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14 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
15 FOR THE COUNTY OF LOS ANGELES – CENTRAL

16 DOTCONNECTAFRICA TRUST, a  
17 Mauritius charitable trust,

18 Plaintiff,

19 v.

20 Internet Corporation for Assigned Names and  
21 Numbers, *et al.*

22 Defendants.

Case No. BC607494

*[Assigned for all purposes to the Hon. Robert  
B. Broadbelt III – Dept. 53]*

**PLAINTIFF DOTCONNECTAFRICA  
TRUST’S REPLY IN SUPPORT OF  
MOTION TO TAX COSTS OF  
INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS**

**Reservation ID: 777327467083**

**Date: Jan. 14, 2020**

**Time: 8:30 a.m.**

*[Declaration of Ethan J. Brown ISO Reply  
filed concurrently herewith]*

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendant Internet Corporation for Assigned Names And Numbers (“ICANN”) seeks to  
4 recover over \$124,120.05 in costs from DotConnectAfrica Trust (“DCA”) under Cal. Code Civ.  
5 Proc. § 1032 et seq, including expenses that were not actually incurred by ICANN, and/or are not  
6 expressly allowed by §1032 et seq, and/or are not allowed as discretionary costs under § 1033.5.

7 For example, ICANN seeks costs for improper filings, deposition costs not incurred by  
8 ICANN, service costs where parties had entered into an electronic service agreement, and costs  
9 associated with a private mediation, among others that were clearly incurred as a convenience or  
10 benefit to the conduct of the litigation rather than reasonably necessary costs.

11 ICANN has failed to meet its burden in showing both in its Memorandum of Costs  
12 (“MOC”) and in its Opposition that many of these costs are allowable, and if they are allowable  
13 or discretionary, that the amounts it seeks are reasonable and necessary. In its Opposition  
14 ICANN attempts to justify its unreasonable and unnecessary costs, but instead expressly supports  
15 DCA’s contentions that it voluntarily assumed costs including but not limited to counsels’  
16 luxurious travel and third-party witness costs for its own convenience and/or benefit in  
17 preparation. Therefore, DCA’s motion to tax at least \$85,794.79 of the total amount sought  
18 should be granted.

19 **II. STANDARD OF REVIEW**

20 California law recognizes three types of litigation costs: (1) allowable; (2) disallowable;  
21 and (3) discretionary. Code Civ. Proc. § 1033.5, subs. (a), (b), (c)(4). For allowable and  
22 discretionary costs to be recoverable, they must be both “reasonably necessary to the conduct of  
23 the litigation rather than merely convenient or beneficial to its preparation” and “reasonable in  
24 amount.” Code Civ. Proc. § 1033.5 (c)(2-3). If specifically allowable under section 1033.5, the  
25 party challenging the costs has the burden of showing that the costs sought are not reasonable or  
26 necessary. However, if the costs not specifically allowable are objected to, then the burden of  
27 proof lies with the requesting party to demonstrate that the costs were necessary and reasonable.  
28 *Ladas v. Cal. State Automobile Assn.* (1993) 19 Cal.App.4th 761, 774. Whether a cost is

1 reasonable is a question of fact. *Lubetzky v. Friedman* (1991) 228 Cal.App.3d 35, 39. ICANN  
2 submitted its MOC and DCA respectfully requests that the Court tax ICANN's costs as set forth  
3 below.

### 4 **III. ARGUMENT**

#### 5 **A. The Deadline to File a Motion to Strike or Tax Costs is not Jurisdictional,** 6 **and May be Extended in the Court's Broad Discretion.**

7 The time limitation proscribed in California Rule of Court 3.1700 is not jurisdictional and  
8 the Court has broad discretion in allowing relief from late filing where there is an absence of  
9 prejudice to opposing party. *Gunlock Corp. v. Walk on Water, Inc.* (1993) 15 Cal.App.4th 1301,  
10 1304 (citing *Hoover Community Hotel Development Corp. v. Thomson* (1985) 168 Cal.App.3d  
11 485, 487-488); *see also* Cal. R. Ct. of Court Rule 870.2. Further, Cal. R. Ct. 3.1700(b)(3) states  
12 that "[i]n the absence of an agreement [to extend the time for serving and filing a motion to strike  
13 or tax costs], the court may extend the times for serving and filing...for a period not to exceed 30  
14 days."

