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7 NAMES AND NUMBERS

8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

11 DOTCONNECTAFRICA TRUST,

12
13 Plaintiff,

14 v.

15 INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS,
16 *et al.*,

17 Defendant.

CASE NO. BC607494

Assigned for all purposes to the
Hon. Robert B. Broadbelt

**DEFENDANT ICANN'S OPPOSITION
TO PLAINTIFF DCA'S MOTION TO
TAX COSTS OF INTERNET
CORPORATION FOR ASSIGNED
NAMES AND NUMBERS**

[Declaration of Jeffrey A. LeVee and
Erin L. Burke Filed Concurrently
Herewith]

Date: January 14, 2020
Time: 8:30 a.m.
Location: Dept. 53

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 After more than three years of litigation, a two-day bench trial in February 2018, and a
4 three-day bench trial in February 2019, this Court held that Plaintiff DotConnectAfrica Trust
5 (“DCA”) was judicially estopped from pursuing this lawsuit against the Internet Corporation for
6 Assigned Names and Numbers’ (“ICANN”), declaring ICANN to be the prevailing party and
7 dismissing DCA’s lawsuit in full. As the prevailing party, ICANN filed a verified cost
8 memorandum, seeking allowable costs it is entitled to as a matter of right, and costs the Court
9 may award in its discretion.

10 In response, DCA filed a motion to tax costs (“Motion”), which does not carry DCA’s
11 burden of proving that ICANN’s costs were unnecessary or unreasonable. DCA offers a number
12 of unsubstantiated, vague, and nonsensical objections to ICANN’s verified cost memorandum,
13 but does not provide any evidence to support its objections. This is insufficient. *Rappenecker v.*
14 *Sea-Land Serv., Inc.*, 93 Cal. App. 3d 256, 266 (1979) (“Defendant’s mere statements in the
15 points and authorities accompanying its notice of motion to strike cost bill and the declaration of
16 its counsel are insufficient to rebut the prima facie showing.”). Further, DCA missed the deadline
17 to file a motion to tax costs, warranting denial of the Motion in its entirety.

18 It is particularly appropriate to award ICANN its costs here, where the Court ruled that
19 DCA should never have brought this lawsuit because DCA repeatedly took the position that it
20 could not—under any circumstances—sue ICANN in Court. And to be clear, all of the costs
21 ICANN seeks were reasonably necessary to the litigation, and reasonable in amount, given that
22 there were two bench trials in this action, and given that the parties traveled to Washington, D.C.,
23 Paris, and South Africa for depositions. For these reasons, ICANN respectfully requests that the
24 Court deny DCA’s Motion and award ICANN its costs in full.

25 **STANDARD OF REVIEW**

26 A prevailing party is entitled as a matter of right to recover allowable costs that are both:
27 (1) reasonable in amount; and (2) reasonably necessary to the conduct of the litigation. Cal. Code
28 Civ. Proc. §§ 1032, 1033.5(c). Even if costs are not expressly provided for in Section 1033.5, the

1 Court may award certain costs within its discretion. *See* Cal. Code Civ. Proc. § 1033.5(c)(4).

2 A prevailing party may submit a verified cost memorandum claiming its allowable and
3 discretionary costs. Cal. R. Ct. 3.7100. If the items on the verified cost memorandum “appear to
4 be proper charges, the burden is on the party seeking to tax costs to show that they were not
5 reasonable or necessary. On the other hand, if the items are properly objected to, they are put in
6 issue and the burden of proof is on the party claiming them as costs.” *Ladas v. Ca. State Auto.*
7 *Ass’n*, 19 Cal. App. 4th 761, 774 (1993); *Benach v. County of Los Angeles*, 149 Cal. App. 4th
8 836, 856 (2007). A party seeking to tax costs “must refer to each item objected to by the same
9 number and appear in the same order as the corresponding cost item” and “must state why the
10 item is objectionable.” Cal. R. Ct. 3.7100(b)(2). It is not enough that the losing party attack costs
11 by simply stating they were unnecessary or unreasonable; the losing party has the burden to
12 present evidence to prove that the costs are not recoverable. *See Rappenecker*, 93 Cal. App. 3d at
13 266 (“Defendant’s mere statements in the points and authorities accompanying its notice of
14 motion to strike cost bill and the declaration of its counsel are insufficient to rebut the prima facie
15 showing.”); *Jones v. Dumrichob*, 63 Cal. App. 4th 1258, 1266 (1998) (same). Whether “a cost
16 item was reasonably necessary to the litigation presents a question of fact for the trial courts[.]”
17 *Ladas*, 19 Cal. App. 4th at 774.

