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10 **ZA CENTRAL REGISTRY, NPC**

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF LOS ANGELES – CENTRAL DISTRICT**

13 DOTCONNECTAFRICA TRUST, a
14 Mauritius Charitable Trust,

15 Plaintiff,

16 v.

17 INTERNET CORPORATION FOR
18 ASSIGNED NAMES AND NUMBERS, a
19 California corporation; ZA Central Registry,
20 a South African non-profit company; and
21 DOES 1 through 50, inclusive,

22 Defendants.

CASE NO. BC607494

Assigned to Hon. Robert B. Broadbelt III,
Dept. 53

**INTERVENOR ZA CENTRAL REGISTRY,
NPC’S OPPOSITION TO MOTION BY
PLAINTIFF DOTCONNECTAFRICA
TRUST TO TAX COSTS OF
INTERVENOR ZA CENTRAL REGISTRY,
NPC**

*[Filed concurrently with Declaration of David
W. Kesselman in Support of Opposition to
Motion by Plaintiff to Tax Costs]*

Date: January 15, 2020
Time: 8:30 a.m.
Location: Dept. 53

1 **I. INTRODUCTION**

2 For more than three years, Plaintiff DotConnectAfrica Trust (“DCA”) sought to judicially
3 invalidate a contract between intervenor ZA Central Registry, NPC (“ZACR”) and Defendant
4 Internet Corporation for Assigned Names and Numbers (“ICANN”). Specifically, by its Tenth
5 Claim in its First Amended Complaint (“FAC”), DCA sought a declaration that the ten-year
6 Registry Agreement between ZACR and ICANN for the operation of the gTLD .Africa should
7 be declared null and void. FAC ¶¶ 126-132. ZACR was forced to intervene in this action, then
8 pending in federal court, to protect its interest in that contract. The district court granted
9 ZACR’s motion to intervene, ruling that ZACR was entitled to intervene as a matter of right and
10 was, in fact, an indispensable party to the action. Declaration of David Kesselman in Support of
11 Intervenor ZA Central Registry, NPC’s Opposition to Plaintiff DotConnectAfrica Trust to Tax
12 Costs of Intervenor ZA Central Registry, NPC (“Kesselman Declaration”) at ¶2 & Ex. A. In
13 doing so, the district court recognized that the interests of ZACR and ICANN were not directly
14 aligned, and that ZACR’s interests might not be adequately represented by ICANN. *Id.* at p.3.

15 After this action was remanded to state court, ZACR actively participated in the litigation,
16 including briefing and arguing against DCA’s motion for a preliminary injunction, propounding
17 and responding to discovery, participating in depositions, and preparing for trial – which was
18 then set for August 22, 2018.¹ Kesselman Decl. ¶3. On October 3, 2019, this Court ruled that
19 DCA was judicially estopped from pursuing this action and dismissed DCA’s lawsuit in full. As
20 a prevailing party, ZACR timely filed a verified cost memorandum, seeking allowable costs it is
21 entitled to as a matter of right, and costs the Court may award in its discretion.

22 DCA does not dispute that ZACR is a prevailing party for the purposes of recovering
23 costs. Instead, it filed a motion to tax costs (“Motion”) challenging ZACR’s entitlement to

24 ¹ The parties, including ZACR, were preparing for a multi-week jury trial. It was understood
25 and agreed by all parties that ZACR would be a full participant at the trial, including examining
26 and cross-examining witnesses. Although the parties reached the eve of trial – including
27 motions in limines, exchanging deposition designations, etc. – Judge Halm (who was then
28 presiding over the matter and had bifurcated the matter into Phase I and Phase II trials)
announced his retirement. That resulted in the need to retry the Phase I judicial estoppel issue
again before Judge Broadbelt – resulting in the vacating of the Phase II trial date.

1 recover certain costs, and/or claiming that certain costs sought by ZACR were unreasonable.
2 DCA offers nothing but conclusory allegations and irrelevant “evidence” to support its claims
3 that costs sought by ZACR were unnecessary or unreasonable. But mere arguments that costs
4 are not necessary or reasonable are not sufficient – DCA was required to present evidence.
5 *Seever v. Copley Press, Inc.*, 141 Cal. App.4th 1550, 1557 (2006). It did not do so. Accordingly,
6 with the limited exceptions identified herein, the Motion should be denied.

