ORAL ARGUMENT SCHEDULED FOR JANUARY 21, 2016

Appeal No. 14-7193

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); JEFFREY A. MILLER, as Co-Administrator of the Estate of Ira William Weinstein; JOSEPH WEINSTEIN; JENNIFER WEINSTEIN HAZI; DAVID WEINSTEIN, minor, by his guardian and next friend SUSAN WEINSTEIN,

Plaintiffs-Appellants.

v.

ISLAMIC REPUBLIC OF IRAN; IRANIAN MINISTRY OF INFORMATION AND SECURITY; AYATOLLAH ALI HOSEINI KHAMENEI, Supreme Leader of the Islamic Republic of Iran; ALI AKBAR HASHEMI-RAFSANJANI, Former President of the Islamic Republic of Iran; ALI FALLAHIAN-KHUZESTANI, Former Minister of Information and Security,

Defendants,

and

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBER,

Appellee.

Consolidated with 14-7194, 14-7195, 14-7198,
14-7202, 14-7203 and 14-7204

On Appeal from the United States District Court
for the District of Columbia

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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* Authorities upon which we chiefly rely are marked with asterisks.

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Glossary

Abbreviation	Meaning
ccTLD	Country-code top level domain name.
DE	Citation to a docket entry in *Weinstein v. Islamic Rep. of Iran*, No. 00-cv-2601 (D.D.C.). Page citations rely on the page numbers on the ECF stamp atop each page, rather than on the original page numbers appearing at the bottom.
FSIA	The Foreign Sovereign Immunities Act, codified at 28 U.S.C. 1602-1611. Of those sections, only 28 U.S.C. 1609-11 are relevant or potentially to this appeal. The term "FSIA" is often, but erroneously, used by ICANN and others to refer also to TRIA §201. TRIA §201 is not part of the FSIA and was codified as a note to it by the Office of Law Revision Counsel.
ICANN	Appellee, Internet Corporation for Assigned Names and Numbers.
IP	Internet Protocol. When used as part of the phrase "IP address," refers to a numerical label assigned to an electronic device that connects to the Internet (*e.g.* a computer, mobile phone, or printer).
SA	The supplemental appendices filed by both parties.
TRIA	The Terrorism Risk Insurance Act of 2002. The only section of TRIA relevant to this appeal is §201, which is codified as a note to 28 U.S.C. 1610(g).
UCC	Uniform Commercial Code.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

ICANN seeks a ruling on the merits on many issues that were not fully briefed, not the subject of discovery, and not reached by the court below. It seeks to convert this Court to a court of first review and requests a precedential ruling on an incomplete record. More remarkably, it asserts that the Appellants have *waived* these many issues by not raising them first.

ICANN seems to be in a hurry to obtain a ruling on the merits, despite that reaching the merits questions now is essentially impossible. In its principal argument on appeal, it takes the remarkable, but unsurprising, position (one, it seems, not adopted by *any* court) that domain names are not property at all: If this Court so holds, ICANN and/or the Department of Commerce would have sole control over the Internet. No domain, registry, or domain name registrar (a broker from which one purchases a domain name, *e.g.* www.godaddy.com) will have any property interest at all—he who holds the root zone will be King of the Internet. And with the U.S. government talking about turning over its interests in the Internet to ICANN,[1] ICANN stands to gain a great deal from a holding that would centralize control over all Internet assets. Such a far-reaching holding should not be made on anything less than a robust record.

[1] Craig Timberg, *U.S. to Relinquish Remaining Control Over the Internet*, WASH. POST, Mar. 14, 2014.

ICANN's posturing notwithstanding, just three questions are actually before this Court right now: 1) whether a series of intangible Internet assets fit within the meaning of a D.C. municipal statute that would permit garnishment of those assets, 2) who should decide that question (this Court or the D.C. Court of Appeals), and 3) whether the record is adequate to permit a resolution of that question (relatedly, whether the district court abused its discretion in disallowing discovery). Everything else is a distraction.

SUMMARY OF ARGUMENT

1. The new issues raised by ICANN in its response brief are not properly before this Court. The court below did not pass on them or find facts regarding them. To decide those questions now, this Court would need to function as a trial court, finding facts and making an initial attempt to discern and apply the law. But this is not a trial court; it is not well-equipped to find facts and thus does not do so. Further, even if it were willing to do so, it cannot do so here given that the factual record is terribly incomplete and that the Appellants were unable to present argument or develop evidence on the pertinent issues to the court below.

2. For the same reasons, ICANN's suggestion that Appellants waived or forfeited any issue is frivolous. Appellants intended to develop the record and respond on the merits before the court below. They were not afforded the opportunity to do so for the simple reason that the court below felt (erroneously) that it could

reach a specific question of law without the benefit of a developed factual record. Appellants requested from the district court the opportunity to obtain discovery and to fully respond on the merits. If the district court's legal conclusions are rejected here, Appellants are entitled to that opportunity on remand.

3. D.C. CODE §16-544 reaches intangible property. *Rowe v. Colpoys*, 137 F.2d 249, 250-51 (D.C. Cir. 1943). ICANN's assertion that *Rowe* is inapposite because it predates §16-544 is simply wrong. The statutory language of §16-544 appeared verbatim in the D.C. Code (in precisely the same context) in 1902. D.C. CODE §1088 (1902). It is beyond dispute that the phrase "goods and chattels," which appears in similar form in §16-544, was taken to include intangible property in 1902, as *Rowe* held.

4. There is no legitimate question as to this Court's jurisdiction. Title 28 U.S.C. 1610(g) permits attachment of the assets for each judgment under 28 U.S.C. 1605A. Four of the seven judgments here at issue fit that description. Jurisdiction to enforce the other three judgments is created by TRIA §201, which permits attachment of "blocked assets," a term of art defined by TRIA §201(d)(2). ICANN's assertion that the attached assets are not "blocked" is clearly refuted by the text of several regulations.

