Nos. 16-55693, 16-55894

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOTCONNECTAFRICA TRUST,
Plaintiff-Appellee,

v.

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

DOTCONNECTAFRICA TRUST,
Plaintiff-Appellee,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,
Defendant,

and

ZA CENTRAL REGISTRY, NPC
Appellant.

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

APPELLANT ZA CENTRAL REGISTRY, NPC'S REPLY BRIEF

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I.

INTRODUCTION

In a remarkable display of hubris, plaintiff/ appellee DotConnectAfrica Trust ("DCA") asserts in its Answering Brief that its pecuniary interests should take priority over the millions of African citizens who continue to be deprived of access to the .Africa gTLD. The governments of Africa have repeatedly made clear through their representative body, the African Union Commission ("AUC"), that they do not support DCA's application to become the registry operator for .Africa. These governments instead support appellant ZA Central Registry, NPC ("ZACR") because ZACR, unlike DCA, participated in the AUC's open request for proposal ("RFP") and, after meeting the AUC's requirements, secured the AUC's support. Yet, defendant/ appellant Internet Corporation For Assigned Names and Numbers ("ICANN") remains unable to delegate .Africa to ZACR because the district court committed clear error in granting DCA's request for the "extraordinary remedy" of a preliminary injunction. DCA's Answering Brief only serves to confirm that the district court's ruling must be vacated.

First, the injunction should be vacated because the record shows that DCA has no likelihood of success on the merits. The record is undisputed that DCA does not have the 60% support of African governments required to be awarded the .Africa gTLD. Nevertheless, DCA asserts that the district court based its

likelihood of success on "well-supported findings." In fact, the district court's amended ruling – finding that "there still exists serious questions going to whether Plaintiff had acquired a sufficient number of endorsements to have passed the geographic names evaluation process" – is expressly contradicted by the record. The district court found that DCA has a likelihood of success because it is "reasonable to infer" that the IRP panel intended for DCA's application to bypass the geographic names evaluation phase (which confirms the required government support) and proceed to the delegation phase. ER 23. The problem is that the district court's finding is, in fact, expressly contrary to the IRP panel's decision; the IRP panel rejected DCA's request that it be "deemed" to have satisfied the government support requirement. ER 816, 822-24. Indeed, DCA itself admits that the IRP panel rejected its request. Answer Brief at 25-26. On this basis alone, the preliminary injunction should be vacated because the factual predicate underlying the district court's ruling on the likelihood of success is entirely without support.

Recognizing the deficiency in the district court's ruling, DCA litters its Answering Brief with unsupported ad hominem attacks on ICANN and ZACR, and relies on flawed procedural arguments to suggest that DCA should still be deemed likely to succeed on the merits. None of DCA's assertions stand up to scrutiny. For example, DCA cannot legitimately rely on deficient and outdated letters from the AUC and UNECA to demonstrate the required African government support.

The AUC expressly repudiated any support for DCA as early as 2010 – two years before the application process began. ER 1314. And UNECA has made clear that, as a United Nations entity, it is not a governmental authority and cannot issue endorsements. ER 1321-22. Similarly, DCA's assertion that the AUC was not allowed to withdraw its support under the ICANN Guidebook is belied by the plain language of the applicable rule, and because the rule did not come into existence until after the letter was withdrawn. Importantly, DCA never addresses the actual reason for the AUC's withdrawal of its earlier letter: the governments of Africa decided to initiate a formal RFP to determine which African entity should receive the endorsement of the AUC. ER 225, 235-36, 1465-67, 529. DCA chose not to participate in the RFP process. ER 529, 226. ZACR did participate, prevailed and received the proper endorsement of the AUC. ER 529, 225, 230-31, 235-36, 1465-67.

In short, DCA can show no likelihood of prevailing on the merits because it does not have support of the African governments – the sovereign entities that represent millions of African citizens who should have a voice in which entity will be the registry operator for the .Africa domain.

Second, the preliminary injunction should be vacated because the record is completely devoid of any legitimate showing of irreparable harm. DCA admits that the original basis for the district court's finding of irreparable harm was

erroneous. DCA Brief at 51. DCA acknowledges that it was "incorrect" in asserting in its initial motion that preliminary relief is necessary because .Africa "can be delegated only once." *Id.* In fact, the evidence is undisputed that redelgation of the .Africa gTLD is not only technically feasible but ICANN has actually redelegated gTLDs on dozens of occasions. ER 97, 62-81, 83-92, 326-338. Thus, even if ICANN delegates .Africa to ZACR in the interim, ICANN has the ability to redelegate .Africa from ZACR to DCA in the future if DCA prevails in the litigation. Accordingly, the record is undisputed that there is no irreparable harm and therefore no basis for the preliminary injunction.

