

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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Jenny Rubin, et al.)	
	Plaintiffs,)	
)	
v.)	CIVIL ACTION NO. 01-1655-RCL
)	
The Islamic Republic of Iran, et al.)	
)	
	Defendants.)	
<hr/>)	
Susan Weinstein, et al.)	
	Plaintiffs,)	
)	
v.)	CIVIL ACTION NO. 00-2601-RCL
)	
The Islamic Republic of Iran, et al.)	
)	
	Defendants.)	
<hr/>)	
Seth Charles Ben Haim, et al.)	
	Plaintiffs,)	
)	
v.)	CIVIL ACTION NO. 02-1811-RCL
)	CIVIL ACTION NO. 08-520-RCL
)	
The Islamic Republic of Iran, et al.)	
)	
	Defendants.)	
<hr/>)	
Ruth Calderon-Cardona, et al.)	
	Plaintiffs,)	
)	
v.)	MISC. NO. 14-648-RCL
)	
Democratic People’s Republic of Korea, et)	
al.)	
)	
	Defendants.)	
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Mary Nell Wyatt, et al.)	
)	
Plaintiffs,)	
)	
v.)	CIVIL ACTION NO. 08-502-RCL
)	
Syrian Arab Republic, et al.)	
)	
Defendants.)	
<hr/>)	
Shaul Stern, et al.)	
)	
Plaintiffs,)	
)	
v.)	CIVIL ACTION NO. 00-2602-RCL
)	
The Islamic Republic of Iran, et al.)	
)	
Defendants.)	
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**NONPARTY ICANN’S REPLY IN SUPPORT OF ITS
MOTION TO QUASH WRITS OF ATTACHMENT**

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INTRODUCTION

Plaintiffs' opposition to ICANN's Motion to Quash Writs of Attachment ("Opposition") is just another attempt by Plaintiffs to delay resolution of this matter. This time, Plaintiffs completely ignore the federal rules of motion practice and replace them with their own—filing a so-called "preliminary response," seeking to unilaterally grant themselves an extension, and demanding further delay and discovery where none is warranted. Such a total disregard for the rules should not be permitted. There is only one thing that a party opposing a motion is permitted to file under Local Rule 7(b)—namely, "a memorandum of points and authorities in opposition to the motion," *i.e.*, an opposition brief. Here, Plaintiffs' Opposition does not and cannot refute any of the arguments in support of ICANN's Motion to Quash; therefore, the Court should grant ICANN's request to quash all seven Writs of Attachment.

In its Motion to Quash (*see, e.g.*, Dkt. No. 106-1 (Mem. Supp. of ICANN's Mot. to Quash)),¹ ICANN set forth six separate and independent reasons to support an order to quash Plaintiffs' Writs of Attachment—any of which, standing alone, is sufficient to warrant the relief requested. Plaintiffs barely mention two of the arguments and completely ignore the other four in their two-page Opposition.

After already receiving a six-week extension to file their Opposition (Dkt. No. 110 (Pl.'s Mot. for Enlargement of Time to Respond to Mot. to Quash)), Plaintiffs then decided they need more discovery on two of the six grounds supporting ICANN's Motion to Quash (Dkt. No. 129 (Pl.'s Mot. for Disc)), and filed their discovery motion on September 25, 2014 (more than a month after informing the Court of their intention to do so; and merely three business days before their Opposition to ICANN's Motion to Quash was due). (Dkt. Nos. 129 & 116 (Reply to

¹ For convenience, throughout this Reply, ICANN cites to filings in the first cited case captioned above, *Rubin v. The Islamic Republic of Iran*.

Pl.’s Mot. for Enlargement of Time to Respond to Mot. to Quash) at 8.) Plaintiffs then simply assumed that their discovery motion would be granted and filed a two-page Opposition to ICANN’s Motion to Quash, effectively saying “more to follow.” (Dkt. No. 130 (Pl.’s Resp. to ICANN’s Mot. to Quash).) But more cannot follow unless this Court so orders and, because the Court has not so ordered, Plaintiffs’ Opposition is the sum total of Plaintiffs’ response to the Motion to Quash. In short, Plaintiffs have, through their gamesmanship, forfeited their right to respond further.

