

MAR 11 2020

Sherri A. Carter, Executive Officer/Clerk
By *K. Mason* Deputy

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES – CENTRAL DISTRICT
DEPARTMENT 53

DOTCONNECTAFRICA TRUST;

Plaintiff,

vs.

INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS;

Defendant.

Case No.: BC607494

Hearing Date: March 10, 2020

Time: 8:30 a.m.

~~TENTATIVE~~ ORDER RE:

- (1) MOTION TO TAX COSTS OF INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS;
- (2) MOTION TO TAX COSTS OF INTERVENOR ZA CENTRAL REGISTRY, NPC

MOVING PARTY: Plaintiff DotConnectAfrica Trust

RESPONDING PARTY: Defendant Internet Corporation for Assigned Names and Numbers

Motion to Tax Costs of Internet Corporation For Assigned Names And Numbers

The court considered the moving, opposition, and reply papers.

MOVING PARTY: Plaintiff DotConnectAfrica Trust

RESPONDING PARTY: Intervenor ZA Central Registry, NPC

Motion to Tax Costs of Intervenor ZA Central Registry

The court considered the moving, opposition, and reply papers.

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1 **BACKGROUND**

2 On January 20, 2016, plaintiff DotConnectAfrica Trust (“DCA”) filed its complaint in
3 this action against defendant Internet Corporation for Assigned Names and Numbers
4 (“ICANN”). On February 26, 2016, DCA filed a First Amended Complaint against defendants
5 ICANN and intervenor ZA Central Registry (“ZACR”), which alleges causes of action for (1)
6 breach of contract, (2) intentional misrepresentation, (3) negligent misrepresentation, (4) fraud
7 and conspiracy to commit fraud, (5) unfair competition (violation of Cal. Bus. & Prof. Code
8 section 17200, et seq.), (6) negligence, (7) intentional interference with contract, (8)
9 confirmation of IRP Award, (9) declaratory relief, (10) declaratory relief, and (11) declaratory
10 relief.

11 On August 9, 2017, the court granted ICANN’s motion for summary adjudication on the
12 first, sixth, eighth, ninth, and eleventh causes of action on the ground that they are barred by a
13 covenant not to sue, waiver, and release provision. (Order Re: ICANN’s Motion for Summary
14 Judgment, filed August 9, 2017, pp. 5, 10.) The court denied ICANN’s motion for summary
15 adjudication as to the second, third, fourth, fifth, and tenth causes of action. (August 9, 2017
16 Order, pp. 5, 10.) However, the court ordered that the court would hold a bifurcated court trial
17 on the issue of ICANN’s affirmative defense of judicial estoppel as to the remaining causes of
18 action.

19 On February 6, 7, and 8, 2019, the court conducted a nonjury trial on phase one of a
20 bifurcated trial. On October 3, 2019, judgment was entered in favor of ICANN, and against
21 DCA, on ICANN’s affirmative defense of judicial estoppel and to bar DCA from bringing or
22 maintaining its claims against ICANN alleged in the FAC in this action. (Statement of Decision,
23 filed October 3, 2019, p. 11:19-26.)

24 On October 18, 2019, ICANN and ZACR each filed a Memorandum of Costs. ICANN
25 sought costs in the total amount of \$124,120.05, consisting of \$2,755 for filing and motion fees,
26 \$69,832.72 for deposition costs, \$17,556.72 for court reporter costs, \$20,387.03 for models,
27 enlargements, and photocopies of exhibits costs, \$206.30 for electronic filing or service costs,
28 and \$13,382.28 in “other” costs (messenger fees, service fees, mediation fees, parking costs, and

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1 travel costs). ZACR sought costs in the total amount of \$47,096.37, consisting of \$1,973.92 for
2 filing and motion fees, \$27,916.68 for deposition costs, \$120 for service of process fees, \$182.45
3 for models, enlargements, and photocopies of exhibits costs, \$12.65 for electronic filing or
4 service fees, and \$16,890.67 in “other” costs (messenger fees, costs for hosting electronic
5 documents, and travel costs).

