October 2013, DCA successfully sought an IRP to review ICANN's processing of its application, including ICANN's handling of the GAC opinion. ER 764. DCA's IRP Panel was comprised of the Honorable William J. Cahill (Ret.) (who replaced the Honorable Richard C. Neal (Ret.) after his passing), Babak Barin, and Professor Catherine Kessedjian. ER 762. Judge Cahill is a JAMS arbitrator and former judge. Mr. Barin and Ms. Kessedjian are both experienced professors of international law as well as experienced arbitrators.

In order to safeguard its rights while the IRP was pending, DCA requested that ICANN "cease any further processing of all applications for the delegation of .Africa gTLD." ER 764. ICANN refused. *Id.* DCA sought assurance from ICANN that it would refrain from taking any further actions until the IRP resolved. *Id.* Not only did ICANN refuse, but the very next day – and apparently earlier than it previously intended to do so – ICANN signed the registry agreement with ZACR. *Id.* Shortly thereafter, on DCA's emergency request, the IRP Panel required ICANN to "immediately refrain from any further processing of any application for .AFRICA until [the Panel] heard the merits of DCA's [IRP] and issued its conclusions regarding the same." ER 765.

ICANN fought to limit the IRP to a hearing with argument by counsel. ER

770. After being denied by the original panel, ICANN moved for reconsideration after the passing of the Hon. Richard C. Neal. ER 769. The IRP Panel unanimously rejected ICANN's request both times. ER 772.

### **I. ICANN Ignores the IRP's Authority**

ICANN claims it has no obligation to follow or adhere to IRP decisions. By its own actions, ICANN admits that the IRP is an illusory check on the organization. ER 732 and 1797. The IRP Panel responded to ICANN's arguments that the IRP was not binding by stating as follows:

“The Panel seriously doubts that the Senators questioning former ICANN President Stuart Lynn in 2002 would have been satisfied had they understood that a) ICANN had imposed on all applicants a waiver of all judicial remedies, and b) the IRP process touted by ICANN as the “ultimate guarantor” of ICANN accountability was only an advisory process, the benefit of which accrued only to ICANN.” ER 768.

Although it did not expressly rule upon some of DCA's arguments, the IRP Panel stated:

“[T]here are perhaps a number of other instances, including certain decisions made by ICANN, that did not proceed in the manner and spirit in which they should have under the Articles of Incorporation and Bylaws of ICANN.” ER 815.

The IRP Panel issued a final and thorough 63-page declaration in the matter on July 9, 2015. The Panel found, *inter alia*, that:

- a. The IRP arbitration was binding. ER 766-68.
- b. ICANN's actions and inactions with respect to DCA's application were inconsistent with ICANN's bylaws and articles of incorporation. ER 807.

- c. ICANN should “continue to refrain from delegating the .Africa gTLD and **permit DCA Trust’s application to proceed through the remainder** of the new gTLD application process.” ER 818.

When the IRP Panel declared that DCA should be allowed to proceed through the “remainder” of the process, the IRP Panel could not have meant that ICANN should be allowed to keep DCA’s application in the initial evaluation phase, where ICANN’s wrongdoing had already tainted the process. DCA’s endorsements had already been reviewed by the ICC and it should have proceeded to the next step in ICANN’s review process, string contention. Instead, ICANN forced DCA to proceed through the geographic name panel phase of the initial evaluation as if the GAC decision had never happened. ER 1788-89.

#### **J. ICANN’s Processing of DCA’s Application After the IRP Declaration**

Instead of allowing DCA’s application to proceed through the remainder of the application process, ICANN re-reviewed DCA’s endorsements. ER 1342-43. ICANN intended to deny DCA’s application. For example, in September 2015, ICANN issued DCA clarifying questions regarding its endorsements, which should have been issued before the problematic GAC advice, and then indicated that DCA’s responses were inadequate. Hoping to gain insight into what exactly was allegedly wrong with its application, DCA agreed to an extended evaluation. ER 758. But, ICANN merely asked the exact same questions without further guidance or clarification, clearly a pretext to deny DCA’s application. (*Id.*). After all, ICANN

had already entered into a registry agreement with ZACR, as ICANN's general counsel had made public *after* the IRP Panel's Declaration issuance. In short, the post-IRP process ICANN put Plaintiff through was a sham with a predetermined ending – ICANN's denial of Plaintiff's application so that ICANN could steer .Africa to ZACR. ER 1524.

There was no reason to re-evaluate DCA's endorsements because ICANN conceded in the IRP that it accepted endorsements from both UNECA and the AUC, both of which DCA obtained before the GAC advice. ICANN did not state that the "withdrawal" of DCA's endorsements was the reason for rejecting its application until after the IRP and after ICANN rejected DCA's application. However, not only was the AUC's attempted withdrawal invalid, but UNECA did not submit any attempted withdrawal until after the geographic names panel resumed following the IRP. ER 798 and 1771. Similar to the purported withdrawal from the AUC, UNECA's letter also came from a different individual than the initial endorser, a low-level employee. ER 1321. Thus, at the time DCA's application was processed, DCA indisputably had the required endorsements, and indeed endorsements that ICANN had used to pass ZACR.

ICANN argues that by seeking another 18 months to obtain regional endorsements during the IRP, DCA effectively admits that it did not have sufficient endorsements. ICANN's Open. Brief, *supra* at 14 and 47. ICANN fails to address

DCA's alternative request that the IRP Panel rule that DCA's endorsements were sufficient. The Panel declined to expressly rule on either request but limited its decision to ICANN's procedure. However, DCA always argued that it had sufficient endorsements due to its letters from the AUC and UNECA. DCA sought 18 months to collect individual government endorsements in the event that the IRP Panel determined that the AUC and UNECA were not proper endorsers because they were not individual governments. ER 816. Had that been the decision from ICANN, both DCA and ZACR would have needed additional time or both would have failed as the ICC confirmed to ICANN.