ARGUMENT

I. The Myriad Questions Raised by ICANN but not Decided Below Should Not be Considered Now

This Court is a "court of review, not of first view." *U.S. v. Peyton*, 745 F.3d 546, 557 (D.C. Cir. 2014). Generally, "a federal appellate court does not consider an issue not passed upon below." *Bowie v. Maddox*, 642 F.3d 1122, 1131 (D.C. Cir. 2011) (quoting *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)).[2] While the Court may, "[i]n appropriate circumstances," review the record and render a decision without affording the district court the opportunity to opine first, its "normal rule" is to

[2] This is neither surprising nor debatable. Under different circumstances, Appellants would have no need to cite additional authority. But because the majority of ICANN's brief assumes the contrary, Appellants additionally cite the following cases: *In re Harman Int'l Indus., Inc. Sec. Litig.*, 791 F.3d 90, 100-01 (D.C. Cir. June 15, 2015); *Liberty Prop. Trust v. Republic Properties*, 577 F.3d 335, 341-42 (D.C. Cir. 2009); *Summers v. Dep't of Justice*, 140 F.3d 1077, 1084 (D.C. Cir. 1998); *Texas Rural Legal Aid v. Legal Servs*, 940 F.2d 685, 697-98 (D.C. Cir. 1991) (finding "dispositive" the absence of "full[] brief[ing] by the parties") (noting that one of the parties "did not address the merits of the claim at all, urging only that we remand the claim for discovery and factfinding in the district court"); *Daingerfield Island Protective Soc. v. Lujan*, 920 F.2d 32, 37 n.5 (D.C. Cir. 1990); *U.S. v. Kin-Hong*, 110 F.3d 103, 116 (1st Cir. 1997) (discretion is available only when the "record is complete"); *Hudson United Bank v. LiTenda Mortgage*, 142 F.3d 151, 159-60 (3d Cir. 1998); *Abril v. Com. of Virginia*, 145 F.3d 182, 185 n.4 (4th Cir. 1998); *Perez v. Aetna Life Ins.*, 150 F.3d 550, 554-55 (6th Cir. 1998); *Davis v. Nordstrom*, 755 F.3d 1089, 1094-95 (9th Cir. 2014); *Backus v. Panhandle E. Pipe Line*, 558 F.2d 1373, 1376 (10th Cir. 1977); *HTC Corp. v. IPCom GmbH & Co.*, 667 F.3d 1270, 1281-82 (Fed. Cir. 2012).

remand under such circumstances. *Bowie*, 642 F.3d at 1131-32 (internal quotation marks omitted). It departs from that normal rule only in "exceptional or otherwise particular circumstances" and adheres to it whenever doing so would "not involve a miscarriage of justice." *In re Harman*, 791 F.3d 90 at 100. In *Singleton*, the Supreme Court explained this strong preference for remand:

> [It is] essential...that parties may have the opportunity to offer all the evidence they believe relevant to the issues...(and) in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence. We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence. Moreover, even assuming that there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may have in defense of the statute.

Singleton, 428 U.S. at 120 (two alternations in original).

While the decision of whether to decide a question not passed on below is "left primarily to the discretion of the courts of appeals," that discretion is best exercised when "the proper resolution is beyond any doubt" in light of controlling precedent. But where the proper resolution is not beyond any doubt and where "injustice [i]s more likely to be caused than avoided by deciding the issue," reaching

such questions is an abuse of discretion. *Id.* at 121; *see also Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 & n.6 (2008).[3]

Deciding an issue not reached by the district court is almost always inappropriate when 1) the record is not complete or underdeveloped, 2) issues of fact remain to be resolved, 3) one of the parties did not have the opportunity to present pertinent argument to the district court, and/or 4) issues remain pertaining to matters within the discretion of the district court. *Singleton*, 428 U.S. at 120-21; *McCready v. Nicholson*, 465 F.3d 1, 19-20 (D.C. Cir. 2006); *Liberty Property*, 577 F.3d at 341-42; *Summers*, 140 F.3d at 1084; *Texas Rural*, 940 F.2d at 697-98; *Hudson United*, 142 F.3d at 159; *Abril*, 145 F.3d at 185 n.4; *Backus*, 558 F.2d at 1376. As Appellants' demonstrated in their opening brief and *infra*, all four of these factors have been violated here. Given that

> the proper role of the court of appeals is not to reweigh the equities or reassess the facts but to make sure that the conclusions derived from those weighings and assessments are juridically sound and supported by the record,

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[3] [T]he Court of Appeals gave short shrift to the District Court's commendable management of this...litigation, and if the case turned on the propriety of the Circuit's decision to reach the preemption issue we would take up the claim that it exceeded its discretion.... The District Court's sensible efforts to impose order upon the issues in play and the progress of the trial deserve our respect.

Exxon Shipping, 554 U.S. at 487 n.6.

Curtiss-Wright Corp. v. Gen. Elec. Co., 446 U.S. 1, 10 (1980), it is certainly not the proper role of the court of appeals to make an *initial* assessment of the facts or an *initial* attempt at balancing equities and exercising discretion. All the more so when the record is unquestionably incomplete and the Court is asked to do all of these things aided only by fragmentary and cherry-picked evidence.

Regardless, ICANN made no attempt to meet its burden of explaining why this case presents "exceptional or otherwise particular circumstances," why failing to reach a decision now would result in "a miscarriage of justice," or why reaching those questions would not be more likely to cause injustice than would remand. *See In re Harman*, 791 F.3d at 100; *Singleton*, 428 U.S. at 121. Nor was ICANN able to show that the answers to the underlying questions are clear "beyond any doubt" in reliance on controlling precedent. *See id.* It is clear that those outstanding issues must be remanded.

II. Appellants Are Entitled to Remand and Discovery

Even if this Court were otherwise inclined to decide issues not passed upon before the Court below, it may not do so here given that Appellants never had a "fair opportunity to dispute the facts material" to those new issues, *Washburn v. Lavoie*, 437 F.3d 84, 89 (D.C. Cir. 2006), or offer the court below substantive briefing on those issues. *Texas Rural*, 940 F.2d at 697-98 (finding the lack of briefing "dispositive"). The appropriate remedy is to remand the case for further proceedings

and factual development so that the other issues may be properly decided on a full record and in a manner likely to yield the most just outcome. *Summers*, 140 F.3d at 1084.

1. ICANN's sophistry notwithstanding, the Appellants never had a meaningful chance to obtain discovery. The evidence in the record is cherry-picked by ICANN—not in response to Appellants' limited discovery requests, but in derogation of them. *See* (SA82, SA84-89[*]).

The lack of evidence, and Appellants' inability to obtain evidence, is particularly striking with regard to the attached IP addresses. In its brief to this Court, ICANN acted as though the attached IP addresses are relatively few in number and secondary to or supporting of the attached country code top level domain names. *E.g.*, (Response 2). Its briefing to the district court was no different. *E.g.*, (DE89-1 at 9). Its representations are inaccurate. (Opening 3-5, 11; SA70, SA75). In their opening brief, Appellants noted their request to obtain discovery relevant to the IP addresses and the fact that ICANN had yet to acknowledge the attachment of the IP addresses. (Opening 18). ICANN not only ignored that note, but incorrectly characterized Appellants' position. (Response 56). The record before the district

[*] Unless otherwise noted, parenthetical numerical references refer to pages of the Appendix. "Opening" references Appellants' opening brief on appeal. "Response" references ICANN's response brief.

court likewise contains references to the attached IP addresses, describing them broadly and not as adjunct to the ccTLDs. *E.g.* (DE108 at 18, 20, 22). ICANN ignores all of that.