Yet, in its amended ruling, the district court rejected this fundamental point on the procedural ground that ICANN had not raised redelegation in its initial opposition brief and, following the dismissal of claims against ZACR, the issue was moot as to ZACR. ER 21, 23. This ruling is clearly erroneous because ZACR maintained standing to challenge the injunction and the district court should have considered ZACR's argument.[1] Indeed, DCA does not challenge ZACR's

[1] DCA does not challenge ZACR's standing but asserts that the district court's failure to consider the motion as to ZACR can be justified because ZACR purportedly delayed in filing its motion. This contention is without merit. There is no time limit for filing a motion to vacate or dissolve a preliminary injunction under Fed. R. Civ. P. 54 (b). Moreover, ZACR's motion was timely filed within the 28 days mandated by Fed. R. Civ. P. 59(e). Further, it was DCA that withheld serving ZACR in South Africa until after the preliminary injunction briefing had been completed. ZACR Brief at 29.

standing as a party impacted by the injunction.[2]

The district court's alternative holding – that DCA's loss of business funding is still sufficient to demonstrate irreparable harm – is also erroneous because it is contrary to controlling law. It is well settled that monetary harm to the plaintiff cannot support a finding of irreparable harm. *Los Angeles Mem'l Coliseum Comm'n v. NFL*, 634 F.2d 1197, 1202 (9th Cir. 1980). Indeed, DCA acknowledges as much by failing to address, let alone distinguish, any of the authorities cited in ZACR's Opening Brief. Thus, on this record, the injunction must be vacated because there is no evidence of irreparable harm.

Third, the injunction should be vacated because the district court erred in failing to undertake the required analysis for the balance of equities. As noted, DCA does not dispute that ZACR has standing and, under the controlling case law, the district court was required to at least consider the harm to ZACR. Recognizing the flaw in the district court's ruling, DCA nevertheless makes various attacks on ZACR's proffered evidence of harm. These assertions are without basis. ZACR

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[2] Since the filing of ZACR's opening brief before this Court, ZACR filed a motion to intervene in the district court proceedings. ECF 122-1. ICANN does not oppose ZACR's motion. *See id.* DCA recognizes ZACR's ongoing interest in the delegation of .Africa, and does not oppose ZACR's request to intervene, so long as ZACR is not deemed an indispensable party due to the potential impact on the district court's subject matter jurisdiction. ECF 128. Both parties agree that further briefing may be required on these issues. ECF 128, 131. A hearing on ZACR's motion to intervene is scheduled for September 19, 2016.

submitted declarations and detailed financial projections showing the basis for ZACR's significant and ongoing harm. ER 226-27, 54-55, 1750-52. At a minimum, the district court should have considered this evidence. Moreover, as part of the evaluation of the harm to the public interest, the district court failed to properly consider the interests of the African people. The district court erred in essentially discarding the declaration of the AUC official charged with information technology for the continent of Africa. ER 46-47, 526-31. DCA's suggestion that the AUC has an abiding interest in .Africa makes the testimony of its officials more probative not less – because the AUC is made up government representatives acting on behalf of millions of African citizens for whom the .Africa gTLD is intended. By any measure, the interests of the AUC and its citizens certainly outweigh whatever pecuniary interests DCA claims for itself. At a minimum, the Court erred in failing to accord the AUC's submission appropriate consideration.

Finally, the district court erred in failing to consider ZACR's alternative argument that DCA should be required to post a bond. DCA's assertions that the district court properly ignored the bond request are without merit as addressed below.

On this record, the district court committed clear error. This Court should reverse and vacate the preliminary injunction order.

II.

ARGUMENT

A. DCA Has No Likelihood of Success on the Merits.

At no time during the application process did DCA have the required support from the governments in Africa. ER 1314, 632-33, 235-36. Faced with overwhelming evidence on this point, DCA relies on improper procedural assertions and baseless attacks on the independence of the AUC, ICANN and UNECA, in an effort to avoid the fundamental flaw in the district court's ruling. None of DCA's arguments stand up to scrutiny.

