

Nos. 16-55693, 16-55894

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

DOTCONNECTAFRICA TRUST,

Plaintiff/Appellee,

v.

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

Defendant/Appellant.

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

**REPLY BRIEF OF INTERNET CORPORATION
FOR ASSIGNED NAMES AND NUMBERS**

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INTRODUCTION

DotConnectAfrica Trust's ("DCA") brief confirms that the district court erred in granting a preliminary injunction. DCA does not seriously attempt to defend the district court's stated ground for the injunction. The court ruled that it was "reasonable to infer" that the IRP Panel found that DCA had satisfied the 60% governmental support or non-objection requirement. As ICANN's opening brief showed, that ruling was erroneous because the IRP Panel expressly disclaimed any such ruling. DCA offers no real response to that point. Instead, DCA now argues that, apart from anything the IRP Panel declared, the preliminary injunction was proper because DCA had valid letters of support from the AUC and UNECA. In other words, rather than arguing that ICANN disregarded the IRP Declaration (an argument that on its face was meritless), DCA now argues the merits of DCA's application itself.

DCA's latest argument is also meritless. First, it is outside the scope of DCA's Ninth Cause of Action, which was the sole basis upon which DCA sought its preliminary injunction. The Ninth Cause of Action is limited to asserting that ICANN failed to follow the IRP Declaration. DCA does not allege in that cause of action that ICANN acted improperly apart from the IRP Declaration.

Second, DCA has not shown that ICANN acted improperly in any event. The record establishes beyond dispute that neither the AUC nor UNECA endorse

DCA's application. They have both unequivocally disclaimed any such endorsement. The record also establishes that the purported earlier endorsements on which DCA relies did not in fact support DCA's application. The AUC letter was withdrawn long before DCA ever filed its application; UNECA made clear that its letter was never intended to be an endorsement; and neither letter complied with the Guidebook's requirements. Nor is there any basis for DCA's assertion that it was treated differently from ZA Central Registry ("ZACR"). Unlike DCA, ZACR, in response to ICANN's clarifying questions, provided an endorsement from the AUC that met the Guidebook's requirements.

DCA also fails to rebut ICANN's showing that the Covenant Not to Sue ("Covenant") is valid and bars DCA's claim. This is a threshold, independent reason why the preliminary injunction must be reversed. Indeed, the district court's preliminary injunction order highlights why the Covenant is needed. By bringing this lawsuit, and preventing the delegation of .AFRICA based on theories that lack any factual or legal basis, DCA has shown how a disappointed applicant can use litigation to frustrate the important purposes of the New gTLD Program and deny to consumers, businesses, and governments the benefits of a new gTLD. The district court should have prevented that result by giving effect to the Covenant.

ARGUMENT

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

A. The Covenant Not to Sue Is Valid Under Section 1668.

ICANN’s opening brief showed that California Civil Code section 1668 does not invalidate the Covenant because ICANN’s alleged failure to follow the IRP Declaration is not “fraud or willful injury to person or property” within the meaning of that section. AOB 29-32. DCA and its amicus Dot Registry have no valid response.

1. DCA’s Argument That the Covenant Not to Sue is “Facially Void” is Groundless.

DCA primarily argues that the Covenant is “facially void” and must be invalidated in its entirety, even as to claims that do not assert “willful injury,” because the Covenant does not expressly carve-out such claims. DCA Br. 35. DCA, however, cites no authority supporting that result. In fact, California courts have squarely rejected it.

In *Werner v. Knoll*, 89 Cal. App. 2d 474 (1948), the plaintiff made the same argument DCA makes here—*i.e.*, that a limitation of liability was invalid in its entirety because it not only covered negligence claims but also “attempt[ed] to relieve [defendant] from the consequences of his own fraud and willful injury.” *Id.* at 476. The court rejected that argument. It held that “[t]he asserted illegality of the provisions relating to fraud and willful injury would not deprive [defendant] of

relying upon the provision relating to negligence since the rule is well established that a lawful promise based on a good consideration is not invalid because an unlawful promise is made for the same consideration.” *Id.* at 477. The court further held that this is true even when the invalid limitations on fraud and willful injury claims “are not separately stated but are included within [a] single phrase” that bars claims for “any cause.” *Id.* As DCA’s own case recognizes, contractual provisions are invalid only “[t]o the extent that the . . . provisions are in violation of the governing statutory law.” *Ulene v. Jacobson*, 209 Cal. App. 2d 139, 142 (1962) (emphasis added).

