

1 Ethan J. Brown (SBN 218814)  
2 [ethan@bnsklaw.com](mailto:ethan@bnsklaw.com)  
3 Sara C. Colón (SBN 281514)  
4 [sara@bnsklaw.com](mailto:sara@bnsklaw.com)  
5 Nona Yegazarian (SBN 316458)  
6 [nona@bnsklaw.com](mailto:nona@bnsklaw.com)  
7 BROWN NERI, SMITH & KHAN LLP  
8 11601 Wilshire Boulevard, Suite 2080  
9 Los Angeles, California 90025  
10 Telephone: (310) 593-9890  
11 Facsimile: (310) 593-9980

12 *Attorneys for Plaintiff*  
13 DotConnectAfrica Trust

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]*

**NOTICE OF MOTION AND MOTION  
BY PLAINTIFF  
DOTCONNECTAFRICA TRUST TO  
TAX COSTS OF INTERNET  
CORPORATION FOR ASSIGNED  
NAMES AND NUMBERS;  
MEMORANDUM OF POINT AND  
AUTHORITIES**

**Reservation ID: 777327467083**

**Date: Jan. 14, 2020**

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

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

1 **TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that on January 14, 2020 at 8:30 a.m. in Department 53 of the  
3 Los Angeles County Superior Court, located at 111 North Hill Street, Los Angeles, CA 90012,  
4 Plaintiff DotConnectAfrica Trust (“DCA”) will, and hereby does, move for an order taxing the  
5 costs claimed by Defendant Internet Corporation for Assigned Names and Number (“ICANN”)  
6 pursuant to Cal. Code Civ. Proc. § 1032 et seq.

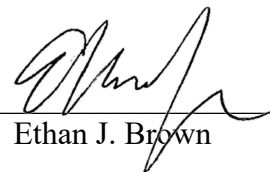
7 The grounds for this motion are that the costs sought by ICANN in its Memorandum of  
8 Costs (“ICANN MOC”) are not recoverable under Cal. Code Civ. Proc. § 1033.5 et seq. as these  
9 costs were not actually incurred by ICANN as is required by § 1033.5 (c)(1); are not allowable costs  
10 as defined by § 1033.5 (a); were not allowable costs pursuant to § 1033.5 (b); were not reasonably  
11 necessary for ICANN to the conduct of the litigation which is required to be eligible for recovery  
12 pursuant to § 1033.5 (c)(2); were not reasonable in amount as required by § 1033.5 (c)(3); and/or  
13 cannot be allowed as discretionary costs under § 1033.5 (c)(4). DCA must not be ordered to pay any  
14 of ICANN’s claimed costs which do not by law qualify for reimbursement.

15 This Motion is based upon this Notice, the Memorandum of Points and Authorities, the  
16 Declaration of Ethan J. Brown, all pleadings, records, and files herein, those matters of which the  
17 Court may take judicial notice, and upon such evidence and/or oral argument as may be made at  
18 the hearing on this matter.

19 Dated: November 5, 2019

**BROWN NERI SMITH & KHAN, LLP**

20  
21 By: \_\_\_\_\_



Ethan J. Brown

22  
23 Attorneys for Plaintiff DotConnectAfrica Trust  
24  
25  
26  
27  
28

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 under Cal. Code Civ. Proc. §1032 et seq, including expenses  
5 that were not actually incurred by ICANN; and/or are not expressly allowed by §1032 et seq;  
6 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, costs  
9 associated with a private mediation, among others costs that were clearly incurred as a  
10 convenience or benefit to the conduct of the litigation rather than reasonably necessary costs.

11 ICANN has failed to show that many of these costs are allowable, and if they are  
12 allowable, that the amounts they seek are reasonable and necessary. Therefore, DCA’s motion to  
13 tax at least \$85,794.79 of the total amount sought should be granted.

14 **II. STANDARD OF REVIEW**

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

26 **III. ARGUMENT**

27 **A. ICANN Cannot Recover Deposition Costs That Are Merely Convenient or Beneficial**

28 Over half of the costs sought by ICANN relate in part to depositions, including transcript,

1 video recording and travel costs<sup>1</sup>. However, only four of the listed depositions were noticed by  
2 ICANN and at least two of the listed depositions were of third-party witnesses noticed by DCA.  
3 ICANN's counsel voluntarily chose to represent third party witnesses Fadi Chehade and Mark  
4 McFadden. For example, Mr. Mark McFadden agreed to voluntarily sit for a deposition in Los  
5 Angeles, even though DCA was in the process of serving him with a deposition subpoena in his  
6 home state of Wisconsin. Thereafter, ICANN voluntarily provided its counsel to Mr. McFadden  
7 to defend his deposition. Now, ICANN not only seeks unreasonably high transcribing costs and  
8 video recording costs for a deposition noticed by DCA, when it is entitled to costs for only one  
9 copy of transcripts for depositions taken by DCA, but ICANN also improperly seeks  
10 reimbursement for Mr. McFadden's travel costs to Los Angeles. Code Civ. Proc. § 1033.5 (a)(3).