1. The IRP Panel Rejected DCA's Request That It Be "Deemed" To Have Satisfied the Government Support Requirement

Contrary to the district court's erroneous finding, the IRP panel decision cannot be read to suggest that the panel intended for DCA's application to bypass the geographic names evaluation phase – where DCA's government support would be evaluated by an independent panel – and proceed to the delegation phase. ER 822-24. DCA admits that the IRP Panel expressly declined to rule on the sufficiency of DCA's African government endorsements, and further declined to given DCA additional time to try to secure the proper endorsements. DCA Brief at 25-26 (conceding "[t]he Panel declined to expressly rule on either request but

limits its decision to ICANN's procedure."). Indeed, DCA cannot escape the undisputed fact that the IRP Panel limited its ruling to the GAC consensus advice only and made no finding with respect to DCA's government support within Africa. ER 806-07, 822-24. Nor could it since the geographic names panel had not yet completed its analysis of DCA's government support at the time ICANN halted DCA's application in 2013. ER 637. Accordingly, the IRP panel's ruling was limited to the GAC process, and the record shows that the panel ruled only that ICANN should process DCA's application from the point at which it left off – the geographic names phase. ER 822-24 (ICANN should "continue to refrain from delegating the .AFRICA gTLD and permit [DCA's] application to proceed through the remainder of the new gTLD application process."). There was no evidentiary basis for the district court to "infer" that the IRP panel deemed DCA to have satisfied the government support requirement.

2. Endorsements For ZACR and DCA Were Not "Equal": The Record is Clear That DCA Never Had the Required Government Support During This Process

As an alternative basis to justify the district court's ruling, DCA asserts that the preliminary injunction can still be upheld because ZACR and DCA both had the same level of support from the AUC. DCA argues that if ZACR passed the geographic names panel review with its AUC endorsement, then DCA necessarily

"should have" also passed the review based on its AUC endorsement. DCA Brief at 7. The record shows that this contention is without merit.

First, the AUC never endorsed DCA at any time during the ICANN gTLD application process. DCA relies on a 2009 AUC letter that was expressly repudiated by the AUC in 2010 – two years *before* ICANN opened the new gTLD process for applications. ER 1312. DCA does not challenge this basic fact. Similarly, DCA does not contest the fact that UNECA made clear that its 2008 letter could not serve as a letter of endorsement. As UNECA explained, it has no power to act as a representative of the governments of Africa. ER 1321-22. Further, neither the 2009 AUC letter nor the 2008 UNECA letter satisfied the Guidebooks requirements. *Cf.* ER 1312 and ER 1316 with ER 952-53. Because the AUC and UNECA did not and could not endorse DCA during this process, the record is unassailable that DCA failed to meet the government support required by the ICANN Guidebook. On that basis, the district court's injunction must be vacated because DCA has no likelihood of success on the merits.

Nevertheless, DCA tries to sidestep this fundamental flaw by making various procedural arguments for why the AUC, a representative body of the 53 countries of Africa, could not properly withdraw its alleged support of DCA. These arguments are similarly without merit.

First, DCA claims that the AUC was not allowed to withdraw its endorsement because the terms of the ICANN Guidebook do not allow for withdrawal in this circumstance. This assertion facially makes no sense since the AUC's withdrawal occurred in 2010 – before the Guidebook provision relied upon by DCA was even in effect.[3]

Second, even if that provision had been in effect and could apply, DCA misconstrues the language of the Guidebook. The operative provision states: "a government may withdraw its support for an application at a later time, including after the new gTLD has been delegated, if the ***registry operator*** has deviated from the conditions of original support or non-objection."[4] ER 930 (emphasis added). Thus, this provision applies on its face only to registry operators – entities that already have contractual agreements with ICANN to operate a specific gTLD. DCA was not even an applicant, let alone a registry operator, at the time of the AUC's withdrawal, and therefore the provision could not have been applicable to DCA.

Third, DCA implies that ICANN's act of processing DCA's application suggests that ICANN recognized the AUC's withdrawal of support was somehow

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[3] The final version of the New gTLD Guidebook was released in September 2011. This version is publicly available on ICANN's website. ECF 95-1.

