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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]*

**REPLY IN SUPPORT OF PLAINTIFF
DOTCONNECTAFRICA TRUST'S
MOTION TO TAX COSTS OF
INTERVENOR ZA CENTRAL
REGISTRY, NPC**

Reservation ID: 393737666127

Date: Jan. 15, 2020

Time: 8:30 a.m.

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

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Intervenor ZA Central Registry, NPC (“ZACR”) seeks to recover over \$47,096.37 in costs
4 under Cal. Code Civ. Proc. §1032 et seq, most of which it is not entitled to, are not expressly
5 allowed by §1032 et seq; and/or are not allowed as discretionary costs under § 1033.5.

6 For example, ZACR seeks costs for unallowable deposition costs and costs associate with
7 the electronic hosting of documents, among others costs that were clearly incurred as a
8 convenience or benefit to the conduct of the litigation, rather than reasonably necessary costs.

9 ZACR has failed to show that many of these costs are allowable, and if they are allowable,
10 that the amounts it seeks are reasonable and necessary. Therefore, DCA’s motion to tax should
11 be granted.

12 **II. STANDARD OF REVIEW**

13 California law recognizes three types of litigation costs: (1) allowable; (2) disallowable;
14 and (3) discretionary. Code Civ. Proc. § 1033.5, subs. (a), (b), (c)(4). For allowable and
15 discretionary costs to be recoverable, they must be both “reasonably necessary to the conduct of
16 the litigation rather than merely convenient or beneficial to its preparation” and “reasonable in
17 amount.” Code Civ. Proc. § 1033.5 (c)(2-3). If specifically allowable under section 1033.5, the
18 party challenging the costs has the burden of showing that the costs sought are not reasonable or
19 necessary. However, if the costs not specifically allowable are objected to, then the burden of
20 proof lies with the requesting party to demonstrate that the costs were necessary and reasonable.
21 *Ladas v. Cal. State Automobile Assn.* (1993) 19 Cal.App.4th 761, 774. Whether a cost is
22 reasonable is a question of fact. *Lubetzky v. Friedman* (1991) 228 Cal.App.3d 35, 39. DCA
23 respectfully requests that the Court tax ZACR's costs as set forth below.

24 **III. ARGUMENT**

25 **A. ZACR Cannot Recover Deposition Costs It Claims**

26 ZACR claims costs for a total of 12 depositions – three of which neither it nor DCA
27 noticed and took. Moreover, the remainder of the costs claimed are ambiguous and vague
28 because they are inconsistent with the costs claimed by ICANN for transcript copies of the same

1 depositions, though they should be the same¹.

2 The only instances where ZACR can claim costs are for taking, video recording, and
3 transcribing depositions that are in instances of necessary depositions noticed by ZACR, and one
4 copy of depositions taken by DCA. Code Civ. Proc. § 1033.5 (a)(3)(A). Consequently, ZACR
5 cannot request costs associated with depositions noticed and taken by ICANN. Therefore, costs
6 associated with the depositions of Sophia Bekele and Erastus JO Mwencha cannot be recovered.
7 See ZACR Memorandum of Costs (“ZACR MOC”), Attachment A, at p. 8. Nothing in the Code
8 of Civil Procedure indicates that it does not contemplate multi-party litigation as ZACR claims.

9 Next, the remaining costs claimed for depositions by ZACR are vague and ambiguous
10 and/or unnecessary for ZACR in the conduct of the litigation. ZACR has not met its burden to
11 establish that such costs were necessary and reasonable. These costs are rather merely convenient
12 or beneficial to its preparation. All but the depositions of Lucky Masilela and Neil Dundas, were
13 depositions of either ICANN witnesses or DCA witnesses, or third-party witnesses related
14 thereto. These depositions were not necessary for ZACR, but merely beneficial. ZACR did not
15 defend the deponents in these depositions. ZACR did not ask questions at any of the listed
16 depositions in its MOC. As an intervener, ZACR did not have any claims against either ICANN
17 or DCA and did not have any claims against it. Though it may have had an interest in the final
18 outcome of the case, its participation in the depositions was merely beneficial, and not reasonably
19 necessary to the conduct of the litigation. Therefore, costs associated with the depositions of
20 Chehade, McFadden, Silber, Brigety, Crocker, and Nguyen, totaling \$9,506.37 should be taxed.

21 Lastly, travel costs to Cape Town, South Africa associated with the depositions of ZACR
22 witnesses Neil Dundas and Lucky Masilela must be taxed as unreasonably and excessive, as they
23 account for business class tickets and stays at expensive hotels, for which DCA is not required to
24 pay. Code Civ. Proc. § 1033.5 (c)(e); *Thon v. Thompson* (App. 4 Dist. 1994) 35 Cal.Rptr.2d 346
25 (Holding that travel expenses sought by prevailing party for expenses incurred by its out-of-

26 ¹ Costs claimed by ICANN and costs claimed by ZACR in their respective cost
27 memoranda are inconsistent for the same transcripts, though they should be the same. As such, it
28 is unclear what the actual costs of certain transcript copies are. For example, both ICANN and
ZACR claim transcribing costs for Mr. Fadi Chehadi in the sums of \$1,087.75 and \$860.55
respectively. Compare ZACR MOC, Attachment A at p. 8 with ICANN MOC, Attachment A at
p. 2. Neither ZACR nor ICANN have clarified all the inconsistencies.