Consistent with this principle, courts have routinely enforced release provisions as to claims not covered by section 1668 even though the provision was stated broadly enough to encompass claims for fraud or willful injury. In *Food Safety Net Servs. v. Eco Safe Sys. USA, Inc.*, 209 Cal. App. 4th 1118 (2012), for example, the provision broadly barred damage claims “arising out of or in any way related to the work herein covered, from any cause or causes.” *Id.* at 1126. Despite its breadth, the court enforced the clause against the plaintiff’s negligence, breach of contract, and bad faith claims, while not applying it to the plaintiff’s fraud claim. *Id.* at 1126-30; *see also Grayson v. 7-Eleven, Inc.*, No. 09cv1353-GPC (WMC), 2013 U.S. Dist. LEXIS 40462, at *12, *18 (S.D. Cal. Mar. 21, 2013) (enforcing clause that covered “all claims . . . suits or causes of action . . . of every

kind and nature”); *Hulsey v. Elsinore Parachute Ctr.*, 168 Cal. App. 3d 333, 340 (1985) (enforcing as to negligence claims a release that covered “all actions, claims or demands . . . for injury or damage”) (citations omitted).

Similarly, in cases that declined to enforce an exculpatory provision, the suit asserted a claim for fraud or willful injury to which section 1668 applies. Thus, in *McQuirk v. Donnelley*, 189 F.3d 793 (9th Cir. 1999), this Court held that a release was invalid as to the plaintiff’s claims for defamation, interference with business expectancy, outrage, and intentional infliction of emotional distress because each of those claims asserted “intentional wrongs.” *Id.* at 796. Similarly, *Blankenheim v. E. F. Hutton & Co.*, 217 Cal. App. 3d 1463, 1472-73 (1990), invalidated an exculpatory clause as to a claim for negligent misrepresentation, which the court found was “fraud” as used in section 1668. *See also Civic Ctr. Drive Apartments Ltd. P’ship v. Sw. Bell Video Servs.*, 295 F. Supp. 2d 1091, 1106 (N.D. Cal. 2003) (finding section 1668 applied because plaintiff alleged fraudulent concealment).¹

DCA and Dot Registry cite *Baker Pac. Corp. v. Suttles*, 220 Cal. App. 3d 1148 (1990), for a contrary rule. Far from rejecting *Werner*, however, *Baker* endorsed it. In *Baker*, an employer sought a declaration that a broad exculpatory

¹ DCA also cites *Frittelli, Inc. v. 350 N. Canon Drive, LP*, 202 Cal. App. 4th 35 (2011), and *Navcom Tech., Inc. v. Oki Elec. Indus. Co.*, No. 5:CV-04175-EJD, 2014 U.S. Dist. LEXIS 32159 (N.D. Cal. Mar. 11, 2014). Those cases do not support DCA, however, because they enforced the exculpatory provision.

provision it required all prospective employees to sign was valid. In ruling on this claim, the court expressly agreed with the holding in *Werner* and similar cases that facial overbreadth does not invalidate an exculpatory clause as to claims not covered by section 1668. *Id.* at 1156. The court concluded that the release at issue was void only because it was tendered as a “condition of employment” and had resulted in employees being denied employment. *Id.* at 1154-56. The court was also concerned that the employer would use the broad declaration it sought to deter employees from ever bringing suit, even as to claims for fraud and willful injury. *Id.* at 1155.

None of these considerations applies here. This is not an employment case. Nor was DCA deterred by the Covenant from applying for a gTLD, and the Covenant was not the reason DCA’s application did not prevail. The Covenant also did not prevent DCA from bringing suit, and the Covenant would not bar DCA’s suit if DCA could allege and prove fraud or willful injury. In these circumstances, *Werner* and subsequent cases apply, and the Covenant should be enforced.

2. DCA Fails to Distinguish Case Law Holding That “Intentional” Conduct Does Not Equate to “Willful Injury” Under Section 1668.

DCA argues that its Ninth Cause of Action falls within section 1668 because it is supposedly “based on alleged intentional and wrongful conduct.” DCA Br. 5.

But DCA does not dispute that courts have consistently held that “intentional” conduct is not by itself “willful injury” under section 1668. *See* AOB 29-32. “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.” *Calvillo-Silva v. Home Grocery*, 19 Cal. 4th 714, 729 (1998) (citations omitted).

That leaves DCA to assert that ICANN’s conduct was “wrongful.” But the conduct DCA alleges is not the kind covered by section 1668. At best, DCA alleges the equivalent of a breach of contract—*i.e.*, a breach by ICANN of its alleged obligation to follow the IRP Declaration or the requirements of the Guidebook. DCA does not—and cannot—dispute that a breach of contract is not “willful injury” under section 1668. AOB 29-31 (citing cases). And that is true even if the breach is alleged to be in “bad faith” or based on a “preconceived conclusion.” AOB 29-30.

DCA also fails to explain why cases interpreting California Insurance Code section 553 are not useful here. The California Court of Appeal has expressly held that “[s]imilar considerations apply in the determination of what contracts are prohibited under the provisions of section 1668 of the Civil Code” and section 533. *Davidson v. Welch*, 270 Cal. App. 2d 220, 233 (1969). DCA also concedes that both statutes aim to deter wrongful conduct (DCA Br. 39-40), and both speak of “willful” conduct. Yet DCA does not address the cases holding that “willful”

conduct referred to in section 533 means more than a merely intentional act. *See* AOB 32. Nor does DCA offer any case arising under section 533 in which a court has deemed mere intentional conduct to be enough.