In February 2016, ICANN formally rejected DCA's application after the extended evaluation. ER 1367.

#### **K. Lower Court Proceedings**

##### **1. Temporary Restraining Order**

On January 20, 2016 DCA filed suit against ICANN in Los Angeles Superior Court. DCA moved for a TRO, but was denied without prejudice for insufficient notice and evidence. ER 1573. Shortly thereafter, ICANN removed the proceedings to the United States District Court for the Central District of California. ER 1568. On February 26, 2016, DCA amended its complaint, adding ZACR as a defendant. ER 1538. Three days before, DCA sought assurances from ICANN's counsel that ICANN would not proceed with the .Africa delegation until after a motion for a PI

could be heard, but ICANN refused to give any assurance. ER 1537. DCA immediately moved for a PI on March 1, 2016. ER 1509. DCA was forced to move for a PI immediately based on ICANN's refusal to provide assurances, not based on any intent to prejudice the affected parties.

The next day, DCA moved for a TRO, applying *ex parte* to prevent ICANN from delegating the domain. ER 1660. DCA's pleadings in the TRO nearly mirrored those in the previously filed PI. ER 103 and 1709. DCA applied for the order on March 2, 2016, because ICANN was scheduled to hold its annual meeting in Marrakech, Morocco beginning March 5. ER 1498.

The day after DCA filed its TRO application, ICANN held a previously unscheduled board meeting in Morocco and resolved to "proceed with the delegation of .Africa to be operated by ZACR." ER 658. An ICANN board member stated to an AUC member "you have the commitment from ICANN... to not let the litigation issues intervene and will pursue the finalization of this issue with diligence and all appropriate measures to ensure that the interests of all parties are protected" apparently referring to both the active TRO and pending PI. ER 340. ZACR was fully aware that DCA filed a TRO as early as March 3, 2016. (*Id.*)

On March 9, the district court granted DCA's *ex parte* application and entered a TRO, enjoining ICANN from issuing the .Africa gTLD until a full hearing on DCA's motion for a PI, scheduled for April 4. ER 752-53.

On March 10, the district court granted DCA's *ex parte* application to appoint a special process server to serve ZACR. ER 1728-27. On March 17, DCA's process server served ZACR via USPS International Mail, Global Express Guaranteed, at its address in South Africa. The documents, including DCA's motion for a PI, were received by ZACR on March 22 at 9:00 a.m. ER 1724-25.

## 2. DCA's Preliminary Injunction

On April 12, 2016 the district court granted DCA's motion for a PI. The district court held that ICANN's Covenant Not to Sue, "[o]n its face... is 'against the policy of the law' because it exempts ICANN from *any and all claims* arising out of the application process, even those arising from fraudulent or willful conduct. Cal. Civ. Code § 1668." ER 43 (italics in original). The district court decision expressly rejected ICANN's contention that the Covenant Not to Sue was enforceable; it did not matter that DCA moved for a PI based on its ninth cause of action for declaratory relief because the gravamen of DCA's claims alleged intentional wrongdoing by ICANN. ER 44.

The district court found "serious questions" as to whether DCA's application should have proceeded to the delegation phase with ZACR's application, a likelihood of irreparable harm that was undisputed by ICANN, a balance of the equities in favor of DCA from the lack of any harm presented by ICANN, and that

the public interest in properly delegating the .Africa gTLD outweighing any interest presented by ICANN to support granting DCA's motion for a PI. ER 44-46.

3. ZACR's Motion to Reconsider and Vacate the Preliminary Injunction

ZACR was indisputably aware of DCA's motion for a PI on March 22, and arguably aware of it on March 3. ER 1709 and 1724. Additionally, the district court did not rule on the PI until three weeks later on April 12. ER 40. ZACR had ample time to seek leave for further briefing from the district court, but, instead waited for a second bite at the apple after the decision was adverse. Indeed, ZACR did not deny that it was aware of the proceedings before the district court granted DCA's PI. ER 197-98.

ZACR appeared in the case and moved to dismiss on May 6, 2016. ER 1665. Ten days later, ZACR filed its motion for reconsideration and to vacate the PI. ER 199. ICANN joined in ZACR's motion, but filed no briefs otherwise. ER 197-98.

ZACR argued that the evidence submitted by DCA with respect to the inability to re-delegate domains was wrong. ER 210. However, ICANN's failure to make the same argument is strong evidence that although re-delegation may be technically possible, it would not be practical in this case. ZACR submitted a declaration from ICANN employee Akram Atallah and webpages from ICANN's own website, which was available when the PI was briefed. ER 96-97 and 326.

Prior to ruling on ZACR's motion for reconsideration and to vacate, the district court granted ZACR's motion to dismiss. The district court then held ZACR's motion to reconsider and vacate as moot. ER 21. However, the district court considered ZACR's arguments substantively because ICANN had joined. ER 22.

### **SUMMARY OF THE ARGUMENT**

Cal. Civil Code §1668 is clear: if a waiver seeks to preclude a party from liability for violations of the law (including but not limited to fraud, intentional misrepresentation, or otherwise), the waiver is void and unenforceable as to any claim. Therefore, it is immaterial that the claim at issue with respect to the PI is a declaratory relief claim. In all events, the district court found that the declaratory relief claim *is* based on intentional wrongful conduct. ER 44.

DCA has shown that the PI was justified both under the "sliding scale" approach, which the district court applied, as well as the "likelihood of success" analysis. ER 43-47. As to the merits of DCA's claim, the evidence shows that if ZACR passed, then DCA passed. Thus, DCA should have proceeded to the delegation phase. ICANN refusal to recognize that this fact and the fact that DCA's endorsements had already been reviewed, demonstrates the likelihood of success on DCA's ninth cause of action for declaratory relief.