15 Here, due to a clerical error, counsel for DCA filed the present Motion on November 5,  
16 2019, just one day after the 15-day deadline. ICANN has suffered no prejudiced by this one-day  
17 delay, especially given that it had 55 days to file its opposition. It is also apparent that they have  
18 suffered no prejudice because they have set none forth in their opposition. The case that ICANN  
19 cites for its argument, *Sanai v. Salta* (2009) 170 Cal.App.4th 746, 757, is mere dicta. Therefore,  
20 DCA respectfully requests that the Court exercise its broad discretion in allowing the one-day  
21 extension and consider DCA's motion to tax costs.

#### 22 **B. ICANN Cannot Recover Deposition Costs That Are Merely Convenient or** 23 **Beneficial**

24 In its Opposition, ICANN fails to address the inconstancies and inexplicably high  
25 deposition costs and travel costs identified by DCA. DCA specifically objected to an itemized  
26 list of costs by stating the cost amount, description and location within ICANN's MOC. Mot. at  
27 3:25-4:6. The only instances were ICANN can claim costs for taking, video recording and  
28 transcribing depositions, are in instances of necessary depositions noticed by ICANN. Code Civ.  
Proc. § 1033.5 (a)(3)(A). All other instances are discretionary, and not justified, but simply

1 convenient or beneficial to ICANN. DCA is not required to pay for ICANN’s convenience.

2           Only four of the listed depositions for which ICANN seeks costs, were noticed by ICANN  
3 and at least two of the listed depositions were of third-party witnesses noticed by DCA. ICANN’s  
4 counsel voluntarily chose to represent third party witnesses Fadi Chehade and Mark McFadden.  
5 As such, most of these are not allowable costs. Code Civ. Proc. § 1033.5. Moreover, ICANN  
6 cannot voluntarily assume costs for its convenience and to its strategic benefit, only to later try  
7 and hang those costs on DCA. Such costs include those voluntarily assumed by presenting and  
8 representing third party witnesses in depositions. For example, ICANN voluntarily provided its  
9 counsel to Mr. McFadden, a third-party witness who agreed to voluntarily sit for a deposition in  
10 Los Angeles while DCA was attempting to serve him with a subpoena in his home state of  
11 Wisconsin. Now, ICANN not only seeks unreasonably high transcribing costs and video  
12 recording costs for a deposition noticed by DCA, when it is statutorily only entitled to costs for  
13 one copy of transcripts for depositions taken by DCA, but ICANN also improperly seeks  
14 reimbursement for Mr. McFadden’s travel costs to Los Angeles. Code Civ. Proc. § 1033.5 (a)(3).  
15 This is just one example of ICANN overreaching.

16           (1) ICANN’s Travel Costs Are Unnecessary And Excessive

17           Finally, ICANN claims unreasonably high travel costs to attend the depositions of Neil  
18 Dundas and Lucky Masilela (\$15,304.34) in South Africa, Erastus JO Mwencha (\$3,670.31) in  
19 Washington D.C., and Pierre Dandjinou (\$12,765.73) in Paris. It tries to justify its costs by  
20 attempting to discredit average costs associated with travel booked within similar time frames  
21 based on aggregate google flights and travel data and claiming DCA “does not attach its own  
22 costs for flights or hotel stays, presumably because it incurred similar costs in traveling to these  
23 depositions.” Opp. at 6-7, n. 3.

24           Although DCA’s costs are irrelevant to the present motion as it is not DCA attempting to  
25 establish the reasonableness of its costs, but ICANN, DCA did not pay for business class  
26 luxurious travel of its counsel. Reply Declaration of Ethan Brown (“Reply Brown Decl.”) at ¶ 4.  
27 Counsel for DCA uniformly took economy or premium economy flights for travel associated with  
28 depositions, with the exception of the travel to Cape Town, for which DCA was still charged a  
reduced amount that was commensurate with a premium economy round trip flight. *Id.* DCA

1 did not pay for business class flights and luxurious hotels for its own counsel, nor should it be  
2 obligated to cover such costs for ICANN’s counsel. Code Civ. Proc. § 1033.5 (c)(e); Cal. *Thon v.*  
3 *Thompson* (App. 4 Dist. 1994) 35 Cal.Rptr.2d 346 (Holding that travel expenses sought by  
4 prevailing party for expenses incurred by its out-of-county attorneys in attending deposition in  
5 county of jurisdiction, would be limited to costs of commercial flight between city where  
6 attorneys practiced and city where deposition occurred; higher cost of charter flight requested by  
7 prevailing party were not “reasonably necessary.”); *Page v. Something Weird Video* (C.D. Cal.  
8 1996) 960 F. Supp. 1438, 1447 (Holding that flying first-class is not “reasonably necessary” to  
9 further litigation).