11 The only instances where ICANN can claim costs for taking, video recording and  
12 transcribing depositions, are in instances of necessary depositions noticed by ICANN. ICANN  
13 noticed two Person Most Qualified ("PMQ") depositions of DCA and one individual deposition  
14 of Ms. Sophia Bekele. See ICANN MOC, Attachment A at p.2. Further, Ms. Bekele's July 23,  
15 2019 transcribing costs are listed at \$6,506.84, over \$2,000 higher than her December 1, 2016  
16 deposition, although the difference in deposition transcript length was only eighteen pages.  
17 Similarly, Ms. Bekele's December 1, 2016 deposition cost is approximately \$1,800 greater than  
18 her September 6, 2017 deposition even though the transcript length difference is only 39 pages.  
19 As such, it is clear that these transcribing costs are unreasonably high and inconsistent across the  
20 board.

21 *(1) ICANN's Travel Costs Are Unnecessary And Excessive*

22 Finally, ICANN claims unreasonably high travel costs to attend the depositions of Neil  
23 Dundas and Lucky Masilela (\$15,304.34), Erastus JO Mwencha (\$3,670.31) in South Africa, and  
24 Pierre Dandjinou (\$12,765.73) in Paris. The \$15,304.34 in travel costs associated with the one  
25 attorney from Jones Day attending the depositions of Neil Dundas and Lucky Masilela, ZACR

26 <sup>1</sup> 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.

1 witnesses, noticed by DCA are wholly unnecessary as ICANN’s counsel, who was neither taking  
2 nor defending these depositions, could have attended telephonically. And even if the Court is  
3 inclined to find that ICANN’s attendance in person was warranted, these costs are unreasonable  
4 and excessive, as they clearly account for first class tickets and stays at expensive hotels, for  
5 which DCA is not required to pay. Code Civ. Proc. § 1033.5 (c)(e); Cal. *Thon v. Thompson*  
6 (App. 4 Dist. 1994) 35 Cal.Rptr.2d 346 (Holding that travel expenses sought by prevailing party  
7 for expenses incurred by its out-of-county attorneys in attending deposition in county of  
8 jurisdiction, would be limited to costs of commercial flight between city where attorneys  
9 practiced and city where deposition occurred; higher cost of charter flight requested by prevailing  
10 party were not “reasonably necessary.”); *Page v. Something Weird Video* (C.D. Cal. 1996) 960 F.  
11 Supp. 1438, 1447 (Holding that flying first-class is not “reasonably necessary” to further  
12 litigation). Based on a Google flight search, round trip flights booked approximately two to three  
13 weeks in advance to South Africa range between \$810 and \$1,534. Declaration of Ethan Brown  
14 (“Brown Decl.”) at ¶ 2, Ex. 1. Four and five star hotels for that same period range between \$78  
15 and \$188 dollar a night. Brown Decl. at ¶3, Ex. 2. As such, the over \$15,000 in travel expenses  
16 for approximately a three night stay is clearly excessive.

17 The same can be said for costs associated with attending Mr. Dandjinou’s deposition in  
18 Paris. Round trip flights to Paris in June range between \$860 to \$1,300 on average based on  
19 Google flights. Brown Decl. at ¶4, Ex. 3. Similarly, four and five star hotels in Paris range from  
20 \$114 per night to approximately \$230 per night. Brown Decl. at ¶5, Ex. 4. Lastly, for travel  
21 costs associated with the deposition of Mr. Mwencha, ICANN claims \$3,670.31 in costs for travel  
22 to Washington, D.C. Flights to Washington D.C. during a similar time period as the deposition  
23 range from \$185 to \$310 round trip, and hotel stays fall at approximately \$150 to \$250 per night.  
24 Brown Decl. at ¶¶6-7, Exs. 5-6. Therefore, all these travel costs must be taxed because DCA is  
25 not required to accommodate the luxurious travel of ICANN’s counsel.

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

- 28 • \$3,670.31 for travel to D.C. for the deposition of Erastus JO Mwencha
- \$1,308.84 and \$685.45 for travel and videotaping for the deposition of Mark McFadden

- 1 • \$387.95 for the videotaping of the deposition of Mike Silber
- 2 • \$15,304.34 for travel to South Africa for the depositions of Neil Dundas and Lucky
- 3 Masilela
- 4 • \$12,765.73 for travel to Paris for the deposition of Pierre Dandjinou
- 5 • And additionally tax the remainder of the \$35,710.10 in deposition costs given the
- 6 unsubstantiated, inconsistent and unreasonable pricing for transcribing across the board.