7 **II. Standard of Review**

8 A prevailing party is entitled to recover certain costs as a matter of right, and other costs
9 in the Court’s discretion. Cal. Cod. Civ. Pro. §1033.5, subd. (a) & (c)(4). Recoverable costs
10 must be reasonable in amount and reasonably necessary to the conduct of the litigation. *Id.* at
11 1033.5(c)(2)-(3). A prevailing party may submit a verified cost memorandum claiming its
12 allowable and discretionary costs. Cal Rule Ct. 3.7100. A party seeking to tax costs “must refer
13 to each item objected to by the same number and appear in the same order as the corresponding
14 cost item” and “must state why the item is objectionable. Cal. Rule Ct. 3.7100(b)(2). “If the
15 items appearing in a cost bill appear to be proper charges, the burden is on the party seeking to
16 tax costs to show that they were not reasonable or necessary. On the other hand, if the items are
17 properly objected to, they are put in issue and the burden of proof is on the party claiming them
18 as costs.” *Ladas v. California State Auto. Assn.*, 19 Cal. App. 4th 761, 774 (1993). “Whether a
19 cost item was reasonably necessary to the litigation presents a question of fact for the trial
20 court.” *Id.*

21 **III. ZACR Should be Awarded its Claimed Deposition Costs**

22 **A. ZACR is entitled to costs for depositions conducted by DCA.**

23 DCA acknowledges, as it must, that ZACR is entitled to claim costs for transcripts of
24 depositions taken by DCA. Motion at 2:3-6. Code Civ. Pro. §§ 1032 & 1033.5(a)(3). The only
25 costs claimed by ZACR for depositions of Chehade, McFadden, Silber, Brigety, Crocker, and
26 Nguyen were the amounts paid to the relevant court reporting services for copies of the
27 depositions. Kesselman Decl. ¶ 4 & Ex. B. ZACR is entitled to recover these costs, and DCA’s
28 motion to tax them should be denied.

1 DCA appears to argue that ZACR was not entitled to actively participate in the case
2 because there was no claim pending against ZACR and ZACR did not assert any claim in the
3 action. However, as the district court recognized, ZACR was an indispensable party to DCA's
4 Tenth Claim, in which DCA sought to invalidate ZACR's registry agreement with ICANN. As
5 an intervenor, ZACR had the same procedural rights and remedies as the original parties.
6 *Bowles v. Superior Court*, 44 Cal.2d 574, 588 (1955). This includes the right to attend
7 depositions in this action. Cal. Code Civ. Proc. § 2025.420(b)(12) (a party's counsel cannot be
8 excluded from attending a deposition). DCA's conclusory statements that ZACR's participation
9 was "merely beneficial" is insufficient to carry its burden on its motion to show that ZACR's
10 participation in the depositions of these key witnesses was not reasonably necessary to ZACR's
11 participation in the action. Further, DCA's argument is irrelevant, because ZACR is not
12 claiming costs related to its participation in these depositions. DCA cannot reasonably dispute
13 that ZACR was, at minimum, entitled to copies of the deposition transcripts, which were
14 necessary to enable it to prepare for trial.² ZACR is entitled to these costs as a matter of right,
15 and DCA's motion to tax \$9,506.37 related to the depositions of Chehade, McFadden, Silber,
16 Brigety, Crocker, and Nguyen should be denied.

17 **B. ZACR is entitled to costs for the depositions of Ms. Bekele and Mr. Mwencha**

18 ZACR also claims costs in connection with the depositions of Sophia Bekele (DCA's
19 principal) and Erasmus Mwencha (the former Deputy Chairperson of the African Union
20 Commission and a key witness in the case).³ These costs are limited to the costs incurred in
21 obtaining transcripts of the depositions⁴ and in traveling to Washington, D.C. for the deposition

22 _____
23 ² It was necessary for ZACR to pay for expedited transcripts for the depositions of McFadden
24 and Brigety because those depositions occurred just before the parties' deadlines for completing
25 pretrial exchanges and filing motions in limine in advance of the Phase II trial, which was then
26 scheduled for August 22, 2018.

27 ³ DCA claims that ZACR is not entitled to costs related to a deposition of Ms. Bekele on
28 September 22, 2017 because no deposition occurred on that date. ZACR's memorandum of
costs inadvertently listed the invoice date rather than the deposition date for this deposition. The
deposition at issue occurred on September 6, 2017. Kesselman Decl. ¶ 5 & Ex. C.