[4] In January of 2012, a further version of the new gTLD Applicant Guidebook was released. ECF 95-1. This was the operative Guidebook in effect when ZACR and DCA applied for .Africa.

invalid. DCA Brief at 16. There is no merit to this contention. The record shows unequivocally that ICANN continued to review DCA's application because its endorsements were not put in issue until the time of the geographic names review process. ER 637-38. Once DCA's deficient "endorsements" were fully reviewed, DCA's application necessarily failed because it lacked the requisite African government support. ER 638, 1353-54, ER 930-32 at 2.2.1.4.4 (outlining the process for evaluating government support).

Unable to make substantive and procedural arguments that withstand scrutiny, DCA next makes unsupported attacks on the credibility of the AUC and UNECA. DCA implies, without evidentiary support, that the AUC withdrawal letter might be disregarded because it was signed by a "lower level official." DCA Brief at 3. Whatever the intended import of that assertion, the letter was signed by the Deputy Chairperson of the African Union Commission. ER 1314. There is no evidence to suggest that the Deputy Chairperson was not fully authorized to sign the 2010 letter on behalf of the AUC. Further, the AUC's position was not limited to the 2010 withdrawal letter. The AUC has repeatedly stated that DCA does not have the support of the African Union countries, including unequivocal language in its 2015 letter advising ICANN that the "AUC does not support the DCA application and, if any such support was initially provided, it has subsequently been withdrawn with the full knowledge of DCA even prior to the commencement

of ICANN's new gTLD application process." ER 235-36, *see also* ER 632-33, 529, 1465-67. The AUC position could not be clearer.

Similarly, DCA argues that the UNECA letter repudiating support for DCA's application might be discarded because it came from a "low-level employee." DCA Brief at 25. In fact, the UNECA letter is signed by the Secretary of the Commission and its Legal Advisor. ER 1321-22. And while the UNECA letter makes clear that the UN "entity is neither a government nor a public authority and therefore is not qualified to issue a letter of support," DCA argues that UNECA's clarifying letter should essentially be ignored because it was not received until after the IRP's ruling in 2015. DCA Brief at 48. But again, as noted, the geographic names panel did not complete its review of the propriety of DCA's government endorsements until 2015. ER 637-39. Accordingly, DCA's argument is unavailing both on substance and procedure.

With no evidence to suggest that it had proper government support, DCA resorts to attacking ICANN and suggesting that ZACR was only able to satisfy the geographic names panel process because ICANN "improperly" favored ZACR's application. Again, there is no basis for this contention.[5] When ZACR and DCA's

[5] Nor is there merit to DCA's claim that ICANN failed to act independently by giving "instructions' to the AUC to derail DCA's application using the GAC process. DCA Brief at 19-20. Not surprisingly, the document that DCA cites does not support this outlandish contention. The letter from ICANN merely explained to the AUC that ICANN has protections in place in the Guidebook that allow

applications were before the geographic names panel, the independent panel issued clarifying questions to both entities due to initial deficiencies in the government endorsements proffered by both applicants. ER 1342-51, 94-95. The record shows that ZACR was able to revise its submission to conform to the technical requirements of the Guidebook because it had the support of the AUC.[6] ER 230-31. DCA, which did not have the support of the AUC, was unable to fix the deficiencies; rather DCA could only continue to cite to the expressly repudiated and deficient AUC "endorsement" letter from 2009. ER 1355-67, 637-39.

Finally, DCA suggests that in addition to all of the other parties supposedly conspiring against it, ZACR's application was flawed because the AUC had a conflict of interest due to an assignment of rights agreement with ZACR for the .Africa domain. While the assertion has no bearing on the propriety of DCA's own likelihood of success, ZACR briefly reviews the facts to demonstrate just how

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governments a role and some oversight in determining which entity should operate a geographic name. ER 1333.

[6] DCA contends that ZACR's endorsement from the AUC was deficient. DCA Brief at 21, 49. DCA mischaracterizes the timeline and the record. In 2012, ZACR submitted its application and its initial support letter from the AUC. ER 224, 55. After receiving clarifying questions asking ZACR to fix deficiencies in its endorsement letter, ZACR submitted a new letter on July 2, 2013 that complied with all requirements. ER 55. Contrary to DCA's assertions, this letter refers to ZACR by its applicant name (UniForum SA (NPC)) and does not discuss "the AUC's initiative to categorize .Africa as a 'reserved' domain.'" ER 230-31. Moreover, DCA's claim that ICANN ghostwrote the letter for the AUC similarly misconstrues the record. ICANN provides all applicants with a template letter to follow in securing proper endorsements. ER 952-53.