6 DCA now moves to tax the costs award sought by ICANN. DCA also moves to tax the
7 costs award sought by ZACR. ICANN and ZACR oppose the respective motions.

8 **LEGAL STANDARD**

9 A prevailing party is entitled as a matter of right to recover costs except as otherwise
10 expressly provided by statute. (Code Civ. Proc., §§ 1032, subds. (a)(4), (b), 1033.5.) Costs
11 recoverable under section 1032 are limited to those that are both (1) reasonably necessary to the
12 conduct of the litigation, and (2) reasonable in amount. (Code Civ. Proc., §§ 1033.5, subds.
13 (c)(2), (3).) Costs “merely convenient or beneficial” to the preparation of a case are disallowed.
14 (Code Civ. Proc., § 1033.5, subd. (c)(2); see *Ladas v. California State Auto. Assn.* (1993) 19
15 Cal.App.4th 761, 774 [expenses for attorney meals incurred while attending local depositions not
16 “reasonably necessary”].)

17 “A ‘verified memorandum of costs is prima facie evidence of [the] propriety’ of the items
18 listed on it, and the burden is on the party challenging these costs to demonstrate that they were
19 not reasonable or necessary.” (*Adams v. Ford Motor Co.* (2011) 199 Cal.App.4th 1475, 1486-
20 1487 [italics and brackets omitted].) “If the items appearing in a cost bill appear to be proper
21 charges, the burden is on the party seeking to tax costs to show that they were not reasonable or
22 necessary. On the other hand, if the items are properly objected to, they are put in issue and the
23 burden of proof is on the party claiming them as costs.” (*Ladas v. California State Auto. Assn.*,
24 *supra*, 19 Cal.App.4th at p. 774.) Costs otherwise allowable as a matter of right may be
25 disallowed if the court determines they were not reasonably necessary, and the court has power
26 to reduce the amount of any cost item to an amount that is reasonable. (See *Perko's Enterprises,*
27 *Inc. v. RRNS Enterprises* (1992) 4 Cal.App.4th 238, 245 [finding that “the intent and effect of
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1 section 1033.5, subdivision (c)(2) is to authorize a trial court to disallow recovery of costs,
2 including filing fees, when it determines the costs were incurred unnecessarily”].)

3 **ICANN’S MEMORANDUM OF COSTS**

4 As an initial matter, the court notes that ICANN, in its opposition, contends that DCA’s
5 motion is untimely under California Rules of Court, rule 3.1700(b)(1). In reply, DCA contends
6 that the time limitation prescribed in rule 3.1700(b)(1) is not jurisdictional and that the court has
7 broad discretion in allowing relief from late filing where there is an absence of prejudice to the
8 opposing party. Here, the court exercises its discretion to consider the merits of DCA’s motion
9 notwithstanding the fact that it was filed one day late.

10 DCA contends that various items listed in ICANN’s Memorandum of Costs (“MOC”)
11 were not reasonably necessary to the conduct of the litigation or are not reasonable in amount.

12 A. Deposition Costs

13 DCA seeks to tax various deposition costs in Section 3 of Attachment A to ICANN’s
14 MOC. (ICANN MOC, Attachment A, p. 2.) DCA contends that the travel and videotaping costs
15 incurred by ICANN to attend the depositions of Erastus JO Mwencha (\$3,670.31 for travel to
16 Washington, D.C.), Mark McFadden (\$1,308.84 for travel to Los Angeles and \$685.45 for
17 videotaping), Neil Dundas and Lucky Masilela (\$15,304.34 for travel to Cape Town, South
18 Africa), Mike Silber (\$387.95 for videotaping), and Pierre Dandjinou (\$12,765.73 for travel to
19 Paris, France) are unreasonable because (1) ICANN’s counsel voluntarily chose to represent
20 third party witness Mark McFadden, and Mark McFadden voluntarily traveled to Los Angeles
21 for his deposition, (2) ICANN’s counsel was neither taking nor defending the depositions of Neil
22 Dundas and Lucky Masilela, and could have attended telephonically, (3) the costs to attend the
23 depositions of Neil Dundas and Lucky Masilela in person clearly account for first class tickets
24 and stays at expensive hotels, (4) the costs associated with attending Pierre Dandjinou’s
25 deposition also account for expensive luxuries, and (5) the costs associated with attending
26 Erastus JO Mwencha’s deposition also account for expensive luxuries. DCA has submitted
27 evidence to show the range of prices for round trip flights and hotels. DCA also contends that
28 \$35,710.10 in deposition costs incurred by ICANN are “unsubstantiated, inconsistent and

