IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Shaul Stern, *et al.*, Plaintiffs, v. The Islamic Republic of Iran, *et al.*, Defendants.	CIVIL ACTION NO. 00-2602-RCL
Susan Weinstein, *et al.*, Plaintiffs, v. The Islamic Republic of Iran, *et al.*, Defendants.	CIVIL ACTION NO. 00-2601-RCL
Jenny Rubin, *et al.*, Plaintiffs, v. The Islamic Republic of Iran, *et al.*, Defendants.	CIVIL ACTION NO. 01-1655-RMU
Seth Charles Ben Haim, *et al.*, Plaintiffs, v. The Islamic Republic of Iran, *et al.*, Defendants.	CIVIL ACTION NO. 02-1811-RCL CIVIL ACTION NO. 08-520-RCL

Ruth Calderon-Cardona, *et al.*, Plaintiffs, v. Democratic People's Republic of Korea, *et al.*, Defendants.	MISC. NO. 14-648
Mary Nell Wyatt, *et al.*, Plaintiffs, v. Syrian Arab Republic, *et al.*, Defendants.	CIVIL ACTION NO. 08-502-RCL

REPLY IN FURTHER SUPPORT OF PLAINTIFFS-JUDGMENT CREDITORS' MOTION FOR DISCOVERY

Plaintiffs respectfully submit this Reply in further support of their Motion for Discovery [DE 129] [1] and in response to ICANN's Opposition thereto [DE 132].

INTRODUCTION

ICANN's Opposition to Plaintiff's Motion for Discovery is replete with distortions of the factual record. Such distortions include that Plaintiffs merely speculate as to the documents they will obtain in discovery, that Plaintiffs misrepresent documents already produced by ICANN, and that Plaintiffs have had sufficient time until now to conduct the sought discovery – DE 132 at 9. Additionally, ICANN's papers contain contradictions that underscore Plaintiffs' need to conduct full discovery to set forth a complete factual record for their substantive opposition to ICANN's Motion to Quash the Writs of Attachment (the "Motion to Quash").

Here are just a few examples of these contradictions. ICANN asserts that discovery should not be permitted because the Internet Assets[2] at issue are contractual services rather than attachable property. But ICANN claims that it has no contractual agreements with Iran, Syria, or North Korea. ICANN claims that discovery is not necessary because *all* of the documents are publically available, while at the same time attempting to distance itself from the clear statements contradicting ICANN's factual claims contained in a *non-public* document Plaintiffs managed to acquire. ICANN argues that Plaintiffs have conceded its arguments while supporting those arguments with evidence regarding the topics on which Plaintiffs seek discovery. Ironically, ICANN's opposition contains a five page factual recitation, reiterating many of the facts from its Motion to Quash on which it seeks to deny Plaintiffs discovery.

[1] To avoid confusion, all docket references herein are to the docket entries for the Rubin case, Case No. 01-1655 (RCL).

[2] All capitalized terms not otherwise defined herein have the meanings ascribed to them in the Discovery Motion.

At the same time, ICANN also introduces a parade of horribles comprised of empty procedural arguments unsupported by legal authority that should not prevent this Court from granting Plaintiffs the necessary time to conduct discovery. ICANN prematurely argues that certain discovery is inappropriate, asserting, for example, that ICANN's counsel cannot be deposed on issues where they have provided interviews to the press, that delay may be created by third parties opposing discovery as vigorously as ICANN, and that discovery tending to show the treatment of ccTLDs as valuable and transferrable property (in contrast to ICANN's position in this litigation) is "private" and protected from discovery. ICANN also prematurely and misleadingly argues that the Federal Rules require the terror victim Plaintiffs to pay discovery costs and related attorneys' fees for a non-party non-profit that typically spends millions of dollars a year on legal fees.

Plaintiffs have shown that discovery will enable them to present this Court with a complete factual record on novel legal and factual questions, and that there is good reason to believe evidence will be found to dispute ICANN's central factual positions underpinning each of its legal arguments. ICANN's opposition and continued reliance on untested factual assertions exemplifies exactly why that discovery should be allowed.

FACTS

ICANN's characterization of Plaintiffs as employing delay tactics and making false assurances to the Court [DE 132 at 8] is a gross misrepresentation. As is evident from the record, the Plaintiffs have been up front with ICANN and with the Court about their need for discovery and have been diligent in their efforts to gather the facts from the very outset. If anyone can be

accused of obstruction here, it is ICANN for seeking to litigate a dispositive motion without engaging in any discovery.[3]

In the very first communications between Plaintiffs' counsel and ICANN's counsel concerning ICANN's request for an extension to respond to the writs of attachment and to Plaintiffs' initial subpoena, Plaintiffs' counsel explained that Plaintiffs would not be in a position to proceed on the merits without receiving a substantive document production from ICANN. DE 116-1 at ¶ 1. Nevertheless, ICANN initiated a merits proceeding by filing its Motion to Quash, while at the same time withholding documents that it had already located in its files which were responsive to Plaintiffs' initial subpoena. Not only did ICANN refuse to produce the documents, necessitating a motion to compel by Plaintiffs [DE 109, withdrawn per stipulation and order][4],

[3] ICANN all but ignores Plaintiffs' legal argument comparing ICANN's Motion to Quash to a pre-discovery summary judgment motion, baldly asserting, in a footnote, that its Motion to Quash is more akin to a motion to dismiss than a summary judgment motion. DE 132 at 13, n. 3. However, on a motion to dismiss, the Court is generally limited to the four corners of the complaint and all well pleaded facts are viewed in favor of the Plaintiffs. *See generally, Howard v. Gutierrez*, 2005 WL 3274394 (D.D.C. Sept. 30, 2005) (stating motion to dismiss standard). Here, Plaintiffs have not yet had an opportunity to file a factual pleading, as they require discovery from ICANN in order to do so. In addition, as noted in the Discovery Motion, this is not a typical litigation, but a supplemental post-judgment enforcement proceeding. DE 129 at 23. Under District of Columbia attachment law, the filing of a factual pleading follows the service of the Writs of Attachment and the garnishee's answers. D.C. Code § 553. Moreover, ICANN's Motion to Quash submission belies its own claim. That submission includes two declarations, including a detailed factual presentation and 240 pages of documentary evidence. This type of submission is typical for a summary judgment motion, but not for a motion to dismiss in which the defendant is not permitted to rely on facts or evidence outside the complaint.