10 Moreover, in calculating comparable costs, DCA attempted to account for bookings made  
11 close to travel, affording ICANN the benefit of any resulting premiums typically associated with  
12 last minute travel, but ICANN seems to think this was not a necessary variable to consider. As  
13 such, DCA has conducted another search for similar travel dates.

14 The \$15,304.34 in travel costs associated with the one attorney from Jones Day attending  
15 the depositions of Neil Dundas and Lucky Masilela, ZACR witnesses, noticed by DCA are still  
16 wholly unnecessary as ICANN’s counsel, who was neither taking nor defending these  
17 depositions, could have attended telephonically. Any such issues ICANN raises related to time  
18 differences, were still present regardless of participation telephonically or in person. Even if  
19 ICANN’s attendance in person was warranted, these costs are still unreasonable and excessive, as  
20 they account for business class tickets (which is often the only luxurious option for international  
21 travel as first class may not be offered) and stays at expensive hotels, for which DCA is not  
22 required to pay. Code Civ. Proc. § 1033.5 (c)(e); *Thon v. Thompson*, 35 Cal.Rptr.2d 346  
23 (Holding that travel expenses sought by prevailing party for expenses incurred by its out-of-  
24 county attorneys in attending deposition in county of jurisdiction, would be limited to costs of  
25 commercial flight between city where attorneys practiced and city where deposition occurred;  
26 higher cost of charter flight requested by prevailing party were not “reasonably necessary.”);  
27 *Page v. Something Weird Video*, 960 F. Supp. at 1447 (Holding that flying first-class is not  
28 “reasonably necessary” to further litigation). Based on a Google flight search, round trip flights  
for the period of October 20th through October 25th to Cape Town, South Africa range between

1 \$696 and \$1,434. Reply Brown Decl. at ¶ 2, Ex. 9. Four and five star hotels for that same  
2 period near the deposition location range between \$77 and \$136 dollars a night. Reply Brown  
3 Decl. at ¶ 3, Ex. 10. As such, the over \$15,000 in travel expenses for even a five night stay  
4 instead of a reasonable three-night stay, is still clearly excessive by at least \$13,000.

5 The same can be said for costs associated with attending Mr. Dandjinou's deposition in  
6 Paris, which in calculating comparable rates, DCA accounted for the French Open and last-  
7 minute travel by including averages. Round trip flights to Paris in June range between \$860 to  
8 \$1,300 on average based on Google flights. Brown Decl. at ¶4, Ex. 3. Similarly, four and five  
9 star hotels in Paris range from \$114 per night to approximately \$230 per night. Brown Decl. at  
10 ¶5, Ex. 4. Lastly, for travel costs associated with the deposition of Mr. Mwencha, ICANN  
11 claims \$3,670.31 in costs for travel to Washington, D.C. Flights to Washington D.C. during a  
12 similar time period as the deposition range from \$185 to \$310 round trip, and hotel stays fall at  
13 approximately \$150 to \$250 per night. Brown Decl. at ¶¶6-7, Exs. 5-6. Therefore, all these  
14 travel costs must be taxed because DCA is not required to accommodate the luxurious travel and  
15 convenience of ICANN's counsel.

16 In sum, DCA respectfully requests that the Court tax ICANN's deposition costs found on  
17 page 8 of Attachment A to its Memorandum of Costs in at least the following amounts:

- 18 • \$3,670.31 for travel to D.C. for the deposition of Erastus JO Mwencha;
- 19 • \$1,308.84 and \$685.45 for travel and videotaping for the deposition of Mark McFadden;
- 20 • \$387.95 for the videotaping of the deposition of Mike Silber;
- 21 • \$15,304.34 for travel to South Africa for the depositions of Neil Dundas and Lucky  
22 Masilela;
- 23 • \$12,765.73 for travel to Paris for the deposition of Pierre Dandjinou;
- 24 • And additionally tax the remainder of the \$35,710.10 in deposition costs given the  
25 unsubstantiated, inconsistent and unreasonably high pricing for transcribing across the  
26 board.