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1 unreasonable pricing for transcribing across the board.” (Motion, p. 4:5-6.) However, “[u]nless
2 objection is made to the entire cost memorandum, the motion to strike or tax costs must refer to
3 each item objected to by the same number and appear in the same order as the corresponding
4 cost item claimed on the memorandum of costs and must state why the item is objectionable.”
5 (Cal. Rules of Court, rule 3.1700(b)(2).)

6 In opposition, ICANN contends that DCA has not met its burden of demonstrating that
7 the deposition costs are unreasonable or unnecessary. ICANN also asserts that its deposition
8 costs were reasonable and necessary because (1) DCA has submitted evidence of travel costs for
9 cities and dates different from those listed in ICANN’s MOC, (2) ICANN’s counsel’s business
10 class flights were reasonably necessary given the length of the flights to Cape Town and Paris,
11 (3) if the business class flight to Paris was expensive, it was because DCA did not serve the
12 deposition notice until a few weeks before the deposition date, (4) all other flight and hotel costs
13 were reasonable, and (5) ICANN’s counsel had a statutory right to attend the depositions in
14 person (Code Civ. Proc., § 2025.420, subd. (b)(12)). ICANN has submitted evidence of its travel
15 invoices to support its claims for travel costs. ICANN also contends that, pursuant to Code of
16 Civil Procedure section 1033.5, subdivision (a)(3), it is entitled to a copy of deposition
17 transcripts as a matter of right, including a copy of the video recording.

18 After considering the evidence submitted, the court finds that there is insufficient
19 evidence demonstrating that the depositions of these witnesses were unnecessary, and that DCA
20 has not met its burden of demonstrating that the travel, transcription, and video recording costs
21 incurred by ICANN in connection with these depositions were not reasonably necessary to the
22 conduct of the litigation or are not reasonable in amount.

23 B. Filing Fees and Exhibit Costs

24 DCA seeks to tax various costs in Sections 1, 2, and 5 of Attachment A to ICANN’s
25 MOC. (ICANN MOC, Attachment A, pp. 1, 2, 3-4.) DCA contends that the items listed in
26 ICANN’s MOC for (1) costs for filing a Notice of Removal to federal court (\$400), (2) costs for
27 filing objections to DCA’s trial brief (\$13.64), and (3) costs associated with “models,
28 enlargements, and photocopies of exhibits” (\$20,387.03) were unreasonable or unnecessary.

1 DCA contends that costs incurred for filing a Notice of Removal are improper because the action
2 was later remanded back to state court, and that costs for filing objections to a trial brief are not
3 allowable by law. DCA contends that ICANN's MOC for "models, enlargements, and
4 photocopies of exhibits" includes costs for photocopying of deposition transcripts, and that
5 ICANN failed to properly specify the costs by grouping these costs together. DCA also contends
6 that ICANN's MOC items for costs incurred for "Trial technology" are vague. DCA further
7 contends that costs incurred for photocopying deposition transcripts are duplicative of the
8 deposition costs, and that, where the judge served as the trier of fact at a bench trial, the "models,
9 enlargements, and photocopies of exhibits" were not reasonably helpful to aid the trier of fact in
10 this action.