[4] While ICANN ultimately produced some documents on September 19, 2014, following negotiation of a protective order, this production was incomplete as ICANN unilaterally decided to produce communications dating back only to July 2010 even though the ccTLDs at issue came into operation well before that date. In addition, the late date of the production would not have provided Plaintiffs with sufficient time to review and analyze the significance of the documents before September 30, 2014. Now that Plaintiffs' counsel has had an opportunity to review the production, it is notable that notwithstanding ICANN's repeated claims that the documents would not benefit Plaintiffs, the documents contain very significant information concerning, *inter alia*, ICANN's role in controlling the "root zone," its relationship with the U.S. Department of Commerce, its control over the ccTLD redelegation process,

but it refused to consent to a reasonable extension of time for Plaintiffs to respond to the Motion to Quash, requiring the parties to litigate a contested motion for enlargement [DE 110].

After reviewing and analyzing ICANN's Motion to Quash, including its unilateral factual submission, Plaintiffs understood that more discovery would be required and that an expert or experts would be needed due to the complexity and highly technical nature of this matter. Accordingly, Plaintiffs' counsel began consulting with various internet experts to deconstruct ICANN's submission and compile a list of items for further discovery. In their Motion for an Enlargement of Time to Respond to ICANN's Motion to Quash, which was filed on August 11, 2014, Plaintiffs explained that they were in the process of retaining an expert or experts. DE 110 at 5. In their Reply in further support of that motion, filed on August 28, 2014, Plaintiffs described their need for additional discovery and expressly stated that they intended to file a separate motion seeking a discovery schedule:

> Like ICANN, plaintiffs desire that this matter be resolved as quickly as possible, but not at the expense of having a fully developed factual and legal record for the court's consideration. After extensive research and consultation with various internet experts, plaintiffs have now reached the conclusion that additional discovery from ICANN and other third parties is needed to enable plaintiffs to fully develop and present the facts to the court.

DE 116 at 6.

> Plaintiffs are in the process of preparing a separate motion laying out the scope of discovery believed to be needed and asking the court to set a suitable schedule for that discovery… Obviously, the necessary discovery will require a period of months, not days or weeks.

DE 116 at 8. The Court granted that Motion by order dated August 29, 2014 [DE 118] based on these representations. Thus, it was clear to all that Plaintiffs would not be in a position to file a

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and the role of the respective governments (i.e., Judgment Debtors herein) in operating the specific ccTLDs at issue here.

substantive opposition to the Motion to Quash by September 30, 2014, but instead would present this Court with their discovery motion by that date.

Further, in connection with their meet and confer efforts with regard to the instant Discovery Motion, by email dated September 19, 2014, Plaintiffs' counsel detailed the discovery that Plaintiffs would be seeking and sought ICANN's consent for a six month discovery period. DE 129-1; Ex. A. In sum, Plaintiffs have never concealed their intention to seek additional discovery, which would necessarily require a further extension of deadlines.

ARGUMENT

A. Plaintiffs Easily Satisfy the Standard for Obtaining Federal Judgment Enforcement Discovery

ICANN's Opposition is fatally flawed in that it ignores the majority of Plaintiffs' legal authorities supporting their right to discovery and instead seizes the opportunity to repeat its substantive arguments as to why the Motion to Quash should be granted. In doing so, ICANN forgets that the Discovery Motion is a procedural motion, the very purpose of which is for Plaintiffs to obtain additional time to conduct discovery to enable them to respond more fully to ICANN's substantive arguments. It would be unfair to expect Plaintiffs to respond substantively to the Motion to Quash absent the additional discovery they have requested.

It is reiterated that district courts have broad discretion in setting discovery schedules. *See* DE 129 at 25 and authorities cited therein. Plaintiffs easily meet the standard for obtaining judgment enforcement discovery. As explained in the Motion, such discovery is authorized by the Federal Rules of Civil Procedure and the District of Columbia Code and local rules. *See*

authorities cited in *Id*. at 23-24. Moreover, Plaintiffs are permitted to engage in judgment enforcement discovery against non-parties. *Id*.[5]

Specifically, judgment enforcement discovery is authorized by Rule 69, which contains broad language regarding the rights of judgment creditors to obtain discovery from *any person* in aid of execution. *See* Fed. R. Civ. P. 69(a)(2). In addition, Rule 69(a)(2) expressly incorporates all of the discovery rules in the Federal Rules of Civil Procedure. Pursuant to Rule 26(b)(1), relevance includes all information "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). *See also GFL Advantage Fund, Ltd. v. Colkitt*, 216 F.R.D. 189, 194 (D.D.C. 2003) (discussing relevancy in connection with judgment enforcement discovery); *Lumber Liquidators, Inc. v. Sullivan*, 939 F. Supp. 2d 57, 59-60 (D. Mass. 2013) (Under Rule 69, "[t]he presumption is in favor of full discovery of any matters arguably related to a creditor's efforts to trace a debtor's assets and otherwise to enforce its judgment.") (citations omitted); *British Int'l Ins. Co. v. Seguros LA Republica, SA*, 200 F.R.D. 586, 589-90 (W.D. Tex. 2000) (noting broad scope of post-judgment discovery under Rule 69 and analyzing relevancy under Rule 26(b)(1)).