3. DCA Has No Valid Answer to the Important Purposes the Covenant Not to Sue Serves.

In its opening brief, ICANN explained that enforcing the Covenant serves important purposes because it prevents the processing of new gTLD applications from becoming tied up in a blizzard of litigation by disappointed applicants and thereby ensures that the benefits of the New gTLD Program are realized. AOB 32-36. This case illustrates the danger such litigation poses. Over four years after ZACR and DCA applied to operate .AFRICA, the citizens, consumers, businesses, and governments of Africa are still being denied the benefits of the .AFRICA gTLD. That deprivation is occurring even though, as shown in ICANN's opening brief and below, it is indisputable that DCA does not have—and never had at any relevant time—the required support or non-objection of 60% of the governments in Africa. The Covenant was adopted to prevent precisely this result.

The Covenant is not an attempt by ICANN to immunize itself against claims of fraud, willful injury, or other conduct that legitimately could fall within section 1668. Rather, it is a sensible mechanism for ensuring a workable process for handling the more than 1,900 applications that ICANN must evaluate. Nor is it unfair. Applicants understand at the outset that they are not guaranteed to obtain

the right to operate a gTLD, and they are informed before ever applying that ICANN's decisions on their applications cannot be challenged in court simply on the basis that ICANN allegedly erred in some fashion.

DCA has no answer to any of this. It blithely asserts that Federal Rule of Civil Procedure 11 "will protect ICANN against frivolous lawsuits." DCA Br. 38. But even frivolous lawsuits require time and money to fend off. And it is not merely frivolous lawsuits that can divert resources and frustrate the broader purposes of the New gTLD Program. DCA incorrectly assumes that the greatest good is achieved by allowing gTLD applications to be tied up in litigation for years in an effort to find the supposed "correct" result. No basis exists for that assumption. Section 1668 is limited to fraud and willful injury (and to violations of the law), because the law recognizes that limiting lawsuits and achieving finality in circumstances like these are not only permissible goals, but serve valuable and important purposes.

DCA and Dot Registry argue that disappointed applicants must be allowed to sue because ICANN is a "monopolist." DCA Br. 12; DR Br. 4, 6, 11, 24. But ICANN is not a monopolist in any relevant sense. ICANN gains nothing by a determination that a given applicant has failed to meet the specified requirements. Its only interest is in ensuring that registry operators are selected based on their qualifications and that applications for geographic names are supported by the

relevant governmental entities, all as set forth in the Guidebook. ICANN's disinterested role in the process is further reason to find that the Covenant is valid.

4. DCA's Other Arguments Are Irrelevant and Groundless.

DCA suggests that section 1668 bars the enforceability of the Covenant because the Covenant is “an *exclusion* of liability, not a *limitation* of liability.” DCA Br. 37 (emphasis in original). At least as to this case, however, that distinction is irrelevant. Even in the case of a complete exclusion of liability, section 1668 prohibits only exclusions for fraud, willful injury, or violation of law. DCA's claims involve none of these.

DCA and Dot Registry argue that section 1668 should bar the Covenant because ICANN's independent review process supposedly does not provide a sufficient alternative to court proceedings. DCA Br. 40-41; DR Br. 18-23. Yet neither DCA nor Dot Registry cite any case holding that the purported absence of alternative procedures invalidates a clause under section 1668. In fact, courts have frequently enforced exclusions of liability without any finding that alternative remedies were available. *See* AOB 29-30 (citing cases).

Finally, DCA's assertion that the Covenant is not the “equivalent of a settlement agreement release” (DCA Br. 38) is a straw man. ICANN has not made

that argument. The Covenant is valid here because DCA is not asserting a claim for fraud or willful injury, not because it is a settlement release.²

B. The Covenant Not to Sue Is Not Unconscionable.

DCA alternatively argues that the Covenant should be invalidated on the ground of unconscionability. DCA Br. 41-44. This argument is also erroneous.

1. The Covenant Not to Sue Is Not Procedurally Unconscionable Because DCA Was Not Surprised or Oppressed by It.

As ICANN's opening brief showed, procedural unconscionability focuses on surprise and oppression. AOB 38. DCA does not argue that it was surprised by the Covenant. Nor could it, given that the provision is prominently highlighted in the Guidebook and DCA admits it was aware of it. *See* AOB 39.