Appellants expressly requested from ICANN "[a]ll documents...referencing, listing or describing: all [IP] addresses allocated, licensed, assigned or transferred by ICANN" to the subject states and agencies. (SA75). ICANN refused. (SA86). To date, there is *no* evidence in the record pertaining to these IP addresses and *no* discovery has been had regarding them. The record is thus obviously inadequate to support the district court's order quashing attachment of the IP addresses.

2. Regarding evidence pertinent to the attached ccTLDs, the record is not materially more complete and is certainly not adequate to support this Court's role as a court of appellate review. *See Kennedy v. Silas Mason*, 334 U.S. 249, 257 (1948) (remanding to district court for record development); *U.S. v. McCants*, 434 F.3d 557, 562 (D.C. Cir. 2006); *AAPS v. Clinton*, 997 F.2d 898, 915 (D.C. Cir. 1993); *U.S. v. Lewis*, 433 F.2d 1146, 1152 (D.C. Cir. 1970) (noting "the need for a record, developed by adversary processes, on which appellate consideration and resolution can safely proceed").

Advancing the contrary position, ICANN makes seven inaccurate assertions regarding discovery and the record below: 1) "Appellants had ample opportunity for discovery" over a three-month period; 2) "[ICANN] produced over sixteen hundred

pages of documents" in response to Appellants' subpoenas; 3) those sixteen 1,600 pages were sufficient; 4) (without substantiation or testing) the documents produced "are the only documents that were responsive" to Appellants' requests for documents (reproduced at (SA74-75)); 5) Appellants' discovery requests are irrelevant to FSIA immunity and the question of whether the attached assets are "goods, chattels, [or] credits" able to be attached under D.C. CODE §16-544; 6) discovery would impose an "unjustified burden" on ICANN, and 7) Appellants can obtain the information they need from "less burdensome" sources. (Response 54-57). These assertions are misleading at best:

Appellants had no legitimate opportunity to obtain discovery.

Appellants served two discovery requests on ICANN in late June 2014. The first was a set of two interrogatories that were not drafted by Appellants but rather appear on the form supplied by the district court to effect the writ of attachment. The second discovery request was a subpoena for the production of documents. ICANN responded to the interrogatories on July 28, 2014, with a single word: "No." (DE88 at 5). And it responded to *each* of Appellants' requests for documents with the following paragraph:

> If Plaintiffs obtain a court order permitting service of the Subpoena, ICANN will meet and confer with Plaintiffs regarding this Request to the extent Plaintiffs wish to, and are permitted to, pursue the documents sought by his [*sic*] Request.

(SA82, SA84-89). This is not exactly good faith participation in discovery.

ICANN subsequently made a mammoth production of irrelevant documents (the old "Tokyo Phonebook" production) that were not fully responsive to the requests. It selected which documents it would produce, was never subject to deposition, and apparently misunderstood Appellants' request for production. This is clear because, for example, ICANN still does not acknowledge that Appellants sought documents related to every IP address under the control of the judgment debtors. *See* (Opening 11; SA75; DE108 at 20). Its production was far from fully responsive. ICANN declined to give Appellants the opportunity to verify for themselves that ICANN had produced the universe of relevant non-privileged documents. Neither Appellants nor the courts can be required to accept ICANN's assertions. The process of civil discovery is intended to render litigation "less a game of blind man's b[l]uff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *U.S. v. Procter & Gamble*, 356 U.S. 677, 682 (1958). ICANN has undone all of that. But Appellants have no interest in playing.

Accordingly, Appellants requested that the district court grant the opportunity to take discovery and simultaneously grant "a commensurate extension to file an opposition to the Motion to Quash allowing for the discovery to be completed before the opposition to that motion is due." (31-35); (DE107 at 13). They argued that ICANN's 1,600 page production was "limited" and "does not address the most

factually relevant issues in the Motion to Quash." *Id.* at 12-13. ICANN made an earlier 240-page production together with its motion to quash that "do[es] not present a complete picture with regard to the relevant facts—particularly with respect to the nature and ownership of ccTLDs, ICANN's role in delegating and transferring such ccTLDs and the economic value of ccTLDs" or even *address* "its role in the distribution of IP addresses or the ownership and value of IP addresses." *Id.* at 14. Appellants additionally informed the district court that their "research to date demonstrates that" ICANN's representations regarding a global consensus on the property status of Internet assets are false. *Id.* They asserted their reasonable belief, together with their justification for so believing, that ICANN actually controls the operation of the root zone and, its objections notwithstanding, has *de facto* authority—which it has exercised in the past—to unilaterally transfer control of country code top level domains. *Id.* at 15. Appellants additionally identified documents that they had obtained independently that clearly demonstrated that ICANN was being liberal with the facts. *Id.* at 17-18. Further, they noted the issues raised by ICANN's motion to quash concern novel questions of law about which there exists little precedent and turn on technical facts about which the average citizen knows very little. *Id.* at 13-14. They therefore requested specific discovery from ICANN and certain other third-parties, identifying precisely what documents they needed and whom they desired to depose. *Id.* at 15-23; (Opening 17-18).

ICANN's disclosures to date have not provided that necessary information; Appellants have no other means of obtaining it.

Appellants did not have adequate time to conduct discovery.

ICANN asserts that Appellants have already had enough time to conduct discovery and squandered it. In light of the description above regarding Appellants' attempts to obtain discovery, particularly discovery that they had no access to without court order, *see* (DE107 at 18-23), ICANN's argument would fail. But, as it happens, ICANN's assertions are incorrect.

Appellants could not have been expected to seek further discovery until ICANN responded to the subpoenas for document production. That response came in late August 2014, after Appellants had moved to compel discovery. (16). ICANN agreed to produce some documents, contingent upon Appellants' agreement to withdraw their motion to compel. Appellants acquiesced to withdraw that motion on September 8. (17). The promised, but inadequate, production of approximately 1,600 pages did not come until September 19. (DE108 at 5). Just four business days later, Appellants filed their motion for discovery. (33). Plainly, Appellants were adequately diligent.

But even if Appellants could have hypothetically been more zealous in seeking and obtaining discovery against ICANN in the face of its obstructions, that alone is not grounds to deprive them of discovery and resolve a complicated,

recurring, and important question of law on an inadequate, misleading, and quite likely incorrect, pixelated factual record. *See Rep. of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2257-58 (2014).

Appellants discovery requests are relevant to D.C. CODE § 16-544, the FSIA, and TRIA.

ICANN spuriously asserts that various other issues they seek resolved now do not need to await discovery. But whether the Internet assets are attachable pursuant to D.C. CODE §16-544 as "goods, chattels, [or] credits" obviously turns on how those assets are classified under D.C. law for the purposes of that statute. It is a classic mixed question of law and fact; the factual resolution must come first. So too regarding 28 U.S.C. 1610(a)(7) and (g) and TRIA §201. Those provisions apply as to assets that are "of a foreign state" (in §1610(a)(7) and (g)) or "of th[e] terrorist party" (in TRIA §201). Whether the Internet assets are "of" the judgment creditors, as that word is understood in the context of those statutes, is likewise a mixed question of law and fact.[4] Whatever "of" means here, determining its applicability demands first better understanding these assets and their relationship with the judgment debtors.

