Nos. 14-7193 (Lead), 14-7194, 14-7195, 14-7198, 14-7202, 14-7203, 14-7204

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUSAN WEINSTEIN, *individually as Co-Administrator of the Estate of Ira William Weinstein, and as natural guardian of plaintiff David Weinstein (minor)*, et al.,

Appellants,

v.

ISLAMIC REPUBLIC OF IRAN, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (Nos. 1:00-cv-2601-RCL; 1:00-cv-2602-RCL; 1:01-cv-1655-RCL; 1:02-cv-1811-RCL; 1:08-cv-520-RCL; 1:08-cv-502-RCL; 1:14-mc-648-RCL)

GARNISHEE-APPELLEE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS' OPPOSITION TO APPELLANTS' MOTION TO CERTIFY QUESTION TO D.C. COURT OF APPEALS AND TO SUSPEND THE BRIEFING SCHEDULE

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Garnishee-Appellee, the Internet Corporation for Assigned Names and Numbers ("Appellee"), hereby submits its Opposition to Appellants' Motion To Certify Question To D.C. Court of Appeals And To Suspend The Briefing Schedule (the "Motion").

INTRODUCTION

In the litigation from which these consolidated appeals arise, Appellants hold money judgments against several foreign states. In an attempt to collect on these money judgments, Appellants are seeking to attach the foreign states' alleged property interests in country code top-level domain names ("ccTLDs"), which, in turn, Appellants allege are in the possession of Appellee. On November 10, 2014, the lower court entered an order granting Appellee's motion to quash Appellants' writs of attachment, finding that "the country code Top Level Domain names at issue may not be attached in satisfaction of plaintiffs' judgments because they are not property subject to attachment under District of Columbia law." *Stern v. Islamic Rep. of Iran*, No. 00-2602 (RCL) et al., 2014 WL 5858095, at *4 (Nov. 10, 2014). Appellants thereafter filed these appeals.

Appellate motions (either dispositive or procedural) were due no later than February 6, 2015. Nevertheless, Appellants nonchalantly filed this Motion more than three months after the deadline and a mere eleven days before their Opening Brief was due. This is another in a long line of delay tactics employed by

Appellants throughout this litigation. Appellants' untimely motion asks this Court: (1) to certify to the D.C. Court of Appeals the question of whether ccTLDs constitute attachable property under District of Columbia law; and (2) to suspend the briefing schedule or, alternatively, grant them an additional extension of time to file their Opening Brief. This newest tactic should be rejected for several reasons.

First, Appellants' Motion should be denied because it is untimely. Appellants do not even address, much less justify, the lateness of their Motion. And even if they had tried to do so, there is no reason to have waited this long to file a motion to certify a question of D.C. law. Appellants point to no new circumstances regarding D.C. attachment law to warrant such a delay (nor is Appellee aware of any); and there are certainly no "exceptional circumstances" sufficient to meet the standard for allowing untimely motions.

Second, Appellants' Motion should be denied on the merits because the attachment issue is controlled by applicable precedent from the D.C. Court of Appeals. Accordingly, certification is unnecessary because controlling precedent "is reasonably clear and provides a 'discernible path' to the resolution of this case." *Dial A Car, Inc. v. Transp., Inc.*, 132 F.3d 743, 746 (D.C. Cir. 1998).

Third, separate and apart from the D.C. attachment law question, a federal law issue could be dispositive of these appeals and eliminate the need to even

reach the attachment issue. Addressing the threshold issue of federal law first, as is standard practice, will likely narrow the relevant issues and allow for an expeditious resolution of these appeals.

Fourth, Appellants have offered no reason for this Court to depart from the more typical course of addressing merits briefing first, and certification issues second. After the merits briefing, the Court will have a more fulsome understanding of *all* of the issues in these cases and be in a better position to evaluate the certification issue (if still needed).

Finally, the Court has already granted Appellants a generous extension of time in the briefing schedule and has now suspended the briefing schedule in light of Appellants' Motion. There is no reason for additional delay and Appellants' most recent delay tactics should not be rewarded. As explained below, merits briefing will facilitate the resolution of these appeals as well as the certification issue, if it is still applicable. Appellee therefore respectfully requests that the Court deny the Motion and issue a new briefing schedule on the merits of Appellants' appeals.