In its brief in opposition to Plaintiffs’ discovery motion (due on October 14, 2014), ICANN will explain why that motion should be denied in its entirety. In this Reply, which together with the Motion to Quash and Plaintiffs’ Opposition completes the three-brief cycle set forth in Local Rule 7, ICANN respectfully suggests that the Court need not consider Plaintiffs’ discovery request and instead should grant this Motion to Quash for the following two reasons.

First, Plaintiffs concede that the Motion to Quash should be granted. Plaintiffs’ Opposition does not even purport to address, and therefore concedes, four of the six independent dispositive grounds for quashing the writs of attachment.

Second, and separately, 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.

Accordingly, this Court should grant ICANN’s Motion to Quash.

ARGUMENT

A. Plaintiffs Concede Several Dispositive Arguments In ICANN's Motion To Quash.

Plaintiffs' Opposition fails to address several of ICANN's dispositive arguments, each of which are independent grounds for quashing the Writs of Attachment. Plaintiffs therefore concede that the Writs of Attachment issued to ICANN should be quashed.

"Circuit precedent and the Local Rules of this Court provide that the failure to respond to an opposing party's arguments results in waiver as to the unaddressed contentions." *Texas v. United States*, No. 11-1303, 2014 U.S. Dist. LEXIS 82790, at *5 (D.D.C. June 18, 2014). Local Rule 7(b) states unequivocally that if a memorandum in opposition is not filed in accordance with deadlines, "the court may treat the motion as conceded." And case law is clear: Rule 7(b) "applies not only to instances where a litigant entirely fails to oppose a motion but also where a party files an opposition that addresses only some of the arguments raised in the underlying motion." *Texas*, 2014 U.S. Dist. LEXIS 82790 at *28; *see also Hopkins v. Women's Div., Gen. Bd. of Global Ministries*, 238 F. Supp. 2d 174, 178 (D.D.C. 2002) ("It is well understood in this Circuit that when a [non-movant] files an opposition to a motion . . . addressing only certain arguments raised by the [movant], a court may treat those arguments that the [non-movant] failed to address as conceded." (citing DC Circuit cases)).

ICANN's Motion to Quash is premised on six "*independent* grounds":

- (1) The .IR, .SY, and .KP ccTLDs are not "property" subject to attachment;
- (2) The .IR, .SY, and .KP ccTLDs are not "owned" by the Defendants;
- (3) The .IR, .SY, and .KP ccTLDs are not "located" in the District of Columbia or even the United States;
- (4) Even if the .IR, .SY, and .KP ccTLDs could be characterized as "property in the United States of a foreign state," this Court would lack jurisdiction over these proceedings, according to the Foreign Sovereign Immunities Act;

- (5) ICANN cannot unilaterally re-delegate or transfer the .IR, .SY, and .KP ccTLDs to anyone, and an order to do so would disrupt contractual relationships; and
- (6) Forced re-delegation of these ccTLDs would destroy whatever value may exist in them, would wipe out the hundreds of thousands of domain name registrations in the ccTLDs, and could lead to fragmentation of the Internet.

(Dkt. No. 106-1 at 10 (emphasis added).) Lest there be any confusion on whether these grounds are truly independent, ICANN repeatedly emphasized that the writs should be quashed “[f]or *any one* or all of these reasons.” (*Id.* (emphasis added).)

Against that backdrop of six independent grounds, through their “Motion for Six-Month Discovery Period” (“Discovery Motion”) Plaintiffs seek discovery to address only two grounds. (Dkt. No. 129 at 10.) Plaintiffs’ Discovery Motion promises that the requested discovery “will directly counter the two main assertions set forth in ICANN’s 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 Plaintiffs.” (*Id.*) Consistent with that limiting statement, Plaintiffs’ specific discovery requests purport to address *only* those two issues. The Opposition openly relies on the Discovery Motion in order to avoid having to respond to ICANN’s arguments. (*See, e.g.*, Dkt. No. 130 at 3 (“As set forth in Plaintiffs’ Motion for discovery, Plaintiffs need to take discovery in order to present the complete evidentiary picture in opposition to ICANN’s Motion to Quash and its claimed factual assertions.”).) Regardless of these delay tactics, the Discovery Motion upon which Plaintiffs’ Opposition is predicated does not even purport to address four of ICANN’s arguments. Under established law, therefore, Plaintiffs have conceded those four uncontroverted dispositive arguments.

