INTERNATIONAL COURT OF JUSTICE

CERTAIN IRANIAN ASSETS

(ISLAMIC REPUBLIC OF IRAN v. UNITED STATES OF AMERICA)

REJOINDER

SUBMITTED BY

THE UNITED STATES OF AMERICA

May 17, 2021

ANNEXES

VOLUME IV

Annexes 331 through 358

ANNEX 331

2013 WL 5312502
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Mr. Jeremy LEVIN and Dr. Lucille Levin, Plaintiffs,
v.
The BANK OF NEW YORK MELLON, JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., Société Générale, and Citibank, N.A., Defendants.
The Bank of New York Mellon, JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., Société Générale, and Citibank, N.A., Third–Party Plaintiffs,
v.
Steven M. Greenbaum, et al., Third–Party Defendants.
The Bank of New York Mellon, JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., Société Générale, and Citibank, N.A., Third–Party Plaintiffs,
v.
Estate of Michael Heiser, et al., Third–Party Defendants.
The Bank of New York Mellon, JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., Société Générale, and Citibank, N.A., Third–Party Plaintiffs,
v.
Carlos Accosta, et al., Third–Party Defendants.

No. 09 CV 5900(RPP).
|
Sept. 23, 2013.

Attorneys and Law Firms

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OPINION & ORDER

ROBERT P. PATTERSON, JR., District Judge.

***1** On August 29, 2012, Plaintiffs Jeremy Levin and Dr. Lucille Levin (the "Levin Plaintiffs" or the "Levins") and third-party Defendants Steven M. Greenbaum, et al. (the "Greenbaum Judgment Creditors"), Carlos Accosta, et al. (the "Accosta Judgment Creditors"), and the Estate of Michael Heiser, et al. (the "Heiser Judgment Creditors") (collectively the "Judgment Creditors") filed a joint motion for partial summary judgment on their claims for turnover of certain blocked assets among those that this Court has designated as the Phase Two Blocked Assets.[1] (Judgment Creditors' Joint Mot. for Partial Summ. J. ("Phase Two Motion"), ECF No. 763.) These assets are currently held by the Defendants Bank of New York Mellon ("BNYM"); JPMorgan Chase & Co., JPMorgan Chase Bank (collectively, "JPMorgan"); Société General ("SoGen"); and Citibank (collectively, the "Banks").[2] (*Id* . at 11.) JPMorgan and SoGen[3] filed their opposition papers on October 15, 2012 ("JPMorgan Opp." and "SoGen Opp.," respectively); BNYM filed its opposition papers on October 16, 2012 ("BYNM Opp."); and Citibank filed its opposition papers on October 22, 2012 ("Citibank Opp.").[4]

The Banks identified over two hundred commercial third-party Defendants—persons or entities with potential rights or claims to the Phase Two Blocked Assets.[5] The Judgment Creditors served each of these potential third-party Defendants; however, only six answered the third-party complaints and claimed any interest in any of the Phase Two

Blocked Assets. (*See* Decl. of Curtis C. Mechling in Supp. of J. Creditors' Joint Mot. for Partial Summ. J. on Claims for Turnover of Phase Two Blocked Assets ("Mechling Decl.") Exs. 24–27, Aug. 29, 2012, ECF No. 764.) Of those six commercial third-party Defendants, only one—the Central Bank of [Redacted] ("CB")—filed a memorandum in opposition to the Judgment Creditors' summary judgment motion. (*See* [Redacted].) Although placed on notice by the Court, (*see* Letter to Sean Thornton, Office of Foreign Assets Control ("12/11/09 OFAC Ltr."); Letter to Harold Koh, Department of State ("12/11/09 State Dept. Ltr.")), the United States government has taken no position on this case nor appeared at any of the proceedings (*see* Tr. of June 21, 2011 H'rg ("Tr.6/21/2011"), ECF No. 409, at 8–9; Tr. of Nov. 13, 2012 H'rg ("Tr.11/13/12"), ECF No. 835, at 4–5).

For the reasons stated below, the Judgment Creditors' motion for partial summary judgment on their claims for turnover of the Phase Two Blocked Assets is granted.

I. BACKGROUND

The Court assumes familiarity with the factual and procedural history discussed in its March 4, 2011 Opinion and Order (the "Phase One Opinion") recognizing the Judgment Creditors' priority interest in the Phase One Assets and granting turnover of those assets. *See Levin I,* 2011 WL 812032, at * 1–21. In brief summary, the Judgment Creditors each hold a valid, unsatisfied judgment against the Islamic Republic of Iran ("Iran"), awarded pursuant to either § 1605(a)(7) or § 1605A of the Foreign Sovereign Immunities Act ("FSIA") and registered in this District. *Id.* Seeking satisfaction of these judgments, the Judgment Creditors claim that they are entitled to turnover of certain assets held by the Banks and blocked by the United States government's Office of Foreign Asset Control ("OFAC") pursuant to various blocking regulations.[6]

***2** In its Phase One Opinion, the Court held that "the record demonstrates that the judgment [debtor], Iran, or its agencies or instrumentalities have an interest in" the Phase One deposit accounts and electronic fund transfers ("EFTs") blocked by OFAC and held at the Banks. *Id.* at * 18, *21. Accordingly, the Court concluded, based on its reading of the Terrorism Risk Insurance Act ("TRIA"), FSIA § 1610(f)(1)(A), and the applicable sanctions regulations, that the Phase One Blocked Assets were subject to attachment and execution by certain Judgment Creditors in partial satisfaction of their outstanding judgments against Iran.[7] *Id.* at *21. Though the Levin Judgment Creditors filed notice of appeal of the Court's Phase One Opinion, the appeal was never briefed and the parties withdrew their appeal shortly thereafter. (*See* Notice of Appeal, ECF No. 332; Order Granting Mot. to Withdraw Appeal, Aug. 10, 2011, ECF No. 415.)

The Court now turns to the Judgment Creditors' claim for turnover of the Phase Two Blocked Assets, which are identified in the declaration of Curtis Mechling, Esq., counsel for the Greenbaum and Accosta Judgment Creditors. (*See* Mechling Decl., Exs. 24–27.) Like the Phase One Blocked Assets, the Phase Two Blocked Assets held by the Banks consist of assets held at the Banks and blocked by OFAC. The Banks disclaim any interest in these assets but nevertheless raise issues concerning the Judgment Creditors' legal entitlement to turnover.

II. LEGAL STANDARD

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party holds the initial burden of demonstrating that there is no genuine issue of material fact. *F.D.I.C. v. Great American Ins. Co.,* 607 F.3d 288, 292 (2d Cir.2010). When the moving party has met this initial burden, the opposing party must set forth specific facts showing that there is a genuine issue for trial, and cannot rest on mere allegations or denials of the facts asserted by the movant. *Davis v. State of New York,* 316 F.3d 93, 100 (2d Cir.2002). The Court must "view the evidence in the light most favorable to the non-moving party, and may grant summary judgment only when no reasonable trier of fact could find in favor of the non-moving party." *Allen v. Coughlin,* 64 F.3d 77, 79 (2d Cir.1995).

III. DISCUSSION

A. Whether the Phase Two Assets Are Subject to Attachment and Turnover

Under the law of the case doctrine, where "a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Pepper v. United States,* 131 S.Ct. 1229, 1250 (2011); *see also Scottish Air Int'l, Inc. v. British Caledonian Group, PLC,* 152 F.R.D. 18, 24–25 (S.D.N.Y.1993) (stating that such prior decisions on a legal issue create "binding precedent"). Courts should only revisit prior rulings in a case if there are " 'cogent" or

'compelling' reasons" for doing so, such as "an intervening change in law, availability of new evidence, or 'the need to correct a clear error or prevent manifest injustice.' " *Johnson v. Holder,* 564 F.3d 95, 99–100 (2d Cir.2009).

***3** Here, in interpreting TRIA and the FSIA to dictate that all of the Phase One Blocked Assets—including blocked EFTs held by intermediary banks—were subject to attachment and turnover, the Court's Phase One Opinion held that

> It is plainly the intention of TRIA and the FSIA to make blocked assets available to plaintiffs .... The nature and wording of TRIA ... indicate[s] that Congress intended all blocked assets to be available for attachment by victims of terror. [...] TRIA and the FSIA employ language subjecting *any* blocked assets to attachment in these circumstances.

Levin, 2011 WL 812032, at * 18 (emphasis in original). As such, the Court determined that TRIA § 201 and FSIA § 1610(f)(1) (A) preempt contrary provisions in Article 4 of the Uniform Commercial Code ("UCC"), which would prevent a judgment creditor from executing on funds involved in wire transfers that have been initiated but not completed. *Id.* (citing *Hausler v. JPMorgan Chase Bank, N.A.,* 740 F.Supp.2d 525 (S.D.N.Y.2010) (*"Hausler I"*)); *also compare* TRIA § 201 *and* FSIA § 1610(f)(1)(A) *with* UCC § 4A–502.

The Phase Two Blocked Assets are of the same types as the Phase One Blocked Assets, and none of the relevant laws have been amended in the time since the Phase One Opinion was issued. As such, the law of the case doctrine suggests that the Court should similarly find that all of the Phase Two Blocked Assets are subject to attachment and turnover, including funds involved in wire transfers that were blocked before they reached the beneficiary's bank, provided that third parties have not asserted a cognizable interest in the blocked assets. *See Pepper,* 131 S.Ct. at 1250.

Nevertheless, the Banks argue that the Court should reconsider the holding of its Phase One Opinion with respect to the proceeds of blocked wire transfers held by intermediary banks in light of the Supreme Court's subsequent decision in *Board of Tr. of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.,* 131 S.Ct. 2188 (2011) (*"Stanford"*), and applications of that decision by other district courts in *Calderon–Cardona v. JPMorgan Chase Bank, N.A.,* 867 F.Supp.2d 389 (S.D.N.Y.2011), *appeal docketed,* No. 12–75 (2d Cir. Jan. 10, 2012), and *Estate of Heiser v. Islamic Republic of Iran,* 885 F.Supp.2d 429 (D.D.C.2012), *appeal docketed,* No. 12–7101 (D.C.Cir. Oct. 5, 2012). *But see also Hausler v. JPMorgan Chase Bank, N.A.,* 845 F.Supp.2d 553 (S.D.N.Y.2012) (*"Hausler II"*), *appeal docketed,* No. 12–1264 (2d Cir. Mar. 20, 2012).

The Court will first address whether blocked EFTs held by intermediary banks are subject to execution. The Court will then turn to whether the Phase Two Blocked Assets share a sufficient nexus with Iran to be subject to attachment and turnover.

i. *Blocked Wire Transfers Held by Intermediary Banks Are Subject to Attachment and Turnover*

1. *Stanford and District Court Applications of Stanford*

***4** After this Court issued its Phase One Opinion, the Supreme Court decided *Stanford,* a patent law case that addressed, in part, the statutory interpretation of the word "of" within the context of ownership of patent rights. *See* 131 S.Ct. at 2193. Following the *Stanford* decision, several district court opinions have discussed its holding with respect to TRIA, of which three merit discussion at some length: Judge Denise L. Cote's opinion in *Calderon–Cardona,* 867 F.Supp.2d 389; Judge Victor Marrero's opinion in *Hausler II,* 845 F.Supp.2d 553; and Judge Royce C. Lamberth's opinion in *Heiser,* 885 F.Supp.2d 429.

Stanford itself did not interpret TRIA, but rather answered the question of whether the Bayh–Dole Act "displaces the norm" that the rights to an invention generally belong to the inventor in patent cases. *Stanford,* 131 S.Ct. at 2192. To answer that question, the Court interpreted the phrase "invention of the contractor." *Id.* at 2193. Stanford University argued that this phrase was most naturally read "to include all inventions made by the contractor's employees with the aid of federal funding," a reading that would have entitled Stanford, as the employer, to rights over the patent at issue. *Id.* at 2196. The Court found Stanford's reading "plausible enough in the abstract," but went on to note that "patent law has always been different," and that, in patent law, the Court has rejected the idea that employment is sufficient to vest title to an employee's invention in the employer. *Id.* at 2196–7. Reading the Bayh–Dole Act against this backdrop, the Court went on to explain that "the use of the word 'of' denotes ownership" (internal citations omitted), and interpreted the statute to vest title to the patent in the employee rather than in his employer. *Id.* at 2196.

Subsequently, the *Calderon–Cardona* Court addressed the question of whether EFTs in which the Democratic Republic

of North Korea and its main intelligence agency, the Cabinet General Intelligence Bureau, had an interest that could be attached by terrorism victims pursuant to TRIA § 201(a). 867 F.Supp.2d at 389. Though it disposed of the case by determining that North Korea was not a "terrorist party" as defined by TRIA, *see id.* at 394–95, the *CalderonCardona* Court nevertheless went further and determined that TRIA did not preempt state law definitions of property ownership, *id.* at 401. To reach this conclusion regarding the preemptive force of TRIA, it cited *Stanford* for the proposition that "the use of the word 'of' denotes ownership." *Id.* at 399 (citing *Stanford*, 131 S.Ct. at 2196). Finding no definition of "property" or "property ownership" in TRIA, the court looked not to OFAC blocking regulations, but rather to state law. *Id.* at 400.

By contrast, the *Hausler II* Court found that TRIA preempted state property law, reaffirming its previous ruling, *Hausler v. JPMorgan Chase Bank, N.A.*, 740 F.Supp.2d 525 (S.D.N.Y.2010) (*"Hausler I"*). In so holding, it emphasized "the Supreme Court's focus on the pertinent statutory context in *Stanford."* *Hausler II*, 845 F.Supp.2d at 569. Looking at TRIA within its statutory context, the *Hausler II* Court first found that TRIA must be read in a way that harmonizes the statute with OFAC regulations, in that case, the Cuban Assets Control Regulations ("CACRs"). The "CACRs broadly define the range of Cuban property interests subject to being blocked under OFAC's direction, and the TRIA expressly makes those blocked assets available for attachment and execution to satisfy certain judgments." *Id.* at 562.

***5** Second, the *Hausler II* Court held that TRIA represented "Congress's recognition that federal law must provide the substantive rules governing the recovery of terrorism related judgments." *Id.* at 563. Third, it held that the use of state property law to dictate the range of assets executable under the TRIA would lead to divergent outcomes depending on where the physical site of the blocking of EFTs was located, and could lead to a system that could be easily manipulated by intermediary banks, "who appear unconstrained in determining where to locate the accounts created when they block an EFT." *Id.* Finally, the *Hausler II* Court held that the interpretation preferred by the garnishee banks would mean that assets could be blocked by OFAC, but then could not be reached by terrorism victims for the enforcement of judgments, "frustrat[ing the] core objective" of TRIA, to satisfy judgments held by victims of terror. *Id.* at 564.

Finally, the *Heiser* Court opinion in the District Court of the District of Columbia, addressed the question of whether Iran had an ownership interest in blocked EFTs sufficient to permit judgment creditors to attach those assets. 885 F.Supp.2d at 429. The Court found that Congress intended for the federal government to control the disposition of assets of state sponsors of terror, and that therefore federal law preempted state law. *Id.* at 444–45. However, the *Heiser* Court did not look to the OFAC regulations to determine what ownership interest was required, relying, in part, on a governmental statement of interest submitted to that court. *See id.* at 441 (noting the government's argument that OFAC blocked assets are used for purposes other than attachment, including as a negotiating tool between nations, and that therefore the scope of attachment under TRIA should not be read coextensively with OFAC blocking regulations); (*see also* Statement of Interest of the U.S. at 12, *Estate of Heiser v. Islamic Republic of Iran*, 00 CV 2329(RCL) (*"Heiser* Statement of Interest").) (taking no stance on the preemptive force of TRIA, but arguing that the phrase "of a terrorist party" required an ownership interest, and the nature of that ownership interest was not defined by TRIA or the OFAC regulations)).

Rather, the *Heiser* Court crafted federal common law to determine what ownership interest was required by TRIA § 201(a), using U.C.C. Article 4 and the common law of judgment liens to guide its determination.[8] *See id.* at 438 (noting that the common law historically provided that "[t]he lien of a judgment attaches to the precise interest or estate which the judgment debtor has actually and effectively in the property, and only to such interest").

2. *There is no Intervening Change in the Law that Requires This Court to Diverge from its Finding that the TRIA Preempts State Law*

Upon a thorough review of the cases cited by the Banks and the Judgment Creditors, this Court does not find any " 'cogent' or 'compelling' reasons," *Johnson*, 564 F.3d at 99–100, to revisit its prior holding. More specifically, there has been no intervening change in law that alters this Court's holding that the phrase "blocked assets of that terrorist party," when read within the statutory context of the TRIA, "indicate[s] that Congress intended all blocked assets be available for attachment by victims of terror." *Levin I*, 2011 WL 812032, at * 18. This Court's prior holding that TRIA preempts state law is therefore affirmed.

***6** First, the case law cited by the Banks and the Judgment Creditors shows that the language of TRIA § 201(a) must be

interpreted in light of the "nature and wording of the statute." *See Exp.-Imp. Bank of U.S. v. Asia Pulp & Paper Co., Ltd.*, 609 F.3d 111, 116 (2d Cir.2010) ("Whether or not midstream EFTs may be attached or seized depends upon the nature and wording of the statute pursuant to which attachment or seizure is sought."). For example, *Stanford* instructs that the interpretation of a statute is highly dependent on the context in which it is written. Though the Court explained its decision, in part, by saying that "the use of the word 'of' denotes ownership," *Stanford*, 131 S.Ct. at 2196, it also made clear that it was interpreting the patent statute in light of the 220 years of patent law since the first Patent Act, and further noted that the interpretation of the phrase "invention of the contractor" proposed by Stanford University, while otherwise a plausible interpretation, would represent a "sea change in intellectual property rights." *Id.* at 2199.

The phrase "of that terrorist party," found in TRIA § 201(a) should therefore be interpreted within the context of the OFAC regulations and in a manner consistent with the remedial purpose of the statute. First, TRIA § 201 refers to OFAC regulations implemented pursuant to the Trading With the Enemy Act ("TWEA") and the International Emergency Economic Powers Act ("IEEPA"), showing Congress' intent that the statutes be considered together. *See Levin I*, 2011 WL 812032 at * 15 (noting that TRIA § 201(d) (2) defines "blocked assets" by reference to the TWEA and IEEPA, and finding that "federal law comprehensively addressed property rights in this context") (citing *Hausler I*, 740 F.Supp.2d at 531.). The OFAC blocking regulations implemented pursuant to the TWEA and IEEPA broadly define the interest in property that a terrorist party must have in certain assets before they may be blocked. *See, e.g.*, 31 C.F.R. § 544.201 ("all property and interests in property that are in the United States ... are blocked"); 31 C.F.R. § 544.305 (defining an "interest in property" as "an interest of any nature whatsoever, direct or indirect"). Legislating against the backdrop of broadly worded OFAC regulations, Congress worded TRIA broadly, thus subjecting all assets blocked under OFAC regulations to attachment by terror victims holding valid judgments.

That Congress intended to render blocked assets attachable rather than leaving them blocked or frozen is in line with the remedial purpose of TRIA, and such an intent is evident in the legislative history.[9] Senator Tom Harkin, a sponsor of the Act, stated, "Making the state sponsors [of terrorism] actually lose billions of dollars will more effectively deter future acts of terrorism than keeping their assets blocked or frozen in perpetuity." 148 Cong. Rec. S 11524–01 (daily ed. Nov. 19, 2002) (statement of Sen. Harkin), 2002 WL 31600115. Permitting assets to be blocked under OFAC regulations but not attached by victims of terror holding valid judgments would frustrate Congress' purpose of "deal[ing] comprehensively with the problem of enforcement of judgments issued to victims of terrorism." H.R.Rep. No.107–779, at 27 (2002), *reprinted in* 2002 U.S.C.C.A.N. 1430, 1434; *see also Hausler II*, 845 F.Supp.2d at 563 (holding that TRIA represents "Congress's recognition that federal law must provide the substantive rules governing the recovery of terrorism related judgments").

***7** Here, there is no dispute that the Judgment Creditors are victims of terror holding valid judgments against Iran. (*See* J. Creditors' 56.1 Stmnt. ¶¶ 16–32.) There is also no dispute that the Banks are in possession of assets blocked pursuant to OFAC regulations. (*See id.* ¶ 33; *see also* Citibank N.A.'s Resp. to J. Creditors' 56.1 Statement ("Citibank's 56.1 Stmnt.") ¶ 33, ECF No. 814; JPMorgan's Resp. to J. Creditors' 56.1 Statement ("JPMorgan's 56.1 Stmnt.") ¶ 33, ECF No. 807; BNYM's Resp. to J. Creditors' 56.1 Statement ("BNYM's 56.1 Stmnt.") ¶ 33, ECF No. 808.) The Banks argue, however, that permitting execution of judgments on these blocked assets would lead to unfair burdens on innocent third parties, who have only the most attenuated connection to Iran. (*See, e.g.*, JPMorgan Opp. at 3–6.) The Court has given all potentially interested parties the opportunity to appear and make this argument themselves, (*see* Mechling Decl., Exs. 1, 24–27, 29) though not all district courts considering similar attachment actions have chosen to do so, *compare Calderon–Cardona*, 867 F.Supp.2d at 393 (ruling on the question of whether EFTs were attachable before providing notice to potentially interested third parties) *and Heiser*, 885 F.Supp.2d at 434, 449 (same) *with Levin I*, 2011 WL 812032 at *18–19 (noting previous entry of an order authorizing third-party interpleader complaints against assets in controversy). *See also Gates v. Syrian Arab Republic*, Nos. 11 C 8715, 11 C 8913, 12 C 1836, 12 C 2983, 2013 WL 1337223, at *10 (N.D.Ill. Mar. 29, 2013) (declining to resolve which parties had an ownership interest in EFTs without first interpleading interested parties, noting that "the best way to determine the details of the transition of the funds at issue in this case is to notify those who may be involved in the transit ... and provide them an opportunity to appear and object to any turnover of the funds").

Of all those interpleaded, only six commercial third-party Defendants who were parties to the wire transfers at issue

have responded to this action. (*See* Mechling Decl., Exs. 24–27.) Of those, only one has sought a license from OFAC. (*See* Letter from [Redacted] 1, Apr. 15, 2013 (notifying the Court that [Redacted] has a pending application before OFAC for a license releasing the blocked funds transferred to the [Redacted] from [Redacted]).) This Court is satisfied that all those with potential interests in Phase Two Blocked Assets have been given notice in this case and, provided that the entities involved are "agencies or instrumentalities of Iran," as addressed below, their assets should be attachable by valid judgment holders under TRIA § 201(a).

The interpretation of TRIA § 201(a) advanced by the Banks is divorced both from the context of the OFAC regulations and from the remedial purpose of the statute. Arguing that the phrase "of that terrorist party" requires ownership of the asset as defined by New York state law, the Banks rely on "the usual rule in judgment enforcing proceedings," (JPMorgan Opp. at 7 (citing 30 Am.Jur.2d *Executions* § 120 (2013))), and on the *Stanford* Court's statement that "the use of the word 'of' denotes ownership" (JPMorgan Opp. at 7 (citing *Stanford,* 131 S.Ct. at 2196)). *See also Calderon–Cardona,* 867 F.Supp.2d at 399–400 (citing *Stanford* in its holding that TRIA requires an ownership interest as defined by New York state law); *Heiser,* 885 F.Supp.2d at 438 (looking to the historical common law of judgment liens in its interpretation of TRIA). However, by overlooking the purpose of TRIA and the implementing regulations to which the statute refers, the Banks advance an approach that "is inconsistent with the Supreme Court's focus on the pertinent federal statutory context in *Stanford.*" *Hausler II,* 845 F.Supp.2d at 568.

***8** Finally, the Bank's interpretation is not necessary to give meaning to the phrase "blocked assets of that terrorist party." As Judge Marrero of this District explained, TRIA is broad in scope, encompassing various terrorist entities and blocking regulations. Therefore, the phrase "of that terrorist party" provides "the necessary, though perhaps perfunctory, instruction that the 'blocked assets' available for execution are only those assets blocked pursuant to the particular regulation or administrative action directed at the particular terrorist-party judgment debtor." *Hausler II,* 845 F.Supp.2d at 567.

ii. *EFTs Are Subject To Attachment Under TRIA § 201(a) and FSIA § 1610(g)*

Upon a review of the case law decided after this Court's Phase One Opinion, this Court does not find any "cogent" or "compelling" reasons, *Johnson,* 564 F.3d at 99–100, to revisit its prior holding that TRIA preempts state law. More specifically, there has been no intervening change in law that alters this Court's holding that the phrase "blocked assets of that terrorist party," when read within the statutory context of TRIA, "indicate[s] that Congress intended all blocked assets be available for attachment by victims of terror." *Levin I,* 2011 WL 812032, at *18. This Court therefore finds, as it did in its Phase One Opinion, that blocked EFTs held by intermediary banks are subject to execution under TRIA.

Given the fact that blocked EFTs held by intermediary banks are subject to execution under TRIA, the Court need not address whether FSIA § 1610(g)[10] would independently provide a basis for preemption of state law and execution of blocked EFTs. It should be noted, however, that FSIA § 1610(g) does not mandate a different result than the one reached here. In fact, the two statutes should be read together, and "reading TRIA § 201 and FSIA § 1610(g) in conjunction with the entire FSIA and the 2008 NDAA amendments shows that Congress intended to create a harmonious whole."[11] *Heiser,* 885 F.Supp.2d at 445. *See also Levin I,* 2011 WL 812032 at *10 (considering both the pre- and post–2008 versions of the FSIA and noting that TRIA is codified as a note to FSIA § 1610, and must be read in the context of the overarching statutory scheme of the FSIA). Reading the two statutes together and in the context of the larger statutory scheme, the Court affirms its Phase One Opinion holding that blocked EFTs held by intermediary banks are subject to execution.

iii. *Whether Phase Two Assets Are Assets or Property of an Agency or Instrumentality of Iran*

In order for the Phase Two Blocked Assets to be subject to attachment and turnover, the Judgment Creditors' motion must comply with C.P.L.R. § 5225(b), as required by Federal Rule of Civil Procedure 69. To be entitled to turnover of the assets, the Judgment Creditors must have provided sufficient evidence to prove that the entities whose assets have been blocked are "agencies and instrumentalities of Iran," as defined by 28 U.S.C. § 1603(b), and that those entities are entitled to the possession of these funds, but for the blocked nature of the assets.[12] *See Levin I,* 2011 WL 812032, at *18 (citing *Weininger v. Castro,* 462 F.Supp.2d 457, 499 (S.D.N.Y.2006)).

***9** Neither the Banks nor any of the commercial third-party Defendants have presented evidence to suggest that the entities discussed below are not agencies or instrumentalities of Iran. (*See* Decl. of Kelly Nevling in Supp. of JPMorgan's

Resp. to Phase Two Mot. ("Nevling JPMorgan Decl.") ¶¶ 11–32, Oct. 15, 2012, ECF No. 805 (contesting whether entities were sufficiently connected to blocked assets, but not contesting their presence on the SDN List); Decl. of Kelly Nevling in Supp. of BNYM's Resp. to Phase Two Mot. ("Nevling BNYM Decl.") ¶¶ 8–20, Oct. 15, 2012, ECF No. 806 (same).) However, as the Judgment Creditors are the moving party, they bear the burden of presenting sufficient evidence to demonstrate that there is no issue of material fact as to the availability of these assets for turnover. *See Levin I,* 2011 WL 812032, at * 19 (citing *Rodriguez v. City of New York,* 72 F.3d 1051, 1060–61 (2d Cir.1995)).

As they did in the Phase One Opinion, the Judgment Creditors rely heavily on an affidavit presented by Dr. Patrick Clawson, a Deputy Director for Research of the Washington Institute for Near East Policy. (*See* Aff. of Dr. Patrick Clawson ("Clawson Aff.") ¶ 2, Aug. 29, 2012, ECF No. 763.) This Court noted in its Phase One Opinion that "Dr. Clawson has extensive experience researching and consulting with government officials about Iran, and has published several books on the subject," and, therefore, the Court accepted Dr. Clawson's expertise in this area. *Levin I,* 2011 WL 812032 at * 19. In examining the evidence presented by the Judgment Creditors here, the Court similarly accepts Dr. Clawson as an expert.

1. *Citibank Phase Two Blocked Assets*

The Judgment Creditors seek a turnover of twenty-three blocked assets held by Citibank (the "Citibank Phase Two Blocked Assets"). (*See* Mechling Decl., Ex. 24.) Citibank does not contest that the entities party to these transfers are agencies and instrumentalities of Iran. (*See* Citibank's 56.1 Stmnt ¶ 66 ("Citibank lacks information sufficient to respond to this assertion of undisputed material fact and refers the Court to the relevant paragraphs in the Clawson Affidavit.").) These assets include wire transfers in which the following entities were the ordering customer, remitter's bank, beneficiary's bank, or the beneficiary: (a [Redacted]. (*See* Phase Two Mot. at 17–18; Mechling Decl. Ex. 24.)

Of these entities, this Court has already held that [Redacted] and [Redacted] are agencies and instrumentalities of Iran, and that holding is affirmed here. *See Levin I,* 2011 2011 WL 812032 at *19–20. Of the remaining banking entities, Dr. Clawson states that [Redacted]; and [Redacted] are all owned by Iran, are national banks of Iran, are controlled by Iran, are agencies or instrumentalities of Iran, or are alter-egos of Iran. (*See* Clawson Aff. ¶¶ 24, 27, 32, 33, 35, 36.) This contention is supported by, and the Court has independently verified, the fact that each bank is on the SDN List maintained by OFAC and is designated for sanctions. *See generally* SDN List, *supra* note 6 (listing [Redacted] as subject to sanctions).

***10** Further, according to Dr. Clawson's affidavit, [Redacted] is a wholly owned subsidiary of [Redacted], which is an agency or instrumentality of Iran, controlled by Iran, owned by Iran, or an alter-ego of Iran. (*See* Clawson Aff. ¶ 29.) To support this contention, Dr. Clawson refers to the SDN List as well as a press release from the Treasury Department available online. *See* SDN List, *supra* note 6; *see also* [Redacted].

Finally, according to Dr. Clawson's affidavit, it is common knowledge among experts in international banking and commerce that [Redacted] is owned by Iran, is controlled by Iran, is an agency or instrumentality of Iran, or is an alter ego of Iran. (*See* Clawson Aff. ¶ 34.) Further, the wire transfer to which [Redacted] was the intended beneficiary, Citibank transfer number four, also included [Redacted] as a party to the transfer, acting as the intended beneficiary bank. (*See* Mechling Decl. Ex. 24.) As discussed above, [Redacted] is also an agency or instrumentality of Iran, listed on OFAC's SDN List and is subject to blocking sanctions. (*See* Clawson Aff. ¶ 27.)

This Court finds that the Judgment Creditors have presented sufficient evidence, through the affidavit of their expert, Dr. Clawson, and independently-verifiable online resources, that the entities associated with the Citibank Phase Two Blocked Assets are agencies and instrumentalities of Iran sufficient to meet the requirements of 28 U.S.C. § 1603(b).

2. *JPMorgan Phase Two Blocked Assets*

The Judgment Creditors seek a turnover of twenty-two blocked assets held by JPMorgan (the "JPMorgan Phase Two Blocked Assets"). (*See* Mechling Decl., Ex. 26.) JPMorgan has not presented any evidence to contest the Judgment Creditor's assertion that the entities involved are agencies and instrumentalities of Iran, (*see* JPMorgan's 56.1 Stmnt. ¶ 66 ("The Court must determine whether the Moving Parties have satisfied their burden of proof with respect to these allegations.")), instead arguing primarily that the parties to the EFTs did not exert a sufficient ownership interest over blocked assets to render them attachable, arguments that the Court addressed above (*see* Nevling JPMorgan Decl. ¶¶ 11–32). These assets include deposit accounts and wire transfers in which the following entities were designated to be the

ordering customer, remitter's bank, beneficiary's bank, the beneficiary, or another entity involved in the transfer: (a) [Redacted]. (*See* Phase Two Mot. at 18; Mechling Decl. Ex. 26.)

Of the entities affiliated with the JPMorgan Phase Two Blocked Assets, four have already been held by this Court to be agencies or instrumentalities of Iran: [Redacted]. *See Levin I*, 2011 2011 WL 812032 at *19–20. That holding is affirmed here. In considering the Citibank Phase Two Assets, above, this Court found that sufficient evidence had been presented to show that [Redacted] are agencies and instrumentalities of Iran for the purposes of 28 U.S.C. § 1603(b), and that finding extends to the JPMorgan Phase Two Blocked Assets in which those parties have an interest.

***11** According to Dr. Clawson's affidavit, it is common knowledge among experts in international banking and commerce, and it is his expert opinion, that [Redacted][13], [Redacted], are all owned by Iran, controlled by Iran, are agencies or instrumentalities of Iran, or are alter-egos of Iran. (*See* Clawson Aff. ¶¶ 23, 30, 31, 38.) In support of this contention, Dr. Clawson refers to the SDN List, which, as has been independently verified by the Court, lists those entities as subject to OFAC sanctions. *See generally* SDN List, *supra* note 6 (listing [Redacted] as subject to sanctions).

[Redacted] is not mentioned in Dr. Clawson's affidavit. Though an independent search shows that [Redacted] was added to OFAC's SDN List on December 2, 2010, that evidence was not presented to the Court by the Judgment Creditors. *See* [Redacted] However, JPMorgan transfer thirteen, the transfer for which [Redacted] was the crediting bank, also had as a party to the transfer the [Redacted], which was the beneficiary's bank. (*See* Mechling Decl., Ex. 26.) As discussed above, [Redacted] is found on the SDN List and described by Dr. Clawson as an agency or instrumentality of Iran. (*See* Clawson Aff. ¶ 23.) Thus, the Judgment Creditors have presented sufficient evidence to show that an agency or instrumentality of Iran is a party to wire transfer thirteen.

This Court therefore finds that the Judgment Creditors have presented sufficient evidence, through the affidavit of their expert, Dr. Clawson, and independently-verifiable online resources, that the entities associated with the JPMorgan Phase Two Blocked Assets are agencies and instrumentalities of Iran sufficient to meet the requirements of 28 U.S.C. § 1603(b).

3. *BNYM Phase Two Blocked Assets*

The Judgment Creditors seek a turnover of twelve blocked assets held by BNYM (the "BNYM Phase Two Blocked Assets"). (*See* Mechling Decl. Ex. 25.) BNYM has not presented any evidence to contest the Judgment Creditor's assertion that the entities involved are agencies and instrumentalities of Iran, (*see* BNYM's 56.1 Stmnt. ¶ 66 ("The Court must determine whether the Moving Parties have satisfied their burden of proof with respect to these allegations.")), instead arguing primarily that the parties to the EFTs did not exert a sufficient ownership interest over blocked assets to render them attachable, arguments that the Court addressed above (*see* Nevling BNYM Decl. ¶¶ 8–20). These assets include wire transfers in which the following entities were the ordering customer, remitter's bank, beneficiary's bank, the beneficiary, or another entity involved in the transfer: (a) [Redacted]. (*See* Phase Two Mot. at 18; Mechling Decl. Ex. 25.)

Of the entities affiliated with the BNYM Phase Two Blocked Assets, three have already been held by this Court to be agencies or instrumentalities of Iran: [Redacted]. *See Levin I*, 2011 2011 WL 812032 at *19–20. That holding is affirmed here. In considering the Citibank Phase Two Assets, above, this Court found that sufficient evidence had been presented to show that [Redacted] are agencies and instrumentalities of Iran for the purposes of 28 U.S.C. § 1603(b), and that finding extends to the BNYM Phase Two Blocked Assets in which those parties have an interest.

***12** According to Dr. Clawson's affidavit, it is common knowledge among experts in international banking and commerce, and it is his expert opinion, that [Redacted] is owned by Iran, controlled by Iran, is an agency or instrumentality of Iran, or is an alter-ego of Iran. (*See* Clawson Aff. ¶ 28.) In support of his opinion, Dr. Clawson cites the SDN List and another online resource, both of which have been independently verified by the Court. *See* SDN List, *supra* note 6 (listing [Redacted] as subject to sanctions); *see also* Wisconsin Project on Nuclear Arms Control, *Featured Iranian Entities:* [Redacted], Iran Watch (Last Modified Sept. 3, 2010) [Redacted] (discussing the American sanctions to which [Redacted] is subject and the UN resolutions discussing the entity's attempts to evade sanctions).

Dr. Clawson's affidavit does not discuss [Redacted], which was a party to BNYM blocked transfer number six. (*See* Mechling Decl. Ex. 25 (listing [Redacted] as "other entity

involved").) Though [Redacted] is listed as subject to secondary sanctions on OFAC's SDN List, such evidence was not presented by the Judgment Creditors. *See* SDN List, *supra* note 6. However, the Judgment Creditors do present evidence with respect to an entity that was also party to transfer number six as the intended beneficiary of the transfer, [Redacted] (*See* Mechling Decl. Ex. 25.) According to Dr. Clawson's affidavit [Redacted] is owned by Iran, controlled by Iran, is an agency or instrumentality of Iran, or is an alter-ego of Iran. (*See* Clawson Aff. ¶ 37.) As the Court has independently verified, [Redacted] is on the SDN List. *See* SDN List, *supra* note 6 (listing [Redacted] as subject to secondary sanctions). Therefore, the Judgment Creditors have presented sufficient evidence to show that an agency or instrumentality of Iran is a party to wire transfer six.

This Court therefore finds that the Judgment Creditors have presented sufficient evidence, through the affidavit of their expert, Dr. Clawson, and independently-verifiable online resources, that the entities associated with the BNYM Phase Two Blocked Assets are agencies and instrumentalities of Iran sufficient to meet the requirements of 28 U.S.C. § 1603(b).

4. *SoGen Phase Two Blocked Assets*

The Judgment Creditors seek a turnover of three blocked assets held by SoGen (the "SoGen Phase Two Blocked Assets"). (*See* Phase Two Mot. at 19.) One asset comprises the proceeds of one blocked deposit account held in the name of. (*See id.;* Mechling Decl., Ex. 27.) The other two assets are blocked EFTs to which respectively, were parties. (*See* Mechling Decl., Ex. 27.) SoGen took no position on the ownership of any of the Phase Two Blocked Assets, and did not oppose the Judgment Creditors' motion for turnover. (*See* SoGen Opp. at 1.)

This Court held, in its Phase One Opinion, that [Redacted] are agencies or instrumentalities of Iran. *See Levin I,* 2011 2011 WL 812032 at * 19–20. That holding is affirmed here. Further, in Dr. Clawson's expert opinion, [Redacted] is a national bank of Iran and an agency or instrumentality of Iran. (*See* Clawson Aff. ¶ 26). [Redacted] is also on OFAC's SDN List, a fact that has been independently verified by the Court. *See* SDN List, *supra* note 6 (listing all offices of [Redacted] worldwide as subject to secondary sanctions).

***13** This Court therefore finds that the Judgment Creditors have presented sufficient evidence, through the affidavit of their expert, Dr. Clawson, and independently-verifiable online resources, that the entities associated with the SoGen Phase Two Blocked Assets are agencies and instrumentalities of Iran sufficient to meet the requirements of 28 U.S.C. § 1603(b).

In sum, given the evidence presented by Judgment Creditors, the record demonstrates that the entities that were party to EFT transfers or deposit accounts which comprise the Phase Two Blocked Assets are agencies or instrumentalities of Iran as defined by 28 U.S.C. § 1603(b). The Court finds that the Judgment Creditors' motion complies with C.P.L.R. § 5225(b), as required by Federal Rule of Civil Procedure 69, and the Judgment Creditors are entitled to turnover of the Phase Two Blocked Assets.

IV. INTERESTS OF COMMERCIAL THIRD–PARTY DEFENDANTS

Given that, under TRIA and FSIA § 1610(g), Phase Two Blocked Assets are subject to attachment, the next issue to address is the conflict between asserted ownership interests of commercial third-party defendants and claims asserted by the Judgment Creditors .[14] In this case, the commercial third-party Defendants have not presented an interest in the Phase Two Blocked Assets, cognizable under TRIA and FSIA § 1610(g), which is superior to that of the Judgment Creditors. Therefore, the Judgment Creditors hold the superior interest to the Phase Two Blocked Assets.

The objective of the TRIA "is to give terrorist victims who actually receive favorable judgments a right to execute against assets that would otherwise be blocked." *Smith ex rel. Estate of Smith v. Federal Reserve Bank of New York,* 346 F.3d 264, 271 (2d Cir.2003). Thus, "any evaluation under the TRIA of the priority of interests in the [Phase Two Blocked Assets] must begin with the understanding that 'terrorist victims' holding judgments, as a group, must be first in line." *Hausler II,* 845 F.Supp.2d at 569.

Further, this Court's Phase One Opinion held that FSIA § 1610(c) provides the procedure to be followed by plaintiffs seeking to execute or attach the property of a foreign sovereign or an agency or instrumentality of a foreign sovereign. *Levin I,* 2011 WL 812032 at *7. Here, the Judgment Creditors hold valid writs of execution in compliance with the procedural requirements of § 1610(c). (*See* Mechling Decl. Exs. 3–4, 6–7, 9–10, 12–13, 15–16, 20–23.)

By contrast, commercial parties asserting a claim to blocked assets pursuant to the statutory scheme of TRIA and FSIA § 1610 are not given priority over terrorism victims holding valid judgments in attachment proceedings. Rather, the proper avenue for redress for commercial third-party Defendants is through OFAC's administrative procedures. *See* 31 C.F.R. § 501.806 (specifying "procedures for unblocking funds believed to have been blocked due to mistaken identity"); *Hausler II,* 845 F.Supp.2d at 570 (noting that "Congress drafted the TRIA against the backdrop of statutory and regulatory provisions ... which require licenses to unblock; this restriction suggests that the TRIA should be read in consideration of these alternative opportunities for parties without terrorism-related judgments to assert interests in blocked assets"). If parties dispute OFAC decisions, they may seek judicial review. *See id.* at 570 (citing *Zarmach Oil Services v. U.S. Dep't of the Treasury,* 750 F.Supp.2d 150 (D.D.C.2010)).

***14** Further, granting terrorism victims priority of interest over third parties claiming an ownership interest in blocked assets is consistent with the purpose of the TRIA. The TRIA was implemented in order to "punish and impose a heavy cost on those aiding and abetting the terrorists." 148 Cong. Rec. S11524–01 (daily ed. Nov. 19, 2002) (statement of Sen. Harkin), 2002 WL 31600115. It would undermine that purpose if, without successful utilization of OFAC's administrative procedures, "foreign banks doing business with the instrumentalities of a terrorist state were found to have a superior interest in the frozen assets as compared to that of a holder of a judgment against that very terrorist state." *Hausler II,* 845 F .Supp.2d at 570.

Here, six commercial third-party Defendants have asserted a claim to the EFTs to which they were parties.[15] All of the commercial third-party Defendants were party to wire transfers that were blocked by OFAC because one of the parties to the transfer was on the SDN list. The proper recourse for these commercial third-party Defendants is through OFAC administrative procedures.[16] Of those six, only two third-party Defendants have demonstrated an intent to seek an unblocking of assets through the requisite OFAC procedures, and only one has actually done so. (*Compare* [Redacted] Decl. ¶ 11 (stating that the CB intends to apply to the Office of Foreign Assets Control for a license authorizing the release of blocked funds), *with* Letter from [Redacted] 1, Apr. 15, 2013 (notifying the Court that the [Redacted] has a pending application before OFAC for a license releasing the blocked funds transferred to [Redacted]). The inclusion in this Order of funds pending before OFAC is conditioned upon the denial of the OFAC license.

Because the Judgment Creditors are holders of valid judgments eligible for execution under the TRIA, the Judgment Creditors' joint interest is superior to the interests of commercial third-party Defendants who have not resorted to OFAC regulatory procedures.

A. Whether the Central Bank Assets Are Immune from Execution

CB opposes this summary judgment motion with respect to one blocked transfer in the amount of [Redacted]. (*See* CB Opp. at 5 .) On August 31, 2009, CB directed JPMorgan to implement a wire transfer in the amount of €233,716.00 to an Iranian engineering firm with an account at [Redacted]. (*See* Decl. of [Redacted] ¶ 7, ("[Redacted] Decl."), Oct. 15, 2012, ECF No. 800.) On September 17, 2009, in accordance with the payment order, JPMorgan debited CB's U.S. dollar deposit account in New York in the sum of [Redacted] and converted such funds to Euros at its U.K. branch for payment to the Iranian recipient in accordance with CB's instructions. (*See* Pollock Decl., Ex. A at p. 404–05.) On September 18, 2009, the U.K. JPMorgan branch recognized that [Redacted] was an entity subject to OFAC blocking regulations, and the assets were transferred into a frozen account. *See* 31 C.F.R. § 544.203; (*See* Pollock Decl. ¶ 6.)

***15** Here, CB contests the attachment of the blocked transfer. CB argues that, as a foreign central bank, (*see* [Redacted]), its funds are immune from execution under FSIA § 1611(b)(1). CB argues that the central bank immunity provided by this section preempts TRIA and FSIA § 1610(g). (*See* CB Opp. at 6–9.) CB's argument fails. Even if CB's assets did fall under the protection of FSIA § 1611(b)(1), that immunity is overridden by the subsequently enacted TRIA § 201(a).[17] *See Weininger,* 462 F.Supp.2d at 457 ("TRIA, which was enacted later in time than § 1611, overrides the immunity conferred in § 1611."); *Peterson v. Islamic Republic of Iran,* No. 10 CV 4518(KBF), 2013 WL 1155576 (S.D.N.Y. Mar. 13, 2013) ("TRIA trumps the central bank provision in 28 U.S.C. § 1611(b)(2)."); *Gates,* 2013 WL 1337223.

i. *The Interplay Between TRIA § 201 and 28 U.S.C. § 1611*

The FSIA provides immunity from attachment and execution of property to the property of a foreign central bank in FSIA § 1611(b) (1).[18] That section provides exceptions to

waivers of sovereign immunity for foreign central banks "notwithstanding the provisions of section 1610 of this chapter." TRIA § 201(a), in turn, authorizes attachment of blocked assets of terrorist parties "notwithstanding any other provision of law." Because the TRIA was codified as a note to FSIA § 1610, CB argues that TRIA's waiver of immunity is preempted by FSIA § 1611(b)(1). (*See* CB Opp. at 9.) However, the TRIA waiver controls because of the broad language of TRIA's "notwithstanding" clause, the more recent enactment of the TRIA, and the remedial purpose of the TRIA.

First, the TRIA uses broad language to preempt "any other provision of law," while § 1611(b) applies narrowly to "the provisions of section 1610." In this District, *Weininger v. Castro* held that the TRIA's broad language targets *all* statutory exceptions to immunity. *See* 462 F.Supp.2d at 498 ("To the extent that a foreign country's sovereign immunity potentially conflicts with Section 201(a), the 'notwithstanding' phrase removes the potential conflict.") (quoting *Smith ex rel Smith,* 280 F.Supp.2d. at 319); *see also Peterson,* 2013 WL 1155576 at *8 ("TRIA's broad language—'notwithstanding any other provision of law ... in every case'—provides one basis pursuant to which a separate 'central bank' analysis becomes unnecessary.").

Further, to the extent TRIA § 201(a) conflicts with FSIA § 1611(b)(1), any conflict should be resolved in favor of the TRIA because it was enacted after § 1611(b). *See Weininger,* 462 F.Supp.2d at 499. Congress is presumed to be aware of its previous enactments when it passes a new statute. *See Vimar Seguors y Reaseguros, S.A. v. M/V Sky Reefer,* 515 U.S. 528, 554 (1995) (citing *Cannon v. Univ. of Chicago,* 441 U.S. 677, 696–699 (1999)). The TRIA's "notwithstanding" clause —enacted in 2002, well after FSIA § 1611(b) was adopted in 1976—thus preempts central bank immunity to the extent it would apply. *See Peterson,* 2013 WL 1155576 at *25; *Weininger,* 462 F.Supp.2d at 499; *see also In re Ionosphere Clubs, Inc.,* 922 F.2d 984, 991 (2d Cir.1990) ("[W]hen two statutes are in irreconcilable conflict, [courts] must give effect to the most recently enacted statute since it is the most recent indication of congressional intent.")