ARGUMENT

I. Appellants' Motion Should Be Denied Because It Is Untimely.

Appellants' Motion is more than three months overdue. Pursuant to the scheduling orders in these appeals, the deadline to file dispositive motions—which

include motions that ask for a case to be transferred to another court—was February 6, 2015. *See* Order (Doc. 1529029), Nos. 14-7193, 14-7194, 14-7195, 14-7198, 14-7202, 14-7203, 14-7204 (Dec. 24, 2014); *see also id.* (providing that procedural motions were due by January 22). Appellants completely ignored the Court's scheduling order and do not even mention the lateness of their Motion. At no point did Appellants ask this Court for leave to file their Motion out of time, nor have they provided a single reason for this unjustified delay. For this reason alone, Appellants' Motion should be denied.

If Appellants had wished to obtain permission to file a motion after the above-mentioned deadline, they were required to seek such permission at least five days *before* the deadline—meaning, five days *before* February 6, 2015. D.C. Cir. R. 27(h)(1) ("A motion to extend the time for filing motions, responses, and replies, or to exceed the page limits for such pleadings, must be filed at least 5 days before the pleading is due."). They made no such request.

In any event, even if Appellants had sought permission to file this late Motion even upon filing it, they could not have met the requisite legal standard. Under applicable D.C. Circuit rules, Appellants would have had to demonstrate "exceptional circumstances" justifying their over-three-month delay. D.C. Cir. R. 27(h)(1) ("Motions [seeking an extension of time] filed less than 5 days before the due date will be denied absent *exceptional circumstances*, except that the clerk

may grant unopposed late filed motions for extension of time for good cause shown.") (emphasis added); *see also* D.C. Cir. R. 27(g)(1).

This Court's decisions, moreover, make clear that the "exceptional circumstances" standard is a demanding one. When determining whether there are "exceptional circumstances" for considering an issue that was belatedly raised, for example, this Court has underscored that the "exceptional circumstances" standard is "onerous." *United States v. Gewin*, 759 F.3d 72, 78 (D.C. Cir. 2014); *see, e.g.*, *United States v. Brice*, 748 F.3d 1288, 1290 (D.C. Cir. 2014) (refusing to consider a belatedly-raised argument because the party had a prior opportunity to present the argument, but had failed to do so due to his attorney's negligence or strategy). Thus, in applying the "exceptional circumstances" standard in the context of an issue that a party had "not asserted at the District Court level," this Court has declared that such issues "ordinarily will not be heard on appeal" unless "injustice might otherwise result." *United States v. TDC Mgmt. Corp.*, 288 F.3d 421, 425–26 (D.C. Cir. 2002).

Here, Appellants cannot—and, indeed, *do not even try to*—demonstrate "exceptional circumstances" for filing their Motion so late. Notably, there has been no change in circumstances that could excuse their dilatory litigation tactics. They now profess the belief that D.C. Court of Appeals precedent does not adequately resolve the attachment issue. However, they base this belief on the

same case law that existed when Judge Lamberth issued his decision on this issue (November 2014), when these consolidated appeals were docketed (December 2014), when Appellants filed their Statement of Issues (January 2015), and when the deadline for filing dispositive appellate motions passed (February 2015). Simply put, Appellants fail to demonstrate any "circumstances," let alone "*exceptional* circumstances," that excuse their untimely request to certify an issue that they have been well aware of for many months.

These delay tactics reflect a pattern that has persisted throughout this litigation. For example, after Appellants issued seven writs of attachment and seven subpoenas *duces tecum* on June 24, 2014, Appellee promptly filed and served the required responses on July 28, 2014 and filed motions to quash on July 29, 2014. *See* Opp'n to Mot. for Enlargement of Time to Respond to Mot. to Quash Writs of Attachment, at 1 (ECF No. 99), *Weinstein v. Islamic Repub. of Iran*, 1:00-cv-2601-RCL (D.D.C.).[1] Appellants, however, did not respond with the same standard of promptness. Instead, Appellants first sought a six-week extension of time to respond to the motions to quash, which was granted. *Id.* at 2–4. Then, just three business days before their opposition was due, Appellants made an eleventh-hour request for additional discovery and asked Judge Lamberth to push back the

[1] For convenience, throughout this opposition, Appellee cites to district court filings that correspond to the lead case on appeal (No. 14-7193).

due date for their opposition by *more than six months*. *See* Appellants' Mot. to Certify at 2–4; Opp'n to Mot. for Six-Month Discovery Period, at 1 (ECF No. 110). Finally, as Appellants acknowledge in their Motion, "two days later," when their opposition brief was due, Appellants filed a self-styled "*Preliminary* Response"—a fabricated pleading found nowhere in the Federal Rules of Civil Procedure. Appellants' Mot. to Certify at 3. In light of Appellants' pattern of dilatory tactics and gamesmanship, it is clear that no "injustice" would result if their certification request was denied and the Court proceeded with merits briefing.