[4] *See Heiser v. Islamic Rep. of Iran*, 735 F.3d 934, 938-41 (D.C. Cir. 2013); *but see Stansell v. Revolutionary Armed Forces of Colombia*, 771 F.3d 713, 735 (11th Cir. 2014), *and Bennett v. Islamic Rep. of Iran*, 799 F.3d 1281, 1289-90 (9th Cir. 2015).

The discovery burden imposed on ICANN is necessary and contemplated by statute.

D.C. CODE §16-552(b) guarantees the holder of a writ of attachment the right to request an oral examination of the garnishee, notwithstanding that the garnishee presumably owes no personal debt to the writ holder and might have done nothing to warrant being subject to civil discovery, other than holding the assets of a judgment debtor. *See Seaboard Fin. v. Ruppert*, 100 A.2d 454, 455 (D.C. 1953). It additionally provides that the garnishee has just ten days to respond to the interrogatories submitted together with the writ of attachment. D.C. CODE §16-552(a). Failure to respond in ten days justifies entry of judgment against the garnishee "for the whole amount of the plaintiff's judgment and costs, and execution may be had thereon." D.C. CODE §16-556(b); *see also Wrecking Corp. of Am. v. Jersey Welding Supply*, 463 A.2d 678, 680 (D.C. 1983). Those provisions are applicable here. Fed.R.Civ.P. 69; *see U.S. v. Thornton*, 672 F.2d 101, 108-09 (D.C. Cir. 1982); *NML Capital*, 134 S. Ct. at 2254. Plainly, ICANN's protests that it is a non-party and cannot be subject to civil discovery must fall on deaf ears. *Northrop v. McDonnell Douglas*, 751 F.2d 395, 407 (D.C. Cir. 1984) ("A reasonable inconvenience must be borne to further the goals of discovery.").

Further, as explained at length *supra* and in Appellants' motion for discovery, the discovery that Appellants seek can *only* be had against ICANN and certain other non-parties. *See* (DE107 at 18-23).

3. In their opening brief, Appellants demonstrated that the district court's decision as to discovery was an abuse of discretion. First, they asserted that because the district court's discovery decision was based upon a faulty conclusion of law as to the meaning of D.C. CODE §16-544, it was an abuse of discretion as a matter of law. (Opening 42-43). Second, they noted that the district court denied discovery as to the IP addresses without even acknowledging that the IP address had been attached and without offering an explanation—a clear abuse of discretion. (Opening 43). ICANN responded by accusing Appellants of a "jeremiad" and then proceeding to list all of the reasons that, in its mind, Appellants do not need or are not entitled to discovery. (Response 54-58). (*Supra*, Appellants explained why all of those assertions lack merit.)

ICANN plainly declined to acknowledge the big issue here, apparently conceding it. As to the first point, it is apparent that ICANN thinks the district court correctly understood §16-544. But it apparently concedes that if it is held to be wrong, the district court's decision is indeed an abuse of discretion. As to the second point, ICANN has nothing to say at all. The district court abused its discretion in

denying discovery as to the IP address (and by quashing the attachment of the IP addresses) necessitating remand.

4. It is apparent from the district court's decision that it reached §16-544 without affording the Appellants the discovery they requested because, in its view, it could resolve the applicability of §16-544 without establishing anything beyond some rudimentary facts. *See* (73) (given the legal conclusions, "there are no factual disputes that require further consideration."). It is likely that the district court would concede that if this Court or the D.C. Court of Appeals holds that the district court misunderstood §16-544, Appellants would then be entitled to discovery.

ICANN attempts to use the district court's opinion to cause harm that the district court never intended and likely did not foresee. It seeks to use the district court's decision not to allow discovery as to this one dispositive issue as a sword to prevent Appellants from obtaining discovery on *any* issue, even after vacatur of the decision below.

III. D.C. CODE §16-544 Describes the Attached Internet Assets

ICANN responds to Appellants' request that this Court certify questions to the D.C. Court of Appeals (Opening 44-47) by asserting 1) the statutory language "goods, chattels, and credits," D.C. CODE §16-544, unambiguously excludes the attached Internet assets and 2) *Cummings General Tire v. Volpe Constr.*, 230 A.2d 712 (D.C. 1967), and *Shpritz v. D.C.*, 393 A.2d 68 (D.C. 1978), are not just pertinent,

but controlling.[5] It views the question of whether to certify as dependent upon this Court's inclinations as to the true meaning of §16-544. But that is an overreach. This Court certifies questions to the D.C. Court of Appeals even if it is otherwise inclined to answer the certified question. The pertinent standard, rather, is whether the answer to the question is rendered clear by controlling precedent. (Opening 46). The district court held that it is not. (71). As Appellants now show, neither of ICANN's proofs to the contrary carry water:

1. ICANN asserts that the terms "goods" and "chattels" unambiguously refer to tangible personal property. (Response 15). In support, it cites to a provision of Article II of the Uniform Commercial Code, governing the sale of goods, that defines the word "goods" to refer only to movable things. D.C. CODE §28:2-105; (Response 15).[6] ICANN's position is puzzling. Why should the definition of "goods" for the purposes of Article II (the article governing the sale of "goods") of the UCC—a uniform act that includes self-contained definitions that were never intended to apply to any other law—be informative as to the meaning of D.C.

[5] ICANN additionally incorporated by reference three other arguments made elsewhere in its brief. (Response 58, 60). Such cursory references are not sufficient to raise issues for the Court's consideration. In any event, Appellants separately address those arguments in this brief.

[6] ICANN additionally cites, without discussion, cases from other jurisdictions to support its claim that "goods" are only "movable objects." (Response 15-16). Those cases too interpret UCC Article II. They are inapposite and add nothing.

attachment law, particularly when this Court has held that the term "goods and chattels" "is a term of broad and inclusive meaning" that reaches even "intangible or incorporeal interest[s]" such as licenses? *Rowe*, 137 F.2d at 250-51; (Opening 24-25).[7]

Perhaps realizing that its citation to the UCC is not worth much, ICANN additionally tries to find support in Black's Law Dictionary and certain other dictionaries published around 1960, which ICANN asserts to be "at or shortly before the time of the statute's enactment." (Response 15-16). ICANN even chides Appellants for relying on the 8th edition of Black's Law Dictionary (published 2004), rather than the 4th (published 1957). (Response 16). That is odd because the revised 4th edition defines "goods" as "a term of variable content. It may include every species of personal property or it may be given a very restricted meaning." BLACK'S LAW DICTIONARY 823 (4th ed. 1968). Further, *Rowe* cited the 3rd edition stating that "goods and chattels" "is a *general* denomination of personal property, as

[7] ICANN argues that *Rowe* is inapposite because it interprets a different Code section. (Response 19). But the pertinent language of *Rowe* interprets D.C. CODE §15-210 (1940), which provided that a "writ of fieri facias may be levied on all *goods and chattels* of the debtor...." *Rowe*, 137 F.2d at 249-50 (emphasis added). It focuses on the phrase "goods and chattels," which appears in similar form in §16-544 (and its 1940 predecessor), a similar statute both in objective and function. Its analysis is directly on point and ICANN's objections are frivolous.

distinguished from real property." 137 F.2d at 250 n.8 (emphasis added). *Rowe* continued in its quote from Black's, noting that "goods and chattels" "embraces choses in action, as well as personalty in possession." *Id.* That is materially similar to the definition of "goods and chattels" cited by Appellants.