***16** Finally, providing an exception to attachment and execution for foreign central banks would frustrate the remedial purpose of the TRIA. As discussed above, the purpose of the TRIA is to "deal comprehensively with the problem of enforcement of judgments issued to victims of terrorism." *Levin I,* 2011 WL 812032 at * 17 (internal citations omitted); *see also Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi,* 556 U.S. 366, 369 (2009) (noting that the TRIA authorizes "holders of terrorism related judgments against [a terrorist state] ... to attach [that state's] assets that the United States has blocked"). CB's arguement that foreign central banks have an "absolute immunity," (CB Opp. at 9), would leave judgment creditors with valid judgments against state sponsors of terror without recourse if assets happened to be held in the account of a foreign central bank, a result plainly inconsistent with the remedial purpose of the statute.

The language of TRIA, the purpose of its enactment, and its subsequent enactment to § 1611(b)(1), all indicate that the TRIA waiver of immunity must control when the two provisions are in conflict. Therefore, central bank immunity does not preempt TRIA and CB funds cannot be considered absolutely immune under FSIA § 1611(b)(1).

V. Whether the Judgment Creditors Are Entitled to Interest

The Code of Federal Regulations ("C.F.R.") mandates that financial institutions holding "blocked assets" must place those assets in "an interest-bearing account," specifically "a blocked account in a U.S. financial institution earning interest at rates that are commercially reasonable for the amount of funds in the account." 31 C.F.R. § 595.203(a)(1); § 595.203(b).

The Judgment Creditors contend that this provision obligated the Banks to hold the Phase Two Blocked Assets in accounts that earned, "at a minimum, [interest] equal to rates being paid by [the Banks] to other depositors on deposits or instruments of comparable size and maturity from the date of blocking until" a disposition on those assets is reached. (*See* J. Creditors' Stipulation To Issues Presented by Mot. Summ. J. 7.) The Judgment Creditors argue that they are entitled to the payment of such interest, regardless of whether it was actually earned on the Phase Two Blocked Assets. (*Id.*)

SoGen, with Citibank joining,[19] argues that the "judgment creditors succeed only to rights of their judgment debtor, and Iran, the judgment debtor here, has no claim for interest on blocked accounts. Because Iran could not demand anything beyond the money that is actually in the blocked accounts, neither can the judgment creditors."[20] (SoGen Opp. at 1–3 (citing *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 313 F.3d 70,

83 (2d Cir.2002) (holding that "a party seeking to enforce a judgment 'stand[s] in the shoes of the judgment debtor' " and "cannot 'reach ... assets in which the judgment debtor has no interest' "); *M.F. Hickey Co. v. Port of New York Auth.*, 258 N.Y.S.2d 129, 130 (1st Dep't 1965); CPLR § 5225(b); § 5227.) SoGen argues that this same principle applies to garnishees, stating that "if a judgment debtor could not bring a particular claim against a garnishee, then neither can its creditors." (*Id.* at 3 (citing *United States v. First Nat'l City Bank*, 321 F.2d 14, 19 (2d Cir.1963); *Smith v. Amherst Acres, Inc.*, 350 N.Y.S.2d 236 (4th Dep't 1973).)

***17** SoGen bases its argument on two flawed contentions: first, that Iran has no claim to the interest that SoGen admits has been accruing on the blocked accounts; and second, that the Judgment Creditors' interest demand is founded on an OFAC regulation, 31 C.F.R. § 595.203, which does not create a private right of action for victims of terrorism to sue to obtain the interest that OFAC mandates the garnishee banks accrue. As the Judgment Creditors correctly point out, SoGen's interpretation of the law renders the OFAC regulation meaningless: the garnishee banks would be compelled to maintain blocked assets in interest-bearing accounts, but that interest would accrue for no one's benefit; neither the judgment debtor nor the judgment creditor would have a right to sue for it. (*See* J. Creditors' Reply 22, ECF No. 825.) There is nothing in the underlying statutes or the regulations that indicates that the interest accumulation was intended to benefit the banks instead of judgment creditor victims of terrorism.

VI. CONCLUSION

For the reasons stated above, the Judgment Creditors' motion for partial summary judgment with respect to the Phase Two Blocked Assets is granted. The Banks are hereby ordered to turn over the Phase Two Blocked Assets with accrued interest to the Judgment Creditors in accordance with the protocol designated by the Judgment Creditors.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2013 WL 5312502

Footnotes

1 In the present motion, the Judgment Creditors seek turnover of approximately $4.7 million or 82% of the Phase Two Blocked Assets. (*See* Tr. of Aug. 16, 2012 Hr'g ("8/16/12 Tr.") at 7, ECF No. 777.) According to the Judgment Creditors, the remaining Phase Two Blocked Assets are not ripe for summary judgment at this time. (*Id.* at 3; *see also* Letter from Richard M. Kremen ("8/16/12 Judgment Creditors' Let.") at 2.)

2 The Court assumes familiarity with the factual background and prior history of this case. A more complete description of the case may be found in the Court's decision regarding the Phase One Blocked Assets. *See Levin v. Bank of New York*, No. 09 CV 5900, 2011 WL 812032, at * 1 (S.D.N.Y. Mar. 4, 2011) (*"Levin I"*).

3 Unlike the other Banks, SoGen does not oppose turnover of the Phase Two Blocked Assets. (*See* SoGen Opp. at 1.) Instead, SoGen's opposition papers only raise the issue of whether the Judgment Creditors are entitled to interest on the assets for the time spanning the date of blocking to the date of turnover. (*See id.*) Citibank joined SoGen's opposition on this point, which was not raised by the other Banks; Citibank also opposes turnover of the electronic fund transfers ("EFTs"). (*See* Citibank Opp. at 2.)

4 Citibank's opposition memorandum of law does not contain any case citations or argument of its own. (*See* Citibank Opp.) Instead, Citibank states only that "it hereby joins in the memoranda [sic] of law filed by [SoGen] ... to the extent that it raises the issue of the appropriate scope of relief with respect to the payment of interest on blocked accounts" and also joins in the memorandum of law filed "by the [JPMorgan] and [BNYM parties] to the extent it draws the Court's attention to the recent decisions, filings and pending appeals on the issue of electronic fund transfers cited therein." (*Id.* at 1–2.)

5 The Banks also named as third-party Defendants other Iranian Judgment Creditors who the Banks had reason to believe might assert a claim against the Phase Two Blocked Assets. (*See* J. Creditors' Statement Pursuant to Local Rule 56.1 ("J. Creditors' 56 .1 Stmnt.") ¶¶ 38–39, ECF No. 767.) The Banks named and served the Peterson Judgment Creditors, Rubin Judgment Creditors, Weinstein Judgment Creditors, Owens Judgment Creditors, Valore Judgment Creditors, Sylvia Judgment Creditors, Bland Judgment Creditors, Brown Judgment Creditors, Murphy Judgment Creditors, and Bennett Judgment Creditors. (*See id.* ¶ 39.) The Peterson Judgment Creditors waived any claim with respect to the Phase Two Blocked Assets and were dismissed from this action on December 12, 2012. (*See id.* ¶ 40; Letter from Liviu Vogel ("10/28/11 Vogel Ltr.") 1, ECF No. 491; Stipulation, Order, & J. of Dismissal as to JPMorgan Assets 1, Dec. 12,

2011, ECF No. 561: Stipulation, Order, & J. of Dismissal as to BNYM Assets 1, Dec. 12, 2011, ECF No. 562; Stipulation, Order, & J. of Dismissal as to SoGen Assets 1, Dec. 12, 2011, ECF No. 564.) The Rubin Judgment Creditors and the Weinstein Judgment Creditors failed to respond and are in default. (*See* Mechling Decl. ¶ 41.) The Brown and Bland Judgment Creditors, the Owens Judgment Creditors, and the Murphy Judgment Creditors have answered the third-party complaints but asserted no claims or rights to the Phase Two Blocked Assets. (*See* Brown & Bland Answer to BNYM Third Party Compl., ECF No. 439; Brown & Bland Answer to JPMorgan Third Party Compl., ECF No. 440; Owens Answer to BNYM Third Party Compl., ECF No. 457; Owens Answer to JPMorgan Third Party Compl., ECF No. 458; Owens Answer to Citibank Third Party Compl., ECF No. 460; Brown & Bland Answer to Citibank Third Party Compl., ECF No.462; Owens Answer to SoGen Third Party Compl., ECF No. 485; Murphy Answer to Citibank Third Party Compl., ECF No.732; Murphy Answer to JPMorgan, BNYM, SoGen Third Party Compl., ECF No. 737.) The Bennett Judgment Creditors filed an answer to the JPMorgan third-party complaint and counterclaimed against JPMorgan but did not counterclaim for a turnover of the Phase Two Blocked Assets. (*See* Bennett Answer to Third Party Compl. & Countercls. ¶¶ 65–82, ECF No. 716.) The Valore Judgment Creditors filed answers and counterclaimed against JPMorgan, BNYM, and Citibank. (*See* Valore Answer to Citibank Third Party Compl. & Countercls ("Valore Citibank Answer"), ECF No. 466; Valore Answer to BNYM Compl. & Countercls. ("Valore BNYM Answer"), ECF No. 489; Valore Answer to JPMorgan Compl. & Countercls. ("Valore JPMorgan Answer"), ECF No. 490.) The Valore Judgment Creditors' counterclaim is based upon, *inter alia*, writs of execution allegedly delivered to the U.S. Marshal on October 5, 2011. (*See* Valore Citibank Answer ¶ 75.) The Valore Judgment Creditors have not joined this motion for summary judgment, nor have they submitted any evidence to support their alleged compliance with 28 U.S.C. § 1610(c). In any case, this writ of execution is later in time than the writs of execution obtained by the Judgment Creditors who are, collectively, the moving parties in this summary judgment motion, and any claim the Valore Judgment Creditors have is therefore inferior. *See Levin I*, 2011 WL 812032 at *8–12.

6 Since January 1984, Iran has been designated a "state sponsor of terrorism" under the Export Administration Act, and is a "terrorist party" as defined under TRIA § 201(d)(4). *See Weinstein v. Islamic Republic of Iran*, 609 F.3d 43, 48 (2d. Cir.2010); Export Administration Act § 2405, 50 App. U.S.C.A §§ 2401–20 (West 2004). Further, certain entities connected to Iran are designated by OFAC to be "agencies and instrumentalities of Iran" and are placed on its Specially Designated Nationals List ("SDN List"). *See* United States Treasury Website, *Specially Designated Nationals List*, http://www.treasury.gov/reso urce-center/sanctions/SDN-List/Pages/default.aspx (last updated Sept. 6, 2013) ("SDN List"). Assets of entities placed on the SDN List must be blocked pursuant to OFAC's sanctions regulations and Presidential Executive Orders. *See, e.g.*, Exec. Order No. 13,599, 77 Fed.Reg. 6,659 (Feb. 5, 2012); 31 C.F.R. § 595.204 (2013).

7 In its Phase One Opinion, the Court ordered the Defendant Banks to turn over the Phase One Assets to the Accosta and Greenbaum Creditors, but not the Levin and Heiser Creditors. *Levin I*, 2011 WL 812032, at *21. The Court concluded that "[d]ue to their failure to obtain a court order under 28 U.S.C. § 1610(c) prior to serving the writs of execution on the New York Banks," the Levins writs were invalid. *Id.* In addition, the Court held that the Heiser Creditors' writ was "not capable of attaching the Bank of New York assets located in New York state because it was issued by a Maryland court and served on the Bank of New York in Maryland." *Id.* Accordingly, the Court held that only the Accosta and Greenbaum Creditors were entitled to a grant of partial summary judgment with respect to the Phase One Assets. *Id.* As for the Phase Two Blocked Assets, it is the Court's understanding that, as part of settlement discussions following the Phase One Opinion, the Judgment Creditors have worked out priority of interest amongst themselves. (*See* 8/16/12 Tr. at 15–16.)

8 This approach was followed by a subsequent D.C. District Court decision by Judge Lamberth in *Peterson v. Islamic Republic of Iran*, No. 01–2094(RCL), 2013 WL 1460188 (D.D.C. Apr. 11, 2013), *appeal docketed* No. 13–7086 (D.C.Cir. May 28, 2013), which held that a garnishee bank, HBUS, had committed no sanctionable conduct when it failed to disclose the existence of three blocked EFTs to judgment creditors. The garnishee bank had averred, in interrogatories, that it was not "indebted to" defendants (in that case, agencies and instrumentalities of Iran) and did not possess any of their "goods, chattels, or credits." The court held that sanctions were not appropriate because the statements were legally accurate and defendants had no possessory interest in the EFTs.

9 The United States government, in an amicus brief before the Second Circuit and a statement of interest before the *Heiser* Court, argues that both TRIA and FSIA § 1610(g) require an ownership interest. (*See Heiser* Statement of Interest; Brief for the United States as Amicus Curiae at 15, *JPMorgan Chase, N.A. v. Hausler*, No. 12–1264 (*"Hausler* Amicus Br.").) This Court has never held otherwise, although the Phase One Opinion held, and its holding is affirmed here, that the nature of that ownership interest is defined by the OFAC regulations rather than by reference to state law. The government goes on to argue for the strategic importance of allowing some assets blocked pursuant to OFAC regulations to be unattachable. In part, the government argues that these blocked assets are used for leverage for international negotiations. (*See Hausler* Amicus Br. at 23.)

This Court has no statement of government interest before it, although the Executive Branch was invited to participate in this action. (*See* 12/11/09 OFAC Ltr.; 12/11/09 State Dept. Ltr.; Tr. 6/21/2011 at 8–9; Tr. 11/13/12 at 4–5.) Its statements of interest in separate actions will be accorded no deference. *See Republic of Altmann v. Austria*, 541 U.S. 677, 701–2 (2004) (rejecting the United States government's interpretation of FSIA when it is a matter of "pure question of statutory construction ... well within the province of the Judiciary" and finding that the United States' views "merit no special deference"); *Hausler I*, 740 F.Supp.2d at 537 (noting that "[c]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there, notwithstanding any contrary interpretation by the Executive Branch"). Any statement from the Executive Branch submitted with respect to the TRIA should be considered suspect, given that Congress' passage of TRIA was over the objection of the Executive Branch and for the purpose of rendering blocked assets attachable. *See In re Islamic Republic of Iran Terrorism Litig.*, 659 F.Supp.2d 31, 58 ("[T]he TRIA appears to represent something of a victory for these terrorism victims—whose interests have been most vigorously advanced by members of Congress—over the longstanding objections of the Executive Branch.").

10 28 U.S.C. § 1610(g) provides:

> (g) Property in certain actions.—
>
> (1) In general.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—
>
> (A) the level of economic control over the property by the government of the foreign state;
>
> (B) whether the profits of the property go to that government;
>
> (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
>
> (D) whether that government is the sole beneficiary in interest of the property; or
>
> (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.
>
> (2) United States sovereign immunity inapplicable.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.
>
> (3) Third-party joint property holders.—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

28 U.S.C. § 1610.

11 FSIA § 1610(g) was one of a series of amendments made to the FSIA in 2008 after Congress enacted TRIA in 2002; the 2008 amendments revised the immunity provisions related to terrorist states, created an express cause of action against state sponsors of terrorism that engaged in terrorist acts, and created FSIA § 1610(g), the execution provision. *See* National Defense Authorization Act for Fiscal Year 2008, Pub.L. No. 110–181 § 1083(a)(1) & (b)(3)(D) (2008) (codified at 28 U.S.C. §§ 1605A & 1610(g)). In relevant part, FSIA § 1610(g) permits judgment creditors holding judgments entered under § 1605A, as the Judgment Creditors in this action are, to attach "the property of a foreign state against which a judgment is entered ... and the property of an agency or instrumentality of such a state."

12 28 U.S.C. § 1603(b) provides:

> For the purposes of this charter ...
>
> **(b)** An "agency or instrumentality of a foreign state" means any entity—
>
> **(1)** which is a separate legal person, corporate or otherwise, and
>
> **(2)** which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> **(3)** which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603.

13 [Redacted]

14 The Levins, Greenbaum, Acosta, and Heiser Judgment Creditors have entered into a confidential settlement agreement resolving their dispute regarding priority, as between them, to the Blocked Assets at issue in this matter and providing for the distribution of proceeds therefrom. (*See* Mechling Decl. ¶ 38.)

15 Three commercial third-party Defendants named in the Citibank third-party complaint—the [Redacted]—have asserted claims to the proceeds of EFTs to which each was a party. (*See* [Redacted]) One commercial third-party defendant named in the BNYM third-party complaint—[Redacted]—asserted a claim to the wire to which it was a party. (*See* Answer to Am. & Supplemental Third–Party Compl. Of BNYM [Redacted]"), ECF No. 521.) Two commercial third-party defendants named in the JPMorgan third-party complaint—CB, whose arguments are addressed above, and [Redacted]—asserted a claim to the wires to which they were parties. (*See* Central Bank of [Redacted] Answer to Additional Am. Third–Party Compl. of JPMorgan Chase Parties ("CB Answer"), ECF No. 655; Mechling Decl., Ex. 26 (referencing a Jan. 22, 2012 letter submitted to counsel from [Redacted] asserting a claim).)

16 CB argues that its blocked transfer is distinguishable from the other EFTs considered here because its transfer was blocked after CB sent a payment order to JPMorgan, where CB's deposit account was located, but before the transfer reached an intermediary bank. (*See* CB Opp. at 12.) The beneficiary bank to which the transfer was directed was [Redacted], an entity whose assets are blocked by OFAC. (*See* Decl. of Richard L. Pollock ¶ 6 ("Pollock Decl."), Oct. 15, 2012, ECF No. 802.) Upon discovering that a party to the transfer was subject to OFAC blocking regulations, JPMorgan was legally required to transfer the funds to a blocked account. *See* 31 C.F.R. § 544.203. To the extent that CB contests that the transfer was improperly blocked by OFAC, the proper procedure is to apply for a license from OFAC. Although CB has stated that it "intends" to seek such a license, there is no evidence before this Court that it has actually done so. (*See* [Redacted]) Until such time as OFAC grants such a license, there is no reason to doubt that the assets were properly blocked in accordance with OFAC blocking regulations. Since this Court affirms its Phase One Opinion holding that TRIA § 201(a) "indicate[s] that Congress intended all blocked assets be available for attachment by victims of terror," CB's assets are properly considered as subject to attachment here. *Levin I*, 2011 WL 812032, at *18.

17 Funds deposited in a bank in the United States may benefit from central bank immunity if the funds belong to a foreign central bank and are held for the bank's own account. *NML Capital Ltd. v. Banco Central de la Republica Argentina*, 622 F.3d, 172, 194 (2d Cir.2011), *cert denied*, 133 S.Ct. 23 (2012). Here, Judgment Creditors allege that CB's transfer may not benefit from central bank immunity because it was in transit to [Redacted] when it was blocked, (*see* Pollock Decl., Ex. A at p. 404–05), not sitting in the deposit account of CB, as CB alleges (*see* CB Opp. at 12). There is no need to reach this issue here, because TRIA trumps central bank immunity in any event.

18 Section 1611(b)(1) of the FSIA states that:

> (b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—
>
> (1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver ...

28 U.S.C.A. § 1611 (West).

19 *See* note 4 *supra*.

20 Nevertheless, SoGen asserts that it "complies with OFAC regulations requiring payment of interest [on blocked assets] at a 'commercially reasonable' rate" by paying interest on blocked accounts "on the same basis as ... similar commercial accounts." (*Id.* at 2.) SoGen still contests the Judgment Creditors' right to that interest, however. (*Id.*) In addition, SoGen asserts that enforcing the Judgment Creditors' demand for interest equal to what SoGen pays "other depositors" would require "further fact and expert discovery and evidentiary hearings" that would be "an extraordinary waste of judicial and party resources over, at most, a few thousand dollars." (*Id.*) This argument is one for the opposing parties to resolve between themselves.

End of Document

ANNEX 332

EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JEREMY LEVIN and DR. LUCILLE LEVIN,	:	(FILED PARTIALLY UNDER SEAL DUE TO CONFIDENTIAL
Plaintiffs,	:	INFORMATION PER ORDER DATED JANUARY 21, 2010)
-against-	:	
THE BANK OF NEW YORK MELLON, JPMORGAN CHASE, N.A., SOCIETE GENERALE and CITIBANK, N.A.,	:	Case No. 09 Civ. 5900 (RPP)
Defendants.	:	

AMENDED SCHEDULING ORDER (I) AUTHORIZING ADDITIONAL PLEADINGS AND (II) GOVERNING AND SCHEDULING FURTHER PROCEEDINGS IN CONNECTION WITH PHASE TWO

WHEREAS, these proceedings were commenced by Jeremy Levin and Dr. Lucille Levin (the "Levin Plaintiffs") filing a summons and complaint in this Court on June 26, 2009;

WHEREAS, the Levin Plaintiffs' complaint seeks relief in the nature of an order directing defendants Citibank, N.A. ("Citibank"), JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A. (collectively, "JPMorgan Chase Bank"), The Bank of New York Mellon ("BNYM"), and Société Générale ("SoGen") (collectively, the "Defendant Banks") to turn over to the Levin Plaintiffs property, including but not limited to, certain blocked assets within their possession, custody or control that are subject to execution in satisfaction of the Levin Plaintiffs' judgment against the Islamic Republic of Iran ("Iran") (the "Blocked Assets");

WHEREAS, the Defendant Banks answered the complaint and, pursuant to Orders of this Court dated January 11, March 18, May 26 and December 10, 2010, commenced third-party interpleader actions in order to bring before the Court as third-party defendants certain persons who may possess an interest in certain of the Blocked Assets designated for inclusion in Phase

One of these proceedings and identified in the Levins' Motion for Partial Summary Judgment on Claims for Turnover Order Phase One Assets filed on July 13, 2010 (the "Phase One Blocked Assets"), or who may have been parties to the wire transfers or other transactions relating to the Phase One Blocked Assets;

WHEREAS, among other parties, the judgment creditors of Iran known in these proceedings as the Greenbaum, Acosta, and Heiser Judgment Creditors were interpled as third-party defendants by the Defendant Banks in connection with certain claims these parties had asserted with respect to the Blocked Assets, including, but not limited to, the Phase One Blocked Assets, and they each filed answers and counterclaims in this proceeding;

WHEREAS, the Court entered an order on January 25, 2010, and subsequent orders on April 12 and June 3, 2010 (the "Service Orders"), authorizing simplified or alternate means for the service of third-party complaints in this proceeding;

WHEREAS, the Court entered a Confidentiality Stipulation and Order among certain parties to this proceeding, which was so ordered on October 26, 2009, and entered orders modifying and expanding the scope of this order on January 11 and August 6, 2010 (collectively, the "Confidentiality Order"), and the Court entered an Order on January 21, 2010 (Docket No. 42) (the "Unsealing Order"), unsealing the file in this case, which requires that documents containing certain type of information nevertheless be filed under seal, with redacted versions filed electronically;

WHEREAS, upon the Levin Plaintiffs' and the Greenbaum, Acosta, and Heiser Judgment Creditors' respective motions for partial summary judgment and turnover of the Phase One Blocked Assets, the Court determined, by Opinion and Order dated January 20, 2011, and amended on March 4, 2011, that the Greenbaum and Acosta Judgment Creditors held a priority

interest in and were entitled to turnover of the Phase One Blocked Assets held by defendant Citibank, and that the Acosta Judgment Creditors held a priority interest in and were entitled to turnover of the Phase One Blocked Asset held by defendant JPMorgan Chase;

WHEREAS, the Levin Plaintiffs filed an appeal of the January 20 and March 4, 2011 Orders;

WHEREAS, thereafter the Levin, Greenbaum, Acosta, and Heiser Judgment Creditors reached a settlement that was approved by the Court, and the Levins dismissed their appeal;

WHEREAS, upon the joint motion for partial summary judgment of the Levin Plaintiffs and the Greenbaum, Acosta, and Heiser Judgment Creditors (collectively, the "Judgment Creditors"), this Court determined, by Order and Judgment dated June 21, 2011, and corrected on July 11, 2011, that the Judgment Creditors collectively possessed a priority interest in, and were entitled to turnover of, the remainder of the Phase One Blocked Assets held by defendants BNYM and SoGen;

WHEREAS, to date, all of the Phase One Blocked Assets have been turned over to the Judgment Creditors by the Defendant Banks, other than interest due on the Phase One Blocked Assets held by SoGen;

WHEREAS, all claims to the Phase One Blocked Assets having been resolved other than payment of the interest due on the Phase One Blocked Assets held by SoGen, the Defendant Banks still have in their possession, custody or control additional funds, Blocked Assets and other blocked accounts and wire transfers to which the Judgment Creditors have asserted claims (the "Phase Two Blocked Assets"), which are more specifically identified in the annexed **Schedule A** to this Order;

WHEREAS, other persons or entities, including, but not limited to, other judgment creditors of Iran and/or parties associated with the blocked accounts and/or wire transfers that make up the Phase Two Blocked Assets, may have claims to the Phase Two Blocked Assets, which claims may be adverse to the Judgment Creditors' claims; and

WHEREAS, this Court has the authority under its inherent powers to manage its proceedings efficiently, including establishing procedures for the giving of notice and procedures by which third parties may participate in these proceedings;

NOW, THEREFORE, it is hereby ORDERED as follows:

1. Each of the Defendant Banks is hereby authorized to file not more than two additional, amended and/or supplemental third-party complaints (the "Phase Two Interpleader Complaints") against the following third-party defendants:

(a) judgment creditors of Iran and other plaintiffs in actions against Iran who have served a writ of execution, writ of garnishment, restraining notice, notice of lis pendens or other legal process on any of the Defendant Banks with regard to, or affecting, the Phase Two Blocked Asset that are identified on Schedule A, hereto (the "Iran Plaintiff Parties");

(b) account holders of any blocked deposit accounts held by the Defendant Banks that are identified on **Schedule A,** hereto, and other persons who the Defendant Banks reasonably believe may have an interest in or claim to the funds in any such account (the "Phase Two Blocked Account Parties");

(c) originators, beneficiaries and bank parties to any blocked wire transfer identified on **Schedule A,** hereto, and other persons referred to in any wire transfer instructions and who the Defendant Banks reasonably believe may have an interest in or claim to the proceeds of any such wire transfer (the "Phase Two Blocked Wire Transfer Parties"); and

(d) the Islamic Republic of Iran, the Iranian Ministry of Information and Security, the Iranian Revolutionary Guard Corp and the Iranian Islamic Revolutionary Guard Corp (the "Iran Parties").

The Defendant Banks shall file the Phase Two Interpleader Complaints on or before September 21, 2011.

2. The Defendant Banks are hereby authorized and directed to serve the Phase Two Interpleader Complaints, together with a copy of this order, on any third-party defendants or other parties to this proceeding who have previously appeared in this proceeding, by e-mail and regular mail upon the respective counsel of record who have appeared for such parties in this action, at their addresses and e-mail addresses listed on the docket in this action, on or before September 26, 2011. The Judgment Creditors and all other parties who have signed the Confidentiality Order shall be served with the Phase Two Interpleader Complaint in unredacted form, and other parties shall be served with the Phase Two Interpleader Complaint in redacted form to the extent necessary to protect the confidentiality of information covered by the Confidentiality Order. Such service shall constitute good and sufficient service of process upon such parties, and the Defendant Banks shall not otherwise be required to serve third-party summonses or other legal process upon any such party.

3. The Judgment Creditors and any other third-party defendants in this proceeding who have filed cross-claims or counterclaims herein are hereby authorized to file and serve amended complaints, or amended answers with amended cross-claims and counterclaims against the Defendant Banks, no later than 14 days after the date Defendant Banks serve them with the Third Party Complaint, and all parties to this action may use any method of service referred to in this Order for any purpose.

4. The Defendant Banks are hereby authorized and directed to serve the Phase Two Interpleader Complaints, together with a third-party summons and a copy of this order, on any third-party defendants who are Iran Plaintiff Parties, but who have not appeared in this

proceeding, by regular mail and e-mail (if their e-mail addresses are known) upon the respective counsel of record for such third-party defendants in their action against Iran, at their addresses and e-mail addresses listed on the complaint in their action against Iran, on or before September 26, 2011. If the plaintiffs in *Khaliq v. Republic of Sudan*, 10 Civ. 0356 (JDB) (D.D.C.), *Owens v. Republic of Sudan*, No. Civ.A. 01-2244 (JDB) (D.D.C.) and/or *Mwila v. Islamic Republic of Iran*, 08 Civ. 1377 (JDB) (D.D.C.), are named as third-party defendants in the Phase Two Interpleader Complaints, process may be served upon their counsel at the following mail and e-mail addresses for the following attorneys, who signed the complaints in those actions and the notices of lis pendens:

Annie P. Kaplan, Esq.
Fay Kaplan Law, P.A.
777 Sixth Street NW, Suite 410
Washington, DC 20001
E-mail address: annie.kaplan@gmail.com

Jane Carol Norman, Esq.
Broad & Norman PLLC
777 Sixth Street NW, Suite 410
Washington, DC 20001
E-mail address: jnorman425@aol.com

Thomas Fortune Fay, Esq.
Fay Kaplan Law, P.A.
777 Sixth Street NW, Suite 410
Washington, DC 20001
E-mail address: thomasfay@aol.com

If plaintiffs in *Weinstein v. Islamic Republic of Iran*, Civil Action No. 00-2601 (RCL) (D.D.C.), are named as third-party defendants in the Phase Two Interpleader Complaints, process may be served upon their counsel at the following mail and e-mail addresses for the following attorneys, who have appeared for those plaintiffs in that case and/or related cases:

Jeffrey A. Miller, Esq.
Westerman Ball Ederer Miller & Sharfstein LLP
1201 RXR Plaza
Uniondate, NY 11556
E-mail: jmiller@westermanllp.com

Robert J. Tolchin, Esq.
The Berkman Law Office, LLC
111 Livingston Street, Suite 1928
Brooklyn, NY 11201
E-mail address: rjt@tolchinlaw.com

Such service shall constitute good and sufficient service of process upon such parties, and the Defendant Banks shall not otherwise be required to serve summonses or other legal process upon any such party.

5. All third-party defendants served pursuant to paragraph 2 of this Order shall file their answers or other responsive papers to the Phase Two Interpleader Complaints within the time specified to file an answer to an amended complaint by Rule 15 of the Federal Rules of Civil Procedure (hereinafter citations to "Rule _" shall refer to these Rules), and all third-party defendants served pursuant to paragraph 4 of this Order shall file their answers or other responsive papers to the Phase Two Interpleader Complaints within the time specified to file an answer to a complaint by Rule 12. Extensions of time will not be granted except on the consent of one of the counsel for the Judgment Creditors or for good cause shown.

6. By September 21, 2011 the Defendant Banks shall provide to the Judgment Creditors' counsel the best contact information available, including, to the extent possible, the full name, address, telephone number(s), facsimile number(s), name of suitable senior person for service by Federal Express or DHL, and appropriate email address(es) (collectively, the "Contact Information"), of any and all Phase Two Blocked Account Parties and Phase Two Blocked Wire Transfer Parties. The address information may provide for the service of an originator or

beneficiary of a wire transfer, or any other non-bank person or entity involved in a wire transfer, in care of that person's or entity's bank, so as to permit service pursuant to paragraph 5 of the Service Order entered herein on January 25, 2010.

7. The Judgment Creditors shall be responsible for (a) preparing third-party summonses to all third-party defendants who are either Phase Two Blocked Account Parties or Phase Two Blocked Wire Transfer Parties; (b) serving the Phase Two Interpleader Complaints, along with third-party summonses and copies of this Court's ECF Rules, the Honorable Judge Robert Patterson's Individual Practices, the order referring this case to Magistrate Judge Dolinger, this Order, the Unsealing Order entered in this case on January 21, 2010 and any of the Service Orders pursuant to which service is being made (collectively, the "Phase Two Service Documents") upon all Phase Two Blocked Account Parties and Phase Two Blocked Wire Transfer Parties named in such pleading and for which Contact Information sufficient for service according to this Order has been provided by the Defendant Banks; and (c) redacting such documents so as to disclose to the Phase Two Blocked Account Parties and the Phase Two Blocked Wire Transfer Parties only Confidential Information (using that term as it is defined in the Confidentiality Order) that relates to blocked deposit accounts and blocked wire transfers that involved or relate to that party. Except as provided in paragraph 9 hereof, the Judgment Creditors are authorized to serve the Phase Two Service Documents in any manner previously authorized by this Court, including, but not limited to, any method of service authorized by any of the Service Orders, including, but not limited to, the Order entered herein on January 25, 2010. The Judgment Creditors are further hereby authorized to serve the Phase Two Service Documents upon the Phase Two Blocked Account Holders and Phase Two Blocked Wire Transfer Parties based upon the Contact Information provided to the Judgment Creditors'

counsel in accordance with paragraph 5 of this Order. Service in accordance with the provisions of this paragraph shall be deemed to satisfy all of the requirements for service imposed by the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602, *et seq.* (the "FSIA"), the Federal Rules of Civil Procedure, the New York Civil Practice Law and Rules and all requirements of due process of law and shall constitute valid, sufficient and binding service on the third-party defendants.

8. The Judgment Creditors shall serve any Phase Two Blocked Account Parties and/or Phase Two Blocked Wire Transfer Parties named as third-party defendants in the Phase Two Interpleader Complaint and residing outside of the United States in nation states subscribing to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (the "Hague Service Convention") pursuant to such Hague Service Convention. In instances where a foreign state requires documents being served pursuant to the Hague Service Convention to be translated into a language other than English and served through a Central Authority, the Judgment Creditors shall only be required to serve the complaint, with exhibits, the third-party summons and the Phase Two Interpleader Complaint, with exhibits, and translations thereof, rather than all of the documents specified in paragraph 7 of this Order.

9. Notwithstanding paragraph 7 of this Order, the Judgment Creditors shall serve any Iran Parties in accordance with the requirements of section 1608 of the Foreign Sovereign Immunities Act of 1976 (the "FSIA"), 28 U.S.C. § 1608.

10. The Judgment Creditors shall attempt to serve third-party defendants via Federal Express, DHL or a form of mail offered by the U.S. Postal Service (other than registered or certified mail) that provides confirmation of delivery in cases where that is feasible, so long as it is consistent with the requirements of the Hague Service Convention and the FSIA. In cases

where service is being made in Iran, the Judgment Creditors shall serve the same party a second time outside of Iran or shall promptly notify the affected Defendant Banks that they are not going to make such service.

11. The Judgment Creditors shall be responsible for arranging to have the complaint, the exhibits thereto, the third-party summons, the Phase Two Interpleader Complaint and the exhibits thereto translated into Farsi and any other languages into which such translations may be required by FSIA § 1608 or the Central Authority of any country where service is being made under the Hague Service Convention. The Judgment Creditors shall bear all costs of such translations, and all costs of serving the third-party defendants that they are responsible for serving, except for the fee charged by the State Department for serving Iran (which shall be borne by those Defendant Banks who name the Iran Parties as third-party defendants and which amount will not be charged by such Defendant Banks as an expense against any recovery by the Judgment Creditors), but counsel for the Judgment Creditors shall be entitled to reimbursement for all such costs incurred by them out of any funds awarded in Phase Two or any subsequent phase of this proceeding.

12. The parties shall make best efforts to effect service of process upon all third-party defendants named in the Phase Two Interpleader Complaints and all other parties that they are responsible for serving under this Order, in accordance with the terms of this Order, by November 7, 2011.

13. The Judgment Creditors will provide copies to the Defendant Banks, as soon as they are available, of all translations of the documents specified in paragraph 10 of this Order, with certificates of translation.

14. Any third-party defendant who files an answer under seal shall file electronically a redacted copy of its answer, redacted in accordance with the Unsealing Order, and shall serve an unredacted copy of that answer upon the following persons by e-mail within two days of filing the answer under seal: Curtis C. Mechling, Esq. at cmechling@stroock.com, Ben Weathers-Lowin, Esq. at bweatherslowin@stroock.com, Richard Kremen, Esq. at richard.kremen@dlapiper.com, David Misler, Esq, at david.misler@dlapiper.com, Suzelle M. Smith, Esq, at ssmith@howarth-smith.com, Liviu Vogel, Esq. at lvogel@salonmarrow.com, Noel J. Nudelman, Esq. at njnudelman@hnklaw.com, and any other counsel entitled to have access to confidential information, at his or her e-mail address listed on the docket sheet. Such third-party defendant shall also serve an unredacted copy of its answer by mail or e-mail upon counsel of record for each Defendant Bank that is named as a third-party plaintiff in the third-party complaint being answered at the addresses and e-mail addresses set forth in the third-party complaint.

15. Within fourteen days after completing service upon any third-party defendant in accordance with the provisions of this Order, the Judgment Creditors shall file with this Court and provide to counsel for the appropriate Defendant Bank a proof of service of such service in accordance with Rule 4(l). In order to comply with Rule 4(l), such proof of service shall be signed by the person who actually prepared the documents for service and delivered them to the U.S. Postal Service, Federal Express or DHL, or otherwise actually made service upon the third-party defendant, shall specify the documents served, the method of service used and the addresses where service was made, and shall, where appropriate, identify the U.S. Postal Service, Federal Express or DHL tracking number for the package and attach a copy of the confirmation

of service received from the U.S. Postal Service, Federal Express or DHL, unless no confirmation has been received after a reasonable period of time.

16. The Unsealing Order, Confidentiality Order, and Protective Order entered in these proceedings on September 29, 2008, that is annexed as Exhibit C to the Levin Plaintiffs' complaint in this proceeding, are hereby further modified to authorize the Judgment Creditors and the Defendant Banks to serve copies of the Phase Two Service Documents upon the Phase Two Blocked Account Parties and the Phase Two Blocked Wire Transfer Parties, and to send copies of the Phase Two Service Documents or translations thereof to such parties in the course of giving them notice of the Phase Two Interpleader Complaint filed pursuant to this Order, provided, however, that the Judgment Creditors and the Defendant Banks shall make best efforts to redact such documents so as to disclose to the Phase Two Blocked Account Parties and the Phase Two Blocked Wire Transfer Parties only Confidential Information (using that term as it is defined in the Confidentiality Order) that relates to blocked deposit accounts and blocked wire transfers that involved or relate to that party.

17. This Court shall hold a status conference in this proceeding at 4 P.M. on December 7, 2011 to determine the status of service of process on the third-party defendants and establish a schedule for further proceedings and motion practice herein.

18. Nothing in this Order shall preclude the Defendant Banks from seeking the Court's permission to file additional third-party interpleader complaints or to amend the Phase Two Interpleader Complaints after September 21, 2011.

SO ORDERED.

Dated: New York, New York
September 16, 2011

Robert P. Patterson, Jr.
United States District Judge

ANNEX 333

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

THE ESTATE OF MICHAEL HEISER, deceased, et al.,

Petitioners,

v.

THE BANK OF TOKYO MITSUBISHI UFJ, NEW YORK BRANCH,

Respondent.

----------x

11-CV-1601 (PKC/MHD)

ORDER CONCERNING NOTICE TO AND SERVICE ON THIRD-PARTIES

WHEREAS, this proceeding was commenced by Petitioners by the filing of a Petition for Turnover Order pursuant to Fed. R. Civ. P. 69 and N.Y.C.P.L.R. §§ 5225 and 5227 (the "Petition") in this Court on March 8, 2011; and

WHEREAS, the Petition seeks an order directing the Respondent The Bank of Tokyo Mitsubishi UFJ, New York Branch ("Respondent") to turn over to Petitioners, in satisfaction of a judgment in the amount of $591,089,966.00 entered in their favor by the United States District Court for the District of Columbia on December 22, 2006, as supplemented by a judgment entered September 30, 2009 (collectively, the "Judgment"), in consolidated cases captioned Heiser v. Iran (Case No. 00-CV-2329 RCL) and Campbell v. Iran (Case No. 01-CV-2104 RCL) (the "Underlying Action"), certain funds (the "Blocked Assets") held by the Respondent that were blocked pursuant to regulations of the Office of Foreign Assets Control ("OFAC") and that may be subject to execution to satisfy the Judgment because the Islamic Republic of Iran ("Iran") or individuals, persons and entities that are agencies or instrumentalities of Iran (collectively, "Persons") may have an interest in such Blocked Assets; and

WHEREAS, the Blocked Assets comprise funds that were the subject of wire transfers for which Respondent was an intermediary bank; and

WHEREAS, on July 12, 2011, Respondent filed an Answer to Petition in which Respondent asserted affirmative defenses including, without limitation, the need to provide proper notice of the Petition to all parties that may have an interest in the Blocked Assets; and

WHEREAS, the parties wish to have the Court exercise its authority to establish requirements and procedures for Petitioners to give notice of this proceeding to certain parties who may claim an interest in the Blocked Assets (the "Third Parties" or a "Third Party"); and

WHEREAS, section 1608(b)(3)(C) of the Foreign Sovereign Immunities Act of 1976 ("FSIA") authorizes the parties to this proceeding, under the circumstances specified therein, to serve process upon or give notice to an agency or instrumentality of a foreign state "as directed by order of the court consistent with the law of the place where service is to be made;" and

WHEREAS, Rules 4(f)(3) and 4(h)(2) of the Federal Rules of Civil Procedure authorize the parties to this proceeding to serve process upon or give notice to persons outside any judicial district of the United States "by other means not prohibited by international agreement, as the court directs;" and

WHEREAS, this Court has the authority under its inherent powers to establish procedures for the service of process or the giving of notice in certain other circumstances as well;

NOW, THEREFORE, it is hereby ORDERED as follows:

1. The following documents (referred to collectively hereinafter as the "Service Documents") shall be served in the manner specified in subsequent provisions of this Order.

a. The Petition;

b. A spreadsheet or other summary provided by the Respondent to the Petitioners identifying (to the extent it can reasonably be determined) those Blocked Assets in which the Respondent believes the person receiving notice may claim an interest;

c. A notice in the form of Exhibit A to this Order (the "Notice of Lawsuit");

d. This Order;

e. To the extent the Service Documents are sent to a person or entity ("Entity") in Iran or a country where the official language is Farsi, Petitioners shall translate the Service Documents into Farsi in compliance with section 1608(b)(3) of the FSIA.

2. Petitioners shall serve the Service Documents upon the following Third Parties, to the extent that Petitioners are in possession of contact information for such parties sufficient to permit them to give notice in the manner specified in this Order:

a. The account holder of record of any Blocked Assets; and

b. The originator, the originator's bank, the beneficiary, the beneficiary's bank, and any intermediary bank for any blocked electronic funds transfer ("EFT").

3. The Service Documents may be served by Petitioners upon any Third Party by any of the following methods:

a. by sending copies of the Service Documents to such Third Party at its last known address, as determined by Petitioners from their own records, records provided by Respondent or public sources such as the internet, either by U.S. global mail (also known as First Class International Mail) or by an express delivery company such as FedEx, UPS or DHL that makes deliveries in the country to which the documents are being sent, directed to the attention of the Managing Director, Chief Executive Officer or Chief Legal Officer of that Third Party if it is a business entity, or to an individual if the Third Party is not an entity. Respondent shall

provide counsel for Petitioners the address it has in its records (if any) of any Third Party within thirty (30) days of the entry of the later this Order and a suitable Protective Order for this case;

b. by sending an e-mail to the last known e-mail address of such Third Party, as determined by Petitioners from their own records, records provided by Respondent or public sources such as internet web sites, which e-mail shall state:

> "IMPORTANT! This e-mail is being sent to put you on notice of a lawsuit pending in the United States District Court for the Southern District of New York that could result in the seizure and forfeiture of funds in which you may have an interest. These funds may include the balances held in one or more bank accounts that were blocked pursuant to applicable OFAC regulations and the proceeds of one or more wire transfers that were interrupted and blocked pursuant to those regulations. Please open the attachments, which are in .pdf form, immediately. They will provide more detailed information about the lawsuit and your potential exposure to loss in that lawsuit."

The e-mail shall also attach .PDF versions of the Service Documents to the e-mail (if the e-mail is being sent to a business entity, the e-mail should be directed to the e-mail address of the Chief Executive Officer, Managing Director or Chief Legal Officer, if known, or it should state, following the word "IMPORTANT," "Deliver this e-mail and the attachments to your Chief Executive Officer, Managing Director or Chief Legal Officer at once"). Respondent shall provide counsel for Petitioners the e-mail address it has in its records (if any) of any Third Party within thirty (30) days of the entry of the later of this Order and a suitable Protective Order for this case;

c. by faxing copies of the Service Documents to such Third Party at its last known fax number, as determined by Petitioners from their own records, records obtained from Respondent or public sources such as the internet (if the fax is being sent to a business entity, the fax cover sheet should be addressed to the Chief Executive Officer, Managing Director or Chief Legal Officer of the entity). Respondent shall provide counsel for Petitioners the fax number it

has in its records (if any) of any Third Party within thirty (30) days of the entry of the later of this Order and a suitable Protective Order for this case; or

d. by serving the Service Documents in any other manner that would constitute good service under Rule 4 of the Federal Rules of Civil Procedure;

e. if the Third Party being given notice is a bank, Petitioners may provide notice by sending the following text to the bank in one or more of a series of linked SWIFT messages:

> "URGENT URGENT URGENT URGENT Deliver this message to your Chief Executive Officer, Managing Director or Chief Legal Officer at once. This message is being sent to put you on notice of a lawsuit pending in the United States District Court for the Southern District of New York that could result in the seizure and forfeiture of funds in which you may have an interest. These funds include the balances held in one or more bank accounts that were blocked pursuant to the OFAC regulations and the proceeds of one or more wire transfers that were interrupted and blocked pursuant to those regulations. What follows is the text of important legal documents that explain the nature of this lawsuit and what you must do to protect your rights, if any, in the funds at issue in the lawsuit. Please contact [contact information to be supplied]. That person can provide you with additional important legal documents relating to the lawsuit."

Such notice should be followed by the Petition and the Notice of Lawsuit, except that the captions of such documents may be abbreviated to show only the name of the first named petitioner and respondent, and the list of persons to whom the Petition is addressed may be omitted. The foregoing text may be modified as necessary to comply with paragraph 5 of this Order in the event that several linked messages or series of linked messages are needed to incorporate all of the specified documents; or

f. if the Third Party being given notice is owned or controlled in whole or in part by Iran or any of its agencies and instrumentalities or has ever been included in a list promulgated by the OFAC of persons whose assets must be blocked pursuant to applicable OFAC regulations, Petitioners may provide notice by causing copies of the Service Documents

to be served on such party in accordance with 28 U.S.C. § 1608(b)(3)(B) and this Court's Instructions for Service of Process on a Foreign Defendant, which contemplate that documents be dispatched to such party by the Clerk of this Court using a form of mail that requires a signed receipt.

4. The notice may be given by any person authorized to effect service of process under Rule 4(c)(2) of the Federal Rules of Civil Procedure.

5. If the Service Documents are too voluminous to be sent to a Third Party by mail or overnight delivery service in one envelope, or as attachments to a single e-mail, or in a single fax or SWIFT, the mailings, e-mails, faxes or SWIFTS shall indicate this fact and the number of envelopes, e-mails, faxes or SWIFTS, as the case may be, that are being sent and notify the recipient to treat them as a single group of documents relating to the same proceeding.

6. Any Protective Order previously entered by this Court ordering the sealing of papers in this action is hereby suspended and amended to the extent necessary for the translation of documents into Farsi and the service and delivery of documents and information as authorized in this Order.

7. Counsel for Petitioners shall file a certificate of service with the Court and serve a copy of the certificate of service on counsel for Respondent within five (5) days after receiving confirmation of service on the Third Parties.

8. Service in accordance with the provisions of this Order shall be deemed to satisfy all of the requirements for service under the FSIA, the Federal Rules of Civil Procedure, N.Y. C.P.L.R., and all of the requirements of due process of law.

9. Any Third Party who fails to assert a claim to the Blocked Assets or take any action within sixty (60) days of the date indicated on the Notice of Lawsuit shall be deemed to

forever waive any claims that such Third Party may have against the Blocked Assets, or against Respondent or Petitioners with respect to the Blocked Assets, and such Third Party shall be forever barred, estopped and enjoined from asserting any claim to the Blocked Assets or pursuing any claim against the Respondent or Petitioners with respect to delivery or payment of the Blocked Assets to Petitioners at any time in any jurisdiction. This Court shall retain continuing jurisdiction with respect to any claims made at any time involving in any way the Blocked Assets.