[5] Ironically, ICANN devotes a whole three pages to arguing that plaintiffs could have conducted discovery earlier. DE 132 at 23-26 ("*In light of the discovery already taken* by plaintiffs and the ninety-day window between serving the Writs of Attachment and seeking this extension, Plaintiffs have had ample opportunity to conduct discovery.") (emphasis added). However, ICANN did not cooperate in responding to Plaintiffs' initial Rule 45 subpoena. In fact, ICANN produced no substantive response to that Subpoena until some two months after it was served, and only after Plaintiffs filed their motion to compel. The bulk of ICANN's production came only on September 19, 2014. Moreover, in its public filings in this case, ICANN has taken the position that Plaintiffs are not entitled to serve it with any discovery absent a Court order authorizing such discovery. DE 117 at 16-17 ("Plaintiffs were required to obtain an order from this Court prior to issuing the Subpoenas to ICANN."). Accordingly, any attempt by Plaintiffs to serve ICANN with further Subpoenas absent a Court Order would have been futile as such attempt likely would have garnered the same objections and lack of cooperation from ICANN as Plaintiffs' original subpoena. In addition, ICANN's suggestion that Plaintiffs were not diligent or misrepresented their intentions to the Court is belied by the record, as detailed in the factual summary above. ICANN's cases cited at DE 132 pp. 24-26 are distinguishable on their facts.

ICANN misrepresents the Rule 69 case law as standing for the proposition that Plaintiffs are not entitled to discovery of ICANN's (broadly defined) "private information." DE 132 at 29-30.[6] The cases relied upon by ICANN address the issue of whether a judgment debtor is permitted to obtain discovery regarding the personal assets of a third party, as opposed to the judgment debtor. *See Id*. and cases cited therein. The general rule, as cited by ICANN, is that such discovery is not permitted absent a suspicion that the third party was the recipient of fraudulently transferred assets from the debtor. *Id*. However, the discovery permitted under Rule 69 is broader than that:

> Under federal common law, the judgment creditor must show either (1) "the necessity and relevance of [the] discovery sought" or (2) that "the relationship between the judgment debtor and the nonparty is sufficient to raise a reasonable doubt about the bona fides of the transfer of assets."

NML Capital Ltd. v. Republic of Argentina, 2014 WL 3898021, *4 (D. Nev. Aug. 11, 2014), *citing* WRIGHT & MILLER, *supra*, § 3014, p. 162. *See also Universitas Edu., LLC v. Nova Group, Inc.*, 2013 WL 3328746, *4-5 (S.D.N.Y. July 2, 2013) (noting that Rule 69 discovery may be "aimed at nonparties who have information, including financial records, related to those [the judgment debtors'] assets") (citations omitted). In *Universitas*, the court overruled objections similar to those raised by ICANN here because the judgment creditor was NOT seeking discovery regarding the third party's personal assets, but about the judgment debtor's

[6] Plaintiffs dispute that they are seeking "private information." As can been seen by the narrow nature and scope of Plaintiffs' requests, Plaintiffs are not looking for blanket financial information about ICANN, but instead information regarding ICANN's factual assertions underlying its arguments regarding the identified Internet Assets. Plaintiffs fully respect the privacy rights of all non-parties and will work in good faith to protect those interests. To the degree that there is "private information" that ICANN identifies, a protective order guarding the confidentiality of such information could be put into place. The proprietary or confidential nature of information is not in itself a reason to deny Plaintiffs access to such information as long as it is relevant. The simple and well accepted way to deal with such issues is to enter into a confidentiality agreement, as Plaintiffs have already done with regard to ICANN's September 19, 2014 document production.

financial assets. Similarly here, the Plaintiffs are not seeking discovery of ICANN's current financial records, but discovery regarding the identified Internet Assets of the Judgment Debtors in ICANN's possession and control. Moreover, Plaintiffs have satisfied the requirements of Rule 69 by demonstrating the necessity and relevance of the information they seek to support their claims to the Judgment Debtors' Internet Assets and oppose ICANN's Motion to Quash.

It is the arguments in ICANN's Motion to Quash that must determine the boundaries of relevance in this case pursuant to Rule 26(b). It would be unfair to require plaintiffs to accept ICANN's factual representations without any opportunity to test and verify their accuracy. *See, e.g., Royal Oak Enterprises, LLC v. Nature's Grilling Products*, LLC, 2011 WL 5858057, *3 (N.D. Ga. Nov. 21, 2011) (in Rule 56(d) context, plaintiff was entitled to discovery to test veracity of declaration testimony submitted by defendant); *Corwin v. Walt Disney World Co*., 2008 WL 754697, *16 (M.D. Fla. March 18, 2008) (plaintiff was not required to take defendant's statements at face value but was entitled to discovery to "test and clarify the veracity" of its claims).

In order for Plaintiffs to rebut ICANN's arguments, Plaintiffs must be permitted to obtain discovery on the factual issues raised by those arguments. As described in detail in the Motion, Plaintiffs' proposed discovery is narrowly tailored to refute the facts raised in ICANN's Motion to Quash. DE 129 at 17-23. It is Plaintiffs position that, through discovery, they will be able to establish facts to rebut all of ICANN's arguments.

Moreover, Plaintiffs are not engaged in a fishing expedition unlikely to result in relevant evidence based on "bare assertions of need" or a "mere hunch," as ICANN suggests. *See* DE 132

at 13-17.[7] In their Motion, Plaintiffs have laid out in detail their proposed targeted discovery. Plaintiffs identified specific witnesses, the proposed testimony and its relevance to the issues. Likewise, Plaintiffs identified specific, narrow categories of documents, explaining their relevance to the issues. DE 129 at 18-23. In addition, before filing their Motion, Plaintiffs spent time researching these issues and consulting with various internet experts, including Bill Manning, to identify categories of discovery that would assist Plaintiffs in refuting ICANN's factual claims. DE 129 at 19-30; DE 129-2 at ¶¶ 2-7.

In order to demonstrate that discovery would likely be fruitful, Plaintiffs presented the Court with a non-public document that clearly disputes ICANN's position that ccTLDs are "contracts for services" rather than attachable property assets and documents showing that ICANN's Board did not even discuss the opinion of the US Government in resolving to remove one of its ccTLDs from the Root. DE 129 at 10 (citing NTIA letter asserting that "the .UM ccTLD is a United States Government asset."); DE 129-2 at 81-83 (ICANN Board Minutes approving resolution to delist .UM ccTLD without discussion of US Government's control or opinion). The fact that ICANN disputes that the statements in the "Impeaching Documents" contradict its positions in the Motion to Quash makes this an issue ripe for fact discovery."

