ORAL ARGUMENT SCHEDULED FOR JANUARY 21, 2016
Nos. 14-7193 (Lead), 14-7194, 14-7195, 14-7198, 14-7202, 14-7203, 14-7204

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

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

Appellants,

v.

ISLAMIC REPUBLIC OF IRAN, et al.,

Appellees,

and

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Garnishee-Appellee.

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

GARNISHEE-APPELLEE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS' RESPONSE TO APPELLANTS' MOTION TO SUPPLEMENT THE RECORD AND FILE A SECOND SUPPLEMENTAL APPENDIX

Jeffrey A. LeVee
Eric P. Enson
JONES DAY
555 South Flower St., 50th Floor
Los Angeles, CA 90071
Telephone: (213) 243-2304
Email: jlevee@jonesday.com
Email: epenson@jonesday.com

Noel J. Francisco (Lead Counsel)
Tara Lynn R. Zurawski
Ryan J. Watson
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
Telephone: (202) 879-3939
Email: njfrancisco@jonesday.com

Counsel for Garnishee-Appellee Internet Corporation for Assigned Names and Numbers

Garnishee-Appellee, the Internet Corporation for Assigned Names and Numbers ("Appellee"), hereby submits its Response to Appellants' Motion To Supplement The Record And File A Second Supplemental Appendix (the "Motion"). Although Appellee does not object to the relief requested in the Motion, it files this response for the purpose of addressing several inaccurate assertions set forth in the Motion.

I. APPELLEE'S BRIEF REFLECTS THE ISSUE LITIGATED AND DECIDED BELOW.

Appellants claim that Appellee has a "myopic focus on the subject top level domain names" and that Appellee "completely ignor[es] a much broader class of assets at issue in this litigation"—namely, "*all* Internet Protocol address [*sic*] of Iran, Iran's Ministry of Information and Security, Syria, North Korea, and the North Korean Intelligence Service." Mot. at 2. However, Appellants' contention that this appeal involves "a much broader class of assets" is inaccurate. The attachability of the ".ir," ".sy," and ".kp." country-code top-level domains (the "Subject ccTLDs") and their supporting Internet Protocol ("IP") addresses was the *only* issue presented by the motion to quash. The District Court's decision likewise focused on the Subject ccTLDs. It is far too late in the day for Appellants to now try to change the scope of this appeal.

In the court below, Appellee moved to quash Appellants' attempt to garnish the Subject ccTLDs and their supporting IP addresses. Indeed, that was the entire

basis upon which this matter was litigated in the court below. Appellee's memorandum in support of the motion to quash explicitly focused on "the .IR, .SY and .KP country code top-level domains ('ccTLDs'), related non-ASCII ccTLDs, and supporting IP addresses."[1] As did Appellee's reply in support of the motion to quash.[2] Furthermore, Appellants' opposition to the motion to quash *never disputed that the issue at hand was the attachability of the Subject ccTLDs and their supporting IP addresses*. Accordingly, the District Court was plainly correct to resolve the case as presented by the parties.

If Appellants disagreed with the scope of the issue presented in the motion to quash—or thought it "myopic"—then they were obliged to say so to the District Court. *E.g.*, *Head v. Fed. Bureau of Prisons*, 86 F. Supp. 3d 1, 4 (D.D.C. 2015) (treating part of a motion "as conceded" because "plaintiff's opposition reveals that

[1] Mem. in Support of Non-Party ICANN's Mot. to Quash Writs of Attachment, D.E. 89-1, at 9 (July 29, 2014); *see id.* at 16, 17. When citing to record items not included in an appendix, docket numbers correspond to *Weinstein v. Islamic Republic of Iran*, and page numbers correspond to the electronic case-filing numbering.

[2] Non-Party ICANN's Reply in Support of Its Mot. to Quash Writs of Attachment, D.E. 109, at 6 (Oct. 10, 2014) ("Plaintiffs' Opposition does not—and cannot—refute the basic fact that the .IR, .SY, and .KP ccTLDs, related non-ASCII ccTLDs and supporting IP addresses (the '.IR, .SY, and .KP ccTLDs') are not property subject to attachment under established District of Columbia law because they are inextricably intertwined with a provision of services.").

he failed to address this argument"). However, Appellants chose not to do so.[3] Instead, they continued their litigation gamesmanship by filing a self-styled "Preliminary Response"—a pleading found nowhere in the federal rules—which they concede "offered no substantive analysis" (Appellants' Br. 19). *See* Appellee's Br. 43. Simply put, choices have consequences—and here, Appellants' strategic choice in the District Court prevents them from reinventing this case on appeal.

II. CONTRARY TO APPELLANTS' SUGGESTION, APPELLEE PROVIDED DISCOVERY IN RESPONSE TO THE SUBPOENAS.

Appellants' Motion also suggests that Appellee did not provide discovery in response to the subpoenas. This too is false. Indeed, Appellants' own statements confirm that they did, in fact, receive discovery from Appellee. Although Appellants' opening brief asserted that "the parties have not yet engaged in discovery" (Appellants' Br. 44), this assertion is false. As Appellee's opposition brief in this appeal explained, in the proceedings below, Appellants explicitly

[3] *See* JA58–61. Among other things, Appellants' opposition recounted Appellee's "assertion[ ] . . . that . . . the assets covered by the Writs of Attachment (the .IR, .SY and .KP country code top-level domains ('ccTLDs'), related non-ASCII ccTLDs, and supporting IP addresses (collectively, the 'Assets')) are not 'property.'" JA60. Appellants requested additional discovery "in order to present the complete evidentiary picture in opposition to ICANN's Motion to Quash and its claimed factual assertions." *Id.*

requested "*additional* discovery."[4] Obviously, one cannot get "additional" discovery if no *initial* discovery has taken place. Indeed, as Appellants concede, Appellee produced documents "in excess of 1600 pages" (Mot. at 3).