For the reasons discussed above, this Court should deny Appellants' untimely motion.

II. The Court Should Deny Appellants' Motion Because Applicable Precedent Governs the Attachment Issue and This Court's Resolution of a Federal Issue Could Obviate the Need to Address the Attachment Issue.

In the event that this Court considers Appellants' Motion on the merits, it should deny the Motion for three additional reasons: *First*, Appellants cannot show that D.C. law is "genuinely uncertain" as to the attachment issue; on the contrary, D.C. Court of Appeals decisions establish a "well settled" legal rule that controls the attachment issue. *Second*, this Court could resolve the present appeals based on at least one threshold question of federal law, which would obviate the need to address the attachment issue. *Third*, Appellants have offered no reason for departing from the typical practice of deciding certification issues after merits

briefing, at which point the Court is in a far better position to evaluate all of the issues in the case.

A. Certification Is Inappropriate Because Applicable Precedent from the D.C. Court of Appeals Provides the Guidance Necessary for this Court to Resolve the Attachment Issue on Appeal.

In their Motion, Appellants try to create uncertainty in order to further delay the merits briefing in these appeals. There is, however, sufficient applicable precedent from the D.C. Court of Appeals to provide all the guidance necessary for this Court to resolve the attachment issue on appeal.

The relevant certification statute provides that the D.C. Court of Appeals "may answer questions of law certified to it" *only if* "it appears to the certifying court there is *no controlling precedent* in the decisions of the District of Columbia Court of Appeals." D.C. Code § 11-723(a) (emphasis added). "In deciding whether to certify a case," this Court "look[s] to whether local law is 'genuinely uncertain' with respect to a dispositive question, and to whether the 'case is one of extreme public importance.'" *Dial A Car, Inc. v. Transp., Inc.*, 132 F.3d 743, 746 (D.C. Cir. 1998) (internal citations omitted). "If, however, there is a 'discernible path for the court to follow,' then [this Court does] not stop short of deciding the question." *Id.*; *see Khan v. Parsons Global Servs., Ltd.*, 428 F.3d 1079, 1082–83 (D.C. Cir. 2005) (declining to certify a question because, although the D.C. Court of Appeals had not addressed the precise factual scenario at issue, it had "already

provided the guidance necessary to resolve [the disputed] point of law" such that the point was no longer "'genuinely uncertain'").

Here, "certification is unnecessary" because controlling precedent "is reasonably clear and provides a 'discernible path' to the resolution of this case." *Dial A Car, Inc.*, 132 F.3d at 746. One of Appellee's key arguments—namely, the argument on which it prevailed below—is that ccTLDs are contracts for services, which are not attachable.[2] In support of this argument on appeal, Appellee again will rely on at least two D.C. Court of Appeals decisions that apply the "well settled" rule that services contracts are not attachable under D.C. law. In *Cummings General Tire Co. v. Volpe Construction Co.*, 230 A.2d 712 (D.C. 1967), the D.C. Court of Appeals held that money relating to a services contract was not garnishable because the defendant did not owe the garnishee any money until the contract work had been completed. *Id.* at 713 (stating that, under D.C. law, "the rule is well settled that money payable upon a contingency or condition is not

[2] As Judge Lamberth explained in the decision below, an Internet domain name consists of a top-level domain, as well as second-level domains within that top-level domain. *Stern*, 2014 WL 5858095, at *1. The top-level domain "is the series of characters that are to the right of the last period in a domain name", and a second-level domain "is the series of characters to the left of the last period in a domain name." *Id.* For example, for the domain name "icann.org," the top-level domain name is ".org," and the second-level domain name is "icann." ccTLDs, which are at issue in this case, "are a particular type" of top-level domain; they "carry a two letter code identifying a relationship to a particular country"—such as ".ir" for Iran, ".sy" for Syria, and ".kp" for North Korea. *Id.* For example, the "icann" second-level domain name in the .ir top-level domain would be "icann.ir."

subject to garnishment until the contingency has happened or the condition has been fulfilled"; further explaining that this rule is "particularly" relevant "in contract situations where payment . . . is conditioned on the completion of the contract work," because the "existence and amount" of any debt are "contingent and uncertain" in such situations). Likewise, in *Shpritz v. District of Columbia*, 393 A.2d 68 (D.C. 1978), the D.C. Court of Appeals held that money allegedly due under a services contract was not garnishable, even though the services had been performed and invoices had been submitted. *Id.* at 70 (reiterating that this rule is "well settled").[3] These cases "already provide[] the guidance necessary to resolve" the attachment question at issue here. *See Khan*, 428 F.3d at 1083 (refusing to certify because D.C. Court of Appeals precedent provided "guidance" that was sufficient to allow the D.C. Circuit to apply the relevant legal principles to the facts at hand).