11 In opposition, ICANN contends that, pursuant to Code of Civil Procedure section 1033.5,
12 subdivision (a)(1), it is entitled to recover its costs for all filing fees, including for filing a Notice
13 of Removal and objections to DCA's trial brief. ICANN also contends that DCA has not met its
14 burden of demonstrating that the models, enlargements, and photocopies of exhibits were not
15 reasonably necessary to the litigation, and that the court's trial preparation orders in this action
16 required the parties to bring copies of the exhibits to court. ICANN also contends that the costs
17 incurred for printing deposition transcripts are not duplicative of the deposition costs because
18 they were printed for use during trial to impeach witnesses or refresh witness recollections.
19 ICANN also contends that, as to trial technology, the technology assisted the court, the
20 witnesses, and trial counsel, and that the parties agreed before each trial to split the cost of trial
21 technology.

22 Because ICANN's objections to DCA's trial brief, filed March 29, 2019, were not
23 authorized, the court grants DCA's request to strike costs for filing objections to DCA's trial
24 brief (\$13.64) in Section 2 of Attachment A to ICANN's MOC. (ICANN MOC, Attachment A,
25 p. 2.) The court finds that the models, enlargements, and photocopies of exhibits costs are
26 allowable, and that DCA has not met its burden of demonstrating that these costs were not
27 reasonably necessary to the conduct of the litigation or are not reasonable in amount.
28

1 C. Discretionary Costs

2 DCA seeks to tax various discretionary costs incurred by ICANN, including (1) costs for
3 messenger fees for delivering courtesy copies and dropping off and picking up trial binders at
4 court (\$1,314.47), (2) costs associated with service of documents on DCA and ZACR (\$852.76),
5 (3) mediation fees that include costs for parking and lunch (\$5,431.50), (4) parking validation
6 costs and “Travel Costs for Hearings/Trials,” which include hotel costs for a witness who resides
7 in Los Angeles. Of those costs, the court finds that the costs for parking and local traveling costs
8 were not reasonably necessary to the conduct of the litigation. “Routine expenses for local travel
9 by attorneys or other firm employees are not reasonably necessary to the conduct of litigation.”
10 (*Ladas v. California State Auto. Assn.*, *supra*, 19 Cal.App.4th at pp. 775-776.) The court finds
11 that costs incurred for messenger fees, mediation fees, and hotel costs for the witness were
12 reasonably necessary to the conduct of the litigation. Therefore, the court exercises its discretion
13 to grant DCA’s request to strike parking and travel costs in Sections 4 and 5 of the Discretionary
14 Costs Section of Attachment A to ICANN’s MOC in the amount of (1) \$46.75 for parking
15 validation costs set forth in Section 4, and (2) \$460.62 for travel costs set forth in Section 5
16 (calculated as the total costs set forth in Section 5 [\$2,838.99] minus “Hotel for trial witness
17 Christine Willett (2/27/2018 – 3/1/2018)” [\$968.45] and “Hotel for trial witness Christine Willett
18 (2/5/2019 – 2/8/2019)” [\$1,409.92]). (ICANN MOC, Attachment A, Discretionary Costs, pp.
19 10-11.)

20 D. Conclusion

21 For the reasons set forth above, DCA’s motion to strike or tax costs of ICANN is granted
22 in part and denied in part. The court finds that the following costs are not allowable and
23 therefore orders them stricken: (1) \$13.64 for DCA’s March 29, 2019 filing objections to DCA’s
24 trial brief set forth in Section 1 of Attachment A to ICANN’s MOC (ICANN MOC, Attachment
25 A, Section 1, p. 2), (2) \$46.75 for parking validation costs set forth in Section 4 of the
26 Discretionary Costs Section of Attachment A to ICANN’s MOC, and (3) \$460.62 for travel costs
27 set forth in Section 5 of the Discretionary Costs Section of Attachment A to ICANN’s MOC.
28 (ICANN MOC, Attachment A, Discretionary Costs, pp. 10-11.)