Even assuming that ICANN has accurately stated the definition of "goods" as it appears in the 1957 edition of Black's, it reaches the result it desires by looking up the terms "goods" and "chattels" individually, rather than as part of the phrase "goods and chattels." (Response 15-16). But *Rowe* points out that the term "goods and chattels," stated together, had a specific meaning. It was almost a term of art. *See* 137 F.2d at 250. ICANN ignores that observation in assuming that "goods" and "chattels" are to be interpreted as though they were separate terms.

In any event, ICANN's instance on the use of dictionaries circa 1960 is a mistake: §16-544 was not first enacted in 1963. When it was incorporated into the 1963 D.C. Code, it was adopted unchanged from the 1961 version, where it was codified at D.C. CODE §15-303 (1961). *See* S. Rep. No. 88-743, at 122; H.R. Rep. No. 88-377, at A114. That section, in turn, derives from D.C. CODE §1088 (1902), *id.*, which read as follows:

> **On what attachment may be levied**. An attachment may be levied upon the judgment debtor's goods, chattels, and credits.

D.C. CODE §1088 (1902). As should be apparent, only the statutory heading has changed in the past 113 years. The actual statutory text appeared then just as it does today. *Compare* D.C. CODE §16-544 (2012).[8]

The 1st edition of Black's Law Dictionary (then published under a different name), dated 1891, provides an excellent source with which to understand D.C. CODE §16-544. It was published roughly ten years before §16-544 was first codified in the District, reflecting the likely meaning of the relevant terms at the time of codification. On page 543, it defines "goods and chattels" precisely as *Rowe* did:

> This phrase is a *general* denomination of personal property, as distinguished from real property; the term "chattels" having the effect of extending its scope to any objects of that nature which would not properly be included by the term "goods" alone.... The general phrase also embraces *choses in action*, as well as personalty in possession.

[8] The statutory language might not have originated in 1902. An 1888 decision by the Supreme Court of the District of Columbia reveals that attachment under D.C. law, "against the goods, chattels, and credits of the absent defendant," derived from an Act of 1715, Ch. 40, §7. *Reynolds v. Smith*, 7 Mackey 27, 30, 1888 WL 11632 at *3 (D.C. 1888); *see Hoffman Chevrolet v. Washington Cnty. Nat. Sav. Bank*, 467 A.2d 758, 762-63 (Md. 1983). *Reynolds* states that, as of 1888, the Act of 1715, as understood by subsequent Maryland decisions, was the law of D.C. 1888 WL 11632 at *3-4.

BLACK, A DICTIONARY OF LAW 543 (1891) (emphasis added).[9] It defines the term "chose in action" thusly:

> A right to personal things of which the owner has not the possession, but merely a right of action for their possession.... Personalty to which the owner has a right of possession in future, or a right of immediate possession, wrongfully withheld, is termed by the law a "chose in action."

Id. at 202. The revised fourth edition adds that a "chose in action" includes "all property in action which depends entirely on contracts express or implied." BLACK'S LAW DICTIONARY 305 (4th ed. 1968). And contemporary editions add that a "chose" is "a thing, whether tangible or *intangible*." BLACK'S LAW DICTIONARY 258 (8th ed. 2004) (emphasis added); *see also* (10th ed. 2014). Those later additions likely do not reflect a change over time in the understanding of these terms but are rather mere clarifications made necessary by changes in word usage and the legal lexicon. This is reflected by the 1st edition's definition of "incorporeal property":

> In the civil law. That which consists in legal right merely. The *same as choses in action* at common law.

[9] That definition is retained verbatim through at least the revised fourth edition. BLACK'S LAW DICTIONARY 823 (4th ed. 1968). Presumably, the 1957 edition, the one preferred by ICANN, similarly defined "goods and chattels."

BLACK, A DICTIONARY OF LAW 612 (1891) (emphasis added). It is clear, therefore, that in 1891 the term "chose in action," and thus the term "goods and chattels," included incorporeal and intangible assets.

It follows that the plain language of the term "goods, chattels, and credits," as used by §16-544, includes intangible property.

2. No decision of the District of Columbia Court of Appeals holds or indicates otherwise. In their opening brief, Appellants noted the irrelevance of *Cummings* and *Shpritz* to the instant appeal. They noted in particular that *Cummings* "turns on the contingency and uncertainty of monetary debts, rather than on their connection to service contracts," *Shpritz* held that garnishment cannot happen until the amount of a debt is established rather than subject to discretion, and, regardless, both cases are not even part of the discussion unless a court finds, after discovery, that the attached Internet assets are service contracts rather than intangible property. (Opening 39-42).

ICANN offered nothing in response. Instead, it asserts *ipse dixit* that *Cummings* and *Shpritz* "underscore[] the black-letter D.C. rule" that "rights that are inextricably bound to services contracts are not attachable." (Response 22-23, 59). ICANN's failure to respond or defend the relevance of *Cummings* and *Shpritz*, despite hanging its hat on those cases, highlights the weakness of its position.

ICANN additionally cites to a case that, relying on a 1990 treatise on wills, suggests that the phrase "goods and chattels" generally refers to tangible personal property. (Response 17); *D.C. v. Estate of Parsons*, 590 A.2d 133, 136-37 (D.C. 1991). But the phrase "goods and chattels" in the context of a will has always had a different meaning than when used in other contexts. *See* BLACK, A DICTIONARY OF LAW 543 (1891). Whatever "goods and chattels" might have meant in a will in 1990 has nothing to do with what that phrase meant in the context of garnishment in 1902, when the language appearing in §16-544 was first codified.

3. The only decision of this Court that directly informs the instant question is *Rowe v. Colpoys*. *See supra*; (Opening 24-25).