1 commercial flight between city where attorneys practiced and city where deposition occurred;
2 higher cost of charter flight requested by prevailing party were not “reasonably necessary.”);
3 *Page v. Something Weird Video* (C.D. Cal. 1996) 960 F. Supp. 1438, 1447 (Holding that flying
4 first-class is not “reasonably necessary” to further litigation).

5 ZACR tries to justify its costs by attempting to discredit DCA’s argument by claiming
6 DCA has not introduced its own counsel’s expenses in attending the aforementioned depositions.
7 Although DCA’s costs are irrelevant to the present motion as it is not DCA attempting to
8 establish the reasonableness of its costs, but ZACR, DCA did not pay for luxurious business class
9 travel of its counsel. Second Declaration of Ethan Brown (“Second Brown Decl.”) at ¶ 4.
10 Counsel for DCA uniformly took economy or premium economy flights for travel associated with
11 depositions, with the exception of the travel to Cape Town, for which DCA was still charged a
12 reduced amount that was commensurate with a premium economy round trip flight. *Id.* DCA did
13 not pay for luxurious business class flights and hotels for its own counsel, nor should it be
14 obligated to cover such costs for ZACR’s counsel.

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

19 Based on a Google flight search, round trip flights to Cape Town, South Africa for the
20 period of October 20th through October 25th range between \$696 and \$1,434. Second Brown
21 Decl. at ¶ 2, Ex. 9. Four and five star hotels for that same period near the deposition location
22 range between \$77 and \$136 dollars a night. Second Brown Decl. at ¶ 3, Ex. 10. As such, the
23 \$7,825.77 in travel expenses for even a five night stay instead of a reasonable three night stay is
24 still excessive and must be taxed.

25 In sum, DCA respectfully requests that the Court tax ZACR’s deposition costs found on
26 page 8 of Attachment A to its Memorandum of Costs in at least an amount totaling \$27,917.38²:

27 ² Note that the total costs of \$27,917.38 calculated by DCA differs from the total
28 deposition costs cited by ZACR because of ZACR’s calculation errors, further emphasizing
DCA’s difficulty of determining the actual costs associated with the listed events. *See* ZACR
MOC, Attachment A at p. 8.

1 **B. ZACR Concedes That It Cannot Recover For Costs Associated With ZACR Error,**
2 **Unnecessary Service of Process Costs, and Unnecessary Photocopying Costs**

3 ZACR has conceded that it cannot recover the \$461.88 associated with improper filings for
4 the correction of the Declaration of David W. Kesselman and service of process of documents
5 where an electronic service agreement was in place. *See* ZACR Opp. at 8.

6 **C. The Discretionary Costs Claimed By ZACR For “Hosting Electronic Documents”**
7 **Are Not Reasonably Necessary To The Conduct Of The Litigation And Are**
8 **Unreasonable In Amount**

9 Pursuant to Cal. Code Civ. Proc. ¶1033.5(a)(15), fees for hosting of electronic documents
10 are allowable if such hosting is ordered by the Court. In order for discretionary costs to be
11 recoverable, they must be both “reasonably necessary to the conduct of the litigation rather than
12 merely convenient or beneficial to its preparation” and “reasonable in amount.” Code Civ. Proc.
13 § 1033.5 (c)(2-4). If the costs not specifically allowable are objected to, as is the case here, then
14 the burden of proof lies with the requesting party - ZACR - to demonstrate that the costs were
15 necessary and reasonable. *Ladas*, 19 Cal.App.4th at 774. ZARC seeks to recover \$16,309.68 in
16 unallowable costs associated with hosting electronic documents. Here there was no Court order
17 requiring such hosting. Moreover, neither Defendant ICANN claimed such costs, nor did DCA
18 utilize a document hosting service, further indicating that the hosting was not necessary.
19 Therefore, ZACR does not and cannot meet its burden in demonstrating any such costs were
20 necessary and reasonable. All fees associated with hosting were voluntarily assumed by ZACR
21 for its convenience and benefit, as they were not reasonably necessary for conducting the
22 litigation.

23 For these reasons, ZACR should not be allowed to recover electronic hosting costs, and
24 the entire \$16,309.68 amount must be taxed.


25 **IV. CONCLUSION**

26 DCA respectfully requests that this Court grant its motion to tax and reduce ZACR’s
27 MOC in at least the amount of \$44,688.94 in addition to any such costs the Court deems
28 appropriate to tax.

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Dated: January 8, 2020

BROWN NERI SMITH & KHAN, LLP

By: 
Ethan J. Brown

Attorneys for Plaintiff DotConnectAfrica Trust