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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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. 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, §201. It is codified as a note to 28 U.S.C. 1610.
UCC	Uniform Commercial Code.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

ICANN seeks rulings on many issues that were not fully briefed, not subjected to discovery, and not reached below. It seeks initial review from this appellate Court and a precedential ruling founded on an incomplete record. Remarkably, it asserts that Appellants have *waived* these same issues by not raising them first.

ICANN desires quick merits rulings despite that reaching the merits now is essentially impossible. It remarkably asserts (without support from *any* court) that domain names are not property. If this Court so holds, ICANN and/or the Commerce Department would have sole control over the Internet. No domain, registry, or domain name registrar will have any property interest at all. With the U.S. government talking about turning over its interests in the Internet to ICANN,[1] ICANN stands to gain 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.

ICANN's posturing notwithstanding, just three questions are before this Court now: 1) whether a series of intangible Internet assets fit within a D.C. garnishment statute, 2) who should decide that question (this Court or the D.C. Court of Appeals),

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

and 3) whether the record suffices to permit resolution of that question. Everything else is a distraction.

SUMMARY OF ARGUMENT

1. The new issues raised by ICANN in its response brief are not ripe. The court below neither decided those issues nor found facts regarding them. Not being a trial court, this Court cannot determine facts and is not well-equipped to do so. Further, even if it were willing, it cannot do so here since the record is incomplete and Appellants were unable to present argument or develop evidence below.

2. ICANN's suggestion that Appellants waived or forfeited issues is frivolous. Appellants desired to develop the record and respond on the merits below, but were deprived of an opportunity to do so because the court below erroneously reached a specific legal question without the benefit of a developed factual record. If the district court's legal conclusions are rejected, Appellants are entitled to discovery 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 wrongly asserts that *Rowe* is inapposite because it predates §16-544. But the language in §16-544 first appeared in the D.C. Code in 1902 as D.C. CODE §1088 (1902). Sections 16-544 and 1088 are materially identical, including their use of the phrase "goods, chattels, and credits."

Accordingly, *Rowe* did not predate the statute here at issue and interpreted language indistinguishable from that of §16-544.

4. This Court's jurisdiction is unassailable. 28 U.S.C. 1610(g) permits attachment for each judgment entered under 28 U.S.C. 1605A. TRIA §201 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 refuted by the text of several regulations.

ARGUMENT

I. Questions Not Decided Below Should Not be Considered

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)); *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 10 (1980) (court of appeals should not reweigh equities or reassess facts).[2] While the Court may, "[i]n appropriate circumstances," review

[2] This is unsurprising. 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

the record and render a decision without affording the district court the opportunity to opine first, its "normal rule" is to remand, *Bowie*, 642 F.3d at 1131-32 (internal quotation marks omitted), departing from that rule only in "exceptional... circumstances" and adhering to it whenever doing so would "not involve a miscarriage of justice." *In re Harman*, 791 F.3d 90 at 100; *see Singleton*, 428 U.S. at 120 ("[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." (some alterations in original)).

While the decision 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. Where doubt exists and "injustice [i]s more likely to be caused than avoided by

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absence of "full[] brief[ing] by the parties"); *Daingerfield Island 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*, 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*, 667 F.3d 1270, 1281-82 (Fed. Cir. 2012).

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 incomplete or underdeveloped, 2) issues of fact remain, 3) a party lacked the opportunity to present pertinent argument, and/or 4) the district court did not resolve all issues dedicated to its discretion. *Singleton*, 428 U.S. at 120-21; *McCready v. Nicholson*, 465 F.3d 1, 19-20 (D.C. Cir. 2006); *Liberty Prop. Trust*, 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. All four of these factors have been violated here.

ICANN did not explain why this case presents "exceptional...circumstances," why failing to reach a decision now would result in "a miscarriage of justice," or why reaching its questions would not be more likely to cause injustice than remand. *See In re Harman*, 791 F.3d at 100; *Singleton*, 428 U.S. at 121. Nor did ICANN show that answers to the underlying questions are clear "beyond any doubt" in

[3] [T]he Court of Appeals gave short shrift to the District Court's commendable management of this...litigation.... 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.

reliance on controlling precedent. *See id.* It is clear that remand and further development before the district court are necessary.