The Opposition then attempts to redefine the metes and bounds of the Discovery Motion by claiming that the “factual assertions” at issue for discovery relate to four of ICANN’s

arguments, directly contradicting the language of the Discovery Motion itself. Plaintiffs cannot change the relief sought in their Discovery Motion simply by mischaracterizing it in their Opposition. Moreover, even if Plaintiffs' Opposition could be construed as amending, *sub silentio*, Plaintiffs' Discovery Motion, two independent grounds for quashing the writs would remain: (1) whether the FSIA bars Plaintiffs Writs of Attachment; and (2) whether forcing ICANN to transfer the .IR, .SY, and .KP ccTLDs to Plaintiffs would destroy their value, and the value of thousands of related websites, as well as undermine ICANN's foundational mission of stabilizing the Internet. To these grounds, Plaintiffs offer *no* response—literally, none—either in the Discovery Motion or in the Opposition. Having squandered two opportunities to respond, Plaintiffs can hardly argue that the Court should exercise its discretion and allow Plaintiffs to file yet another brief at some indefinite time. This should not be permitted. These issues are conceded, pursuant to Local Rule 7(b).

The lack of response by Plaintiffs on these two issues is not surprising. As ICANN explained in its Motion to Quash, even if the .IR, .SY, and .KP ccTLDs are considered property of Defendants, then the FSIA bars this Court's subject-matter jurisdiction. (Dkt. No. 106-1 at 17–18.) The only potentially relevant exception is if the “property in the United States of a foreign state” is “used for a commercial activity in the United States.” 28 U.S.C. § 1610(a). There is no evidence before this Court indicating that this exception applies. Plaintiffs' silence confirms that they do not disagree.

Similarly, ICANN explained that the forced transfer or re-delegation of the ccTLDs at issue would destroy their value and risk undermining the stable and interoperable nature of the Internet. (*Id.* at 20–22.) That is a rather straightforward proposition. Plaintiffs do not counter it.

Plaintiffs do not even try to respond to, much less refute, four (or at least two) of ICANN's six independent dispositive arguments. Accordingly, Plaintiffs have conceded those arguments and the Motion to Quash should be granted.

B. Plaintiffs' Footnote Response To The Merits Of Some Of ICANN's Arguments Demonstrate Plaintiffs' Misunderstanding Of The Nature Of A ccTLD.

Plaintiffs devote footnote space to respond to the merits of ICANN's arguments that ccTLDs are not attachable property, by citing two cases finding some intangible property interests in second-level domain names.² Plaintiffs' brief analysis, however, misapplies the cited case law and completely overlooks the services inherent in a ccTLD, which is the critical (and dispositive) characteristic that leads to the conclusion that a ccTLD is not attachable property.

The pertinent question raised in ICANN's Motion to Quash is not whether something is merely property, but whether something is *attachable property*—that is, property subject to attachment. (Dkt. No. 106-1 at 10–13.) Whether something is attachable under District of Columbia law depends upon, among other things, whether that something is bound to a service contract. District of Columbia law is “clear, unambiguous and well settled” that “contracts for service” are “not subject to garnishment.” *Sperry v. Am. Politics, Inc.*, No. 87-2940, 1988 WL 129733, at *2 (D.D.C. Nov. 17, 1988) (citing *Shpritz v. Dist. of Columbia*, 393 A.2d 68, 70 (D.C. 1978)). As set forth in ICANN's Motion to Quash, the .IR, .SY, and .KP ccTLDs cannot be attached under District of Columbia law because “a ccTLD is simply the provision of routing

² To quickly recap a more detailed explanation provided in ICANN's Motion to Quash, Internet domain names like “ICANN.ORG” essentially comprise two elements: What comes before and after the last dot. (Dkt. No. 106-2 (Jeffrey Decl. in Supp. of ICANN's Mot. to Quash) ¶ 4.) Characters after the last dot, such as .COM and .ORG are known as top-level domains (“TLDs”). A ccTLD is essentially a TLD with some geographical significance, such as .US, for the United States, .UK, for the United Kingdom, and so forth. The part of a domain name before the last dot, such as “ICANN” in “ICANN.ORG” or “USCOURTS” in “USCOURTS.GOV,” is referred to as a second-level domain name. (*Id.*) Those second-level domain names are what individuals and entities can register in the TLDs and ccTLDs, which are then used to identify online websites and email addresses. (*Id.*)

and administrative services for the domain names registered within that ccTLD,” it is not attachable property. (Dkt. No. 106-1 at 12.)