baseless DCA's attacks are on this process. The AUC held a public RFP to determine which entity it would support to launch the .Africa gTLD. ER 225, 235-36, 1465-67, 529. DCA chose not to submit a proposal or participate in the RFP process. ER 529, 226. ZACR submitted a proposal and, after prevailing in the IRP process, was thereafter officially endorsed by the AUC to apply for and launch .Africa. ER 529, 225, 55, 230-31, 235-36, 1465-67. At that time, ZACR and the AUC entered into an agreement to work cooperatively in a shared mission to "establish a world class domain name registry operation . . . by engaging and utilising African technology, know-how and funding; for the benefit and pride of Africans; in partnership with African governments and other ICT stakeholder groups." ER 1381. There is nothing improper about the governments of Africa maintaining some level of interest in the .Africa domain. The AUC's RFP was open to DCA and transparent. DCA chose not to participate and therefore ensured that it would not have the support of the African governments.[7] ER 529, 226.

In the end, no matter how DCA attempts to complicate and convolute the facts, the record speaks for itself. DCA never had the support of the African

[7] DCA never acknowledges, let alone explains why, it chose not to participate in the AUC RFP process. It was DCA's own failure to abide the AUC's open and transparent process that put DCA in the position of having no African government support.

governments as mandated by ICANN's Guidebook. DCA has no likelihood of success on the merits and the injunction should be vacated.

B. DCA Cannot Show Irreparable Harm

The record makes clear that DCA will not be irreparably harmed by the delegation of .Africa to ZACR because, should DCA prevail at trial, .Africa can be redelegated to DCA. ER 97, 62-81, 83-92, 326-38. In a striking admission, DCA concedes this fact in its Answering Brief, stating: "DCA was incorrect as to the technical possibility of delegation . . . ." DCA Brief at 51. **The fact that ICANNN has the power to redelegate .Africa negates any potential for irreparable harm and therefore any basis for the preliminary injunction**. *See Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7, 21 (2008) (irreparable harm required to maintain a preliminary injunction); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (plaintiff "must establish that irreparable harm is likely, not just possible, in order to obtain a preliminary injunction") (citing *Winter*).

DCA's only response is to suggest that it initially believed "delegation of a gTLD usually only occurs when a registry's contract with ICANN expires after the initial ten-year period." [8] DCA Brief at 51. While the record shows that DCA's

[8] DCA's support for this belief is lacking. DCA merely cites to the Declaration of ZACR's CEO for the proposition that the Registry Agreement between ICANN and ZACR runs for ten years. ER 226.

original belief was wrong, DCA's statement further proves the point: ICANN is fully capable of redelegating a gTLD. And, DCA's other argument, that redelegation is complicated and may not be available because redelegation must be approved by the U.S. Department of Commerce ("DOC"), whose contract with ICANN is set to expire, is unsupported speculation. Every ICANN delegation or redelegation of a gTLD is presently subject to DOC oversight. ER 114. DCA has proffered no admissible evidence, or even a cogent argument, to suggest that every agreement entered into by ICANN over the last 20 years should now be subject to question after ICANN's contract with the DOC expires. DCA has put forward no credible evidence supporting that redelegation would be unduly complex or impossible. The record supports the opposite conclusion – redelegation is not only feasible but has occurred over 40 times.[9] ER 97.

Having conceded that redelegation is an available remedy, DCA tries to sidestep the substantive point by falling back on yet another flawed procedural argument, this time contending that ICANN and ZACR made the redelegation argument too late. DCA Brief at 50-51. As stated in ZACR's opening brief at 28-29, the timing of ZACR's motion to vacate/ reconsider was of DCA's own making.

[9] DCA's insinuation that the ICANN declaration should be accorded little weight because it was proffered by an "employee" smacks of the same desperation used to attack the AUC and UNECA submissions. The "ICANN employee" is, in fact, ICANN's President of Global Domains Division, Akram Attallah. DCA Brief at 50; ER 96-97.

After filing the First Amended Complaint which added ZACR as a party defendant, DCA set a briefing schedule that it knew would be completed before ZACR had been served with the complaint. DCA knew that ZACR was a South African non-profit company, knew (or should have known) that South Africa is not a signatory to the Hague Convention, and knew that service would take time. And while the district court issued an order on March 10, 2016 allowing for special service on ZACR in South Africa, DCA chose not to serve ZACR until March 22, 2016 – the day after briefing was complete on the preliminary injunction motion. [10] ER 1724. Under these circumstances, the timing of ZACR's motion was reasonable.