10. By consenting to the relief set forth herein, Respondent has not waived, forfeited or prejudiced in any way the ability of the Third Parties to join in any proceeding relating to the Petition, and it has not waived, forfeited or prejudiced in any way any of the Third Parties' rights, defenses, arguments or objections that they may have in response to the Petition, all of which are expressly reserved and given effect by ensuring that the Third Parties will be given notice of their right to interpose opposition to the relief sought in this turnover proceeding.

Dated: New York, New York
August 23 2011

SO ORDERED:

United States Magistrate Judge

ANNEX 334

919 F.Supp.2d 411
United States District Court,
S.D. New York.

ESTATE OF Michael HEISER, et al., Petitioners,
v.
BANK OF TOKYO MITSUBISHI UFJ, NEW YORK BRANCH, Respondent.

No. 11 Civ. 1601 (PKC).
|
Jan. 29, 2013.

Synopsis
Background: Family members and the estates of seventeen U.S. Air Force servicemembers killed in 1996 terrorist attacks in Saudi Arabia sought to enforce a judgment against the Islamic Republic of Iran, and Iran-based entities which were found by the United States District Court for the District of Columbia, Royce C. Lamberth, J., to have provided support for the terrorist attacks. Petitioners moved for summary judgment and sought an order compelling respondent bank to turn over funds that they claimed belonged to Iran-based entities that functioned as mere instrumentalities of the Islamic Republic of Iran, which were blocked pursuant to Presidential Executive Orders and directives issued by the Office of Foreign Assets Control (OFAC).

The District Court, P. Kevin Castel, J., held that petitioners were entitled to an order attaching Islamic Republic of Iran entities' funds.

Motion granted.

Attorneys and Law Firms

***412** Cary Brian Samowitz, Timothy H. Birnbaum, DLA Piper U.S. LLP, New York, NY, Dale Kerbin Cathell, David B. Misler, Richard Marc Kremen, DLA Piper U.S. LLP, Baltimore, MD, for Petitioners.

Karl Geercken, Alston & Bird, LLP, New York, NY, for Respondent.

MEMORANDUM AND ORDER

P. KEVIN CASTEL, District Judge:

The petitioners are family members and the estates of seventeen U.S. Air Force servicemembers killed in the 1996 terrorist attacks on the Khobar Towers in Saudi Arabia. They seek to enforce a judgment against the Islamic Republic of Iran, the Iranian Ministry of Information and Security, and the Iranian Islamic Revolution Guard Corps, all of which were found by the United States District Court for the District of Columbia (Hon. Royce C. Lamberth, U.S.D.J.) (the "District of Columbia Court") to have provided support for the terrorist attacks.

Petitioners move for summary judgment and seek an order compelling respondent Bank of Tokyo Mitsubishi UFJ, New York Branch ("Bank of Tokyo") to turn over funds that they claim belong to Iran-based entities that function as mere instrumentalities of the Islamic Republic of Iran. The funds were initially electronic funds transfers ("EFTs") that were blocked pursuant to directives of the United States Department of Treasury, and now sit in interest-bearing accounts held by the Bank of Tokyo. The Bank of Tokyo does not oppose the motion.

The petitioners have come forward with evidence that the funds they seek to attach belong to instrumentalities of the Islamic Republic of Iran, and were lawfully blocked pursuant to presidential orders and Department of Treasury authority. For reasons that will be explained, such assets may be attached in satisfaction of a judgment. The petitioners' motion is therefore granted.

BACKGROUND

For the purpose of this motion, the following facts are undisputed, and the record is scrutinized in the light most favorable to the respondent. *See, e.g., Costello v. City of Burlington,* 632 F.3d 41, 45 (2d Cir.2011).

***413** The respondent does not dispute the facts set forth by the petitioners, and has submitted no counter-statement in opposition to the petitioners' statement of undisputed facts filed pursuant to Local Rule 56.1. In its memorandum of law, the respondent states that it "does not oppose the ultimate relief sought by Petitioners in the Motion, namely, the turnover of the Blocked Assets." (Response Mem. at 1.)

It also describes itself as a "disinterested stakeholder" in the underlying assets. (Response Mem. at 3.)

A. *Proceedings in the District of Columbia Court.*

On June 25, 1996, an attack on the Khobar Towers complex in Saudi Arabia killed nineteen U.S. Air Force personnel. (Pet. 56.1 ¶ 1.) The petitioners in this case include representatives of the estates for seventeen of those victims. (Pet. 56.1 ¶¶ 2–4.)

Petitioners were plaintiffs in two actions filed in the District of Columbia Court. On September 29, 2000, certain of the petitioners filed an action pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330, *et seq.* (the "FSIA"). *See Heiser v. Iran,* 00 Civ. 2329 (D.D.C.) (RCL). (Pet. 56.1 ¶ 3.) The FSIA establishes exclusive federal jurisdiction over actions against foreign states, 28 U.S.C. § 1330, and includes a terrorism exemption for a foreign state's immunity, 28 U.S.C. § 1605A. Petitioners asserted that the Islamic Republic of Iran, the Iranian Ministry of Information & Security (the "MOIS") and the Iranian Revolutionary Guard Corps (the "IRGC") were liable to them for wrongful death and intentional infliction of emotional distress. (Pet. 56.1 ¶ 3.) Additional petitioners in this action brought similar claims against the same defendants in a second action filed on October 9, 2001, *Campbell v. Iran,* 01 Civ. 2104 (D.D.C.) (RCL). (Pet. 56.1 ¶ 4.) The District of Columbia Court consolidated the two cases, (Pet. 56.1 ¶ 5.)

On December 22, 2006, the District of Columbia Court entered default judgment against Iran, the MOIS and the IRGC. *See Estate of Heiser v. Islamic Republic of Iran,* 466 F.Supp.2d 229 (D.D.C.2006). It concluded that the three defendants were jointly and severally liable for damages totaling $254,431,903. (Pet. 56.1 ¶ 6.)

On January 13, 2009, the District of Columbia Court retroactively applied the recently enacted section 1605A of the FSIA, 28 U.S.C. § 1605A,[1] and that the petitioners were entitled to proceed under the new statute. (Pet. 56.1 ¶ 7; Seniawski Dec. Ex. 2.) Thereafter, on September 30, 2009, that court entered a supplemental judgment under section 1605A of the FSIA, awarding additional damages for lost wages and future earnings totaling $336,658,063. (Pet. 56.1 ¶ 8; Seniawski Dec. Ex. 3.)

B. *Orders Directed to Satisfying the Judgment.*

The District of Columbia Court subsequently issued orders directed to the collection of the two judgments. On February 7, 2008, it concluded that, pursuant to 28 U.S.C. § 1610(c), a period had elapsed following entry of judgment sufficient to authorize an attachment in aid and execution of the December 2006 judgment. (Pet. 56.1 ¶ 9; Seniawski Dec. Ex. 4.) On May 10, 2010, it reached the same conclusion as to the September 2009 supplemental judgment. (Pet. 56.1 ¶ 10; Seniawski Dec. Ex. 5.)

***414** On September 8, 2008, the petitioners registered the December 2006 judgment in this District, pursuant to 28 U.S.C. § 1963. (Pet. 56.1 ¶ 13; M18–302, judgment no. 08,1562; Seniawski Dec. Ex. 7.) Petitioners registered the September 2009 judgment in this District on December 6, 2010. (Amended Petition ("Pet.") 56.1 ¶ 14; 10 MC 00005, judgment no. 10,2146; Seniawski Dec. Ex. 8.) Thereafter, pursuant to Rule 69, Fed.R.Civ.P., and New York CPLR § 5230, the petitioners served writs of execution issued by the Clerk of this District on the U.S. Marshal. (Pet. 56.1 ¶ 15; Seniawski Dec. Ex. 9 & 10.) The U.S. Marshal then served the writs on the Bank of Tokyo. (Pet. 56.1 ¶ 16; Seniawski Dec. Ex. 10.)

C. *Procedural History of the Present Action.*

Petitioners commenced this action by filing a petition for a turnover order pursuant to Rule 69 and sections 5225 and 5227 of the CPLR. (Docket # 1.) Petitioners assert that the respondent Bank of Tokyo possesses assets belonging instrumentalities of the MOIS, the IRGC and the government of Iran. (Pet. ¶¶ 25–26.) The Petition states that the respondent is named as a defendant pursuant to CPLR § 5225(b), which permits a judgment creditor to commence a special proceeding against a person in possession or custody of money owed to a judgment creditor. (Pet. ¶ 6.) The respondent asserts no right to these assets. (Pet. 56.1 ¶ 27.)

Petitioners seek to recover funds that were blocked pursuant to Presidential Executive Orders and directives issued by the Office of Foreign Assets Control ("OFAC"), an agency of the United States Department of Treasury. These funds are held by entities that OFAC has designated as Specially Designated Nationals ("SDNs"), and deemed "individuals and companies owned or controlled by, or acting for or

on behalf of, targeted countries."[2] Petitioners contend these funds are owned by mere instrumentalities of the Islamic Republic of Iran. They seek an order directing that the following blocked assets be turned over to them, in aid of the judgments entered by the District of Columbia Court; $90,268.80 from Bank Sepah, International, PLC ("BSI"); $4,740 from Azores Shipping Company LL FZE ("Azores"); $61,974 and $99,974 from IRISL Benelux NV; $97,767.50 from the Export Development Bank of Iran; and $2,181.88 from Bank Melli Iran ("Bank Melli") (collectively, the "Iran Entities"). (Seniawski Dec. ¶ 20.) These entities all have been served with notice of petitioners' claims, but have filed no responses and have not appeared in this action. (Seniawski Dec. ¶¶ 21–23.) Each of these entities is listed by OFAC as a "proliferator" of "weapons of mass destruction" or as a global terrorist. (Seniawski Dec. ¶ 24.)

It is undisputed that respondent Bank of Tokyo maintains bank accounts holding the blocked assets of the SDNs listed above. (Pet. 56.1 ¶ 25.) In its memorandum of law, Bank of Tokyo states that it has frozen these assets pursuant to OFAC directive, (Response Mem. at 2.) Under 31 C.F.R. § 595.203, Bank of Tokyo was required to maintain the funds in interest-bearing accounts.

On August 23, 2011, Magistrate Judge Dollinger, to whom this action was referred for general pretrial supervision, signed an order directing service of the Petition and other relevant documents to all third parties, with the documents translated into Farsi. (Docket # 25.) The respondent produced contact information for the Iran Entities. (Pet 56.1 ¶ 22.) Specifically, ***415** the service order stated: "Any Third Party who fails to assert a claim to the Blocked Assets or take any action within sixty (60) days of the date indicated on the Notice of Lawsuit shall be deemed to forever waive any claims that such Third Party may have against the Blocked Assets, or against Respondent or Petitioners with respect to the Blocked Assets." (Docket # 25 ¶ 9.) The deadline for any third party to appear in this matter or to assert a claim has since expired. (Pet. 56.1 ¶ 24.)

In its response to the present motion, Bank of Tokyo states that it "does not oppose the ultimate relief sought by Petitioners in the Motion, namely, the turnover of the Blocked Assets." (Response Mem. at 1.) The United States also has submitted letter-briefs setting forth its views on the petitioners' summary judgment motion. The United States has neither supported nor opposed the motion.

SUMMARY JUDGMENT STANDARD.

Summary judgment "shall" be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 56(a), Fed.R.Civ.P. It is the burden of a movant on a summary judgment motion to come forward with evidence on each material element of his claim or defense, sufficient to demonstrate that he or she is entitled to relief as a matter of law. *Vt. Teddy Bear Co. v. 1–800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir.2004). In raising a triable issue of fact, the non-movant carries only "a limited burden of production," but nevertheless "must 'demonstrate more than some metaphysical doubt as to the material facts,' and come forward with 'specific facts showing that there is a genuine issue for trial.' " *Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 84 (2d Cir.2004) (quoting *Aslanidis v. U.S. Lines, Inc.*, 7 F.3d 1067, 1072 (2d Cir.1993)).

A fact is material if it "might affect the outcome of the suit under the governing law," meaning that "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The Court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor, and may grant summary judgment only when no reasonable trier of fact could find in favor of the nonmoving party. *Costello*, 632 F.3d at 45; *accord Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–88, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). In reviewing a motion for summary judgment, the court may scrutinize the record, and grant or deny summary judgment as the record warrants. Rule 56(c)(3). In the absence of any disputed material fact, summary judgment is appropriate. Rule 56(a).

Though the respondent does not oppose the motion, petitioners still must establish that they are entitled to judgment as a matter of law. "If the evidence submitted in support of the summary judgment motion does not meet the movant's burden of production, then 'summary judgment must be denied *even if no opposing evidentiary matter is presented.*' " *Vt. Teddy Bear Co.*, 373 F.3d at 244 (emphasis in original) (quoting *Amaker v. Foley*, 274 F.3d 677, 681 (2d Cir.2001)); *see also Champion v. Artuz*, 76 F.3d 483, 486 (2d Cir.1996) (summary judgment "may properly be granted only if the facts as to which there is no genuine dispute show that the moving party is entitled to judgment as a matter of law.") (quotation marks and citation omitted).

***416** *DISCUSSION*

The Court first reviews FSIA provisions that permit a successful plaintiff to attach funds that have been blocked pursuant to executive order and OFAC directives. Second, the Court examines presidential authority to block certain international financial transactions and OFAC's implementation of its blocking regime. Finally, the Court examines the evidence submitted by petitioners that the entities from which petitioners seek recovery are instrumentalities of the Republic of Iran.

I. *The FSIA Framework for Sovereign Liability and the Execution of Judgment.*

The FSIA "provides the exclusive basis for subject matter jurisdiction over all civil actions against foreign state defendants, and therefore for a court to exercise subject matter jurisdiction over a defendant the action must fall within one of the FSIA's exceptions to foreign sovereign immunity." *Weinstein v. Islamic Republic of Iran,* 609 F.3d 43, 47 (2d Cir.2010). Section 1605(a)(7), which has since been repealed with many of its terms incorporated into 28 U.S.C. § 1605A,[3] "abrogates immunity for those foreign states officially designated as state sponsors of terrorism by the Department of State where the foreign state commits a terrorist act or provides material support for the commission of a terrorist act and the act results in the death or personal injury of a United States citizen." *Weinstein,* 609 F.3d at 48; *see also Levin v. Bank of New York,* 2011 WL 812032, at *8–9 (S.D.N.Y. Mar. 4, 2011) (discussing relationship between sections 1605(a)(7) and 1605A). Iran has been designated as a state sponsor of terrorism since 1984, and is subject to jurisdiction under section 1605A and its predecessor statute, section 1605(a)(7). *See Weinstein,* 609 F.3d at 48.

The FSIA defines a "foreign state" to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). It defines an "instrumentality" to include "a separate legal person, corporate or otherwise" that either is "an organ of a foreign state" or a person "whose shares or other ownership interest is owned by a foreign state or political subdivision thereof," provided that it is not a citizen of the United States or "created under the laws of any third country." 28 U.S.C. § 1603(b)(l–3). The District of Columbia Court concluded that the defendants in that action were subject to jurisdiction under the then-operative section 1605(a)(7). which provided a terrorism exemption from a foreign government's immunity against money damages claims in the United States. 466 F.Supp.2d at 254–55. It also concluded that those defendants were liable to the plaintiffs. *Id.* at 271–356.

The Terrorism Risk Insurance Act of 2002 ("TRIA") provides for attachment in aid of execution of a judgment. Section 201(a) of TRIA, which is codified as a note to 28 U.S.C. § 1610, states:

> Notwithstanding any other provision of law, and except as provided in subsection (b) [of this note], in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605A or 1605(a)(7) (as such section was in effect on January 27, 2008) of title 28, United States Code, the blocked assets of that terrorist party ***417** (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

Pub. L. 107–297, Title II, § 201(a), (b), (d), Nov. 26, 2002, 116 Stat. 2337, as amended. Pub. L. 112–158, Title V, § 502(e)(2), Aug. 10, 2012, 126 Stat. 1260. According to the Second Circuit, it is "beyond cavil that Section 201(a) of the TRIA provides courts with subject matter jurisdiction over post-judgment execution and attachment proceedings against property held in the hands of an instrumentality of the judgment-debtor, even if the instrumentality is not itself named in the judgment." *Weinstein,* 609 F.3d at 50.

Separately, section 1610(g) permits attachment in aid of an execution of a judgment entered under section 1605A. It provides that "the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of the level of economic control over the property by the government of the foreign state." 28 U.S.C. § 1610(g)(1)(A). The District of Columbia Court observed that the statute " 'expand[s] the category of foreign sovereign property that can be attached; judgment creditors can now reach any U.S. property in which Iran has any interest ... whereas before they could only reach property belonging to Iran.' " *Estate of Heiser v. Islamic Republic of Iran,* 807 F.Supp.2d 9, 18 (D.D.C.2011) (quoting *Peterson v. Islamic Republic of Iran,* 627 F.3d 1117, 1123 n. 2 (9th Cir.2010)). "Thus, the only requirement for attachment

or execution of property is evidence that the property in question is held by a foreign entity that is in fact an agency or instrumentality of the foreign state against which the Court has entered judgment." *Id.* at 19,

II. *Executive Branch Authority over Foreign Transactions and the Blocking Procedures of the Office of Foreign Asset Control ("OFAC").*

The International Emergency Economic Powers Act, 50 U.S.C. § 1701, *et seq.* ("IEEPA"), authorizes the President to regulate international economic transactions. Specifically, it permits the executive branch to "investigate, regulate or prohibit ... transfers of credit or payments ... by ... any banking institution, to the extent that such transfers ... involve any interest of any foreign country ... [and any] transactions involving ... any property in which any foreign country ... has any interest." 50 U.S.C. § 1702(a)(1). Presidents have issued several executive orders under the IEEPA, including Executive Order No. 12947, 60 Fed.Reg. 5079 (Jan. 23, 1995) (Prohibiting Transactions with Terrorists Who Threaten to Disrupt the Middle East Peace Process), Executive Order No. 13224, 66 Fed.Reg. 49079 (Sept. 23, 2001) (Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism), and Executive Order No. 13382, 70 Fed.Reg. 38567 (June 28, 2005) (Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters), and Executive Order No. 13599, 77 Fed.Reg. 6659 (Feb. 5, 2012) (Blocking Property of the Government of Iran and Iranian Financial Institutions).

***418** OFAC describes itself as "act[ing] under Presidential national emergency powers, as well as authority granted by specific legislation, to impose controls on transactions and freeze assets under U.S. jurisdiction."[4] OFAC has implemented numerous so-called "blocking" regimes, including the Weapons of Mass Destruction Proliferators Sanction, 31 C.F.R. § 544.101, *et seq.*, and the Terrorism Sanctions Regulation, 31 C.F.R. § 595.101, *et seq.* OFAC requires the blocking of "all property and interests in property that are in the United States" belonging to SDNs. 31 C.F.R. § 544.201(a). OFAC defines "interest" as "an interest of any nature whatsoever, direct or indirect," 31 C.F.R. §§ 544.305, and property as any "property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future or contingent," *id.* § 544.308. OFAC publishes a list of SDNs at http://www.treasury.gov/sdn, which it frequently updates.

OFAC has designated the following entities as SDNs: Bank Sepah, Bank Sepah International, PLC ("BSI"); Iranohind Shipping Company ("Iranohind"); Azores Shipping Company LL FZE ("Azores"); IRISL Benelux NV; Export Development Bank of Iran ("EDBI"); Bank Melli; and the Islamic Republic of Iran Shipping Lines ("IRISL"). (Office of Foreign Assets Control, Specially Designated Nationals and Blocked Persons List, January 24, 2013, at 97, 99, 100, 161, 221, 233.)[5] The petitioners seek to attach funds belonging to these entities, (Seniawski Dec. Ex. 14.) Respondent Bank of Tokyo has expressly stated that it blocked these entities' assets pursuant to OFAC directive. (Response Mem. at 2.) As previously noted, the TRIA provides that "the blocked assets" of a "terrorist party" "shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable." Note, 28 U.S.C. § 1610.

III. *The Petitioners Have Come Forward with Evidence that the Eight Non–Party Iranian Entities Are Instrumentalities of Iran.*

In support of its summary judgment motion, the petitioners have submitted the affidavit of Patrick L. Clawson, Ph.D, the Director of Research of the Washington Institute for Near East Policy. Clawson states that he has specialized knowledge concerning financial accounts, wire transfers and other transactions involving assets blocked by OFAC directives. (Clawson Aff't ¶ 10.) Clawson also asserts that he is knowledgeable as to bank charters and ownership, particularly as to Iran's national and state-owned banks. (Clawson Aff't ¶ 10.) He swears that he closely follows Iran's press and political system and has researched its economy and commercial enterprises. (Clawson Aff't ¶¶ 9–12.)

Clawson asserts that the following entities are owned at least in part by the government of the Islamic Republic of Iran:

A. *Bank Melli.*

According to Clawson, the Central Bank of Iran expressly recognizes Bank Melli Iran as a "commercial government-owned bank." (Clawson Aff't ¶ 13.) Bank Melli states in a financial report available on its website that "[t]he capital is completely ***419** owned by the Government of the Islamic Republic of Iran." (Clawson Aff't ¶ 13.)[6]

Based on the express statements of Bank Melli, the petitioners have established that Bank Melli is an "instrumentality" of the government of Iran. 28 U.S.C. § 1603(b).

B. *Bank Sepah.*

Iran nationalized ownership of Bank Sepah in 1980. (Clawson Aff't ¶ 14.) On its website, the Central Bank of Iran describes Bank Sepah as a "commercial government-owned bank."[7] (Clawson Aff't ¶ 14.) Clawson states that he is aware of no evidence of any planned changes in ownership or plans to privatize Bank Sepah. (Clawson Aff't ¶ 14.)

Because the Central Bank of Iran identifies Bank Sepah as a "commercial government-owned bank," petitioners have established that Bank Sepah is an "instrumentality" of the government of Iran. 28 U.S.C. § 1603(b).

C. *BSI.*

On January 9, 2007, the Treasury Department concluded that BSI is owned and controlled by Bank Sepah. (Clawson Aff't ¶ 15.) BSI's company website states that it "is a wholly-owned subsidiary of Bank Sepah Iran."[8] (Clawson Aff't ¶ 15.) Its website also states that it was incorporate to "[take] over the assets, liabilities and business of the London Branch of Bank Sepah, Iran."[9] (Clawson Aff't ¶ 15.)

As noted, the Central Bank of Iran describes Bank Sepah as a "commercial government-owned bank." As a wholly-owned subsidiary of Bank Sepah operating in London, BSI, like its parent company, qualifies as an "instrumentality" of the government of Iran. 28 U.S.C. § 1603(b).

D. *EDBI.*

The website of the Central Bank of Iran lists EDBI as a "specialized government bank."[10] (Clawson Aff't ¶ 16.) Clawson asserts that EDBI is "widely known" as a "state owned, specialist export and import bank created to increase non-oil exports from Iran and develop international trade." (Clawson Aff't ¶ 16.) He states that it "is active in promoting Iran's non-oil exports and trade with Iran's neighbors." (Clawson Aff't ¶ 16.) On October 22, 2008, OFAC froze EDBI assets under U.S. jurisdiction. (Clawson Aff't ¶ 16.) OFAC identifies EDBI as "one of the leading intermediaries handling Bank Sepah's financing, including WMD-related payments."[11]

This Court affords little weight to Clawson's statements about what is "widely known" about EDBI's operations. These unsupported statements are not accompanied by any citation to the record or publicly available factual information. Nevertheless, the fact that the Central Bank of Iran lists EDBI as a "specialized government bank" and that OFAC has deemed EDBI an intermediary in Bank Sepah financing operations is sufficient evidence that EDBI functions as an instrumentality ***420** of the government of Iran. 28 U.S.C. § 1603(b).

E. *IRISL.*

OFAC recognizes IRISL as under control by the government of Iran, and acting as the country's "national maritime carrier...."[12] (Clawson Aff't ¶ 17.) It has concluded that IRISL had placed its international network of ships and hubs into the service of the Iranian military, particularly the arm of its military overseeing ballistic missile development. We imposed sanctions on IRISL, its corporate network, and its fleet, prohibiting U.S. persons from dealing with the company."[13] OFAC also has concluded that IRISL has created front companies in Panama to conceal the ownership of its vessels, and has repeatedly repainted, renamed and transferred nominal ownership of vessels. (*Id.*)

As Iran's "national maritime carrier," IRISL functions as an instrumentality of the government of Iran. 28 U.S.C. § 1603(b).

F. *Azores, Iranohind and IRISL Benelux NV.*

Petitioners assert that Azores, Iranohind and IRISL Benelux NV are all entities controlled by IRISL, citing to conclusions reached by the United States Treasury, as well as British and European Union Authorities.

The United States Treasury has frozen the assets of Azores and announced restrictions on transactions related to the company.[14] It identifies Azores as a front company for IRISL, based in the United Arab Emirates. *Id.* The European Union also has identified Azores as a "[f]ront company owned or controlled by IRISL or an IRISL affiliate. It is the registered owner of a vessel owned or controlled by IRISL."[15] The European Union concluded that Azores is controlled by Moghddami Fard, who is the company's director, and that Fard acts as IRISL's regional director in the United Arab Emirates. *Id.* The EU has stated that Fard has organized several companies in an attempt to circumvent restrictions

on the IRISL. *Id.* The British government also has imposed restrictions on Azores, citing its relationship with Fard.[16] Clawson asserts that the prominent role played by Fard and the evidence of IRISL ownership suggest that the IRISL controls Azores. (Clawson Aff't ¶ 18.)

The United States Treasury has designated Iranohind as engaging in proliferation activities. It has stated that the company was "found to be owned or controlled by or acting or purporting to act for or on behalf of, director or indirectly, IRISL."[17] The Clawson Affidavit summarizes similar findings by the United Nations and the British government, as well as reports by an Indian shipping company and press outlets concerning Iranohind's relationship to IRISL. (Clawson Aff't ¶ 19.)

The United States Treasury has designated IRISL Benelux NV as engaging in proliferation activities, stating that it was "found to be owned or controlled by or ***421** acting or purporting to act for or on behalf of, directly or indirectly, IRISL."[18] It stated that entities doing businesses with this and other IRISL entities "may be unwittingly helping the shipping line facilitate Iran's proliferation activities." *Id.*

Based on the foregoing, this Court concludes that Azores, Iranohind and IRISL Benelux NV functioned as instrumentalities of the government of Iran. 28 U.S.C. § 1603(b). Each is owned or controlled by, or acts on behalf of IRISL, which is Iran's national carrier.

IV. *The Petitioners Are Entitled to Attach the Requested Funds.*

Petitioners have come forward with evidence that the Iran Entities are agencies and instrumentalities of Iran. In addition, OFAC has listed each of these entities as SDNs. (Office of Foreign Assets Control, Specially Designated Nationals and Blocked Persons List, January 24, 2013, at 97, 99, 100, 161, 221, 233.)[19] Under the FSIA, because the Iran entities are instrumentalities of Iran, the assets of these entities may be attached in aid of execution of judgment. 28 U.S.C. § 1610(g). Section 201 of the TRIA also states that these assets may be subject to attachment in aid of execution of judgment. Note, 28 U.S.C. § 1610.

Petitioners have submitted a chart produced by the respondent reflecting the EFT transactions, including the transactions' dates, the sending banks and the transactions' originators and beneficiaries. (Seniawski Dec. Ex. 14.) Specifically, the chart reflects that BSI was the intended beneficiary of a $90,628.80 EFT of June 21, 2007; Azores originated a $4,740 EFT of September 29, 2008; IRISL Benelux NV was the intended beneficiary of two EFTs of January 21 and 22, 2009, the first in an amount of $61,974 and the second in an amount of $99,974; EDBI was intended beneficiary of a $97,767.50 EFT of April 24, 2009; and Bank Melli was issuing bank in a $2,181.88 EFT of July 26, 2010. (Seniawski Dec. Ex. 14.) The respondent participated in these transactions, either as the sending bank or the beneficiary's bank. (Seniawski Dec. Ex. 14.) This chart is evidence that the Iran Entities have an interest in the blocked assets that warrant them to attachment in aid of execution of judgment. In addition, the Iran Entities received notice of this action and have failed to appear and assert a claim as to any of the assets.

Pursuant to Rule 69(a), Fed.R.Civ.P., a money judgment is enforced by a writ of execution. "The procedure on execution —and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies." *Id.* New York CPLR § 5225(b) governs the enforcement of a judgment as to property not in the possession of a judgment debtor. It states in part:

> Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, the court shall require such person to pay the money, or so much of ***422** it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff.... Notice of the proceeding shall also be served upon the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. The court may permit the judgment debtor to intervene in the proceeding.

Id. Petitioners have come forward with evidence that respondent Bank of Tokyo is "a person in possession or custody of money" that belongs to the Iran Entities, a fact that Bank of Tokyo does not dispute. The named judgment debtors are the Islamic Republic of Iran, the Iranian Ministry of Information and Security, and the Iranian Islamic Revolution

Guard Corps, and petitioners have come forward with evidence that the Iran Entities function as instrumentalities of the Islamic Republic of Iran. Pursuant to section 201(a) of the TRIA, as instrumentalities of the Islamic Republic of Iran, "the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution." Note, 28 U.S.C. § 1610. Under CPLR § 5225(b), "the judgment debtor is entitled to the possession of such property...."

Based on the foregoing, this Court concludes that the petitioners have established their entitlement to an order attaching the Iran Entities' funds that are possessed by the respondents and that they have satisfied the procedure set forth by New York CPLR § 5225(b).

V. *This Court and the Parties Accept the Representations of the United States that No OFAC License Is Required to Authorize Release of the Blocked Assets.*

While the respondent does not oppose the petitioners' motion, it notes concerns that OFAC must issue a license specific to the blocked assets before they can be made available for attachment. (Response Mem. at 2–3.) It states that if it were to turn over the funds without an OFAC license, it could be subject to civil and criminal penalties, (Response Mem. at 3.) The IEEPA sets forth civil and criminal penalties for violating the statute and any related license, order, regulation or prohibition. 50 U.S.C. § 1705. As respondent notes, the Department of Treasury also has stated on its website that "[a] license is an authorization from OFAC to engage in a transaction that otherwise would be prohibited."[20] Respondent argues that the petitioners should bear any risks or expenses associated with releasing the blocked funds. (Resp. Mem. at 3.)

At the invitation of the Court and in response to the current motion, the United States submitted a Statement of Interest pursuant to 28 U.S.C. § 517. The Statement concludes that "in the event a court determines that blocked assets are subject to TRIA, those funds may be distributed without a license from OFAC." (Statement of Interest at 3.) The Statement attaches a January 6, 2006 letter addressed to Judge Marrero in *Weininger v. Castro,* which asserted in identical terms that if the TRIA applied to the underlying funds, the funds can be distributed without a license from OFAC. (Statement of Interest Ex. E.) *See also Weininger v. Castro,* 462 F.Supp.2d 457, 499 (S.D.N.Y.2006) (quoting same). Petitioners also state that they have kept OFAC informed of this litigation ***423** and submitted a copy of the present motion to OFAC, as required by 31 C.F.R. § 501.605. (Seniawski Supp. Dec. ¶¶ 3–4 & Ex. 2.)

Following the submissions by the government and the petitioners, Bank of Tokyo now "accepts the representations of counsel for the Petitioners about its communications with OFAC and accepts the Government's stated position that a turnover order of this Court would be sufficient" to permit Bank of Tokyo "to disburse the Blocked Assets without the need for a separate OFAC license." (Response to Statement of Interest ¶ 3.)

This Court is aware of no contrary authority that would require an OFAC license in this instance. It accepts the Statement of Interest's assertion that no OFAC license is required.

CONCLUSION

The petitioners' motion for summary judgment is GRANTED. (Docket # 36.) The Clerk is directed to terminate the motion.

Petitioners are directed to submit a proposed order, on notice to the respondent, within 14 days of the date of this Memorandum and Order.

SO ORDERED.

All Citations

919 F.Supp.2d 411

Footnotes

1 Section 1605A, like its predecessor 28 U.S.C. § 1605(a)(7), exempted from foreign immunity any state that engaged in terrorism-related activities or provided material support to such activities.

2 *See* http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx.

3 *See* Pub.L. 110–181, Div. A, § 1083(b)(1)(A)(iii), Jan. 28, 2008, 122 Stat. 341.

4 http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx

5 Available at http://www.treasury.gov/ofac/downloads/tllsdn.pdf.
6 *See* http://www.bmi.ir/Fa/uploadedFiles/FinanceReportFiles/2011_ 2_13/f97c06b161_2752675b48.pdf.
7 *See* http://www.cbi.ir/simplelist/3088.aspx.
8 *See* http://www.banksepah.co.uk/downloads/Annual_Report_and_ Financial_Statements_31_03_05.pdf.
9 *See* http://www.banksepah.co.uk/?page=13.
10 http://www.cbi.ir/simplelist/2389.aspx.
11 http://www.treasury.gov/press-center/press-releases/Pages/hp 1231.aspx.
12 http://www.treasury.gov/connect/blog/pages/No-Safe-Port-for-IRISL.aspx.
13 http://www.treasury.gov/connect/blog/pages/No-Safe-Port-for-IRISL.aspx.
14 http://www.treasury.gov/press-center/press-releases/Pages/tg 1212.aspx.
15 http://eurlex.europa.eu/LexUriServ/LexUriServ.do? uri=OJ:L:2011:319:0011:0031:EN:PDF
16 http://www.hm-treasury.gov.uk/d/finsanc_public_notice_reg1245_ 021211.pdf
17 http://www.treasury.gov/press-center/press-releases/Pages/hp 1130.aspx.
18 http://www.treasury.gov/press-center/press-releases/Pages/hp 1130.aspx.
19 http://www.treasury.gov/ofac/downloads/t11sdn.pdf.
20 http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx# 60.

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ANNEX 335

UNTED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

X

THE ESTATE OF MICHAEL HEISER, deceased; GARY HEISER, FRANCIS HEISER; THE ESTATE OF LELAND TIMOTHY HAUN, deceased; IBIS S. HAUN; MILAGRITOS PEREZ-DALIS; SENATOR HAUN; THE ESTATE OF JUSTIN R. WOOD, deceased; RICHARD W. WOOD; KATHLEEN M. WOOD; SHAWN M. WOOD; THE ESTATE OF EARL F. CARTRETTE, JR., deceased; DENISE M. EICHSTAEDT; ANTHONY W. CARTRETTE; LEWIS W. CARTRETTE; THE ESTATE OF BRIAN MCVEIGH, deceased; SANDRA M. WETMORE; JAMES V. WETMORE; THE ESTATE OF MILLARD D. CAMPBELL; MARIE R. CAMPBELL, BESSIE A. CAMPBELL; THE ESTATE OF KEVIN J. JOHNSON, deceased; SHYRL L. JOHNSON; NICHOLAS A. JOHNSON, A MINOR, BY HIS LEGAL GUARDIAN SHYRL L. JOHNSON; LAURA E. JOHNSON; BRUCE JOHNSON; THE ESTATE OF JOSEPH E. RIMKUS, deceased; BRIDGET BROOKS; JAMES R. RIMKUS; ANNE M. RIMKUS; THE ESTATE OF BRENT E. MARTHALER, deceased; KATIE L. MARTHALER; SHARON MARTHALER; HERMAN C. MARTHALER III; MATTHEW MARTHALER; KIRK MARTHALER; THE ESTATE OF THANH VAN NGUYEN, deceased; CHRISTOPHER R. NGUYEN; THE ESTATE OF JOSHUA E. WOODY, deceased; DAWN WOODY; BERNADINE R. BEEKMAN; GEORGE M. BEEKMAN; TRACY M. SMITH; JONICA L. WOODY; TIMOTHY WOODY; THE ESTATE OF PETER J. MORGERA, Deceased; MICHAEL MORGERA; THOMAS MORGERA; THE ESTATE OF KENDALL KITSON, JR., Deceased; NANCY R. KITSON; KENDALL K. KITSON; STEVE K. KITSON; NANCY A. KITSON; THE ESTATE OF CHRISTOPHER ADAMS, deceased; CATHERINE ADAMS; JOHN E. ADAMS; PATRICK D. ADAMS; MICHAEL T. ADAMS; DANIEL ADAMS; MARY YOUNG; ELIZABETH WOLF; WILLIAM ADAMS; THE ESTATE OF CHRISTOPHER LESTER, deceased; CECIL H. LESTER; JUDY LESTER; CECIL H. LESTER, JR.; JESSICA F. LESTER; THE ESTATE OF JEREMY A. TAYLOR, deceased; LAWRENCE E. TAYLOR; VICKIE L. TAYLOR; STARLINA

11CV1602 (LTS)(MHD)

[RE: Islamic Republic of Iran, Iranian Ministry of Information and Security, and the Iranian Islamic Revolutionary Guard Corps., Judgment Debtors]

THIRD-PARTY PETITION IN INTERPLEADER OF BANK OF BARODA, NEW YORK BRANCH

D. TAYLOR; THE ESTATE OF PATRICK P. FENNIG, deceased; THADDEUS C. FENNIG; CATHERINE FENNIG; PAUL D. FENNIG; and MARK FENNIG,

Petitioners,

v.

BANK OF BARODA, NEW YORK BRANCH,

Respondent.

BANK OF BARODA, NEW YORK BRANCH,

Interpleader Petitioner,

v.

BANK SADERAT IRAN; BANK MELLI IRAN; EXPORT DEVELOPMENT BANK OF IRAN; BEHRAN OIL CO.; DR. K.C. CHATURVEDI; MEHRAD KALA AND CO. LTD.; OCOO ALBAN IMEX; ABHARRIS CO.; MARYAM MASHKOORI; MOJTABA ALAVI. A/C; CHABOKRAN TOOLS INTERNATIONAL TRANSPORT CO.; MOHAMMADMEHDI TAYEBIKAMARDY; THE UNITED STATES OF AMERICA, THE ESTATE OF MICHAEL HEISER, deceased; GARY HEISER, FRANCIS HEISER; THE ESTATE OF LELAND TIMOTHY HAUN, deceased; IBIS S. HAUN; MILAGRITOS PEREZ-DALIS; SENATOR HAUN; THE ESTATE OF JUSTIN R. WOOD, deceased; RICHARD W. WOOD; KATHLEEN M. WOOD; SHAWN M. WOOD; THE ESTATE OF EARL F. CARTRETTE, JR., deceased; DENISE M. EICHSTAEDT; ANTHONY W. CARTRETTE; LEWIS W. CARTRETTE; THE ESTATE OF BRIAN MCVEIGH, deceased; SANDRA M. WETMORE; JAMES V. WETMORE; THE ESTATE OF MILLARD D. CAMPBELL; BESSIE A. CAMPBELL; THE ESTATE OF KEVIN J. JOHNSON, deceased; SHYRL L. JOHNSON; NICHOLAS A. JOHNSON, A MINOR, BY HIS LEGAL GUARDIAN SHYRL L. JOHNSON;

LAURA E. JOHNSON; BRUCE JOHNSON; THE ESTATE OF JOSEPH E. RIMKUS, deceased; BRIDGET BROOKS; JAMES R. RIMKUS; ANNE M. RIMKUS; THE ESTATE OF BRENT E. MARTHALER, deceased; KATIE L. MARTHALER; SHARON MARTHALER; HERMAN C. MARTHALER III; MATTHEW MARTHALER; KIRK MARTHALER; THE ESTATE OF THANH VAN NGUYEN, deceased; CHRISTOPHER R. NGUYEN; THE ESTATE OF JOSHUA E. WOODY, deceased; DAWN WOODY; BERNADINE R. BEEKMAN; GEORGE M. BEEKMAN; TRACY M. SMITH; JONICA L. WOODY; TIMOTHY WOODY; THE ESTATE OF PETER J. MORGERA, Deceased; MICHAEL MORGERA; THOMAS MORGERA; THE ESTATE OF KENDALL KITSON, JR., Deceased; NANCY R. KITSON; KENDALL K. KITSON; STEVE K. KITSON; NANCY A. KITSON; THE ESTATE OF CHRISTOPHER ADAMS, deceased; CATHERINE ADAMS; JOHN E. ADAMS; PATRICK D. ADAMS; MICHAEL T. ADAMS; DANIEL ADAMS; MARY YOUNG; ELIZABETH WOLF; WILLIAM ADAMS; THE ESTATE OF CHRISTOPHER LESTER, deceased; CECIL H. LESTER; JUDY LESTER; CECIL H. LESTER, JR.; JESSICA F. LESTER; THE ESTATE OF JEREMY A. TAYLOR, deceased; LAWRENCE E. TAYLOR; VICKIE L. TAYLOR; STARLINA D. TAYLOR; THE ESTATE OF PATRICK P. FENNIG, deceased; THADDEUS C. FENNIG; CATHERINE FENNIG; PAUL D. FENNIG; and MARK FENNIG,

Interpleader Respondents.

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THIRD-PARTY PETITION IN INTERPLEADER

Respondent and Interpleader Petitioner Bank of Baroda, New York Branch, by its attorneys Wormser, Kiely, Galef & Jacobs LLP, as its third-party petition in interpleader alleges as follows:

NATURE OF PROCEEDINGS

1. Bank of Baroda, New York Branch ("Bank of Baroda NY") is bringing this third-party petition in interpleader pursuant to Sections 1006 and 5239 of the New York Civil Practice

Law and Rules ("CPLR"), Rule 22 of the Federal Rules of Civil Procedure ("FRCP"), Sections 1335 and 2361 of Title 28, United States Code ("U.S.C."), and Section 134 of the New York Banking Law.

2. Petitioners in the first-captioned proceedings above have filed in this Court and served on Bank of Baroda NY a Petition for Turnover Order Pursuant To Fed.R.Civ.P. 69 and N.Y.C.P.L.R. § 5225 and 5227, dated March 8, 2011 (the "Petition"), seeking a turnover of certain funds that Bank of Baroda NY has restrained and placed in blocked accounts pursuant to regulations instituted by the United States Department of Treasury, Office of Foreign Assets Control (the "OFAC Regulations") and Executive Orders issued by the President of the United States. See a copy of the Petition attached hereto as Exhibit 1.

3. Specifically, the Petition seeks an order from the Court directing Bank of Baroda NY to turn over to the United States Marshal all of the assets that have been blocked by Bank of Baroda NY in which Petitioners believe Iran and/or its agencies, instrumentalities, and any separate juridical entity have an interest.

4. Bank of Baroda NY seeks a determination from the Court regarding the rights, if any, of Interpleader Respondents and any other interested parties to those funds that have been held by Bank of Baroda NY pursuant to the OFAC Regulations and Executive Orders.

5. Bank of Baroda NY now brings this Third Party Petition in Interpleader to obtain a determination from the Court as to (i) whether the funds blocked are subject to execution as they are electronic fund transfers; and (ii) whether the funds blocked can even be considered property in which Iran has an interest or Iran's "assets", when Iran was neither the originator nor the beneficiary of the electronic fund transfers; and (iii) even if the electronic fund transfers are considered property in which Iran has an interest or Iran's assets and can be executed on,

whether Petitioners have a superior interest to such wire transfers over any other judgment creditors with judgments against Iran or the agencies or instrumentalities.

6. Bank of Baroda NY has named three (3) banks, Bank Saderat Iran, Bank Melli Iran, and Export Development Bank of Iran (together, the "Iranian Banks") as Interpleader Respondents because the electronic fund transfers that were interrupted and blocked by Bank of Baroda NY were en route to accounts of individuals and entities in branches of those three banks.

7. Bank of Baroda NY has named Behran Oil Co.; Dr. K.C. Chaturvedi; Mehrad Kala and Co. Ltd.; Ocoo Alban Imex; Abharris Co; Maryam Mashkoori; Mojtaba Alavi, A/C; Chabokran Tools International Transport Co.; Mohammadmehdi Tayebikamardy, as Interpleader Respondents as each of these Interpleader Respondents was the beneficiary of an electronic fund transfer that was in the process of being transmitted when it was intercepted and blocked by Bank of Baroda NY as intermediary bank.

8. Bank of Baroda NY has also named the United States of America as an Interpleader Respondent herein in order for a determination of the rights to the electronic fund transfers. The United States Department of Treasury has promulgated the regulations pursuant to which the electronic fund transfers have been blocked. These regulations, in part, require that any persons subject to jurisdiction in the United States that are in possession or control of property in which Iran or an agency or instrumentality of Iran has an interest, is prohibited from transferring, disbursing that property unless pursuant to a license issued by the United States to Iran its agency or instrumentality.

PARTIES

9. Respondent and Interpleader Petitioner Bank of Baroda NY is the New York

branch of Bank of Baroda, which is headquartered in Baroda, India. Bank of Baroda NY's office is at One Park Avenue, New York, New York. Bank of Baroda NY is an agency or instrumentality of the Government of India under the Foreign Sovereign Immunities Act (28 U.S.C. § 1603(b)), as the Government of India owns 53.81% of the shares of Bank of Baroda.

10. Upon information and belief, Bank Saderat Iran is a bank headquartered in Iran with branches throughout the world.

11. Upon information and belief, Bank Melli Iran is a bank headquartered in Iran with branches throughout the world.

12. Upon information and belief, Export Development Bank of Iran is a bank headquartered in Iran with branches throughout the world.

13. Upon information and belief, each of the Iranian Banks is considered an "agency or instrumentality" of the Islamic Republic of Iran under 28 U.S.C. § 1603(b).

14. The United States of America (the "United States") is a governmental entity that, through certain of its agencies and departments, promulgated certain regulations requiring the blocking of certain assets, some of which are the subject of the Petition and this Third-Party Petition and Interpleader, and through the Executive Branch, has issued Executive Orders.

15. The United States, via the OFAC Regulations or other regulations promulgated by the United States Department of Treasury, has listed the Iranian Banks on OFAC's list of Specially Designated Nationals and Blocked Persons and/or in Appendix A to 31 C.F.R. § 560, Appendix A.

16. Interpleader Respondents Behran Oil Co.; Dr. K.C. Chaturvedi; Mehrad Kala and Co. Ltd.; Ocoo Alban Imex; Abharris Co; Maryam Mashkoori; Mojtaba Alavi, A/C; Chabokran Tools International Transport Co.; Mohammadmehdi Tayebikamardy, are each the beneficiary of

an electronic fund transfer that was in the process of being transmitted when it was intercepted and blocked by Bank of Baroda NY, as intermediary bank.

17. Upon information and belief, Petitioners are plaintiffs in, or beneficiaries of the judgments issued in, the consolidated cases of Heiser v. Iran, (Case No. 00-cv2329(RCL))and Campbell v. Iran, (Case No. 01cv2104(RCL)) in the United States District Court, District of Columbia.

JURISDICTION AND VENUE

18. This Court has subject matter jurisdiction over this proceeding pursuant to 28 U.S.C. § 1331 as it arises under the laws and treaties of the United States, and 28 U.S.C. § 1367 because the matters at issue in this proceeding are so related to those in the Petition, which is within the original jurisdiction of this Court, that they form part of the same case or controversy. The Court also has jurisdiction pursuant to 28 U.S.C. § 1335 because this proceeding concerns money or property with a value of over $500 in the possession of Bank of Baroda NY and two or more of the Interpleader Respondents are of diverse citizenship.

19. Venue is proper in this Court pursuant to 28 U.S.C. 1391(b) because the Petition seeks to enforce a judgment that has been filed in this district and the property that is the subject of the Petition has been alleged to be located in this District.

FACTUAL BACKGROUND

20. Upon information and belief, Petitioners obtained judgments in two actions in the United States District Court, District of Columbia (Heiser v. Iran, 00cv2329(RCL)) and Campbell v. Iran, (01CV 2104(RCL)) in a total amount of $591,089,966.00 plus post-judgment interest (the "Judgments") against judgment debtors the Islamic Republic of Iran, the Iranian Ministry of Information and Security, and the Iranian Islamic Revolutionary Guard Corps.

("collectively "Iran"). See Exhibit 1.

21. Upon information, the Judgments were entered against Iran in both cases on default.

22. Petitioners do not allege in their Petition that they complied with 28 U.S.C. § 1603, which would require that they send a copy of the default judgment to the judgment debtors in a manner provided for service in 28 U.S.C. § 1608.

23. Upon information and belief and as alleged in the Petition, on or about September 8, 2008 and on or about December 8, 2010, Petitioners registered the Judgments in the United States District Court, Southern District of New York.