Finally, ICANN's claim that Plaintiffs' discovery requests of other non-parties will "spur a flood of satellite discovery disputes…" [DE 132 at 26-27] is not a basis for the Court to deny Plaintiffs' Discovery Motion. *First*, that argument is based on pure speculation – just because ICANN is intent on blocking Plaintiffs' discovery efforts at every turn does not mean that other third parties will take the same approach. *Second*, none of the three cases cited by ICANN stand for the proposition that a Court must deny reasonable discovery because parties that will be

[7] The cases cited by ICANN on this point stand for general propositions and do not support denial of Plaintiffs' narrowly tailored discovery.

subjected to the discovery are likely to oppose it. *Third*, Plaintiffs have proposed limited document discovery of only *three* entities - ICANN, Verisign and Neustar – and depositions of *nine* witnesses, *six* of whom are currently affiliated in some way with the three mentioned entities.[8] Thus, there is no reason that, in the event discovery disputes arise, such disputes cannot be addressed between the parties to that dispute, narrowed, and litigated, if necessary, to a resolution well before the end of the six month discovery period, absent unusual constraints on the Court's calendar.

B. ICANN's Claim That Plaintiffs' Proposed Discovery is Irrelevant to Some of ICANN's Arguments and that those Arguments are Ripe for Decision is Incorrect

1. Contrary to ICANN's Assertion, Plaintiffs Have Not Conceded Any of ICANN's Legal Arguments

Relying on Local Rule 7(b), ICANN repeatedly argues that by failing to address certain of ICANN's legal arguments in their September 30, 2014 submission titled "Plaintiffs-Judgment Creditors Response to Internet Corporation for Assigned Names and Numbers' Motion to Quash Writ of Attachment," plaintiffs have conceded those arguments. *See* DE 132 at 9; 19, Fn. 2, *citing* D.C. Dist. Ct. Local R. 7(b). However, in making this argument, ICANN misrepresents the nature of Plaintiffs' filing, which was never intended to be a substantive opposition to the Motion to Quash, but a responsive pleading to inform the court about the filing of Plaintiffs' Discovery

[8] In response to ICANN's point about the difficulty of serving a subpoena on a witness located outside of the United States [DE 132 at 27, n. 7], Plaintiffs note that only two of their proposed witnesses fall within that category – Lesley Cowley, located in the UK and Kevin Robert Elz – believed to be located in Thailand. Although international discovery may be time-consuming, Plaintiffs are hopeful that these individuals will be less recalcitrant than ICANN, and that the international witnesses may travel to the United States during the discovery period, as Ms. Cowley was recently in California on business at an ICANN hosted conference. In any event, potential difficulty in obtaining some discovery from third parties should not prevent this Court from allowing Plaintiffs a chance to seek that discovery. Also, just because Plaintiffs might fail in obtaining *some* of their requested discovery is not grounds to deny Plaintiffs from seeking or receiving *any* discovery.

Motion requesting an additional extension of time in order to conduct discovery. The one case relied upon by ICANN is distinguishable on its facts because the plaintiff in that case filed a substantive opposition to defendants' motion to dismiss, but failed to address a number of the defendants' arguments in her opposition. Also, in that case, unlike here, there was no request for additional discovery or for an extension of time pending. *Hopkins v. Women's Div. Gen. Bd. of Global Ministries*, 238 F. Supp. 2d 174, 178 (D.D.C. 2002).

Additionally, as laid out in the subsections below, Plaintiffs have requested discovery relevant to all of ICANN's six "separate" arguments in support of the Motion to Quash. ICANN seizes upon language in Plaintiffs' Motion that the discovery sought is largely aimed at countering two of ICANN's main assertions underlying the Motion to Quash, "that the Assets are not property and if the Assets are property, that ICANN lacks the ability to transfer the Assets to Plaintiff." [DE 129 at 10]. ICANN does this to argue that Plaintiffs intended to limit their discovery to two issues, rather than all of the other legal arguments in ICANN's Motion to Quash, which build from those claims. Plaintiffs do not agree with ICANN's characterization. These factual conclusions and related evidence underlie not just two, but each of ICANN's six "separate" reasons it claims the Writs should be quashed. As a result of this misreading of Plaintiff's Motion for Discovery, ICANN claims that its four other legal arguments are unopposed and offer separate and independent bases for dismissing plaintiffs' Writs of Attachment without any discovery. DE 132 at 18.

However, as is clear from the Motion for Discovery, Plaintiffs did not limit their discovery to only two of ICANN's legal arguments. Each of ICANN's legal arguments rests on

analysis of certain overlapping and intertwined facts[9] regarding the nature of the Assets and ICANN's control over them. As detailed below, the discovery sought by Plaintiffs is relevant to each of ICANN's six legal arguments, which will demonstrate the flaws and fallacies in ICANN's position.

2. Plaintiffs are Entitled to Discovery to Establish that the Internet Assets at Issue Constitute Defendants' Attachable Property

Plaintiffs reiterate that ICANN's Motion to Quash raises complex matters of first impression on which there is no existing case law. Therefore, ICANN's claim that its Motion to Quash must be granted as a matter of law, divorced from any factual inquiry or analysis, is overly simplistic and fails to do justice to the issues.

ICANN repeatedly argues that regardless of whether the facts Plaintiffs seek to discover establish that the assets at issue are property, such assets are not ***attachable*** property under District of Columbia law, and therefore any discovery on this issue would be futile. DE 132 at 11, 18. There are many flaws in ICANN's approach.

