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' REPLY IN SUPPORT OF THEIR MOTION FOR LEAVE TO FILE THEIR REPLY BRIEF OVERSIZED

Plaintiffs-Appellants,
by their Attorneys,

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Apparently unsure how to justify its opposition to this motion,[1] ICANN resorts to *ad hominem* attacks and absurd analogy. For example, ICANN compares the Appellants here to an appellant before the Federal Circuit that deliberately deleted spaces from its opening brief so as to circumvent the word limit. (ICANN's response at 9-10). The Federal Circuit offered a citation from the brief as an example, "Thorner.v.SonyComputerEntm'tAm.LLC,669F3d1362,1365(Fed.Cir.2012)," noting that it was counted as a single word by the plaintiffs, even though it should have been counted as 14. *Pi-Net Int'l, Inc. v. JPMorgan Chase & Co.*, 600 F. App'x 774, 774 (Fed. Cir. 2015). Obviously, Appellants here have done nothing to deceive the Court or surreptitiously skirt any of its rules.

ICANN's rhetoric makes for interesting reading, but unfortunately comes at the expense of careful and reasoned analysis. ICANN's response is entirely unresponsive.

A. ICANN's Argument that the Many Issues Raised by its Response Brief are not "New" is Frivolous

Appellants' motion explained at length that ICANN's response brief effected a "massive" expansion of the issues before the Court on appeal. (Motion at 1-3). Several times in that discussion, they used the word "new," indicating that the issues

[1] On October 27, 2015, Appellants moved for leave to file their reply brief oversized. (Document #1580380). ICANN responded on October 30, 2015. (Document #1581289).

raised were new to this appeal. *See id.* ICANN, latching onto that word, mischaracterizes Appellants' argument. It devotes nearly three pages of its response to arguing that the issues are not new to this *litigation*. (ICANN's response at 6-8). But that question is not at issue in this motion. It appears that, rather than using its response to address the motion, ICANN seized the opportunity to improperly further its arguments on the merits, making those pages of its response an unauthorized sur-reply; they should be disregarded.

There is no legitimate basis to dispute that the multitude of issues freshly raised by ICANN in its response brief were new to this appeal. As such, Appellants had the right to respond to them in their reply brief. (Motion at 2). ICANN offers no response to this point. Its attempt to contest that portion of the motion is frivolous.

B. Circuit Rule 28(e) Neither Compels nor Rewards Excessive Litigiousness

1. In their motion, Appellants explained that after learning that ICANN intended to litigate any motion for additional words, "in a show of goodwill and an effort to resolve amicably a dispute among counsel," Appellants opted to attempt to keep their reply brief within the allotted 7,000 words. (Motion at 3-5). They found that preferable to needlessly litigating with ICANN about procedural matters. Because of the Jewish holiday schedule and various other obligations, both personal and professional, their counsel were unable to begin work on their reply brief immediately. The first draft of that brief was not completed until early Friday,

October 23. By 11:59 p.m. October 20, the time by which ICANN claims this motion was due, it was not yet certain whether Appellants would be able to address each issue that they needed to address in their reply brief while remaining within the 7,000 word limit. Obviously, they could not have then filed a motion for leave to exceed the word limit while remaining true to their desire to avoid needless litigation.

ICANN was aware of this. In the undersigned's email to ICANN's counsel on October 26, I wrote:

> We...attempted to keep the brief to 7,000 words. That has unfortunately proven to be impossible. While we don't need an extra 3,500 words as I originally indicated, we might need 2,500. I won't have a precise number until editing is completed, which won't happen until tomorrow.... Seeing our good faith effort to accommodate you, I hope you will consent[.]

(Motion Ex. A at 3). ICANN nevertheless accuses Appellants of deliberately withholding this motion until the last minute. (ICANN's response at 3-4). And it labels the motion "dilatory" evidence of "brinksmanship," while suggesting that Appellants and their counsel, in so delaying their motion, have displayed "arrogan[ce.]" (ICANN's response at 1, 4-5). ICANN's portrayal of events is inaccurate and self-serving; the record must be set straight.