II. Appellants Are Entitled to Remand and Discovery

Even if this Court were inclined to decide issues not passed upon below, it may not do so here given that Appellants lacked 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 substantive briefing below. *Texas Rural*, 940 F.2d at 697-98 (finding the lack of briefing "dispositive"). The appropriate remedy is remand for further factual development so that the issues may be decided on a full record and in a manner likely to yield a just outcome. *Summers*, 140 F.3d at 1084.

1. ICANN's sophistry notwithstanding, Appellants lacked a meaningful opportunity for discovery. The evidence in the record was 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, and before the court below, ICANN inaccurately represented that the attached IP addresses are

[*] 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.

relatively few in number and secondary to the attached country code top level domain names. *E.g.*, (Response 2); (Opening 3-5, 11, 18; SA70, SA75); (DE89-1 at 9). *But see* (DE108 at 18, 20, 22). Appellants expressly noted that ICANN did not acknowledge Appellants' attachment of the IP addresses. (Opening 18). ICANN did not change course and instead incorrectly characterized Appellants' position. (Response 56).

Appellants 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, the record contains *no* evidence regarding these IP addresses and *no* discovery has occurred regarding them. The record is thus obviously inadequate to support the district court's order quashing attachment of the IP addresses.

2. The record evidence pertaining to the attached ccTLDs is inadequate to support this Court's appellate role. *See Kennedy v. Silas Mason*, 334 U.S. 249, 257 (1948) (remanding 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").

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 1,600 pages of documents in response to Appellants' subpoenas; 3) those 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 information from "less burdensome" sources. (Response 54-57). These assertions are misleading at best:

Appellants lacked an opportunity for discovery.

Appellants served two discovery requests on ICANN in June 2014. The first, two interrogatories, was not drafted by Appellants but was rather a boilerplate form supplied by the district court. The second was a document subpoena. ICANN responded to the interrogatories on July 28 with a single word: "No." (DE88 at 5). It responded to *each* of Appellants' requests for documents with the following dissembling 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).

ICANN subsequently produced many irrelevant documents that were not fully responsive to the requests. It selected the documents it produced, was never subject to deposition, and apparently misunderstood Appellants' request. 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). ICANN's assertion that its production was complete cannot be accepted at face value. Civil discovery renders litigation "less a game of blind man's buff 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).

Appellants asked the district court to allow discovery, together with a corresponding extension of Appellants' time to oppose ICANN's motion to quash. (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 [ICANN's motion]." *Id.* at 12-13. Appellants explained that ICANN's earlier 240-page production "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 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 explained that ICANN *actually* controls the operation of the root zone and has *de facto* authority—which it has exercised in the past—to unilaterally transfer control of country code top level domains. *Id.* at 15. They identified documents, which they had obtained independently, that demonstrate ICANN's looseness with facts. *Id.* at 17-18. They noted that issues raised by ICANN concern novel legal questions turning on obscure technical facts about which there exists little precedent. *Id.* at 13-14. They therefore requested specific discovery from ICANN and third-parties, identifying precisely what documents they needed and whom they desired to depose. *Id.* at 15-23; (Opening 17-18). ICANN's disclosures have not provided that necessary information; Appellants have no other means of obtaining it.

Appellants lacked adequate time for discovery.

ICANN incorrectly asserts that Appellants already had enough time to conduct discovery. Appellants attempted to obtain discovery, but ICANN refused to participate in good faith and the district court did not allow further discovery. *See* (DE107 at 18-23).

Appellants could not have reasonably sought further discovery until ICANN responded to the subpoenas for document production. That response came in late August 2014, only after Appellants had moved to compel discovery. ICANN agreed to produce some documents, contingent upon Appellants' withdrawing their motion to compel. (16). ICANN's inadequate 1,600-page production did not come until September 19. (DE108 at 5). Just four business days later, Appellants filed their motion for discovery. (33). Plainly, Appellants were diligent.

Even if Appellants could have been more zealous in pursuing discovery against ICANN, that alone is not grounds to bar discovery and resolve complicated, recurring, and important questions of law on an inadequate and quite likely incorrect factual record. *See Rep. of Argentina v. NML Capital*, 134 S. Ct. 2250, 2257-58 (2014).