As for irreparable injury, DCA was unaware of any gTLDs being re-delegated after a registry agreement was signed. ICANN's opposition to DCA's motion for a PI presented no evidence to the contrary. Instead, after the district court granted the PI, ZACR submitted evidence as part of its motion for reconsideration and to vacate – from an ICANN employee, from ICANN's website, and available to ICANN when the PI was briefed – arguing that a gTLD can be re-delegated. Although technically possible, re-delegation in this instance is not practicably feasible – presumably the reason why ICANN did not make the argument initially. The district court held that “ICANN failed to make this argument in its opposition to Plaintiff's Motion for Preliminary Injunction,” and “[did] not state that this fact was unknown or unavailable to ICANN prior to the Court's issuance of the injunction, nor [was] there reason to believe it can.” ER 23. ICANN waived the argument and ZACR cannot claim this is new evidence or evidence unavailable at the time of the PI briefing. DCA also submitted evidence that DCA's sole business purpose was to obtain the .Africa gTLD and subsequently manage it. If ZACR is improperly awarded .Africa, DCA's funding will cease and the business will be destroyed - an irreparable harm to DCA.

The balance of the equities also strongly favors DCA. ICANN offered no evidence of harm to itself if ICANN were enjoined from issuing the .Africa domain until this case resolves. On its motion for reconsideration and to vacate, ZACR only

offered speculative, spreadsheets of amounts it claims as lost profits, but fails to explain exactly how those losses are incurred, or whether they can be mitigated. ZACR and ICANN also acknowledge that ICANN signed the registry agreement with ZACR with full knowledge that the IRP against ICANN was in progress, further demonstrating ICANN's bias towards ZACR.

Finally, the public interest weighs in favor of an injunction on .Africa's delegation until this case is resolved. The internet is the world's largest public domain. In arguing against the PI, ICANN only offered biased, conclusory, and speculative assertions of "harm to the continent of Africa" from AUC member Moctar Yedaly. The district court accorded that declaration little weight and determined that it is "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." ER 46-47. ZACR offered vague declarations asserting that ZACR was planning to donate funds from the operation of .Africa to benefit an unidentified Africa charity, and concluding that the continent of Africa suffers harm but presenting no identifiable facts. In contrast, DCA is already set up as a trust and has started implementing its charity work with funding from supporters.

The district court properly exercised its discretion in issuing the PI and denying ZACR's motion for reconsideration. Accordingly, the decisions of the district court should be affirmed.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

#### **A. Appellate Review**

An order granting a PI is reviewed for abuse of discretion. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009). An order is only reversed “if the district court based its decision on an erroneous legal standard or on clearly erroneous findings of fact.” *Id.* “The district court’s interpretation of the underlying legal principles...is subject to de novo review.” *Id.*

#### **B. Preliminary Injunction**

“District courts in the Ninth Circuit use two tests when analyzing a request for a temporary or preliminary injunction: the ‘traditional’ and ‘alternative’ criteria tests.” *Imperial v. Castruita*, 418 F.Supp.2d 1174, 1177-78 (C.D. Cal. 2006). Under the former test, the plaintiff must show “(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases).” *Id.* Under the alternative, or “serious questions” test, “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." *Towery v. Brewer*, 672 F.3d 650, 657 (9th Cir. 2012). "This approach requires that the elements of the preliminary injunction test be balanced, so that a stronger showing of one element may offset a weaker showing of another." *Id.*

### **C. Motions for Reconsideration and Motions to Vacate**

A motion for reconsideration is should not be granted "absent highly unusual circumstances." *Marilyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F. 3d 873, 880 (9th Cir. 2009); Fed. R. Civ. P. 59(e). A motion for reconsideration "may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000); *See also Ausmus v. Lexington Ins. Co.*, No. 08-CV-2342-L (LSP), 2009 U.S. Dist. LEXIS 63007, at \*4-5 (S.D. Cal. July 15, 2009). Under L.R. 7-18, "a motion for reconsideration... may only be made on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision."

A motion to vacate requires new or changed circumstances that have arisen after the court granted the injunction. Fed. R. Civ. P. 54(b). *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1124 (9th Cir. 2005).

For the reasons set forth below, the district court properly exercised its discretion in granting the preliminary and refusing to vacate it, and that decision should not be overturned.

**II. THE DISTRICT COURT PROPERLY HELD THAT THE COVENANT NOT TO SUE IS FACIALLY VOID BECAUSE IT SEEKS TO EXEMPT LIABILITY FOR INTENTIONAL ACTS, NEGLIGENCE, AND FRAUD.**

**A. ICANN's waiver is void under Section 1668.**

A waiver seeking to exempt an individual from fraud, willful injury, or violations of law is void, and the Covenant Not to Sue purports to do just that. “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.” Cal. Civ. Code §1668 (hereinafter “Section 1668”);<sup>1</sup> *See also Reudy v. Clear Channel Outdoors, Inc.*, 693 F.Supp.2d 1091, 1116 (N.D. Cal. 2007) [“a party [cannot] contract away liability for his fraudulent or intentional acts or for his

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<sup>1</sup> ICANN asserts that Section 1668 “covers only ‘willful injury’ to the person or property of another”. ICANN’s Open. Brief, *supra* at 32. The plain language of the statute specifically excludes “fraud, **or** willful injury to the person or property of another, **or** violation of law.” [Emphasis added].

negligent violations of statutory law,’ regardless of whether the public interest is affected” (internal citations and quotations omitted).] “To the extent that the challenged [contract] provisions are in violation of the governing statutory law, they are void.” *Ulene v. Jacobson*, 209 Cal.App.2d 139, 142-43 (1962).