⁴ DCA may claim that it was unreasonable for ZACR to pay fees to obtain a rough draft and
expedite the transcript of Ms. Bekele's December 1, 2016 deposition. However, that deposition

1 of Mr. Mwencha. Kesselman Decl. ¶¶ 5 & 7 & Exs. C & E. DCA argues that ZACR is not
2 entitled to these costs because (1) the costs are not recoverable under California Code of Civil
3 Procedure section 1033.5(a)(3) because neither DCA nor ZACR noticed the depositions, and (2)
4 it was unreasonable for ZACR’s counsel to travel to Washington, D.C. to attend the deposition
5 of Mr. Mwencha. Because the costs claimed by ZACR are properly recoverable under section
6 1033.5(a)(3) and/or section 1033.5(c)(4), DCA’s motion to tax these costs should be denied.

7 As to DCA’s first argument, ZACR acknowledges that section 1033.5(a)(3), which does
8 not appear to contemplate deposition costs in multi-party litigation, refers to depositions “taken
9 by the claimant” and “taken by the party against whom costs are allowed.” But from a litigation
10 perspective, there is no rational distinction between costs incurred by ZACR in connection with
11 depositions conducted by ICANN and those incurred in connection with depositions taken by
12 DCA. Accordingly, even if the Court finds that costs related to depositions taken by ICANN do
13 not precisely fall within the costs identified in section 1033.5(a), this Court should exercise its
14 discretion to award ZACR costs under section 1033.5(c)(4).

15 As to DCA’s second argument, ZACR’s counsel’s participation at the deposition of
16 Mr. Mwencha was reasonably necessary to ZACR’s conduct of the litigation. Mr. Mwencha
17 was the Deputy Chairperson of the African Union Commission (“AUC”) during time periods
18 relevant to this action. DCA’s fourth cause of action is predicated on an alleged conspiracy
19 between ZACR, the AUC, and ICANN. FAC ¶¶83-95. At the time of his deposition,
20 Mr. Mwencha lived in Nairobi, Kenya – beyond the subpoena power of this Court. Accordingly,
21 ZACR’s only opportunity to observe Mr. Mwencha’s testimony, and ask questions if necessary,
22 was during his deposition. Indeed, ZACR designated excerpts of Mr. Mwencha’s testimony as
23 part of its pre-trial submissions for the Phase II trial, originally scheduled for August 22, 2018.

24 _____
25 was conducted a mere eight days before ZACR was required to file its opposition to DCA’s
26 motion for preliminary injunction. DE #301 ZACR’s Opposition to Plaintiff’s Motion for
27 Preliminary Injunction, filed Dec. 9, 2016. Likewise, it was reasonable to expedite the transcript
28 July 23, 2018 transcript of Ms. Bekele, because it occurred just before the parties’ deadlines for
completing pretrial exchanges and filing motions in limine in advance of the Phase II trial,
which was then scheduled for August 22, 2018.

1 Kesselman Decl. ¶6 & Ex. D Accordingly, ZACR’s counsel’s attendance at the deposition was
2 reasonably necessary to the conduct of the litigation.

3 **C. ZACR’s Travel Costs to South Africa were Reasonable**

4 ZACR should be awarded the costs it claimed for its counsel to travel to South Africa to
5 defend the depositions of Neil Dundas and Lucky Masilela. DCA noticed the PMK depositions
6 of ZACR in South Africa. Accordingly, it was entirely reasonable for ZACR’s counsel to seek
7 costs to defend the depositions.⁵ The only costs claimed by ZACR consisted of costs for airfare
8 and hotel lodging – ZACR did not submit claims for other costs incurred, such as the cost of
9 meals or other transportation. Kesselman Decl. ¶ 8 & Ex. F.

10 ZACR’s counsel traveled on business class – which was entirely reasonable given that
11 the travel time to and from South Africa exceeded 20 hours each way. Kesselman Decl. ¶8 &
12 Ex. F. ZACR’s costs of \$7,125.50⁶ for two days of deposition in Cape Town, South Africa are
13 entirely reasonable, and ZACR should be allowed to recover them in full. *Chaaban v. Wet Seal,*
14 *Inc.*, 203 Cal.App.4th 49 (2012) (“Section 1033.5, subdivision (a)(3), permits a prevailing party
15 to recover ‘travel expenses to attend depositions.’”); *See Hoge v. Lava Cap Gold Mining Corp.*,
16 55 Cal.App.2d 187-88 (1942). ZACR is claiming costs for five nights of hotel accommodations,
17 which is reasonable given the distance traveled, the need to adjust to a 10-hour time change, and
18 to defend two days of depositions.