18 ARGUMENT

19 I. DCA’S MOTION IS UNTIMELY

20 This Court should deny DCA’s Motion in its entirety because DCA missed the deadline to
21 file the Motion. A party seeking to tax costs must file a motion to tax costs within fifteen days of
22 the filing of a verified memorandum. Cal. R. Ct. 3.1700(b)(1). ICANN filed its verified cost
23 memorandum on October 18, 2019, rendering DCA’s deadline to file its Motion on November 4,
24 2019. But DCA did not file its motion to tax costs until November 5, nor did it ask for (or
25 receive) any extension. Accordingly, this Court should deny DCA’s motion as untimely.¹ *Sanai*

26 _____
27 ¹ DCA may argue that because ICANN served its verified cost memorandum via email,
28 DCA was allotted two additional court days to file its motion. Cal. R. Ct. 3.1700(b)(1); Cal.
Code Civ. Proc. § 1010.6(a)(4). But any such argument belies the parties’ express agreement that
email service constitutes personal service. Declaration of Jeffrey A. LeVee (“LeVee Decl.”) ¶ 2,
Ex. A (DCA’s counsel confirming that “electronic service constitutes personal service”). The

1 v. *Salta*, 170 Cal. App. 4th 746, 757 (2009) (“The defendants’ motion to tax costs . . . was ruled
2 untimely (one day late).”).

3 **II. ICANN IS ENTITLED TO RECOVER ITS ALLOWABLE COSTS**

4 Notwithstanding that DCA’s motion is untimely, DCA failed to meet its burden of
5 showing that ICANN’s claim for allowable costs are unnecessary or unreasonable.

6 **A. ICANN’s Deposition Costs Are Reasonably Necessary And Reasonable In
7 Amount.**

8 Section 1033.5 provides that ICANN is entitled as a matter of right to recover costs for
9 “[t]aking, video recording, and transcribing necessary depositions, including an original and one
10 copy of those taken by the claimant and one copy of depositions taken by the party against whom
11 costs are allowed.” Cal. Code. Civ. Proc. § 1033.5(a)(3)(A). ICANN is also entitled to “[t]ravel
12 expenses to attend depositions.”² *Id.* § 1033.5(a)(3)(B) ICANN’s deposition costs are both
13 reasonably necessary to the litigation and reasonable in amount; DCA has not and cannot
14 demonstrate otherwise.

15 **1. ICANN’s travel costs are reasonably necessary and reasonable in
16 amount given the extensive travel required.**

17 ICANN is claiming costs for its flights, hotel stays, transportation costs, and meals while
18 traveling to international and out-of-state depositions. These costs are expressly allowable by
19 statute and should be awarded as a matter of right. *See* Cal. Code Civ. Proc. § 1033.5(a)(3)(A);
20 *Chaaban v. Wet Seal, Inc.*, 203 Cal. App. 4th 49, 59 (2012) (trial court properly awarded travel
21 costs, including hotel, gas, car rental, and parking, to prevailing defendant); *Howard v. Am. Nat.*
22 *Fire Ins. Co.*, 187 Cal. App. 4th 498, 541 (2010) (trial court had discretion to award attorney meal
23 expenses incurred while traveling to take depositions).

24 DCA claims that ICANN’s travel costs are “unreasonably high” and must be the result of
25 first class travel. DCA, however, relies only on Google searches to support its position.³ But this
26 Motion is thus untimely.

27 ² DCA’s argument that “[t]he only instances were [*sic*] ICANN can claim costs for taking,
28 video recording and transcribing depositions, are in instances of necessary depositions noticed by
ICANN” (Mot. at 2) is therefore an incorrect interpretation of the statute.

³ Interestingly, DCA does not attach its own costs for flights or hotel stays, presumably
because it incurred similar costs in traveling to these depositions.