7 **B. ICANN Cannot Recover For Improper Filing Fees and Duplicative Costs.**

8 ICANN seeks to recover costs for the improper filing of a Notice of Removal to Federal  
9 court in the amount of \$400. *See* ICANN MOC, Attachment A at p. 1. Such filing was improper  
10 given the remand back to state Court. Therefore, this \$400 cost must be taxed. Furthermore,  
11 ICANN seeks a \$13.64 for the filing of Objections to DCA’s Trial Brief, which was improper as  
12 no such objections are allowable by law. *See* ICANN MOC, Attachment A at p. 2. Therefore,  
13 this cost too must be taxed.

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

21 Here, ICANN seeks to recover costs for deposition transcript copies, which are clearly  
22 duplicative of the transcribing costs they also seek to recover. ICANN is entitled to costs for only  
23 one copy of depositions taken by DCA and an original and one copy of those taken by ICANN.  
24 Code Civ. Proc. § 1033.5 (a)(3). Therefore, costs for any additional copies are duplicative and  
25 unrecoverable. Given, that ICANN groups all these costs together, it is vague and ambiguous  
26 which costs are attributed to which of the categories listed: binders, exhibits, deposition  
27 transcripts or trial demonstratives. ICANN has not properly specified the costs as required by the  
28 memorandum of costs. Moreover, it is unclear why costs for such photocopies, binders,  
transcripts and demonstratives associated with the second Phase I trial are almost double

1 (\$12,342.83) those of the first Phase I trial (\$6,517.07). *See* ICANN MOC, Attachment A at 3-4.  
2 If anything, costs associated with retrying Phase I should be significantly less than they had been  
3 for Phase I.

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

10 **C. The Discretionary Costs Claimed By ICANN Were Not Reasonably Necessary To**  
11 **The Conduct Of The Litigation And Are Unreasonable In Amount.**

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

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

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

1 Third, ICANN requests a total of \$5,431.50 in “Mediation Fees.” *See* ICANN MOC at p.  
2 10. These costs include parking and lunch, in addition to the \$5,000 cost of mediation. This  
3 mediation was not court-ordered. Parties participated, though unsuccessfully, voluntarily. These  
4 costs were not reasonably necessary expenses and ICANN cannot meet its burden in establishing  
5 they are. *Gibson v. Bobroff* (App. 1 Dist. 1996) 57 Cal.Rptr.2d 235 (holding that even where an  
6 unsuccessful mediation is court ordered, it is in the sound discretion of the trial court to award  
7 fees); *Berkeley Cement, Inc. v. Regents of University of California* (App. 5 Dist. 2019) 242  
8 Cal.Rptr.3d 252, rehearing denied, review denied. (holding that claimant failed to establish that  
9 fees paid in unsuccessful voluntary mediation were reasonably necessary and not merely  
10 convenient or beneficial to the preparation of litigation.). Therefore, the entire \$5,431.50,  
11 including lunch and parking, for “Mediation Fees” must be taxed.

12 Finally, in addition to claiming costs for lunch and travel for mediation, ICANN claims  
13 parking validation costs for DCA’s counsel totaling \$46.75, which it voluntarily offered, and  
14 “Travel Costs for Hearings/Trial,” including hotel costs totaling \$2,378.37 for both Phase I trial  
15 for ICANN employee and witness Christine Willett, who resides in Los Angeles. None of these  
16 costs are were reasonably necessary, but merely convenient and beneficial to ICANN and its  
17 counsel, not to mention excessive. Therefore, the expenses claimed by ICANN on pages 10  
18 through 11 of its MOC are also not recoverable. *Ladas* 19 Cal.App.4th at 774–75(holding that  
19 only meal expenses statutorily allowable are those for jurors while they are kept together during  
20 trial and deliberation and local travel expenses, including parking fees, are not allowed as  
21 reimbursable costs). For these reasons, ICANN should not be allowed to recover these costs and  
22 the entire \$2,838.99 in “Travel Costs For Hearings/Trial” must be taxed.

#### 23 **IV. CONCLUSION**

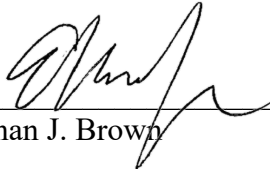
24 DCA respectfully requests that this Court grant its motion to tax and reduce ICANN’s  
25 MOC in at least the amount of \$85,794.79 in addition to any such costs the Court deems  
26 appropriate to tax given that ICANN has not adequately specified, or adequately explained the  
27 discrepancies in,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



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Dated: November 5, 2019

**BROWN NERI SMITH & KHAN, LLP**

By:  \_\_\_\_\_  
Ethan J. Brown

Attorneys for Plaintiff DotConnectAfrica Trust