Moreover, in the proceedings below, Judge Lamberth confirmed that ccTLDs are services contracts and therefore not attachable property—"ccTLDs exist only as they are made operational by the ccTLD managers that administer the

[3] Appellants erroneously assert that Judge Lamberth found "nothing within the District of Columbia to guide [his] decision" and that he "simply applied the law of Virginia." Appellants' Mot. to Certify at 4. To the contrary, Judge Lamberth's decision relied on the D.C. Court of Appeals' decision in *Cummings*. *See Stern*, 2014 WL 5858095, at *3. As Judge Lamberth further stated, "[w]hile interpretations of the D.C. Code are sparse, they tend to support [Appellee's] understanding of ccTLDs." *Id.*

registries of second level domain names within them and by the parties that cause the ccTLDs to be listed on the root zone file." *Stern*, 2014 WL 5858095, at *3. Furthermore, this Court has held that an entity serving as the "exclusive registry and exclusive registrar" for certain "top-level domains" was engaged in the provision of "*services*." *Thomas v. Network Solutions, Inc.*, 176 F.3d 500, 505 (D.C. Cir. 1999) (emphasis added); *id.* at 504–511 (repeatedly characterizing the functions performed by the operator of a top-level domain as "services"); *see also Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 984 (9th Cir. 1999) (holding that a top-level domain fell "squarely on the 'service' side of the product/service distinction").

In sum, Appellants cannot show that D.C. Court of Appeals precedent is "'genuinely uncertain'" on the attachment question at issue here. *Dial A Car*, 132 F.3d at 746. On the contrary, the D.C. Court of Appeals has expressly declared that the pertinent legal rule is "well settled." *Cummings*, 230 A.2d at 713 (internal quotation marks omitted); *Shpritz*, 393 A.2d at 70. Accordingly, there is a "'discernible path'" for this Court to follow with respect to the attachment issue, *see Dial A Car*, 132 F.3d at 746, and certification is inappropriate.

B. Certification Is Not Warranted Because This Court Could Resolve the Present Appeals Based on at Least One Threshold Question of Federal Law, Which Would Eliminate the Need to Address the Certification Issue.

Certification is appropriate only when "District of Columbia law is 'genuinely uncertain' with respect to *the dispositive question*." *Nationwide Mut. Ins. Co. v. Richardson*, 270 F.3d 948, 950 (D.C. Cir. 2001) (emphasis added); *see United States v. Old Dominion Boat Club*, 630 F.3d 1039, 1047 (D.C. Cir. 2011); *East v. Graphic Arts Indus. Joint Pension Trust*, 107 F.3d 911, 911 (D.C. Cir. 1997) (certifying "a question of District of Columbia law [that] will control the disposition of the pending appeal"); *see also, e.g.*, *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 392 n.2 (2d Cir. 2008) ("Our local rules require that we certify only state law questions 'that will control the outcome of a case.'") (citation omitted); *Slowiak v. Land O'Lakes, Inc.*, 987 F.2d 1293, 1296 (7th Cir. 1993) (declining to certify because the claims could be resolved without reaching questions of state law), *overruled on other grounds by Hill v. Tangherlini*, 724 F.3d 965 (7th Cir. 2013). But here the D.C. attachment law issue Appellants seek to certify is not necessarily "the dispositive question" on appeal.

In fact, there is at least one threshold issue of federal law that could be dispositive of the appeals without ever reaching the attachment question. In particular, in the court below, Appellee argued that *even if* ccTLDs are attachable and are owned by foreign states, which they are not, the Foreign Sovereign

Immunities Act divests federal courts of jurisdiction over this dispute. *See* Mem. in Support of Mot. to Quash the Writ of Attachment, at 17–18 (ECF No. 89); Reply in Support of Mot. to Quash the Writ of Attachment, at 5 (ECF No. 109). Attachment of a foreign state's property in the United States is controlled by the Foreign Sovereign Immunities Act, which provides that "the property in the United States of a foreign state shall be immune from attachment . . . except as provided" in 28 U.S.C. §§ 1610–1611. *See* 28 U.S.C. § 1609. In other words, this Court may exercise jurisdiction *only if* one of the narrow exceptions in Sections 1610 and 1611 of the Foreign Sovereign Immunities Act applies. *See, e.g.*, *FG Hemisphere Assocs., LLC v. Republique du Congo*, 455 F.3d 575, 584–85 (5th Cir. 2006); *see generally Corzo v. Banco Central De Reserva Del Peru*, 243 F.3d 519, 522 (9th Cir. 2001). Importantly, however, no such sovereign immunity exception applies here. As such, once the parties commence merits briefing on these appeals, the Court will be able to resolve the present appeals simply by holding that it lacks jurisdiction.[4]