On its face, the Covenant Not to Sue violates Section 1668. See *Baker Pacific Corp. v. Suttles*, 220 Cal.App.3d 1148, 1153 (1990) [holding a covenant not to sue that released “for, from and against any and all liability whatsoever” of “any and all claims of every nature” void for excluding fraud, intentional acts, and negligent violations of statutory law]. ICANN’s Covenant Not to Sue precludes each and every plausible cause of action because it excludes legal redress altogether. “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[.]” If any and all claims are barred, then claims for fraud, willful injury, or willful or negligent violations of law are necessarily barred by the Covenant Not to Sue.

The case law provided by ICANN supports voiding the Covenant Not to Sue: “Ordinarily, the statute invalidates contracts that purport to exempt an individual or entity from liability for future intentional wrongs.” *Frittelli, Inc. v. 350 N. Canon Drive, LP*, 202 Cal.App.4th 35, 43 (2011). “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.* (“*Blankenheim*”), 217 Cal.App.3d 1463, 1471 (1990). “[E]ven when a plaintiff pleads only breach of contract ... 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.” *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); *see also Civic Ctr. Drive Apartments Ltd. P’ship v. Sw. Bell Video Servs.*, 295 F.Supp.2d 1091, 1106 (N.D. Cal. 2003).

ICANN’s argument is further weakened by the fact that the Covenant Not to Sue is an **exclusion** of liability, **not a limitation** of liability. The district court agreed with DCA and held that “[o]n its face, the Release [Covenant Not to Sue] is ‘against the policy of the law’ because it exempts ICANN from *any and all claims* arising out of the application process, even those arising from fraudulent or willful conduct.” Cal. Civ. Code §1668. ER 43 [italics in original]. The district court also found that even if the Covenant Not to Sue were not void on its face it should not preclude the declaratory relief cause of action, which was the subject of the PI papers, because “the alleged conduct giving rise to this claim is intentional.” ER 44.

ICANN argues that *Food Safety Net Servs. v. Eco Safe Sys. USA, Inc.*, is directly on point. 209 Cal.App.4th 1118 (2012). In *Food Safety*, “[T]he clause effectively limits Food Safety’s liability for breaches of contractual obligations and

ordinary negligence[.]” *Id.*, at 1127. ICANN’s exclusion of liability is not limited to breaches of contractual obligations or negligence.

Finally, as it incorrectly argued in the district court, ICANN’s Covenant Not to Sue is not the equivalent of a settlement agreement release. ICANN cites *Grayson v. 7-Eleven, Inc.*, but that court expressly stated that “Section 1668 ‘is meant to prohibit contracts releasing liability for future torts not to prohibit settlements of disputes relating to past conduct.’” 2013 U.S. Dist. LEXIS 40462, at \*13-14 (S.D. Cal. Mar. 21, 2013). DCA has repeatedly explained that the Covenant Not to Sue should be treated differently than settlement agreements in the context of Section 1668. ER 1503 and 1766-67.

Therefore, on its face the Covenant Not to Sue is void under Section 1668.

**B. The public interest of holding bad actors accountable is superior to ICANN’s “business-interest” of avoiding litigation costs.**

ICANN argues with no support, that the Covenant Not to Sue – the individualized preclusion of liability for ICANN – is within the public’s interest. ICANN claims that because it is a non-profit (although it has assets of more than \$300 million) (ER 388), it should not be required to incur the costs of litigation for its wrongful acts. *Id.* Federal Rule of Civil Procedure 11 will protect ICANN against frivolous lawsuits. There is no public interest in excluding only ICANN from liability for violations of the law.

Finally, the Covenant Not to Sue was not negotiated between ICANN and gTLD applicants. ICANN itself submitted evidence that it rejected suggestions from the public, and its own advisory committee, that it modify the Covenant not to sue. ICANN's own GAC – the committee that “consider[s] and provide[s] advice on the activities of ICANN...particularly matters where there may be an interaction between ICANN policies and various laws” – stated: “**The exclusion of ICANN liability...provides no leverage to applicants to challenge ICANN's determinations...the covenant not to challenge and waiver...is overly broad, unreasonable, and *should be revised in its entirety.***” ER 715 and 1769 [emphasis added]). No changes were made to the Covenant Not to Sue. ICANN ignored all advice and forced applicants to agree to the Covenant Not to Sue.

The California Legislature demonstrated its intent to void contractual provisions like the Covenant Not to Sue by enacting Section 1668. There is no public interest in allowing ICANN to escape liability.

**C. The Insurance Code deters wrongful conduct in a similar fashion as Section 1668.**

ICANN cites to Cal. Ins. Code §533 (“Section 533”) to apply the term “willful act” from an unrelated insurance statute to Section 1668. The distinction between the application of “willful act” in Section 533 and “willful injury to person or property” in Section 1668 is clear: Section 533 acts as a deterrent to violations of the law, expressly exempting insurers from indemnifying their insureds for liability

for violations of the law.<sup>2</sup> Thus if an insured is found liable for a tortious violation of the law, that wrongdoer cannot pass the costs and liability onto his insurer and the wrongful actor is held accountable. Section 533 seeks to enforce public policy that insurers are not liable for tortious acts of insured. *See Davidson v. Welch*, 270 Cal.App.2d 220, 233-35 (1969). Similarly, Section 1668 seeks to ensure those who violate the law are held accountable by preventing parties from contractually avoiding liability. By automatically voiding any contracts that seek to exempt liability for fraud, willful injury, intentional or negligent unlawful actions, wrongful actors are held liable for their actions. *See Blankenheim, supra*, at 1471 (“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.”)

Accordingly, Section 533 supports the argument that ICANN’s Covenant Not to Sue is void.

**D. The IRP does not provide applicants with any other legitimate redress.**

The existence of the IRP does not make the Covenant Not to Sue proper. ICANN refuses to recognize the IRP as binding. If ICANN has no obligation to follow the IRP Panel’s decision, such redress is illusory and wholly dependent on

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<sup>2</sup> As stated above, Section 1668 prohibits contracts that exempt anyone from “fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent” and ICANN offers no authority to narrow the plain language of the statute.