24. On or about December 23, 2010, Petitioners' counsel mailed a letter to Bank of Baroda NY requesting that Bank of Baroda NY "immediately restrain any and all assets and debts owed to Iran, any agencies or instrumentalities of Iran, and any separate juridical entities in which Iran may have an interest, direct or indirect . . . pending further order of the Court."

25. On or about January 3, 2011, the United States Marshals Service, Southern District of New York served a writ of execution for $254,431,963.42 on Bank of Baroda NY.

26. On or about March 8, 2011, Petitioners served the Petition on Bank of Baroda NY, seeking the turnover of the funds held by Bank of Baroda NY pursuant to OFAC Regulations.

27. As of September 30, 2010, Bank of Baroda, solely as an intermediary bank and pursuant to the OFAC Regulations, has blocked certain electronic fund transfers.

28. Each of these electronic fund transfers originated in India and was remitted to Bank of Baroda NY as an intermediary bank en route to the accounts held by certain individual and entity Interpleader Respondents in the Iranian Banks (the "Funds").

29. Whenever electronic fund transfers are denominated in United States Dollars, the transfers must pass through a bank licensed in the United States before going to its ultimate destination, even if both the originator and the beneficiary are located outside the United States.

30. Kim Chemicals Limited, Mumbai India, remitted funds through Bank of Baroda, Crawford Market Branch, Mumbai India, via Bank of Baroda NY as the intermediary bank, for credit to Interpleader Respondent Behran Oil Co.'s account with Interpleader Respondent Bank Saderat Iran in Dubai, United Arab Emirates.

31. Dr. K.C. Chaturvedi in Chittorgarh, Rajasthan, India remitted funds through Bank of Baroda, Udaipur Branch in Rajasthan, India, via Bank of Baroda NY as intermediary bank, for credit to Interpleader Respondent Dr. K.C. Chaturvedi's account in Bank Melli Iran in London.

32. N.R. Agarwal Industries Ltd. in India remitted funds through Bank of Baroda, Mahatma Gandhi Road Branch in Mumbai, India, via Bank of Baroda NY as the intermediary bank, for credit to Interpleader Respondent Mehrad Kala and Co Ltd.'s account with Interpleader Respondent Export Development Bank of Iran, Central Branch in Tehran, Iran.

33. Bank of Baroda, Chandavarkar Road, Matunga, India remitted funds, via Bank of Baroda NY as the intermediary bank, for credit to Interpleader Respondent Ocoo Alban Imex's account with Interpleader Respondent Export Development Bank of Iran, Shiraz Branch.

34. LCC Mfg. Co. Pvt. Ltd., Coimbatore, India, remitted funds through Bank of Baroda, Coimbatore, India, via Bank of Baroda NY as the intermediary bank, for credit to Interpleader Respondent Abharris Co.'s account at the Export Development Bank of Iran (Mirdamad Branch), Tehran, Iran.

35. Ashit Patel, Vasna, Ahmedabad, India, remitted funds through Bank of Baroda, Ashram Road, Ahmedabad, India, via Bank of Baroda NY as the intermediary bank, for credit to

Interpleader Respondent Maryam Mashkoori's account with Interpleader Respondent Bank Saderat Iran, Mashhad, Iran.

36. PSONS Limited, Dubai, United Arab Emirates, remitted funds through Bank of Baroda, Dubai, United Arab Emirates, via Bank of Baroda NY as the intermediary bank, for final credit to Interpleader Respondent Mojtaba Alavi, A/C's account with Interpleader Respondent Bank Melli Iran (Siba), Karama Branch, Dubai, United Arab Emirates.

37. Breeze Project India Private Ltd., Vasant Kunj, New Delhi, India, remitted funds through Bank of Baroda, Nehru Place Branch, New Delhi, India, via Bank of Baroda NY as the intermediary bank, for credit to Interpleader Respondent Chabokran Tools International Transport Co.'s account with Interpleader Respondent Bank Saderat Iran, Mashhad Iran.

38. Iswar Textile Agency, Bhilwara, Rajasthan, India, remitted funds through Bank of Baroda, Bhilwara Branch, Rajasthan, India, via Bank of Baroda NY as the intermediary bank, to Interpleader Respondent Mohammadmehdi Tayebikamardy's account with Interpleader Respondent Bank Export Development Bank of Iran (Mirdamad Branch), Tehran, Iran.

39. Bank of Baroda NY blocked these electronic fund transfers pursuant to the OFAC Regulations and Executive Orders of the President of the United States.

40. One such regulation provides that property in which Iran has any interest that is in the possession or control of persons subject to the jurisdiction of the United States may "not be transferred, paid, exported, withdrawn or otherwise dealt in except as authorized." See 31 C.F.R. § 535.201.

41. Upon information and belief, one way for an Iranian entity to be so authorized is by obtaining a license from the United States Department of Treasury. See, e.g., 31 C.F.R. § 535.215.

42. OFAC has published a list of Specially Designated Nationals and Blocked Persons on its website at www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx which lists those individuals and companies owned or controlled by, or acting for or on behalf of, certain "target" countries. It also lists individuals, groups, and entities, such as terrorists and narcotics traffickers designated under certain programs that are not country-specific (the "OFAC List").

43. Upon information and belief, the Interpleader Respondents Iranian Banks all appear on the OFAC List.

44. Because the Iranian Banks appear on the OFAC List, the filter that had been instituted by Bank of Baroda NY instantaneously blocked the electronic fund transfers at issue herein.

45. Upon information and belief, none of the beneficiaries referenced in paragraphs 77 through 85 above appear on the OFAC List.

46. Pursuant to the OFAC Regulations, any financial institution that has blocked assets of entities or individuals on the OFAC List must submit an Annual Report of Blocked Property to OFAC, listing the property and funds retained.

47. Bank of Baroda NY has complied with the OFAC Regulations and has submitted the annual report to OFAC.

48. In their Petition, Petitioners contend that, having allegedly delivered a writ of execution with respect to the Judgments to the United Marshal's Office of the Southern District of New York on December 10, 2010, and having filed the Petition on March 8, 2011, their claim to the Funds take priority over any other claims by any other person.

49. In Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd., 585 F.3d 58 (2nd Cir.

2009); Hawknet, Ltd. v. Overseas Shipping Agencies, 590 F.3d 87 (2nd Cir. 2009); and Eitzen Bulk A/S v. Ashapura Minechem Ltd., 632 F.3d 53 (2nd Cir. 2011), the Second Circuit held that electronic fund transfers that are restrained by an intermediary bank are not available for execution because, among other things, an electronic fund transfer is neither the property of the originator nor of the beneficiary.

50. Given that the funds that Petitioners herein are seeking to attach are electronic fund transfers, it would seem that those funds would not be attachable under Jaldhi, Hawknet, and Eitzen Bulk.

51. Bank of Baroda NY is aware of the language of Section 201 of the Terrorism Risk Insurance Act of 2002 (the "TRIA") which provides:

> Notwithstanding any other provision of law, and except as provided in subsection (b), in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

52. Upon information and belief, Petitioners contend that the blocked assets are subject to execution to satisfy the Judgments because they constitute "blocked assets" of Iran or of an "agency or instrumentality" of Iran, within the meaning of TRIA § 201.

53. A recent Southern District of New York decision in Levin v. Bank of New York, 09cv5900 (RPP), 2011 U.S. Dist. LEXIS 23779 (S.D.N.Y. Mar. 4, 2011) indicated that, pursuant to TRIA and FSIA, assets in which Iran has an interest, even if those assets are electronic fund transfers, may be available for execution by judgment creditors.

54. Upon information and belief, the part of the decision in Levin that held that

electronic fund transfers in which Iran has an interest is subject to execution, has not been appealed to the Second Circuit.

55. Therefore, there might be a difference of opinion among the courts in this Circuit as to whether electronic fund transfers in which Iran has any interest is subject to execution.

56. In The Bank of New York v. Rubin, 484 F.3d 149 (2nd Cir. 2007), the Second Circuit, relying on Weinstein v. Islamic Republic of Iran, 299 F.Supp.2d 63 (E.D.N.Y. 2004) held that certain funds held in American banks that belonged to some Iranian banks (some of which are also Interpleader Respondents herein) were not available for attachment because they were not considered "frozen".

57. Moreover, upon information and belief, unlike the cases cited above, neither the originators nor the beneficiaries of the electronic fund transfers that are the subject of the Petition appear on either the OFAC List, nor are they otherwise subject to having their assets blocked under OFAC Regulations.

58. It is also possible that Interpleader Respondents Iranian Banks will seek ownership or possession of the electronic fund transfers that were blocked by Bank of Baroda NY.

59. Interpleader Respondent United States may also contend that (i) Petitioners' actions do not suffice to give them priority with respect to the funds; (ii) that some or all of the Funds should remain under OFAC's control in blocked accounts in Bank of Baroda NY; (iii) the Funds are not subject to the OFAC Regulations because they are not property in which Iran or its agencies or instrumentalities have any interest; and/or (iv) the Funds may not be used to satisfy judgments and/or should be released pursuant to a valid license issued by OFAC under applicable regulations.

60. Given the differing court opinions, and the possibility of disputing claims as to the Funds, Bank of Baroda NY is requesting that this Court determine who has the rights to electronic fund transfers blocked by Bank of Baroda NY, including whether Iran or an agency or instrumentality of Iran have any interest in the Funds for purposes of the OFAC Regulations.

61. Bank of Baroda NY also seeks guidance as to whether any of the Iranian Banks hold a license to transfer or otherwise deal with assets or property in the United States.

AS AND FOR A FIRST CAUSE OF ACTION

(Interpleader pursuant to Fed. R. Civ. P. 22)

62. Bank of Baroda NY repeats and realleges paragraphs 1 through 61 as if fully set forth hereat.

63. Federal Rule of Civil Procedure 22(a)(1) provides that "persons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead", and Federal Rule of Civil Procedure 22(a)(2) provides that "a defendant exposed to similar liability may seek interpleader through a crossclaim or counterclaim."

64. Bank of Baroda NY is a disinterested stakeholder of the Funds.

65. The attempt by Petitioners to enforce judgments by attaching blocked assets being held potentially for the benefit of parties other than the judgment debtors presents adverse claims within the meaning of Fed. R. Civ. P. 22.

66. Bank of Baroda NY faces, or may face, conflicting claims by Interpleader Respondents with respect to the Funds, thereby exposing Bank of Baroda NY to multiple liability absent resolution of all claims in one proceeding.

67. Bank of Baroda NY is prepared to deposit the Funds into the registry of the Court pending the Court's determination of the Interpleader Respondents' entitlements thereto.

68. Bank of Baroda NY requests that the Court make a determination as to the Interpleader Respondents' entitlements, if any, to the Funds.

AS AND FOR A SECOND CAUSE OF ACTION

(Order pursuant to 28 U.S.C. § 2361)

69. Bank of Baroda NY repeats and realleges paragraphs 1 through 68 as if fully set forth hereat.

70. 28 U.S.C. § 2361 provides that:

> in any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court.
>
> Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment.

71. Bank of Baroda NY is a disinterested stakeholder of the Funds.

72. Bank of Baroda NY requests that the Court issue an order restraining and permanently enjoining the Interpleader Respondents from instituting or prosecuting any action or claim against Bank of Baroda NY in any jurisdiction arising from or relating to any claim to the Funds.

73. Bank of Baroda NY requests that the Court discharge Bank of Baroda NY from the first-captioned proceedings above.

AS AND FOR A THIRD CAUSE OF ACTION

(Interpleader Pursuant to CPLR § 5239)

74. Bank of Baroda NY Bank of Baroda NY repeats and realleges paragraphs 1

through 73 as if fully set forth hereat.

75. CPLR § 5239 provides that

> [p]rior to the application of property or debt by a sheriff or receiver to the satisfaction of a judgment, any interested person may commence a special proceeding against the judgment creditor or other person with whom a dispute exists to determine rights in the property or debt", and that in such proceeding, the court "may vacate the execution or order, void the levy, direct the disposition of the property or debt, or direct that damages be awarded.

76. The attempt by Petitioners to enforce the Judgments by executing on blocked assets being held potentially for the benefit of parties other than the judgment debtors constitutes a dispute regarding the right in property.

77. Bank of Baroda NY faces, or may face, conflicting claims by Interpleader Respondents with respect to the Funds, thereby exposing Bank of Baroda NY to multiple liability absent resolution of all claims in one proceeding.

78. Bank of Baroda NY requests that the Court issue an Order determining the rights in the "property or debt" being held in the blocked account.

AS AND FOR A FOURTH CAUSE OF ACTION

(Interpleader Pursuant to NY Banking Law § 134)

79. Bank of Baroda NY repeats and realleges paragraphs 1 through 78 as if fully set forth hereat.

80. Pursuant to New York Banking Law § 134(6)(a):

> in all actions against any bank or trust company to recover for moneys on deposit therewith, if there be any person or persons not parties to the action, who claim the same fund, the court in which the action is pending, may, on the petition of such bank or trust company, and upon eight days' notice to the plaintiff and such claimants, and without proof as to the merits of the claim, make an order amending proceedings in the action by making such claimants parties defendant thereto; and the court shall thereupon

> proceed to determine the rights and interest of the several parties to the action in and to such funds. The remedy provided in this section shall be in addition to and not exclusive of that provided in any other interpleader provision.

81. The attempt by Petitioners to enforce the Judgments by executing on blocked assets being held potentially for the benefit of parties other than the judgment debtors presents claims to the same fund within the meaning of Fed. R. Civ. P. 22.

82. Bank of Baroda NY faces, or may face, conflicting claims by Interpleader Respondents with respect to the Funds, thereby exposing Bank of Baroda NY to multiple liability absent resolution of all claims in one proceeding.

83. Bank of Baroda NY requests the Court to determine the rights, if any, of the Interpleader Respondents with respect to the electronic fund transfers that were blocked by Bank of Baroda NY.

AS AND FOR A FIFTH CAUSE OF ACTION

(Attorneys fees and costs)

84. Bank of Baroda NY repeats and realleges paragraphs 1 through 83 as if fully set forth hereat.

85. Bank of Baroda NY is a disinterested stakeholder in the Funds.

86. Under case law in the Second Circuit, disinterested stakeholders who assert interpleader are entitled to attorneys' fees and costs.

87. Upon direction or an Order from the Court, Bank of Baroda NY is prepared to deposit the Funds into the registry of the Court, from which an award to Bank of Baroda NY of attorneys fees and costs may be taken.

WHEREFORE, Respondent and Interpleader Petitioner Bank of Baroda, New York Branch requests:

(a) an order and judgment determining the rights, if any, of each of the Interpleader Respondents to the Funds;

(b) determining whether and to what extent any of the Funds are subject to execution to satisfy the Judgments in favor of any of the Interpleader Respondents against Iran;

(c) discharging Bank of Baroda NY from any and all liability to the Interpleader Respondents, and any other persons who may have claims to, or an interest in, any of the Funds that are turned over the Petitioners or any of the Interpleader Respondents to satisfy the Judgments, and permanently enjoining the Interpleader Respondents from instituting or prosecuting any claim or action against Bank of Baroda NY arising from or relating to any claim to the Funds;

(d) Upon discharge of Bank of Baroda NY, dismissing Bank of Baroda NY as a party to the first-above captioned proceedings;

(e) awarding to Bank of Baroda NY their costs and expenses in this proceeding, including reasonable attorneys fees; and

(f) awarding to Bank of Baroda NY such other and further relief as may be just and proper.

Dated: April 8, 2011
New York, New York

WORMSER, KIELY, GALEF & JACOBS LLP
Attorneys for Interpleader Petitioner
Bank of Baroda, New York Branch

By: _____

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ANNEX 336

2013 WL 4780061
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

The ESTATE OF Michael HEISER et al, Petitioners,

v.

BANK OF BARODA, NEW YORK BRANCH, Respondent.

No. 11 Civ. 01602(LGS).

July 17, 2013.

MEMORANDUM AND ORDER

LORNA G. SCHOFIELD, District Judge.

***1** Presently before the Court is the motion of Respondent, Bank of Baroda, for attorney's fees and expenses pertaining to Respondent's interpleader petition, totaling $34,795.64. For the reasons that follow, Respondent's motion is granted in part. Respondent is awarded fees totaling $10,438.69.

I. Factual Background

Petitioners, family members and the estates of seventeen U.S. Air Force service members killed in a 1996 terrorist attack on the Khobar Towers in Saudi Arabia, hold judgments against the Islamic Republic of Iran in the amount of $591,089,966. *See Estate of Heiser v. Islamic Republic of Iran,* 659 F.Supp.2d 20, 31 (D.D.C.2009) (awarding $336,658,063); *Estate of Heiser v. Islamic Republic of Iran,* 466 F.Supp.2d 229, 356 (D.D.C.2006) (awarding $254,431,903.00).

Pursuant to the Office of Foreign Asset Control ("OFAC") regulation, Respondent blocked certain electronic funds, which were destined for three Iranian Banks (the "Blocked Assets"). Petitioners filed a turnover petition on March 8, 2011, naming Bank of Baroda as Respondent and demanding that it turn over the Blocked Assets pursuant to the Terrorism Risk Insurance Act of 2002 ("TRIA"), which authorizes funds blocked pursuant to OFAC Regulation to be used in execution of judgments against terrorist organizations.

On April 11, 2011, Respondent filed a third-party petition in interpleader against thirteen individuals and entities. (Dkt. No. 11). On August 8, 2011, Magistrate Judge Michael H. Dolinger entered an order, which provided for service of the turnover petition and related documents on the third parties whom Respondent believed might assert a claim to the Blocked Assets. (The "Service Order," Dkt. No. 39; *see also* Dkt. No. 38).

On February 15, 2013, Judge Laura Taylor Swain, to whom the case was previously assigned, granted Petitioners' motion for summary judgment, ordering Respondent to turn over the $119,827.68 in Blocked Assets, less $20,000.00 for the attorney's fees and costs claimed by Respondent. (Dkt. No. 76). The Order noted that Petitioners disputed that Respondent was entitled to attorney's fees and costs and ordered Respondent to hold the $20,000 in a blocked account pending further order of the Court. (*Id.*). The February 15, 2013 Order also "discharged and released" Respondent "from all liability and obligations" with respect to the Blocked Assets once they were turned over to Petitioners. (*Id.*).

Respondent then filed the present motion seeking compensation for the interpleader petition and attaching invoices reflecting $30,796.50 in attorney's fees and $3,999.14 in expenses, or a total of $34,795.64, incurred in connection with this action. (Dkt. No. 78; Exhibit G to Morin Decl.; Dkt. No. 79). Petitioners argue that (1) Respondent is not entitled to any award of fees and costs because the work that they did was unnecessary, but (2) if attorney's fees and costs are awarded, the amount should be steeply reduced.

II. An Award of Fees and Costs Is Appropriate

***2** A "reasonable award of fees and costs" is available to an interpleader plaintiff where such plaintiff is "(1) a disinterested stakeholder, (2) who had conceded liability, (3) has deposited the disputed funds into court, and (4) has sought a discharge from liability." *New York Life Ins. Co. v. Apostolidis,* 841 F.Supp.2d 711, 720–21 (E.D.N.Y.2012) (quoting *Septembertide Pub., B.V. v. Stein and Day, Inc.,* 884 F.2d 675, 683 (2d Cir.1989)). As a general rule, "[a]ttorney's fees and costs are ... awarded to a disinterested stakeholder who has expended time and money participating in a dispute not of his own making and the outcome of which has no impact on him." *Wells Fargo Bank, N.A. v. ESM Fund I, LP,* 785 F.Supp.2d 188, 198 (S.D.N.Y.2011) aff'd, 504 F. App'x 38 (2d Cir.2012) (quoting *Weininger v. Castro,* 462 F.Supp.2d 457, 501 (S.D.N.Y.2006)). Courts in this district have awarded fees and costs to interpleader banks in turnover

actions. *See, e.g., Weininger,* 462 F.Supp.2d at 502; *Rux v. ABN–Amro Bank, N.V.,* No. 08 Civ. 6588, 2009 WL 8660085, at * 6 (S.D.N.Y. Apr. 14, 2009).

Here, Petitioners oppose the award of fees and expenses to Respondent on the grounds that the interpleader was unnecessary and ultimately abandoned. Petitioners argue that Respondent's taking no further action relating to its interpleader petition after the Court approved the Service Order constitutes abandonment. To the contrary, Respondent acted reasonably in ceasing to pursue the interpleader petition after service procedures adequate to protect its interests were adopted. Pursuant to the Service Order, Petitioners assumed responsibility for serving persons and entities that Respondent identified as potentially having an interest in the Blocked Assets. The Court does not agree that the interpleader was unnecessary or characterize Respondent's action, which contributed to service of the relevant parties, as "abandonment."

Here, Respondent is entitled to reasonable attorney's fees and costs because Respondent is a disinterested stakeholder, has conceded liability and has sought and received discharge from future liability arising from the frozen funds in question. Respondent expended time and money in a dispute from which it had nothing to gain, and was successful in obtaining judicial relief from future liability pertaining to the funds at issue.

III. Reasonable Attorney's Fees and Costs

The Court next examines whether the attorney's fees and costs claimed by Respondent are reasonable.

An interpleader is limited to recovering fees and costs incurred in the bringing of the interpleader action. *Fid. Brokerage Services LLC v. Caro,* No. 10 Civ. 5893, 2011 WL 4801523, at *2 (S.D.N.Y. Oct. 11, 2011) (citing *Estate of Ellington v. EMI Music Publishing,* 282 F.Supp.2d 192, 194 (S.D.N.Y.2003)). The court must determine what amount is reasonable for the interpleader plaintiff given the circumstances of the case. *Estate of Ellington,* 282 F.Supp.2d at 194 (S.D.N.Y.2003) (citing 7 Wright, Miller & Kane, Federal Practice and Procedure § 1719 at 686–87 (3d ed.2001)). "District courts have broad discretion when calculating a fee awarded" to an interpleader plaintiff. *Landmark Chems., SA v. Merrill Lynch & Co.,* 234 F.R.D. 62, 63 (S.D.N.Y.2005).

***3** "It is well-settled that a stakeholder is not entitled to costs and fees it would have incurred in the ordinary course of business." *Fid. Brokerage Servs.,* 2011 WL 4801523, at *2 (citation and internal marks omitted); *see also Travelers Ins. Co. v. Estate of Garcia,* No. 00 Civ. 2130, 2003 WL 1193535, at *4 (E.D .N.Y. Feb. 4, 2003) ("[C]ourts need not award attorneys' fees in interpleader actions where the fees are expenses incurred in the ordinary course of business."). A "typical interpleader claim does not involve extensive or complicated litigation, and thus fees should be relatively modest." *Estate of Ellington,* 282 F.Supp.2d at 194; *see also Weininger,* 462 F.Supp.2d at 502 ("In the usual case the [attorney's] fee will be relatively modest, inasmuch as all that is necessary is the preparation of a petition, the deposit in court or posting of a bond, service on the claimants, and the preparation of an order discharging the stakeholder." (quoting 7 Wright, Miller & Kane, Federal Practice and Procedure § 1719 at 686–87 (3d ed.2001)).

Here, Respondent argues that the case presented "complex legal and factual circumstances" justifying its fee request. Specifically, Respondent argues that the decisions in *Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.,* 585 F.3d 58, 71 (2d Cir.2009), a case concerning Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure ("Rule B"), cast doubt on whether EFTs were considered property within the meaning of TRIA. Respondent, however, overstates the breadth of the holding in *Jaldhi. Compare id.* ("[B]ecause there is no governing federal law on the issue and New York law clearly prohibits attachment of EFTs, we conclude that EFTs being processed by an intermediary bank in New York are not subject to Rule B attachment."), *with Hausler v. JP Morgan Chase Bank, N.A.,* 740 F.Supp.2d 525, 531 (S.D.N.Y.2010) (holding "that the plain language and purpose of ... TRIA [is] markedly different from the federal laws governing *Jaldhi"* and that EFTs are subject to execution under TRIA because TRIA preempts New York property laws). In any event, to the extent that *Jaldhi,* or any other case, introduced uncertainty with regard to TRIA attachment actions, it was not incumbent upon Respondent, as a disinterested party, to incur legal fees in relation to these issues beyond what was necessary to interplead the adverse parties. *See Weininger,* 462 F.Supp.2d at 502 (discounting legal fees claimed to the extent that the "litigation strategy" of the bank asserting interpleader "went beyond that of a typical disinterested stakeholder, whose legal expenses are associated merely with its efforts to secure interpleader" and "advocated a position against Plaintiffs"); *Fid. Brokerage Servs.,* 2011

WL 4801523, at *1 (holding that an interpleader is limited to recovering fees and costs incurred in the bringing of the interpleader action). Therefore, Respondent cannot argue that it is entitled to greater compensation in this action because of the complexity of the law.

***4** Petitioners argue that if fees and costs are awarded to Respondent, they should be greatly reduced. Indeed, courts often reduce awards to interpleader plaintiffs where there is no extensive litigation or lengthy discovery. *See GOAT, Inc. v. Four Finger Art Factory, Inc.*, No. 01 Civ. 10079, 2002 WL 31684400, at *2 (S.D .N.Y. Nov. 25, 2002) (reducing award from $27,000 to $7,000 and noting that 30 hours claimed for legal research and drafting was excessive for "what should have been a relatively straightforward interpleader"); *Estate of Ellington*, 282 F.Supp.2d at 195 (S.D.N.Y.2003) (reducing award from $37,000 to $10,000 where work "primarily involved two conferences with this Court and two settlement conferences with the Magistrate Judge, drafting the complaint, reviewing and responding to correspondence, and negotiating and commenting on the final discharge"). Petitioners also argue that it was not necessary for Respondent to incur fees after August 8, 2011, when the Service Order was approved and Petitioners assumed the responsibility for serving the third parties identified by Respondent.

Petitioners further argue that Respondent should not be compensated for tasks that it was required to perform as part of its ordinary course of business. *See Fid. Brokerage Servs.*, 2011 WL 4801523, at *2 ("It is well-settled that a stakeholder is not entitled to costs and fees it would have incurred in the ordinary course of business.") (citation and internal marks omitted). Petitioners point out that the information required to complete the interpleader action was maintained and readily available to the Respondent, who was under a statutory obligation to file reports pertaining to frozen funds pursuant to TRIA. *See* 31 C.F.R. § 501.601 (requiring "every person holding property blocked pursuant to the provisions of [OFAC regulations to] keep a full and accurate record of such property ... for at least 5 years after the date such property is unblocked"). "[I]t is not uncommon for banks ... to have to respond to discovery requests from parties—or from the Government—staking claim to or inquiring about funds in their custody. Such costs are part of a bank's ordinary course of business." *Fid. Brokerage Servs.*, 2011 WL 4801523, at *2 (citation and internal marks omitted).

The Court also takes into consideration that the total amount of Blocked Assets in this action was $119,827.68. The $34,795.64 sought by Respondent is not an insignificant portion of the amount at stake. It does not serve the purpose of TRIA for interpleader plaintiffs to cause a large reduction in the funds available to compensate the victims of terrorism. *See Rux*, Order Regulating Attorney's Fees and Costs, No. 08 Civ. 06588, Dkt. No. 212, at 2. ("The victims should not have their recoveries diminished by [awards to interpleader banks], nor should the expenses be unreasonably high."); *see also GOAT*, 2002 WL 31684400, at *2 (reducing award of attorney's fees and costs in part because the amount requested "would exceed 20% of the fund"). In *Rux*, a turnover action pursuant to TRIA, the court awarded $115,000 in fees and costs to nine respondent banks, which sought $621,247 in fees and expenses related to the interpleader action. *Rux*, 2009 WL 8660085, at * 6 (S.D.N.Y. Apr. 14, 2009). The court reduced all of the recovery sought without individual determination on reasonableness of hours or rates:

Respondent Bank	***Fees and Costs Requested***	***Fees and Costs Allowed***
American Express Bank, Ltd.	$65,761.56	$5,000.00
ABN–Amro Bank N.V.	$15,822.94	$5,000.00
Bank of America	$15,650.36	$5,000.00
Bank of China	$17,540.27	$5,000.00
The Bank of New York Mellon	$100,138.88	$25,000.00

Citibank, N.A.	$89,406.55	$5,000.00
Deutsche Bank Trust Company Americas	$148,519.72	$35,000.00
HSBC Bank USA, N.A.	$12,365.18	$5,000.00
JPMorgan Chase Bank, N.A.	$157,044.76	$25,000.00
	***Total:* $621,247.22**	***Total:* $115,000.00**

***5** *Rux*, Order Regulating Attorneys' Fees and Costs, No. 08 Civ. 06588, Dkt. No. 212, at 3. The *Rux* court nevertheless observed that allowing compensation to the interpleader banks for "expenses incurred ... in proceedings not of their own making, to assure that payments from blocked funds do not prejudice innocent beneficiaries, or the banks themselves, are integral to the process of allowing the victims of terrorism to recover from blocked assets." *Id.* at 2.

In the instant action, the Court concludes that while it is appropriate to award fees and costs to Respondent, it is also appropriate to reduce them. As an initial matter, it appears that Respondent spent roughly 35 hours on researching and drafting the interpleader. This seems excessive in light of the type and amount of work required. Also, Respondent's attorneys should not be compensated for acquiring contact information for the beneficiaries of the Blocked Assets when Respondent was required to maintain that information in its ordinary course of business under OFAC regulations. Rather than scrutinize each billing entry, the Court determines that a reduction in the attorney's fees and costs by 70% is appropriate. *See LV v. New York City Dep't of Educ.*, 700 F.Supp.2d 510, 525 (S.D.N.Y.2010) (A court may reduce the hours claimed across the board by some percentage where it finds it difficult to assess the reasonableness of the hours billed due to "vagueness, inconsistencies or other deficiencies." (quoting *Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 173 (2d Cir.1998)). Here, the fees sought relating to researching and drafting the interpleader are excessive, and many of the fees sought in relation to work performed after the Service Order was entered are questionable and vague. A reduction of 70% balances the entitlement of Respondent to reasonable fees as a disinterested interpleader with Petitioners' right pursuant to TRIA to enforce their judgment as victims of terrorism.

Accordingly, the Court awards Respondent attorney's fees and costs in the amount of $10,438.69.

IV. Conclusion

Respondent's motion for attorney's fees and costs is GRANTED IN PART. Respondent is awarded fees and costs totaling $10,438.69. The remaining Blocked Assets shall be turned over to Petitioners to the extent that their judgments against the Islamic Republic of Iran remain unsatisfied. No later than **August 16, 2013,** Petitioners shall submit an affirmation representing the amount of their judgments that remain outstanding, and a proposed order for turnover of the remaining Blocked Assets, less the $10,438.69 that will be paid to Respondent.

The Clerk of Court is directed to close the motion at docket number 78.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2013 WL 4780061

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ANNEX 337

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

THE ESTATE OF MICHAEL HEISER, deceased, et al.,

Petitioners,

v.

BANK OF BARODA, NEW YORK BRANCH,

Respondent.

----------x

11-CV-1602 (LTS/MHD)

ORDER CONCERNING NOTICE TO AND SERVICE ON THIRD-PARTIES

WHEREAS, this proceeding was commenced by Petitioners by the filing of a Petition for Turnover Order pursuant to Fed. R. Civ. P. 69 and N.Y.C.P.L.R. §§ 5225 and 5227 (the "Petition") in this Court on March 8, 2011; and

WHEREAS, the Petition seeks an order directing the Respondent Bank of Baroda, New York Branch ("Respondent") to turn over to Petitioners, in satisfaction of a judgment in the amount of $591,089,966.00 entered in their favor by the United States District Court for the District of Columbia on December 22, 2006, as supplemented by a judgment entered September 30, 2009 (collectively, the "Judgment"), in consolidated cases captioned Heiser v. Iran (Case No. 00-CV-2329 RCL) and Campbell v. Iran (Case No. 01-CV-2104 RCL) (the "Underlying Action"), certain funds (the "Blocked Assets") held by the Respondent that were blocked pursuant to regulations of the Office of Foreign Assets Control ("OFAC") and that may be subject to execution to satisfy the Judgment because the Islamic Republic of Iran ("Iran") or individuals, persons and entities that are agencies or instrumentalities of Iran (collectively, "Persons") may have an interest in such Blocked Assets; and

WHEREAS, the Blocked Assets comprise funds that were the subject of wire transfers for which Respondent was an intermediary bank; and

WHEREAS, on April 8, 2011, Respondent filed an Answer to Petition in which Respondent asserted affirmative defenses including, without limitation, the need to provide proper notice of the Petition to all parties that may have an interest in the Blocked Assets; and

WHEREAS, the parties wish to have the Court exercise its authority to establish requirements and procedures for Petitioners to give notice of this proceeding to certain parties who may claim an interest in the Blocked Assets (the "Third Parties" or a "Third Party"); and

WHEREAS, section 1608(b)(3)(C) of the Foreign Sovereign Immunities Act of 1976 ("FSIA") authorizes the parties to this proceeding, under the circumstances specified therein, to serve process upon or give notice to an agency or instrumentality of a foreign state "as directed by order of the court consistent with the law of the place where service is to be made;" and

WHEREAS, Rules 4(f)(3) and 4(h)(2) of the Federal Rules of Civil Procedure authorize the parties to this proceeding to serve process upon or give notice to persons outside any judicial district of the United States "by other means not prohibited by international agreement, as the court directs;" and

WHEREAS, this Court has the authority under its inherent powers to establish procedures for the service of process or the giving of notice in certain other circumstances as well;

NOW, THEREFORE, it is hereby ORDERED as follows:

1. The following documents (referred to collectively hereinafter as the "Service Documents") shall be served in the manner specified in subsequent provisions of this Order.

a. the Petition;

b. a spreadsheet or other summary prepared by the Respondent, depending on what is reasonably available and appropriate, identifying (to the extent it can reasonably be

determined) those Blocked Assets that the Respondent believes that the person receiving notice may claim an interest in;

c. a notice in the form of Exhibit A to this Order (the "Notice of Lawsuit");

d. this Order;

e. to the extent the Service Documents are sent to a person or entity ("Entity") in Iran or a country where the official language is Farsi, Petitioners shall translate the Service Documents into Farsi in compliance with section 1608(b)(3) of the FSIA.

2. Petitioners shall serve the Service Documents upon the following Third Parties, to the extent that Petitioners are in possession of contact information for such parties sufficient to permit them to give notice in the manner specified in this Order:

a. The account holder of record of any Blocked Assets; and

b. The originator, the originator's bank, the beneficiary, the beneficiary's bank, and any intermediary bank for any blocked electronic funds transfer ("EFT").

3. The Service Documents may be served by Petitioners upon any Third Party by any of the following methods:

a. by sending copies of the Service Documents to such Third Party at its last known address, as determined by Petitioners from their own records, records provided by Respondent or public sources such as the internet, either by U.S. global Mail (also known as First Class International Mail) or by an express delivery company such as FedEx, UPS or DHL that makes deliveries in the country to which the documents are being sent, directed to the attention of the Managing Director, Chief Executive Officer or Chief Legal Officer of that Third Party if it is a business entity, or to the individual if the Third Party is not an entity. Respondent

shall provide counsel for Petitioners the address it has in its records (if any) of any Third Party within thirty (30) days of the entry of this Order;

b. by sending an e-mail to the last known e-mail address of such Third Party, as determined by Petitioners from their own records, records provided by Respondent or public sources such as internet web sites, which e-mail shall state:

> "IMPORTANT! This e-mail is being sent to put you on notice of a lawsuit pending in the United States District Court for the Southern District of New York that could result in the seizure and forfeiture of funds in which you may have an interest. These funds may include the balances held in one or more bank accounts that were blocked pursuant to the Iranian Transactions Regulations and the proceeds of one or more wire transfers that were interrupted and blocked pursuant to those Regulations. Please open the attachments, which are in pdf form, immediately. They will provide more detailed information about the lawsuit and your potential exposure to loss in that lawsuit."

The e-mail shall also attach PDF versions of the Service Documents to the e-mail (if the e-mail is being sent to a business entity, the e-mail should be directed to the e-mail address of the Chief Executive Officer, Managing Director or Chief Legal Officer, if known, or it should state, following the word "IMPORTANT," "Deliver this e-mail and the attachments to your Chief Executive Officer, Managing Director or Chief Legal Officer at once"). Respondent shall provide counsel for Petitioners the e-mail address it has in its records (if any) of any Third Party within thirty (30) days of the entry of this Order;

c. by faxing copies of the Service Documents to such Third Party at its last known fax number, as determined by Petitioners from their own records, records obtained from Respondent or public sources such as the internet (if the fax is being sent to a business entity, the fax cover sheet should be addressed to the Chief Executive Officer, Managing Director or Chief Legal Officer of the entity). Respondent shall provide counsel for Petitioners the fax number it has in its records (if any) of any Third Party within thirty (30) days of the entry of this Order; or

d. by serving the Service Documents in any other manner that would constitute good service under Rule 4 of the Federal Rules of Civil Procedure;

e. if the Third Party being given notice is a bank, Petitioners may provide notice by sending the following text to the bank in one or more of a series of linked SWIFT messages:

> "URGENT URGENT URGENT URGENT Deliver this message to your Chief Executive Officer, Managing Director or Chief Legal Officer at once. This message is being sent to put you on notice of a lawsuit pending in the United States District Court for the Southern District of New York that could result in the seizure and forfeiture of funds in which you may have an interest. These funds include the balances held in one or more bank accounts that were blocked pursuant to the Iranian Transaction Regulations and the proceeds of one or more wire transfers that were interrupted and blocked pursuant to those Regulations. What follows is the text of important legal documents that explain the nature of this lawsuit and what you must do to protect your rights, if any, in the funds at issue in the lawsuit. Please contact [contact information to be supplied]. That person can provide you with additional important legal documents relating to the lawsuit.,"

Such notice should be followed by the Petition and the Notice of Lawsuit, except that the captions of such documents may be abbreviated to show only the name of the first party on either side and the list of persons to whom the Petition is addressed may be omitted. The foregoing text may be modified as necessary to comply with paragraph 5 of this Order in the event that several linked messages or series of linked messages are needed to incorporate all of the specified documents; or

f. if the Third Party being given notice is owned or controlled in whole or in part by Iran or any of its agencies and instrumentalities or has ever been included in a list promulgated by the Office of Foreign Assets Control ("OFAC") of the United States Department of the Treasury of persons whose assets must be blocked pursuant to the Iranian Transaction Regulations, 31 C.F.R. Part 560, Petitioners may provide notice by causing copies of the Service Documents to be served on such party in accordance with 28 U.S.C. § 1608(b)(3)(B) and this

Court's Instructions for Service of Process on a Foreign Defendant, which contemplate that documents be dispatched to such party by the Clerk of this Court using a form of mail that requires a signed receipt.

4. The notice may be given by any person authorized to effect service of process under Rule 4(c)(2) of the Federal Rules of Civil Procedure.

5. If the Service Documents are too voluminous to be sent to a Third Party by mail or overnight delivery service in one envelope, or as attachments to a single e-mail, or in a single fax or SWIFT, the mailings, e-mails, faxes or SWIFTS shall indicate this fact and the number of envelopes, e-mails, faxes or SWIFTS, as the case may be, that are being sent and notify the recipient to treat them as a single group of documents relating to the same proceeding.

6. Any Protective Order previously entered by this Court ordering the sealing of papers in this action, are hereby suspended and amended to the extent necessary for the translation of documents into Farsi and the service and delivery of documents and information as authorized in this Order.

7. Counsel for Petitioners shall file a certificate of service with the Court and serve a copy of the certificate of service on counsel for Respondent within five (5) days after receiving confirmation of service on the Third Parties.

8. Service in accordance with the provisions of this Order shall be deemed to satisfy all of the requirements for service under the FSIA, the Federal Rules of Civil Procedure, N.Y.C.P.L.R., and all of the requirements of due process of law.

9. Any Third Party who fails to assert a claim to the Blocked Assets or take any action within sixty (60) days of the date indicated on the Notice of Lawsuit shall be deemed to forever waive any claims that such Third Party may have against the Blocked Assets, or against

Respondent or Petitioners with respect to the Blocked Assets, and such Third Party shall be forever barred, estopped and enjoined from asserting any claim to the Blocked Assets or pursuing any claim against the Respondent or Petitioners with respect to delivery or payment of the Blocked Assets to Petitioners.

10. By entering into this Stipulation, Respondent has not waived, forfeited or prejudiced in any way the ability of the Third Parties to join in any proceeding relating to the Petition, and it has not waived, forfeited or prejudiced in any way any of the Third Parties' rights, defenses, arguments or objections that they may have in response to the Petition, all of which are expressly reserved and given effect by ensuring that the Third Parties will be given notice of their right to interpose opposition to the relief sought in this turnover proceeding.

Dated: New York, New York
Aug. 8, 2011

SO ORDERED:

United States ~~District~~ Judge
Magistrate

EXHIBIT A

TO: THOSE PERSONS OR ENTITIES WHICH MAY CLAIM AN INTEREST IN FUNDS BLOCKED BY REGULATIONS AFFECTING THE ISLAMIC REPUBLIC OF IRAN.

THIS NOTICE OF LAWSUIT IS BEING SENT TO YOU TO ADVISE YOU OF A LAWSUIT PENDING IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK THAT MAY RESULT IN THE SEIZURE AND FORFEITURE OF FUNDS IN WHICH YOU MAY HAVE AN INTEREST. PETITIONERS HAVE OBTAINED A JUDGMENT AGAINST THE ISLAMIC REPUBLIC OF IRAN AND SEEK TO SATISFY THAT JUDGMENT FROM ASSETS OF THAT NATION OR ITS AGENCIES AND INSTRUMENTALITIES. THOSE ASSETS MAY INCLUDE BALANCES HELD BY BANK OF BARODA, NEW YORK BRANCH (THE "RESPONDENT BANK") IN CERTAIN ACCOUNTS THAT WERE BLOCKED PURSUANT TO REGULATIONS ISSUED BY THE OFFICE OF FOREIGN ASSETS CONTROL OF THE TREASURY DEPARTMENT OF THE UNITED STATES ("OFAC"). THEY ALSO INCLUDE THE PROCEEDS OF CERTAIN WIRE TRANSFERS THAT WERE BLOCKED PURSUANT TO THOSE REGULATIONS. RECORDS FURNISHED BY THE RESPONDENT BANK INDICATE THAT YOU MAY HAVE AN INTEREST IN THE FUNDS IN ONE OR MORE SUCH BLOCKED ACCOUNTS AND/OR THAT YOU MAY HAVE BEEN A PARTY, EITHER AS THE ORIGINATOR, BENEFICIARY OR ORIGINATING, INTERMEDIARY OR BENEFICIARY'S BANK WITH RESPECT TO ONE OR MORE OF THOSE BLOCKED WIRE TRANSFERS.

THE COURT MAY ORDER THAT THOSE FUNDS BE TURNED OVER TO PETITIONERS TO SATISFY THE JUDGMENT WITHOUT FURTHER PROCEEDINGS UNLESS YOU ACT TO ASSERT YOUR CLAIMS TO THOSE FUNDS

BY THE SUBMISSION OF COMPETENT EVIDENCE TO THE COURT THAT SUCH FUNDS ARE NOT PROPERTY OF IRAN OR ITS AGENCIES OR INSTRUMENTALITIES. YOU MUST ACT WITHIN SIXTY (60) DAYS AFTER THE DATE OF THIS NOTICE IN ORDER TO PROTECT THE RIGHTS, IF ANY, YOU MAY HAVE WITH RESPECT TO SUCH FUNDS.

The judgment being enforced arises out of a claim against the Islamic Republic of Iran, the Iranian Ministry of Information and Security and the Iranian Islamic Revolutionary Guard Corps. (collectively, "Iran") as described below. In that lawsuit brought in the United States District Court for the District of Columbia (the "D.C. Court"), the personal representative and family members of seventeen United States Air Force officer and airmen ("Petitioners") killed in the June 25, 1996 terrorist bombing of the Khobar Towers in Khobar, Saudi Arabia, recovered money and an award of damages and a judgment against Iran on the ground that Iran was legally responsible for the attack. This judgment, as amended and supplemented, is in the sum of $591,089,966.00 together with interest that is accruing.

The judgment holder then brought lawsuits in the United States District Court for the Southern District of New York in March 2011 (collectively, the "New York Lawsuit") in an effort to collect funds to satisfy the judgment. The New York Lawsuit was brought against the Respondent Bank, among other banks, and is based on Petitioners' claim that the Respondent Bank is holding funds belonging to the Islamic Republic of Iran and its agencies and instrumentalities that should be turned over to Petitioners to pay the amount due under the judgment. The amount sought by Petitioners, including interest and costs and expenses of the D.C. Lawsuit, is in excess of US $591 million. The accounts in question have been blocked by the Respondent Bank because it was required to do so pursuant to Executive Orders of the

President of the United States and the Iranian Transactions Regulations issued by the United States Department of the Treasury.

THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK HAS ORDERED THAT ANY PERSON OR ENTITY CLAIMING TO BE THE OWNER OF OR TO HAVE AN INTEREST IN ANY OF THE FUNDS DEPOSITED WITH THE COURT MUST SUBMIT WRITTEN OBJECTIONS WITHIN SIXTY (60) DAYS OF THE DATE OF THIS NOTICE. SUCH OBJECTIONS MUST BE IN WRITING, SPECIFY THE ACCOUNTS THAT YOU CLAIM TO HAVE AN INTEREST IN AND SET FORTH THE FACTUAL BASIS FOR YOUR CLAIM. THEY MUST BE SIGNED BY YOU, AN OFFICER OF YOUR ORGANIZATION OR YOUR ATTORNEY. YOU MUST SUBMIT SUCH OBJECTIONS TO THE ATTORNEYS FOR THE PETITIONER AND THE ATTORNEYS FOR THE RESPONDENT BANK AT THEIR ADDRESSES AS SET FORTH ON THE SCHEDULE AT THE END OF THIS NOTICE, AND TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

IT IS STRONGLY RECOMMENDED THAT YOU CONSULT WITH AN ATTORNEY AND OBTAIN LEGAL ADVICE AS TO WHAT ACTION YOU SHOULD TAKE. YOU SHOULD ALSO CONSIDER ASKING THE COURT FOR PERMISSION TO INTERVENE IN THE NEW YORK LAWSUIT AND BECOME A PARTY TO THE LAWSUIT FOR ALL PURPOSES.

WHATEVER YOU DECIDE TO DO, IT IS IMPORTANT THAT YOU ACT PROMPTLY. IF YOU DO NOT SUBMIT WRITTEN OBJECTIONS OR MAKE A MOTION TO INTERVENE WITHIN SIXTY (60) DAYS OF THE DATE OF THIS

NOTICE, THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK MAY DETERMINE THAT YOU HAVE DEFAULTED AND LOST YOUR RIGHT TO ASSERT A CLAIM TO THE FUNDS THAT HAVE BEEN PAID INTO THE REGISTRY OF THE COURT. IN THAT EVENT, THE COURT COULD TURN OVER SUCH FUNDS TO PETITIONERS TO SATISFY THE JUDGMENT. THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK MAY ALSO ENTER AN ORDER RELEASING AND DISCHARGING THE RESPONDENT BANK FROM ANY OBLIGATIONS TO HOLD THE FUNDS IN THOSE ACCOUNTS FOR YOU OR TO PAY THOSE FUNDS TO YOU. IF YOU WANT TO ASSERT YOUR RIGHTS, IF ANY, IN THE FUNDS BEING HELD BY THE COURT, YOU SHOULD SUBMIT WRITTEN OBJECTIONS OR TAKE OTHER APPROPRIATE ACTION WITHIN THE SIXTY (60) DAY DEADLINE.

IF YOU FILE TIMELY OBJECTIONS, THE COURT MAY HOLD A HEARING TO DETERMINE WHETHER YOU HAVE A VALID CLAIM. THE HEARING WILL BE HELD ~~IN COURTROOM ___ OF THE DANIEL PATRICK MOYNIHAN UNITED STATES COURTHOUSE AT 500 PEARL STREET, NEW YORK, NEW YORK~~, ON A DATE ~~AFTER~~ _____ THAT HAS NOT YET BEEN FIXED. IF YOU HAVE FILED WRITTEN OBJECTIONS OR INTERVENED IN THE PROCEEDINGS, YOU ARE INVITED TO ATTEND THE HEARING, IN PERSON OR THROUGH AN ATTORNEY, AND PRESENT COMPETENT EVIDENCE FOR YOUR CLAIMS. (IF YOU ARE NOT A NATURAL PERSON, YOU MUST APPEAR BY AN ATTORNEY.) YOU MUST APPEAR IN ORDER TO PRESERVE ANY CLAIM YOU MAY HAVE TO THE FUNDS BEING HELD BY THE COURT.