First, regardless of how ICANN would like the Court to view the matter, the question of whether assets are attachable property cannot be divorced from the facts. To answer that question, the Court must consider both the factual element, *i.e.*, whether the assets contain typical characteristics of property, such as market value, ownership, exclusive rights, etc., and

[9] ICANN itself cites similar facts in support of some of its arguments. For example, in support of its first two arguments (ccTLDs are not property and they are not owned by the countries to which they are assigned), ICANN relies on overlapping facts such as that ccTLDs lack market value and that there is consensus among governments that no property rights exist in ccTLDs. DE 106-1 at 17; 20; 22. Also, ICANN makes the same factual claim that the defendants do not control which entities will operate the ccTLDs to support both its second and fifth arguments (ccTLD's are not owned by the countries to which they are assigned and ICANN does not have unilateral power to transfer the ccTLDs). DE 106-1 at 21; 26.

the legal element, *i.e.*, whether such property is attachable under the relevant law, and then apply the law to the facts.

Second, as a matter of fact, ICANN takes the position that the Internet Assets are nothing more than contracts for the provision of services. DE 132 at 18. At the same time, ICANN has denied the existence of any contracts between it and the Judgment Debtors. DE 106-1 at 16; DE 117-1, Ex. A at 1. In any event, Plaintiffs dispute ICANN's factual position and anticipate that through discovery they will thoroughly establish that the Internet Assets are a form of intangible property allowing Defendants the right to control and monetize internet traffic directed to the respective Internet Assets and to create (and monetize) sub-domains of the ccTLDs, and that the intangible property is represented by a line of code in the "Root Zone," wholly controlled by ICANN. DE 129 at 15.

Third, while ICANN states categorically that these Internet Assets are not attachable under District of Columbia law, the only District of Columbia authorities cited by ICANN in its opposition are two inapposite cases standing for the proposition that contractually created credits or indebtedness due only upon the passage of time or subject to too many conditions cannot be garnished. DE 132 at 21; 31.[10] ICANN also refers the Court to its prior pleadings, citing DE 106-

[10] Citing *Sperry v. Am. Politics, Inc.*, 1998 WL 129733, *2 (D.D.C. Nov. 17, 1998) and *Shpritz v. Dist. Of Columbia*, 393 A.2d 68, 70 (D.C. 1978). *Sperry* involved an attempt to garnish the non-transferable, non-refundable airline tickets valid for limited dates owed to the judgment debtor by the garnishee in exchange for the debtor's provision of advertising services. *Shpritz* stands for the proposition that "contract rights" to money that is uncertain and contingent upon "acceptance of performance satisfactory to the [garnishee], or upon the exercise of 'judgment, discretion, (or) opinion, as distinguished from mere calculation or computation,' then the amount of the debt is not sufficiently certain to permit garnishment." *Shpritz* at 70. Unlike in these cases, the judgment debtors' rights to the assets at issue are not due at some unspecified time in the future or subject to the acceptance of the Defendants' future performance, but rather are presently enjoyed and exploited by the judgment debtors and also allegedly provided without any contractual agreement by ICANN, and thus any contractual contingencies or limitations.

1 at 10-13 (ICANN"s Motion to Quash) and DE 131 at 6-11 (ICANN's so-called Reply on the Motion to Quash). In these other pleadings, ICANN cited to a number of cases from other jurisdictions, mostly from Virginia, finding in various contexts that second level domains (as opposed to top level domains) are in the nature of service contracts as opposed to property. Only two of these cases involved attempts to enforce a judgment against a second level domain. *See Network Solutions, Inc. v. Umbro International, Inc.*, 259 Va. 759 (2000); *Dorer v. Arel*, 60 F. Supp.2d 558, 560 (ED Va 1999).[11] However, ICANN completely ignores the 9th Circuit *Office Depot* case in which a judgment creditor was permitted to enforce a judgment against the judgment debtor's second level domains, which were considered to be intangible property under California law. *See Office Depot, Inc. v. Zuccarini*, 596 F.3d 696 (9th Circuit 2010).

Moreover, relevant District of Columbia law indicates that the District of Columbia more likely would view the assets at issue as intangible property, like the 9th Circuit, rather than contingent service contracts, as in Virginia. District of Columbia permits attachment of intangible assets such as those at issue here. *See, e.g., Rowe v. Colpoys*, 137 F.2d 249, 249-51 (D.C. Cir. 1943) (describing a transferable liquor license as an "intangible or incorporeal interest" that could be attached under the D.C. Code as a valuable right with attributes of property); *Goldberg v. Southern Builders*, 184 F.2d 345, 348 (D.C. Cir. 1950) (discussing attachment of intangible property in the form of debts). In addition, in the conversion context, the only District of Columbia court to have addressed the issue concluded that second level domain names constitute intangible property. *See Xereas v. Heiss*, 933 F. Supp. 2d 1, 6 (D.D.C. 2013) ("domain names are generally considered intangible property") *citing Kremen v. Cohen*, 337

[11] There are many reasons why these cases do not apply here, including that they are from a different jurisdiction and District of Columbia precedent indicates that it would not reach the same result because it views second level domains as intangible property.

F.3d 1024, 1030 (9th Cir. 2003); *Famology.com, Inc. v. Perot Sys. Corp.*, 158 F. Supp. 2d 589, 591 (E.D. Pa. 2001). Thus, to the extent TLDs are analogous to second level domains, the relevant authorities hold that the District of Columbia views them as intangible property (which can be attached) and not service contracts subject to future contingencies.

Fourth, many of the facts on which Plaintiffs seek discovery are intended to directly counter ICANN's factual arguments in its Motion to Quash - for example, that there is no market for ccTLDs, that ccTLD operators do not enjoy exclusive rights to their ccTLDs and that there is consensus among governments that no property rights exist in ccTLDs. DE 106-1 at 20-21. Since ICANN put forth those factual arguments, ICANN obviously believes that those facts are relevant to the Court's assessment of the legal issues.

Finally, as made clear in the Motion for Discovery, in response to ICANN's argument regarding whether the ccTLDs are ***attachable*** property, Plaintiffs seek relevant discovery such as: the deposition of, and documents requests from, Verisign regarding the transfer of the rights to the .TV ccTLD for millions of dollars per year (DE 129, at 19-20, 23); the deposition of Jeff Neuman of Neustar, Inc. and document requests from Neustar, regarding the transfer of rights to the .CO ccTLD for more than $100 million (*Id.*); the deposition of Lesley Cowley regarding the transfer of the .UK ccTLD from the academic community to commercial entities (which resulted in an increase in fees paid to ICANN), and document requests on this topic (*Id*. at 20, 23). This discovery is directly targeted to help Plaintiffs establish the nature of the Internet Assets and that they constitute intangible property under District of Columbia law.