1 “evidence” is irrelevant and does not support that ICANN’s costs were unreasonable.

2 First, as to Intervenor ZA Central Registry’s (“ZACR”) persons most knowledgeable
3 depositions in South Africa, the Google flight and hotel searches DCA cites are plainly irrelevant.
4 The depositions took place in Cape Town, South Africa, but the flights and hotels DCA relies on
5 are for Johannesburg. DCA’s Google flights and hotels are also for November 2019, whereas the
6 depositions took place in October 2017.

7 Additionally, ICANN’s counsel flew business class to Cape Town, which was nearly a 25-
8 hour flight *each way*. LeVee Decl. ¶ 5. Flying business class was entirely reasonable given the
9 extensive travel. *See Hoge v. Lava Cap Gold Mining Corp.*, 55 Cal. App. 2d 176, 187–88 (1942)
10 (awarding travel expenses between California and New York for attorney attending a deposition);
11 *cf. Thon v. Thompson*, 29 Cal. App. 4th 1546, 1549 (1994) (declining to award prevailing party
12 higher cost of chartering flight, but awarding \$5,100 based on the price of a commercial flight
13 between Bakersfield and San Diego). ICANN’s counsel also booked a reasonable hotel for its
14 five-night stay in Cape Town. ICANN’s five-night stay was reasonably necessary to adjust to the
15 ten-hour time difference, and to account for two days of deposition. LeVee Decl. ¶ 5. Although
16 DCA has not met its burden of demonstrating that these costs were unreasonable, ICANN
17 attaches its travel invoices to support its claim for costs. LeVee Decl. ¶ 5, Ex. B.

18 DCA also claims that ICANN counsel’s attendance at these depositions in person were
19 unnecessary. That is absurd. ICANN’s counsel had a statutory right to attend the depositions in
20 person. *See* Cal. Code Civ. Proc. § 2025.420(b)(12) (a party’s counsel cannot be excluded from
21 attending a deposition). Additionally, DCA’s First Amended Complaint (“FAC”) contains
22 numerous allegations against ICANN for its treatment of ZACR’s .AFRICA application. *See*,
23 *e.g.* FAC ¶¶ 26-32, 75-76, 81. Indeed, DCA’s fourth cause of action is predicated entirely on an
24 alleged conspiracy between ICANN, ZACR, and the African Union Commission. FAC ¶¶ 83-95.
25 It was reasonably necessary for ICANN—the defendant in this litigation—to attend ZACR’s
26 persons most knowledgeable depositions in person. And, participating telephonically (as DCA
27 suggests) would have required ICANN to participate in the middle of the night, due to the ten-
28 hour time change. LeVee Decl. ¶ 4.

1 Second, ICANN’s travel costs for Mr. Dandjinou’s deposition in Paris, France were also
2 reasonable. Declaration of Erin L. Burke (“Burke Decl.”) ¶ 4, Ex. 1. ICANN’s counsel traveled
3 business class to Paris, an eleven-hour flight each way. *Id.* ¶ 4. ICANN’s counsel also stayed at
4 a reasonably-priced hotel close to Jones Day’s Paris office to avoid any travel costs to and from
5 the deposition. *Id.* ICANN booked its travel to Paris just a few weeks in advance because DCA
6 did not serve the amended deposition notice for Mr. Dandjinou’s June 5, 2018 deposition until
7 late May 2018. *Id.* ¶ 2. Additionally, Mr. Dandjinou’s deposition took place during the middle of
8 the French Open, likely resulting in increased travel costs during this time. *Id.* DCA’s Google
9 searches are therefore an unrealistic comparison, because they reflect pricing for flights and
10 hotels booked seven months in advance. And to be clear, the costs for Mr. Dandjinou’s
11 deposition could have been much higher. Mr. Dandjinou resides in Benin, Africa. *Id.* ¶ 3. To
12 avoid the time and expense of traveling to Africa for a deposition, ICANN offered to make Mr.
13 Dandjinou available for a deposition at Jones Day’s more convenient Paris office. *Id.* DCA
14 accepted. *Id.*

