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

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APPELLANTS' REPLY MEMORANDUM REGARDING THE DISTRICT COURT'S LACK OF JURISDICTION

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There is no dispute that the appeals here must be dismissed as moot. The district court concluded that appellant ZA Central Registry, NPC ("ZACR") is an indispensable party, and that its presence destroyed the complete diversity that was the sole basis for federal subject matter jurisdiction. Accordingly, the district court remanded the case to state court. While appellee DotConnectAfrica Trust ("DCA") acknowledges that the district court's remand renders these appeals moot, DCA argues that the district court's determination that it lacked subject matter jurisdiction: (1) does not invalidate the preliminary injunction; and (2) precludes this court from vacating the preliminary injunction. DCA is wrong on both counts. As set forth below, the law is clear that a district court's orders issued without subject matter jurisdiction are null and void, and this Court retains jurisdiction to vacate the void preliminary injunction.

DCA's arguments are contrary not only to the law, but to common sense. Under DCA's logic, the district court's preliminary injunction order *cannot be vacated at all* despite the fact that the Court lacked subject matter jurisdiction when it granted the injunction. In DCA's telling, this Court has no power to vacate the injunction. Instead, DCA suggests that the district court should have vacated the injunction when it found that it lacked subject matter jurisdiction. But once ICANN and ZACR filed their appeals, the district court was divested of jurisdiction to rule on the preliminary injunction order. And so DCA's argument is

meritless because it suggests that the district court's preliminary injunction order must remain in place and is permanently immune from review.[1] That is not—and cannot be—the law.

I. THE DISTRICT COURT'S PRELIMINARY INJUNCTION ORDER IS NULL AND VOID.

DCA cites no authority suggesting—let alone holding—that an order entered by a district court that did not have subject matter jurisdiction is valid. The cases cited in appellants' opening memorandum hold squarely that such orders are void and have no effect. *See* ECF No. 54, pp. 4-5. DCA argues that this case is different because the district court itself determined that it lacked jurisdiction and remanded the case to state court without this Court ordering it to do so. But that distinction is irrelevant. Orders made without jurisdiction are void because a court without jurisdiction lacks the power to rule on any issue going to the merits. *Ruiz v. Snohomish Cty. Pub. Util. Dist. No. 1*, 824 F.3d 1161, 1165 (9th Cir. 2016) (lack of jurisdiction "depriv[es] the court of the authority to rule on the merits"). It does not matter whether the determination of no jurisdiction is first made by the district court or by this Court. Either way, the district court lacked subject matter jurisdiction and its orders are void, with no force or effect.

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[1] Although the matter has been remanded to the state court, the state court has no power to vacate a federal district court's order.

Nor is there any merit to DCA's suggestion that the preliminary injunction order is not void because ZACR was not a party when the district court declined to reconsider the order. First, ZACR indisputably was a party when the preliminary injunction order was entered. The district court's later refusal to reconsider that order after it dismissed DCA's affirmative claims against ZACR did not retroactively validate the preliminary injunction order. Second, and more fundamentally, the district court's lack of subject matter jurisdiction did not depend on when ZACR was dismissed or when it sought to intervene. Instead, by ruling that ZACR was "indispensable," the district court determined that ZACR must be treated as a party for jurisdictional purposes, whether or not it actually was a party to the action. It is a person's indispensability, not its joinder, that defeats jurisdiction. *See Freeman v. Nw. Acceptance Corp.*, 754 F.2d 553, 559 (5th Cir. 1985) (ruling that existence of indispensable party defeated diversity jurisdiction, even though that entity had not sought to intervene and had never been made a party); *see also* 4-19 *Moore's Federal Practice - Civil* § 19.05 ("It is an oxymoron to speak, as many do, of 'joining an indispensable party.' By definition, an indispensable party cannot be joined. Indispensability is a conclusory label *that is applied retroactively*.") (emphasis added). Because ZACR was at all times indispensable to the instant action—regardless of whether it was a named party—

the district court *never* had subject matter jurisdiction. Accordingly, the preliminary injunction issued by the district court is void.