Nor has DCA shown oppression. Its only argument on this point is that it "had no ability to negotiate" the Covenant. DCA Br. 42. Even if that were true, it would not be determinative. DCA does not dispute that it is a sophisticated

² Citing *Regents of Univ. of Cal. v. Tunkl*, 60 Cal. 2d 92 (1963), Dot Registry argues that ICANN cannot invoke the "negligence exception" to section 1668 because the Covenant supposedly concerns the "public interest." DR Br. 9 n.4. This argument is not properly before the Court, because DCA did not raise it in its brief. *See Swan v. Peterson*, 6 F.3d 1373, 1383 (9th Cir. 1993) ("Generally, we do not consider on appeal an issue raised only by an amicus."). The argument is also groundless. DCA's claim here is not for negligence or other similar tortious conduct. It alleges only a dispute over the meaning of an IRP Declaration. *Tunkl* does not address this kind of claim. In addition, although new gTLDs benefit the public, the sophisticated business entities that apply to operate those gTLDs are not the kind of persons the "public interest" exception was adopted to protect.

business entity, and courts have repeatedly upheld releases in cases involving sophisticated business parties, even where one party arguably had greater bargaining power and where the release was non-negotiable. *O'Donoghue v. Superior Court*, 219 Cal. App. 4th 245, 258-59 (2013) (enforcing release and holding that “the ‘adhesive aspect’ of a contract ‘is not dispositive’ on the issue of unconscionability,” especially where “the elements of surprise or misrepresentation are not present”) (citations and alterations omitted); *Captain Bounce, Inc. v. Business Fin. Servs.*, No. 11-CV-858 JLS (WMC), 2012 U.S. Dist. LEXIS 36750, at *19 (S.D. Cal. Mar. 19, 2012) (“[T]he business-to-business context of the Agreements is relevant . . . Plaintiffs are sophisticated borrowers distinguishable from the consumer or employee plaintiff who is a party to the typical unconscionable contract.”).

Beyond that, DCA does not deny that the Guidebook was adopted only after extensive public comment, a process in which DCA participated. 4 ER 683-86, 689. DCA complains that ICANN adopted the Covenant even though some commenters objected to it. DCA Br. 14-15. But that does not make the Covenant oppressive or negate the public process by which it was adopted. DCA presents no evidence that ICANN failed to consider the comments. Nor does DCA dispute that ICANN explained in response to the comments its legitimate reasons for adopting the Covenant. 4 ER 706; *see also* 4 ER 705-12.

Likewise groundless is DCA's complaint that the Guidebook "does not encourage the parties to consult with an attorney before signing, nor did DCA do so." DCA Br. 43. DCA does not contend that it was discouraged from seeking the advice of counsel, and as a sophisticated entity it had the resources to do so.

Dot Registry argues that the Covenant was a surprise because ICANN's Bylaws supposedly "suggested that the IRP would be a dispute resolution process akin to an arbitration." DR Br. 25. Dot Registry does not identify the provision that supposedly created this impression. Nor does it claim that IRP proceedings are not conducted in accordance with ICANN's Bylaws or the Guidebook. Dot Registry asserts that "ICANN has interpreted the IRP procedure in such a way as to limit applicant's procedural rights." DR Br. 19. The only examples it offers, however, are that briefs are limited to twenty-five pages, that hearings are typically telephonic, and that hearings generally do not include live witnesses. None of these parameters is surprising in an informal, alternative accountability mechanism intended to avoid the costs, burdens, and delay of full-blown court proceedings. Indeed, even in litigation, similar rules often apply to such things as dispositive motions.³ Dot Registry also complains about the limited scope of the IRP standard

³ See, e.g., C.D. Cal. L.R. 11-6 (limiting memoranda to twenty-five pages); S.D. Cal. L.R. 7.1(d)(1) ("A judge may, in the judge's discretion, decide a motion without oral argument."); C.D. Cal. L.R. 7-6 ("Factual contentions involved in any motion and opposition to motions shall be presented, heard, and determined upon

(continued)

of review, and that ICANN does not deem IRP final declarations binding. DR Br. 21-22. However, as discussed below and in ICANN's opening brief, neither of those aspects of the IRP could come as a surprise to applicants or has any relevance here.

2. The Covenant Not to Sue Is Not Substantively Unconscionable.

DCA and Dot Registry argue that the Covenant is substantively unconscionable because it is supposedly "one-sided." DCA Br. 43-44; DR Br. 26-30. This argument, however, ignores settled law that "[u]nconscionability turns not only on a 'one-sided' result, but also on an absence of 'justification' for it." *Walnut Producers of Cal. v. Diamond Foods, Inc.*, 187 Cal. App. 4th 634, 647 (2010) (citations omitted).

Here, as discussed above, there is ample justification for the Covenant. Nor is it true that only ICANN benefits. When given effect, the Covenant achieves finality and reduces delays and uncertainties, which benefits the participants generally and hastens the delivery of the benefits of new gTLDs. As this case illustrates, the interested parties are not limited to ICANN and the parties whose applications do not prevail. They include successful applicants and the consumers,

declarations and other written evidence . . . alone, except that the Court may, in its discretion, require or allow oral examination of any declarant or any other witness.").

businesses, and governmental entities that directly benefit from a system that facilitates prompt delegation of gTLDs.