15 Third, ICANN’s travel costs for Mr. Mwencha’s deposition in Washington, D.C. were
16 reasonable, and far less than they could have been otherwise. LeVee Decl. ¶ 7, Ex. C. ICANN’s
17 counsel flew premium economy to Washington, D.C., and selected a reasonable hotel. *Id.* ¶ 7.
18 The date and location for Mr. Mwencha’s deposition was scheduled a few weeks in advance,
19 requiring the parties to book flights and hotels on a somewhat expedited basis. *Id.* ¶ 6. DCA’s
20 Google searches are therefore irrelevant, as they reflect pricing for flights and hotels booked five
21 months in advance. And the costs for Mr. Mwencha’s deposition could have been much higher.
22 At the time of his deposition, Mr. Mwencha was living in Nairobi, Kenya. To avoid the time and
23 expense of DCA, ICANN, and ZACR’s counsel traveling to Africa, Mr. Mwencha agreed to
24 come to Washington, D.C. *Id.* ICANN reimbursed Mr. Mwencha for his two-night hotel stay in
25 Washington, D.C., which is far less costly than the parties traveling to Kenya. *Id.*

26 In sum, ICANN’s costs for each of these depositions (all noticed by Plaintiff DCA, but
27 Mr. Mwencha’s deposition) were reasonably necessary and reasonable in amount, such that
28 ICANN should be awarded its costs in full.

1 **2. ICANN’s costs for transcripts and video recordings are reasonably**
2 **necessary and reasonable in amount.**

3 ICANN is entitled to its costs for transcripts and video recordings because they are
4 reasonably necessary and reasonable in amount, and DCA has not met its burden to demonstrate
5 otherwise. DCA generally seeks to “tax the remainder of the \$35,710.10” based on
6 “unsubstantiated, inconsistent, and unreasonable pricing for transcribing across the board.” Mot.
7 at 4. But DCA’s argument is not a proper objection to ICANN’s memorandum on costs: it
8 contradicts the express requirement that DCA “must refer to each item objected to” and “must
9 state why the item is objectionable.” Cal. R. Ct. 3.1700(b)(2); *see also Jones*, 63 Cal. App. 4th at
10 1266 (finding that mere statements in the points and authorities and declaration of counsel are
11 insufficient to rebut a showing of costs).

12 Notwithstanding its procedural deficiencies, DCA’s argument is false. ICANN is entitled
13 to a copy of deposition transcripts as a matter of right, including a copy of the video recording.⁴
14 Cal. Code Civ. Proc. § 1033.5(a)(3)(A); *Heller v. Pullsbury, Madison & Sutro*, 50 Cal. App. 4th
15 1367, 1395–96 (1996) (upholding trial court’s award of costs for videotaped depositions).
16 ICANN’s costs for copies of the deposition transcripts and video recordings were also reasonable
17 in amount.⁵ LeVee Decl. ¶ 8, Ex. D, ¶ 11, Ex. E.

18 DCA also challenges ICANN’s costs for taking, transcribing, and videotaping the
19 deposition of Sophia Bekele. As demonstrated by the attached invoices, however, ICANN’s
20 claim for costs are entirely reasonable. LeVee Decl. ¶ 12, Ex. F. The cost for the December 2016

21 ⁴ The video recording of Mr. Silber’s and Mr. McFadden’s depositions were plainly
22 necessary because neither deponent is within the subpoena power of the Court. Mr. Silber left his
23 employ as an ICANN Board member in October 2018 and resides in South Africa. LeVee Decl.
24 ¶ 11. Mr. McFadden was not employed by ICANN and resides in Wisconsin. *Id.* Accordingly,
25 had ICANN intended for either witness to testify at trial, it would have had to rely on their
videotaped deposition testimony, unless either witness volunteered to travel to Los Angeles.
Further, it was DCA who noticed the deposition and initiated the video recording (*id.*), further
demonstrating that ICANN is entitled to these costs. *See Heller*, 50 Cal. App. 4th at 1395
(rejecting argument that video tape costs were excessive and unfairly burdensome in part because
party against whom costs were sought “initiated the videotaping of depositions”).

26 ⁵ DCA complains that the costs claimed by ZACR and ICANN differ for Fadi Chehade’s
27 deposition transcript. Mot. at 2, n.1. The discrepancy is likely due to ICANN’s decision to order
28 a rough transcript of Mr. Chehade’s transcript, which was reasonably necessary as trial was just
two and a half months away. LeVee Decl. ¶ 10. The attached Declaration of Jeffrey A. LeVee
explains all of ICANN’s costs for depositions, and demonstrates that these costs were reasonably
necessary and reasonable in amount.