Here's what really happened: Appellants immediately contacted ICANN when they realized that it was "likely" that they were going to need additional words. (Motion Ex. A at 7). Appellants naïvely assumed that ICANN would recognize that

its response brief dramatically expanded the issues before this Court (however improperly), thus dramatically expanding Appellants' burden on reply, and would thus not oppose Appellants' request. When ICANN refused to consent, Appellants could have immediately filed a contested motion, spending time drafting the motion and then a reply, and compelling a panel of this Court to convene and decide whether to grant the request—perhaps all for naught. Instead, Appellants sought to avoid such a waste of resources and the Court's time. They set about drafting their reply brief to determine whether doing so within 7,000 words was possible, again naïvely expecting ICANN to act reasonably and collegially if the task proved impossible. As soon as Appellants had come to the decision that additional words were absolutely necessary, they contacted ICANN's counsel and filed this motion the next day.

If Appellants are guilty of anything, it is not "flout[ing]" this Court's rules, *contra* ICANN's reply at 2, but rather of being naïve. They acted in good faith and thought that ICANN would reciprocate. They were wrong.

2. The parties have debated the intent behind Circuit Rule 28(e). Appellants argue that Rule 28(e)'s objective is to ensure that motions to exceed the word limits, which seek prospective relief and anticipate a ruling prior to the due date of the brief, can actually be resolved by the time the brief is due. They therefore argued that the instant motion, which does not seek prospective relief, does not fit within Rule 28(e). (Motion at 4-5). ICANN rejects that position, despite offering no

legal argument to justify its position.[2] Instead, it misrepresents Appellants' position by stating that Appellants distinguish between motions filed the day before the deadline and those filed thereafter solely on the basis that "2, 3, 4, 5, or 6 days" are not one day. (ICANN's response at 4-5). That is indeed an "absurd" argument. *Id.* But it is not Appellants' argument. Rather, Appellants distinguished between motions that seek prospective relief and those that seek retrospective relief, explaining that there appears to be no reason for the seven day limitation on motions seeking retrospective relief. (Motion at 4-5). ICANN apparently believes that the seven day limitation is intended to apply in every instance, even where applying it seems to make little sense. ICANN's understanding of Circuit Rule 28(e) leaves much wanting. It is apparent that the Appellants have understood the rule correctly.

But even if not—even if the Court had some other reason for Circuit Rule 28(e) that neither party has intuited and, as a result, that rule arguably *does* apply here—it is certain that the Court's objective was *not* to inspire the type of litigiousness that ICANN advocates. ICANN wants this Court to hold that Circuit Rule 28(e) compels litigants to move to expand the word limits seven days before their briefs are due every time they *might* have the need for extra words. Such a holding would create a very strong incentive for parties to so move *always* (at least

[2] "Ad hominem attacks on counsel...do not count as legal argument[.]" *Leo v. Garmin Int'l, Inc.*, 464 F. App'x 737, 740 (10th Cir. 2012).

where there is some plausible argument that the words limits created by the Federal Rules are inadequate). True, many of those motions will be rejected. But the Court and the parties will have spent undue resources in the process. Enabling the parties resolve such issues by themselves (either by reaching consent or by somehow avoiding the problem) is in everyone's interests.

Unfortunately, this motion practice proved to be necessary. But the Appellants made a good faith effort to avoid it. For that good deed, they should not be punished.

C. Ironically, ICANN's Opposition Uses More Words than Appellants Desire for their Reply Brief!

ICANN vigorously protests Appellants' request for 2,363 words above what the rules permit. In so objecting, ICANN submitted an opposition of approximately 2,750 words, a significant portion of which reaches the merits of this appeal. Its decision to oppose the motion has resulted in much wasted time and resources. As this Court held in addressing a motion to strike *portions* of a brief, such motions are "disfavored" and constitute an unnecessary "burden" on the Court. *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty*, 647 F.2d 200, 201 (D.C. Cir. 1981). ICANN's opposition, which seeks to have Appellants' entire brief stricken, likewise created an unnecessary burden and should be rejected as such.

D. ICANN Fails to Recognize the Exceptional Circumstances Created by Its Behavior

ICANN, erroneously assuming that Circuit Rule 28(e) applies and that Appellants needed to demonstrate "exceptional circumstances" for filing this motion less than seven days before their brief was due, again relies on mischaracterization to purportedly show that Appellants have not met that standard. ICANN asserts that the "exceptional circumstance[]" cited by Appellants is simply the fact that "Appellants identified their desire for extra words and raised the issue with opposing counsel nearly a month ago, but chose not to raise it with the Court until now." (ICANN's response at 5). But Appellants were clear:

> [Appellants] 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.