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

ICANN 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 they are classified under D.C. law for purposes of that statute. It is a classic mixed question of law and fact; 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 "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 that must await discovery.[4]

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 depose the garnishee, notwithstanding that the garnishee presumably owes no debt to the writ holder. *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 accompanying the writ of attachment. D.C. CODE §16-552(a). Failure to timely respond 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. Rule 69; *see U.S. v. Thornton*, 672 F.2d 101, 108-09 (D.C. Cir. 1982); *NML Capital*, 134 S. Ct. at 2254. ICANN's protests that it is a non-party and cannot be subject to civil

[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).

discovery must be rejected. *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, the discovery that Appellants seek can *only* be had against ICANN and other non-parties. *See* (DE107 at 18-23).

3. Appellants' opening brief demonstrated that the district court's decision on discovery was an abuse of discretion because it: 1) was based upon a faulty legal conclusion about D.C. CODE §16-544 (Opening 42-43) and 2) denied discovery on the IP addresses without acknowledging that the IP address had been attached. (Opening 43). ICANN's principal response was to accuse Appellants of a "jeremiad." (Response 54-58).

ICANN ignored, and thus conceded, the bigger issue. On the first point, ICANN apparently concedes that if the district court's interpretation of §16-544 is wrong, then its discovery holding is indeed an abuse of discretion. On the second point, ICANN said nothing at all. The district court abused its discretion in denying discovery about (and by quashing the attachment of) the IP addresses, necessitating remand.

4. The district court clearly believed discovery unnecessary as it thought it could resolve the applicability of §16-544 on the rudimentary facts available. *See* (73) ("[T]here are no factual disputes that require further consideration."). Likely,

the district court would agree that if this Court finds that the district court misunderstood §16-544, Appellants would be entitled to discovery.

ICANN invokes the district court's opinion to cause harm the district court never intended and likely did not foresee, using the district court's decision disallowing discovery on this issue as a sword to prevent discovery on *any* issue, even after vacatur of the decision below.

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

ICANN views the questions regarding certification, *see* (Opening 44-47), as dependent upon this Court's inclinations as to the true meaning of §16-544. But this Court certifies questions to the D.C. Court of Appeals even if it is otherwise inclined to answer the certified question. The standard, rather, is whether controlling precedent clearly resolves the underlying issues. (Opening 46). The district court held that it does not. (71).

Regarding §16-544, ICANN asserts that 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 controlling.[5] Neither is correct.

1. ICANN asserts that "goods" and "chattels" unambiguously mean tangible personal property. (Response 15). It cites UCC Article II, governing sales of goods, defining "goods" as referring 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 of the UCC—an act that includes self-contained definitions never intended to apply to any other law—be informative as to the meaning of D.C. 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]

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[5] ICANN invoked by reference three other arguments made elsewhere in its brief. (Response 58, 60). Cursory references are not adequate to raise arguments. Regardless, Appellants separately address those arguments.

[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 also interpret UCC Article II. They add nothing.

[7] ICANN argues that *Rowe* is inapposite because it interprets a different Code section. (Response 19). 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

Perhaps realizing the failings of its UCC citations, ICANN quotes Black's Law Dictionary and other dictionaries published around 1960, which ICANN asserts to be "at or shortly before the time of the statute's enactment." (Response 15-16). But the revised 4th edition of Black's, published shortly thereafter, 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). *Rowe* cited the 3rd edition stating that "goods and chattels" "is a *general* denomination of personal property, as distinguished from real property," "embrace[ing] choses in action, as well as personalty in possession." 137 F.2d at 250 n.8 (emphasis added). *Id.* That definition is materially similar to the one cited by Appellants. (Opening 24).

Even assuming ICANN has accurately stated the 1957 edition of Black's definition of "goods," ICANN reaches its desired result by looking up "goods" and "chattels" individually, rather than as part of the phrase "goods and chattels." (Response 15-16). *Rowe* points out that the term "goods and chattels," stated together, had a specific meaning, like a term of art. *See* 137 F.2d at 250.

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its 1940 predecessor), a similar statute both in objective and function. *Rowe* is directly on point.

Regardless, ICANN's insistence on the use of dictionaries circa 1960 is a mistake: §16-544 was not first enacted in 1963. When incorporated into the 1963 D.C. Code, it was adopted unchanged from the 1961 version, 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, derived from D.C. CODE §1088 (1902), *id.*, which read:

> **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). Only the statutory heading has changed in the past 113 years. The statutory text appeared then just as it does today. *Compare* D.C. CODE §16-544 (2012).