ICANN's choice whether to adhere thereto. Furthermore, the scope of the IRP is limited to review of actions "inconsistent with the Articles of Incorporation or Bylaws" depriving applicants of redress for violations of state and federal laws by ICANN. ER 1211.

Accordingly, because liability is excluded and not limited from the nature of the illusory IRP proceeding, the Covenant Not to Sue is void as a matter of law.

**E. The Covenant Not to Sue is Unconscionable.**

Although the district court did not consider rule on unconscionability in refusing to enforce the Covenant Not to Sue, this Court has authority to adjudicate it. *See Coszalter v. City of Salem*, 320 F.3d 968, 979 (9th Cir. 2003) [recognizing that appellate courts have authority to affirm on any ground supported in the record, even if trial court did not reach the issue].

Even if the district court had not found that pursuant to Section 1668 the Covenant Not to Sue did not preclude the declaratory relief claim, the district court could have found that Covenant Not to Sue is unenforceable because it is unconscionable. "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." Cal. Civ. Code §1670.5(a); *see also*

*Nat'l Rural Telcoms. Coop. v. DIRECTV, Inc.*, 319 F.Supp.2d 1040, 1054 (C.D. Cal. 2003). “To determine unconscionability, courts look to whether the allocation of the burdens and benefits are so one-sided as to shock the conscience or whether there is an ‘absence of meaningful choice on the part of one of the parties together with the contract terms which are unreasonably favorable to the other party.’” *Id.*

“In order to render a contract unenforceable under the doctrine of unconscionability, there must be both a procedural and substantive element of unconscionability.” *Ferguson v. Countrywide Credit Indus.*, 298 F.3d 778, 783 (9th Cir. 2002) [internal citations omitted]. “[C]ourts use a sliding scale, ‘such that the greater the degree of unfair surprise or unequal bargaining power, the less the degrees of substantive unconscionability required to annul the contract and vice versa.’” *Stern v. Cingular Wireless*, 453 F.Supp.2d 1138, 1146 (2006). ICANN’s contract is both procedurally and substantively unconscionable.

#### 1. The Covenant Not to Sue is Procedurally Unconscionable

Contrary to the assertions of ICANN, DCA had no ability to negotiate the Covenant Not to Sue. “A contract is procedurally unconscionable if at the time the contract was formed there was ‘oppression’ or ‘surprise.’ Oppression exists if an inequality of bargaining power between the parties results in the absence of real negotiation and meaningful choice.” *See also Ingle v. Circuit City Stores, Inc.* (“*Ingle*”), 328 F.3d 1165, 1172 (9th Cir. 2003)

DCA had no bargaining power because ICANN holds a monopoly on gTLDs. ICANN is the only gTLD provider in the world; .Africa could not be obtained from anyone else. ER 755. In order to apply, DCA was forced to agree to the Guidebook that contained the Covenant Not to Sue. ER 756. DCA did not negotiate any provision of the Guidebook, nor did DCA contribute the language in the Covenant Not to Sue. *Id.* The Guidebook does not encourage the parties to consult with an attorney before signing, nor did DCA do so. ER 756 and 863.

ICANN asserts that the Covenant Not to Sue was a collaborative effort because ICANN invited comments. But ICANN's own GAC submitted criticism of the Covenant Not to Sue, which ICANN ignored. ER 715 (“**The exclusion of ICANN liability ...provides no leverage to applicants to challenge ICANN's determinations ...The covenant not to challenge... is overly broad, unreasonable, and should be revised in its entirety**”) (emphasis added). ICANN refused to eliminate the Covenant Not to Sue in the face of the GAC and other commenters' recommendations. ER 1769. It is therefore disingenuous to imply DCA could have effectively negotiated elimination of the release or used the comment process to avoid it.

## 2. The Covenant Not to Sue is Substantively Unconscionable

The one-sided benefit to ICANN demonstrates that the Covenant Not to Sue is substantively unconscionable. “Substantive unconscionability centers on the

“terms of the agreement and whether those terms are so one-sided as to shock the conscience.” *Ingle*, supra at 1172. Here, the Covenant Not to Sue affords protection only to ICANN. ER 1993. ICANN is not prohibited from suing applicants in a court of law. It only requires that applicants give up rights to sue for **any and all** acts by ICANN related to the processing of a gTLD application. *Id.* The Covenant Not to Sue absolves ICANN wholly of any liability while providing absolutely no benefit to gTLD applicants.

Thus, the Covenant Not to Sue is both procedurally and substantively unconscionable.

**F. The Covenant Not to Sue was procured by fraud.**

The district court could have alternatively found that ICANN’s Covenant Not to Sue was unenforceable as procured by fraud. “Fraud in the inducement is a subset of the tort of fraud whereby ‘the promisor knows what he is signing but his consent is induced by fraud, mutual assent is present and a contract is formed, which by reason of the fraud is voidable.’” *Jewelers Mut. Ins. Co. v. Adt Sec. Servs.*, No. C 08-02035 JW) 2009 U.S. Dist. LEXIS 58691, at \*7-8 (N.D.Cal. July 9, 2009). [internal citations omitted]. “Where the plaintiff proves fraudulent inducement ... none of [the fraudulently induced agreement’s] provisions have any legal or binding effect.” *Edgewater Place, Inc. v. Real Estate Collateral Mgmt. Co.* (“*In Re Edgewater Place, Inc.*”), 1999 U.S. Dist. LEXIS 23692, Case No. ED CV 98-281

RT at \*12 (C.D. Cal., May 19, 1999). ICANN required DCA to abide by its Guidebook and pay \$185,000 in order to apply for the .Africa gTLD. DCA was falsely led to believe that the IRP provided legitimate and binding redress in lieu of court review. ICANN subsequently failed to follow the IRP and DCA would not have agreed to the Guidebook or paid \$185,000 had it known that ICANN did not consider itself bound by the IRP. ER 1769-1770. The Covenant Not to Sue is unenforceable due to ICANN's fraud.