Enclosed with this Notice of Suit are copies of the Petition and related documents filed by Petitioners in order to commence the New York Lawsuit and the order of the Court establishing procedures for submitting objections and determining the rights of interested persons. These documents are being sent to you because the records of the Respondent Bank indicate that you may have an interest in the funds being held by the Respondent Bank. The enclosed documents include documents or information identifying the bank accounts and/or wire transfers in which you may have an interest, to the extent that Respondent Bank has been able to identify such accounts and transfers.

This notice has been approved by the United States District Court for the Southern District of New York, and the Court has directed Petitioners to send it to you along with the enclosed documents.

Dated: New York, New York
August __, 2011

ADDRESSES FOR SUBMISSION OF OBJECTIONS

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THE COURT:

Clerk of the Court
United States District Court for the
Southern District of New York
Daniel Patrick Moynihan Courthouse
500 Pearl Street
New York, NY 10007
Docket No. 11-CV-1602 (LTS/MHD)

ANNEX 338

807 F.Supp.2d 9
United States District Court,
District of Columbia.

ESTATE OF Michael HEISER, et al., Plaintiffs,

v.

ISLAMIC REPUBLIC OF IRAN, et al., Defendants.

Estate of Millard D. Campbell, et al., Plaintiffs,

v.

Islamic Republic of Iran, et al., Defendants.

Nos. 00–cv–2329 (RCL), 01–cv–2104 (RCL).
|
Aug. 10, 2011.

Synopsis

Background: Survivors of terrorist bombing of residential facility housing American military personnel stationed in Saudi Arabia, along with estates and family members of personnel killed in the bombing, brought actions, under the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act (FSIA), against the Islamic Republic of Iran, the Iranian Ministry of Information and Security (MOIS), and the Iranian Islamic Revolutionary Guard Corps (IRGC), alleging that those entities provided material support and assistance to the terrorist group that carried out the attack. Following consolidation of the actions, and entry of default judgment and award of compensatory damages against all defendants, 466 F.Supp.2d 229, plaintiffs sought retroactive application of new statutory provision which permitted recovery of punitive damages, and judgment was amended to hold defendants liable for compensatory and punitive damages, 659 F.Supp.2d 20. Thereafter plaintiffs, alleging that an Iranian company to which an American telephone company owed money was an instrumentality of Iran, sought to garnish those funds. American telephone company sought leave to interplead Iranian company as a defendant.

Holdings: The District Court, Royce C. Lamberth, Chief Judge, held that:

Iranian telecommunications company was an agency or instrumentality of Iran, and

under District of Columbia law, amount listed by American telephone company, in its second answer to interrogatories, as amount it owed to Iranian company, would be used as final sum subject to execution.

Ordered accordingly.

Attorneys and Law Firms

***11** Mark Charles Del Bianco, Kensington, MD, Richard Marc Kremen, David B. Misler, Melissa Lea Mackiewicz, DLA Piper US, LLP, Baltimore, MD, Shale D. Stiller, Elizabeth Renee Dewey, DLA Peper Rudnick Gray Cary U.S. LLP, Washington, DC, for Plaintiffs.

Neil Keith Gilman, Hunton & Williams, LLP, Washington, DC, for Defendants.

MEMORANDUM OPINION

ROYCE C. LAMBERTH, Chief Judge.

I. INTRODUCTION

On the night of June 25, 1996, a tanker truck crept quietly along the streets of Dhahran, coming to rest alongside a fence surrounding the Khobar Towers complex, a residential facility housing United States Air Force personnel stationed in Saudi Arabia. A few minutes later, the truck exploded in a massive fireball that was, at the time, the largest non-nuclear explosion ever recorded on Earth. The devastating blast, which was felt up to 20 miles away, sheared the face off Building 131 of the Khobar Towers complex and left a crater more than 85 feet wide and 35 feet deep in its wake. The bombing killed 19 U.S. military personnel and wounded more than 100. Subsequent investigations revealed that members of Hezbollah carried out the attack.

A few years after the bombing, plaintiffs—who are former service members injured in the attack, their families, and estates and family members of those killed—brought suit under the "state-sponsored terrorism" exception to the Foreign Sovereign Immunities Act ("FSIA" or the "Act"), then codified at 28 U.S.C. § 1605(a)(7). Plaintiffs allege that the Islamic Republic of Iran ("Iran"), the Iranian Ministry of Information and Security, and the Iranian Islamic

Revolutionary Guard Corps provided material support and assistance to Hezbollah to carry out the heinous attack. Following Iran's failure to appear and plaintiffs' presentation of evidence to substantiate their claims, the Court found that "the Khobar Towers bombing was planned, funded, and sponsored by senior leadership in the government ***12** of the Islamic Republic of Iran; the IRGC had the responsibility and worked with Saudi Hizbollah to execute the plan; and the MOIS participated in the planning and funding of the attack." *Heiser v. Islamic Republic of Iran,* 466 F.Supp.2d 229, 265 (D.D.C.2006) ("*Heiser I* ").[1] The Court subsequently entered judgment against all defendants for $250 million in compensatory damages. *Id.* at 356. A few years later, Congress passed the National Defense Authorization Act for Fiscal Year 2008 ("NDAA" or the "2008 Amendments"), which replaced § 1605(a)(7) with a new state-sponsored terrorism exception codified at § 1605A, permitted recovery of punitive damages, and added a new provision concerning the enforcement of judgments. Pub.L. No. 110–181, § 1083, 122 Stat. 3, 338–44 (2008). Invoking the NDAA's procedures for retroactive application, in 2009 the Court entered an amended judgment, holding defendants jointly and severally liable for an additional $36 million in compensatory damages and $300 million in punitive damages. *Heiser v. Islamic Republic of Iran,* 659 F.Supp.2d 20, 31 (D.D.C.2009).

Following entry of final judgment, plaintiffs began their journey down the often-frustrating and always-arduous path shared by countless victims of state-sponsored terrorism attempting to enforce FSIA judgments. The matter before the Court today requires exploration of the latest in a series of attempts by Congress to aid these victims. In this instance, plaintiffs—relying on a new provision added to the FSIA as part of the 2008 Amendments—assert that the Telecommunication Infrastructure Company of Iran ("TIC") is an instrumentality of Iran, and ask the Court to direct Sprint Communications Company LP ("Sprint") to turn over funds it owes to TIC. Sprint responds that plaintiff has failed to prove that TIC is an instrumentality as defined by the FSIA, seeks leave to interplead TIC as a defendant, and raises several other legal defenses to attachment of the funds. The Court first reviews the regime of legal and regulatory provisions governing execution of FSIA judgments, and then turns to the parties' dispute.

II. BACKGROUND

A. Statutory and Regulatory Framework

1. Iran–Specific Regulations

Relations between the United States and Iran deteriorated following the 1979 revolution in which Iran's monarchy was displaced by an Islamic republic, ruled by the Ayatollahs, that remains in power today. Following the regime change and fueled by the Iran hostage crisis, President Carter—exercising the authority granted to him under the International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq.*—blocked the flow of assets between the United States and Iran, and seized Iranian property located within the United States. Executive Order 12170, 44 Fed. Reg. 65,729 (Nov. 14, 1979). Over the next two years, Presidents Carter and Reagan issued numerous Executive Orders seizing additional assets, while the Office of Foreign Assets Control ("OFAC")—a component of the Department of the Treasury that administers and enforces economic and trade sanctions—promulgated regulations concerning transactions between persons in the United States and Iran. In 1981, the United States and Iran reached an agreement, known as ***13** the Algiers Accords, which led to the release of the hostages and the unfreezing of most Iranian assets. Over the following decades, sanctions regimes instituted by Executive Orders and rules promulgated by OFAC evolved into the complex web of regulations governing Iranian assets in the United States, as well as transactions with Iran.[2]

Today, the basic framework for the treatment of Iranian property and trade with Iran is set forth in two complementary sets of provisions promulgated by OFAC that generally bar all transactions either with Iran or involving Iranian interests and then carve out limited exceptions to that embargo. The first, known as the Iranian Assets Control Regulations ("IACR") and codified at 31 C.F.R. Part 535, was implemented in 1980 during the Iran Hostage Crisis, 45 Fed. Reg. 24,432 (Apr. 9, 1980), and "broadly prohibits unauthorized transactions involving property in which Iran has any interest," while granting specific licenses for certain transactions. *Flatow v. Islamic Republic of Iran,* 305 F.3d 1249, 1255 (D.C.Cir.2002). The second, known as the Iranian Transactions Regulations ("ITR") and codified at 31 C.F.R. Part 560, "confirms the broad reach of OFAC's Iranian sanctions programs by establishing controls on Iranian trade, investments, and services.... As under the IACR, there is a general prohibition under the ITR of unauthorized transactions, coupled with specific licenses permitting certain kinds of transactions." *Flatow,* 305 F.3d at 1255; *see also Weinstein v. Islamic Republic of Iran,* 299 F.Supp.2d 63,

68 (E.D.N.Y.2004) ("The ITR prohibited, *inter alia,* the importation of goods and services from Iran, and the exportation, reexportation, and sale or supply of goods, technology or services to Iran.").

2. Attachment and Execution under the FSIA

"It is a well-established rule of international law that the public property of a foreign sovereign is immune from legal process without the consent of that sovereign." *Loomis v. Rogers,* 254 F.2d 941, 943 (D.C.Cir.1958); *see also Weinstein v. Islamic Republic of Iran,* 274 F.Supp.2d 53, 56 (D.D.C.2003) ("[T]he principles of sovereign immunity 'apply with equal force to attachments and garnishments.' ") (quoting *Flatow v. Islamic Republic of Iran,* 74 F.Supp.2d 18, 21 (D.D.C.1999)). To promote this general principle, the FSIA broadly designates all foreign-owned property as immune, and then articulates limited exceptions to that immunity. *See* 28 U.S.C. § 1609 ("[T]he property in the United States of a foreign state shall be immune from attachment, arrest and execution except as provided in sections 1610 and 1611 of this chapter."). These exceptions include, *inter alia,* property (1) located in the United States that is (2) used for commercial activity and (3) controlled by a foreign state or its instrumentalities. *Id.* at § 1610(a)-(b); *see also Bennett v. Islamic Republic of Iran,* 604 F.Supp.2d 152, 161 (D.D.C.2009) ("[The FSIA] provides that the property of a foreign state is *not* immune from attachment or execution if the property at issue is used for a commercial activity by the foreign state") (emphasis in original). Though providing a workable framework in theory, the past decade of litigation under the Act has proved, for victims of state-sponsored terrorism, to be a journey down a never-ending road littered ***14** with barriers and often obstructed entirely. Two particular roadblocks merit greater discussion.

The first difficulty plaintiffs holding judgments against Iran often faced was the limited number of Iranian assets remaining in the United States. Attempting to overcome this shortfall, plaintiffs targeted property in which an Iranian entity—often a financial institution owned or controlled by Iran—had an interest. Though expressly sanctioned by § 1610(b), this strategy was undercut by the Supreme Court's decision in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba,* which involved a U.S. financial institution's attempt to collect money owed to it by the Cuban government through the seizure of funds deposited in the institution by a Cuban bank. 462 U.S. 611, 613, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983). In its opinion, the Supreme Court observed that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such," and determined that Congress "clearly expressed its intention that duly created instrumentalities of a foreign state are to be accorded a presumption of independent status." *Id.* at 626–27, 103 S.Ct. 2591. According to the *First Nat'l* Court, this presumption may be overridden *only* where the plaintiff demonstrates that the foreign entity is exclusively controlled by the foreign state or where recognizing the separateness of that entity and the foreign state "would work fraud or injustice." *Id.* at 629–30, 103 S.Ct. 2591. The practical effect of this holding was to shield the property of instrumentalities of foreign states from attachment or execution absent evidence of a connection between the instrumentality and the foreign state so strong as to render any distinction irrelevant. And by placing the burden of proof on this issue squarely on plaintiffs, the *First Nat'l* holding became a substantial obstacle to FSIA plaintiffs' attempts to satisfy judgments. *See, e.g., Oster v. Republic of S. Afr.,* 530 F.Supp.2d 92, 97–100 (D.D.C.2007); *Bayer & Willis Inc. v. Republic of the Gam.,* 283 F.Supp.2d 1, 4–5 (D.D.C.2003).

The second hurdle facing FSIA plaintiffs involved assets that once belonged to Iran or its agencies but had been seized and retained by the United States. As a legal matter, "assets held within United State Treasury accounts that might otherwise be attributed to Iran are the property of the United States and are therefore exempt from attachment or execution by virtue of the federal government's sovereign immunity." *In re Islamic Republic of Terrorism Litig.,* 659 F.Supp.2d 31, 53 (D.D.C.2009) (citing *Dep't of the Army v. Blue Fox, Inc.,* 525 U.S. 255, 119 S.Ct. 687, 142 L.Ed.2d 718 (1999)). Victims of state-sponsored terrorism attempting to seize such assets were thus put in the perverse position of litigating against their own government, *see Weinstein,* 274 F.Supp.2d at 56 ("[I]f a litigant seeks to attach funds held in the U.S. Treasury, he or she must demonstrate that the United States has waived its sovereign immunity with respect to those funds.") which strongly opposed attempts to attach such assets. As one commentator explains:

> As a matter of foreign policy, the President regards frozen assets as a powerful bargaining chip to induce behavior desirable to the United States; accordingly, allowing private plaintiffs to file civil lawsuits and tap into the frozen assets located in the United States may weaken the executive branch's negotiating position with other

> countries. For this reason, several U.S. presidents have opposed giving victims access to these funds.

Debra M. Strauss, *Reaching Out to the International Community: Civil Lawsuits* ***15** *as the Common Ground in the Battle against Terrorism,* 19 Duke J. Comp. & Int'l L. 307, 322 (2009). The Executive Branch has consistently succeeded in arguing that the FSIA does not waive the United States' immunity with respect to seized Iranian assets. *See, e.g., Flatow,* 74 F.Supp.2d 18.

Eventually Congress enacted the Terrorism Risk Insurance Act ("TRIA"), Pub. L. No. 107–297, 116 Stat. 2322 (2002), "to 'deal comprehensively with the problem of enforcement of judgments rendered on behalf of victims of terrorism in any court of competent jurisdiction by enabling them to satisfy such judgments through the attachment of blocked assets of terrorist parties.' " *Weininger v. Castro,* 462 F.Supp.2d 457, 483 (S.D.N.Y.2006) (quoting H.R. Conf. Rep. 107–779, at 27 (2002), 2002 U.S.C.C.A.N. 1430, 1434). The TRIA declares that

> [n]otwithstanding any other provision of law, ... in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, ... the blocked assets of the terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

TRIA § 201(a). In other words, the TRIA "subjects the assets of state sponsors of terrorism to attachment and execution in satisfaction of judgments under § 1605(a)(7)," *In re Terrorism Litig.,* 659 F.Supp.2d at 57, by "authoriz[ing] holders of terrorism-related judgments against Iran ... to attach Iranian assets that the United States has *blocked.*" *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi,* 556 U.S. 366, 129 S.Ct. 1732, 1735, 173 L.Ed.2d 511 (2009) (quotations omitted; emphasis in original).

The TRIA was designed to remedy many of the problems that previously plagued victims of state-sponsored terrorism; in practice, however, it led to very few successes. But while the TRIA did abrogate the *First Nat'l* holding with respect to "blocked assets," *Weininger,* 462 F.Supp.2d at 485–87, that victory proved hollow once victims discovered that, at least with respect to Iran, "very few blocked assets exist." *In re Terrorism Litig.,* 659 F.Supp.2d at 58. And the barren landscape facing these FSIA plaintiffs was only further depleted by the exclusion of diplomatic properties from the TRIA's reach. *See Bennett,* 604 F.Supp.2d at 161 ("[The TRIA] expressly excludes 'property subject to Vienna Convention on Diplomatic relations, or that enjoys equivalent privileges and immunities under the law of the United States, being used for exclusively for diplomatic or consular purposes.' ") (quoting TRIA § 201(d)(2)(B)(ii)).

Against this desolate backdrop, Congress enacted the NDAA, which added paragraph (g) to the execution section of the FSIA. This new provision, in its entirety, declares:

> (g) Property in Certain Actions.—
>
> (1) In general.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—
>
> ***16** (A) the level of economic control over the property by the government of the foreign state;
>
> (B) whether the profits of the property go to that government;
>
> (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
>
> (D) whether that government is the sole beneficiary in interest of the property; or
>
> (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.
>
> (2) United states sovereign immunity inapplicable.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the [TWEA] or the [IEEPA].
>
> (3) Third-party joint property holders.—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of

> an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

28 U.S.C. § 1610(g). Courts have had little opportunity to explore the full implications of § 1610(g), though at least one has observed that the NDAA will have a significant impact on plaintiffs' attempts to enforce FSIA judgments. *See Calderon–Cardona v. Dem. People's Rep. of Korea,* 723 F.Supp.2d 441, 458 (D.D.C.2010) ("Section 1083 adds a new subsection, section 1610(g)(1), which significantly eases enforcement of judgments entered under section 1605A.").

B. Procedural History

Having obtained judgment against defendants and properly served them with copies of that judgment as required under the FSIA, Order, May 10, 2010[158], plaintiffs issued several writs to a number of telecommunications companies asking, *inter alia,* whether the particular company does any business with, or is indebted to, defendants or the Telecommunications Company of Iran ("TCI").[3] Plaintiffs targeted such companies in light of an ITR license authorizing "[a]ll transactions of common carriers incident to the receipt or transmission of telecommunications and mail between the United States and Iran." 31 C.F.R. § 560.508. In its response, Sprint explained that it does no business with TCI, but stated:

> Consistent with the authority granted by the United States Department of Treasury, Office of Foreign Assets Control, 31 C.F.R. § 560.508, Sprint does exchange telecommunications traffic directly with the Telecommunication Infrastructure Company of Iran, which was not a defendant in the underlying action and was not identified in the plaintiffs' Writ as an 'agency' or 'instrumentality' of one or more of defendants.
>
> ***17** The Sprint/TIC relationship is a bilateral telecommunications carrier relationship that results in a periodic settlement and offset process to determine the net payer and payee. So far as is known, during 2010, Sprint has been a net payer, which will result in quarterly payments to TIC. Because telecommunications services are commoditized, the amounts of payments are directly related to the volume of calls Sprint sends to TIC in a given month for termination in Iran. At present, Sprint owes to TIC the sum of $358,708.76 based on amounts which have been declared by the parties for the months of January, February and March, 2010. Sprint may owe TIC amounts for traffic conducted in April and May, 2010, but those amounts have not yet been determined or invoiced and thus no debt is currently due.

Answer and Defenses of Garnishee Sprint Communications Company LP ¶¶ 4–5, June 21, 2010[165] ("Answer"). Relying on this response, plaintiffs requested that the Court traverse Sprint's Answer and order the company to turn over the funds that it owed to TIC, asserting that Sprint admitted that it owes money to an instrumentality of Iran and that § 1610(g) permits attachment of these funds. Motion for Traverse of Answer ¶¶ 7–13, July 1, 2010[166]. In response, Sprint pointed to unresolved issues of fact and sought trial on various matters, Request for Trial Setting by Garnishee Sprint Communications Company, LP, Sep. 22, 2010[168]—a request that the Court denied soon thereafter. Order, Sep. 23, 2010[169]. In that same Order, the Court also invited the United States to weigh in on whether plaintiffs can garnish payments from a U.S. company to an instrumentality of Iran in satisfaction of a judgment under § 1605A. *Id.*[4] Before any response was submitted by the United States, plaintiffs moved for judgment on the writ and an order directing Sprint to turn over funds owed to TIC. Motion for Judgment against Garnishee Sprint Communications Company LP and for Turnover of Funds, Feb. 8, 2011[172].

After plaintiffs' motions were fully briefed, the Court previously denied plaintiffs' motion for traverse, finding that nothing in Sprint's Answer could satisfy plaintiffs' burden to demonstrate that the funds owed to TIC are not immune from execution—which requires proof that TIC is in fact an agency or instrumentality of Iran. Order 3–4, Mar. 31, 2011[180]. And as for plaintiffs' motion for judgment, the Court observed that plaintiffs' submission of evidence on reply denied Sprint "a full and fair opportunity to respond," and thus deferred ruling until Sprint was given an adequate chance to counter. *Id.* at 5–6. The Court then directed Sprint to respond to plaintiffs' evidence or "seek any other relief it deems necessary." *Id.* at 6.

Sprint subsequently sought leave to both amend its Answer and interplead TIC, arguing that TIC is a necessary party to these proceedings. Motion for Leave to Amend Answer, May 2, 2011[183] ("Leave Mtn."). At the same time, Sprint submitted a proposed complaint against TIC, Counterclaim for Interpleader, May 3, 2011 [184–1], and an amended answer in which it states that it presently owes TIC $613,587.38 and raises a number of defenses previously asserted in its original Answer and opposition to

plaintiffs' motion for judgment. Answer & Defenses, June 10, 2011[187] ("Second Answer"). Plaintiffs opposed Sprint's request for leave to amend and interplead TIC, Opposition to Motion for Leave, May 19, 2011[185], and subsequently moved again for judgment on ***18** the writ. Second Motion for Judgment of Condemnation, July 6, 2011[189]. For the reasons set forth below, the Court grants plaintiffs' motion for judgment, grants in part and denies in part Sprint's request for leave, and directs Sprint to turn over to plaintiffs the funds owed to TIC.

III. DISCUSSION

A. Plaintiffs' Entitlement to Funds Held by Sprint and Owed to TIC

Plaintiffs invoke § 1610(g) of the FSIA in their attempt to garnish funds held by Sprint and owed to TIC.[5] This provision is designed to "clarify the circumstances under which the property of a foreign state sponsor of terrorism is subject to attachment and execution." *Bennett,* 604 F.Supp.2d at 162. Under § 1610(g), the property "of a foreign state" or "of an agency or instrumentality of a foreign state" is subject to execution, even where that property "is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity." 28 U.S.C. § 1610(g)(1).[6] This provision "expand[s] the category of foreign sovereign property that can be attached; judgment creditors can now reach any U.S. property in which Iran has any interest ... whereas before they could only reach property belonging to Iran." *Peterson v. Islamic Republic of Iran,* 627 F.3d 1117, 1123 n. 2 (9th Cir.2010). Sprint does not contest that the funds it owes to TIC are potentially subject to § 1610(g), but instead argues that (1) plaintiffs have not demonstrated that TIC is an agency or instrumentality of Iran as defined by the FSIA, (2) the amount potentially owed was frozen at the time the writ was issued, and (3) attachment of the funds would subject Sprint to the risk of double liability in violation of the Act's plain terms. Opposition to Motion for Judgment 4–7, Mar. 7, 2010[176] ("Jdgmt. Opp."). The Court discusses each of these objections in turn.

1. TIC is an Agency or Instrumentality of Iran

To attach the funds held by Sprint, plaintiffs need only establish that TIC is ***19** an agency or instrumentality of Iran. 28 U.S.C. § 1610(g). Prior attempts to execute against assets held by foreign instrumentalities had to be made under § 1610(b), which requires—in addition to proof of an instrumentality relationship—that "the judgment relates to a claim *for which the agency or instrumentality is not immune* by virtue" of the FSIA liability exceptions. *Id.* § 1610(b)(2) (emphasis added). Combined with the presumption of independent status articulated by the Supreme Court in *First Nat'l,* the practical effect of this provision is to ensure that "an agency or instrumentality of a foreign state could not automatically be liable for the debts of its associated foreign state." *Weininger,* 462 F.Supp.2d at 483; *see also id.* at 482 ("[A]gencies and instrumentalities also enjoy immunity from suit and execution unless an exception applies."). Further complicating matters under § 1610(b)(2), the Supreme Court—relying on the principle of U.S. corporate law that "[a]n individual shareholder, by virtue of his ownership of shares, does not own the corporation's assets and, as a result, does not own subsidiary corporations in which the corporation holds an interest"—held that mere ownership of a foreign entities' stock does not render assets held by that entity subject to execution under § 1610(b). *Dole Food Co. v. Patrickson,* 538 U.S. 468, 474–76, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003). Section 1610(g) unwinds these limitations, however, by excluding any requirement that the foreign instrumentality be subject to the underlying claim and thus not otherwise immune from liability, *see generally* 28 U.S.C. § 1610(g),[7] and by expressly declaring that property held by an instrumentality is subject to execution "regardless of the level of economic control over the property by the government of the foreign state." *Id.* § 1610(g)(1)(A).[8] Thus, the only requirement for attachment or execution of property is evidence that the property in question is held by a foreign entity that is in fact an agency or instrumentality of the foreign state against which the Court has entered judgment.

The FSIA defines "instrumentality" as any entity that (1) is "a separate legal person, corporate or otherwise," (2) is "an organ of a foreign state" or "whose shares or other ownership interest is owned by a foreign state," and that (3) is "neither a citizen of a State of the United States ... nor created under the laws of any third country." 28 U.S.C. § 1603(b)(1)-(3). To show that TIC is an instrumentality of Iran, plaintiffs submit an affidavit from Dr. Patrick Clawson,[9] who reviewed several documents concerning TIC's status. Affidavit ***20** of Patrick L. Clawson, Ex. 1 to Reply in Support of Motion for Judgment, Mar. 28, 2011 [178–1] ("Clawson Aff."). Dr. Clawson reviews TIC's Articles of Association, explaining that its shares are 100% government-owned and that there is "no ambiguity that TIC is under the direct control of the [Iranian] Ministry of Information

and Communications Technology." *Id.* at ¶¶ 12–13. He also explains that TIC was created "in accordance with Iran's constitution and with Islamic Law," and that "the decision to create TIC was taken by the government." *Id.* at ¶ 14; *see also id.* at ¶ 15 (quoting Articles of Association explaining that Iranian Cabinet approved creation of TIC). Finally, Dr. Clawson states that "Mohammad Ali Forghani, the Deputy Minister of Information and Communications Technology, was appointed the chairman of the TIC Board of Directors, which under the Articles of Association is responsible for controlling TIC." *Id.* at ¶ 17.[10]

Based on this evidence, the Court has no trouble finding that TIC is an instrumentality of Iran. First, the evidence shows that TIC is distinct from, though wholly owned by, Iran. Second, Dr. Clawson's review of TIC's Articles of Association establishes that it is an "organ" of an Iranian cabinet-level Ministry, and that Iran possesses an "ownership interest" in TIC. Finally, the testimony demonstrates that TIC is established under the laws of Iran, and not those of the United States or a third country. This is sufficient to establish that TIC is an instrumentality of Iran. *See Auster v. Ghana Airways, Ltd.*, 514 F.3d 44, 46 (D.C.Cir.2008) (finding that Ghana Airways is instrumentality of Ghana based on evidence that it "was incorporated under the laws of Ghana and wholly owned by Ghana"); *Peterson v. Islamic Republic of Iran*, 563 F.Supp.2d 268, 273 (D.D.C.2008) (observing "no doubt" that Japan Bank for International Cooperation is instrumentality of Japan because it "was established by Japanese statute," its capital "is wholly owned by the Japanese government" and it "is under the direct control of the Japanese Minister of Finance and the Japanese Minister of Foreign Affairs").

2. Total Amount Subject to the Writ

Having found that TIC is an instrumentality of Iran and thus the funds owed to it by Sprint are subject to execution under § 1610(g), the Court now turns to the total amount of money at issue. Under the FSIA, local law on attachment and execution control any dispute. *Levin v. Bank of N.Y.*, No. 09 Civ. 5900, 2011 WL 812032, at *7–8, 2011 U.S. Dist. LEXIS 23779, at *35–*36 (S.D.N.Y. Mar. 4, 2011). DC law specifies that funds held by third parties are subject to attachment and execution only where they are "actually due and ascertainable in amount," *Cummings Gen. Tire Co. v. Volpe Constr. Co.*, 230 A.2d 712, 714 (D.C.1967), and no amount may be garnished that includes future payments which are contingent upon performance or are otherwise uncertain in amount. *See id.* at 713 ("[M]oney payable upon a contingency or condition is not subject to garnishment until the contingency has happened or the condition has been filled."). Thus, "[i]f the amount of the debt becomes fixed ... only upon acceptance of performance satisfactory to the obligee, 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 v. Dist. of Columbia*, 393 A.2d 68, 70 (D.C.1978) (citations omitted).

***21** The funds owed to TIC by Sprint result from "a bilateral telecommunications carrier relationship" that relies on "a periodic settlement and offset process to determine the net payer and payee." Second Answer ¶ 5. This is not a case, therefore, where Sprint "unconditionally owes" TIC a definite sum at the time Sprint answered plaintiffs' interrogatories. *Consumers United Ins. Co. v. Smith*, 644 A.2d 1328, 1356 n. 34 (D.C.1994) (citing *Cummings*, 230 A.2d at 713). Accordingly, Sprint is only required to turn over those amounts that have been officially declared by Sprint and TIC. As a general rule, the amount of money subject to garnishment is set at the time a writ is executed. DC law, however, provides that a party seeking attachment or execution may submit interrogatories to the third party holding the funds in order to ascertain any changes to the amounts owed between the time the writ is served and the time the third party files an answer to the writ. D.C.Code § 16–521(a). At the time Sprint filed its Second Answer to plaintiffs' writ and accompanying interrogatories, Sprint represented that $613,587.38 is the sum that it owes TIC that the company and TIC have agreed upon, and that other amounts accruing after March 2011 "have not yet been determined." Second Answer ¶ 5. Because the process by which these amounts are calculated is not readily ascertainable, the Court will use this representation in Sprint's Second Answer as the final sum. D.C.Code § 16–521(a).

3. Double Liability

Finally, Sprint correctly notes that, as an innocent third party to the underlying action concerning the Khobar Towers bombing, it is afforded certain protections under both the FSIA and DC law. The FSIA contains the following provision: "Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon

such judgment." 28 U.S.C. § 1610(g)(3). In commenting on this provision, the House Report to the 2008 Amendments explains that "[w]hile [§ 1610(g)] is written to subject any property interest in which the foreign state enjoys a beneficial ownership to attachment and execution, the provision would not supersede the court's authority to appropriately prevent impairment of interests in property held by other persons who are not liable to the claimants in connection with the terrorist act." H.R. Conf. Rep. No. 110–477, at 1001–02 (2007); *see also id.* at 1002 ("The conferees encourage the courts to protect the property interests of such innocent third parties by using their inherent authority, on a case-by-case basis, under the applicable procedures governing execution on judgment."). Thus, § 1610(g)(3) "expressly protects the rights of third parties in actions to levy or execute upon a judgment entered against Iran." *In re Terrorism Litig.*, 659 F.Supp.2d at 122.

In invoking this provision to defend against garnishment, Sprint points to a particular bedrock principle of the law concerning post-judgment proceedings: "It ought to be and it is the object of the courts to prevent the payment of any debt twice." *Harris v. Balk,* 198 U.S. 215, 226, 25 S.Ct. 625, 49 L.Ed. 1023 (1905). The District of Columbia law on attachment and execution codifies this general principle; specifically, the relevant provision declares:

> A judgment of condemnation against a garnishee, and execution thereon, or payment by the garnishee in obedience to the judgment or an order of the court, ***22** is a sufficient defense to any action brought against him by the defendant in the action in which the attachment is issued, for or concerning the property or credits so condemned.

D.C.Code § 16–528. Under normal circumstances involving parties located in the United States, courts are generally assured that garnishees will be protected by the Full Faith and Credit Clause of the Constitution, which requires other courts to recognize liability and garnishment Orders as full defenses to subsequent litigation. Here, however, Sprint argues that Iranian courts would fail to recognize the legitimacy of plaintiffs' default FSIA judgment, and thus Sprint could be exposed to double-liability in litigation with TIC over the funds. Jdgmt. Opp. at 4–5.

The Court is unaware of any DC caselaw applying § 16–528 to litigation involving Iran or other foreign states. But in *JPMorgan Chase Bank, N.A. v. Motorola, Inc.,* the First Department of the Appellate Division in New York was confronted with a bank's attempt to satisfy a default judgment against Iridium India Telecom Ltd. ("IITL") by attaching funds owed by defendant Motorola, Inc. to IITL as a result of an unrelated lawsuit in India. 47 A.D.3d 293, 294–95, 846 N.Y.S.2d 171 (2007). In response, Motorola argued that the proposed attachment subjected it to double-liability, as "the Indian court is unlikely to deem Motorola's liability to IITL to be reduced by any payment it makes to Chase." *Id.* at 300, 846 N.Y.S.2d 171. The *Motorola* Court agreed, relying on a "policy to protect garnishees from double liability" under both applicable precedent, *id.* at 306, 846 N.Y.S.2d 171 (citing *Harris,* 198 U.S. at 226, 25 S.Ct. 625), and New York law. In closing, the First Department observed that "Chase ... will realize a 'windfall' if we sustain a garnishment that, given the demonstrated state of Indian law, will force Motorola to bear the cost of Chase's inability to collect its collateral from IITL," and thus held that "[t]he avoidance of this injustice constitutes sufficient reason to exercise our power ... to deny a garnishment, even assuming that the garnishment would otherwise be proper." *Id.* at 312, 25 S.Ct. 625.

The posture of this case is in stark contrast to that of *Motorola*, in which the third party presented "unrebutted evidence"—including a statement by an Indian law expert—that the courts in India would not recognize the validity of the default judgment, and thus would not offset the third party's liability to IITL as a result of its payment to Chase. 47 A.D.3d at 304–05, 846 N.Y.S.2d 171; *see also id.* at 307, 846 N.Y.S.2d 171 (finding that "the record evidence indicates that the Indian courts will not give the judgment appealed from the effect to which it is entitled under New York law"). Here, Sprint does no more than casually assert that "[i]t does not require elaborate argument or citation to conclude that this defense will be unavailing to Sprint in the event of future litigation between Sprint and TIC in an Iranian court." Jdgmt. Opp. at 4. This unsupported statement fails for several reasons. As an initial matter, unlike *Motorola*—which involved an ongoing suit already proceeding in Indian courts—here Sprint points to no proceeding in which it could be subject to liability to TIC. In a similar vein, Sprint does not explain how it could possibly be subject to the jurisdiction of any Iranian court, nor does it identify any assets that could be in jeopardy were a tribunal located in Iran to rule against it. And to the extent that TIC might pursue an action in a U.S. court against Sprint, DC law expressly protects Sprint from any future judgment. D.C.Code § 16–528 ("A judgment of condemnation against a garnishee ... is a sufficient defense to any action brought against him ... for or concerning ***23** the property or credits so condemned."). Absent additional evidence of a genuine risk, the Court holds that Sprint is adequately protected from

any possibility of exposure to double liability, as required by § 1610(g).

B. Sprint's Remaining Objections

In addition to objections based on § 1610(g), Sprint advances several independent legal arguments as to why the Court should not enter judgment on the writ in favor of plaintiffs. The Court dismisses these objections for the reasons that follow.

1. Request for Interpleader

The position most forcefully taken by Sprint is that it should be permitted to interplead TIC into this proceeding. In support of this request, Sprint argues that TIC is a necessary party and that its presence is required to resolve the factual question of whether it is an agency or instrumentality of Iran. Reply in Support of Motion for Leave 1–3, May 26, 2011 [186] ("Leave Reply"). The Court will deny Sprint's motion.

As an initial matter, the Court has determined that TIC is in fact an agency or instrumentality of Iran—a conclusion that Sprint does not contest[11]—and the FSIA does not require any provision of special notice to TIC. Specifically, the FSIA requires *only* that a copy of any default judgment be served on defendants, 28 U.S.C. § 1608(e)—a task which has already been accomplished—and does not demand service of additional post-judgment motions. *Peterson,* 627 F.3d at 1129–30 & n. 5.[12] Moreover, even if notice requirements found in the FSIA could be read to require service of post-judgment motions, the provisions concerning notice apply only to attachment and execution under §§ 1610(a) & (b) and say nothing about § 1610(g). *See* 28 U.S.C. § 1610(c) ("No attachment or execution referred to in subsections (a) and (b) of this section...."). The explicit exclusion of attachments and executions under § 1610(g) from the notice requirement is further evidence that Congress did not intent to require service of garnishment writs on agencies or instrumentalities of foreign states responsible for acts of state-sponsored terrorism under § 1605A—a conclusion in keeping with the underlying justifications for the 2008 Amendments. *See In re Terrorism Litig.,* 659 F.Supp.2d at 64 (explaining "broad remedial purposes Congress sought to achieve through the enactment of the [NDAA]"). Accordingly, TIC is not a necessary party to this action under applicable law.[13]

Moreover, there is no need for interpleader in this action. "[A] prerequisite for interpleader is that the party requesting interpleader demonstrate that he ***24** has been or may be subjected to adverse claims." *Hollister v. Soetoro,* 258 F.R.D. 1, 3 (D.D.C.2009). As set forth above, Sprint has not sufficiently established *any* risk of being subjected to double liability over the funds it currently holds. *Supra.* "[I]nterpleader requires real claims, or at least the threat of real claims—not theoretical, polemical, speculative, or I'm-afraid-it-might-happen-someday claims." *Id.* This requirement is not satisfied in this instance.

Nor does DC law provide for interpleader in garnishment proceedings—in contrast to other jurisdictions. *See, e.g.* Miss.Code Ann. § 11–35–41 (2011). Instead, DC law permits any person with a claim to property subject to attachment to appear and demand a trial of any issues necessary to determine the appropriate action with respect to the property in question. D.C.Code § 16–554. According to Sprint, amounts due to TIC have been accruing and held by the company since January 2010. Second Answer ¶ 5 n.1. TIC is surely on notice of the hold-up, and if it wishes to challenge the garnishment of funds owed to it by Sprint, DC law provides a clear mechanism for it to register any objection. The Court sees no reason to aid TIC by prolonging this dispute in response to TIC's silence.

Finally, this action has been proceeding for more than a decade, and yet in all this time Iran has not appeared to account for its role in the horrific bombing of the Khobar Towers residential complex. This choice was made despite both exposure to more than $500 million in damages and evidence that Iran is perfectly capable of appearing when it wishes. *See, e.g., Rubin v. Islamic Republic of Iran,* No. 03 Civ. 9370, 2008 WL 192321, at *1, 2008 U.S. Dist. LEXIS 4651, at *1–*2 (Jan. 18, 2008). Though Sprint correctly points out that the excessive delay in these proceedings is not the company's fault, it is equally true that the funds to be turned over in this matter are not the company's proceeds. And to the extent interpleader might minimize any risk Sprint may face after the close of these proceedings, that risk came into existence at the precise moment the company decided to engage in commercial transactions with an instrumentality of Iran—OFAC license or not. In this instance, Congress has announced a broad new policy to aid terrorist victims, and has passed a law that permits those victims to seize funds headed for any agency or instrumentality of Iran. The Court will not stand as a roadblock on the path to justice by imposing new requirements or permitting supplementary procedures that

Congress itself did not deem necessary. As an action in equity, acceptance of an interpleader action is not mandatory, and may be denied for equitable reasons. *Star Ins. Co. v. Cedar Valley Express, LLC,* 273 F.Supp.2d 38, 41–42 (D.D.C.2002). In this instance, given the heinous nature of the attack on Khobar Towers, Iran's deliberate choice not to participate in these proceedings despite repeated notice, *see In re Terrorism Litig.,* 659 F.Supp.2d 31, 85 (observing that "the notion" that Iran might appear "is almost laughable because that nation has never appeared in any of the terrorism actions that have been litigated against it in this Court"), and the extensive delay in justice for victims of state-sponsored terrorism, the Court sees no reason to postpone action. Accordingly, Sprint's request for interpleader will be denied.

2. Preemption by OFAC Regulations

The Court now turns to whether the OFAC license that permits Sprint's exchange of telecommunications traffic with TIC preempts enforcement of plaintiffs' judgment. Sprint argues that application of the FSIA and the District of Columbia's ***25** enforcement provisions is preempted by the existence of a regulatory regime maintained by OFAC which "implement[s] the foreign policy judgments of the Executive Branch." Jdgmt. Opp. at 3–4. In support of this position, Sprint argues that were the Court to permit execution, "the general license set forth in 31 C.F.R. § 560.508 is rendered a nullity." *Id.* at 3. The Court disagrees.

As an initial matter, the Court rejects any assertion that today's holding could render the general license provided by OFAC a "nullity." The purpose of the general license found in § 560.508 is to permit U.S. companies—such as Sprint—to conduct telecommunications business without being barred by the general prohibitions of the ITR, and nothing in either the OFAC regulations or the letter from OFAC to Sprint, submitted in support of Sprint's opposition, indicates that § 560.508 is designed to have any other effect. Moreover, permitting execution of Sprint's indebtedness to TIC in satisfaction of a valid § 1605A judgment in no way undermines the license, as Sprint remains authorized to exchange telecommunications traffic with TIC or any other Iranian entity under the OFAC regulations.[14]

Having dismissed Sprint's attempt to construct mountains from molehills, the Court turns to the question of preemption. "[I]n every preemption case, 'the purpose of Congress is the ultimate touchstone.' " *Geier v. Am. Honda Motor Co.,* 166 F.3d 1236, 1237 (D.C.Cir.1999) (quoting *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996)). The matter before the Court, however, is not a typical preemption case. While it is true that DC law provides the process by which plaintiffs may enforce their judgment, the substantive basis for their right to execution is not found in DC law, but in § 1610(g) of the FSIA—a federal statute. Thus, the fundamental question at the heart of Sprint's argument is whether the scope of § 1610(g) is limited by OFAC regulations. The Court rejects this proposition, for three reasons.

First, nothing in the text of the FSIA supports Sprint's position. Congress passed the 2008 Amendments—including § 1610(g)—well-aware of the complex regime of Executive Orders, regulations and statutes which permitted—and, unfortunately, more often prevented—FSIA plaintiffs from enforcing judgments under the Act. *See Ark. Dairy Coop. Ass'n v. Dep't of Agriculture,* 573 F.3d 815, 829 (D.C.Cir.2009) ("Courts 'generally presume that Congress is knowledgeable about existing ***26** law pertinent to the legislation it enacts.' ") (quoting *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 184–85, 108 S.Ct. 1704, 100 L.Ed.2d 158 (1988)). Yet, in crafting the broad remedial language of § 1610(g), Congress made no exceptions to its reach, despite the fact that the plain language of the Act undeniably reaches transactions otherwise authorized by OFAC regulations. This omission is telling, particularly where Congress has demonstrated its ability to exempt particular property from execution by—for example—explicitly exempting diplomatic property from the reach of the TRIA. TRIA § 210(b)(2)(A).

Second, the language of the OFAC regulations does not give any hint of any intended preemptive effect. The specific provision allowing Sprint to exchange telecommunications traffic with TIC reads, in its entirety: "All transactions of common carriers incident to the receipt or transmission of telecommunications and mail between the United States and Iran are authorized." 31 C.F.R. § 560.508. Nothing in this regulatory provision indicates that it somehow immunizes the activity undertaken under the "general license" from all other statutes—including from execution of legitimate judgments. Indeed, OFAC's letter to Sprint suggests precisely the opposite. In that letter, OFAC explains that payments to TIC are authorized by § 560.508, but then goes on to express the caveat that payments to certain Iranian banks are prohibited by other federal laws, and thus may not be made *regardless* of the general license. Ltr. from OFAC to

Sprint, dated Jan. 13, 2009 at 1–2, attached as Ex. 1 to Sprint Opp., Mar. 7, 2011 [176–1]. The fact that certain federal laws can override the legitimacy of payments made in connection with transactions authorized by § 560.508 undermines any notion that this provision has the immunizing quality urged by Sprint.

Finally, mindful of the central role that Congressional intent plays in preemption analysis, the Court cannot ignore that a core purpose of the NDAA is to significantly expand the number of assets available for attachment in satisfaction of terrorism-related judgments under the FSIA. As already set forth above, the language of § 1610(g) is broad and without reservation; indeed, this Court has explored the "broad remedial purposes" of the NDAA, explaining that § 1610(g) "demonstrate[s] that Congress remains focused on eliminating these barriers that have made it nearly impossible for plaintiffs in these actions to enforce civil judgments against Iran or other state-sponsors of terrorism." *In re Terrorism Litig.*, 659 F.Supp.2d at 62–64. In light of these strong remedial purposes, the Court will not now read a significant exception into § 1610(g) that is not otherwise found in the text and that would severely undercut the unmistakable goals of Congress.

3. Necessity of a Regulatory License

Finally, Sprint argues that plaintiffs must obtain a specific license to garnish funds held by the company and owed to TIC. Jdgmt. Opp. at 8. In support of this position, Sprint cites an OFAC regulation declaring that

> [e]xcept as otherwise authorized, specific licenses may be issued on a case-by-case basis to authorize transactions in connection with award, decisions or orders of the Iran–United States Claims Tribunal in The Hague, the International Court of Justice, or other international tribunals (collectively 'tribunals'); agreements settling claims brought before tribunals; and awards, orders, or decisions of an administrative, judicial or arbitral proceeding in the United States or abroad, where the proceeding involves the enforcement of awards, decisions or orders of tribunals, or is contemplated ***27** under an international agreement, or involves claims arising before 12:01 a.m. EDT, May 7, 1995, that resolve disputes between the government of Iran and the United States or United States nationals.

31 C.F.R. § 560.510. The plain language of this provision refutes Sprint's position. By its own terms, § 560.510 applies only to transactions concerning (1) awards of international tribunals, (2) settlements of disputes in international tribunals, and (3) awards of U.S. courts in connection with either enforcement of awards of international tribunals or claims arising *before* May 7, 1995. *See generally id.* The underlying action in these proceedings does not involve the ruling of any international tribunal as envisioned in this regulatory provision, and thus § 560.510 is applicable *only* if this action involved claims "arising before 12:01 a.m. EDT, May 7, 1995." *Id.* The Khobar Towers bombing occurred more than a year after this date, *supra,* however, and even if it had not, the "claim" in this proceeding is the right to funds held by Sprint, which arose only two years ago when the Court entered judgment on behalf of plaintiffs. *Ministry of Def. & Support for the Armed Forces v. Cubic Def. Sys.*, 385 F.3d 1206, 1224 (9th Cir.2004), *rev'd on other grounds,* 546 U.S. 450, 126 S.Ct. 1193, 163 L.Ed.2d 1047 (2006). Moreover, as the Eleventh Circuit has explained, the primary purpose of this provision is to regulate any judgment leading to the transfer of funds or assets from the United States to Iran, *See Dean Witter Reynolds, Inc. v. Fernandez,* 741 F.2d 355, 362–63 (11th Cir.1984) (observing that license under § 560.510 must be secured where U.S. citizen seeks to "transfer[ ] assets out of this country" to Iran)—which is obviously not the case here. The Court therefore holds that no OFAC license is necessary under relevant regulations.[15]

IV. CONCLUSION

The Court would like to conclude by noting that this decision represents renewed hope for long-suffering victims of state-sponsored terrorism. Would *like to.* But the bleak reality is that today's decision comes after more than a year of litigation and results in a turnover of funds amounting to less than one-tenth of one-percent of what plaintiffs are entitled to in these consolidated cases. And this infinitesimal sum is dwarfed by even greater magnitudes when compared to the endless agony and suffering befalling these victims. A step in the right direction, to be sure. But a very small one.

A separate Order and Judgment consistent with these findings shall issue this date.

All Citations

807 F.Supp.2d 9

Footnotes

1 Hezbollah is synonymous with "Hizbollah," which is merely a "variant transliteration[ ] of the same name." *Oveissi v. Islamic Republic of Iran,* 498 F.Supp.2d 268, 273 n. 3 (D.D.C.2007), *rev'd on other grounds,* 573 F.3d 835 (D.C.Cir.2009).

2 The Court here only briefly recounts the relevant background to place the current regulatory framework in proper context. For an extensive history of regulations and Executive Orders concerning Iran, see Judge Wexler's excellent summary in *Weinstein v. Islamic Republic of Iran,* 299 F.Supp.2d 63, 65–68 (E.D.N.Y.2004).