ICANN evokes *Thomas v. Network Solutions*, 176 F.3d 500 (D.C. Cir. 1999), for the proposition that a second level domain name is a "service." (Response 25-26). But *Thomas* does not concern §16-544 and its discussion of "services" is irrelevant to this litigation. The only services that *Thomas* describes are "domain name registration" and "renewal services." *Thomas*, 176 F.3d at 504-05, 510. As far as Plaintiffs know, ICANN engages in neither domain registration nor renewal. Even assuming that it provides genuine services to consumers, that provision of services does not negate that the holder of the domain name is a holder of property. If a business owner contracts with a surveillance and security company to watch and safeguard his business, that fact does not convert his property interests in the

business or in the building that houses his business into a services contract. The two (the property interest and the services contract) are obviously separable. *Thomas* did not hold otherwise.[10]

4. Finally, ICANN claims that top level domain names are not "goods, chattels, [or] credits" because they are not "property." Rather, says ICANN, they are akin to a zip code, having no clear identity given that the second-level domain names that they support "are constantly leaving and joining" the top level domain. (Response 11-13). So too an apartment building. The tenants of an apartment building constantly change. But to argue, therefore, that the apartment building is not property would be absurd. Whether country-code top level domains (which *have* been bought and sold, ICANN's displeasure notwithstanding[11]) are more akin to zip

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[10] Seeking support for its misapplication of *Thomas*, ICANN misrepresents *Lockheed Martin v. Network Solutions*, 194 F.3d 980 (9th Cir.1999). (Response 26). *Lockheed* indicates that the operation of the Domain Name System constitutes a provision of services for the purposes of contributory trademark infringement analysis. *Lockheed*, 194 F.3d at 984. *Lockheed* does not suggest that the owner of the domain name that paid for those services does not own the domain name as property. The Ninth Circuit subsequently held otherwise. *See Kremen v. Cohen*, 337 F.3d 1024, 1030 (9th Cir.2003); *Office Depot, Inc. v. Zuccarini*, 596 F.3d 696, 701-702 (9th Cir. 2010) (holding that judgment debtor's domain name may be transferred to receiver to aid in execution of judgment).

[11] ICANN points out some of the instances involving the sale of ccTLDs involved the transfer of a corporation, not a ccTLD. (Response 14). But it appears that, in each instance, the corporation was a sole-purpose entity that did nothing other than own and operate the ccTLD. *See* (SA54, SA65-66). On ICANN's theory,

codes (which cannot be bought or sold) or apartment buildings will be resolved following discovery.

But whether the attached assets are more similar to a zip code, an apartment building, or a phone book, it is clear that "like other forms of property, domain names are valued, bought and sold, often for millions of dollars[.]" *Kremen*, 337 F.3d at 1030. Indeed, the domain name in *Kremen*, sex.com, was worth *$40 million*. *Id.* at 1027.

IV. ICANN's Claim that Appellants Waived or Forfeited Any Issue is Frivolous

1. It is indisputable that Appellants never intended to waive any argument before the district court. In their discovery motion, they asked that court to grant them an "extension [of time] to file an opposition to the Motion to Quash allowing for...discovery to be completed before the opposition to that motion is due." (DE107 at 13). Appellants attached that motion as an exhibit to their preliminary response to

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those sole-purpose corporations were empty shells, owning nothing of value. The only substantial asset they had, the ccTLD, belongs to no one. That revelation, no doubt, would leave the purchasers of those corporations quite surprised.

Moreover, ICANN's implicit concession that a corporation may be attached under D.C. law is significant. "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law." *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819) (Marshall, *C.J.*). But ICANN argues that intangible assets are not attachable.

ICANN's motion to quash, noting that they "need to take discovery in order to present the complete evidentiary picture" before responding the motion to quash. (59-60). They concluded:

> Plaintiffs respectfully request that the Court grant the pending Motion for Discovery, which *inter alia*, would permit Plaintiffs to file a complete opposition to ICANN's Motion to Quash on the merits and with the benefit of fulsome discovery on the factual issues underlying the novel legal questions raised by these proceedings.

(61). Obviously, the Appellants had much to say on the merits, but requested the opportunity to complete the record before having to respond.

The district court surprised them by ruling on the merits, despite never finding facts or even establishing its own jurisdiction (*see infra*). They had believed in good faith that the district court would either afford them the opportunity to conduct discovery or, upon rejecting that request, would afford them an opportunity to respond on the merits. Instead, the district court reached a question that, it believed (erroneously), could be resolved with a rudimentary factual record and without debate. That decision, and only that decision, was ripe for appeal. On appeal, Appellants did not raise all of the other issues because they cannot yet be addressed.

ICANN's cases regarding waiver and forfeiture are all inapposite as none of them address these unusual facts. It is unsurprising that ICANN found no case on point. The rule that it advances—finding forfeiture on these facts—is rather absurd.

Moreover, ICANN misstates the law regarding waiver on appeal. When an appellee raises a new issue in its brief, the appellant is free to fully respond in its reply brief. *U.S. v. Van Smith*, 530 F.3d 967, 970 n.2 (D.C. Cir. 2008). Thus, while Appellants do not believe these new matters are or should be before the Court, if the Court nevertheless addresses them, any arguments that Appellants make in reply are before the Court and not waived. In that instance, this Court would consider legal questions *de novo* but, given a terribly incomplete record supported by no factual findings, cannot resolve any factual matters not passed upon by the court below.

Perhaps ICANN never believed this Court would actually rule on waiver and forfeiture, but was rather hoping that ICANN would be able to argue in the future, in reliance on the mandate rule, that Appellants will be foreclosed from defending certain issues before the *district court*. Appellants thus respectfully request a clear statement from the Court that Appellants have waived or forfeited nothing and are entitled to press every issue not finally decided by this Court.

V. This Court's Jurisdiction is Not in Question

A. ICANN's Suggestion that Jurisdiction May be Lacking in *Ben Haim II*, *Rubin*, *Wyatt*, or *Calderon* is Erroneous

ICANN rightly concedes that 28 U.S.C. 1610(g) permits attachment of sovereign assets, and thus creates jurisdiction to do so, when the judgment creditor seeks to enforce any judgment entered under 28 U.S.C. 1605A or properly converted

into one. (Response 48-50); Pub.L. No. 110-181, §1083(c)(2)(A). And it implicitly acknowledges that four of the seven judgments were indeed entered under §1605A. (Response 50). It nevertheless asserts that this Court and the district court lacked subject matter jurisdiction. (Response 1, 39-40, 58).

The four judgments that are properly under §1605A are *Ben Haim II*, *Rubin*, *Wyatt*, and *Calderon*. The Court below had documentary evidence of that fact regarding the first three of those judgments as *it* had entered or converted the judgments, as reflected in the district court's docket. (102, 139, 169); *see also Rubin v. Islamic Rep. of Iran*, No. 01-cv-1655, docket entry 81 at 2 n.2. The *Calderon* judgment appears on the docket of the court below. (212). While the judgment does not reference §1605A, it refers to "the order issued on July 16, 2010 (Docket No. 37)[.]" The first sentence of the July 2010 order makes clear that *Calderon* is a §1605A case. *Calderon-Cardona v. Democratic People's Rep. of Korea*, No. 08-cv-1367, docket entries 37 at 1; 40 at 1.