1 deposition is higher than the September 2017 deposition because the cost per page for the
2 transcript, as set by the court reporting service, is higher. *Id.* The cost for the July 2018
3 deposition is higher because the transcribing cost includes the cost for video recording the
4 deposition, as they were included on the same invoice. Additionally, ICANN ordered the July
5 2018 transcript on an expedited basis, which was reasonably necessary under the circumstances:
6 Ms. Bekele's deposition occurred less than one month before the Phase II trial date, and just two
7 days before the deadline to file motions *in limine* (where ICANN's motion was based on Ms.
8 Bekele's testimony at this deposition). *See Chaaban*, 203 Cal. App. 4th at 55 (awarding
9 prevailing party the extra costs to expedite the deposition transcript where trial was to start within
10 a few weeks of the deposition).

11 Finally, DCA seeks to tax costs associated with Mark McFadden's travel to Los Angeles
12 for his deposition. But these costs are entirely reasonable, and far lower than they would have
13 otherwise been. LeVee Decl. ¶ 13, Ex. G. Mr. McFadden is a Wisconsin resident, so ICANN
14 offered to bring Mr. McFadden to Los Angeles to avoid the time and expense of DCA, ICANN,
15 and ZACR traveling to Wisconsin. LeVee Decl. ¶ 13. DCA accepted ICANN's offer.⁶ *Id.*

16 In sum, ICANN's deposition costs are reasonably necessary and reasonable in amount,
17 and ICANN is entitled to these allowable costs as a matter of right.

18 **B. ICANN's Costs For Filing Fees Are Recoverable.**

19 ICANN is entitled to recover its costs for all filing fees in this case as a matter of right.
20 *See* Cal. Code Civ. Proc. 1033.5(a)(1). DCA does not dispute the majority of ICANN's filing
21 fees, but takes issue with two filings. First, DCA challenges the \$400 fee for filing the Notice of
22 Removal to federal court because the case was ultimately remanded back to state court. Mot. at
23 4. DCA's argument is nonsensical. ICANN filed the Notice of Removal based on diversity
24 jurisdiction: ICANN is a citizen of California, DCA is a citizen of the Republic of Mauritius and
25 Kenya, and the amount in controversy exceeded \$75,000. LeVee Decl. ¶ 14. After the case was
26 removed to federal court, ZACR was added as a party. ZACR, like DCA, is a foreign citizen,

27 ⁶ DCA also challenges ICANN's decision to represent Mr. McFadden at his deposition.
28 Mot. at 2. But DCA overlooks that ICANN's decision to represent Mr. McFadden (and bring him
to Los Angeles) significantly reduced the parties' travel costs.

1 thereby destroying diversity. *Id.* The federal court remanded the case back to state court for lack
2 of subject matter jurisdiction. *Id.* Accordingly, at the time ICANN filed the Notice of Removal,
3 it was procedurally proper, and reasonably necessary to the litigation.

4 Second, DCA challenges ICANN’s \$13.64 cost for filing objections to DCA’s trial brief,
5 arguing that the objections were not allowable by law. Mot. at 4. ICANN filed the objections to
6 DCA’s trial brief because the evidence DCA cited was irrelevant, misstated the documents or trial
7 testimony, or was misleading. LeVee Decl. ¶ 15. ICANN’s decision to advocate its affirmative
8 defense by filing the objections can hardly be characterized as unnecessary.

9 Accordingly, because the filings were reasonably necessary and reasonable in amount,
10 ICANN is entitled to recover these costs.

11 **C. ICANN’s Costs For Models, Enlargements, And Photocopies Of Exhibits Are**
12 **Recoverable.**

13 Section 1033.5 provides that a prevailing party is entitled to recover costs for “[m]odels,
14 the enlargements of exhibits and photocopies of exhibits, and the electronic presentation of
15 exhibits, including costs of rental equipment and electronic formatting . . . if they were reasonably
16 helpful to aid the trier of fact.” Cal. Code Civ. Proc. § 1033.5(a)(13). DCA has not met its
17 burden of demonstrating that these costs are unnecessary or unreasonable. Nor can it.