3 Because a review of the history of these consolidated actions before the present motions is not necessary for resolution of the matter before the Court, this opinion recounts only the relevant post-judgment history. For a full recap of the liability proceedings, see *Heiser I,* 466 F.Supp.2d at 248–51.

4 To date, the United States has declined to offer any opinion on these proceedings.

5 Though this new provision is codified as part of the general immunity exceptions in the FSIA, the subsection only applies to "property of a foreign state against which a judgment is entered under section 1605A," 28 U.S.C. § 1610(g)(1); thus, the benefits provided accrue only to victims of state-sponsored terrorism who obtained judgments under § 1605A, and not its predecessor, § 1605(a)(7). *In re Terrorism Litig.,* 659 F.Supp.2d at 115.

6 The TRIA is inapplicable in this instance, as that statute applies only to "blocked assets," which it defines as "any asset seized or frozen by the United States." TRIA § 201(d)(2)(A). Here, the payments owed from Sprint to TIC are neither seized nor frozen; instead, they are made under a general license permitting payments incident to telecommunications traffic. 31 C.F.R. § 560.508. Money transferred between Sprint and TIC is thus "regulated," which is "[t]he act of controlling by rule or restriction." *Black's Law Dictionary* 1311 (8th ed. 2004). Moreover, the TRIA defines "blocked assets" by reference to OFAC regulations, *Levin v. Bank of N.Y.,* No. 09 Civ. 5900, 2011 WL 812032, at *16–17, 2011 U.S. Dist. LEXIS 23779, at *64 (S.D.N.Y. Mar. 4, 2011); *see also Hausler v. JPMorgan Chase Bank, N.A.,* No. 09–cv–10289, 2010 U.S. Dist. LEXIS 96611, at *22 (S.D.N.Y. Sep. 13, 2010) ("TRIA explicitly indicates that 'blocked assets' are to be determined in reference to the [OFAC regulations]."), which provide that a "license authorizing a transaction otherwise prohibited under this part has the effect of removing a prohibition or prohibitions." 31 C.F.R. § 535.502(c). Thus, because transactions between Sprint and TIC are undertaken under an OFAC licensing scheme, they are unblocked and not subject to attachment. *See Bank of N.Y. v. Rubin,* 484 F.3d 149, 150 (2d Cir.2007) (holding "that assets blocked pursuant to Executive Order 12170 ... and its accompanying regulations, *see* 31 C.F.R. Part 535, that are also subject to license of 31 C.F.R. § 535.579, are not blocked assets under the TRIA").

7 One exception to this expansion of available assets for execution of § 1605A judgments is the ability of FSIA plaintiffs to attach diplomatic properties. *See Bennett,* 604 F.Supp.2d at 162 ("[Section] 1610(g) is silent with respect to diplomatic properties; ... even if the full scope or application of § 1610(g) is not entirely clear, a plain reading of the new enactment in no way provides a sufficient basis for stripping away the immunity long afforded to diplomatic property."); *see also id.* (noting that legislative history "strongly suggests that Congress did not intend for § 1610(g) to allow for attachment or execution of diplomatic properties").

8 Though not at issue here, it also bears mention that § 1610(g) does not limit attachment to property used in "commercial activity"—unlike the execution provisions found in § 1610(a) & (b)—and thus the Act "removes from the victims the burden of specifying commercial targets ... to help them receive justice and recover damages." Strauss, *Reaching Out, supra* at 332–33.

9 This Court has previously observed that Dr. Clawson is "a 'widely-renowned expert on Iranian affairs.' " *Anderson v. Islamic Republic of Iran,* 753 F.Supp.2d 68, 78 (D.D.C.2010) (quoting *Peterson v. Islamic Republic of Iran,* 264 F.Supp.2d 46, 51 (D.D.C.2003)).

10 Sprint does not contest the veracity of Dr. Clawson's affidavit. Leave Mtn. at 2.

11 TIC does object that Dr. Clawson's affidavit is hearsay. Leave Reply at 3 n.1. However, Dr. Clawson's own affidavit verifies the authenticity of the Articles of Association and their consistency with standard legal documents in Iran, and thus this public record may be relied upon. *United States v. Ragano,* 520 F.2d 1191, 1200 (5th Cir.1975); *see also* Fed.R.Evid. 807.

12 Sprint attempts to create a conflict on this issue by citing *Autotech Techs. LP v. Integral Research & Dev. Corp.,* 499 F.3d 737 (7th Cir.2007). That case, however, involved post-judgment *contempt* motions and expressly relied on local and federal rules mandating service of such motions. *Id.* at 747.

13 Sprint's reliance on *Butler v. Polk* to argue that this procedure is a new action requiring service under the FSIA, Leave Reply at 3, is misplaced, as the *Butler* court evaluated whether a *separate* enforcement action is *removable,* 592 F.2d 1293, 1295–96 (5th Cir.1979), and did not address any of the questions before this Court.

14 Sprint cites *ABC Charters, Inc. v. Bronson,* 591 F.Supp.2d 1272 (S.D.Fla.2008), but that case is of little help. In *ABC Charters,* the district court was evaluating whether recent amendments to the Florida Sellers of Travel Act were void under the doctrine of conflict preemption. *See generally id.* at 1301–03. In holding that those amendments were preempted, the court observed that federal law "already places restrictions on sellers of travel, including regulations as to who can travel to Cuba, when they can travel, how often they can travel, who can arrange travel to Cuba, and how those transportation arrangements are to be made." *Id.* at 1302–03. The Florida law, the court explained, "seeks to regulate all of these matters," and held that to "place additional restrictions on these sellers of travel, which would regulate the exact same conduct, would create inherent conflicts." *Id.* at 1303. Here, by contrast, *Congress* expressly authorized the use of local procedures for attachment and execution in satisfaction of FSIA judgments—awards entered under a *federal act*—and it did so while well-aware of OFAC's existing licensing scheme. Under these circumstances, the Court does not find that the general provisions of DC law concerning post-judgment procedures present an irreconcilable conflict with federal regulations concerning exchanges of telecommunications traffic with Iranian entities.

15 Sprint also points the Court to a statement of interest by the government in a case in which a plaintiff was attempting to garnish payments owned by several private charter companies to instrumentalities of the Cuban government in satisfaction of a FSIA judgment. In that instance, the government took the position that "garnishment is one among many forms of transfer subject to the licensing requirements under the [Cuban Asset Control Regulations]." U.S. Statement of Interest in *Martinez v. ABC Charters, Inc., et al.,* No. 10 Civ. 20611 at 13–14, Ex. 2 to Opp. to Mtn. for Jdgmt., Mar. 7, 2011 [176–2]. In doing so, however, the government relied on two provisions of the relevant regulations: the first bars any transfer of assets between the United States and Cuba without a license, 31 C.F.R. § 515.201, and the second defines transfers to expressly include all garnishments. *Id.* § 515.310. By contrast, the ITR—under which Sprint exchanges telecommunications traffic with TIC—does not include *any* discussion of garnishments.

End of Document

ANNEX 339

UNTED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

X

THE ESTATE OF MICHAEL HEISER, deceased; GARY HEISER, FRANCIS HEISER; THE ESTATE OF LELAND TIMOTHY HAUN, deceased; IBIS S. HAUN; MILAGRITOS PEREZ-DALIS; SENATOR HAUN; THE ESTATE OF JUSTIN R. WOOD, deceased; RICHARD W. WOOD; KATHLEEN M. WOOD; SHAWN M. WOOD; THE ESTATE OF EARL F. CARTRETTE, JR., deceased; DENISE M. EICHSTAEDT; ANTHONY W. CARTRETTE; LEWIS W. CARTRETTE; THE ESTATE OF BRIAN MCVEIGH, deceased; SANDRA M. WETMORE; JAMES V. WETMORE; THE ESTATE OF MILLARD D. CAMPBELL; MARIE R. CAMPBELL, BESSIE A. CAMPBELL; THE ESTATE OF KEVIN J. JOHNSON, deceased; SHYRL L. JOHNSON; NICHOLAS A. JOHNSON, A MINOR, BY HIS LEGAL GUARDIAN SHYRL L. JOHNSON; LAURA E. JOHNSON; BRUCE JOHNSON; THE ESTATE OF JOSEPH E. RIMKUS, deceased; BRIDGET BROOKS; JAMES R. RIMKUS; ANNE M. RIMKUS; THE ESTATE OF BRENT E. MARTHALER, deceased; KATIE L. MARTHALER; SHARON MARTHALER; HERMAN C. MARTHALER III; MATTHEW MARTHALER; KIRK MARTHALER; THE ESTATE OF THANH VAN NGUYEN, deceased; CHRISTOPHER R. NGUYEN; THE ESTATE OF JOSHUA E. WOODY, deceased; DAWN WOODY; BERNADINE R. BEEKMAN; GEORGE M. BEEKMAN; TRACY M. SMITH; JONICA L. WOODY; TIMOTHY WOODY; THE ESTATE OF PETER J. MORGERA, Deceased; MICHAEL MORGERA; THOMAS MORGERA; THE ESTATE OF KENDALL KITSON, JR., Deceased; NANCY R. KITSON; KENDALL K. KITSON; STEVE K. KITSON; NANCY A. KITSON; THE ESTATE OF CHRISTOPHER ADAMS, deceased; CATHERINE ADAMS; JOHN E. ADAMS; PATRICK D. ADAMS; MICHAEL T. ADAMS; DANIEL ADAMS; MARY YOUNG; ELIZABETH WOLF; WILLIAM ADAMS; THE ESTATE OF CHRISTOPHER LESTER, deceased; CECIL H. LESTER; JUDY LESTER; CECIL H. LESTER, JR.; JESSICA F. LESTER; THE ESTATE OF JEREMY A. TAYLOR, deceased; LAWRENCE E. TAYLOR; VICKIE L. TAYLOR; STARLINA

11CV1602 (LTS)(MHD)

[RE: Islamic Republic of Iran, Iranian Ministry of Information and Security, and the Iranian Islamic Revolutionary Guard Corps., Judgment Debtors]

ANSWER TO PETITION OF BANK OF BARODA, NEW YORK BRANCH

D. TAYLOR; THE ESTATE OF PATRICK P. FENNIG, deceased; THADDEUS C. FENNIG; CATHERINE FENNIG; PAUL D. FENNIG; and MARK FENNIG,

Petitioners,

v.

BANK OF BARODA, NEW YORK BRANCH,

Respondent.

_____X

ANSWER TO PETITION

BANK OF BARODA, NEW YORK BRANCH, by its attorneys, Wormser, Kiely, Galef & Jacobs LLP ("Bank of Baroda NY"), for its answer to the Petition for Turnover Order Pursuant to Fed.R.Civ.P. 69 and N.Y.C.P.L.R. §§ 5225 and 5227 (the "Petition"), hereby alleges the following:

NATURE OF PROCEEDING

1. The first sentence of Paragraph 1 of the Petition asserts a legal conclusion to which no responsive pleading is required, and the Court is respectfully referred to the texts of the statutes and Rules referenced in that sentence. Bank of Baroda NY denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the remainder of Paragraph 1 of the Petition.

JURISDICTION AND VENUE

2. Paragraph 2 of the Petition asserts a legal conclusion to which no responsive pleading is required, and the Court is respectfully referred to the statutes, Rules and case law referenced in Paragraph 2 of the Petition.

3. Admits that the Court has personal jurisdiction over Bank of Baroda NY, but

denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in Paragraph 3 of the Petition, and further avers that Paragraph 3 of the Petition asserts legal conclusions to which no responsive pleading is required. The Court is respectfully referred to the text of the statutes and Rules referenced in Paragraph 3 of the Petition.

THE PARTIES

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 4 of the Petition.

5. Denies the allegations set forth in Paragraph 5 of the Petition, except admits that it is the New York Branch of Bank of Baroda and has an office at One Park Avenue, New York, New York.

6. Paragraph 6 of the Petition asserts a legal conclusion to which no responsive pleading is required, and further avers that Petitioners quote selectively from N.Y.C.P.L.R. § 5225(b), and refers the Court's attention to the full text of that statute.

7. Paragraph 7 of the Petition asserts a legal conclusion to which no responsive pleading is required.

BACKGROUND

The Judgment Against Iran

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 8 of the Petition.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 9 of the Petition, except to admit that Petitioners attached an Order, dated February 7, 2008, as Exhibit A to the Petition and refers the Court to the contents of

that exhibit.

10. Denies knowledge or information sufficient to form a belief as the truth of the allegations set forth in Paragraph 10 of the Petition, except to admit that Petitioners attached an Order, dated May 10, 2010, as Exhibit B to the Petition and refers the Court to the contents of that exhibit.

Registration of the Judgment in this District

11. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 11 of the Petition, except to admit that Petitioners attached a document entitled "Certification of Judgment for Registration in Another District" as Exhibit C to the Petition and refers the Court to the contents of that exhibit.

Enforcement of the Judgment in this District

12. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 12 of the Petition, and further avers that Paragraph 12 of the Petition asserts a legal conclusion to which no responsive pleading is required.

13. Paragraph 13 of the Petition asserts a legal conclusion to which no responsive pleading is required, and refers the Court to the text of the statutes referenced in Paragraph 13 of the Petition.

14. Paragraph 14 of the Petition asserts a legal conclusion to which no responsive pleading is required and refers the Court to the text of the statutes referenced in Paragraph 14 of the Petition.

15. Paragraph 15 of the Petition asserts a legal conclusion to which no responsive pleading is required, except to admit that Petitioners quote selectively from TRIA § 201 and to refer the Court to the text of the statutes and case law referenced in Paragraph 15 of the Petition.

16. Paragraph 16 of the Petition asserts a legal conclusion to which no responsive pleading is required, and further refers the Court to the text of the statutes referenced in Paragraph 16 of the Petition.

17. Paragraph 17 of the Petition asserts legal conclusions to which no responsive pleading is required, and refers the Court to the text of the statute, regulations, Executive Orders, etc. referenced in Paragraph 17 of the Petition, except to admit that, pursuant to its obligations under various Executive Orders and federal regulations, Bank of Baroda NY has from time to time reported information to Office of Foreign Assets Control ("OFAC") indicating that Bank of Baroda NY has interrupted and blocked electronic fund transfers pursuant to the provisions of such Executive Orders and regulations, and denies knowledge or information sufficient to form a belief as to whether any "assets" "held" by Bank of Baroda NY are being "held" "on behalf of" the Islamic Republic of Iran, the Iranian Ministry of Information and Security, and the Iranian Islamic Revolutionary Guard Corps. (collectively, "Iran"), its agencies or instrumentalities, and/or separate juridical entities in which Iran has an interest, direct or indirect.

18. Bank of Baroda NY denies the allegations in Paragraph 18 of the Petition, and further avers that a Court must determine if Bank of Baroda NY is in "possession" of "Iranian assets".

19. Paragraph 19 of the Petition asserts legal conclusions to which no responsive pleading is required, and Bank of Baroda NY further denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 19 of the Petition.

20. Denies the allegations set forth in Paragraph 20 of the Petition, except to admit that Bank of Baroda NY received a document referencing one Writ of Execution for $254,431,963.42 from the United States Marshals Service, Southern District of New York on

January 3, 2011.

21. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 21 of the Petition, except to admit that Petitioners have attached a document entitled "Process Receipt and Return" as Exhibit E to the Petition, and refers the Court to the contents of that exhibit.

22. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 22 of the Petition.

23. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 23 of the Petition, as Bank of Baroda NY does not have the knowledge or information sufficient to form a belief as to whether (i) Iran, its agencies or instrumentalities, and/or separate juridical entities in which Iran has an interest, direct or indirect, have any interest in any electronic fund transfers that were interrupted and blocked by Bank of Baroda NY; (ii) Petitioners have any rights to the electronic fund transfers. Bank of Baroda NY further avers that Paragraph 23 of the Petition asserts legal conclusions to which no responsive pleading is required.

24. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 24 of the Petition, and further avers that Paragraph 24 contains legal conclusions to which no responsive pleading is required.

25. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 25 of the Petition, and further avers that Paragraph 25 of the Petition contains legal conclusions to which no responsive pleading is required, and further avers that Bank of Baroda NY does not have the knowledge or information sufficient to form a belief as to whether (i) Iran, its agencies or instrumentalities, and/or separate juridical entities in which

Iran has an interest, direct or indirect, have any interest in the electronic fund transfers that were interrupted and blocked by Bank of Baroda NY, or (ii) Petitioners have any rights to those blocked funds. Bank of Baroda NY further avers that Paragraph 25 of the Petition asserts legal conclusions to which no responsive pleading is required.

CLAIM FOR RELIEF

Turnover

26. In response to Paragraph 26 of the Petition, Bank of Baroda NY repeats and realleges the allegations contained in Paragraphs 1 through 25 as if fully set forth hereat.

27. Paragraph 27 of the Petition contains legal conclusions to which no responsive pleading is required, and Bank of Baroda NY further avers that Bank of Baroda NY does not have the knowledge or information sufficient to form a belief as to whether (i) Petitioners are entitled to enforce a Judgment against any of the electronic fund transfers that were blocked by Bank of Baroda NY, or (ii) Iran, its agencies or instrumentalities, and/or separate juridical entities in which Iran has an interest, direct or indirect, have any interest in those funds.

28. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 28 of the Petition, and further avers that Bank of Baroda NY does not have the knowledge or information sufficient to form a belief as to whether Iran, its agencies or instrumentalities, and/or separate juridical entities in which Iran has an interest, direct or indirect, have any interest in the electronic fund transfers that were blocked by Bank of Baroda NY.

29. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 29 of the Petition.

30. Denies knowledge or information sufficient to form a belief as to the truth of the

allegations set forth in Paragraph 30 of the Petition.

31. Denies the allegations set forth in Paragraph 31 of the Petition.

32. Denies the allegations set forth in Paragraph 32 of the Petition.

33. Admits the allegations set forth in Paragraph 33 of the Petition.

34. Paragraph 34 of the Petition contains legal conclusions and a prayer for relief to which no responsive pleading is required, and further avers that Bank of Baroda NY does not have the knowledge or information sufficient to form a belief as to whether (i) Petitioners have any interest in any of the electronic fund transfers interrupted and blocked by Bank of Baroda NY, or (ii) Iran, its agencies or instrumentalities, and/or separate juridical entities in which Iran has an interest, direct or indirect, have any interest in those funds.

AFFIRMATIVE DEFENSES/OBJECTIONS IN POINT OF LAW

Bank of Baroda NY, without assuming the burden of proof for those matters upon which Petitioners bear such burden, for its affirmative defenses and objections in point of law, allege as follows:

FIRST

35. Persons other than Iran or its agencies and instrumentalities may have ownership or other interests in part or all of the funds at Bank of Baroda NY that are the subject of this turnover proceeding (the "Funds") which may be superior to the rights of Petitioners.

SECOND

36. The Funds consist of the proceeds of the electronic fund transfers that were routed through Bank of Baroda NY as an intermediary bank but could not be completed because of applicable regulations promulgated and/or administered by OFAC, and so are being held in one or more blocked accounts at Bank of Baroda. Persons other than Iran or its agencies and

instrumentalities, who or which were the originators, beneficiaries or bank participants in such wire transfers may have ownership or other interests in part or all of such Funds which may be superior to the rights of Petitioners, if any, to have execution against such Funds to satisfy the Judgment.

THIRD

37. The electronic fund transfers that are at issue herein were originated from persons or entities other than Iran or its agencies or instrumentalities, and, when blocked by Bank of Baroda NY, were being transmitted to persons or entities who are also not Iran or its agencies or instrumentalities. Such persons or entities may be indispensable parties hereto and may have the right to receive notice of these proceedings and an opportunity to be heard before this Court enters a judgment in this proceeding that would terminate or otherwise affect their rights in the Funds.

FOURTH

38. The electronic fund transfers that are at issue herein were originated from persons or entities other than Iran or its agencies or instrumentalities, and, when blocked by Bank of Baroda NY, were being transmitted to persons or entities who are also not Iran or its agencies or instrumentalities, and thus the funds at issue may not be "blocked assets of a terrorist party" under Section 201 of the Terrorism Risk Insurance of Act of 2002 ("TRIA") or considered property in which Iran has an "interest" and under the OFAC Regulations.

FIFTH

39. To the extent that Petitioners claim that some part or all of the Funds belong to persons that are agencies or instrumentalities of Iran, or that such persons have an interest in some part or all of the Funds, such persons are indispensable parties hereto and have the right to

receive notice of these proceedings and an opportunity to be heard before this Court determines whether they are in fact agencies or instrumentalities of Iran or whether such assets are subject to execution to satisfy the Judgment.

SIXTH

40. To the extent that other persons who hold judgments against Iran based on its involvement with acts of terrorism have served restraining notices, notices of pendency, writs of execution or other process or documents on Bank of Baroda NY with respect to assets that may belong to Iran or any of its agencies or instrumentalities, such persons are indispensable parties hereto and have the right to receive notice of these proceedings and an opportunity to be hard so that this Court may determine which judgment creditors should take precedence with respect to any assets that may belong to Iran or its agencies or instrumentalities.

SEVENTH

41. To the extent that Petitioners are seeking to satisfy the Judgment from blocked assets subject to TRIA §201, the Court should consider whether Petitioners have established all of the elements necessary to obtain relief under that statute, including whether Iran is a "terrorist party," as that term is defined in TRIA; whether the Judgments arise from claims based on an "act of terrorism," as that term is defined in TRIA, or for which a terrorist party is not immune under Foreign Sovereign Immunities Act; whether and to what extent the Funds belong to Iran or entities that are "agencies or instrumentalities" of Iran, as those terms are used in TRIA; whether the fact that neither the originators nor the beneficiaries of the electronic fund transfers at issue are Iran or its agencies or instrumentalities bars the execution of the Funds by Petitioners; and whether and to what extent the Judgment is for compensatory damages, as opposed to other forms of relief.

EIGHTH

42. The Court should determine whether the Judgments were entered on default and if so, whether copies were served on Iran in the manner required by FSIA §1608(a) in order to comply with FSIA §1608(e).

NINTH

43. The Court should determine whether, in order to comply with the requirements of CPLR §§5225(b) and Rule 69 of the Federal Rules of Civil Procedure, a copy of the Petition and the accompanying exhibits must be served on Iran in the manner required by FSIA §1608(a).

TENTH

44. The Court should determine whether TRIA §201 and FSIA §1610(c) require that the Judgment must be enforced by a writ of execution that specifically identifies the property that plaintiffs seek to levy against, whether such a writ of execution must be specifically authorized by the Court that allegedly entered the Judgment, i.e., the United States District Court for the District of Columbia and, if so, whether such a writ has been so authorized and delivered to the appropriate official.

ELEVENTH

45. The Court should determine whether the Petition states a cause of action or sets forth a claim for which relief may be granted.

TWELFTH

46. The Funds at issue are electronic fund transfers that were blocked by Bank of Baroda NY as an intermediary bank, and are therefore not subject to attachment.

THIRTEENTH

47. Nothing in this Answer shall constitute a waiver of any rights of set-off that Bank

of Baroda NY may have against any party, person or entity.

WHEREFORE, Respondent Bank of Baroda NY requests the entry of judgment in this proceeding:

(a) Dismissing the Petition against Bank of Baroda NY;

(b) Awarding to Bank of Baroda NY its costs and expenses in this proceeding, including reasonable attorneys' fees and expenses; and

(c) Such other and further relief as may be just and proper.

Dated: April 8, 2011
New York, New York

WORMSER, KIELY, GALEF & JACOBS LLP
Attorneys for Respondent
Bank of Baroda, New York Branch

By: /S/

Jennifer L. Marlborough (JM4303)
John T. Morin (JM0390)
825 Third Avenue, 26th Floor
New York, New York 10022
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ANNEX 340

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ESTATE OF MILLARD D. CAMPBELL, et al., Plaintiffs, v. ISLAMIC REPUBLIC OR IRAN, et al. Defendants.	Civil Action No. 00-CV-02104 (RCL)
ESTATE OF MICHAEL HEISER, et al., Plaintiffs, v. ISLAMIC REPUBLIC OF IRAN, et al., Defendants.	Civil Action No. 00-CV-02329

ANSWER AND DEFENSES OF GARNISHEE SPRINT COMMUNICATIONS COMPANY LP

Garnishee, Sprint Communications Company LP ("Sprint"),[1] by and through undersigned counsel, hereby submits its Answer to Plaintiffs' Interrogatories in Writ of Attachment and states as follows:

1. Plaintiffs' Interrogatories in Writ of Attachment were served on or around May 21, 2010. Sprint previously spoke with plaintiffs' counsel on or around May 25, 2010 and agreed that Sprint would have more than 10 days to file this Answer.

Answers to Interrogatories

[1] Plaintiffs served the Writ of Attachment on Sprint Nextel Corporation. Sprint Communications Company LP is the Sprint Nextel affiliate which is responsible for long distance traffic, and it appears voluntarily in defense of the Writ. Sprint Nextel Corporation does not conduct long distance traffic with Iran.

2. After a reasonable search, Sprint states it is not indebted to the Islamic Republic of Iran, Iranian Ministry of Information and Security, the Iranian Islamic Revolutionary Guard Corps, or Telecommunications Company of Iran, and has not been so indebted at any time between service of the writ and the filing of this answer.

3. Sprint does not possess or control any tangible or intangible personal property of the Islamic Republic of Iran, Iranian Ministry of Information and Security, the Iranian Islamic Revolutionary Guard Corps, or Telecommunications Company of Iran (including goods, chattels, or credits), and has not possessed or controlled such property during the time between service of the Writ and the filing of this answer.

4. Consistent with the authority granted by the United States Department of Treasury, Office of Foreign Assets Control, 31 C.F.R. § 560.508, Sprint does exchange telecommunications traffic directly with the Telecommunication Infrastructure Company ("TIC") of Iran, which was not a defendant in the underlying action and was not identified in the plaintiffs' Writ as an "agency" or "instrumentality" of one or more of defendants.

5. The Sprint/TIC relationship is a bilateral telecommunications carrier relationship that results in a periodic settlement and offset process to determine the net payer and payee. So far as is known, during 2010, Sprint has been a net payer, which will result in quarterly payments to TIC. Because telecommunications services are commoditized, the amounts of payments are directly related to the volume of calls Sprint sends to TIC in a given month for termination in Iran. At present, Sprint owes to TIC the sum of $358,708.76 based on amounts which have been declared by the parties for the months of January, February and March, 2010. Sprint may owe TIC amounts for traffic conducted in April and May, 2010, but those amounts have not yet been determined or invoiced and thus no debt is currently due.

6. Sprint is not aware of the identities of the "agencies or instrumentalities," as that term is defined by applicable law, of the Islamic Republic of Iran, Iranian Ministry of Information and Security, or the Iranian Islamic Revolutionary Guard Corps.

Defenses

7. The relief requested under the Writ may subject Sprint to an unreasonable and unacceptable risk of double liability in that the default judgment underlying the Writ may not be given full faith and credit in the home jurisdiction of TIC. Thus, payment by Sprint pursuant to the Writ may not constitute a defense to its liability to TIC in Iran or in another foreign court.

8. The relief requested by the Writ is pre-empted by federal law in that Sprint is authorized to deliver long distance traffic to Iran via TIC pursuant to 31 C.F.R. § 560.508, which constitutes a general license authorizing what would otherwise be a prohibited transaction. The grant to Sprint (and to other United States domestic telecommunications carriers) of this general license represents a judgment by foreign policy officials of the United States, including among others the State and Treasury Departments, that telecommunications traffic between the United States and Iran should be preserved as a matter of explicit United States foreign policy. Recognition of a garnishment right on behalf of plaintiffs here would directly burden that traffic and probably result in its disruption or cancellation because TIC would not accept calls from Sprint terminating in Iran unless it was compensated for doing so. Thus, application of state garnishment statutes to any payment to TIC pursuant to this general license is pre-empted by federal law implementing the foreign policy judgments of the Executive Branch.

9. On information and belief, TIC was not an agency or instrumentality of the Iranian government or any of the Iranian government defendants at the time of service of the Writ, while the debt which is sought to be garnished was incurred, or at the time the underlying suit was commenced, and thus is not subject to levy for the debts of the defendants under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1603(b), 1605(a)(7), 1610(b). *Dole Food Co. v. Patrickson*, 538 U.S. 468, 123 S.Ct. 655 (2003); *First Nat'l City Bk. v. Banco Para El Comercio Exterior de Cuba*, 426 U.S. 611 (1983).

10. The Terrorism Risk Insurance Act of 2002 ("TRIA") permits the attachment of assets belonging to terrorist states in order to satisfy judgments against those states only if the assets in question are "blocked assets." TRIA § 201(a), codified at 28 U.S.C. § 1610 note; *Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 129 S.Ct. 1732, 1738 (2009). Sprint is not in possession of any "blocked asset" of defendants or of TIC, and could not be because its long distance traffic to Iran is conducted pursuant to a general license given by the Office of Foreign Assets Control of the Department of the Treasury. 31 C.F.R. § 560.508. By statute, "blocked assets" do not include payments made pursuant to a license issued by the United States government. TRIA § 201(d)(2)(B)(i), codified at 28 U.S.C. § 1610 note. In addition, Iranian assets in the United States are not generally "blocked" pursuant to treaty, various executive orders and regulation. *See* Iranian Assets Control Regulations, 31 C.F.R. Part 535; *Elahi*, 129 S.Ct. 1732.

11. Sprint gives notice that it will seek to recover any and all attorneys' fees and costs which are authorized by law, and hereby demands delivery of any garnishment deposit which may have been made for its protection.

12. For the reasons stated in the above defenses, Sprint demands that the Writ of Attachment be dissolved, that Sprint be dismissed from this action with prejudice, and that this Court award Sprint its reasonable attorneys' fees and costs.

As To Interrogatory Answers:

13. The undersigned Kirk Salzmann declares under penalty of perjury that he is Counsel - Litigation for Sprint and that the foregoing Answers to Interrogatories in Attachment are, to the best of his knowledge and belief, true and correct as to every material matter.

DATED: June 18, 2010

Kirk Salzmann

As to Defenses:

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Counsel for Sprint Communications Company, LP and Sprint Nextel Corporation

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of June, 2010 the foregoing Answers and Defenses of Garnishee Sprint Communications Company LP was filed with the Court by overnight mail and served upon the following counsel of record by first-class mail, postgage prepaid:

Mark C. Del Bianco
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Kensington, MD 20895

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Melissa L. Mackiewiz
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Shale D. Stiller
Elizabeth R. Dewey
DLA Piper Rudnick Gray Cary US LLP
1200 19th Street, NW
Washington, DC 20036-2412

Service on the Defendants has not been made because, to undersigned counsel's knowledge, Defendants have no counsel of record and have not entered an appearance, and service directly upon Defendants is impractical and/or unduly burdensome for non-party Sprint Communications Company, LP.

Neil K. Gilman

Annex 340

ANNEX 341

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Attorneys for Defendant Citibank, N.A.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT NEW YORK

JEREMY LEVIN and LUCILLE LEVIN, Plaintiffs, - against - BANK OF NEW YORK, JP MORGAN CHASE, SOCIETE GENERALE, AND CITIBANK, Defendants.	Case No. 09 Civ. 5900 (RPP) **ANSWER WITH AFFIRMATIVE DEFENSES**

Defendant Citibank, N.A., named herein as "Citibank" ("Citi"), by its undersigned attorneys, Davis Wright Tremaine LLP, as Defendant submits this Answer with Affirmative Defenses to the Complaint of Mr. Jeremy Levin and Dr. Lucille Levin "Levin," Plaintiffs, and states as follows:

NATURE OF PROCEEDING AND RELIEF REQUESTED

1. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1, except admits based on publicly available documents that the plaintiffs obtained a judgment in the amount of $28,807,719 against the Islamic Republic of Iran that was entered by the U.S. District Court for the District of Columbia on February 6, 2008

and thereafter registered with this Court and refers to documents cited in Paragraph 1 for a true and complete recitation of the contents thereof.

2. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2, except refers to the authorities stated therein for a true and complete recitation of the contents thereof.

3. To the extent that certain text in Paragraph 3 has been redacted in the copy of the Complaint served on Citi, it denies knowledge and information sufficient to form a belief as to the truth of those allegations and those allegations contained in Paragraph 3 to the extent they refer to the Defendants to this action other than Citi ("Other Defendants"), and further states that the allegations contained in Paragraph 3 constitute legal conclusions as to which no response is required, except denies knowledge and information sufficient to form a belief as to the truth of the allegation that "Iran has an interest in [the blocked assets reported to OFAC] directly or indirectly" and refers to the letter from Sean Thornton dated October 6, 2008 for a true and complete recitation of the contents thereof.

4. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 4, except refers to the protective order entered on September 30, 2008 by the District Court of the District of Columbia in *Levin v. Islamic Republic of Iran*, No. 05-cv-0294 (GK) (D.D.C.) for a true and complete recitation of the contents thereof.

5. To the extent that certain text in Paragraph 5 has been redacted in the copy of the Complaint served on Citi, it denies knowledge and information sufficient to form a belief as to the truth of those allegations and those allegations contained in Paragraph 5 to the extent they refer to the Defendants to this action other than Citi ("Other Defendants"), and further states that the allegations in Paragraph 5 constitute a legal conclusion as to which no response is required, except admits that the Complaint purports to seek enforcement of the February 6, 2008 judgment

and refers to Attachment D of the Complaint for a true and complete recitation of the contents thereof.

6. States that the allegations contained in Paragraph 6 constitute legal conclusions as to which no response is required, and refers to the cited New York Civil Practice Law and Rules for a true and complete recitation of the contents thereof.

7. States that the allegations contained in Paragraph 7 constitute legal conclusions as to which no response is required, and refers to the cited provision of the Terrorism Risk Insurance Act for a true and complete recitation of the contents thereof.

8. States that the allegations contained in Paragraph 8 constitute legal conclusions as to which no response is required, and refers to the cited provision of the Foreign Sovereign Immunities Act for a true and complete recitation of the contents thereof.

9. States that the allegations contained in Paragraph 9 constitute legal conclusions as to which no response is required, and refers to 28 U.S.C. § 1610 and the letter from Sean Thornton dated October 6, 2008 for a true and complete recitation of the contents thereof.

10. States that the allegations contained in Paragraph 10 constitute legal conclusions as to which no response is required, and refers to the cited provisions and decisions for a true and complete recitation of the contents thereof.

11. States that the allegations contained in Paragraph 11 constitute legal conclusions as to which no response is required, and refers to the provisions and decisions cited in Paragraph 11 for a true and complete recitation of the contents thereof.

JURISDICTION AND VENUE

12. Admits that Plaintiffs purport to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §§ 1331(2009); § 201 of the Terrorism Risk Insurance Act; 28 U.S.C. §§ 1605(a)(7)(2007), 1605A (2009); and the Court's ancillary jurisdiction as alleged in

Paragraph 12; but states that the allegations constitute legal conclusions as to which no response is required.

13. Admits that Plaintiffs purport to invoke the jurisdiction of this Court pursuant to Fed. R. Civ. P. 4(k) as alleged in Paragraph 13, but states that the allegations constitute legal conclusions as to which no response is required.

14. Admits that Plaintiffs allege that venue is proper in the District pursuant to 28 U.S.C. §§ 1391(b) and (d) (2009) as alleged in Paragraph 14, but states that the allegations constitute legal conclusions as to which no response is required.

THE PARTIES

15. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 15 and refers to *Levin v. Islamic Republic of Iran*, 529 F. Supp. 2d 1 (D.D.C. 2007) for a true and complete recitation of the contents thereof.

16. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 16, and refers to the document attached to the Complaint as Exhibit A for a true and complete recitation of the contents thereof.

17. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 17, and notes that certain text in Paragraph 17 has been redacted in the copy of the Complaint served on Citi.

18. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 18, and notes that certain text in Paragraph 18 has been redacted in the copy of the Complaint served on Citi.

19. Denies the allegations contained in the first sentence of Paragraph 19, except states that Citi is a national bank incorporated under the laws of the United States doing business in New York with offices at 399 Park Avenue, New York, New York, and admits that (a) Citi

has reported certain blocked assets to OFAC pursuant to certain Executive Orders and refers to the document attached as Exhibit D to the Complaint for the terms and contents thereof, and (b) the Complaint purports to name Citi as a garnishee in this action pursuant to C.P.L.R. § 5225(b).

20. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 20, and notes that certain text in Paragraph 20 has been redacted in the copy of the Complaint served on Citi.

21. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 21 which is entirely redacted in the copy of the Complaint served on Citi.

22. States that the allegations contained in Paragraph 22 constitute legal conclusions as to which no response is required, and refers to the opinions cited in Paragraph 22 for a true and complete recitation of the contents thereof.

STATEMENT OF FACTS

PLAINTIFFS' JUDGMENT

23. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 23, except refers to the opinion cited in Paragraph 23 for a true and complete recitation of the contents thereof.

24. States that the allegations contained in Paragraph 24 constitute legal conclusions as to which no response is required, and refers to the Export Administration Act of 1979 and section 201(d)(4) of the TRIA for a true and complete recitation of the contents thereof.

25. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 25, except refers to *Levin v. Islamic Republic of Iran*, 529 F.Supp.2d 1 (D. D.C. 2007) for a true and complete recitation of the contents thereof.

26. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 26, except admits that on February 6, 2008 the District Court for the District of Columbia entered a judgment in favor of Plaintiffs in the amount of $28,807,719 and refers to *Levin v. Islamic Republic of Iran*, 529 F.Supp.2d 1 (D. D.C. 2007) for a true and complete recitation of the contents thereof.

27. States that the allegations contained in Paragraph 27 constitute legal conclusions as to which no response is required, but admits that a judgment under case number 09-0732 has been registered with this Court.

PLAINTIFFS' WRIT OF EXECUTION

28. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 28.

29. States that the allegations contained in Paragraph 29 constitute legal conclusions as to which no response is required, and refers to the authority cited therein for a true and complete recitation of the contents thereof.

IRAN HAS AN INTEREST IN BLOCKED ASSETS HELD BY DEFENDANT BANKS

30. States that the allegations contained in Paragraph 30 constitute legal conclusions as to which no response is required, and refers to Section 201 of the Terrorism Risk Insurance Act for a true and complete recitation of the contents thereof.

31. States that the allegations contained in Paragraph 31 constitute legal conclusions as to which no response is required.

32. States that the allegations contained in Paragraph 32 constitute legal conclusions as to which no response is required, and refers to Section 201 of the Terrorism Risk Insurance Act for a true and complete recitation of the contents thereof.

33. States that the allegations contained in Paragraph 33 constitute legal conclusions as to which no response is required, and refers to the Executive Orders cited in Paragraph 33 for a true and complete recitation of the contents thereof.

34. States that the allegations contained in Paragraph 34 constitute legal conclusions as to which no response is required, and refers to the Executive Order cited in Paragraph 34 for a true and complete recitation of the contents thereof.

35. States that the allegations contained in Paragraph 35 constitute legal conclusions as to which no response is required, and refers to the Executive Order cited in Paragraph 35 for a true and complete recitation of the contents thereof.

36. States that the allegations contained in Paragraph 36 constitute legal conclusions as to which no response is required.

37. States that the allegations contained in Paragraph 37 constitute legal conclusions as to which no response is required, and refers to the OFAC Regulations cited in Paragraph 37 for a true and complete recitation of the contents thereof.

38. States that the allegations contained in Paragraph 38 constitute legal conclusions as to which no response is required, and refers to the Regulations cited in Paragraph 38 for a true and complete recitation of the contents thereof.

39. States that the allegations contained in Paragraph 39 constitute legal conclusions as to which no response is required, and refers to the Regulations cited in Paragraph 39 for a true and complete recitation of the contents thereof.

40. States that the allegations contained in Paragraph 40 constitute legal conclusions as to which no response is required, and refers to the Regulations cited in Paragraph 40 for a true and complete recitation of the contents thereof.

41. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in the first sentence of Paragraph 41, except refers to the Executive Order cited in paragraph 41 for a true and complete recitation of the contents thereof, and otherwise denies each and every allegation in the second sentence of Paragraph 41.

42. Denies each and every allegation in Paragraph 42, except denies knowledge and information sufficient to form a belief as to the truth of the allegations thereof to the extent those allegations refer to the Other Defendants, and further admits that Citi has reported to OFAC assets blocked pursuant to certain Executive Orders and refers to the letter from Sean Thornton dated October 6, 2008 for a true and complete recitation of the contents thereof.

43. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 43, except refers to the letter from Sean Thornton dated October 6, 2008 for a true and complete recitation of the contents thereof.

44. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 44, except refers to the documents cited in Paragraph 44 for a true and complete recitation of the contents thereof.

45. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 45, except refers to 28 U.S.C. § 1610(g) for a true and complete recitation of the contents thereof.

46. Denies knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 46 to the extent the allegations contained therein refer to the Other Defendants. To the extent the allegations contained in Paragraph 46 refer to Citi, states that the allegations thereof constitute legal conclusions as to which no response is required.

47. Denies knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 47 to the extent the allegations contained therein refer to the Other

Defendants. To the extent the allegations contained in Paragraph 47 refer to Citi, states that the allegations thereof constitute legal conclusions as to which no response is required.

PLAINTIFFS HAVE A SUPERIOR INTEREST IN THE BLOCKED ASSETS HELD BY DEFENDANT BANKS

48. Denies knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 48 to the extent the allegations contained therein refer to the Other Defendants. To the extent the allegations contained in Paragraph 48 refer to Citi, denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 48, except refers to the documents and authorities cited therein for a true and complete recitation of the contents thereof.

49. Denies knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 49 to the extent the allegations contained therein refer to the Other Defendants. To the extent the allegations contained in Paragraph 49 refer to Citi, states that the allegations thereof constitute legal conclusions as to which no response is required.

50. Denies knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 50 to the extent the allegations contained therein refer to the Other Defendants. To the extent the allegations contained in Paragraph 50 refer to Citi, states that the allegations thereof constitute legal conclusions as to which no response is required.

51. Denies knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 51 to the extent the allegations contained therein refer to the Other Defendants. To the extent the allegations contained in Paragraph 51 refer to Citi, states that the allegations thereof constitute legal conclusions as to which no response is required.

52. Denies knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 52 to the extent the allegations contained therein refer to the Other

Defendants. To the extent the allegations contained in Paragraph 52 refer to Citi, states that the allegations thereof constitute legal conclusions as to which no response is required.

CLAIM FOR RELIEF AGAINST DEFENDANTS CITIBANK

PURSUANT TO C.P.L.R. § 5225

53. Citi incorporates its responses to paragraphs 1 through 52 as though fully set forth herein.

54. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 54.

55. States that the allegations contained in Paragraph 55 constitute legal conclusions as to which no response is required.

56. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 56, except refers to the documents and authorities cited in Paragraph 56 for a true and complete recitation of the contents thereof.

57. States that the allegations contained in Paragraph 57 constitute legal conclusions as to which no response is required.

AFFIRMATIVE DEFENSES

Without assuming the burden of proof or the burden of persuasion on any matters where the burden rests on Plaintiffs, Citi asserts the following affirmative and other defenses with respect to the Complaint.

58. Citi incorporates its responses to paragraphs 1 through 57 as though fully set forth herein.

FOR ITS FIRST AFFIRMATIVE DEFENSE

59. Persons other than the Islamic Republic of Iran or its agencies or instrumentalities may have ownership or other interests in part or all of the assets blocked by Citi that are the

subject of this action ("Assets") which may be superior to the rights of Plaintiffs to enforce their judgment ("Judgment") against the Assets.

FOR ITS SECOND AFFIRMATIVE DEFENSE

60. The Assets sought by Plaintiffs in this action include wire transfers that were routed through Citi as an intermediary bank but that could not be completed because they were blocked pursuant to an Executive Order or regulations administered by OFAC. Citi simply blocks any property or accounts that it is directed to block by such Executive Orders or regulations. Because under New York law, wire funds in the temporary possession of Citi as an intermediary bank are not the property of the originator, the ordering bank or the beneficiary, they are not subject to attachment and turn over. *See The Shipping Corp. of India Ltd. v. Jaldi Overseas Pte Ltd.*, 2009 U.S. App. LEXIS 22747, * 33-37 (2d Cir. 2009).

FOR ITS THIRD AFFIRMATIVE DEFENSE

61. The Assets sought by Plaintiffs in this action may be subject to competing claims by other holders of final judgments against the Islamic Republic of Iran or its agencies and instrumentalities, including but not limited to plaintiffs in *Peterson v. Islamic Republic of Iran*, Case No. 01-2094, 01-2684 (D.D.C.); *Greenbaum v. Islamic Republic of Iran*, Case No. 02-2148 (D.D.C.); *Acosta v. Islamic Republic of Iran*, Case No. 06-745 (D.D.C.); and *Rubin v. Islamic Republic of Iran*, Case No.01-1655 (D.D.C.). One or more of these judgment holders have already served writs of execution and/or restraining orders on Citi prior to this action.

FOR ITS FOURTH AFFIRMATIVE DEFENSE

62. To the extent Plaintiffs seek Assets in this action that are located outside the United States, such Assets are immune from attachment and execution in New York under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1610(a) which authorizes execution against property of a foreign state under certain circumstances which is located "in the United States."

See Aurelius Capital Partners, LP v. The Republic of Argentina, 2009 U.S. App. LEXIS 22746, * 21-23 (2d Cir. 2009) ("section 1610(a) . . . authorizes execution against property of a foreign state located in the United States").

FOR ITS FIFTH AFFIRMATIVE DEFENSE

63. Plaintiffs have not served or named as parties to these proceedings, or otherwise provided an opportunity to be heard, all interested or necessary parties, including other persons who have or may have claims in the Assets, including all parties to the transactions, wire transfers and accounts that Plaintiffs contend, or may contend, are properly subject to attachment and turnover in these proceedings; all beneficial owners of the Assets who may or may not be parties to such transactions, wire transfers and accounts; upon information and belief, the United States of America, which has prohibited transfer of any blocked Assets pursuant to the Weapons of Mass Destruction Proliferators Sanctions Regulations and the Global Terrorism Sanctions Regulations; and all holders of judgments against the same judgment debtor whose claims against the Assets may have priority over those of Plaintiffs. Accordingly, all such interested parties have a right of notice of these proceedings and an opportunity to be heard before this Court enters a judgment that would terminate or otherwise affect their rights in the Assets.

FOR ITS SIXTH AFFIRMATIVE DEFENSE

64. To the extent that Plaintiffs seek to enforce their rights under TRIA § 201, plaintiffs must establish all of the elements necessary to obtain relief under that statute, including but not limited to whether the Complaint was served upon the judgment debtor in a manner provided by applicable law.

FOR ITS SEVENTH AFFIRMATIVE DEFENSE

65. To the extent that Plaintiffs seek to enforce their rights under section 1605(a) of FSIA, plaintiffs must establish all of the elements necessary to obtain relief under that statute,

including but not limited to whether the Complaint was served upon the judgment debtor in a manner provided by applicable law.

FOR ITS EIGHTH AFFIRMATIVE DEFENSE

66. No proof of service on the judgment debtor, as required by CPLR §§ 5225 and 5227, has been filed with the Court.

FOR ITS NINTH AFFIRMATIVE DEFENSE

67. Pursuant to the Weapons of Mass Destruction Proliferators Sanctions Regulations (31 C.F.R. §§ 544.101et seq.) and the Global Terrorism Sanctions Regulations (31 C.F.R. §§ 594.101 et seq.) (collectively the "Regulations"), and designations issued by OFAC thereunder, and the various Executive orders underlying those regulations, Citibank, N.A. is and has been prohibited from transferring any property and assets held in which any person designated under the Regulations has an interest, except pursuant to a license issued by OFAC. Citi therefore seeks a determination from the Court that Plaintiffs can satisfy their judgment against the Islamic Republic of Iran by attaching and obtaining a turnover of assets and/or accounts in which Iran has an interest, directly or indirectly.

WHEREFORE, Defendant Citibank N.A ("Citi") respectfully requests that the Court enter judgment determining whether an order of execution or turnover should be issued in respect of the blocked Islamic Republic of Iran property held by Citi and, if the Court does order execution or turnover, determine in its order:

(a) that all appropriate and/or necessary parties were given appropriate notice of the proceedings and the manner of such notice;

(b) the precise account and amount of property, if any, to be turned over pursuant to any execution or other turnover order, and to whom the turnover is granted;

(c) the appropriate apportionment amongst the various Defendant banks of funds and/or accounts to be turned over to satisfy the Judgment;

(d) whether, as to each property or account in respect of which execution or turnover is ordered, (i) the account holder is regarded as an "agency or instrumentality" of a terrorist party on a claim based on an act of terrorism within the meaning of TRIA; or (ii) the judgment is based on a claim in respect of an act for which a terrorist party is not immune under 28 U.S.C. § 1605(a)(7).