The Ninth Circuit’s decision in *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003), does not change this conclusion, as Plaintiffs suggest in footnote 2 of their Opposition. (Dkt. No. 130 at 3 n.2.)³ First, the *Kremen* court did not address any of the issues raised in ICANN’s Motion to Quash. The *Kremen* court evaluated the narrow issue of whether a second-level domain name, SEX.COM, was property subject to conversion under California law. *Kremen* 337 F.3d at 1030–33. In this matter, among other issues, the Court is asked to determine whether the .IR, .SY, and .KP ccTLDs are property owned by Defendants subject to attachment under District of Columbia law. In *Kremen*, the Ninth Circuit did not address any of these issues.

Second, Virginia courts—to which this Court looks for guidance—have addressed whether second-level domain names can be considered property in judgment enforcement proceedings and have found that they cannot because any right to use of a domain name is attendant to the service contracts between the person or entity that registers the domain name (the “registrant”) and the entity that makes the domain name operational (the “registrar”). In *Network Solutions, Inc. v. Umbro Int’l, Inc.*, 529 S.E.2d 80, 86 (Va. 2000), for example, the Virginia Supreme Court found that “[i]rrespective of how a domain name is classified . . . a domain name registrant acquires the contractual right to use a unique domain name for a specified period of time. However, that contractual right is inextricably bound to the domain name services that [the registrar] provides.” In other words, according to the court, whatever contractual rights a judgment debtor may have in a domain name, “those rights do not exist separate and apart from [the registrar’s] services that make the domain names operational

³ Plaintiffs also cite *Office Depot, Inc. v. Zuccarini*, 596 F.3d 696 (9th Cir. 2010), but that decision merely adopts the holding in *Kremen* without any analysis.

Internet addresses.” *Id.* Accordingly, the Virginia Supreme Court found that a second-level domain name registration is a contract for services that “is not subject to garnishment.” *Id.*

Likewise, in *Dorer v. Arel*, 60 F. Supp. 2d 558, 560–61 (E.D. Va. 1999), the plaintiff sought to enforce a default judgment against a second-level domain name under a writ of fieri facias. The Eastern District of Virginia, however, ruled that “there are several reasons to doubt that domain names should be treated as personal property subject to judgment liens,” chief among them is the fact that a second-level domain name “entails only contract, not property rights.” *Id.* According to the court: “a judgment debtor ‘owns’ the domain name registration in the same way that a person ‘owns’ a telephone number. . . . In most cases, a domain name registration is valueless apart from the way it is used by the entity with rights to it, and if the only value that comes from transfer of the domain name is from the value added by the user, it is inappropriate to consider that an element subject to execution.” *Id.* at 561 (footnote omitted); *see also Size, Inc. v. Network Solutions, Inc.*, 255 F. Supp. 2d 568, 573 (E.D. Va. 2003) (holding domain names are not property, but are the result of “NSI’s domain name registration service”); *Washington Speakers Bureau, Inc., v. Leading Auths., Inc.*, 49 F. Supp. 2d 496, 498 (E.D. Va. 1999) (holding that a domain name, which was the subject of a trademark suit, could not be ordered transferred to the trademark owner, because “by prevailing . . . [plaintiff] had won the right to enjoin infringement, but had acquired no right of ownership over the four domain names”). Thus, the finding in *Kremen*⁴ that some intangible property right might exist in a

⁴ It is important to note that the Ninth Circuit’s ruling in *Kremen* has been rejected by the California Court of Appeals, to which the Ninth Circuit must defer on the interpretation of California law. *In re Forchion*, 130 Cal. Rptr. 3d 690, 709 (Cal. Ct. App. 2011) (“Upon closer analysis of the formation of domain names, however, it becomes apparent that a domain name is not property, but rather the product of a contract for services between the registrant and registrar.”).

second-level domain name is irrelevant to the issue of whether those rights may be attached in judgment enforcement proceedings, such as this.

