

ORAL ARGUMENT SCHEDULED FOR JANUARY 21, 2016
14-7193(L), 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, *et al.*,
Plaintiffs-Appellants

v.

ISLAMIC REPUBLIC OF IRAN, *et al.*,
Defendants-Judgment Debtors

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,
Third Party Garnishee-Appellee

**APPELLANTS' MOTION FOR LEAVE TO
FILE THEIR REPLY BRIEF OVERSIZED**

Plaintiffs-Appellants,
by their Attorneys,

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Pursuant to Fed. R. App. P. 27, Appellants Weinstein *et al.* (the Plaintiffs-Appellants in all seven consolidated cases) respectfully request leave to file an oversized reply brief of 9,363 words. As explained further *infra*, the additional space is made necessary by Appellee Internet Corporation for Assigned Names and Numbers' ("ICANN") decision to raise many issues not addressed by any decision of the district court and not raised in Appellants' opening brief. ICANN has indicated that it will oppose this motion.

Appellants filed their opening brief on August 27, 2015. Therein, they raised just three issues: 1) whether the assets attached by Appellants are attachable property for the purposes of D.C. CODE §16-544, 2) whether that question should be certified to the D.C. Court of Appeals, and 3) whether the district court abused its discretion in denying discovery. Appellants' Br. 1-2. ICANN responded on September 28, nominally adding just two additional questions: 1) whether the judgment debtors own the attached Internet assets and 2) whether the assets are immune from attachment. ICANN's Br. 1. In truth, its attempted expansion of this appeal was massive. Subsumed in ICANN's larger subject headings are several additional new issues raised in ICANN's response brief but not resolved or the subject of any findings below: 3) whether the attached assets are even "property," 4) whether ICANN has the authority to transfer those assets, 5) whether attachment would constitute good public policy, 6) whether 28 U.S.C. 1610(a)(7); 1610(g), or the

Terrorism Risk Insurance Act (TRIA) § 201 are broad enough in scope to reach the attached Internet assets 7) whether this court has subject matter jurisdiction, and 8) whether Appellants *waived* any of these arguments by not raising them independently. ICANN's Br. 11-14, 32-36, 41-54. All told, of the 50 pages of ICANN's brief that contain merits arguments, no fewer than 27 of them are devoted to raising issues not resolved below, not the subject of any findings below, and not raised in Appellants' opening brief.

Appellants are entitled to fully respond to each of those new issues. *U.S. v. Van Smith*, 530 F.3d 967, 970 n.2 (D.C. Cir. 2008); *Env'tl. Def. Fund v. EPA*, 210 F.3d 396, 401 n.8 (D.C. Cir. 2000); *Asbury v. Teodosio*, 412 F. App'x 786, 791-92 (6th Cir. 2011); *U.S. v. Ramirez*, 557 F.3d 200, 203 (5th Cir. 2009); *Wakefield v. Cordis Corp.*, 304 F. App'x 804, 807 n.4 (11th Cir. 2008); *Bennett v. Tucker*, 827 F.2d 63, 69 n.2 (7th Cir. 1987) (“[W]here an appellee raises a[n] argument not addressed by the appellant in its opening brief, the appellant may reply.”).

The propriety of reaching many of these arguments turns on the scope of discovery and other proceedings below. To properly reply, therefore, Appellants must more fully recount some of those proceedings below, describe in greater detail the discovery to date, and demonstrate that ICANN's new issues are not properly before the Court and should not now be resolved.

As a result, in addition to replying in support of the arguments that Appellants raised in their opening brief, Appellants' reply brief must also address 1) waiver and forfeiture, 2) jurisdiction under the foreign sovereign immunities act and TRIA, 3) the classification of the Internet assets as "property," 4) whether that property is owned by the judgment debtors or anyone else, 5) whether ICANN has authority to transfer that property, 6) public policy, 7) the discovery, if any, that was had as to each of these issues, 8) the propriety of this Court resolving any of them now, and 9) whether Appellants waived or forfeited any of these issues.