26 **C. ICANN Cannot Recover for Improper Filing Fees and Duplicative Costs.**

27 ICANN seeks to recover costs for the improper filing of a Notice of Removal to Federal  
28 court in the amount of \$400. *See* ICANN MOC, Attachment A at p. 1. Such filing was improper

1 given the remand back to state Court. Pursuant to 28 U.S.C. §1441(b)(2), removal on the basis of  
2 diversity jurisdiction is only proper where no party in interest properly joined and served as a  
3 defendant is a citizen of the State in which such action is brought. ICANN was and is a citizen of  
4 California, as such the filing of its Notice of Removal was improper. *Id.* Therefore, this \$400  
5 cost must be taxed. Furthermore, ICANN seeks a \$13.64 for the filing of Objections to DCA's  
6 Trial Brief, regardless of what ICANN argues, there is no law it can cite to allowing the filing of  
7 such objections. *See* ICANN MOC, Attachment A at p. 2. Therefore, this cost too must be taxed.

8 Finally, ICANN seeks to recover \$20,387.03 in costs associated with "Models,  
9 Enlargements, and Photocopies of Exhibits." *See* ICANN MOC, Attachment A at p. 3-4. This  
10 heading is an inaccurate description of what ICANN seeks to recover. Costs of models,  
11 enlargements and photocopies of exhibits, and their electronic presentation may be allowable if  
12 they are reasonably helpful to aid the trier of fact. Code Civ. Proc. § 1033.5 (a)(13). Costs are  
13 not allowable for exhibits not used at trial. *Ladas v. Cal. State Automobile Assn.* (1993) 19  
14 Cal.App.4th 761, 774.

15 Here, ICANN seeks to recover costs for deposition transcript copies, which are clearly  
16 duplicative of the transcribing costs they also seek to recover. ICANN is entitled to costs for only  
17 one copy of depositions taken by DCA and an original and one copy of those taken by ICANN.  
18 Code Civ. Proc. § 1033.5 (a)(3). Therefore, costs for any additional copies are duplicative and  
19 unrecoverable. Given, that ICANN groups all these costs associated with "Models, Enlargements,  
20 and Photocopies of Exhibits" together, it is vague and ambiguous which costs are attributed to  
21 which of the categories listed: binders, exhibits, deposition transcripts or trial demonstratives.  
22 ICANN has not properly specified the costs as required by the memorandum of costs. Moreover,  
23 it is unclear why costs for such photocopies, binders, transcripts and demonstratives associated  
24 with the second Phase I trial are almost double (\$12,342.83) those of the first Phase I trial  
25 (\$6,517.07). *See* ICANN MOC, Attachment A at 3-4. ICANN fails to address this even in its  
26 opposition. If anything, costs associated with retrying Phase I should be significantly less than  
27 they had been for the first Phase I trial. Simply attaching invoices does not make these costs  
28 reasonable in amount.

Lastly, Phase I was a bench trial, where the judge served as the trier of fact. As such,

1 blowup demonstratives of statutes are not reasonably helpful to aid the trier of fact in this  
2 instance. DCA cannot properly ascertain what the costs associated with the “Trial Technology”  
3 category entails as it too is vague and ambiguous in what specifically the cost is being attributed  
4 to. Since this was not a jury trial and the trier of fact was likely not reasonably aided by the  
5 models and blowups (in part only excerpting the law), these costs of \$20,387.03 must be taxed.

6 **D. The Discretionary Costs Claimed by ICANN Were Not Reasonably Necessary to The**  
7 **Conduct Of The Litigation And Are Unreasonable In Amount.**

8 In order for discretionary costs to be recoverable, they must be both “reasonably necessary  
9 to the conduct of the litigation rather than merely convenient or beneficial to its preparation” and  
10 “reasonable in amount.” Code Civ. Proc. § 1033.5 (c)(2-4). ICANN seeks discretionary costs for  
11 messenger fees, service fees, mediation fees, parking validation fees, and travel costs for court  
12 appearances. None of these costs are reasonably necessary to the conduct of litigation, but merely  
13 convenient or beneficial to its preparation. Furthermore, to the extent that they are reasonably  
14 necessary, they are not reasonable in amount.