(e) whether, to the extent that Citi is ordered to turn over any amount representing a deposit debt owed to the Islamic Republic of Iran, Citi is discharged from any and all obligations or liabilities to the Islamic Republic of Iran, as a judgment debtor within the meaning of CPLR § 5209, or to any other person to the full extent of the payment; and

(f) whether Citibank, N.A. is entitled to other and further relief, including an award of attorneys' fees and the costs of this proceeding.

Dated: New York, New York
October 23, 2009

DAVIS WRIGHT TREMAINE LLP

By: Sharon Sch

Sharon L. Schneier
Christopher J. Robinson
1633 Broadway
New York, New York 10019
(212) 489-8230

Attorneys for Defendant Citibank, N.A.

CERTIFICATE OF SERVICE

I, Christopher J. Robinson, hereby certify that on the 23rd day of October, 2009, I caused to be served by email and mail, a true and correct copy of the accompanying Defendant Citibank N.A.'s Response to the Complaint, dated June 22, 2009 upon the following:

Kathryn Lee Crawford
Suzelle Smith, Esq.
HOWARTH & SMITH
523 West Sixth Street, Suite 728
Los Angeles, CA 90014
Attorneys for Plaintiffs Mr. Jeremy Levin and Dr. Lucille Levin

Howard B. Levi, Esq.
J. Kelly Nevling, Esq.
LEVI LUBARSKY & FEIGENBAUM LLP
1185 Avenue of the Americas
17th Floor
New York, NY 10036
Attorneys for Defendants The Bank of New York Mellon and JPMorgan Chase Bank, N.A.

Mark G. Hanchet, Esq.
Christopher J. Houpt, Esq.
MAYER BROWN LLP
1675 Broadway
New York, NY 10019
Attorneys for Defendant Societe Generale SA

Christopher J. Robinson

ANNEX 342

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JEREMY LEVIN and DR. LUCILLE LEVIN, Plaintiffs, v. BANK OF NEW YORK, JPMORGAN CHASE, SOCIÉTÉ GÉNÉRALE SA, and CITIBANK, Defendants.	**Civil Action No. 09-cv-5900 (RPP)** **ECF Case** **UNDER SEAL**

ANSWER

Defendant Société Générale ("SG") hereby answers the Complaint of Plaintiffs Jeremy Levin and Dr. Lucille Levin as follows:

1. SG denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of the Complaint.

2. SG denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of Paragraph 2 of the Complaint. The second sentence of Paragraph 2 of the Complaint contains legal conclusions to which a responsive pleading is not required.

3. SG admits the allegations contained in Paragraph 3 of the Complaint as to SG. SG denies knowledge or information sufficient to form a belief as to the truth of allegations contained in Paragraph 3 of thc Complaint relating to any other Defendant.

4. SG denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 4 of the Complaint. SG further states that Paragraph 4 of the Complaint states legal conclusions to which a responsive pleading is not required.

5. Paragraph 5 of the Complaint states legal conclusions to which a responsive pleading is not required.

6. SG admits the accuracy of the quotation contained in Paragraph 6 of the Complaint.

7. Paragraph 7 of the Complaint states legal conclusions to which a responsive pleading is not required.

8. Paragraph 8 of the Complaint states legal conclusions to which a responsive pleading is not required.

9. SG denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 9 of the Complaint.

10. Paragraph 10 of the Complaint states legal conclusions to which a responsive pleading is not required.

11. Paragraph 11 of the Complaint states legal conclusions to which a responsive pleading is not required.

12. Paragraph 12 of the Complaint states legal conclusions to which a responsive pleading is not required.

13. Paragraph 13 of the Complaint states legal conclusions to which a responsive pleading is not required.

14. Paragraph 14 of the Complaint states legal conclusions to which a responsive pleading is not required.

15. SG denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 15 of the Complaint.

16. SG denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 16 of the Complaint.

17. SG cannot respond to Paragraph 17 of the Complaint, because it was served upon SG in redacted form.

18. SG cannot respond to Paragraph 18 of the Complaint, because it was served upon SG in redacted form.

19. SG cannot respond to Paragraph 19 of the Complaint, because it was served upon SG in redacted form.

20. SG admits that it has an office at 1221 Avenue of the Americas, New York, New York. SG denies the remaining allegations contained in the first sentence of Paragraph 20 of the Complaint and states that Société Générale is a French banking institution, domiciled and headquartered in France. SG denies the second sentence of Paragraph 20 of the Complaint. The third sentence of Paragraph 20 of the Complaint states legal conclusions to which a responsive pleading is not required.

21. SG admits the allegations contained in the first sentence of Paragraph 21 of the Complaint. SG denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in the second sentence of Paragraph 21 of the Complaint. The third sentence of Paragraph 21 of the Complaint states legal conclusions to which a responsive pleading is not required.

22. Paragraph 22 of the Complaint states legal conclusions to which a responsive pleading is not required.

23. SG denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 23 of the Complaint.

24. SG denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 24 of the Complaint.

25. SG denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 25 of the Complaint.

26. SG denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 26 of the Complaint.

27. SG denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 27 of the Complaint.

28. SG denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 28 of the Complaint.

29. Paragraph 29 of the Complaint states legal conclusions to which a responsive pleading is not required.

30. Paragraph 30 of the Complaint states legal conclusions to which a responsive pleading is not required.

31. SG denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 31 of the Complaint.

32. SG admits the accuracy of the quotation contained in Paragraph 32 of the Complaint.

33. SG denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 33 of the Complaint.

34. Paragraph 34 of the Complaint states legal conclusions to which a responsive pleading is not required.

35. Paragraph 35 of the Complaint states legal conclusions to which a responsive pleading is not required.

36. SG denics knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 36 of the Complaint.

37. Paragraph 37 of the Complaint states legal conclusions to which a responsive pleading is not required.

38. Paragraph 38 of the Complaint states legal conclusions to which a responsive pleading is not required.

39. Paragraph 39 of the Complaint states legal conclusions to which a responsive pleading is not required.

40. SG denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 40 of the Complaint.

41. SG denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 41 of the Complaint.

42. SG denies the allegations contained in Paragraph 42 of the Complaint insofar as they relate to SG. SG denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 42 of the Complaint.

43. SG denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 43 of the Complaint.

44. SG denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 44 of the Complaint.

45. Paragraph 45 of the Complaint states legal conclusions to which a responsive pleading is not required.

46. Paragraph 46 of the Complaint states legal conclusions to which a responsive pleading is not required.

47. Paragraph 47 of the Complaint states legal conclusions to which a responsive pleading is not required.

48. SG denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 48 of the Complaint.

49. Paragraph 49 of the Complaint states legal conclusions to which a responsive pleading is not required.

50. Paragraph 50 of the Complaint states legal conclusions to which a responsive pleading is not required.

51. Paragraph 51 of the Complaint states legal conclusions to which a responsive pleading is not required.

52. Paragraph 52 of the Complaint states legal conclusions to which a responsive pleading is not required.

53. SG repeats and realleges each of the foregoing responses and allegations as if set forth fully herein.

54. Paragraph 54 of the Complaint states legal conclusions to which a responsive pleading is not required.

55. Paragraph 55 of the Complaint states legal conclusions to which a responsive pleading is not required.

56. Paragraph 56 of the Complaint states legal conclusions to which a responsive pleading is not required.

57. Paragraph 57 of the Complaint states legal conclusions to which a responsive pleading is not required.

AFFIRMATIVE DEFENSES

Without assuming any burdens not imposed by law, SG asserts the following defense to the allegations in the Complaint:

FIRST AFFIRMATIVE DEFENSE

58. The Complaint seeks to execute on funds that are not property of the Islamic Republic of Iran (the "Republic").

SECOND AFFIRMATIVE DEFENSE

59. Persons other than the Republic or its agencies and instrumentalities may have ownership or other interests in part or all of the funds at SG that are the subject of this turnover proceeding (the "SG Blocked Accounts") which may be superior to the rights of Plaintiffs against such funds.

THIRD AFFIRMATIVE DEFENSE

60. Parties other than Plaintiffs who may have an interest in the SG Blocked Funds may be indispensable parties and/or may have the right to notice of these proceedings and an opportunity to be heard before this Court enters a judgment in this proceeding that would terminate or otherwise affect their rights in the SG Blocked Accounts.

FOURTH AFFIRMATIVE DEFENSE

61. Plaintiffs have not satisfied the requirements of Section 201 of the Terrorism Risk Insurance Act ("TRIA").

FIFTH AFFIRMATIVE DEFENSE

62. Plaintiffs have not satisfied the requirements of Sections 1608(a) and 1610(c) of the Foreign Sovereign Immunities Act ("FSIA").

SIXTH AFFIRMATIVE DEFENSE

63. The Complaint does not state a cause of action for which relief may be granted.

SEVENTH AFFIRMATIVE DEFENSE

64. SG hereby reserves its future rights of setoff against funds on deposit in bank accounts at SG that belong to the Republic or its agencies and instrumentalities.

EIGHTH AFFIRMATIVE DEFENSE

65. To the extent that the funds belonging to the Republic and its agencies and instrumentalities that are in accounts at SG and the other Defendants in this proceeding exceed the amount due to the Plaintiffs, this Court should allocate the amounts to be turned over by each of the Defendants and determine from which accounts such funds should be debited in such a way that none of the Defendants is required to turn over to Plaintiffs more than that Defendant's allocable share.

RESERVATION OF RIGHTS

SG reserves its right to supplement its answer and affirmative defenses with additional information that becomes available or apparent during the course of investigation, preparation, or discovery, and to amend its pleading accordingly.

WHEREFORE, having fully answered the Complaint and asserted affirmative defenses thereto, SG respectfully requests that this Court enter an order:

i) dismissing the Complaint as against SG in its entirety with prejudice;

ii) determining whether all appropriate and/or necessary parties were given appropriate notice of the proceedings and the manner of such notice;

iii) the precise amount, if any, to be turned over pursuant to any execution or other turnover order, and to whom the turnover is granted;

iv) the appropriate apportionment amongst the Defendants of funds and/or accounts to be turned over, if any;

v) whether, as to each property or account in respect of which execution or turnover is ordered, (i) the account holder or owner is regarded as an "agency or instrumentality" of a terrorist party on a claim based on an act of terrorism within the meaning of the TRIA; or (ii) the judgment is based on a claim in respect of an act for which a terrorist party is not immune under 28 U.S.C. § 1605(a)(7);

vi) awarding SG the costs of defending this action including reasonable attorney's fees;

vii) granting SG any additional equitable and other relief that the Court deems just and proper under the circumstances.

Dated: New York, New York
October 23, 2009

MAYER BROWN LLP

By: _____

Mark G. Hanchet
Christopher J. Houpt
1675 Broadway
New York, New York 10019
(212) 506-2500

Attorneys for Defendant
Société Générale

ANNEX 343

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JEFFREY LEVIN and DR. LUCILLE LEVIN,	:	Civil Action No. 09 Civ. 5900 (RPP)
Plaintiffs,	:	**FILED UNDER SEAL**
-against-	:	
BANK OF NEW YORK, et al.,	:	**ANSWER OF DEFENDANT JPMORGAN CHASE BANK, N.A.**
Defendants.	:	

Defendant JPMorgan Chase Bank, N.A. ("JPMCB"), improperly sued in this proceeding as "JPMorgan Chase," by its attorneys, Levi Lubarsky & Feigenbaum LLP, as its answer to the complaint, states as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 1 of the complaint.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 2 of the complaint except admits that the Foreign Sovereign Immunities Act of 1976, as amended, 28 U.S.C. §§ 1602 et seq. (the "FSIA"), and the National Defense Authorization Act for Fiscal Year 2008, P.L. 110-181, 122 Stat. 3 (2008) (the "2008 NDAA") are statutes of the United States and refers to those statutes for a full and accurate statement of their terms and provisions.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 3 of the complaint except admits that JPMCB, pursuant to its obligations under various Executive Orders and federal regulations, has from time to time reported information to the Office of Foreign Assets

Control ("OFAC") of the United States Department of the Treasury indicating that JPMCB is in possession of assets that have been blocked pursuant to the provisions of such Executive Orders and regulations.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 4 of the complaint except admits that a copy of a protective order purportedly entered by the United States District Court for the District of Columbia in an action entitled Levin v. Islamic Republic of Iran, Civil Action No. 05-2494 (GK) (D.D.C.) (the "DC Action"), is annexed to the complaint as Exhibit C and refers to Exhibit C for the contents thereof.

5. To the extent that paragraph 5 of the complaint sets forth allegations that require a response from JPMCB, denies knowledge or information sufficient to form a belief as to the truth of those allegations.

6. To the extent that paragraph 6 of the complaint sets forth allegations that require a response from JPMCB, denies those allegations except admits that paragraph 6 purports to quote selectively from section 5225(b) of the New York Civil Practice Law and Rules ("CPLR") and refers to section 5225(b) for the full text of that statutory provision.

7. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 7 of the complaint except admits that it quotes selectively from section 201 of the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 (2002) ("TRIA"), and refers to section 201 for the full text of that statutory provision.

8. To the extent that paragraph 8 of the complaint sets forth allegations that require a response from JPMCB, denies those allegations except admits that paragraph 8 purports to quote selectively from FSIA § 1610 and refers to section 1610 for the full text of that statutory provision.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 9 of the complaint.

10. To the extent that paragraph 10 of the complaint sets forth allegations that require a response from JPMCB, denies those allegations except admits that paragraph 10 purports to quote selectively from decisions of the New York City Court and the United States Court of Appeals for the Second Circuit and refers to those decisions for the full text thereof.

11. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 11 of the complaint.

12. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 12 of the complaint except admits that the Court has subject matter jurisdiction over this proceeding pursuant to, inter alia, 28 U.S.C. § 1367, admits that paragraph 12 purports to quote selectively from FSIA §§ 1605(a)(7) (repealed) and 1605A and refers to former section 1605(a)(7) and section 1605A for the full text of those statutory provisions.

13. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 13 of the complaint except admits that the Court has in personam jurisdiction over JPMCB in this proceeding.

14. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 14 of the complaint except admits that the Southern District of New York is a proper venue for this proceeding.

15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 15 of the complaint.

16. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 16 of the complaint.

17. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 17 of the complaint except admits that paragraph 17 quotes selectively from CPLR § 5225(b) and refers to section 5225(b) for the full text of that statutory provision.

18. Denies the allegations set forth in paragraph 18 of the complaint except states that JPMCB is a national bank with its main office in Ohio, admits that JPMCB has offices at One Chase Manhattan Plaza, New York, New York, admits that JPMCB, pursuant to its obligations under various Executive Orders and federal regulations, has from time to time reported information to OFAC indicating that JPMCB is in possession of assets that have been blocked pursuant to the provisions of such Executive Orders and regulations, denies knowledge or information sufficient to form a belief as to whether the Islamic Republic of Iran ("Iran") has an interest in any such assets and refers to the complaint as a whole for a statement of the capacity or capacities in which JPMCB has been named as a defendant in this proceeding.

19. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 19 of the complaint.

20. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 20 of the complaint.

21. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 21 of the complaint.

22. Denies the allegations set forth in paragraph 22 of the complaint.

23. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 23 of the complaint.

24. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 24 of the complaint except admits upon information and belief that Iran is a foreign state.

25. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 25 of the complaint except admits that paragraph 25 purports to quote from and characterize a decision rendered by the court in the DC Action and refers to that decision for its contents..

26. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 26 of the complaint.

27. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 27 of the complaint.

28. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 28 of the complaint.

29. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 29 of the complaint.

30. To the extent that paragraph 30 of the complaint sets forth allegations that require a response from JPMCB, denies those allegations except admits that paragraph 30 quotes selectively from TRIA § 201 and refers to section 201 for the full text of that statutory provision.

31. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 31 of the complaint except admits upon information and belief that Iran is a foreign state.

32. To the extent that paragraph 32 of the complaint sets forth allegations that require a response from JPMCB, denies those allegations except admits that paragraph 32 purports to quote selectively from TRIA § 201 and refers to section 201 for the full text of that statutory provision.

33. Denies knowledge of information sufficient to form a belief as to the truth of the allegations set forth in paragraph 33 of the complaint and refers to the relevant Executive Orders issued by various Presidents of the United States for their terms and provisions.

34. To the extent that paragraph 34 of the complaint sets forth allegations that require a response from JPMCB, denies knowledge or information sufficient to form a belief as to the truth of those allegations except admits that paragraph 34 quotes selectively from Executive Order No. 13,382, 70 Fed. Reg. 38,567 (June 28, 2005) ("Executive Order No. 13,382"), and refers to that Executive Order for the full text thereof.

35. To the extent that paragraph 35 of the complaint sets forth allegations that require a response from JPMCB, denies those allegations except admits

that paragraph 35 purports to quote selectively from Executive Order No. 13,382 and refers to that Executive Order for the full text thereof.

36. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 36 of the complaint except admits that OFAC administers various sanctions programs and refers to the regulations governing those programs for their terms and provisions.

37. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 37 of the complaint except admits upon information and belief that OFAC has issued Foreign Assets Control Regulations for the Financial Community and refers to those regulations for the full text thereof.

38. To the extent that paragraph 38 of the complaint sets forth allegations that require a response from JPMCB, denies those allegations except admits that paragraph 38 purports to quote selectively from 31 C.F.R. § 544 and refers to those regulations for the full text thereof.

39. To the extent that paragraph 39 of the complaint sets forth purported conclusions of law, no answer is required from JPMCB, but admits that paragraph 39 purports to summarize subsection 201(a) of 31 C.F.R. § 544 and refers to those regulations for the full text thereof.

40. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 40 of the complaint.

41. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 41 of the complaint.

42. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 42 of the complaint except admits that JPMCB, pursuant to its obligations under various Executive Orders and federal regulations, has from time to time reported information to OFAC indicating that JPMCB is in possession of assets that have been blocked pursuant to the provisions of such Executive Orders and regulations.

43. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 43 of the complaint.

44. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 44 of the complaint except admits that paragraph 44 purports to quote selectively from 31 C.F.R. § 500.312 and refers to that regulation for the full text thereof.

45. Denies the allegations set forth in paragraph 45 of the complaint except admits that paragraph 45 purports to quote selectively from FSIA § 1610(g) and refers to section 1610(g) for the full text of that statutory provision.

46. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 46 of the complaint.

47. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 47 of the complaint.

48. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 48 of the complaint.

49. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 49 of the complaint.

50. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 50 of the complaint.

51. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 51 of the complaint.

52. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 52 of the complaint.

53. In response to paragraph 53 of the complaint, which repeats and realleges the allegations of paragraphs 1 to 52 of the complaint, repeats and realleges its responses to those paragraphs, as set forth in paragraphs 1 to 52 of this answer, with the same force and effect as if they were set forth here in full.

54. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 54 of the complaint.

55. To the extent that paragraph 55 of the complaint sets forth purported conclusions of law, no answer is required from JPMCB.

56. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 56 of the complaint.

57. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 57 of the complaint.

AFFIRMATIVE DEFENSES/OBJECTIONS IN POINT OF LAW

JPMCB, without assuming the burden of proof for those matters upon which plaintiffs bear such burden, for its affirmative defenses and objections in point of law, alleges as follows:

FIRST

58. Persons other than Iran or its agencies and instrumentalities may have ownership or other interests in part or all of the funds at JPMCB that are the subject of this turnover proceeding (the "Funds") which may be superior to the rights of plaintiffs, if any, to have execution against such Funds to satisfy the judgment allegedly entered in favor of plaintiffs that is referred to in paragraph 1 of the complaint (the "Judgment").

SECOND

59. The Funds consist largely or entirely of the proceeds of wire transfers that were routed through JPMCB as an intermediary bank but could not be completed because of applicable regulations promulgated and/or administered by OFAC, and so are being held in one or more blocked accounts at JPMCB. Persons other than Iran or its agencies and instrumentalities who were the originators, beneficiaries or bank participants in such wire transfers may have ownership or other interests in part or all of such Funds which may be superior to the rights of plaintiffs, if any, to have execution against such Funds to satisfy the Judgment.

THIRD

60. To the extent that the Funds are held in accounts in the name of or for the benefit of persons or entities ("persons") other than Iran or its agencies and instrumentalities, or that persons other than Iran or its agencies and instrumentalities may have been parties to or have an interest in the proceeds of wire transfers that could not be completed due to applicable regulations, such persons may be indispensable parties hereto and may have the right to receive notice of these proceedings and an opportunity

to be heard before this Court enters a judgment in this proceeding that would terminate or otherwise affect their rights in the Funds.

FOURTH

61. To the extent that plaintiffs claim that some part or all of the Funds belong to persons that are agencies or instrumentalities of Iran, or that such persons have an interest in some part or all of the Funds, such persons are indispensable parties hereto and have the right to receive notice of these proceedings and an opportunity to be heard before this Court determines whether they are in fact agencies or instrumentalities of Iran or whether such assets are subject to execution to satisfy the Judgment.

FIFTH

62. To the extent that other persons who hold judgments against Iran based on its involvement with acts of terrorism have served restraining notices, notices of pendency, writs of execution or other process or documents upon JPMCB with respect to assets that may belong to Iran or any of its agencies or instrumentalities, such persons are indispensable parties hereto and have the right to receive notice of these proceedings and an opportunity to be heard so that this Court may determine which judgment creditors should take precedence with respect to any assets that may belong to Iran or its agencies or instrumentalities.

SIXTH

63. To the extent that plaintiffs are seeking to satisfy the Judgment from blocked assets subject to TRIA § 201, the Court should consider whether plaintiffs have established all of the elements necessary to obtain relief under that statute, including whether Iran is a "terrorist party," as that term is defined in TRIA; whether the Judgment

was on a claim based on an "act of terrorism," as that term is defined in TRIA, or for which a terrorist party is not immune under 28 U.S.C. § 1605(a)(7); whether and to what extent the Funds belong to Iran or entities that are "agencies or instrumentalities" of Iran, as those terms are used in TRIA; and whether and to what extent the Judgment is for compensatory damages, as opposed to other forms of relief.

SEVENTH

64. To the extent that plaintiffs are attempting to assert rights under FSIA § 1605A or 2008 NDAA § 1083, the Court should consider whether plaintiffs have established all of the elements and satisfied all of the conditions necessary in order to invoke the provisions of those statutes, including whether the DC Action was brought under former FSIA § 1605(a)(7) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, prior to January 28, 2008; whether the DC Action relied upon either such provision as creating a cause of action; whether either or both of those provisions failed to create a cause of action in favor of plaintiffs against Iran; whether the DC Action was still before the courts in any form on January 28, 2008; whether plaintiffs made a motion in the DC Action, within sixty days after January 28, 2008, to have that action and the Judgment given effect as if the DC Action had originally been filed under FSIA § 1605A; and whether plaintiffs commenced another action pursuant to FSIA § 1605A, arising out of the same act or incident as the DC Action, within the time period specified in 2008 NDAA § 1083(c)(3).

EIGHTH

65. The Court should determine whether the Judgment was entered on default and if so, whether a copy must be served on Iran in the manner required by FSIA § 1608(a) in order to comply with FSIA § 1608(e) and whether that has been done.

NINTH

66. The Court should determine whether, in order to comply with the requirements of CPLR §§ 5225(b) and Rule 69 of the Federal Rules of Civil Procedure, a copy of the complaint and the accompanying exhibits must be served on Iran in the manner required by FSIA § 1608(a), or whether it is sufficient to serve such papers in the manner permitted by CPLR § 5225(b), and whether that has been done.

TENTH

67. The Court should determine whether TRIA § 201 and FSIA § 1610(c) require that the Judgment must be enforced by a writ of execution that specifically identifies the property that plaintiffs seek to levy against, whether such a writ of execution must be specifically authorized by the Court that allegedly entered the Judgment, i.e., the United States District Court for the District of Columbia and if so, whether such a writ has been so authorized and delivered to the appropriate official.

ELEVENTH

68. To the extent that other persons who hold judgments against Iran based on its involvement with acts of terrorism have served restraining notices, notices of pendency, writs of execution or other process or documents upon JPMCB with respect to assets that may belong to Iran or any of its agencies or instrumentalities, the Court should

determine whether plaintiffs' rights to the Funds are superior to the rights of the plaintiffs in those other actions.

TWELFTH

69. The Court should determine whether the complaint states a cause of action or sets forth a claim for which relief may be granted.

THIRTEENTH

70. Nothing in this Answer shall constitute a waiver of any rights of set-off that JPMCB may have against any party, person or entity.

FOURTEENTH

71. To the extent that the funds belonging to Iran and its agencies and instrumentalities that are in accounts at JPMCB and the other defendants in this proceeding exceed the amount necessary to satisfy the Judgment, this Court should allocate the amounts to be turned over by each of the defendants, and determine from which accounts the funds should be debited, in such a way that none of the defendants and none of the other affected persons is required to turn over to plaintiffs more than that defendant's or person's allocable share of the amount necessary to satisfy the Judgment.

WHEREFORE defendant JPMorgan Chase Bank, N.A. requests the entry of a judgment in this proceeding

(1) Dismissing the complaint in its entirety as against JPMorgan Chase Bank, N.A.;

(2) Awarding to JPMorgan Chase Bank, N.A. its costs and expenses in this proceeding, including reasonable attorneys' fees; and

(3) Granting such other and further relief to JPMorgan Chase Bank, N.A. as may be just and proper.

Dated: New York, New York
October 23, 2009

LEVI LUBARSKY & FEIGENBAUM LLP

By: J. Kelley Nevling

Howard B. Levi
J. Kelley Nevling, Jr.
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New York, NY 10036
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Attorneys for Defendant JPMorgan Chase Bank, N.A., improperly sued in this proceeding as "JPMorgan Chase"

TO: HOWARTH & SMITH
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Attorneys for Defendant The Bank of New York Mellon, sued herein as "Bank of New York"

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Attorneys for Defendant Citibank, N.A., sued herein as "Citibank"

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Attorneys for Defendant Société Générale, S.A.,
Sued herein as "Societe Generale"

ANNEX 344

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JEFFREY LEVIN and DR. LUCILLE LEVIN,	:	Civil Action No. 09 Civ. 5900 (RPP)
Plaintiffs,	:	**FILED UNDER SEAL**
-against-	:	
BANK OF NEW YORK, et al.,	:	**ANSWER OF DEFENDANT THE BANK OF NEW YORK MELLON**
Defendants.	:	

Defendant The Bank of New York Mellon ("BNYM"), improperly sued in this proceeding as "Bank of New York," by its attorneys, Levi Lubarsky & Feigenbaum LLP, as its answer to the complaint, states as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 1 of the complaint.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 2 of the complaint except admits that the Foreign Sovereign Immunities Act of 1976, as amended, 28 U.S.C. §§ 1602 et seq. (the "FSIA"), and the National Defense Authorization Act for Fiscal Year 2008, P.L. 110-181, 122 Stat. 3 (2008) (the "2008 NDAA") are statutes of the United States and refers to those statutes for a full and accurate statement of their terms and provisions.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 3 of the complaint except admits that BNYM, pursuant to its obligations under various Executive Orders and federal regulations, has from time to time reported information to the Office of Foreign Assets

Control ("OFAC") of the United States Department of the Treasury indicating that BNYM is in possession of assets that have been blocked pursuant to the provisions of such Executive Orders and regulations.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 4 of the complaint except admits that a copy of a protective order purportedly entered by the United States District Court for the District of Columbia in an action entitled Levin v. Islamic Republic of Iran, Civil Action No. 05-2494 (GK) (D.D.C.) (the "DC Action"), is annexed to the complaint as Exhibit C and refers to Exhibit C for the contents thereof.

5. To the extent that paragraph 5 of the complaint sets forth allegations that require a response from BNYM, denies knowledge or information sufficient to form a belief as to the truth of those allegations.

6. To the extent that paragraph 6 of the complaint sets forth allegations that require a response from BNYM, denies those allegations except admits that paragraph 6 purports to quote selectively from section 5225(b) of the New York Civil Practice Law and Rules ("CPLR") and refers to section 5225(b) for the full text of that statutory provision.

7. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 7 of the complaint except admits that it quotes selectively from section 201 of the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 (2002) ("TRIA"), and refers to section 201 for the full text of that statutory provision.

8. To the extent that paragraph 8 of the complaint sets forth allegations that require a response from BNYM, denies those allegations except admits that paragraph 8 purports to quote selectively from FSIA § 1610 and refers to section 1610 for the full text of that statutory provision.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 9 of the complaint.

10. To the extent that paragraph 10 of the complaint sets forth allegations that require a response from BNYM, denies those allegations except admits that paragraph 10 purports to quote selectively from decisions of the New York City Court and the United States Court of Appeals for the Second Circuit and refers to those decisions for the full text thereof.

11. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 11 of the complaint.

12. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 12 of the complaint except admits that the Court has subject matter jurisdiction over this proceeding pursuant to, inter alia, 28 U.S.C. § 1367, admits that paragraph 12 purports to quote selectively from FSIA §§ 1605(a)(7) (repealed) and 1605A and refers to former section 1605(a)(7) and section 1605A for the full text of those statutory provisions.

13. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 13 of the complaint except admits that the Court has in personam jurisdiction over BNYM in this proceeding.

14. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 14 of the complaint except admits that the Southern District of New York is a proper venue for this proceeding.

15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 15 of the complaint.

16. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 16 of the complaint.

17. Denies the allegations set forth in paragraph 17 of the complaint except admits that BNYM is a bank chartered and operating under the laws of the State of New York with its headquarters in the State of New York, having offices at One Wall Street, New York, New York, admits that BNYM, pursuant to its obligations under various Executive Orders and federal regulations, has from time to time reported information to OFAC indicating that BNYM is in possession of assets that have been blocked pursuant to the provisions of such Executive Orders and regulations, denies knowledge or information sufficient to form a belief as to whether the Islamic Republic of Iran ("Iran") has an interest in any such assets, admits that paragraph 17 quotes selectively from CPLR § 5225(b), refers to section 5225(b) for the full text of that statutory provision, and refers to the complaint as a whole for a statement of the capacity or capacities in which BNYM has been named as a defendant in this proceeding.

18. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 18 of the complaint.

19. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 19 of the complaint.

20. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 20 of the complaint.

21. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 21 of the complaint.

22. Denies the allegations set forth in paragraph 22 of the complaint.

23. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 23 of the complaint.

24. To the extent that paragraph 24 of the complaint, which contains certain conclusions of law, sets forth allegations that require a response from BNYM, denies knowledge or information sufficient to form a belief as to the truth of those allegations, except admits upon information and belief that Iran is a foreign state.

25. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 25 of the complaint except admits that paragraph 25 purports to quote from and characterize a decision rendered by the court in the DC Action and refers to that decision for its contents.

26. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 26 of the complaint.

27. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 27 of the complaint.

28. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 28 of the complaint.

29. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 29 of the complaint.

30. To the extent that paragraph 30 of the complaint sets forth allegations that require a response from BNYM, denies those allegations except admits that paragraph 30 quotes selectively from TRIA § 201 and refers to section 201 for the full text of that statutory provision.

31. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 31 of the complaint except admits upon information and belief that Iran is a foreign state.

32. To the extent that paragraph 32 of the complaint sets forth allegations that require a response from BNYM, denies those allegations except admits that paragraph 32 purports to quote selectively from TRIA § 201 and refers to section 201 for the full text of that statutory provision.

33. Denies knowledge of information sufficient to form a belief as to the truth of the allegations set forth in paragraph 33 of the complaint and refers to the relevant Executive Orders issued by various Presidents of the United States for their terms and provisions.

34. To the extent that paragraph 34 of the complaint sets forth allegations that require a response from BNYM, denies knowledge or information sufficient to form a belief as to the truth of those allegations except admits that paragraph 34 quotes selectively from Executive Order No. 13,382, 70 Fed. Reg. 38,567 (June 28, 2005) ("Executive Order No. 13,382"), and refers to that Executive Order for the full text thereof.

35. To the extent that paragraph 35 of the complaint sets forth allegations that require a response from BNYM, denies those allegations except admits

that paragraph 35 purports to quote selectively from Executive Order No. 13,382 and refers to that Executive Order for the full text thereof.

36. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 36 of the complaint except admits that OFAC administers various sanctions programs and refers to the regulations governing those programs for their terms and provisions.

37. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 37 of the complaint except admits upon information and belief that OFAC has issued Foreign Assets Control Regulations for the Financial Community and refers to those regulations for the full text thereof.

38. To the extent that paragraph 38 of the complaint sets forth allegations that require a response from BNYM, denies those allegations except admits that paragraph 38 purports to quote selectively from 31 C.F.R. § 544 and refers to those regulations for the full text thereof.

39. Denies the allegations set forth in paragraph 39 of the complaint except admits that paragraph 39 purports to summarize subsection 201(a) of 31 C.F.R. § 544 and refers to those regulations for the full text thereof.

40. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 40 of the complaint.

41. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 41 of the complaint.

42. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 42 of the complaint except admits that

BNYM, pursuant to its obligations under various Executive Orders and federal regulations, has from time to time reported information to OFAC indicating that BNYM is in possession of assets that have been blocked pursuant to the provisions of such Executive Orders and regulations.

43. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 43 of the complaint.

44. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 44 of the complaint except admits that paragraph 44 purports to quote selectively from 31 C.F.R. § 500.312 and refers to that regulation for the full text thereof.

45. Denies the allegations set forth in paragraph 45 of the complaint except admits that paragraph 45 purports to quote selectively from FSIA § 1610(g) and refers to section 1610(g) for the full text of that statutory provision.

46. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 46 of the complaint.

47. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 47 of the complaint.

48. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 48 of the complaint.

49. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 49 of the complaint.

50. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 50 of the complaint.

51. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 51 of the complaint.

52. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 52 of the complaint.

53. In response to paragraph 53 of the complaint, which repeats and realleges the allegations of paragraphs 1 to 52 of the complaint, repeats and realleges its responses to those paragraphs, as set forth in paragraphs 1 to 52 of this answer, with the same force and effect as if they were set forth here in full.

54. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 54 of the complaint.

55. Denies the allegations set forth in paragraph 55 of the complaint.

56. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 56 of the complaint.

57. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 57 of the complaint.

AFFIRMATIVE DEFENSES/OBJECTIONS IN POINT OF LAW

BNYM, without assuming the burden of proof for those matters upon which plaintiffs bear such burden, for its affirmative defenses and objections in point of law, alleges as follows:

FIRST

58. Persons other than Iran or its agencies and instrumentalities may have ownership or other interests in part or all of the funds at BNYM that are the subject of this turnover proceeding (the "Funds") which may be superior to the rights of

plaintiffs, if any, to have execution against such Funds to satisfy the judgment allegedly entered in favor of plaintiffs that is referred to in paragraph 1 of the complaint (the "Judgment").

SECOND

59. The Funds consist largely or entirely of the proceeds of wire transfers that were routed through BNYM as an intermediary bank or beneficiary's bank but could not be completed because of applicable regulations promulgated and/or administered by OFAC, and so are being held in one or more blocked accounts at BNYM. Persons other than Iran or its agencies and instrumentalities who were the originators, beneficiaries or bank participants in such wire transfers may have ownership or other interests in part or all of such Funds which may be superior to the rights of plaintiffs, if any, to have execution against such Funds to satisfy the Judgment.

THIRD

60. To the extent that the Funds are held in accounts in the name of or for the benefit of persons or entities ("persons") other than Iran or its agencies and instrumentalities, or that persons other than Iran or its agencies and instrumentalities may have been parties to or have an interest in the proceeds of wire transfers that could not be completed due to applicable regulations, such persons may be indispensable parties hereto and may have the right to receive notice of these proceedings and an opportunity to be heard before this Court enters a judgment in this proceeding that would terminate or otherwise affect their rights in the Funds.

FOURTH

61. To the extent that plaintiffs claim that some part or all of the Funds belong to persons that are agencies or instrumentalities of Iran, or that such persons have an interest in some part or all of the Funds, such persons are indispensable parties hereto and have the right to receive notice of these proceedings and an opportunity to be heard before this Court determines whether they are in fact agencies or instrumentalities of Iran or whether such assets are subject to execution to satisfy the Judgment.

FIFTH

62. To the extent that other persons who hold judgments against Iran based on its involvement with acts of terrorism have served restraining notices, notices of pendency, writs of execution or other process or documents upon BNYM with respect to assets that may belong to Iran or any of its agencies or instrumentalities, such persons are indispensable parties hereto and have the right to receive notice of these proceedings and an opportunity to be heard so that this Court may determine which judgment creditors should take precedence with respect to any assets that may belong to Iran or its agencies or instrumentalities.

SIXTH

63. To the extent that plaintiffs are seeking to satisfy the Judgment from blocked assets subject to TRIA § 201, the Court should consider whether plaintiffs have established all of the elements necessary to obtain relief under that statute, including whether Iran is a "terrorist party," as that term is defined in TRIA; whether the Judgment was on a claim based on an "act of terrorism," as that term is defined in TRIA, or for which a terrorist party is not immune under 28 U.S.C. § 1605(a)(7); whether and to what

extent the Funds belong to Iran or entities that are "agencies or instrumentalities" of Iran, as those terms are used in TRIA; and whether and to what extent the Judgment is for compensatory damages, as opposed to other forms of relief.

SEVENTH

64. To the extent that plaintiffs are attempting to assert rights under FSIA § 1605A or 2008 NDAA § 1083, the Court should consider whether plaintiffs have established all of the elements and satisfied all of the conditions necessary in order to invoke the provisions of those statutes, including whether the DC Action was brought under former FSIA § 1605(a)(7) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, prior to January 28, 2008; whether the DC Action relied upon either such provision as creating a cause of action; whether either or both of those provisions failed to create a cause of action in favor of plaintiffs against Iran; whether the DC Action was still before the courts in any form on January 28, 2008; whether plaintiffs made a motion in the DC Action, within sixty days after January 28, 2008, to have that action and the Judgment given effect as if the DC Action had originally been filed under FSIA § 1605A; and whether plaintiffs commenced another action pursuant to FSIA § 1605A, arising out of the same act or incident as the DC Action, within the time period specified in 2008 NDAA § 1083(c)(3).

EIGHTH

65. The Court should determine whether the Judgment was entered on default and if so, whether a copy must be served on Iran in the manner required by FSIA § 1608(a) in order to comply with FSIA § 1608(e) and whether that has been done.

NINTH

66. The Court should determine whether, in order to comply with the requirements of CPLR §§ 5225(b) and Rule 69 of the Federal Rules of Civil Procedure, a copy of the complaint and the accompanying exhibits must be served on Iran in the manner required by FSIA § 1608(a), or whether it is sufficient to serve such papers in the manner permitted by CPLR § 5225(b), and whether that has been done.

TENTH

67. The Court should determine whether TRIA § 201 and FSIA § 1610(c) require that the Judgment must be enforced by a writ of execution that specifically identifies the property that plaintiffs seek to levy against, whether such a writ of execution must be specifically authorized by the Court that allegedly entered the Judgment, i.e., the United States District Court for the District of Columbia and if so, whether such a writ has been so authorized and delivered to the appropriate official.

ELEVENTH

68. To the extent that other persons who hold judgments against Iran based on its involvement with acts of terrorism have served restraining notices, notices of pendency, writs of execution or other process or documents upon BNYM with respect to assets that may belong to Iran or any of its agencies or instrumentalities, the Court should determine whether plaintiffs' rights to the Funds are superior to the rights of the plaintiffs in those other actions.

TWELFTH

69. The Court should determine whether the complaint states a cause of action or sets forth a claim for which relief may be granted.

THIRTEENTH

70. BNYM hereby reserves its future rights of setoff against funds on deposit in bank accounts at BNYM that belong to Iran or its agencies and instrumentalities.

FOURTEENTH

71. To the extent that the funds belonging to Iran and its agencies and instrumentalities that are in accounts at BNYM and the other defendants in this proceeding exceed the amount necessary to satisfy the Judgment, this Court should allocate the amounts to be turned over by each of the defendants, and determine from which accounts the funds should be debited, in such a way that none of the defendants and none of the other affected persons is required to turn over to plaintiffs more than that defendant's or person's allocable share of the amount necessary to satisfy the Judgment.

WHEREFORE defendant The Bank of New York Mellon requests the entry of a judgment in this proceeding

(1) Dismissing the complaint in its entirety as against The Bank of New York Mellon;

(2) Awarding to The Bank of New York Mellon its costs and expenses in this proceeding, including reasonable attorneys' fees; and

(3) Granting such other and further relief to The Bank of New York Mellon as may be just and proper.

Dated: New York, New York
October 23, 2009

LEVI LUBARSKY & FEIGENBAUM LLP

By: _____
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J. Kelley Nevling, Jr.
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Attorneys for Defendant Citibank, N.A., sued herein as "Citibank"

MAYER BROWN LLP
1675 Broadway
New York, NY 10019-5820

Attorneys for Defendant Société Générale, S.A.,
Sued herein as "Societe Generale"

ANNEX 345

770 F.3d 993
United States Court of Appeals,
Second Circuit.

Ruth CALDERON–CARDONA; Ruth Calderon–Cardona, in her capacity as personal representative of The Estate of Eladia Cardona–Rosario; Luz Calderon–Cardona; Louis Calderoncardona; Gloria Calderon–Cardona; Jose Raul Calderon–Cardona; Ana Delia Calderon–Cardona; Hilda Calderon–Cardona; Salvador Calderon–Martinez; Angel Calderonguzman in his capacity as personal representative of The Estate of Miguel Calderon–Cardona; Miguel Calderonguzman in his capacity as personal representative of The Estate of Miguel Calderon–Cardona; Angel Luis Ramirez–Colon in his capacity as personal representative of The Estate of Pablo Tirado–Ayala; and Antonia Ramirezfiero, Petitioners–Appellants,

v.

The BANK OF NEW YORK MELLON, HSBC, Standard Chartered, Deutsche Bank Trust Company of the Americas, UBS AG, Citibank, N.A., Bank of China, Consolidated–Defendants–Appellees, JPMorgan Chase Bank, N.A., Intesa Saopaolo, Respondents–Appellees.*

No. 12–0075.
|
Argued Feb. 11, 2013.
|
Decided Oct. 23, 2014.

Synopsis

Background: Families and victims of a terrorist attack in Israel sought to satisfy a judgment entered pursuant to Foreign Sovereign Immunities Act (FSIA) against the Democratic Republic of North Korea and its main intelligence agency, 723 F.Supp.2d 441, by seizing accounts at the respondent banks that contained funds blocked pursuant to sanctions imposed by the U.S. Government against North Korea. The United States District Court for the Southern District of New York, Cote, J., 867 F.Supp.2d 389, granted judgment for respondents. Petitioners appealed.

Holdings: The Court of Appeals, Hall, Circuit Judge, held that:

on matter of first impression, an electronic fund transfer (EFT) blocked midstream is "property of a foreign state" or "the property of an agency or instrumentality of such a state," subject to attachment under the FSIA, only where either the state itself or an agency or instrumentality thereof, such as a state-owned financial institution, transmitted the EFT directly to the bank where the EFT is held pursuant to the block;

remand was required for parties to conduct discovery; and

Presidential waiver effectively rendered FSIA attachment remedy unavailable.

Affirmed in part, vacated in part, and remanded.

Attorneys and Law Firms

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Before: HALL, LYNCH, and CARNEY, Circuit Judges.

Opinion

HALL, Circuit Judge:

Before us on appeal is a matter of first impression regarding the interpretation of § 201 of the Terrorism Risk Insurance Act of 2002 (codified at 28 U.S.C. § 1610 note) ("TRIA") and §§ 1610(f)(1) and 1610(g) of the Foreign Sovereign Immunities Act ("FSIA") (codified at 28 U.S.C.). The petitioners are family members of victims of state sponsored terrorism. They seek to enforce their 2010 judgment ("the underlying judgment") obtained against the Democratic People's Republic of Korea ("North Korea") by attaching the blocked assets of that state pursuant to TRIA § 201 and FSIA §§ 1610(f)(1) and 1610(g). In particular, the petitioners seek to satisfy their judgments from electronic fund transfers ("EFTs") blocked in United States banks pursuant to the sanctions regimes imposed ***996** upon North Korea by the United States government.[1] The banks at which the EFTs are blocked oppose turning over the value of the EFTs to petitioners. The questions raised on appeal are whether petitioners are precluded from recovering because North Korea's designation as a state sponsor of terrorism was revoked in 2008, prior to the entry of the underlying judgment, and whether the EFTs sought to be attached are the property of North Korea, or of its agencies or instrumentalities, and therefore properly subject to execution to satisfy a judgment against North Korea.

BACKGROUND

A. Underlying Judgment

The petitioners are family members and estate representatives of two American citizens, Carmelo Calderon–Molina and Pablo Tirado–Ayala, who were victims of a terrorist attack in Israel on May 30, 1972. The attack was carried out by terrorists affiliated with the Japanese Red Army and the Popular Front for the Liberation of Palestine.

On March 28, 2008, the victims' families and estate representatives commenced suit against North Korea and the North Korean Cabinet General Intelligence Bureau in the United States District Court for the District of Puerto Rico under FSIA § 1605A, alleging that North Korea and the North Korean Cabinet General Intelligence Bureau "provided material support to the terrorists by supplying them with the armaments used to carry out the attack." *Calderon–Cardona v. JPMorgan Chase Bank, N.A.*, 867 F.Supp.2d 389, 392 (S.D.N.Y.2011). When the suit was filed, North Korea was designated by the United ***997** States Department of State ("State Department") as a state sponsor of terrorism under § 6(j) of the Export Administration Act of 1979. North Korea and the North Korean Cabinet General Intelligence Bureau defaulted, and on August 5, 2010, the district court entered judgment for the petitioners awarding compensatory damages in the amount of $78 million and punitive damages in the amount of $300 million. *See Calderon–Cardona v. Democratic People's Republic of Korea*, 723 F.Supp.2d 441, 460–85 (D.P.R.2010). The petitioners' judgment remains unsatisfied.

By order dated October 11, 2008, while petitioners' § 1605A action was pending, the State Department rescinded North Korea's status as a state sponsor of terrorism. Rescission of Determination Regarding North Korea, 73 Fed.Reg. 63,540 (Oct. 24, 2008). Then–Secretary of State Condoleezza Rice did so in accordance with a Presidential Report issued on June 26, 2008, which was the end-result of negotiations with North Korea regarding its development of nuclear technologies.

B. Judgment Collection and Proceedings Before the District Court

In an attempt to collect on the judgment, petitioners registered it in the Southern District of New York pursuant to 28 U.S.C. § 1963 on October 8, 2010. Seeking to locate North Korean assets, the petitioners then served a subpoena on the Office of Foreign Assets Control ("OFAC") of the Department of the Treasury requesting the identities of financial institutions holding assets that are blocked as a result of sanctions against North Korea and information regarding other property of North Korea. OFAC, in response, produced a list of "the financial institutions that have reported to OFAC that they are holding assets blocked pursuant to sanctions against North Korea." Having identified a number of these institutions and subpoenaed them for information about such accounts and their value, the petitioners subsequently requested orders for turnover pursuant to Federal Rule of Civil Procedure 69 and New York Civil Practice Law Rules 5225(b) and 5227 seeking to enforce their judgment by attaching the blocked funds pursuant to TRIA § 201, FSIA § 1610(f)(1), and FSIA § 1610(g). Respondent financial institutions opposed the petitions.

The district court denied the petitions for turnover, concluding that petitioners failed to demonstrate entitlement to relief under TRIA § 201 and FSIA § 1610(g). The court held first that North Korea did not qualify as a "terrorist party" as required by TRIA § 201. It then concluded that even if North Korea qualified as a "terrorist party," the blocked assets held by the respondents are not "owned by" North Korea for purposes of TRIA or FSIA § 1610(g). Finally, it concluded that petitioners could not rely on FSIA § 1610(f)(1) to support their turnover petitions because that section had been waived by the President of the United States.