C. The Covenant Not to Sue Was Not Procured by Fraud.

DCA argues that “fraud in the inducement” occurred because DCA was “falsely led to believe that the IRP provided legitimate and binding redress in lieu of court review.” DCA Br. 45. Yet, DCA still fails to identify any false representation (let alone a *knowingly* false one) that ICANN made on that issue. It points only to ICANN’s statements after the Guidebook was adopted that ICANN does not consider IRP declarations to be binding—statements that DCA does not allege were false. DCA’s own cited authority confirms that this is not fraud. DCA Br. 44 (citing *Jewelers Mut. Ins. Co. v. Adt Sec. Servs.*, No. C 08-02035 JW, 2009 U.S. Dist. LEXIS 58691 (N.D. Cal. July 9, 2009) (dismissing fraud claim where plaintiff relied on defendant’s alleged statement, made after the contract was entered, that it had fulfilled its contractual obligation)).

* * * * *

The Covenant is not unconscionable, and was not procured by fraud. Nor has DCA asserted a claim to which section 1668 applies. The district court’s order finding serious questions regarding the Covenant’s enforceability should accordingly be reversed and the preliminary injunction vacated.

II. THE DISTRICT COURT ERRED IN FINDING SERIOUS QUESTIONS ON THE MERITS.

Because the Covenant bars this lawsuit, the preliminary injunction must be reversed even if DCA had shown a likelihood of success on the merits of its underlying claim. But DCA has failed on that issue as well.

A. DCA's New Rationale Is No More Valid than the District Court's Previous Two Rationales.

As noted, DCA does not seriously attempt to defend the district court's rationale for concluding that DCA is likely to prevail on the merits. The district court stated that it was "reasonable to infer" that the IRP Panel ruled that ICANN must treat DCA as having satisfied the 60% government endorsement or non-objection requirement. 1 ER 23. As ICANN's opening brief demonstrated (AOB 44-50), this ruling is irreconcilable with the IRP Declaration. The IRP Panel addressed only DCA's arguments regarding the Governmental Advisory Committee ("GAC") advice. The IRP Panel nowhere ruled—or even suggested—that DCA had the requisite 60% support or non-objection, or that DCA could skip over that requirement. To the contrary, the IRP Panel expressly declined to make any such ruling when it explicitly stated that it was not ruling on any other of DCA's challenges. 4 ER 815.

DCA does not respond to any of this, effectively conceding that the district court's second rationale was no more valid than the court's admittedly mistaken

original ruling. Instead, DCA argues that it is likely to prevail because it “had sufficient endorsements before the GAC advice and after.” DCA Br. 46.

According to DCA, its endorsements were sufficient “[b]ecause ICANN accepted the AUC and UNECA endorsements in passing ZACR’s application,” which meant that “ICANN was required to accept the valid endorsements from the AUC and UNECA for DCA.” *Id.* at 47. This argument fails for several reasons.

1. DCA’s New Rationale Does Not Fall Within DCA’s Ninth Cause of Action.

At the threshold, DCA’s argument is not based on the IRP Declaration and thus is outside the scope of DCA’s Ninth Cause of Action. The Ninth Cause of Action seeks a declaration that ICANN be required to “follow the IRP Declaration.” 7 ER 1562. The IRP Panel, however, never determined that DCA had “sufficient endorsements” or that ICANN was required to accept as valid DCA’s purported endorsements from the AUC and UNECA. ICANN’s determination of that issue thus cannot have been in contravention of anything the IRP Panel declared, and thus cannot support the only basis on which DCA sought a preliminary injunction.

2. DCA Did Not Have Valid Endorsements From Either the AUC or UNECA.

Even if DCA’s argument fell within the Ninth of Cause of Action, DCA is incorrect that it possessed valid endorsements or that it stood on the same footing with ZACR.

(a) The AUC Supported ZACR, Not DCA.

DCA does not dispute that the AUC has unequivocally and repeatedly stated that it supports only ZACR's application, and not DCA's. Instead, DCA argues that the AUC's unambiguously stated position should be disregarded because the AUC is supposedly bound by a 2009 letter of support for DCA, even though the AUC withdrew that letter in 2010. DCA asserts that, under the Guidebook, once a government expresses support, it is forever bound by that expression unless the applicant thereafter fails to meet a condition expressly included in the endorsement. DCA Br. 47. This argument, which the district court did not adopt, is groundless.

First, DCA erroneously assumes that the AUC's 2009 letter was valid to begin with. In fact, as ICANN made clear to DCA in clarifying questions sent in 2015, the AUC's letter did not comply with the Guidebook's requirements because it did not demonstrate the government's understanding that DCA was seeking the .AFRICA string through the gTLD application process and did not demonstrate that DCA was willing to accept the conditions under which the string would be available. 5 ER 930; 6 ER 1350. Accordingly, the clarifying questions requested that DCA submit an updated letter that satisfied these requirements. 6 ER 1350. But DCA never did so, even after ICANN gave DCA a second opportunity, lasting three months, to provide an updated letter during the Extended Evaluation of

DCA's application. 6 ER 1356. This, by itself, rendered the 2009 AUC letter invalid and insufficient to meet the Guidebook's requirements.