ICANN argues that §1610(g) cannot apply because Appellants failed to submit evidence to the district court demonstrating that it does apply. (Response 49). Of course, they had no reason to do so: The proceedings had not yet reached the point where it was necessary to argue the FSIA. In any event, the claim is obviously false regarding *Ben Haim II*, *Rubin*, and *Wyatt*, and irrelevant and misleading in *Calderon*.

ICANN additionally argues that enforcement here would impair third-party interests. (Response 48-49). But §1610(g)(3), which governs such situations, does not exclude from its jurisdiction enforcement efforts that impair third-party interests. Rather, it authorizes the court to *use its jurisdiction* to protect those interests.

There is no good faith argument that jurisdiction is lacking in *Ben Haim II*, *Rubin*, *Wyatt*, or *Calderon*. ICANN's suggestion that there is no jurisdiction over this entire *proceeding* is erroneous.

B. TRIA §201 is Available in the Remaining Cases

ICANN's only basis for arguing that TRIA §201 is not available in *Weinstein*, *Ben Haim I*, and *Stern* is that the attached Internet assets are not "blocked assets." (Response 51-52). But TRIA §201(d)(2) defines "blocked asset" to mean any asset seized or frozen pursuant to executive action or other regulation made pursuant to specified statutes. An OFAC blocking regulation, which is promulgated pursuant to those statutory authorities, provides:

> No property subject to the jurisdiction of the United States or which is in the possession of or control of persons subject to the jurisdiction of the United States in which on or after the effective date Iran has any interest of any nature whatsoever may be transferred, paid, exported, withdrawn or otherwise dealt in except as authorized.

31 C.F.R. 535.201. For the purposes of that regulation, "property" includes "contracts of any nature whatsoever, and any other property...tangible or intangible,

or interest or interests therein, present, future or contingent." 31 C.F.R. 535.311. If the Internet assets at issue are theoretically attachable under D.C. CODE §16-544, there is no colorable argument that they are not also within TRIA §201.

C. TRIA §201 is Also Available in *Rubin*, *Wyatt*, and *Calderon*

ICANN offers no reason to hold TRIA inapplicable to *Rubin* or *Wyatt*. There is none. Regarding *Calderon*, it makes two arguments: *First*, it suggests that no blocking regulation reaches the property of the government of North Korea. (Response 52-53). But 31 C.F.R. 510.201 does. *See also* Executive Order 13466 (blocking "all property and interests in property of North Korea"). *Second*, it argues TRIA does not apply because North Korea, which was a classified state sponsor of terrorism at the time the *Calderon* action was filed, was no longer so classified at the time the *Calderon* judgment was entered. (Response 53-54). But that is not the operative question. TRIA applies regarding "a judgment against a terrorist party on a claim based upon an act of terrorism." §201(a). The statute does not specify when the judgment debtor must be classified as a "terrorist party," *see* §201(d)(4), and the assumption that the relevant time is entry of judgment is unfounded. Rather, it is more likely that Congress, which wrote a statute intended to punish terrorist parties and compensate victims of terrorism, wanted the assets of those parties to be available as broadly as possible. A "terrorist party," so designated at the time the underlying action is filed, thus fits within TRIA. Moreover, TRIA is also applicable

regarding "a judgment...for which a terrorist party is not immune under section 1605A or 1605(a)(7)." §201(a). That phrase certainly describes North Korea here.

D. 28 U.S.C. 1610(a)(7) is Available in Every Case

ICANN offers a litany of reasons to question the propriety of applying 28 U.S.C. 1610(a)(7) here. (Response 45-48). Alas, a full response is not possible prior to discovery, other than to say that Appellants dispute (and disputed below) much of what ICANN wrote in its brief. The district court made no pertinent factual findings. Nor should this Court.

Briefly, Appellants note: *First*, this Court can take notice that purchasing a .IR domain name in the U.S. is very easy; that it is possible need not be proven. *See*, *e.g.*, Only Domains, .ir Domain Names, https://www.onlydomains.com/domains/Iran/.ir. *Second*, there are a great many websites registered with .IR that seek to sell things in the U.S. and are thus using the .IR ccTLD to facilitate sales in the U.S. To verify this, type the following into a Google search bar: ["United States" buy site:.ir]. On October 22, Appellants get 378,000 hits; each has a .IR domain name.

VI. ICANN's Parade of Horribles is Gratuitous

ICANN argues that permitting Appellants to attach the ccTLDs will undermine the Internet at large and harm the interests of the citizens of Iran, North Korea, and Syria. Not so. Appellants are fully aware that the district court can—and

should—protect the interests of third parties. Appellants welcome the opportunity to work together with the district court and ICANN to ensure a smooth transition that harms no one other than the judgment debtors.

In particular, *Appellants have no intent or desire to manage or operate the ccTLDs themselves*. *Contra* (Response 24-25). They intend to license the operation of the ccTLDs to a third-party approved by the district court and, possibly, ICANN. Their objectives are to recover for the terrible injuries they suffered many years ago and to ensure that the judgment debtors pay for their awful crimes, not to destroy the Internet or, as ICANN might have it, cause the sky to fall.[12]

Additionally, ICANN's slippery slope argument and references to the possible future attachment of generic top level domains, such as .COM, lack merit. Whether attachment of the ccTLDs at issue here might create problems of logistics or policy in a future case will be resolved in that future hypothetical case. Even ICANN seems to recognize that granting the attachment here will not cause the Internet to fail. Its invitation to ponder imponderables and endless "what ifs" should be taken exactly as it was intended: a distraction.

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[12] ICANN suggests that Iran, which in 2009 shut the Internet down to prevent its citizens from organizing, *Iran Blocks Internet on Eve of Rallies*, CBS NEWS, Dec. 6, 2009, http://www.cbsnews.com/news/iran-blocks-internet-on-eve-of-rallies, will do a better job of protecting the interests of the Iranian people than will Appellants' contractor. That seems unlikely.

VII. TLDs are Attachable Property

ICANN argues that ccTLDs are either not property or else not attachable. This issue was not fully briefed below, has not been the subject of discovery below, has not been the subject of fact finding below, and is not properly before this Court. Appellants' full response must await discovery.

Briefly, Appellants note: *First*, ICANN's suggestion that ccTLDs are not owned by anyone because computer scientists and others declared it to be so is perplexing. (Response 12). If no one owns the assets, what gives ICANN (or the Department of Commerce) its authority over them? Does ICANN really assert that it (perhaps together with the Department of Commerce) is the sole arbiter of the Internet? If so, does anything other than ICANN's commitment to the public prevent ICANN from randomly taking away Canada's .CA ccTLD and giving it to Rihanna or Jimmy Buffet? If ICANN did so, would Canada have a cause of action for conversion or the like? ICANN's position is that Canada has no property interest in the .CA whatsoever. If so, there should be nothing preventing ICANN (perhaps together with Commerce) from doing with the .CA what it wishes. That, of course, is implausible. It would undoubtedly strike Ottawa with surprise. For its part, ICANN also claims that it does not own the property. But, to paraphrase this Court, "if [Canada and ICANN] do[] not own that property, then someone else must."