Because this Court could potentially resolve the appeals in their entirety based upon the threshold federal law issue discussed above, certification is

[4] Appellee may raise additional federal law issues. The Foreign Sovereign Immunities Act issue, however, is sufficient to demonstrate why this Court should not depart from the typical practice of requiring merits briefing before deciding to certify an issue. *See infra* at II.C.

unnecessary and inappropriate.

C. At Most, This Court Should Decide the Certification Issue After Merits Briefing and Argument.

For the reasons discussed above, certification here is not warranted and the Motion should be denied. If, however, the Court chooses not to dispose of this Motion entirely, the certification question should be resolved only after merits briefing and argument. As noted, this case involves *both* questions of D.C. *and* federal law. This Court, therefore, would be in a better position to evaluate the certification issue after full briefing and argument, which would illuminate the threshold federal law issue(s), as well as the attachment issue on which Appellants seek certification. The benefits of full briefing in cases involving potential certification are illustrated by *Khan v. Parsons Global Services*, in which this Court: (1) referred the motion to certify to the merits panel; and (2) directed the parties to "include in their briefs the arguments raised in the motion to certify." *See* Order (Doc. 877478), No. 04-7162 (Feb. 11, 2005); *see also Khan*, 428 F.3d at 1083 (declining, after briefing, to certify the question). Indeed, numerous cases from this Court and from other circuits make clear that, when certification occurs, it typically takes place *after* a full round of merits briefing.[5] Appellants have

[5] *See, e.g.*, *Holmes v. Amerex Rent-A-Car*, 113 F.3d 1285, 1286 (D.C. Cir. 1997) (certifying a question after merits briefing); *Johnson v. Wash. Metro. Area Transit Auth.*, 98 F.3d 1423, 1424 (D.C. Cir. 1996) (same); *East v. Graphic Arts Indus.*

offered no reason why a similar procedure should not apply here.

III. This Court Should Issue A New Briefing Schedule On The Merits.

Finally, Appellee respectfully requests that this Court establish a new briefing schedule that requires Appellants to file their Opening Brief as soon as possible. Appellants have been granted approximately two and one-half months to file their Opening Brief, and now have the benefit of a suspension of the schedule pending further order of this Court. *See* Order (Doc. 1546617) (Apr. 9, 2015); Order (Doc. 1555259) (June 2, 2015). Further delay is not warranted, for at least two reasons.

First, as noted above, Appellants' Motion is three months late; they have offered no explanation whatsoever for this delay; there are no "exceptional circumstances" justifying this untimely Motion; and the merits of the Motion fail. *Second*, as also noted above, merits briefing will facilitate the resolution of the certification issue, since it will illuminate the issues underlying these appeals and allow the Court to make a better informed decision on whether certification is

(continued…)

Joint Pension Trust, 107 F.3d 911 (D.C. Cir 1997) (same); *Tiara Condo. Ass'n v. Marsh & McLennan Cos.*, 607 F.3d 742, 749 (11th Cir. 2010) (same); *Smith v. Carbide & Chemicals Corp.*, 507 F.3d 372, 374 (6th Cir. 2007) (same); *Konstantopoulos v. Westvaco Corp.*, 112 F.3d 710, 715 (3d Cir. 1997) (same); *C.R. Klewin, Inc. v. Flagship Props., Inc.*, 936 F.2d 684, 685 (2d Cir. 1991) (same); *Shepperd v. Boettcher & Co.*, 859 F.2d 1472 (10th Cir. 1988) (same); *Gov't Employees Ins. Co. v. Brown*, 675 F.2d 645, 647 (5th Cir. 1982) (same).

warranted. This is precisely why certification decisions are typically made after, rather than before, a case has been briefed on the merits.

Accordingly, Appellee respectfully requests that this Court establish a new briefing schedule requiring Appellants to file their Opening Brief as soon as possible.

CONCLUSION

For the foregoing reasons, this Court should deny Appellants' untimely Motion and establish a new briefing schedule for the merits of these appeals.

Dated: June 9, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of June, 2015, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, and four paper copies also were mailed to the Clerk of Court via First-Class U.S. Mail. In addition, the electronic filing described above caused the foregoing to be served on all registered users to be noticed in this matter, including:

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