1 **ZACR'S MEMORANDUM OF COSTS**

2 DCA contends that various items listed in ZACR's MOC were not reasonably necessary
3 to the conduct of the litigation or are not reasonable in amount.

4 A. Deposition Costs

5 DCA seeks to tax various deposition costs in Section 4 of Attachment A to ZACR's
6 MOC. (ZACR MOC, Attachment A, p. 8.) DCA contends that, of the 12 depositions listed in
7 ZACR's MOC, one deposition never occurred, and three depositions were not noticed or taken
8 by DCA. DCA contends that the remaining deposition costs are ambiguous and vague because
9 they are inconsistent with the costs claimed by ICANN for transcript copies of the same
10 depositions, and all depositions except for those of Lucky Masilela and Neil Dundas were not
11 necessary for ZACR as an intervenor. DCA also contends that the travel costs to South Africa
12 associated with the deposition of Neil Dundas and Lucky Masilela are unreasonable and
13 excessive because they account for first class tickets and expensive hotels.

14 In opposition, ZACR contends that (1) ZACR was entitled to actively participate in the
15 case and depositions because ZACR was an indispensable party to DCA's tenth cause of action,
16 and thus, as an intervenor, ZACR had the same procedural rights and remedies as the original
17 parties, (2) ZACR's deposition costs are nonetheless limited to costs incurred in obtaining
18 transcripts of the depositions, and for travel and expenses to attend depositions, and (3) all the
19 depositions conducted by ICANN were reasonably necessary to ZACR's conduct of the litigation
20 as an intervenor.

21 The court finds that there is insufficient evidence demonstrating that the depositions of
22 these witnesses were unnecessary to ZACR's conduct of the litigation as an intervenor, and that
23 DCA has not met its burden of demonstrating that the travel and transcription costs incurred by
24 ZACR in connection with these depositions were not reasonably necessary to the conduct of the
25 litigation or are not reasonable in amount.

26 B. Filing and Service Fees

27 DCA seeks to tax various costs in Sections 1 and 5 of ZACR's MOC. (ZACR MOC,
28 Attachment A, pp. 7-8, 9.) DCA contends that (1) ZACR cannot recover costs for the improper

1 filing associated with the correction of the Declaration of David W. Kesselman filed on July 31,
2 2018, and August 2, 2018 (\$65.00 + \$76.76 = \$141.76) because the costs are a result of ZACR's
3 counsel's mistake, and (2) ZACR cannot recover costs associated with service of process on
4 DCA and ICANN for its motions in limine (\$310.12) because the parties entered into an
5 electronic service agreement (Brown Decl., ¶¶ 8-9).

6 In its opposition, ZACR states that, although it believes these costs might be recoverable,
7 it does not oppose DCA's motion to tax these costs. (Opp'n, p. 8:1-5.) Therefore, the court
8 grants DCA's request to strike these costs for a total amount of \$461.88. (ZACR MOC,
9 Attachment A, pp. 7-8, 9.)

10 C. Discretionary Costs

11 Finally, DCA seeks to tax costs claimed by ZACR for "hosting electronic documents"
12 (\$16,309.68). (ZACR MOC, Attachment A, Section 16, pp. 11-12.) DCA contends that
13 ZCAR's costs for hosting electronic documents are not reasonably necessary to the conduct of its
14 litigation because, pursuant to Code of Civil Procedure section 1033.5, subdivision (a)(15), costs
15 for hosting of electronic documents are allowable only if ordered by the court, and there was no
16 court order requiring such hosting in this action. DCA contends that the costs associated with
17 electronic hosting were voluntarily assumed by ZACR for its convenience and benefit.

18 In opposition, ZACR contends that electronic hosting of documents was reasonably
19 necessary to ZACR's conduct of its litigation because ZACR is a South African company with
20 no presence in the United States. (Kesselman Decl., ¶ 9.) ZACR asserts that DCA propounded
21 many requests for production on ZACR, and that ZACR was required to collect thousands of
22 pages of documents in South Africa and send them electronically to its counsel in California for
23 review and production.