For all the foregoing reasons, DCA respectfully requests this Court affirm the district court's decision regarding the Covenant not to Sue.

### **III. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN GRANTING THE PRELIMINARY INJUNCTION.**

DCA satisfied all elements for the issuance of a PI and the court properly exercised its discretion in granting the PI based on the "sliding scale" or "serious questions" analysis set forth in *Alliance for the Wild Rockies v. Cottrell* ("Cottrell"), 632 F.3d 1127, 1131-35 (9th Cir. 2011).

#### **A. DCA demonstrated serious questions as to the merits of its ninth cause of action because ICANN's IRP previously determined that ICANN improperly processed DCA's application.**

In its ninth cause of action, DCA seeks declaratory relief that it is entitled to proceed through the *remainder* of the .Africa gTLD program as expressly stated by the IRP Panel. ER 1526. The Federal Declaratory Judgment Act provides that "[i]n

a case of actual controversy within its jurisdiction...any court of the United States...may declare the rights and other legal relations of any interested party seeking such declaration.” 28 U.S.C. §2201(a). An actual dispute exists between DCA and ICANN because ICANN is denying DCA the proper application processing according to the IRP Panel. ICANN has made no argument to the contrary. The IRP Panel made two rulings: (1) “that both the actions and inactions of the Board with respect to the application of DCA Trust relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN;” and (2) “that ICANN continue to refrain from delegating the .AFRICA gTLD and permit DCA Trust’s application to proceed through the *remainder* of the new gTLD application process.” ER 822-23 [emphasis added]. DCA disputes that ICANN permitted DCA’s application to proceed through the *remainder* of the new gTLD application process. ER 1527.

In its initial decision, the district court incorrectly cited to evidence of ZACR’s endorsement evaluation. ER 45. Nonetheless, the evidence the district court reviewed shows that DCA has raised a serious question on the merits because DCA had sufficient endorsements before the GAC advice and after. The district court stated in its ruling on reconsideration: “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*.” ER 23 (emphasis

added). Because ICANN accepted the AUC and UNECA endorsements in passing ZACR's application, ICANN was required to accept the valid endorsements from the AUC and UNECA for DCA.

ICANN and ZACR's main argument is based on the incorrect conclusion that DCA never had the requisite 60% regional support from the countries in Africa. ICANN's Open. Brief, *supra* at 45-47; Appellant ZA Central Registry, NPC's Opening Brief at 30-32, No. 16-55693 (July 22, 2016) ("ZACR's Open. Brief"). DCA obtained letters of support from both UNECA and the AUC – entities which ICANN approved as endorsers (ER 797-99) – and whose members comprise more than 60% of the nations in Africa. ER 514. DCA was the first party to obtain this support, and the support from the AUC was obtained prior to the AUC signing an agreement with ZACR for the rights to .Africa. ER 1312, 1316, and 1517-18. At the time the problematic GAC advice occurred, DCA had the required endorsements.

ICANN now attempts to argue that these endorsements were withdrawn, but according to the Guidebook, a withdrawal of support is only permitted after an applicant applies if an applicant failed to meet one of the conditions of its endorsement.<sup>3</sup> ER 930 and 1716. Neither of the letters of support contained conditions and therefore neither could have effectively been withdrawn. *Id.*

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<sup>3</sup>This was not a stated basis for ICANN's rejection of DCA's application until after the rejection of DCA's application.

Additionally, UNECA's purported withdrawal letter was not received until after the IRP, far after the time that ICANN should have processed DCA's application. ER 1316 and 1716.

ICANN argued that the Guidebook rules regarding endorsement withdrawals did not apply because the AUC letter was not valid in the first place. ER 1800. This argument is circular: ICANN declares that the endorsements were not proper precisely because they were withdrawn. ER 1771. The April 2010 letter from the AUC to DCA stated that the AUC it "no longer endorses individual initiatives in this matter." ER 1314. This language suggests that the AUC might endorse more than one applicant, but even if the AUC had intended it as a withdrawal, Section 2.2.1.4.3 of the Guidebook states that a governmental entity may only withdraw its endorsement if the conditions of its endorsement have not been satisfied. ER 930. There was no condition on the endorsement from the AUC so there could be no withdrawal. ER 1312 and 1316. The AUC and UNECA letters were valid when issued, and still are to this day.

ICANN also argues that the rule for withdrawals does not apply because it was not in effect when the purported withdrawal occurred. ICANN's Open. Brief, *supra* at 49. ICANN did not make this argument at the district court, and this Court should not consider it. But even if this Court does consider this waived argument, it is not persuasive because the Guidebook was officially published on June 4, 2012

and required Applicants to submit all gTLD applications by April 12, 2012. ER 862-64. If the rules were not applied retroactively, the Guidebook has no force. ICANN cannot apply its Guidebook rules selectively.

ICANN's argument that the rule is not exclusive should also be rejected. ICANN states that the *only enumerated* rule in the Guidebook with respect to withdrawals is not the exclusive means provided for withdrawals of support. ICANN's Open. Brief, *supra* at 50. There are no other rules. Without any express enumeration, it can be inferred that ICANN intended to make this rule exclusive. Furthermore, it would be grossly unfair to an applicant, who spent significant time obtaining the endorsements (in addition to the \$185,000 application fee), to be denied the fruits of their labor at the political whim of the endorser. ER 1764.

Further, ZACR's endorsements were improper. ER 1772. Most of ZACR's alleged letters of support do not mention ZACR by name. *Id.* The support letters that ZACR submitted actually provide support for the AUC's initiative to categorize .Africa as a "reserved" domain. (*Id.*) As stated above, ICANN denied the AUC's attempt to do this. (*Infra*, Statement of Case, Subsection E). Later, ICANN ghost wrote an endorsement letter from the AUC for ZACR. ER 1772. ICANN should not have considered the AUC as a valid endorser for ZACR, considering that ZACR had entered into an assignment of rights with the AUC for the .Africa domain, if

ZACR succeeds. *Id.* ICANN failed to offer any rebuttal on this point to the district court.