(Motion at 5). Later in its response, ICANN doubles down, asserting that Appellants' decision not to earlier move for an expansion of the word limit in an effort to avoid needless litigation was in no way an "accommodation." Indeed, ICANN calls that assertion "baseless." (ICANN's response at 10-11). It is apparent that ICANN does not even recognize that its scorched-earth approach to litigation is a problem or that

its problem has necessitated this late-stage motion practice. This Court can help prevent similar behavior in the future by making clear that it does not condone litigiousness for its own sake.

D. Appellants' use of the Glossary was Legitimate and Certainly does not Justify Denying this Motion

ICANN pedantically argues that the Court should deny the instant motion because, *inter alia*, Appellants "abuse[] the...glossary[.]" (ICANN's response at 9). That is false. The rules require briefs containing abbreviations to include a glossary "defining each such abbreviation." Circuit Rule 28(a)(3). ICANN does not dispute that Appellants' reply brief contains abbreviations or that Appellants were obligated to include a glossary. Instead, it argues that Appellants sinned by incorporating into their glossary definitions some "substantive explanations." ICANN's "argument" makes a massive logical leap and, in any event, is meritless.

First, ICANN cites to no authority prohibiting the use of substantive explanation in the glossary to help define the abbreviations. Appellants recognize that the glossary was not intended as a vehicle to enable litigants to communicate substantive argument. But there is a very significant difference between substantive argument (pertinent to the merits of the appeal) and "substantive explanations" that are necessary to give a definition meaning and context. ICANN has accused Appellants of including substantive *explanation* in their glossary, no more. It failed

to establish that doing so violates the rules; it certainly failed to establish a material or prejudicial violation of the rules.

Second, only one of Appellants' definitions (that of "FSIA") arguably includes a substantive explanation (notwithstanding ICANN's use of the plural "explanations"). ICANN asserts that Appellants' definition of "IP" is somehow substantive. It is most certainly not.

Third, the arguably substantive explanation of the abbreviation "FSIA" has virtually nothing to do with this appeal and thus did not belong in the body of the brief. Appellants included it in the glossary only to correct a mistake made repeatedly by ICANN and to clarify that Appellants were not making the same mistake. In their response brief, ICANN erroneously indicated that the Terrorism Risk Insurance Act of 2002 ("TRIA") is part of the Foreign Sovereign Immunities Act. In defining "FSIA," Appellants sought to make clear that they were not simultaneously referring to TRIA, as ICANN did. The use of the glossary for that purpose is entirely legitimate.

Moreover, ICANN's professed strict fidelity to the rules is feigned. Fed. R. App. P. 27(d)(1)(D) requires motion papers (including responses) to be "double spaced," headings, footnotes, and certain quotations excluded. Most of ICANN's response appears to be double spaced. But pages 6-7 of the response contains single spaced text presented in bullet points consisting of neither heading, nor footnote, nor

quotation. Those portions of ICANN's response violate the rules. Normally, Appellants would overlook such a violation, leaving it for the Court to address—or not—as it deems appropriate. But because ICANN has argued that this Court should prevent Appellants from filing a brief for what can at worst be considered a technical violation, Appellants note that ICANN should be subject to the same fate. "The lady doth protest too much, methinks." William Shakespeare, Hamlet, Act 3, sc 2.

* * * *

ICANN offers no non-frivolous reason *not* to grant the instant motion on its merits. Its arguments on the merits play entirely on misdirection, confusion, and gratuitous invention. And despite that Appellants explained at length in their motion why they did not seek an expansion of the word limit seven days before their brief was due, noting ICANN's failure to reciprocate Appellants' good faith, ICANN offers nothing of substance. Its argument, rather, is that Appellants should have been less trusting and more aggressive in their motion practice.

For the foregoing reasons and those in the motion, Appellants respectfully request leave to file an oversized reply brief of 9,363 words. If that relief is not granted, then Appellants respectfully request one week following the ruling on this motion in which to submit a reply brief compliant with the Court's ruling on this motion.

Dated: Baltimore, Maryland
November 6, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2015, I filed the foregoing using the ECF system, which is expected to electronically serve all counsel of record.

/s/ Meir Katz
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