15 First, ICANN claims costs for messenger fees for filings, deliveries to the courtroom of  
16 courtesy copies and binders. Department 53 does not require courtesy copy deliveries of filings,  
17 therefore none of those costs are reasonably necessary. Further, ICANN and its counsel could  
18 have brought exhibit binders to court and from court for the short trial, especially since Jones Day  
19 offices are located less than a mile from the courthouse, and any costs associated with couriers  
20 delivering and picking up any such binders were associated with a mere convenience to ICANN  
21 and its counsel. As such, a total of \$1,314.47 for deliveries of courtesy copies and drop off and  
22 pick up of trial binders must be taxed. *See* ICANN MOC at p. 5-9.

23 Second, ICANN seeks costs associated with service on DCA and ZACR. On May 6, 2016  
24 parties entered into an electronic service agreement. Brown Decl., ¶¶ 8-9, Exs. 7-8. As such  
25 costs associated with service after May 6, 2016 are neither necessary nor allowable. Nor are hard  
26 copies of such pleadings convenient to DCA and its counsel. Therefore, \$852.76 in service costs  
27 must be taxed. *See* ICANN MOC at p. 9-10.

28 Third, ICANN requests a total of \$5,431.50 in “Mediation Fees.” *See* ICANN MOC at p.  
10. These costs include parking and lunch, in addition to the \$5,000 cost of mediation. This



1 mediation was not court-ordered. Parties participated, though unsuccessfully, voluntarily. These  
2 costs were not reasonably necessary expenses and ICANN cannot meet its burden in establishing  
3 they are. *Gibson v. Bobroff* (App. 1 Dist. 1996) 57 Cal.Rptr.2d 235 (holding that even where an  
4 unsuccessful mediation is court ordered, it is in the sound discretion of the trial court to award  
5 fees); *Berkeley Cement, Inc. v. Regents of University of California* (App. 5 Dist. 2019) 242  
6 Cal.Rptr.3d 252, rehearing denied, review denied. (holding that claimant failed to establish that  
7 fees paid in unsuccessful voluntary mediation were reasonably necessary and not merely  
8 convenient or beneficial to the preparation of litigation.). Therefore, the entire \$5,431.50,  
9 including lunch and parking, for “Mediation Fees” must be taxed.

10 Finally, in addition to claiming costs for lunch and travel for mediation, ICANN claims  
11 parking validation costs for DCA’s counsel totaling \$46.75, which it voluntarily offered, and  
12 “Travel Costs for Hearings/Trial,” including hotel costs totaling \$2,378.37 for both Phase I trials  
13 for ICANN employee and witness Christine Willett. Though ICANN claims that Ms. Willett  
14 resides in Orange County, that still does not justify her hotel stay during trial. Ms. Willett works  
15 in Los Angeles and there was no reason for her daily presence at trial. Even if there was, a  
16 commute from Orange County is still local and avoidance of such is strictly for convenience.

17 As such, none of these costs are were reasonably necessary, but merely convenient and  
18 beneficial to ICANN, its counsel, and its witnesses, not to mention excessive. Therefore, the  
19 expenses claimed by ICANN on pages 10 through 11 of its MOC are also not recoverable. *Ladas*  
20 19 Cal.App.4th at 774–75(holding that only meal expenses statutorily allowable are those for  
21 jurors while they are kept together during trial and deliberation and local travel expenses,  
22 including parking fees, are not allowed as reimbursable costs). For these reasons, ICANN should  
23 not be allowed to recover these costs and the entire \$2,838.99 in “Travel Costs For  
24 Hearings/Trial” must be taxed.

#### 24 IV. CONCLUSION

25 DCA respectfully requests that this Court grant its motion to tax and reduce ICANN’s  
26 MOC in at least the amount of \$85,794.79 in addition to any such costs the Court deems  
27 appropriate to tax given that ICANN has not adequately specified, or adequately explained the  
28 discrepancies in, costs and descriptions associated with deposition costs, court reporting costs,

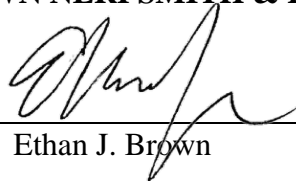
1 and costs for models, enlargements and photocopies.

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3 Dated: January 6, 2020

**BROWN NERI SMITH & KHAN, LLP**

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By:   
Ethan J. Brown

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Attorneys for Plaintiff DotConnectAfrica Trust

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