Accordingly, the court did not err in issuing and affirming the PI.

**B. DCA demonstrated irreparable injury.**

The district court properly exercised its discretion in determining that DCA demonstrated irreparable harm. In the instance that a plaintiff seeks both monetary relief and non-monetary relief, irreparable harm is not necessarily non-existent. *See Blackwater Lodge & Training Ctr., Inc. v. Broughton*, 2008 U.S. Dist. LEXIS 49371 at \*28 (S.D. Cal. 2008).

On its motion for a PI, DCA presented evidence that it was unaware gTLDs could be re-delegated. DCA believed, after independently researching the issue, and given that the new gTLD delegation process is new, that once a gTLD was granted it could not be redelegated. ER 755 and 1527-28. ICANN did not present any evidence to the contrary. ER 1801. ICANN merely argued that any interest in the domain was financial in nature. *Id.* Presumably this was because ICANN knows that re-delegation is not a practical solution in this matter.

On the motion for reconsideration, ZACR submitted a declaration from an ICANN employee refuting the claim made by DCA that a gTLD cannot be re-delegated and argued that therefore DCA would not be irreparably harmed. ER 96-97. This argument, based on information from ICANN's employee and website,

should have been made by ICANN when opposing DCA's motion for a PI and ZACR could also have presented it earlier. Although DCA was incorrect as to the technical possibility of delegation, delegation of a gTLD usually only occurs when a registry's contract with ICANN expires after the initial 10-year period. ER 226 and 1716. The process will also be complicated, if even available, considering the fact that re-delegations must be approved by the U.S. Department of Commerce, whose contract with ICANN, expires in less than two months. ER 114, 119-20, and 1717.

Irrespective of the re-delegation issue, the court properly concluded there was irreparable harm because DCA also presented evidence that it would likely be forced to shut down if the PI was lifted. ER 1716. If the gTLD is delegated to ZACR, DCA will also lose business funding and likely be forced to shut down operations, including its charitable work, because its principal goal was to obtain the .Africa gTLD. (*Id.*) DCA's irreparable injury is not solely the loss of business funding – a monetarily compensable injury – as ZACR and ICANN argue. ICANN's Open. Brief., *supra* at 53; ZACR's Open. Brief, *supra* at 34. It is the destruction of the business and charity in their entirety.

Thus, DCA has established irreparable injury.

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**C. The balance of hardships weighs in DCA's favor.**

“If the balance tips decidedly toward plaintiffs, and if plaintiffs have raised serious enough questions to require litigation, the injunction should issue.” *Aguirre v. Chula Vista Sanitary Service & Sani-Tainer, Inc.*, 542 F.2d 779, 781 (9th Cir. 1976).

DCA would be harmed more than ZACR if the PI were lifted. It would be extremely difficult as a practical matter for re-delegation to take place here and, in the meantime, DCA would likely lose its funding to operate, as Africa is a central part of its mission. ER 1707. ZACR manages other domains. ER 224 and 1718. Thus, the harm to DCA if the sole domain it was established to manage is wrongfully delegated to ZACR outweighs any speculative harm that ZACR presents.

Further, the district court noted that “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. ZACR presented a declaration claiming it was incurring “current and continuing costs” of “approximately \$20,000 per month” for “consultants, marketing, sponsorships and related expenses.” ER 226. The calculated Loss of Net Income after Tax for ZACR following the Registry Agreement (March 2013) to May 2016 was estimated to be \$15 million. *Id.* ZACR supports these calculations with a single spreadsheet lacking nearly any detail as to the necessity or unavoidability of these purported costs. ER

1749-52. Additionally, as part of the .Africa application, ZACR submitted a “Continual Performance Guarantee” in the amount of \$140,000, apparently to satisfy ICANN’s Continued Operations Instrument (“COI”) requirements. ER 1387. While ZACR’s revenue projections are not public, ZACR must have projected less income than \$15 million in its application, otherwise such a low COI would not be justified. ER 1757. Finally, ZACR’s argument is also based on the false assumption that it is the rightful owner of the .Africa gTLD.

ICANN made no argument to the district court that it would be harmed by a PI.

Thus, with respect to the parties, the balance of equities favors DCA.

**D. The public interest is in properly and fairly delegating the .Africa domain.**

All evidence submitted by ZACR and ICANN is either biased or wholly speculative as to harm to the public, and the public interest in having the .Africa gTLD properly awarded is superior. “The public interest analysis for the issuance of a preliminary injunction requires us to consider whether there exists some critical public interest that would be injured by the grant of preliminary relief. *Cottrell*, 632 F.3d 1127, *supra* at 1138.

First, the district court properly gave little if any weight to the declaration of Moctar Yedaly – an AUC official. ER 46-47. As stated above, the AUC signed an agreement for the transfer of all the rights to .Africa if ZACR obtains those rights.

Thus, the AUC's self-interest makes its declaration less than credible. This obvious conflict is not simply because the AUC supports ZACR's application as ZACR claims. ZACR's Open. Brief, *supra* at 38. It is because the AUC has the rights to .Africa through its assignment agreement with ZACR, a fact which both ZACR and ICANN fail to include in their opening briefs.

Furthermore, the statements made by Mr. Yedaly are speculative and conclusory. Nor has Mr. Yedaly explained why he is qualified to opine on Africa's public interest. ER 1718. The alleged benefits to a "Development Fund" are speculative. ER 226-27. Finally, the evidence provided by ZACR on its motion for reconsideration suffered the same flaws and could have been provided earlier.