18 First, these costs were reasonably necessary to the litigation. There were two bench trials
19 before this Court, a two-day trial in February 2018, and a three-day trial in February 2019. For
20 each trial, this Court’s trial preparation order *requires* the parties to bring three copies of exhibits
21 to Court the day of trial. ICANN was responsible for printing all of the parties’ joint exhibits and
22 its own exhibits for both trials.⁷ LeVee Decl. ¶ 17. This Court also *requires* the parties to
23 assemble a trial binder with each party’s trial brief, motions *in limine*, witness list, and exhibit
24 list. Again, ICANN was responsible for printing the trial binders for this Court for both trials. *Id.*

25 ⁷ DCA claims that “[c]osts are not allowable for exhibits not used at trial,” relying on
26 *Ladas*. Mot. at 4. Here, all exhibits were used at trial because this Court required the parties to
27 bring three copies of each exhibit to trial. Whether the parties actually introduced each exhibit at
28 trial is of no import. *See Benach*, 149 Cal. App. 4th at 856 (“Although the Department did not
use the majority of its exhibits at trial, nothing indicates it could have anticipated that they would
not be used. An experienced trial judge would recognize that it would be inequitable to deny as
allowable costs exhibits any prudent counsel would prepare in advance of trial.”).

1 As to deposition transcripts, DCA argues that these costs are duplicative of costs sought
2 under Section 1033.5(a)(3)(C). But ICANN’s costs here are for printing deposition transcripts to
3 lodge with the Court during trial and/or to impeach the witness, or refresh a witness’s
4 recollection, at trial. Indeed, ICANN had to refer to Ms. Bekele’s deposition transcripts during
5 the 2018 trial often, either because Ms. Bekele could not recall her prior testimony or because she
6 testified inconsistently with her deposition testimony. LeVee Decl. ¶ 18.

7 As to trial technology, ICANN seeks costs associated with the monitors used to display
8 exhibits for the Court, counsel table, and the witness. This technology assisted both the Court
9 (*i.e.*, the trier of fact), the witness, and trial counsel, by allowing counsel to show the Court and
10 the witness the exact page or portion of sometimes voluminous exhibits and focus on particular
11 portions during questioning. DCA’s objection to these costs as vague and ambiguous (Mot. at 5)
12 is perplexing. DCA and ICANN agreed before each trial to split the cost of the trial technology
13 so DCA should have incurred similar (if not the same) costs. LeVee Decl. ¶ 19.

14 Second, these costs were reasonable in amount, as demonstrated by the attached invoices.⁸
15 *Id.* ¶ 20, Ex. H, ¶ 21, Ex. I. Accordingly, ICANN is entitled to these costs as a matter of right.

16 **III. ICANN IS ENTITLED TO RECOVER ITS DISCRETIONARY COSTS**

17 ICANN is also entitled to recover its discretionary costs because they are both reasonably
18 necessary to the litigation and reasonable in amount.

19 **A. ICANN’s Claim For Messenger Fees Is Reasonably Necessary And** 20 **Reasonable In Amount.**

21 ICANN requested costs for messenger fees associated with delivering courtesy copies of
22 filings to Court, and transporting voluminous trial exhibit binders to and from Court. California
23 courts have exercised their discretion to award costs for messenger fees in these circumstances.
24 *See Ladas*, 19 Cal. App. 4th at 776 (awarding courier and messenger costs for “filing documents
25 with the court” and “transporting exhibits to and from the courtroom”); *Benach*, 149 Cal. App.
26 4th at 858 (upholding trial court’s grant of costs for messenger services).

27 ⁸ DCA questions why costs associated with the 2019 trial are higher than the 2018 trial.
28 Mot. at 4-5. The invoices clarify that the costs for the 2019 trial are higher because ICANN is
claiming costs for trial exhibits it attached to its pre-trial brief, and for binders of a subset of
exhibits it prepared for each witness. LeVee Decl. ¶ 21, Ex. I.