19 DCA claims that the costs claimed should be taxed to ZACR because the costs are
20 unreasonable and excessive “as they clearly account for first class tickets and stays at expensive
21 hotels.” Motion at 2:22-24. Significantly, DCA does not introduce its own counsel’s expenses in
22 attending the depositions as evidence of “reasonable expenses.” Instead, DCA submits evidence
23 of the cost of flights to, and hotels in, Johannesburg, South Africa in November, 2019 (a
24

25 ⁵ Tellingly, DCA does not challenge the need for ZACR’s counsel to travel to South Africa to
26 defend these depositions.

27 ⁶ However, upon further review, ZACR discovered that its memorandum of costs inadvertently
28 included additional expenses in the amount of \$700.27. ZACR does not object to the reducing
the \$7,825.77 claimed in its memorandum by this amount, resulting in claimed costs of
\$7,125.50.

1 different month and year). Declaration of Ethan Brown, ¶¶ 2-3. But this “evidence” is entirely
2 irrelevant to the cost of air travel and hotel accommodations to South Africa in October, 2017.
3 Although DCA has failed to show that ZACR’s claimed expenses were unreasonable, ZACR
4 attaches travel invoices to support its claims for costs. Kesselman Decl. ¶8 & Ex. F.

5 For the reasons set forth herein, DCA’s motion to tax \$7,161.50 in costs to ZACR
6 should be denied.

7 **IV. ZACR’s Costs for Hosting Electronic Documents Were Reasonably Necessary to**
8 **the Conduct of the Litigation.**

9 Under the circumstances of this case, electronic hosting of documents was reasonably
10 necessary to ZACR’s ability to participate in the litigation, and the Court should award ZACR
11 its costs under California Code of Civil Procedure section 1033.5(c)(4). ZACR is a South
12 African company, with no presence in the United States, much less California. Kesselman Decl.
13 ¶ 9. DCA propounded 85 separate requests for production on ZACR. DCA’s requests were
14 broad, both in the scope of documents demanded and in the time periods covered. Kesselman
15 Decl. ¶ 9 & Ex. G. In order to respond to discovery in this jurisdiction, ZACR was required to
16 collect thousands of pages of documents in South Africa and to send them electronically to its
17 counsel in California for review and production. *Id.* Additionally, more than 35,000 pages of
18 documents were produced electronically by ICANN and DCA in this action. *Id.* Given the
19 international locations of the parties, and the sheer volume of electronic documents produced,
20 electronic hosting of those documents was reasonably necessary to the conduct of the litigation.
21 ZACR’s cost of \$16,309.68 for nearly three years of hosting was reasonable. *Id.*

22 Indeed, in the Motion, DCA offers no real evidence or argument that costs incurred by
23 ZACR were either unreasonable or unnecessary. Instead, DCA offers only unsupported
24 statements by counsel that the electronic hosting of documents was merely “convenient,” not
25 “reasonably necessary.” Motion at p. 4. For the reasons set forth above ZACR’s costs for the
26 electronic hosting of documents was reasonably necessary in the context of this action, and its
27 costs were reasonable. DCA’s motion to tax costs should be denied, and ZACR should be
28 permitted to recover these costs.

1 **V. ZACR Does Not Oppose DCA's Motion to Tax Costs for \$461.88**

2 ZACR's memorandum of costs included costs associated with the filing of a corrected
3 declaration and certain service costs, collectively totally \$461.88. While ZACR believes that
4 these costs might be recoverable, in an effort to be reasonable, it will not oppose DCA's motion
5 to tax them.

6 **VI. CONCLUSION**

7 As set forth herein, ZACR's costs were both reasonably necessary to the conduct of the
8 litigation and reasonably necessary in amount. Accordingly, ZACR should be awarded its
9 claimed costs, and subject to the limited reduction of \$1,162.15⁷ of, DCA's motion to tax costs
10 should be denied.

11 DATED: January 2, 2020

Respectfully submitted,

KESSELMAN BRANTLY STOCKINGER LLP

13 By: 

14 David W. Kesselman
15 Amy T. Brantly
16 Kara D. McDonald

17 *Attorneys for Intervenor*
18 ZA CENTRAL REGISTRY, NPC

27 _____
28 ⁷ See *infra* at section V and n. 7.