Appellants' true complaint appears to be not that they received no discovery from Appellee, but rather that the discovery they did receive was not responsive to their requests. Appellants' Motion asserts that the document production "had *nothing* to do with Appellants' subpoenas." Mot. at 3 (emphasis in original). This too is manifestly incorrect.

First, Appellants' own words again confirm that the document production was, in fact, responsive to the subpoenas. In the proceedings below, Appellants filed a motion to "compel production of documents *in response* to [a] subpoena."[5] After subsequent negotiations, Appellants and Appellee ultimately filed a document that jointly withdrew the motion to compel—and, in that document, they jointly informed the court that, "within two days of the parties finalizing and filing a proposed protective order regarding the production of documents in the above-referenced actions, [Appellee] will produce to Plaintiffs non-privileged documents

[4] Pls.' Reply to Opp'n to Mot. for Enlargement of Time, D.E. 100 at 6 (Aug. 28, 2014) (emphasis added); *see* Appellee's Br. 54.

[5] Mot. by Plaintiffs-Judgment Creditors to Compel Production of Documents in Response to Subpoena, D.E. 93 at 1, 3 (Aug. 11, 2014) (capitalization omitted; emphasis added).

responsive to Document Request No. 7 for the time period of July 1, 2010 to July 1, 2014."[6] And, as noted above, Appellee followed through on this commitment to produce such responsive documents.[7]

Second, the documents that Appellee produced were, in fact, responsive to the subpoenas. Appellant made seven document requests in their subpoenas. In response to the first six, Appellee's counsel informed Appellants' counsel that, apart from publicly available documents on Appellee's website, Appellee did not have anything to produce. Notably, however, Appellee agreed to produce documents regarding Document Request 7, which sought communications between Appellee and Defendants Iran, Syria, North Korea, the Iranian Ministry of Information and Security, and the Cabinet General Intelligence Bureau of North Korea "concerning any of the foregoing" topics listed in the first six document requests. For example, some of the documents produced with respect to Document Request 7 contained correspondence with the administrative contacts for the Subject ccTLDs. *See* Appellee's Br. 55. Additionally, some of the documents produced in relation to Document Request 7 contained details about Root Zone changes and name-server changes for the Subject ccTLDs. *See id.*

---

[6] Consent Mot. Regarding Pls.' Mot. to Compel, D.E. 103 at 3, ¶ 8 (Sept. 8, 2014) (emphasis added).

[7] Mot. at 3 (acknowledging that Appellee produced "in excess of 1600 pages").

Third, it bears noting that, on the discovery issue, Appellants' arguments in their Motion To Supplement The Record are based on an incomplete and misleading description of how discovery unfolded below. Appellants' Motion, for example, focuses almost exclusively on Appellee's initial objections to the subpoenas. However, Appellants fail to inform this Court that, *after* those initial objections, the parties engaged in negotiations that *resolved* Appellants' motion to compel. Indeed, as noted above, Appellants then *withdrew* their motion to compel precisely because Appellee agreed to produce responsive documents as described above.[8] Appellants' omission of these material facts from their Motion is perplexing.

* * *

For the foregoing reasons, Appellee disagrees with several assertions set forth in the Motion. In any event, the District Court correctly quashed the writs of attachment, and it did not abuse its discretion by refusing to allow further discovery.

[8] Consent Mot. Regarding Pls.' Mot. to Compel at 3, ¶¶ 5–6 ("On August 11, 2014, Plaintiffs filed their Motion to Compel relating to ICANN's objections and responses to the Subpoenas. . . . Since then, the parties have met and conferred regarding Plaintiffs' Motion to Compel, and have reached the following agreement to resolve the Motion to Compel."); *see also* Order Granting Consent Mot. Regarding Pls.' Mot. to Compel, D.E. 104 (Sept. 9, 2014); Mot. at 3; JA43 ("ICANN has already produced documents responsive to Plaintiffs' subpoenas.").

Dated: October 22, 2015

Respectfully submitted,

/s/ Noel J. Francisco

Noel J. Francisco
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 879-3939
Email: njfrancisco@jonesday.com

Counsel for Garnishee-Appellee Internet Corporation for Assigned Names and Numbers

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October, 2015, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system. In addition, the electronic filing described above caused the foregoing to be served on all registered users to be noticed in this matter, including:

Robert J. Tolchin
Berkman Law Office, LLC
111 Livingston Street, Suite 1928
Brooklyn, NY 11201
Email: rtolchin@berkmanlaw.com
Counsel for Appellants

Meir Katz
Berkman Law Office, LLC
PO Box 65335
Baltimore, MD 21215
Email: MKatzLitigation@gmail.com
Counsel for Appellants

Steven Thomas Gebelin
Scott Michael Lesowitz
Raines Feldman LLP
9720 Wilshire Boulevard, 5th Floor
Beverly Hills, CA 90212
Email: sgebelin@raineslaw.com
Email: slesowitz@raineslaw.com
Counsel for Appellants

Dated: October 22, 2015

/s/ Noel J. Francisco
Noel J. Francisco
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 879-3939
Email: njfrancisco@jonesday.com
Counsel for Garnishee-Appellee Internet Corporation for Assigned Names and Numbers