The 1st edition of Black's, dated 1891, provides an excellent source to illuminate D.C. CODE §16-544. It was published roughly ten years before §16-544 was first codified in the District, reflecting the likely contemporaneous meaning of the terms. 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.

BLACK, A DICTIONARY OF LAW 543 (1891) (emphasis added).[8] It defines the term "chose in action":

> 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). 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. 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.

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.

[8] That definition is retained verbatim through at least the revised fourth edition. BLACK'S LAW DICTIONARY 823 (4th ed. 1968).

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

2. No decision of the District of Columbia Court of Appeals holds otherwise. In their opening brief, Appellants distinguished *Cummings* and *Shpritz* and explained their irrelevance to this appeal. (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 its dependence on those cases, highlights the weakness of its position.

ICANN additionally cites to *D.C. v. Estate of Parsons*, 590 A.2d 133, 136-37 (D.C. 1991), a case relying on a 1990 treatise on wills, to suggest that "goods and chattels" refers to tangible personal property. (Response 17). But the phrase "goods and chattels" in the context of a will does not necessarily have the same meaning as when used in other contexts. *See* BLACK, A DICTIONARY OF LAW 543 (1891). *Parsons* does not inform the meaning of that term when codified in 1902 in the predecessor to §16-544.

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 limited to "domain name registration" and "renewal services," which are irrelevant to this litigation. *See Thomas*, 176 F.3d at 504-05, 510.

Further, even if ICANN provided genuine "services" (as used by *Thomas*) to consumers, that would 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 separate. *Thomas* did not hold otherwise.[9]

[9] 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 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 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).

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 like 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, in fact, *have* been bought and sold[10]) are more like zip codes or apartment buildings will be resolved following discovery.

In any event, 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.

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[10] ICANN points out some of the instances where ccTLDs were sold involved transfers of corporations, not ccTLDs. (Response 14). But it appears that, in each instance, the corporation was a single-purpose entity that did nothing other than own and operate the ccTLD. *See* (SA54, SA65-66). On ICANN's theory, those single-purpose corporations were empty shells, owning nothing of value. The only substantial asset they had, the ccTLD, belongs to no one. That revelation would leave the purchasers of those corporations surprised.

Moreover, ICANN's implicit concession that a corporation may be attached under D.C. law is significant, given ICANN's argument that intangible assets are not attachable, since 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.*).

IV. Appellants Did Not Waive or Forfeit Any Issue

1. Appellants never intended to waive any argument before the district court. In their discovery motion, they requested time after the conclusion of discovery to respond to ICANN's motion to quash, suggesting that "discovery [should] be completed before the opposition to that motion is due." (DE107 at 13). Appellants attached their motion as an exhibit to their preliminary response to ICANN's motion to quash, noting that they "need to take discovery in order to present the complete evidentiary picture" before responding to the motion to quash. (59-61). Obviously, Appellants had much to say on the merits, but requested the opportunity to complete the record before doing so.

The district court surprised them by ruling on the merits, despite never finding facts or even establishing its own jurisdiction (*see infra*). They had expected in good faith that the district court would either afford an opportunity for discovery or, upon rejecting that request, to respond on the merits. Instead, the district court reached a question that, it believed (erroneously), could be resolved with a rudimentary factual record. That decision, and only that decision, was ripe for appeal.[11]

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

[11] ICANN's cases regarding waiver and forfeiture are all inapposite as none of them address these facts.

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 Appellants make in reply are before the Court and not waived.[12]

V. This Court's Jurisdiction is Not in Question

A. Jurisdiction is Certain in *Ben Haim II*, *Rubin*, *Wyatt*, and *Calderon*

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). It implicitly acknowledges that four of the seven judgments—*Ben Haim II*, *Rubin*, *Wyatt*, and *Calderon*—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).

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

[12] In that instance, this Court would consider legal questions *de novo* but cannot resolve factual matters not passed on below and not established in the record.

point where it was necessary to argue the FSIA. Moreover, the court below already had documentary evidence such that submitting any would have been redundant.[13]

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.