II. THIS COURT HAS THE POWER TO VACATE THE DISTRICT COURT'S PRELIMINARY INJUNCTION ORDER.

The district court's lack of jurisdiction renders its preliminary injunction order null and void, without regard to whether this Court or the district court expressly vacates it. However, DCA is mistaken in asserting that the district court's jurisdictional ruling deprives this Court of the authority to vacate a void preliminary injunction order.

DCA argues that, because the district court found that it lacks jurisdiction, "this Court also no longer has jurisdiction" even to order vacatur. ECF No. 55, p. 3. DCA's argument is based entirely on 28 U.S.C. § 1447(d), which provides that remand orders based are unreviewable on "appeal or otherwise." However, appellants are not seeking review of the district court's remand order. Section 1447(d) is thus irrelevant here.

As demonstrated by the cases cited in appellants' opening memorandum, this Court has ordered vacatur even after finding that the district court lacked jurisdiction. *See* ECF No. 54, p. 5; *see, e.g., Takeda v. Nw. Nat'l Life Ins. Co.*, 765 F.2d 815, 822 (9th Cir. 1985) (directing district court to vacate its preliminary injunction order after holding that a third party was indispensable and destroyed diversity). These cases, which DCA does not address, show that a lack of

jurisdiction does not deprive a court of the power to vacate its own orders or to vacate the orders of a lower court.

The principle that lack of power to rule on the merits does not eliminate a court's power to vacate prior orders is also shown in the rule that "[f]ederal courts normally vacate the orders below when a case becomes moot on appeal." *Pub. Utils. Comm'n of Calif. v. FERC*, 100 F.3d 1451, 1461 (9th Cir. 1996) (citing *United States v. Munsingwear*, 340 U.S. 36, 39 (1950)). Just as lack of subject matter jurisdiction deprives a court of the power to rule on the merits, mootness also eliminates that power, because it eliminates the "case or controversy" necessary for the exercise of judicial power under Article III. Despite that lack of power, the "established practice" when mootness occurs is to vacate the order on appeal "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Munsingwear,* 340 U.S. at 39, 41. In accord with this practice, this Court has frequently vacated the district court's orders after determining that the appeal was moot. *See, e.g., United States v. Krane*, 625 F.3d 568, 570, 574 (9th Cir. 2010) ("we must dismiss this appeal as moot and instruct the district court to vacate its [appealed-from] order directing compliance with the subpoena"); *Strategic Diversity, Inc. v. Alchemix Corp*., 666 F.3d 1197, 1211 (9th Cir. 2012) ("we vacate the award of attorneys' fees and dismiss the appeal of this award as moot"); *see also Oster v. Wagner*, 504 Fed. Appx. 555, 555 (9th Cir.

2013) ("we dismiss this appeal as moot and follow the 'established practice' in the federal system of vacating the judgment below, here the district court's order granting Plaintiffs-Appellees' motion for a preliminary injunction and the district court's contempt order").

These cases apply fully here. Not only did the district court rule that it lacks jurisdiction (which renders its preliminary injunction order null and void), but its ruling mooted this appeal and prevented appellants from obtaining appellate review of the preliminary injunction. "[T]he duty of the appellate court" in this situation is to vacate the district court's preliminary injunction order to "clear[] the path for future relitigation of the issues between the parties and eliminate[] a judgment, review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 40.

CONCLUSION

Because the district court lacked jurisdiction and the preliminary injunction is null and void, the preliminary injunction must be vacated, and the appeals should be dismissed as moot.

Dated: November 7, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing APPELLANTS' REPLY MEMORANDUM REGARDING THE DISTRICT COURT'S LACK OF JURISDICTION 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 November 7, 2016. Under said practice, the CM/ECF users were electronically served.

Executed on November 7, 2016, at Los Angeles, California.

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