In ruling upon the motion for a PI, the district court held that:

"[T]he public has an interest in the fair and transparent application process that grants gTLD rights. ICANN regulates the internet – a global system that dramatically impacts daily life in today's society."  
ER 46.

The district court ultimately, and correctly, concluded that the public interest – of Africa and the international community in general – is better served if the delegation of .Africa is made after a determination of the fairness of ICANN's conduct.

**E. ZACR is Not Entitled to a Bond.**

The district court properly exercised its discretion in refusing to require a bond. ZACR is not entitled to a bond because it waited nearly a month to ask for

one and it does not have to incur the costs it complains about. A district court may grant a PI, “only if the movant gives security in an amount that the court considers proper to pay for the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.” Fed. R. Civ. P. 65(c). The district court retains discretion as to the amount of security required, if any. *Diaz v. Brewer*, 656 F.3d 1008, 1015 (9th Cir. 2011). The bond amount may be set at zero if there is no evidence the party will suffer damages from the injunction. *Wells Fargo Bank, N.A. v. Weems*, CV15-7768 RSW (PJWx), 2015 U.S. Dist. LEXIS 166466, at \*14 (C.D. Cal. Dec. 11, 2015), citing *Connecticut General Life Ins. Co. v. New Images of Beverly Hills*, F.3d 878, 882 (9th Cir. 2003).

According to the IRP Panel’s Ruling, ICANN should not have entered into a registry agreement with ZACR prior to the completion of the IRP. *Infra*, Statement of Case, Subsection H. ZACR complains of costs of \$20,000 per month for consultants, marketing, sponsorships, and related expenses. ER 226. Not only are these costs based on the assumption that ZACR is the rightful owner of .Africa, but ZACR is under no obligation to incur these costs. ER 1719-1720. ZACR cannot complain of costs that it fails to mitigate. Furthermore, these costs were caused by ZACR’s voluntary acts in the face of uncertainty and ICANN’s wrongdoing, not the PI, and such self-inflicted injury cannot support the requirement of a bond. *Id.*

The evidence provided by ZACR is also insufficient. In *Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc. (Nintendo)*, on which ZACR relies, the court executed a \$15 million bond in favor of Lewis Galoob Toy, Inc., after a meticulous accounting proved the PI caused Galoob at least \$15 million in damages. 16 F.3d 1032, 1033 (9th Cir. 1994). To determine Galoob's damages the court considered: 1) Galoob's received order for over 550,000 Game Genie units; 2) the "Canadian multiplier method", which showed that, in general, a product will sell ten to twelve times as well in the United States as in Canada; and 3) multiplied Galoob's 1.6 million unit sales lost by the net wholesale price of \$34.28, times the 27.6 percent profit margin reaching a loss of at over \$15 million in profits due to the injunction. *Id.* at 1034-35.

In contrast, ZACR did not provide the district court with any concrete evidence to support its exorbitant \$15,000,000 bond claim. It offered no evidence of how many registrars it would license .Africa to, nor did it offer evidence of how much ZACR would make from each third party agreement. ER 1720. In short, ZACR has no evidentiary support for the massive profits it claims in a conclusory fashion it would make if it were to receive .Africa.

In *Netlist Inc. v. Diablo Techs., Inc.* the court set a bond in the amount of \$900,000, the approximate amount of the net profits Diablo would have received for chipset sales affected by the PI. No. 13-cv-05962-YGR, 2015 U.S. Dist. LEXIS 3285, at \*39-40 (N.D. Cal. Jan. 12, 2015). *Netlist* is readily distinguishable because

Diablo breached a Supply Agreement and a Nondisclosure Agreement with Netlist. *Id.* at \*28. DCA does not have a contractual relationship with ZACR. Unlike Diablo, ZACR does not have a revenue stream to base its claimed losses on, nor does it have evidence besides a conclusory declaration claiming \$15,000,000 in losses.

Finally, ICANN has never requested a bond. Without any justification provided by either Defendant as to why a bond should be required, the district court properly refused to require one.

Therefore, the Court should affirm the decision of the district court in refusing to require DCA to post a bond.

**IV. ALTERNATIVELY, THIS COURT SHOULD REMAND TO THE TRIAL COURT FOR RECONSIDERATION OF OTHER EVIDENCE.**

If, despite the foregoing, this Court finds that the district court erred in issuing and maintaining the PI, this Court should remand to the trial court to consider whether the following evidence, discovered after DCA's motion for PI was filed, would support upholding the PI.

First, in support of the notion that the Covenant Not to Sue is unenforceable, are the Noncommercial Users Constituency ("NCUC") comments to ICANN regarding the Covenant Not to Sue, which ICANN ignored. The NCUC wrote to ICANN that "If ICANN or the applicant engaged in questionable behavior legal recourse and investigation should remain open. Not only would this be within

standard contractual norms, but also in keeping with ICANN's stated mission of openness, transparency, fairness and especially accountability.”

Second, recently discovered evidence shows that there is an overlap of ownership and control over ZACR and its registrar DNServices PTY LTD. The relationship between ZACR and DNServices also suggests that ZACR is actually a shell entity incapable of performing the necessary registry functions on its own. These subsequently discovered facts further support the trial court's decision to issue and maintain the PI.

## **CONCLUSION**

ICANN expressly agreed to process gTLD applications fairly and transparently. Instead, ICANN colluded with ZACR to award the .Africa domain to the AUC. The district court properly granted DCA's motion for a PI and properly affirmed the PI on reconsideration. DCA respectfully requests this Court affirm those decisions.

Dated: August 19, 2016

Respectfully submitted,  
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## **STATEMENT OF RELATED CASES**

All related cases are identified in the Opening Briefs of Appellants ICANN and ZACR.

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,907 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. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016's 14-point font Times New Roman.

Dated: August 19, 2016

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## **STATUTORY ADDENDUM**

All applicable statutes are contained in the brief or addendum of Appellant ICANN.