3. Plaintiffs' Proposed Discovery is Relevant to Whether the Judgment Debtors Own the Internet Assets at Issue

The issue of ownership is primarily factual. In support of its ownership argument, ICANN asserted, *inter alia*, that the ccTLDs are not owned by the Judgment Debtors because

they were not purchased by the Judgment Debtors and there is no established procedure authorizing the Judgment Debtors to sell the ccTLDs. DE 106-1 at 20. ICANN further claimed that the Judgment Debtors lack the right to exclude others from their ccTLDs. *Id*. at 21. ICANN also cited to what it states are established principles in the internet community, specifically the document known as ICP-1, to support its general claim that there are no property rights in ccTLDs. *Id*. Unsurprisingly, some of these factual assertions overlap with ICANN's arguments that ccTLDs are not property.

Plaintiffs' proposed discovery is relevant to these points, including the deposition of Bill Manning, regarding the United States Government and ICANN taking the position that the government of a country that a ccTLD is associated with owns the ccTLD, as the U.S. government and ICANN did with the .UM ccTLD(DE 129 at 17-18, 21); the discovery mentioned above regarding Columbia and Tuvalu's sales of their rights to the ccTLDs of their countries (*Id*. at 19-20; 23); and Australia and the United Kingdom taking action to re-delegate their ccTLDs from the academic communities to commercial interests, including the depositions of Lesley Cowley and Kevin Robert Elz (*Id.* at 20).

Plaintiffs expect that the discovery will show that whether private persons or governments, ccTLD operators exercise ownership over their ccTLDs in the sense, *inter alia*, that they have the right to exclusively operate the ccTLDs and collect any fees from such operation and to sell their rights to an interested buyer. In addition, Plaintiffs expect to demonstrate that in several instances, governments have been instrumental in assigning or transferring ccTLDs and associated rights from one operator to another. Plaintiffs also expect discovery to rebut ICANN's claim that there is consensus in the internet community that

property rights do not exist in ccTLDs. This will show that ICANN's factual arguments do not support its conclusion that the ccTLDs are incapable of being owned by the Judgment Debtors.

4. Plaintiffs' Proposed Discovery will Assist Plaintiffs in Establishing that the Court has Jurisdiction Over the Assets at Issue

As an initial matter, Plaintiffs note that in the District of Columbia, personal jurisdiction over the garnishee vests the court with jurisdiction over the intangible property of the judgment debtor held by the garnishee. *See, e.g., United States ex rel. Ordmann v. Cummings*, 85 F.2d 273, 275 (D.C. Cir. 1936) ("[I]t is not the res which confers jurisdiction, but rather the person of the garnishee…"); *Marvins Credit, Inc. v. General Motors Corp.*, 119 A.2d 447, 448 (D.C. App. 1956) (same). In this regard, the District of Columbia follows the general federal rule that an intangible "has no material existence, and, therefore, has no physical location," and is considered located wherever the court has personal jurisdiction over the garnishee. *See, e.g., In re McAllister*, 216 B.R. 957, 974 n.12 (Bankr. N.D.Ala. 1998); *Champion Intern. Corp. v. Ayars*, 587 F. Supp. 1274 (D. Conn 1984). Accordingly, since this Court has personal jurisdiction over ICANN and the ccTLDs are intangible property under District of Columbia law, this Court may exercise jurisdiction over the ccTLDs. Thus, all of Plaintiffs proposed discovery directed towards the issue of the nature of the assets and whether they are property is relevant to this argument, as well.

Plaintiffs also note that, as explained by the 9th Circuit in *Office Depot*, the *res* of intangible property, such as a second level domain, may be located in multiple places, including the location of the registry or registrar. *Office Depot*, 596 F.3d at 702 ("attaching a situs to intangible property is necessarily a legal fiction."). The registry in which the ccTLDs are given meaning is located in the IANA root servers, which are controlled by ICANN in geographically dispersed locations.

On this topic, Plaintiffs seek relevant discovery including: the deposition of Kim Davies on ICANN's ability to transfer, and its history of transferring, ccTLDs, and documents associated with Mr. Davies' positions (DE 129 at 19, 22); depositions of Jeffrey LeVee and Joe Simms regarding ICANN's control of the Root Zone[12] (*Id*. at 19-20); the deposition of Kevin Robert Elz regarding ICANN's re-delegation of the .AU ccTLD (*Id*.at 20); the deposition of Bill Manning regarding ICANN's removal of the .UM ccTLD from the root zone (Id., p. 21); documents relating to numerous ccTLD re-delegations (*Id*.); the deposition of, and documents requests from, Verisign regarding the transfer of the rights to the .TV ccTLD for millions of dollars per year (*Id*. at 19-20, 23) the deposition of Jeff Neuman of Neustar, Inc. and document requests from Neustar, regarding the transfer of rights to the .CO ccTLD for more than $100 million (*Id*.); the deposition of Lesley Cowley regarding the transfer of the .UK ccTLD from the academic community to commercial entities (which resulted in an increase in fees paid to ICANN), and document requests on this topic (*Id*. at 20, 23).