1 DCA only challenges ICANN’s messenger fees for delivering courtesy copies to this
2 Court, and delivery of trial exhibit binders to Court. Mot. at 5. As to delivery of courtesy copies,
3 DCA is undoubtedly aware that in January 2019, the Los Angeles Superior Court began requiring
4 parties to file electronically documents with the Court. It is often a requirement to submit paper
5 copies of electronic filings to the court as a courtesy. As this was a new policy in January 2019,
6 ICANN followed this common requirement, and submitted paper copies of electronic filings to
7 this Court as a courtesy, especially because the final pre-trial status conference and trial dates for
8 the Phase I trial were fast approaching, meaning getting filings into the Court’s hands was time-
9 sensitive. LeVee Decl. ¶ 22.

10 ICANN’s messenger fees for delivering trial exhibit binders to Court were also reasonably
11 necessary. According to this Court’s trial preparation order, the parties must jointly prepare *three*
12 *sets* of exhibit binders and bring them to court the day of trial. As stated above, ICANN was
13 responsible for printing the parties’ joint exhibits, in addition to its own exhibits, and transporting
14 these exhibit binders to Court. LeVee Decl. ¶ 23. The three sets of exhibit binders, which
15 amounted to multiple boxes, were extremely heavy, such that ICANN’s counsel could not carry
16 them to Court without substantial burden. *Id.* ¶ 24. Accordingly, it was entirely reasonable to
17 messenger the exhibit binders to Court. *See Ladas*, 19 Cal. App. 4th at 776 (awarding messenger
18 costs for “transporting exhibits to and from the courtroom”).

19 DCA does not dispute that any of these fees were unreasonable in amount, but ICANN
20 nonetheless attaches these invoices to demonstrate their propriety. LeVee Decl. ¶ 25, Ex. J.

21 **B. ICANN’s Claim For Service Fees Is Reasonably Necessary And Reasonable**
22 **In Amount.**

23 ICANN’s request for service fees is reasonably necessary to the litigation, namely serving
24 the Plaintiff and the Intervenor with filings and with trial exhibits. ICANN did not personally
25 serve DCA with every filing or discovery in this case, only those it deemed reasonably necessary.
26 For instance, ICANN personally served DCA with its motion for summary judgment, which
27 included voluminous exhibits, for DCA’s convenience. The Court should exercise its discretion
28 to award ICANN its service costs.

1 **C. ICANN’s Claim For Mediation Fees Is Reasonably Necessary And**
2 **Reasonable In Amount.**

3 The parties participated in two mediations in this case: the first in September 2016, and
4 the second in January 2019 as ordered by this Court. ICANN is seeking its costs for the mediator
5 fees, parking validation at ICANN’s counsel’s office, and lunch offered at the mediation for the
6 September 2016 mediation, and ICANN counsel’s parking at the January 2019 mediation.
7 California courts have exercised their discretion in awarding a prevailing party costs for
8 mediation. *See Gibson v. Bobroff*, 49 Cal. App. 4th 1202, 1210 (1996) (plaintiff who prevailed in
9 a personal injury action was awarded reimbursement for costs incurred in mediation before trial);
10 *Berkeley Cement, Inc. v. Regents of Univ. of Cal.*, 30 Cal. App. 5th 1133, 1143 (2019) (upholding
11 trial court’s decision to award costs for voluntary mediation).⁹ This includes both court-ordered
12 mediation and voluntary mediation. *See Berkeley Cement, Inc.*, 30 Cal. App. 5th at 1143. Here,
13 the parties participated in mediation to attempt to resolve the dispute prior to expending further
14 time and money on costly litigation. LeVee Decl. ¶ 26. That the parties were unsuccessful in
15 resolving their dispute is of no import to ICANN’s claim for costs. *See, e.g., Berkeley Cement,*
16 *Inc.*, 30 Cal. App. 5th at 1143 (upholding cost award for unsuccessful voluntary mediation).

17 There is no dispute that these costs were reasonable in amount, but ICANN nonetheless
18 attaches its invoices. LeVee Decl. ¶ 27, Ex. K, ¶ 28, Ex. L. Accordingly, because the mediation
19 costs were reasonably necessary and reasonable in amount, this Court should award ICANN these
20 costs.