Second, even if the 2009 AUC letter had not been defective, DCA is incorrect that the Guidebook prevents the AUC from withdrawing its support. DCA relies on language from section 2.2.1.4.3 of Guidebook, but that language was not proposed even in draft form until November 2010, and the Guidebook was not adopted until September 2011—both well after the AUC withdrew its letter in April 2010.⁴

In addition, even if the language had been in effect, nothing in the Guidebook suggests that section 2.2.1.4.3 is addressed to the circumstance here, where the initial letter of support was sent nearly three years before the application period was even open and was withdrawn only eight months later, still two years before the application was even submitted.

DCA suggests that section 2.2.1.4.3 is intended to protect applicants that have incurred application expenses in reliance on a letter of support. DCA Br. 16-17. Yet DCA offers no evidence to support that view. Nor could it. It makes no sense to suggest that ICANN would adopt a provision that purports to dictate to governmental entities the circumstances under which they may change

⁴ The versions of the Guidebook are available at <https://newgtlds.icann.org/en/about/historical-documentation>. The November 2010 draft is version 5. The September 2011 version is version 9.

their support. In the Guidebook language on which DCA relies, section 2.2.1.4.3 refers only to “registry operators” and provides that, in the event of a dispute between a governmental entity and a “registry operator,” ICANN will comply with a court order from the government’s jurisdiction. 5 ER 930. This language makes clear that the Guidebook is not attempting to unilaterally dictate when a government may withdraw support, let alone attempting to do so with respect to an applicant rather than a registry operator. Here, DCA was not even an applicant yet. The AUC provided its initial letter and withdrew it before DCA even submitted its application. DCA’s argument that a governmental entity may not withdraw its support before an application is even submitted is meritless.

DCA also argues that the AUC’s letter of withdrawal was invalid because it was not signed by the same person who signed the letter of support. DCA Br. 3. This argument is likewise groundless. DCA has offered no evidence that the person signing the withdrawal letter was not authorized to do so, or that the withdrawal letter did not reflect the AUC’s intent. To the contrary, the AUC’s subsequent actions—holding an open selection process, choosing ZACR, and then unequivocally informing ICANN that it supports ZACR and not DCA—remove any doubt that the AUC intended to withdraw any support for DCA. Similarly groundless is DCA’s assertion that the AUC’s letter “did not expressly withdraw its endorsement of DCA.” DCA Br. 16. Not only do the AUC’s subsequent

actions refute that assertion, but the withdrawal letter itself is clear that the AUC has “reconsidered its approach” with respect to .AFRICA and “no longer endorses individual initiatives in this matter.” 6 ER 1314. Instead, the AUC said it would go “through an open process” to select its preferred applicant. *Id.* This cannot be interpreted as meaning anything other than that the AUC was withdrawing its previous letter of support for DCA.

Also meritless is DCA’s argument that ICANN “did not consider the withdrawal valid” because ICANN supposedly “considered and evaluated” DCA’s application until June 2013. DCA Br. 16. Even assuming that ICANN was fully informed of the AUC’s withdrawal of support, that would not mean that DCA’s application was dead in the water. It would just mean that DCA did not have available to it one avenue for satisfying the 60% support or non-objection requirement. It was thus entirely appropriate for ICANN to continue processing DCA’s application along with the other 1,929 applications it received under the New gTLD Program—and doing so was not an admission that ICANN believed DCA had the AUC’s support or had otherwise satisfied the 60% requirement.⁵

⁵ As purported evidence that it disclosed that the AUC had withdrawn its support, DCA cites to ER 1771, which is DCA’s reply memorandum in support of its preliminary injunction motion. That memorandum in turn cites to an excerpt of DCA’s application, found at 3 ER 503. In that excerpt, DCA referred elliptically to an “attempt to invalidate” the AUC endorsement. DCA did not state that the “attempt to invalidate” was a letter from the AUC withdrawing its own support.

(continued)

(b) DCA Did Not Have a Valid Endorsement from UNECA.

DCA also argues that it had UNECA's support, pointing to a letter UNECA sent in August 2008. DCA Br. 47-48; 6 ER 1316. This argument is also meritless.

First, like the AUC letter, UNECA's letter did not comply with the Guidebook requirements. ICANN issued clarifying questions to DCA in September 2015 that pointed out this defect and requested an updated letter. 6 ER 1342. If UNECA had actually supported DCA, and if it were a proper representative of the African governments, it would have been a simple matter for DCA to respond to the clarifying question by submitting a properly completed letter. DCA never did so. This, by itself, rendered UNECA's letter invalid and insufficient to meet the Guidebook's requirements.