24 The court notes that DCA correctly contends that costs for hosting of electronic
25 documents are allowable only if ordered by the court and, because there was no court order
26 requiring such hosting in this action, ZACR's costs for hosting electronic documents are properly
27 objected to and the burden of proof is on ZACR. (*Ladas v. California State Auto. Assn.*, *supra*,
28 19 Cal.App.4th at p. 774; Code Civ. Proc., § 1033.5, subd. (a)(15).) The court finds that ZACR

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1 has met its burden of showing that ZACR's costs associated with hosting electronic documents
2 were reasonably necessary to the conduct of the litigation and are reasonable in amount. The
3 court therefore exercises its discretion to allow ZACR's costs associated with hosting electronic
4 documents in this action. (Code Civ. Proc., § 1033.5, subd. (c)(4).)

5 D. Conclusion

6 For the reasons set forth above, DCA's motion to strike or tax costs of ZACR is granted
7 in part and denied in part. The court finds that the following costs are not allowable and
8 therefore orders them stricken: (1) \$141.76 for filing fees associated with the correction of the
9 Declaration of David W. Kesselman on July 31, 2018, and August 2, 2018, set forth Section 1 of
10 Attachment A to ZACR's MOC, and (2) \$320.12 for service of process of ZACR's motions in
11 limine on DCA and ICANN, set forth in Section 1 of Attachment A to ZACR's MOC. (ZACR
12 MOC, Attachment A, Section 1, pp. 7-8.)

13 **ORDER**

14 For the reasons set forth above, plaintiff DotConnectAfrica Trust's motion to strike or tax
15 costs of defendant Internet Corporation for Assigned Names and Numbers is granted in part and
16 denied in part, as follows.

17 The court finds that the following costs are not allowable and therefore orders them
18 stricken: (1) \$13.64 for DCA's March 29, 2019 filing objections to DCA's trial brief set forth in
19 Section 1 of Attachment A to ICANN's, MOC (ICANN MOC, Attachment A, Section 1, p. 2),
20 (2) \$46.75 for parking validation costs set forth in Section 4 of the Discretionary Costs Section
21 of Attachment A to ICANN's MOC, and (3) \$460.62 for travel costs set forth in Section 5 of the
22 Discretionary Costs Section of Attachment A to ICANN's MOC. (ICANN MOC, Attachment A,
23 Discretionary Costs, pp. 10-11.) Thus, after those costs are stricken, defendant ICANN shall
24 recover its costs from plaintiff DCA in the total amount of \$123,599.04 (\$124,120.05 minus
25 \$521.01 = \$123,599.04).


26 For the reasons set forth above, plaintiff DotConnectAfrica Trust's motion to strike or tax
27 costs of intervenor ZA Central Registry, NPC is granted in part and denied in part, as follows.

1 The court finds that the following costs are not allowable and therefore orders them
2 stricken: (1) \$141.76 for filing fees associated with the correction of the Declaration of David
3 W. Kesselman on July 31, 2018, and August 2, 2018, set forth in Section 1 of Attachment A to
4 ZACR's MOC, and (2) \$320.12 for service of process of ZACR's motions in limine on DCA and
5 ICANN, set forth in Section 1 of Attachment A to ZACR's MOC. (ZACR MOC, Attachment A,
6 Section 1, pp. 7-8.) Thus, after those costs are stricken, defendant ZACR shall recover its costs
7 from plaintiff DCA in the total amount of \$46,634.49 (\$47,096.37 minus \$461.88 = \$46,634.49).

8 The court orders defendant Internet Corporation for Assigned Names and Numbers to
9 give notice of this order.

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11 IT IS SO ORDERED.

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13 DATED: March 11, 2020

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16 Robert B. Broadbelt III
17 Judge of the Superior Court
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