Finally, DCA resorts to arguing that the district court's ruling should be sustained because DCA will be irreparably harmed by an alleged loss of investor funding if the injunction is lifted. The law in this Circuit is clear, however, that economic injury is insufficient to show irreparable harm. ZACR Brief at 34-35 (citing *Los Angeles Mem'l Coliseum Comm'n v. NFL,* 634 F.2d 1197, 1202 (9th Cir. 1980) (economic injury not sufficient for irreparable harm); *Amylin Pharms., Inc. v. Eli Lilly & Co.,* 456 F. App'x 676, 678 (9th Cir. 2011) (affirming denial of

[10] DCA suggests that it sought to notify ZACR by informal means. The law is clear that knowledge of a lawsuit does not constitute service of process and ZACR had no obligation to enter these proceedings before proper service. *See e.g., Mid-Continent Wood Prods., Inc. v. Harris,* 936 F.2d 297, 301 (7th Cir. 1991).

preliminary injunction because harm that is fully compensable through money damages . . . does not support injunctive relief"); 13-65 Moore's Federal Practice ¶ 65.22 n.5). DCA does not even attempt to address, let alone, distinguish these cases in its brief. DCA cites only to *Blackwater Lodge & Training Ctr., Inc. v. Broughton*, 2008 U.S. Dist. LEXIS 49371 at *28 (S.D. Cal. 2008), in an attempt to suggest that economic injury might support a preliminary injunction. In *Blackwater*, the district court based the propriety of injunctive relief on the fact that plaintiff was unable to fulfill a contract it had with the United States Navy and faced deprivation of its constitutional rights. *Id.* at *28. The district court did not expressly find irreparable injury based on monetary harm to the plaintiff or rule inconsistent with established Ninth Circuit precedent on this issue. *Id*.

DCA also claims that because a probable lack of investor funding may result in the destruction of the business and its charity, it has shown irreparable harm. Even assuming that DCA's speculative statement might be true, DCA does not explain how such harm is not monetarily compensable. And, there is nothing in the record supporting this statement except the speculation of Ms. Bekele. ER 1716. As more fully stated in ZACR's opening brief, such speculation cannot support a finding of irreparable harm. ZACR Brief at 34 (citing *Caribbean Marine Servs. Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988) and *Rubin ex rel. NLRB*

v. Vista Del Sol Health Servs., Inc., 80 F. Supp. 3d 1058, 1100 (C.D. Cal. 2015)). DCA never addresses the propriety of these decisions.

Because .Africa can be redelegated, and the loss of business funding does not constitute irreparable harm as a matter of law, DCA cannot show irreparable harm. Accordingly, the preliminary injunction should be vacated.

C. The Balance of Hardships Weighs in ZACR's Favor

As set forth in ZACR's opening brief, in determining the balance of hardships, the impact on all parties, and even affected non-parties, must be considered. *Los Angeles Mem'l Coliseum*, 634 F.2d at 1203 (mandating that in evaluating preliminary injunction court must evaluate harm to defendant); *Atari Corp. v. Sega of America, Inc.*, 869 F.Supp. 783, 792 (N.D. Cal. 1994) (holding that harm to affected third party companies must be taken into account in either balancing the harms or weighing the public interest). DCA seemingly concedes this point as it never suggests that ZACR's interests should not have been considered. On that basis alone, the district court erred.

DCA argues only that the balance of harms weighs in its favor because redelegation would be extremely difficult and DCA would likely lose funding to operate its only domain, .Africa. DCA Brief at 52. But, DCA cites no credible support for its assertions; again the record shows that redelegation has occurred on more than 40 occasions and is entirely feasible. ER 97. And while DCA

speculates that it will lose funding, the record actually suggests that the gTLD would increase in value if ICANN is allowed to immediately delegate .Africa to ZACR. ER 227. In the unlikely event that DCA were to prevail at trial and obtain injunctive relief mandating redelegation, DCA would receive a gTLD that will have increased in value. *Id*.

ZACR, on the other hand, has presented detailed support for the harm it will suffer because of the preliminary injunction, including lost opportunity costs in the amount of $15 million. ER 226-27, 54-55, 1750-52. DCA's contention that the spreadsheet supporting ZACR's calculation is not sufficiently detailed is without basis. ZACR's spreadsheet breaks out the $15 million number based on the number of expected registrations (based on historical numbers and experience) during different launch phases. ER 1750-52.