5. Plaintiffs' Proposed Discovery is Relevant to Factual Issues Raised by the Exceptions to Immunity in the FSIA

Under the Foreign Sovereign Immunities Act ("FSIA"), Plaintiffs must satisfy one of the exceptions to immunity in order to enforce their judgment against the Judgment Debtors. 28

[12] ICANN prematurely asserts that Messrs. Sims and LeVee may not be deposed. DE 129 at 28. Their cited authority makes clear that law allowing a subpoena to counsel to be quashed is dependent on "the extent of the lawyer's involvement in the pending litigation" and the prevention of "disclosure of privileged or other protected matter, if no exception or waiver applies." *Sterne Kessler Goldstein & Fox, PLLC v. Eastman Kodak Co.*, 276 F.R.D. 376, 382 (D.D.C. 2011). There is no indication that Mr. LeVee is involved with this litigation, and ICANN's privilege has likely been waived, at least to the extent that the attorneys discussed their role in the creation of ICANN with the press. DE 129-2 at 4, 56 (2011 interview of Mr. LeVee and Mr. Simms titled "Present At The Creations: ICANN's Birth, Domain Expansion And Jones Day's Role," published by The Metropolitan Corporate Counsel at http://www.metrocorpcounsel.com/pdf/2011/August/44.pdf)

U.S.C. § 1609. However, ICANN's presentation of this issue as a purely legal question is inaccurate and misleading. DE 132 at 19-20. The applicable FSIA exceptions are found in Section 1610(a)(7) - the property subject to attachment is "used for commercial activity in the United States…," and Section 1610(g) – property of a foreign state against which judgment is entered under Section 1605A is subject to attachment.[13] Certainly, the applicability of the "commercial activity" exception involves questions of fact. *See, e.g., AF-Cap Inc. v. Republic of Congo*, 383 F. 3d 361, 368 (5th Cir. 2004) (applicability of commercial activities exception is mixed question of law and fact). It is Plaintiffs' position that the Internet Assets at issue are used for commercial activity in the United States and the United States is the situs. For example, a .ir second level domain can be purchased in the United States for approximately $100. The ccTLDs reside in the "root zone" of the Internet, which is maintained by ICANN, a United States entity subject to this Court's jurisdiction. Thus, discovery concerning ownership, the "root zone" and ICANN's control over it is relevant to ICANN's FSIA argument.

Specific discovery relevant to this topic includes: the deposition of, and document requests from, Verisign regarding the transfer of the rights to the .TV ccTLD for millions of dollars per year (Motion, pp. 19-20, 23); the deposition of Jeff Neuman of Neustar, Inc. and document requests from Neustar, regarding the transfer of rights to the .CO ccTLD for more than $100 million (*Id.*); the deposition of Kim Davies on ICANN's ability to transfer, and history of transferring, ccTLDs, and documents associated with Mr. Davies' positions (*Id.* at 19, 22); depositions of Jeffrey LeVee and Joe Simms regarding ICANN's control of the Root Zone (*Id.* at 19-20); the deposition of Kevin Robert Elz regarding ICANN's re-delegation of the .AU ccTLD (*Id.* at 20); the deposition of Bill Manning regarding ICANN's removal of the .UM ccTLD from

[13] Not surprisingly, ICANN completely ignores Section 1610(g).

the root zone (*Id.* at 21); documents relating to numerous ccTLD re-delegations and related agreement to fund US based ICANN establishing the commercial nature of ccTLD transfers (*Id.*).

6. Plaintiffs' Proposed Discovery will Show that ICANN has the Unilateral Power to Re-Delegate the ccTLDs at Issue

ICANN claims that even if it has the power to re-delegate a ccTLD, it cannot do so unilaterally, as all such re-delegations require approval of the U.S. Department of Commerce ("DoC"). DE 132 at 24. Discovery is expected to show that the DoC has effectively delegated all of its power to ICANN, routinely approves all recommendations for re-delegations by ICANN and, in essence, is nothing more than a rubber stamp for ICANN's decisions. Whether or not ICANN could produce additional documents to support its position does not negate the DoC's own testimony to the U.S. House of Representatives establishing that ICANN is in full control of IANA functions.

> "ICANN processes root zone change requests for Top Level Domains (TLDs) and makes publicly available a Root Zone WHOIS database with current and verified contact information for all TLD registry operators. In all three cases ICANN as the IANA functions operator applies the policies developed by the interested parties when completing requests related to the various IANA functions customers. NTIA [National Telecommunication and Information Administration]'s role in the IANA functions includes the *clerical role* of administering changes to the authoritative root zone file and, more generally, serving as the historic steward of the DNS via the administration of the IANA functions contract. *The NTIA role does not involve the exercise of discretion or judgment with respect to such change requests*."
>
> The Hon. Lawrence E. Strickling, Ass't Sect. for Comm's and Information, National Telecommunications and Information Administration, US DoC, Statement to the Committee on the Judiciary's Subcommittee on Courts, Intellectual Property, and the Internet, "Should the Department of Commerce Relinquish Direct Oversight Over ICANN?", Hearing April 10, 2014, http://judiciary.house.gov/_cache/files/8fd91090-d800-4500-8e9e-

e283f52ed2f3/041014-icann-strickling.pdf, last accessed Oct. 22, 2014. (emphasis added).

Plaintiffs seek relevant discovery on the scope of ICANN's authority and power to transfer ccTLDs including: the deposition of Kim Davies on ICANN's ability to transfer, and history of transferring, ccTLDs, and documents associated with Mr. Davies' positions (DE 129 at 19, 22); depositions of Jeffrey LeVee and Joe Simms regarding ICANN's control of the Root Zone (*Id.* at 19-20); the deposition of Kevin Robert Elz regarding ICANN's re-delegation of the .AU ccTLD (*Id.* at 20); the deposition of Bill Manning regarding ICANN's removal of the .UM ccTLD from the root zone (*Id.* at 21); and documents relating to numerous ccTLD re-delegations (*Id.*).

7. Plaintiffs Proposed Discovery is Relevant to ICANN's Claim that Forced Re-Delegation will Destroy the Value of the ccTLDs and the Second Level Domains Registered to Them

ICANN argues that the forced transfer of the Internet Assets would destroy their value and that of any second level domains registered to them, by making them inoperable. Whether or not this is a cognizable basis to prevent the attachment of the Internet Assets[14], Plaintiffs dispute that this would be the result if Plaintiffs are successful and have so stated in their Motion. DE 129 at 15. Indeed, moving the ccTLDs away from autocratic regimes that restrict internet access and content and have relatively poor telecommunications abilities will surely benefit the value and functioning of the ccTLDs and all second level domains registered to the ccTLDs.