Second, far from supporting DCA, UNECA wrote in 2015 that UNECA "is neither a government nor a public authority" and "does not have a mandate to represent the views or convey the support or otherwise of African governments in matters relating to application for delegation of the gTLD." 3 ER 510-11; *see also* 4 ER 653-54 (earlier version of same letter). So, in addition to refusing to provide an updated letter satisfying the Guidebook's requirements, UNECA clarified that

Instead, DCA described the "attempt" as a "forged, unstamped letter" that was a "work of sabotage." 3 ER 503. This purported disclosure was hardly enough to inform ICANN as to what actually happened.

its 2008 letter could not be taken as expressing the support of any African nation for DCA. *Id.*

(c) DCA’s Complaints About ZACR’s Endorsements Are Irrelevant and Erroneous.

Unable to demonstrate that it satisfied the 60% requirement, DCA tries to turn the table by arguing that “ZACR’s endorsements were improper.” DCA Br. 49. This argument is irrelevant because a purported lack of support for ZACR’s application would not mean that DCA had the required support or non-objection. DCA must show that its own application satisfied the requirements, not merely argue that ZACR’s application failed to.

But even if ZACR’s endorsements were relevant, DCA is incorrect that ZACR’s application did not satisfy the 60% requirement. Citing its brief in the court below rather than any evidence, DCA argues that “most” of the letters of support ZACR submitted “do not mention ZACR by name.” DCA Br. 49. Even if this were true, it would be irrelevant. ZACR still had the updated AUC support letter, which DCA does not dispute mentions ZACR by name and contains the other information required by the Guidebook. Because the AUC represents all of the countries in Africa except Morocco (3 ER 527-28), its endorsement by itself satisfies the 60% requirement, without regard to any other letters.

DCA’s argument that ICANN “discriminat[ed]” against DCA (DCA Br. 3) fails for the same reason. Just as it did with DCA, ICANN sent clarifying

questions to ZACR regarding the letter of support the AUC initially provided for ZACR's application. 2 ER 94. In contrast to DCA, however, ZACR complied with ICANN's request for an updated letter and submitted one that fully complied with the Guidebook requirements. 2 ER 230. DCA's argument that it was treated differently from ZACR is thus unfounded. Both were issued clarifying questions and asked to provide an updated letter, but only ZACR complied with that request.

DCA was likewise not treated differently from ZACR with respect to support from UNECA. DCA relies on a passage from ICANN's submission to the IRP Panel in which ICANN stated that it accepted the ICC's advice that UNECA "should be treated as a relevant public authority" and that UNECA's endorsement had been "taken into account." 4 ER 798. That passage, however, was written before UNECA submitted its letter in 2015 making clear that UNECA lacks authority to speak on behalf of African nations regarding gTLD applications. 3 ER 510-11. Further, UNECA's clarification regarding its lack of authority did not affect the processing of ZACR's application because ZACR satisfied the 60% support or non-objection requirement by virtue of the AUC's support.

DCA complains that ICANN improperly "ghost wrote" the AUC's updated letter of support. DCA Br. 49; *see* 3 ER 505. This is also specious. To help applicants ensure that their letters of governmental support meet the Guidebook requirements, the Guidebook contains a sample form of an endorsement letter.

5 ER 952. As noted, the AUC's initial letter of support for ZACR did not comply with the Guidebook requirements, thus prompting ICANN to issue clarifying questions asking ZACR for an updated letter from the AUC. 2 ER 94. ICANN staff prepared the draft letter to which DCA refers (3 ER 506) shortly thereafter. With the AUC already having made clear its support of ZACR, there was nothing improper in ICANN staff providing this guidance in completing the required paperwork, consistent with the Guidebook.

There was also nothing improper in ICANN explaining to the AUC, in a publicly posted response to the AUC's inquiry, the options available to the AUC through the GAC process. DCA Br. 17; 6 ER 1333.⁶ DCA assumes that ICANN must stand mute when inquiries are made and cannot answer questions or volunteer information about its procedures. No basis exists for that assumption. DCA suggests that giving such information violates ICANN's duty to act "independently." DCA. Br. 17. But DCA cites nothing saying that independence requires ICANN to remain silent about its procedures. Any such duty of silence would be particularly perverse with respect to governmental entities like the AUC. Far from being obligated to not communicate with them, ICANN's Bylaws require ICANN to "recognize[e] that government and public authorities are responsible for

⁶ As noted at 4 ER 757 ¶ 22, the letter is posted at <https://www.icann.org/en/system/files/correspondence/crocker-to-ibrahim-08mar12-en.pdf>.

public policy” and to “duly tak[e] into account governments’ or public authorities’ recommendations.” 6 ER 1202.