Heiser, 735 F.3d at 939. It makes no intuitive sense to say that it belongs to *no one*. ICANN has yet to identify the mystery owner.

Further, the suggestion that ccTLDs are owned by no one is contrary to what Appellants have heard from others in the field while preparing for this case. *See*, *e.g.*, (50-56). Appellants should have the opportunity to develop the record and allow this Court the ability to decide for itself. Similarly, ICANN's position is contrary to the interests of many ccTLD holders (*i.e.* owners) around the globe. This Court should be reluctant to define their property interests without first appointing an *amicus* to represent them.

Second, in arguing that ccTLDs are service contracts, it appears that ICANN may be confusing ccTLDs with ccTLD *managers*. *See* (Response 24). A ccTLD manager is presumably encumbered with contractual obligations, both to the ccTLD and to the second level domains that are registered with the ccTLD. But the ccTLD is an intangible thing accompanied by exclusive rights; it is not a contract. *See Sprinkler Warehouse v. Systematic Rain*, 859 N.W.2d 527, 530 (Minn. Ct. App. 2015). Appellees seek ownership of that intangible thing and those rights. As noted *supra*, they do not seek to personally manage the ccTLDs.

Third, ICANN asserts that ccTLDs are materially different from second level domains such that evidence that second level domains are not attachable means, *a fortiori*, ccTLDs are not attachable. *E.g.*, (Response 29). ICANN is correct that

ccTLDs are materially different from second level domains, but in precisely the opposite manner than the one asserted by ICANN. A ccTLD manager provides many services to its second level domains; ICANN provides little or nothing to the ccTLDs. *See also* (Opening 33-36) (offering other distinctions left unrefuted by ICANN). That, after all, is the reason ICANN is comfortable comparing a ccTLD to a zip code. *See* (Response 13-14). Thus, a decision indicating that a second level domain might not be attachable in light of the services it receives from a ccTLD manager says nothing about whether the ccTLD is attachable.

For the same reason, ICANN's assertion elsewhere that the ownership of a ccTLD is so tied up with service contracts that it cannot be thought of as a separate entity should be taken with a grain of salt. *E.g.*, (Response 24-26). So too regarding its attempt to compare a ccTLD to the unwanted services of an over-zealous lawyer looking for work. *See* (Response 22). A ccTLD is not dependent upon services provided by ICANN.

Fourth, ICANN claims that "numerous judicial decisions have concluded that even second-level domains are not attachable property." (Response 27). But after performing what must have been an exhaustive search, ICANN was able to turn up just seven decisions, six of them being from Virginia, five of which were by trial courts. *See* (Response 27-28). The one decision that was not from Virginia, *Wornow v. Register.Com, Inc.*, 778 N.Y.S.2d 25 (1st Dep't 2004), is so remarkably short on

analysis its precedential value is highly doubtful. The only appellate decision that ICANN could find that offers any substantial analysis is *Network Solutions v. Umbro Int'l*, 529 S.E.2d 80 (Va. 2000). But contrary to ICANN's repetitive assertions in its brief, *Umbro* did not hold that domain names are mere contractual rights. *CRS Recovery v. Laxton*, 600 F.3d 1138, 1142-43 (9th Cir. 2010).

In any event, *Umbro* is an outlier, *id.* at 1142, that is both inapposite and unpersuasive. *See* (Opening 30-38).

Fifth, ICANN incorrectly asserts that 1) D.C. construes its garnishment statutes strictly in the same manner that Virginia does, and, 2) as a result, *Umbro* is indistinguishable. (Response 30). While *pre-judgment* garnishment statutes (which impose a remarkable remedy and burden) are generally strictly construed in D.C., *Rieffer v. Home Indem.*, 61 A.2d 26, 26-27 (D.C. 1948), no case extends that rule to post-judgment attachment, which does not pose the same concerns. ICANN's attempt to extend *Rieffer's* strict construction rule to this case is erroneous.[13] Regardless, ICANN missed the point. What distinguishes *Umbro* is not simply the strict construction requirement. It is that requirement *coupled* with the unusual language in the Virginia statute that inspired the *Umbro* decision. (Opening 30-31).

[13] This Court applied *Rieffer* in a very different context, but also one that warrants strict construction: the protection of third-party interests. *Heiser*, 735 F.3d at 939. That concern is likewise not at issue here.

Sixth, ICANN asserts that it lacks the *contractual* right to assign or transfer the ccTLDs here at issue. (Response 33). Appellants doubt that strongly and expect to be able to disprove it after discovery. *See, e.g.*, Dep't of Commerce, IANA Functions and Related Root Zone Management Transition [Q&A] at 2, http://www.ntia.doc.gov/files/ntia/publications/qa_-_iana-for_web_eop.pdf ("[Commerce's] role is largely symbolic. [Commerce] has no operational role and does not initiate changes to the authoritative root zone file [or assign] protocol numbers[.]"); (DE107 at 18-19). Moreover, as a matter of D.C. attachment law, ICANN's unilateral right to transfer *vel non* is irrelevant. *Washington Loan & Trust Co. v. Susquehanna Coal Co.*, 26 App. D.C. 149, 154 (D.C. Cir. 1905) (the necessity of two parties to effect a transfer is not "magic" that puts the property "beyond the reach of creditors and the process of the courts") (interpreting D.C. CODE §1089 (1902), which was immediately adjacent and complementary to the section at issue in this litigation, D.C. CODE §1088 (1902)).

Regardless, even if ICANN were correct and even if its contractual inability to transfer were relevant, that would not mean that ICANN lacks the *de facto* ability to force the transfer.

Seventh, even if ccTLDs cannot be owned in the traditional sense, that does not mean that they are not the subject of property interests. Iran, North Korea, and Syria have a property interest in their ccTLDs. That interest in property, however it

may ultimately be defined, is attachable under D.C. law and it is what Appellants seek.

CONCLUSION

For the reasons set forth herein and in Appellants' opening brief, the order of the court below should be vacated and this case remanded with instructions to conduct discovery.

Dates: Baltimore, Maryland
October 27, 2015

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 32(a)(7)

Pursuant to Rule 32(a)(7) and Circuit Rule 32(a)(1) of the Rules of this Court, I certify that this brief contains 9,363 words. This word count was made by use of the word count feature of Microsoft Word, which is the word processor program used to prepare this brief. This word count includes the whole brief from the jurisdictional statement through the conclusion, including footnotes.

Dated: Baltimore, Maryland
October 27, 2015

/s/ Meir Katz
Meir Katz