[14] ICANN's legal basis for this argument amounts to a recitation that *bona fide* purchasers are not proper attachment targets, that economic waste is a common law concept, and that writs of garnishment or attachment are meant to create liens preventing a garnishee from disposing of assets. DE 106 at 21-22. None of these principals compel ICANN's eisegesis of a rule nor prevent the transfer of Defendants' Internet Assets to Plaintiffs.

Plaintiffs also disagree that the value of the ccTLDs at issue is exclusively dependent on the second level domains currently registered to those ccTLDs. Plaintiffs may be able to maximize the value of the ccTLDs by marketing them to new audiences as was done with the .CO, .CC and .TV ccTLDs. In any event, as it relates to this issue, Plaintiffs expect that the discovery concerning transfers and sales of particular ccTLDs[15], such as .ML, .KE, .AU, .PN, .EH, .UM, .CN, .CO, .CC and .TV, will demonstrate that transfers, even if forced, (i) do not necessarily affect the value of the ccTLD, but often increase it and (ii) do not result in the second level domains registered to the ccTLD being rendered inoperable.

In summary, ICANN is simply incorrect in claiming that the discovery Plaintiffs seek "will not alter the Court's analysis of the remaining four legal issues raised in ICANN's Motion to Quash…" DE 132 at 18-19.

C. ICANN's Argument that all Future Discovery Costs Should be Shifted to Plaintiffs is Misleading and Premature.

ICANN mis-cites FRCP 45(d)(1), claiming that it "mandates" Plaintiffs to reimburse all of ICANN's discovery compliance costs going forward. DE 132 at 30. Instead, the Rule states:

> *Avoiding Undue Burden or Expense; Sanctions*. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.
> Fed. R. Civ. P 45(d)(1).

[15] Relevant discovery that Plaintiffs seek on this topic includes: the deposition of Kim Davies on ICANN's ability to transfer, and history of transferring, ccTLDs, and documents associated with Mr. Davies' positions (DE 129 at 19, 22); depositions of Jeffrey LeVee and Joe Simms regarding ICANN's control of the Root Zone (*Id.* at 19-20); the deposition of Kevin Robert Elz regarding ICANN's re-delegation of the .AU ccTLD (*Id.* at 20); the deposition of Bill Manning regarding ICANN's removal of the .UM ccTLD from the root zone (*Id.*, p. 21); documents relating to numerous ccTLD re-delegations and monetization thereof (*Id.*).

Rather than mandating *ex-ante* cost shifting for all third party discovery, the rule requires parties and their attorneys to avoid imposing undue burden. Without clear explanation of the "undue burden or expense" and giving Plaintiffs the opportunity to shape and direct ICANN's compliance with discovery, any claims for fee-shifting are premature.

Indeed, fee shifting under Rule 45 arises in situations where the subpoena recipient is later compelled to produce documents by motion. Such cases with cost shifting requests by third parties consider "whether the non-party actually has an interest in the outcome of the case, whether the non-party can more readily bear its costs than the requesting party, and whether the litigation is of public importance." *Linder v. Calero-Portocarrero*, 251 F.3d 178, 182 (D.C. Cir. 2001). Here, ICANN has repeatedly and clearly expressed its interest in the issues in this enforcement action; is an international non-profit[16] that already pays millions of dollars a year in attorneys' fees as part of its operating costs; and ICANN has trumpeted the importance of the issues in this enforcement proceeding to the entire internet community (*i.e.* the public). There is no clear reason to believe that all costs must be shifted *ex ante* to the victims of terrorism seeking the transfer of Debtor Defendants' Internet Assets.

D. ICANN's Delay/Diligence Argument is Misplaced.

As detailed above, Plaintiffs have not been dilatory in seeking discovery, but have faced delay and resistance from ICANN throughout this enforcement proceeding. Moreover, ICANN's

[16] *Exxon Shipping Co. v. U.S. Dep't of Interior* provides no special protection to "non-profit" nonparties, but instead repeats the truism that Rule 45 provides all "non-parties special protection against the time and expense of complying with subpoenas." 34 F.3d 774, 779 (9th Cir. 1994) (instructing that government was subject to subpoenas, but protections may prevent compulsion of unpaid expert testimony from government officials.)

sudden identification of potentially relevant resources available on its website does not negate the need for Plaintiffs' discovery. For example, the website identified in Mr. Enson's Declaration as most relevant to ccTLDs, https://www.icann.org/resources/pages/cctlds-2012-02-25-en , does not contain any documents regarding many of the ccTLDs identified in the Motion for Discovery, such as .UM, .CO,.TV, .ML,.PN, .EH, .UM, or .CN. Moreover, three of the five links for information regarding the transfer of .AU are dead and instead link to http://www.iana.org/domains/root, the main landing page for IANA. In any event, to the extent that responsive documents are publically available on ICANN's website, ICANN should be required to specifically identify such documents rather than putting Plaintiffs to the burden of sifting through the hundreds of documents on ICANN's website. *See, e.g., Fridkin v. Minnesota Mut. Life Ins. Co., Inc.*, 1998 WL 42322, *4 (N.D. Ill. Jan. 29, 1998) (defendant need not produce publically available documents, but was required to identify such documents).

While it is promising that ICANN may be able to point to public documents that are relevant to the discovery, and that by doing so it may lower the cost of compliance with Plaintiff's proposed discovery, this is no reason to deny discovery of evidence that has not been prepared for public presentation by ICANN.

CONCLUSION

For the reasons set forth herein, the Plaintiffs' Motion should be granted in all respects.

Dated: October 24, 2014

Respectfully submitted,

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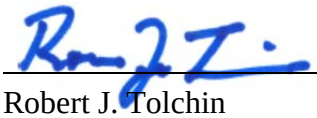
by: 
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CERTIFICATE OF SERVICE

I hereby certify on this 24th day of October, 2014, that a copy of the forgoing Reply in Further Support of Plaintiffs Judgment Creditors Motion for Discovery was served via United States District Court ECF filing system and/or via email on counsel for ICANN:

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