Upon seeing ICANN's brief, Appellants immediately recognized that replying to it was going to be a difficult task that would require more time and space than a typical reply brief. As noted, they received ICANN's brief on September 28. That was during the Jewish holiday of Sukkot, during which several of the Appellants' attorneys were occupied. They nonetheless contacted ICANN's counsel on the 29th, stating that they intended to seek from this Court a 30-day extension and an additional 3,500 words for their reply brief. Exhibit A (email correspondence between Meir Katz, Esq., Noel Francisco, Esq., and Eric Enson, Esq.). ICANN's counsel refused to consent to any additional words, but agreed to a 14-day extension "in light of the [Jewish] holidays." *Id.* They additionally stated that they would file an opposition to any motion seeking more than 14 days or an expansion of the word limit. *Id.* Appellants tried to reach a compromise with ICANN, but ICANN refused.

Id. Accordingly, in a show of goodwill and an effort to resolve amicably a dispute among counsel, Appellants decided to try and accommodate ICANN. On October 4, Appellants filed a consent motion for a 14-day extension, which was granted, but did not seek an expansion of the word limit.

Appellants' counsel then adjusted their schedules and made a substantial effort to timely finish their brief. *See id.* They were successful, but, given the many issues that the brief needed to cover, were not able to keep the brief within the 7,000 words demanded by Fed. R. App. P. 32(a)(7)(B)(ii). Accordingly, on October 26, they again contacted ICANN's counsel seeking consent to file this motion, noting that they needed no more than an additional 2,500 words (1,000 fewer than they originally asked for). Exhibit A.

ICANN again objected, relying on Circuit Rule 28(e), which provides that motions to exceed the limits on the length of a brief must ordinarily be made seven days before the brief is due or else under "exceptional circumstances." Circuit Rule 28(e); Exhibit A. Appellants explained that Circuit Rule 28(e) pertains to motions filed well before the brief, seeking *prospective* leave to exceed the word limits. The instant motion, in contrast, is filed together with the brief and respectfully asks the Court accept the brief *retrospectively*, notwithstanding that it is oversized. It thus does not fit within Circuit Rule 28(e). *Id.* Presumably, the 7-day limitation in Circuit Rule 28(e) exists to enable the Court to respond to motions to exceed the word limits

before the deadline to file has run. That concern does not exist regarding a motion for leave to file, which is generally filed at or just before the deadline and does not contemplate a ruling prior to filing.

Moreover, as Appellants explained to ICANN, *id.*, even if the “exceptional circumstances” test applied here, it is easily satisfied. Appellants first contacted ICANN seeking an additional 3,500 words well before the 7-day deadline articulated in Circuit Rule 28(e). ICANN refused to grant consent and stated an intent to oppose the motion. In an effort to avoid confrontation or needless litigation, Appellants elected to try their best to accommodate ICANN, and thus did not seek any expansion of the word limit. They anticipated that, if after a good faith effort, they found themselves unable to complete the brief in 7,000 words, ICANN would be reasonable and reciprocate. Unfortunately, ICANN refused to be reasonable. *See* Exhibit A. Appellants’ good faith effort to accommodate the wishes of opposing counsel, coupled with ICANN’s opportunistic decision to massively expand the scope of this appeal and then assert (erroneously) that all issues not raised by Appellants have been waived, constitutes exceptional circumstances that would justify granting the instant request even if Circuit Rule 28(e) were applicable.

Appellants respectfully remind the Court that their opening brief was undersized. While the rules permitted 14,000 words, Fed. R. App. P. 32(a)(7)(B)(i), they used only 10,955 words. Appellants’ Br. Cert. of Compliance. That differential

of 3,045 words is far greater than the additional space now requested by Appellants. (In total, the Rules grant an appellant 21,000 words. Appellants here have used just 20,316 words.) While Appellants recognize that they have no right to use in their reply brief the 3,045 words left unused by their opening brief, they submit that the length of their opening brief is a relevant factor in considering their request for extra space on reply. Further, they note that if ICANN's litany of new issues had actually been ripe for appeal, Appellants would have raised them in their opening brief and would have had adequate space to do so.

If, for some reason, the Court is not inclined to grant the instant motion, Appellants respectfully request one week to eliminate some part of their argument and submit a complaint reply brief.

Accordingly, Appellants respectfully request leave to file an oversized reply brief of 9,363 words or else a week following this Court's ruling on the instant motion in which to submit a compliant brief.

Dated: Baltimore, Maryland
October 27, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2015, I filed the foregoing using the ECF system, which is expected to electronically serve all counsel of record.

 /s/ Meir Katz
Meir Katz