B. TRIA §201 is Available in the Remaining Cases

ICANN's argues that TRIA §201 is not available in *Weinstein*, *Ben Haim I*, and *Stern* because 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.

[13] (102, 139, 169, 212); *Rubin v. Islamic Rep. of Iran*, No. 01-cv-1655, docket entry 81 at 2 n.2; *Calderon-Cardona v. Democratic People's Rep. of Korea*, No. 08-cv-1367, docket entries 37 at 1; 40 at 1.

31 C.F.R. 535.201. For 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.

TRIA is available in every other case, including *Calderon*. ICANN argues 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"). ICANN also 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 when judgment was entered. (Response 53-54). But that is not the operative question. TRIA applies 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.[14]

[14] Alternatively, TRIA also applies regarding "a judgment against a terrorist party on a claim based upon an act of terrorism." §201(a). That clause does not specify the time at which the party must be a terrorist party. Congress likely intended the statute to apply as broadly as possible.

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

For a litany of reasons, ICANN questions the propriety of applying 28 U.S.C. 1610(a)(7). (Response 45-48). A full response is impossible prior to discovery, other than to say 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. *See*, *e.g.*, Only Domains, .ir Domain Names, https://www.onlydomains.com/domains/Iran/.ir. *Second*, there are many websites registered with .IR that engage in commerce in the U.S. and are thus using the .IR ccTLD to facilitate sales in the U.S. To verify this, search the following on Google: *"United States" buy site:.ir*. On October 22, Appellants got 378,000 hits.

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.

In particular, *Appellants have no intent or desire to manage or operate the ccTLDs themselves*. *Contra* (Response 24-25). They intend to sell or license the operation of the ccTLDs to a third-party approved by the district court and, possibly,

ICANN. Their objectives are not to destroy the Internet, as ICANN might have it, but to recover for the terrible injuries they suffered many years ago at the hands of the judgment debtors.[15]

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 recognized as a distraction.

VII. Top Level Domain Names 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, has not been the subject of fact finding, and is not properly before this Court. Appellants' full response must await discovery.

[15] 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.

Briefly, Appellants note: *First*, in arguing that ccTLDs are service contracts, it appears that ICANN is 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). Appellants seek ownership of that intangible thing and those rights. As noted *supra*, they do not seek to personally manage the ccTLDs.

Second, 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 differ materially from second-level domains, but in precisely the opposite manner. A ccTLD manager provides 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); (Response 13-14 (ICANN comparing ccTLDs to zip codes, which receive no services)). Thus, a decision indicating that second-level domains might not be attachable in light of the services they receive from a ccTLD manager says nothing about whether the ccTLD, which receives virtually no services, is attachable.

For the same reason, ICANN's assertion that ccTLD ownership is so tied up with service contracts that it cannot be considered a separate entity should be rejected. *E.g.*, (Response 24-26). So too regarding its attempt to liken a ccTLD to the unwanted services of an over-zealous lawyer looking for work. *See* (Response 22).

Third, ICANN claims that "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 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*, 778 N.Y.S.2d 25 (N.Y. App. 2004), is so short on analysis its precedential value is doubtful. ICANN's sole appellate decision offering substantial analysis is *Network Solutions v. Umbro Int'l*, 529 S.E.2d 80 (Va. 2000). But contrary to ICANN's assertions, *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 inapposite and unpersuasive outlier, *id.* at 1142. *See* (Opening 30-38).

Fourth, 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.[16] Regardless, *Umbro* is distinguished not simply by the strict construction requirement, but by that requirement *coupled* with unusual language in the Virginia statute that inspired *Umbro*. (Opening 30-31).

Fifth, ICANN asserts it lacks the *contractual* right to assign or transfer ccTLDs. (Response 33). Appellants doubt that and expect to be able to prove that, at minimum, ICANN has *de facto* authority to re-delegate ccTLDs. *See, e.g.*, Commerce Department, 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, under D.C. attachment law, ICANN's unilateral right to transfer *vel non* is irrelevant. *Washington Loan & Trust v. Susquehanna Coal*, 26 App. D.C.

[16] 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.

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 here, D.C. CODE §1088 (1902)).

CONCLUSION

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

Dated: Baltimore, Maryland
January 7, 2016

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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 6,963 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
January 7, 2016

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