Third, the *Kremen* decision is even more irrelevant here because there are significant differences between a second-level domain name and a ccTLD. A standard second-level domain name can generally be used and exploited by only one person or organization as the registrant of that domain name. A ccTLD, however, is used and exploited by the thousands, and perhaps millions, of entities and individuals that register domain names therein to support their websites and email addresses. A ccTLD is thus no more exclusive than a zip code or a telephone area code. And like a zip code or area code, a ccTLD is intended to be used by many, rather than one. Likewise, while a second-level domain name may be capable of a precise definition (such as EXAMPLE.COM), a ccTLD most assuredly cannot. A ccTLD is not capable of precise definition because it is constantly changing as new second-level domain names are added and deleted. For example, a ccTLD like .US may have hundreds of thousands of second-level domain names registered under it on any given day. But as soon as someone registers a new second-level domain name in the .US ccTLD, the ccTLD's "definition" will change accordingly. And whereas an entity or individual may easily obtain a contractual right to operate a second-level domain name by contracting with a registrar, the standards for operating a ccTLD are much more rigorous, as set forth in ICANN's Motion to Quash. (Dkt. No. 106-1 at 14–15.) Indeed, entities may or may not be able to act as a ccTLD manager depending on availability, technical abilities, and other specific criteria. No person, nor organization, has a legal right to operate a ccTLD.

Ultimately, even if a second-level domain name could be conceptualized to be a mix of a property right and service contract, a ccTLD is purely the provision of technical and

administrative services that permit the operation of second-level domain names within that ccTLD. This is precisely what the Ninth Circuit found in *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980 (9th Cir. 1999). There, the court was called on to determine whether the .COM TLD was a “product” or a “service,” and the court ruled that the .COM TLD fell “squarely on the ‘service’ side of the product/service distinction.” *Id.* at 984. As the Ninth Circuit correctly analogized, “NSI’s role [as the manager of .COM] differs little from that of the United States Postal Service: when an Internet user enters a domain-name combination, NSI translates the domain-name combination to the registrant’s IP address and routes the information or command to the corresponding computer. . . . NSI does not supply the domain-name combination any more than the Postal Service supplies a street address.” *Id.* at 984–85.

Just like .COM, the .IR, .SY, and .KP ccTLDs are not products or property, they are simply databases that provide routing and administrative services for the second-level domain names registered by organizations and individuals within those ccTLDs, as set forth in ICANN’s Motion to Quash. (Dkt. No. 106-1 at 12.) Under the indisputable District of Columbia law discussed above, ccTLDs are non-garnishable services; the law therefore requires the immediate quashing of Plaintiffs’ Writs of Attachment. Neither Plaintiffs’ Opposition nor their recent discovery requests—all premised on the mistaken notion that these types of services may be attached—changes any of this.

Lastly, no more persuasive or relevant, is Plaintiffs’ contention—again, only in a footnote—that “numerous ccTLDs have been monetized by their respective governments (*e.g.* .CO and .TV), moved away from prior registries or registrars (*e.g.* .AU and .ZU), and claimed as government property (.UM).” (Dkt. No. 130 at 3 n.1.) Here too, assuming for purposes of the argument only that a ccTLD can be monetized does not change the fact that it is a service and,

therefore, incapable of being garnished. Plaintiffs' claim that ccTLD managers have been changed from one manager to another is not surprising and has no probative value whatsoever relating to the question of whether a ccTLD is *attachable* property. And this is so even if a ccTLD has been claimed as property by one government entity, for claiming something as "property," does not necessarily make it property, and certainly does not make it *attachable* property. Put simply, a service contract may be (a) monetized, (b) transferred, and even (c) considered property—but all of these are voluntary acts or unilateral considerations. The key question in attachment proceedings is whether a service contract may be transferred to judgment creditors *involuntarily*. Under District of Columbia and analogous Virginia law, it plainly may not. "[W]here the property is in the form of a contract right, the judgment creditor does not step into the shoes of the judgment debtor and become a party to the contract, but merely has the right to hold the garnishee liable for the value of that contract right." *Network Solutions*, 529 S.E.2d at 88 (internal quotation marks omitted).

In sum, the entire nature of ccTLDs is that of a service, which is not garnishable under District of Columbia law. Accordingly, there is no reason to permit and await Plaintiffs' requested discovery. The Court should proceed to a decision on, and grant, ICANN's Motion to Quash.

CONCLUSION

For the foregoing reasons, ICANN respectfully requests that the Court grant the Motion to Quash on the basis of the now-complete briefing on that Motion.

Dated: October 10, 2014

Respectfully submitted,

/s/ Noel J. Francisco

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CERTIFICATE OF SERVICE

I certify that on October 10, 2014, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system, causing it to be served on all registered users to be noticed in this matter, including:

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