DCA also is incorrect in arguing that the AUC’s endorsement of ZACR was invalid because the AUC had earlier requested that ICANN put .AFRICA on a reserved names list. DCA Br. 49. As ICANN explained to the AUC, placing .AFRICA on a reserved names list would have prevented any entity—including an entity supported by the AUC—from applying for the string. 6 ER 1333 n.1. It also would have been inconsistent with the purpose of the New gTLD Program—and with the AUC’s own stated desires—in making strings such as .AFRICA available. 6 ER 1333. Accordingly, ICANN declined the AUC’s request. None of this, however, has any bearing on the validity of the AUC’s endorsement of ZACR. DCA points to nothing in the Guidebook or anywhere else that says that making the reserved names request disqualified the AUC from thereafter supporting ZACR’s application. Nor is there any reason why that should be the result. The request itself was not improper, and preventing the AUC from expressing its support simply because it inquired about reserving the name would be contrary to the entire purpose of the 60% support or non-objection requirement

in ensuring that the operator of a geographic gTLD be satisfactory to the governments in that region.⁷

Similarly groundless is DCA's argument that ZACR entered into an improper "assignment of rights" with the AUC. DCA Br. 49; *see also* DCA Br. 17-18. The language of ZACR's application that DCA quotes is not an assignment of any rights. The language simply states that the AUC retains its rights, including whatever intellectual property or other rights it possesses, as well as the right to withdraw its support for ZACR in favor of a different operator. 7 ER 1391. Again, DCA points to nothing that makes any of this improper.

In short, no valid dispute exists that ZACR had the required support and DCA did not. DCA has not demonstrated that any legitimate question exists on this issue, let alone the kind of serious questions necessary to sustain a preliminary injunction.

III. THE DISTRICT COURT ERRED IN ASSESSING IRREPARABLE HARM AND THE BALANCE OF INTERESTS.

DCA also fails to show irreparable injury or that the public interest favors an injunction.

⁷ Citing only its executive director's conclusory declaration, DCA argues that the AUC committee that selected ZACR was comprised of people who were also members of "other organizations affiliated with ZACR." DCA Br. 18 (citing 4 ER 758). Even if that were true, it would be irrelevant because nothing in Guidebook provides that a governmental entity may support only entities with which the government or its representatives have no affiliation.

A. DCA Would Not Be Irreparably Harmed in the Absence of the Preliminary Injunction.

ICANN's opening brief showed that the district court erred when it concluded that "DCA will suffer irreparable harm because .AFRICA can be delegated only once." 1 ER 46; AOB 51. The best DCA can say in response is that: (1) it previously "believed" re-delegation was not possible; and (2) the Court should disregard the evidence establishing that re-delegation is possible because that evidence was supposedly submitted too late. DCA Br. 50-51. An erroneous belief, however, does not constitute irreparable injury; and the evidence regarding re-delegation was presented below in a timely motion for reconsideration. No legitimate purpose is served by perpetuating an injunction on a ground that is demonstrably untrue, particularly in light of the public interest in the prompt delegation of .AFRICA.

DCA alternatively argues that if the preliminary injunction is vacated and the .AFRICA gTLD is delegated for operation by ZACR, DCA will be irreparably harmed because it will lose funding and possibly go out of business. DCA Br. 51. Such monetary losses, however, are compensable by damages and are thus not irreparable. *See* AOB 52. In addition, DCA has provided no evidence to support its claim. All it offers is its own conclusory assertions, unsupported by any facts. That is not enough.

B. The District Court Erroneously Assessed the Balance of the Equities and Where the Public Interest Lies.

DCA repeats the district court's assertion that the declaration provided by the AUC asserting the strong interest of citizens, consumers, businesses, and governmental entities in Africa in the prompt delegation of .AFRICA should be disregarded because the AUC is supposedly "biased." DCA Br. 53. Yet DCA has no answer to, and thus ignores, the fact that the AUC is the designated representative of essentially all the nations in Africa with respect to this very issue—and that the AUC's purported "self-interest" is precisely the interest that the 60% support or non-objection requirement was adopted to further. Disregarding the AUC's expression of interest as supposedly self-interested is akin to disregarding as biased an expression from the United States government as to whether its delegate to the United Nations should be seated.

DCA asserts that the AUC's view is "less than credible" because the AUC supposedly "has the rights to .Africa through its assignment agreement with ZACR." DCA Br. 54. As shown above (at 27), no such assignment exists. ZACR's application simply states that the AUC has retained its right to its own intellectual property and to support the operator of its own choice. Nothing in that retention of rights disqualifies the AUC from fulfilling its role as a representative of the African governments.

CONCLUSION

The district court's order granting the preliminary injunction should be reversed.

Dated: September 9, 2016.

Respectfully submitted,

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**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 6,963 words.

Dated: September 9, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing REPLY BRIEF OF INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS 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 September 9, 2016. Under said practice, the CM/ECF users were electronically served.

Executed on September 9, 2016, at Los Angeles, California.

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