Finally, although not addressed by the district court, DCA's argument that the amount of ZACR's "Continual Performance Guarantee" does not support claimed income of $15 million is wrong.[11] First, DCA admits ZACR's revenue projections are not public and that DCA's argument is based on speculation. Second, the Continued Operations Instrument ("COI") figure that DCA relies on was subsequently revised in response to follow-up questions from ICANN. ECF

[11] This argument was never raised by DCA in the briefing below. DCA raised this argument only in evidentiary objections which the court never addressed. ER 1757.

107. Third, and most important, DCA is confusing registration numbers with revenue. The COI number is based on the number of expected registration numbers, not expected income, thus supporting that ZACR's estimated losses are conservative and not inflated. ER 1750-52.

The record makes clear that the district court erred in failing to consider ZACR when evaluating the balance of equities. On a properly considered record, the equities strongly weigh in ZACR's favor and the injunction should be vacated. *See e.g., MacDonald v. Chicago Park Dist.*, 132 F.3d 355, 361, 363 (7th Cir. 1997); *Atari*, 869 F. Supp. At 792; *ATCS Inte'l LLC v. Jefferson Contracting Corp.*, 807 F. Supp. 2d 516, 519 (E.D. Va. 2011).

D. The People of Africa Are Injured By the Preliminary Injunction

In considering the balance of harms, DCA claims that the district court rightly disregarded evidence showing the harm to the people of Africa. There is no basis to DCA's assertion. The declaration submitted by the Head of Information Society Division of the AUC demonstrates that the people of Africa are being harmed by the delay in the delegation of .Africa. ER 526-31. The district court erred in failing to take that into proper account.

The African Union ("AU") which, as noted represents the 53 member states of the African continent, has mandated that the AUC serve as the secretariat of the AU. Specifically, the AUC is entrusted with carrying out the AU's executive

functions. ER 527. Despite this, DCA argues that sworn statements from the AUC official, relating to harm to the African people due to the delay in the delegation of .Africa, is "biased," "speculative," and "conclusory." Yet, the AUC is the entity that has been charged with official responsibility to speak on behalf of the people of Africa.[12] *Id.* And, DCA's argument that the district court justly discredited the AUC declaration because of its supposed self-interest in seeing .Africa delegated to ZACR makes no sense. As stated, the AUC held a public RFP to decide which applicant for .Africa to support. ER 225, 235-36, 1465-67, 529. It was DCA that chose not to participate in the RFP process. ER 529, 226. ZACR participated and prevailed. ER 529, 225, 230-31, 235-36, 1465-67. It is axiomatic that the AUC would support ZACR's application after it complied with the AUC's requirements. The governments of Africa, acting through the AUC, have an interest in the .Africa domain and in seeing that it is operated by an entity that will support the AUC's initiative to provide secure, world-class technical infrastructure to the people of Africa. ER 528-29, 226-27.

[12] DCA fails to address an AUC letter, signed by the Commissioner of Infrastructure and Energy of the AUC, to ICANN, dated June 2, 2014, which similarly states that the citizens of Africa are eagerly awaiting the gTLD .Africa. ER 632-33. DCA similarly fails to address ZACR's position that the district court should have given deference to the official position of foreign state representatives under the act of state doctrine. ZACR Brief at 38 (citing *Int'l Ass'n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354, 1360 (9th Cir. 1981)).

Moreover, the district court should have properly considered that the delay in the designation of .Africa deprives a charity of funds that would be used to support African developmental projects and initiatives. ER 227, 530-31. While, DCA contends that the benefits of such a charity are "speculative," the record shows that approximately $5.5 million would have already been donated to online development within Africa. ER 227, 530-31, 1750-52. This charitable benefit to the people of Africa clearly outweighs any supposed harm to DCA. The district court erred in failing to fully take this into account.

E. In The Alternative, DCA Should Be Forced To Post A Bond

While the district court does maintain discretion in setting the bond amount, courts generally excuse a bond only in "exceptional cases." *Frank's GMC Truck Ctr., Inc. v. General Motors Corp.*, 847 F.2d 100, 103 (3d Cir. 1988) (bond is "almost mandatory"). The district court denied the bond on grounds that ICANN had not raised the argument in its initial papers. ER 23. Because it is undisputed that ZACR retained standing to challenge the preliminary injunction, the district court should have considered its request. ZACR Brief at 40 (citing *Timken v. U.S.*, 569 F. Supp. 65, 82-83 (Ct. Int'l Trade 1983) (holding that pursuant to FRCP 65(c), nonparty intervenor directly impacted by injunction has standing to seek security). DCA apparently concedes ZACR's standing to seek a bond because it does not address this point in its answering brief.