21 **D. ICANN’s Remaining Costs Are Reasonably Necessary and Reasonable in**
22 **Amount.**

23 This Court should award ICANN its remaining costs for DCA’s counsel’s parking, and
24 ICANN’s counsel’s travel to hearings and trial. First, ICANN is seeking costs for parking it
25 provided to DCA’s counsel on three occasions when DCA’s counsel visited ICANN’s counsel’s

26 ⁹ DCA cites to this case to support that ICANN has not met its burden of establishing that
27 the mediation costs are reasonably necessary. But DCA misstates the court’s holding. The court
28 *did not*, as DCA asserts, hold that “claimant failed to establish that fees paid in successful
 voluntary mediation were reasonably necessary.” Mot. at 6. Instead, the court expressly upheld
 the trial court’s grant of costs for voluntary mediation and concluded that fees for voluntary
 mediation “are not categorically nonrecoverable as ‘not reasonably necessary to the conduct of
 the litigation.’” *Berkeley Cement, Inc.*, 30 Cal. App. 5th at 1143.

1 office for case-related matters (a courtesy DCA never provided to ICANN when ICANN traveled
2 to DCA’s counsel’s office). LeVee Decl. ¶ 29, Ex. M. These expenses would have otherwise
3 been incurred by DCA, and ICANN is seeking to recover them now.

4 Second, ICANN is seeking costs for travel to, and parking at, hearings and trial in this
5 matter.¹⁰ ICANN’s counsel was required to appear at court for numerous hearings and two trials
6 in this case. LeVee Decl. ¶ 30. ICANN often brought to Court binders, exhibits, briefs, and other
7 items that rendered walking to Court not feasible. *Id.* These costs were therefore reasonably
8 necessary and reasonable in amount. LeVee Decl. ¶ 30, Ex. N.

9 Third, ICANN is seeking Christine Willett’s hotel costs for the 2018 and 2019 trials.
10 ICANN *and DCA* identified Ms. Willett on their witness lists, and she appeared in Court each
11 day of the 2018 and 2019 trials. LeVee Decl. ¶ 31. Ms. Willett resides in Orange County, not in
12 Los Angeles as DCA claims. *Id.* Accordingly, it was reasonably necessary for Ms. Willett to
13 stay in a hotel adjacent to the Court during trial, to avoid commuting to and from Orange County
14 each day. Again, these costs were reasonable in amount. LeVee Decl. ¶ 31, Ex. O.

15 **IV. ICANN IS ENTITLED TO RECOVER ALL COSTS THAT DCA DID NOT**
16 **OBJECT TO**

17 Although DCA objected to the majority of ICANN’s request for costs, there is a subset of
18 costs that DCA posed no objection to. These include the following: (1) \$2,355.00 in filing and
19 motion fees (Memorandum of Costs (Worksheet) (“MOC”), Attachment A at 1); (2) \$192.66 in e-
20 filing fees (3) \$17,556.72 in court reporter fees (MOC, Attachment A at 3); and (4) \$2,897.81 in
21 messenger fees for filings, delivery of courtesy copies to courtroom, etc. (MOC, Attachment A at
22 5-8). Facing no objection by DCA, the Court should award ICANN these costs in full. *See* Cal.
23 R. Ct. 3.1700(4) (“After the time has passed for a motion to strike or tax costs. . . , the clerk must
24 immediately enter the costs on the judgment.”).

25
26 ¹⁰ The court in *Ladas* did not hold that local travel expenses and parking fees are not
27 allowed as reimbursable costs, as DCA argues. Mot. at 6. Instead, the court found that, in that
28 case, the prevailing party “failed to demonstrate how any of these charges were necessary to
conduct the litigation.” *Ladas*, 19 Cal. App. 4th at 776. Here, ICANN has demonstrated that
these costs are reasonably necessary and reasonable in amount.

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CONCLUSION

In conclusion, all of ICANN’s costs were reasonably necessary to the litigation and reasonable in amount. Accordingly, ICANN is entitled to its allowable costs as a matter of right, and this Court should exercise its discretion in awarding ICANN its discretionary costs. Awarding ICANN its costs is particularly appropriate here where this Court ruled that DCA should never have brought this lawsuit in the first place, based on DCA’s repeated statements to a prior tribunal that it could never sue ICANN under any circumstances.

Dated: December 30, 2019

Respectfully submitted,

JONES DAY

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INTERNET CORPORATION FOR
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