Instead, DCA claims that no bond should issue because ZACR is under no obligation to incur ongoing costs to promote the .Africa domain name. However, as addressed in ZACR's opening brief, these expenses are necessary to maintain visibility for the .Africa project and because of the ongoing need to interface with government officials throughout the continent of Africa. ER 226, 54.

DCA's further suggestion that *Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc.*, 16 F.3d 1033, 1039 (9th Cir. 1994) is distinguishable because there, a detailed accounting was provided, is wrong. DCA Brief at 56. ZACR offered a detailed spreadsheet supporting its request for a $15 million bond. ER 1750-52. ZACR specified the number of domain registrations in different phases of the launch of .Africa. *Id*. ZACR also based the registration numbers on responses to ICANN's 2012 .Africa application questions after researching historical data and its application passed ICANN's evaluation. ER 54-55. Thus, DCA's claim that ZACR's spreadsheet is not detailed enough to support the requested bond amount is without basis. Additionally, in *Nintendo*, the detailed accounting was made after the plaintiff lost at trial and Galoob Toys sought to execute on the bond.[13]

[13] DCA's attempt to distinguish *Netlist Inc. v. Diablo Techs., Inc.*, No. 13-cv-05962-YGR, 2015 U.S. Dist. LEXIS 3285, at *39-40 (N.D. Cal. Jan. 12, 2015) also fails because ZACR did base its losses on historical data and research. ER 54-55.

F. ZACR's Motion to Vacate/Reconsider Was Proper

Littered throughout DCA's brief is the suggestion that the arguments raised in ZACR's motion to vacate/ reconsider were properly ignored by the district court due to supposed concerns about the timeliness of the filing. While this contention is wrong on the facts as addressed in ZACR's opening brief and above, it is also wrong as a matter of law. A motion to modify a preliminary injunction is meant to relieve inequities that arise after the original order. *Credit Suisse First Boston Corp. v. Grunwald,* 400 F.3d 1119, 1124 (9th Cir. 2005). Here, the equities are compelling that ZACR, the party directly impacted by the injunction, should have a right to be heard on these issues. *See e.g., United States v. Bd. Of School Commrs. of City of Indianapolis,* 128 F.3d 507, 511 (7th Cir. 1997). Additionally, ZACR has complied with the requirements for bringing a motion for reconsideration as ZACR timely filed, and raised factual errors and proffered evidence that were not previously before the Court. C.D. Local Rule 7-18. Thus, the district court erred in failing to properly consider ZACR's arguments as to ZACR.

G. DCA Provided No New Facts Justifying Remand

DCA contends that if this Court finds that the district court erred in issuing and maintaining the preliminary injunction, the case should be remanded to the district court to consider whether the discovery of "new" evidence would

nevertheless support upholding the preliminary injunction. DCA's only support for this argument is that it claims to have just discovered that there is an overlap of ownership and control over ZACR and its registrar DNServices Pty. Ltd.[14] DCA Brief at 58. First, this supposed new fact has no bearing on DCA's likelihood of success on the merits. It has nothing to do with the glaring deficiencies in DCA's application. Second, ICANN has already determined that ZACR is fully capable of performing the necessary registry functions. ER 639; *see also* ER 224. That was the entire point of the rigorous procedures that ICANN required all applicants to meet in advance of being awarded the .Africa gTLD. In short, there is no merit to DCA's suggestion. It knows full well that its preliminary injunction was procured in error and must be vacated.

III.

CONCLUSION

The record is overwhelming that the district court erred in maintaining the preliminary injunction order. The record shows that DCA failed to satisfy any of the requirements for a preliminary injunction. The people of Africa have waited long enough to have access to the .Africa gTLD. The district court's order should be reversed and the preliminary injunction vacated.

[14] DNServices serves as the technical backend operator for ZACR.

Dated: September 9, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,383 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App.P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016's 14-point font Times New Roman.

Dated: September 9, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2016, I electronically filed the foregoing document described as ***APPELLANT ZA CENTRAL REGISTRY, NPC'S REPLY BRIEF*** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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