DISCUSSION

A. Applicable Law

The Foreign Sovereign Immunities Act is the sole basis for obtaining jurisdiction over a foreign state in federal court. FSIA provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604 (1988). Thus, if a defendant is a foreign state within the meaning of FSIA, that defendant is not subject to the jurisdiction of the United States Courts unless one of the exceptions in the Act applies.

***998** In 1996, Congress amended FSIA to include a terrorism exception, codified at 28 U.S.C. § 1605(a)(7), in order to "give American Citizens an important economic and financial weapon against ... outlaw states" that sponsor terrorism by providing "safe havens, funding, training, supplying weaponry, medical assistance, false travel documentation, and the like." H.R.Rep. No. 104–383, at 62 (1995). This section was subsequently repealed, and Congress enacted § 1605A in its place. *See* Pub.L. 110–181, Div. A, § 1083, Jan. 28, 2008, 122 Stat. 341 (repealing 28 U.S.C. § 1605(a)(7) and creating 28 U.S.C. § 1605A); 28 U.S.C. § 1605A(a)(2)(A)(i)(*I*) ("The court shall hear a claim under this section if ... the foreign state was designated as a state sponsor of terrorism" by the State Department). To the extent relevant to this case, § 1605A provides for the same exceptions to foreign sovereign immunity as the repealed section.

FSIA also has several sections which address the type of foreign property that can be attached by judgment creditors. Generally, property of a foreign sovereign is immune from attachment. *See* 28 U.S.C. § 1609. Exceptions are, however, provided by 28 U.S.C. § 1610(f)(1)(A), TRIA § 201(a), and 28 U.S.C. § 1610(g).

1. 28 U.S.C. § 1610(f)(1)(A)

28 U.S.C. § 1610(f)(1)(A) provides that "any property with respect to which financial transactions are prohibited or regulated" under the Trading with the Enemy Act ("TWEA"), or the International Emergency Economic Powers Act ("IEEPA") can be subject to execution or attachment to satisfy a judgment which was obtained under the terrorism exception outlined in § 1605A. *See* 28 U.S.C. § 1610(f)(1)(A) ("[S]hall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) ... or section 1605A"). Also in § 1610(f), however, Congress authorized the President to "waive" section 1610(f)(1) "in the interest of national security." 28 U.S.C. § 1610(f)(3). President Clinton waived § 1610(f)(1)'s attachment remedy entirely, effectively preventing judgment creditors from collecting pursuant to § 1610(f)(1). *See* Presidential Determination 2001–03, 65 Fed.Reg. 66,483 (Oct. 28, 2000). This waiver, which no president has rescinded, effectively rendered the attachment remedy under § 1610(f)(1) unavailable to plaintiffs.

2. TRIA

In an effort to aid victims of terrorism to satisfy their judgments Congress in 2002 enacted TRIA which is not subject to presidential waivers issued under 28 U.S.C. § 1610(f). *See* Pub.L. No. 107–297, 116 Stat. 2322 (2002), *reprinted in relevant part at* 28 U.S.C. § 1610 note; H.R.Rep. No. 107–779, at 27 (2002), 2002 U.S.C.C.A.N. 1430 (Conf.Rep.); *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 556 U.S. 366, 386, 129 S.Ct. 1732, 173 L.Ed.2d 511 (2009) ("Congress placed the 'notwithstanding' clause in § 201(a) ... to eliminate the effect of any Presidential waiver issued under 28 U.S.C. § 1610(f) prior to the date of the TRIA's enactment."). Specifically, TRIA authorizes plaintiffs holding a judgment against a terrorist party to attach blocked assets of the terrorist party or any agency or instrumentality of the terrorist party. *See* TRIA § 201(a). The statute provides that:

> Notwithstanding any other provision of law, and except as provided in subsection (b), in every case in which a person *has obtained a judgment against a terrorist party* on a claim based on an act ***999** of terrorism, or for which a terrorist party is not immune under [28 U.S.C. § 1605(a)(7)], the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in the aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

TRIA § 201(a) (emphasis supplied). On August 10, 2012, Congress amended TRIA and added language indicating that it is applicable to section 1605A judgment holders. *See* Iran Threat Reduction and Syrian Human Rights Act of 2012, Pub.L. No. 112–158, § 502(e) (Aug. 10, 2012).

3. 28 U.S.C. § 1610(g)

Subsequent to the enactment of TRIA, in 2008, Congress also enacted 28 U.S.C. § 1610(g), which authorizes attachment remedies for plaintiffs seeking to satisfy a judgment obtained under § 1605A. *See* 28 U.S.C. § 1610(g)(1) (allowing attachment of property of a foreign state "against which a judgment is entered under section 1605A"). Section 1610(g) not only allows attachment of property of a foreign state but also property of an agency or instrumentality "that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity." *Id.* § 1610(g)(1). Attachment is allowed even if the property is regulated under TWEA or IEEPA. Section 1610(g), however, does not "supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property." *Id.* § 1610(g)(3).

B. Issues for Review

On appeal petitioners argue pursuant to TRIA § 201, 28 U.S.C. § 1610(g), and 28 U.S.C. § 1610(f)(1)(A) that they are entitled to execute against the blocked EFTs, which they claim belong to North Korea. As we explain below, petitioners' arguments with regard to TRIA and 28 U.S.C. § 1610(f)(1)(A) lack merit. Additional discovery is required, however, to determine whether attachment of some of the EFTs is permissible under 28 U.S.C. § 1610(g).

1. TRIA § 201

Pursuant to TRIA, assets are attachable when "a person has obtained a judgment against a terrorist party on a claim based on an act of terrorism." TRIA § 201(a). Here, the statutory text of TRIA unambiguously requires that there (1) be a judgment, (2) against a terrorist party, and (3) the claim underlying the judgment be based on an act of terrorism. *See United States v. Santos*, 541 F.3d 63, 67 (2d Cir.2008) ("When a court determines that the language of a statute is unambiguous, its inquiry is complete."). While plaintiffs have a judgment against North Korea that is based on an act of terrorism, that judgment was not entered against a terrorist party. As the district court correctly observed, a foreign state is a "terrorist party" for purposes of TRIA § 201(d) when it is " 'designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 ... or Section 620A of the Foreign Assistance Act of 1961.' " *Calderon–Cardona*, 867 F.Supp.2d at 394 (quoting TRIA § 201(d)). North Korea was no longer designated a state sponsor of terrorism as of October 11, 2008. The underlying judgment was entered against North Korea on August 5, 2010, nearly two years later. At the time the judgment below was entered, therefore, because North Korea was not a state sponsor of terrorism, it was not a "terrorist party" within the meaning of TRIA. The underlying judgment, consequently, ***1000** was not a judgment against a terrorist party at the time it issued.

Petitioners' contention that a state's previous, but now lifted, designation as a state sponsor of terrorism satisfies TRIA § 201(a)'s requirement that the judgment be entered against a "terrorist party" is unpersuasive. Although interpreting "a judgment against a terrorist party on a claim based on an act of terrorism" to include only judgments entered against a

party that was a designated state sponsor of terrorism when the judgment was entered appears the more natural reading, petitioners' interpretation of the language as applying where the party against whom judgment was entered was a state sponsor of terrorism when the terrorist act was committed or when the action was commenced has at least some plausibility. The statutory context, however, makes clear that Congress intended the former meaning. In other parts of FSIA, when Congress has intended that a former state sponsor of terrorism be denied sovereign immunity for wrongs done during the time it was so designated, Congress has done so expressly. For example, in creating the private right of action against foreign states under FSIA § 1605A(c) Congress expressly included states that were formerly designated as state sponsors of terrorism. FSIA § 1605A(c) ("A foreign state that is *or was* a state sponsor of terrorism ... shall be liable."). It would be discordant to hold that Congress believed it needed to provide expressly that a former state sponsor of terrorism could be held liable in one part of FSIA, but that it only needed to do so impliedly in a later-enacted statute it codified as a note to FSIA. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) ("A court must therefore interpret [a] statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole." (internal citation and quotation marks omitted)). Accordingly, because their judgment was not issued against a terrorist party, petitioners may not attach the EFTs at issue pursuant to TRIA § 201(a).

2. FSIA § 1610(g)

Section 1610(g) is not limited in the same way as TRIA § 201(a). Under § 1610(g),

> the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment.

28 U.S.C. § 1610(g)(1). Because, as noted, a "judgment ... under § 1605A" expressly includes judgments against foreign nations formerly, but not currently, designated as state sponsors of terrorism, the fact that North Korea no longer has that designation does not bar attachment of North Korea's property, or that of its agents and instrumentalities, under § 1610(g).

Whether attachment of the EFTs under § 1610(g) is possible turns, instead, on whether the blocked EFTs at issue are "property of" North Korea or "the property of an agency or instrumentality of" North Korea. We review these legal questions *de novo*. *Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 66–67 (2d Cir.2009) (reviewing *de novo* the "threshold issue of whether EFTs are indeed 'defendant's' property"); *see also Salve Regina Coll. v. Russell*, 499 U.S. 225, 231, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991) (holding that "a court of appeals ***1001** should review *de novo* a district court's determination of state law").

"[W]hether or not midstream EFTs may be attached or seized depends upon the nature and wording of the statute pursuant to which attachment and seizure is sought." *Export–Import Bank of U.S. v. Asia Pulp & Paper Co.*, 609 F.3d 111, 116 (2d Cir.2010). Congress has not defined the type of property interests that may be subject to attachment under FSIA § 1610(g).[2] In particular, FSIA § 1610(g) is silent as to what interest in property the foreign state, or agency or instrumentality thereof, must have in order for that property to be subject to execution. Because of the absence of any definition of the property rights identified in the statutory text, we hold that FSIA § 1610(g) does not preempt state law applicable to the execution of judgments in this case. Moreover, given this gap in the contours of the legislation, we cannot infer that Congress intended merely to leave a void. We therefore apply the general rule in this Circuit that when Congress has not created any new property rights, but "merely attaches consequences, federally defined, to rights created under state law," we must look to state law to define the "rights the [judgment debtor] has in the property the [creditor] seeks to reach." *Asia Pulp*, 609 F.3d at 117 (first alteration in original) (internal quotation marks omitted). In short, Congress provided that "property" of a foreign state is subject to execution, and absent any indication that Congress intended a special definition of the term, "property" interests are ordinarily those created and defined by state law.

In this Circuit, two cases in particular interpret New York law delineating the property interests held by parties to an EFT that is intercepted midstream. In *Asia Pulp* and *Jaldhi*, we dealt with the interpretation of Article 4 of the New York Uniform Commercial Code ("NY UCC"), which governs EFTs held in New York banks. *See* N.Y. U.C.C. Law Ch. 38, Art. 4–A; *Asia Pulp*, 609 F.3d at 118 (Article 4–A was "enacted to provide a comprehensive body of law that defines the rights and obligations that arise from wire transfers" (internal quotation marks omitted)). Looking to

both the text of N.Y. UCC § 4–A–503 and the official commentaries to that statute, we determined in *Jaldhi* that under New York law "EFTs are neither the property of the originator nor the beneficiary while briefly in the possession of an intermediary bank." *Jaldhi*, 585 F.3d at 71. In *Asia Pulp* we explained that this was so because "wire transfers, which include EFTs, are a unique type of transaction to which ordinary rules do not necessarily apply." *Asia Pulp*, 609 F.3d at 118. Because EFTs function as a chained series of debits and credits between the originator, the originator's bank, any intermediary banks, the beneficiary's bank, and the beneficiary, "the only party with a claim against an intermediary bank is the sender to that bank, which is typically the originator's bank." *Id.* at 119–20 (quoting Permanent Editorial Board for the Uniform ***1002** Commercial Code Commentary No. 16 §§ 4A–502(d) and 4A–503, at 3 (2009)). Put another way, under the N.Y. UCC's statutory scheme, the only entity with a property interest in an EFT while it is midstream is the entity immediately preceding the bank "holding" the EFT in the transaction chain. In the context of a blocked transaction, this means that the only entity with a property interest in the stopped EFT is the entity that passed the EFT on to the bank where it presently rests. We therefore hold that an EFT blocked midstream is "property of a foreign state" or "the property of an agency or instrumentality of such a state," subject to attachment under 28 U.S.C. § 1610(g), only where either the state itself or an agency or instrumentality thereof (such as a state-owned financial institution) transmitted the EFT directly to the bank where the EFT is held pursuant to the block.

Because the district court's opinion issued prior to discovery relating to the details of the entities involved in the transaction chains of the EFTs at issue in this case, the record contains little to no evidence of whether the entities that transmitted the EFTs to the respondent banks were agencies or instrumentalities of North Korea. Without knowing the nature of those entities, we cannot determine whether the EFTs are properly attachable. Remand is therefore required for the parties to conduct discovery aimed at resolving the factual issues surrounding whether the entities that transmitted the EFTs to the respondent banks were agencies or instrumentalities of North Korea. *Accord Palestine Monetary Auth. v. Strachman*, 62 A.D.3d 213, 873 N.Y.S.2d 281 (App.Div. 1st Dep't 2009) (remanding for additional discovery where it was not known whether the bank that transmitted the EFT to the bank that was holding the EFT was controlled by a foreign government against which judgment was sought).

3. FSIA § 1610(f)(1)

As for FSIA § 1610(f)(1), we hold that petitioners' claim for relief pursuant to that statutory provision is without merit for the simple reason that a party's right to proceed under that section was eliminated by a valid executive order that no subsequent presidential administration has rescinded. *See* Presidential Determination 2001–03, 65 Fed.Reg. 66,483, 2000 WL 34508240 (Oct. 28, 2000).

CONCLUSION

We have reviewed the parties' additional arguments and find them unavailing. In light of the foregoing analysis, the judgment of the District Court is affirmed in part with respect to its holdings that the EFTs cannot be attached pursuant to TRIA § 201 and FSIA § 1610(f)(1), and is vacated and remanded in part for further proceedings to determine whether the EFTs may be attached pursuant to FSIA § 1610(g).

All Citations

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Footnotes

* The Clerk of Court is respectfully directed to amend the caption to conform to that above.

1 By way of background, an EFT is a transfer of money using electronic technology rather than paper transactions. We explained the operation of EFTs in *Shipping Corp. of India Ltd.v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58 (2d Cir.2009) as follows,

> An EFT is nothing other than an instruction to transfer funds from one account to another. When the originator and the beneficiary each have accounts in the same bank that bank simply debits the originator's account and credits the beneficiary's account. When the originator and beneficiary have accounts in different banks, the method for transferring funds depends on whether the banks are members of the same wire transfer consortium. If the banks are in the same consortium, the originator's bank debits the originator's account and sends instructions directly to the beneficiary's bank

upon which the beneficiary's bank credits the beneficiary's account. If the banks are not in the same consortium—as is often true in international transactions—then the banks must use an intermediary bank. To use an intermediary bank to complete the transfer, the banks must each have an account at the intermediary bank (or at different banks in the same consortium). After the originator directs its bank to commence an EFT, the originator's bank would instruct the intermediary to begin the transfer of funds. The intermediary bank would then debit the account of the bank where the originator has an account and credit the account of the bank where the beneficiary has an account. The originator's bank and the beneficiary's bank would then adjust the accounts of their respective clients. *See* Amicus Br. 9–11.

To more concretely illustrate the circumstances of the instant case, consider the following example: ABC Shipping wants to transfer $100 to XYZ Overseas. ABC has an account at India National Bank, and XYZ has an account at Bank of Thailand. India National Bank and Bank of Thailand do not belong to the same consortium, but each has an account at New York Bank. To begin the transfer, ABC instructs India National Bank to transfer $100 to XYZ's account at Bank of Thailand. India National Bank then debits ABC's account and forwards the instruction to New York Bank. New York Bank then debits India National's account and credits Bank of Thailand's account. Bank of Thailand then credits XYZ's account, thereby completing the transfer.

Id. at 60 n. 1.

2 This lack of definition is apparent in the myriad approaches taken by district courts tasked with interpreting TRIA's and FSIA § 1610(g)'s provisions allowing execution upon the assets "of" a terrorist state. *See, e.g., Estate of Heiser v. Islamic Republic of Iran,* 885 F.Supp.2d 429, 443 (D.D.C.2012) (holding that both TRIA § 201 and FSIA § 1610(g) "require plaintiffs to prove some terrorist state ownership in order to attach and execute on property" and finding that ownership interest through federal interstitial rule making); *see also, e.g., Bennett v. Islamic Republic of Iran,* 927 F.Supp.2d 833, 845–46 (N.D.Cal.2013) (applying California law defining property subject to enforcement of a money judgment, and allowing attachment of blocked assets where instrumentality of Iran held at least a beneficial interest in those assets.).

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ANNEX 346

602 Fed.Appx. 37
This case was not selected for
publication in West's Federal Reporter.
RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.
United States Court of Appeals,
Second Circuit.

Jeremy LEVIN and Dr. Lucille Levin, Plaintiffs–Appellees,

v.

BANK OF NEW YORK, et al., Defendants,
JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A., Third–Party Plaintiffs,

v.

Central Bank of Nigeria, Third–Party Defendant–Appellant,
JPMorgan Chase & CO. and JPMorgan Chase Bank, N.A., Third–Party Plaintiffs,

v.

Steven M. Greenbaum, et al., Third–Party Defendants–Appellees.

No. 13–4711.
|
May 11, 2015.

Appeal from the United States District Court for the Southern District of New York (Patterson, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and hereby is **REVERSED.**

Attorneys and Law Firms

David H. Fromm (Patrick R. O'Mea, on the brief), Brown Gavalas & Fromm LLP, New York, NY, for Appellant.

Kristy N. Grace, DLA Piper LLP (US), Baltimore, MD (Timothy Birnbaum, DLA Piper LLP (US), New York, NY; Richard M. Kremen, Dale K. Cathell, DLA Piper LLP (US), Baltimore, MD; Curtis C. Mechling, Jamie L. Bernard, Stroock & Stroock & Lavan LLP, New York, NY; Suzelle M. Smith, Don Howarth, Howarth & Smith, Los Angeles, CA, on the brief), for Appellees.

***38** PRESENT: RICHARD C. WESLEY, DEBRA ANN LIVINGSTON and DENNY CHIN, Circuit Judges.

SUMMARY ORDER

We **REVERSE** the judgment of the District Court and **REMAND** with instructions to the District Court to vacate the turnover order and to enter judgment for third party Defendant–Appellant Central Bank of Nigeria dismissing the complaint. *See Calderon–Cardona v. Bank of N.Y. Mellon*, 770 F.3d 993 (2d Cir.2014); *Hausler v. JP Morgan Chase Bank, N.A.*, 770 F.3d 207 (2d Cir.2014) (per curiam).

All Citations

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ANNEX 347

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JEREMY LEVIN AND LUCILLE LEVIN, Plaintiffs, -v- BANK OF NEW YORK, JP MORGAN CHASE, SOCIETE GENERALE AND CITIBANK, N.A., Defendants.	:	09-CV-5900 (JPO) ORDER

J. PAUL OETKEN, District Judge:

1. Pursuant to the Mandate issued by the Second Circuit on June 3, 2015 (2d Cir. No. 13-4711, Dkt. No. 1050), third-party defendant Central Bank of Nigeria is hereby directed to submit to the Court, on or before September 2, 2015, a proposed order implementing the Second Circuit's ruling.

2. Certain letter motions previously filed in this case have been rendered moot. Accordingly, the letter motions at docket numbers 914, 916, 956, and 957 are hereby denied as moot.

3. The pending motion for Partial Summary Judgment On Single Phase Two Asset (Dkt. No. 969) and the pending Cross Motion for Summary Judgment (Dkt. No. 984) are hereby denied without prejudice to refiling. The parties may renew their motions, or file other appropriate motions, following the Supreme Court's disposition of the petitions for certiorari in *Calderon-Cardona v. Bank of New York Mellon*, 770 F.3d 993 (2d Cir. 2014), and *Hausler v. JP Morgan Chase Bank, N.A.,* 770 F.3d 207 (2d Cir. 2014) (per curiam), with briefing that takes into account the operative rulings in those cases as well as any other relevant developments in the law.

The Clerk of Court is directed to close the motions at docket numbers 914, 916, 956, 957, 969, and 984.

SO ORDERED.

Dated: August 20, 2015
New York, New York

J. PAUL OETKEN
United States District Judge

ANNEX 348

U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

October 28, 2014

By ECF
Honorable Robert P. Patterson
United States District Judge
United States Courthouse
500 Pearl Street
New York, NY 10007

Re: *Levin v. Bank of New York, et al.*,
09 Civ. 5900 (RPP)

Dear Judge Patterson:

I write respectfully to inform the Court of two recent Second Circuit opinions deciding issues that are important to resolution of the pending motion for partial summary judgment (Dkt. No. 969) in the above-referenced matter. *See Calderon-Cardona v. Bank of New York Mellon*, No. 12-75, slip op. Oct. 23, 2014, and *Hausler v. JP Morgan Chase Bank, N.A.*, No. 12-1264, *per curiam* slip op. Oct. 27, 2014 (copies enclosed). Both decisions relate specifically to issues discussed in the United States' Statement of Interest in this matter (Dkt. No. 1018). Your Honor heard oral argument on August 21, 2014.

In *Calderon-Cardona*, judgment creditors attempted to attach midstream electronic funds transfers ("EFTs") to enforce a judgment against North Korea under FSIA section 1605A. In applying section 1610(g) of the FSIA, the Circuit stated that attachability "turns . . . on whether the blocked EFTs at issue are 'property of' North Korea or 'the property of an agency or instrumentality of' North Korea," a question the Circuit reviewed *de novo*. Slip Op. at 12. Further, the Circuit held that section 1610(g) "does not preempt state law applicable to the execution of judgments in this case," *id.*, and that "we must look to state law to define the 'rights the [judgment debtor] has in the property the [creditor] seeks to reach,'" *id.* at 13 (quoting *Export-Import Bank of U.S. v. Asia Pulp & Paper Co.*, 609 F.3d 111, 117 (2d Cir. 2010) (bracketed modifications in *Calderon-Cardona*)). Applying the New York UCC as the relevant state law governing "property interests held by parties to an EFT," the Circuit further held that, in the case of midstream EFTs, whether a judgment debtor holds a property interest sufficient to permit attachment depends on whether that party transferred funds directly to the intermediary bank that now holds the funds. Citing the lack of record evidence on that question, the Circuit remanded the matter for discovery to determine whether North Korean agencies or instrumentalities transmitted the EFTs to the intermediary banks.

Hausler also involved blocked midstream EFTs held by New York banks, which a judgment creditor of Cuba sought to attach under section 201 of TRIA. The Circuit held *per curiam* that, under TRIA as under the FSIA, "we must look to state law to define the rights the judgment debtor has in the property the [creditor] seeks to reach." Slip Op. at 7 (quoting *Calderon-Cardona*, Slip. Op. at 12-13 (quotation marks omitted)). The Circuit again looked to

New York property law because "the banks at which the EFTs are blocked are in New York." *Id.* at 8. The Circuit went on to observe, quoting *Calderon-Cardona*, that "the only entity with a property interest in the stopped EFT is the entity that passed the EFT on to the bank where it presently rests." *Id.* at 8 (quotation marks omitted). The Circuit reversed the district court's judgment permitting attachment because, unlike in *Calderon-Cardona*, it was "undisputed" that the judgment debtor had not transferred the EFTs directly to the intermediary banks. *Id.* Because Cuba had no "property interest in the EFTs," TRIA section 201 did not permit their attachment. *Id.*

Respectfully,

PREET BHARARA
United States Attorney

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ANNEX 349

2017 WL 4863094
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Jeremy LEVIN and Lucille Levin, Plaintiffs,

v.

The BANK OF NEW YORK MELLON, et al., Defendants.

The Bank of New York Mellon, et al., Third-Party Plaintiffs,

v.

Steven M. Greenbaum, et al., Third-Party Defendants.

09-CV-5900 (JPO)

|

Signed 10/27/2017

Attorneys and Law Firms

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Christopher J. Robinson, Sharon L. Schneier, Davis Wright Tremaine LLP, New York, NY, Noel J. Nudelman, Heideman Nudelman & Kalik, PC, Washington, DC.

OPINION AND ORDER

J. PAUL OETKEN, United States District Judge

***1** Plaintiffs Jeremy Levin and Dr. Lucille Levin ("Plaintiffs") are judgment creditors of the Islamic Republic of Iran ("Iran"). In 2009, they filed this suit seeking turnover of Iranian assets within the United States in an effort to enforce an unsatisfied judgment against Iran. Plaintiffs now move for leave to file a supplemental complaint pursuant to Federal Rule of Civil Proecudre Rule 15(d). For the reasons that follow, the motion is granted in part.

I. Background

The Court presumes familiarity with the factual and procedural history of this case, as discussed in its two prior Opinions and Orders issued on March 4, 2011, and September 23, 2013. *See Levin v. Bank of N.Y. (Levin I)*, No. 09 Civ 5900, 2011 WL 812032, at *1–4 (S.D.N.Y. Mar. 4, 2011) (Patterson, J.); *Levin v. Bank of N.Y. Mellon (Levin II)*, No. 09 Civ 5900, 2013 WL 5312502, at *1-2 (S.D.N.Y. Sept. 23, 2013) (Patterson, J.).

Plaintiffs hold an unsatisfied final judgment of $28,807,719 against Judgment-Debtor Iran, arising out of the 1984

kidnapping of Jeremy Levin in Beirut, Lebanaon. (Dkt. No. 1099-1 ("Supp. Compl.") ¶ 1.) Levin's abductors were terrorists who were trained, supported, aided, funded, and directed by Iran.[1] *Id.*

Plaintiffs filed the original Complaint in this action in 2009 (the "2009 Complaint"), seeking turnover of all assets within the jurisdiction of the United States in which Iran has a direct or indirect interest. (Dkt. No. 1099 at 2; Dkt. No. 70.) The 2009 Complaint alleged that Defendant-Garnishee J.P. Morgan Chase Bank, N.A. ("JPMCB"), along with other New York banks, possessed "assets blocked by the U.S. government due to the fact that Iran has an interest in them either directly or indirectly ('Iranian Blocked Assets')." (Dkt. No. 70 ¶ 3).[2]

Although Plaintiffs, along with other judgment creditors, have obtained turnover of certain Iranian assets from Defendant-Garnishee JPMCB (*see, e.g.*, Dkt. No. 1089), Plaintiffs' judgment has not been fully satisfied. (Dkt. No. 1100 ¶ 4). On November 29, 2016, Plaintiffs served interrogatories on JPMCB. (Supp. Compl. ¶ 4.) JPMCB's responses, which were served on January 12, 2017, revealed the existence of two additional, previously undisclosed Iranian Blocked Assets: (1) "a deposit account" under the name of Lebanese businessman Kassim Tajideen ("Tajideen Account"); and (2) an account "hold[ing] the proceeds of a wire transfer, also known as an electronic funds transfer ('EFT'), that was blocked by JPMCB under ...31 C.F.R. Parts 560, 561 and 594 ['Iranian Sanctions']" ("Saderat Account"). (*Id.*; Dkt. No. 1101 at 1).

***2** Plaintiffs move for leave to file a supplemental complaint seeking turnover of the Tajideen Account and the Saderat Account for collection and partial satisfaction of their judgment against Iran pursuant to § 201(a) of the Terrorism Risk Insurance Act of 2002 ("TRIA")[3] and §§ 1610(f)(1)(a) and (g)(1) of the Foreign Soverign Immunities Act ("FSIA").[4] (Dkt. No. 1099 at 4; Supp. Compl. ¶¶ 8–9.)

II. Discussion

Under Federal Rule of Civil Procedure 15(d), a party may "move to serve a supplemental pleading and the district court may grant such a motion, in the exercise of its discretion, upon reasonable notice and upon such terms as may be just." *Quaratino v. Tiffany & Co.*, 71 F.3d 58, 66 (2d Cir. 1995). "Absent undue delay, bad faith, dilatory tactics, undue prejudice to the party to be served with the proposed pleading, or futility, the motion should be freely granted." *Id.* (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

***3** With respect to the Tajideen Account, the Court concludes that Plaintiffs should be permitted to supplement their original complaint. Upon discovering the existence of the Tajideen Account on June 12, 2017, Plaintiffs acted promptly by delivering writs of execution for immediate service and levy on Defendant JPMCB on June 13, 2017. (Dkt. No. 1100 ¶ 7.) There is no evidence of "undue delay, bad faith, [or] dilatory tactics." *Quaratino*, 71 F.3d at 66. Nor is there any evidence of undue prejudice or futility. *See id.* Most important, JPMCB does not oppose Plaintiffs' motion as it relates to the Tajideen Account. (Dkt. No. 1101 at 2.)

With respect to the Saderat Account, however, the Court concludes that supplementation would be futile. In order to "execute a judgment on the blocked assets of a terrorist party, or its agency or instrumentality, to satisfy a judgment against the terrorist party," a plaintiff must establish that

> (1) the plaintiff obtained a judgment against the terrorist party; (2) the judgment is for a claim based on an act of terrorism; (3) the assets are "blocked assets" within the meaning of TRIA; and (4) execution is sought only to the extent of the plaintiff's outstanding judgment for compensatory damages.

Doe v. Ejercito De Liberacion Nacional, No. 15 Civ. 8652, 2017 WL 591193, at *2 (S.D.N.Y. Feb. 14, 2017). Here, JPMCB argues that supplementation would be futile because the Saderat Account does not qualify as a "blocked asset" under TRIA, as it is not the property of a terrorist party. The Court agrees.

In *Hausler v. JP Morgan Chase Bank, N.A.*, the Second Circuit identified certain conditions precedent to treating an EFT at a bank located in New York[5] as the property of a terrorist state under TRIA § 201(a):

> [U]nder New York law EFTs are neither the property of the originator nor the beneficiary while briefly in the possession of an intermediary bank. As such, the only entity with a property interest in the stopped EFT is the entity that passed the EFT on to the bank where it presently rests. Thus, in order for an EFT to be a blocked asset of [a terrorist state] under TRIA § 201(a), either [the terrorist state] itself or an agency or instrumentality thereof (such as a state-owned financial institution) [must have] transmitted the EFT *directly* to the bank where the EFT is held pursuant to the block.

770 F.3d 207, 212 (2d Cir. 2014) (last alteration in original) (emphasis added) (citations omitted) (quoting *Calderon-Cardona v. Bank of New York Mellon*, 770 F.3d 993, 1001-02 (2d Cir. 2014)) (internal quotation marks omitted). In other words, unless a terrorist state transferred the EFT in question directly to the blocking bank, the EFT is not attachable "[b]ecause no terrorist party or agency or instrumentality thereof has a property interest" in it. *Id.*; *see also Ejercito*, 2017 WL 591193, at *3 ("[O]nly property of a target party can be attached under TRIA[,] and ... a mid-stream EFT is the sole property of the entity that transmitted the EFT to the blocking bank.").

Here, as in *Hausler* and *Ejercito*, it is "undisputed that no [terrorist state] transmitted any of the blocked EFTs in this case directly to the blocking bank." *Ejercito*, 2017 WL 591193, at *2 (quoting *Hausler*, 770 F.3d at 212) (internal quotation mark omitted). The blocked EFT in question was transmitted to JPMCB directly by Lloyd's Bank. (Dkt. No. 1101 at 11; Dkt. No. 1104 at 6). Under established Second Circuit law, the EFT is thus considered property of Lloyd's Bank, which is not an agent or instrumentality of Iran; consequently, the EFT cannot be attached under TRIA.

***4** Plaintiffs attempt to sidestep *Hausler*'s rule based on the fact that Bank Saderat used Lloyd's bank as a "correspondent bank"[6] rather than an "intermediatry bank." (Dkt. No. 1104 at 6.) The Court concludes that this is a distinction without a difference, at least as it relates to the Second Circuit's rule in *Hausler*. As the *Ejercito* court explained, even where an EFT is transferred to a blocking bank by a "correspondent bank," the transferred asset is considered the "sole property" of the correspondent bank, rather than the "principal" bank (i.e., Bank Saderat). *See Ejercito*, 2017 WL 591193, at *1–3. Therefore, the EFT is not attachable unless the correspondent bank is itself a terrorist state or an agent or instrumentality thereof. Because Lloyd's Bank is not a terrorist state, the Saderat Account is not attachable, and supplementation would be futile as to that asset.

III. Conclusion

For the foregoing reasons, Plaintiffs' motion for leave to file a supplemental complaint is GRANTED in part and DENIED in part.

The Clerk of Court is directed to close the motion at Docket Number 1098.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 4863094

Footnotes

1 The facts set forth in this section are taken from Plaintiffs' proposed Supplemental Complaint. (*See* Supp. Compl.) Because Defendant J.P. Morgan Chase Bank, N.A. partially opposes leave to supplement on futility grounds, "the allegations of the [proposed supplemental] pleading ... must be presumed true, and the Court must draw all reasonable inferences in the pleading party's favor" in deciding whether to grant leave to supplement. *Unique Sports Generation, Inc. v. LGH-III, LLC*, No. 03 Civ. 8324, 2005 WL 2414452, at *5 (S.D.N.Y. Sept. 30, 2005).

2 More specifically, these assets were blocked by the United States Treasury Department's Office of Foreign Assets Control ("OFAC"). *See Levin I*, 2011 WL 812032, at *1. "OFAC administers various sanctions against terrorists ... and state sponsors of terrorism ... by enforcing prohibitions on transactions and trades and/or blocking property or assets of ... terrorism-supporting countries...." (Supp. Compl. ¶ 34.)

3 Section 201(a) of TRIA provides:

> Notwithstanding any other provision of law, and except as provided in subsection (b), in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

TRIA, Pub. L. No. 107-297, § 201(a), 116 Stat. 2322, 2337 (2002) (codified at 28 U.S.C. § 1610 note).

4 Section 1610 of FSIA provides, in relevant part:

> (f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)),

section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

...

[(g)(1)] Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

28 U.S.C. § 1610.

5 Here, as in *Hausler*, "the bank[ ] at which the EFTs are blocked are in New York, so we look to New York property law" to "define the 'rights the judgment debtor has in the property the [creditor] seeks to reach.' " *Hausler v. JP Morgan Chase Bank, N.A.*, 770 F.3d 207, 212 (2d Cir. 2014) (second alteration in original) (quoting *Calderon-Cardona v. Bank of New York Mellon*, 770 F.3d 993, 1001 (2d Cir. 2014)).

6 According to Plaintiffs, a "correspondent bank" is a "bank 'that acts as an agent for another bank, or engages in an exchange of services with that bank, in a geographical area to which the other bank does not have direct access.' " (Dkt. No. 1104 at 8 (quoting *Bank, Black's Law Dictionary* (10th ed. 2014)).) *See also Sidwell & Co. v. Kamchatimpex*, 632 N.Y.S.2d 455, 457 (N.Y. Sup. Ct. 1995) ("[A] foreign financial institution ... that is unable to operate a branch or subsidiary office in the United States maintains a dollar account at a [correspondent bank], to effect US dollar transactions for itself and its customers.").

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ANNEX 350

751 Fed.Appx. 143
This case was not selected for publication in West's Federal Reporter.

United States Court of Appeals, Second Circuit.

Doctor Lucille LEVIN and Jeremy Levin, Plaintiffs—Third-Party Defendants — Cross-Defendants—Counter-Claimants—Counter-Defendants—Appellants,

v.

JPMORGAN CHASE BANK, N.A., Defendant—Third-Party Plaintiff—Third-Party Defendant—Counter-Defendant—Cross-Defendant—Counter-Claimant—Appellee.

17-3854-cv
|
October 9, 2018

Synopsis

Background: After obtaining judgment of more than $28 million against the Islamic Republic of Iran in connection with terrorist kidnapping, 529 F.Supp.2d 1, judgment creditors filed suit against bank in order to attach funds within the United States to satisfy the judgment, and subsequently moved for leave to file supplemental complaint seeking turnover of two accounts pursuant to the Terrorism Risk Insurance Act (TRIA) and the Foreign Sovereign Immunities Act (FSIA). The United States District Court for the Southern District of New York, J. Paul Oetken, J., 2017 WL 4863094, granted motion in part and denied it in part on grounds of futility. Judgment creditors appealed.

Holdings: The Court of Appeals held that:

[1] absent a federal definition of "property" in either FSIA or TRIA, the court would look to state law to define the rights that Iran had in the property that judgment creditors sought to reach, and

[2] under New York law, electronic funds transfer (EFT) that was blocked by bank in accordance with Iranian sanctions regulations was not "property" of a terrorist entity, a foreign state, or an agency or instrumentality of such a state, and thus was not attachable under FSIA or TRIA.

Affirmed.

West Headnotes (3)

[1] **Federal Courts** Execution and enforcement

Absent a federal definition of "property" in either the Foreign Sovereign Immunities Act (FSIA) or the Terrorism Risk Insurance Act (TRIA), court would look to state law to define the rights that foreign judgment debtor had in the property that judgment creditors sought to reach. 28 U.S.C.A. §§ 1610, 1610(g); Pub. L. No. 107-297, 116 Stat. 2322 (2002).

[2] **International Law** Terrorism and related activity

Under New York law, electronic funds transfer (EFT) that was blocked by New York bank in accordance with Iranian sanctions regulations promulgated by the Office of Foreign Assets Control (OFAC), which was not transferred directly to bank by terrorist entity, foreign state, or agency or instrumentality of foreign state, but by another bank, was not "property" of a terrorist entity, foreign state, or agency or instrumentality of such state, and thus was not attachable under the Foreign Sovereign

Immunities Act (FSIA) or the Terrorism Risk Insurance Act (TRIA). 28 U.S.C.A. §§ 1610, 1610(g); Pub. L. No. 107-297, 116 Stat. 2322 (2002); N.Y. Uniform Commercial Code § 4-A.

1 Cases that cite this headnote

[3] **International Law** ⇐ Terrorism and related activity

In determining whether, under New York law, electronic funds transfer (EFT) held by New York bank and blocked pursuant to sanctions regulations promulgated by the Office of Foreign Assets Control (OFAC) was property of a terrorist entity, foreign state, or agent or instrumentality of such state, so as to be attachable under the Foreign Sovereign Immunities Act (FSIA) or the Terrorism Risk Insurance Act (TRIA), the identity of the immediate transferor of the funds as an "intermediary bank" was irrelevant; in this context, the purported distinction between correspondent banks and intermediary banks was a distinction without a difference. 28 U.S.C.A. §§ 1610, 1610(g); Pub. L. No. 107-297, 116 Stat. 2322 (2002); N.Y. Uniform Commercial Code § 4-A.

1 Cases that cite this headnote

***145** Appeal from an October 27, 2017 judgment of the United States District Court for the Southern District of New York (Oetken, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Attorneys and Law Firms

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For Defendant-Appellee: Steven B. Feigenbaum, Levi Lubarsky Feigenbaum & Weiss LLP, New York, NY

Present: Richard C. Wesley, Debra Ann Livingston, Circuit Judges, Geoffrey W. Crawford, District Judge.*

SUMMARY ORDER

Lucille and Jeremy Levin ("the Levins") appeal from an October 27, 2017 order of the United States District Court for the Southern District of New York (Oetken, *J.*), which was certified as a final judgment under Federal Rule of Civil Procedure 54(b) on February 12, 2018, denying their motion for leave to file a supplemental complaint pursuant to Federal Rule of Civil Procedure 15(d). We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

* * *

The Levins hold an unsatisfied judgment against the Islamic Republic of Iran ("Iran") arising out of the 1984 kidnapping of Jeremy Levin in Beirut, Lebanon. On February 6, 2008, the United States District Court for the District of Columbia entered judgment in the amount of $28,807,719 in the Levins' lawsuit against Iran pursuant to § 1605(a)(7) of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602 et seq. ("FSIA").[1] *See Levin v. Islamic Republic of Iran*, 529 F.Supp.2d 1 (D.D.C. 2007). The Levins now seek to attach funds to satisfy that judgment.

On June 26, 2009, the Levins filed their initial complaint in the instant lawsuit, alleging that JPMorgan Chase Bank, N.A. ("JPMCB") possessed "assets blocked by the U.S. government due to the fact that Iran has an interest in them either directly or indirectly ('Iranian Blocked Assets')." App 183. A later round of discovery revealed the existence of two previously undisclosed Iranian Blocked Assets in JPMCB's possession: (1) a deposit account under the name of Lebanese businessman Kassim Tajideen (the "Tajideen Account") and (2) an account (the "Saderat Account") holding the proceeds of a wire transfer, also known as an electronic funds transfer (the "EFT"), that was blocked by JPMCB in accordance with Iranian sanctions regulations promulgated by the Office of Foreign Assets Control ("OFAC"). On July 12, 2017, the Levins sought leave under Fed. R. Civ. P. 15(d) to file a supplemental complaint seeking turnover of the Tajideen Account and the Saderat Account pursuant to § 201(a) of the Terrorism Risk Insurance ***146** Act of 2002

("TRIA")[2] and §§ 1610(f)(1)(A) and (g)(1) of the FSIA.[3]

JPMCB did not oppose the Levins' motion with respect to the Tajideen Account. With respect to the Saderat Account, however, the parties differed. The Levins argued that the Saderat Account was attachable because the funds belonged to an "agency or instrumentality" of Iran—Bank Saderat, an Iranian bank based in Tehran ("Saderat").[4] JPMCB argued that Saderat lacked title to the funds because the immediate transferor of the funds to JPMCB was not Saderat but Lloyds Bank Plc ("Lloyds"), a U.K. bank headquartered in London that transferred the funds in its capacity as Saderat's correspondent bank.

The district court granted the Levins' motion to supplement their complaint with respect to the Tajideen Account but denied the motion with respect to the Saderat Account. With respect to the Saderat Account, the court concluded that supplementation of the complaint would be futile under *Calderon-Cardona v. Bank of New York Mellon*, 770 F.3d 993 (2d Cir. 2014), and *Hausler v. JP Morgan Chase Bank, N.A.*, 770 F.3d 207 (2d Cir. 2014). The court quoted *Hausler* for the proposition that "in order for an EFT to be a blocked asset of [a terrorist state] under TRIA § 201(a), either [the terrorist state] itself or an agency or instrumentality thereof (such as a state-owned financial institution) [must have] transmitted the EFT *directly* to the bank where the EFT is held pursuant to the block." *Levin v. Bank of New York Mellon*, No. 09-CV-5900 (JPO), 2017 WL 4863094, at *4 (S.D.N.Y. Oct. 27, 2017) (quoting *Hausler*, 770 F.3d at 212 (emphasis and brackets in original)). Because the blocked EFT in question was transmitted to JPMCB directly by Lloyds, rather than Saderat, the EFT constituted property of Lloyds and could not be attached under TRIA or FSIA. *Id.*

***147**

* * *

We review the district court's holding *de novo*. A district court's denial of leave to amend or supplement a complaint is generally reviewed for abuse of discretion. *See, e.g.*, *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007). However, "[w]hen the denial of leave to amend is based on a legal interpretation, such as a determination that amendment would be futile, a reviewing court conducts a *de novo* review." *Hutchison v. Deutsche Bank Sec. Inc.*, 647 F.3d 479, 490 (2d Cir. 2011); *see also Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 592 (2d Cir. 2007) (reviewing *de novo* a district court's denial of leave to amend on grounds of futility). Because the district court denied the Levins' motion to amend their complaint on grounds of futility, we review that decision *de novo*.

Whether the Levins may attach the Saderat Account to satisfy their judgment against Iran turns on the issue of ownership of those funds. *See* FSIA § 1610(g)(1) (authorizing attachment of "the *property of* a foreign state against which a judgment is entered under section 1605A, and the *property of* an agency or instrumentality of such a state" (emphasis added)); TRIA § 201(a) ("the *blocked assets of* [a] terrorist party (including the *blocked assets of* any agency or instrumentality of that terrorist party)" (emphasis added)); FSIA § 1610(f)(1)(A) ("any *property* with respect to which financial transactions are prohibited or regulated" (emphasis added)). *See also Calderon-Cardona*, 770 F.3d at 1000 ("Whether attachment of [ ] EFTs under § 1610(g) is possible turns ... on whether the blocked EFTs at issue are 'property of' [a foreign state or its agency or instrumentality].").

[1] [2]Ownership of property is generally a question of state law. In *Calderon-Cardona*, we noted that "Congress has not defined the type of property interests that may be subject to attachment under FSIA § 1610(g)." *Id.* at 1001; *see also Hausler*, 770 F.3d at 211 (observing the same with regard to TRIA § 201(a)). Absent a federal definition of "property" in either FSIA or TRIA, we apply the "general rule in this Circuit that when Congress has not created any new property rights, but 'merely attaches consequences, federally defined, to rights created under state law,' we must look to state law to define the 'rights the [judgment debtor] has in the property the [creditor] seeks to reach.' " *Calderon-Cardona*, 770 F.3d at 1001 (quoting *Export-Import Bank v. Asia Pulp & Paper Co.*, 609 F.3d 111, 117 (2d Cir. 2010) (brackets in original)). The relevant state law governing EFTs blocked by New York banks is Article 4 of the New York Uniform Commercial Code ("N.Y. UCC"). *See* N.Y. UCC § 4-A; *Asia Pulp*, 609 F.3d at 118 (Article 4-A was "enacted to provide a comprehensive body of law that defines the rights and obligations that arise from wire transfers." (internal quotation marks omitted)).

The application of N.Y. UCC Article 4 to EFTs has received extensive consideration in this Circuit. In *Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58 (2d Cir. 2009), we determined that under New York law "EFTs are neither the property of the originator nor the beneficiary while briefly in the possession of an intermediary bank." *Id.* at 71. Subsequently, both *Calderon-Cardona* and *Hausler* addressed this issue with particular clarity. In *Calderon-Cardona*, we observed that "under the N.Y. UCC's statutory scheme, the only entity with a property interest in an EFT while it is midstream is the entity

immediately preceding the bank 'holding' the EFT in the transaction chain." Therefore, *Calderon-Cardona* held:

> "[A]n EFT blocked midstream is 'property of a foreign state' or 'the property ***148** of an agency or instrumentality of such a state,' subject to attachment under 28 U.S.C. § 1610(g), *only* where either the state itself or an agency or instrumentality thereof (such as a state-owned financial institution) transmitted the EFT *directly* to the bank where the EFT is held pursuant to the block."

Calderon-Cardona, 770 F.3d at 1002 (emphasis added). *Hausler* then further extended *Calderon-Cardona*'s holding to the TRIA context. In *Hausler*, we held that "in order for an EFT to be a 'blocked asset of' Cuba under TRIA § 201(a), either Cuba 'itself or an agency or instrumentality thereof (such as a state-owned financial institution) [must have] transmitted the EFT *directly* to the bank where the EFT is held pursuant to the block." *Hausler*, 770 F.3d at 212 (quoting *Calderon-Cardona*, 770 F.3d at 1002) (emphasis added) (brackets in original).

The Saderat Account falls squarely within the holding of these cases. Here, as in *Hausler*, "it is undisputed that no [terrorist entity] transmitted any of the blocked EFTs in this case directly to a blocking bank." *Id.* Instead, the Saderat Account funds were transmitted directly to JPMCB by Lloyds Bank. The Levins nowhere assert that Lloyds constitutes an "agency or instrumentality" of Iran. Because the EFT was not transferred directly to JPMCB by a foreign state or an agency or instrumentality of a foreign state, it was not "property of" a foreign state or an agency or instrumentality of such a state, and thus not attachable under FSIA or TRIA.

On appeal, the Levins principally contend that ownership of the Saderat Account at the time of blocking is a disputed question of fact and that the district court should have allowed supplementation of their complaint in order to proceed to discovery on that question. We disagree. New York's law of property—as applied to the context of EFTs blocked pursuant to OFAC sanctions—has been established by *Calderon-Cardona* and *Hausler*. Under those cases, ownership of an EFT blocked by a New York bank depends entirely on the identity of the immediate transferor to that bank. *See Calderon-Cardona*, 770 F.3d at 1002 (permitting attachment "*only* where either the state itself or an agency or instrumentality thereof ... transmitted the EFT *directly* to the bank where the EFT is held pursuant to the block") (emphasis added); *Hausler*, 770 F.3d at 212 (same). In this case, the identity of the immediate transferor—Lloyds Bank—is undisputed. Since neither party contends that Lloyds Bank is an agency or instrumentality of Iran itself, the EFT is not attachable.

[3]Nor can we diverge from that result based on the Levins' purported distinction between the "intermediary bank" at issue in *Calderon-Cardona* and *Hausler* and the "correspondent bank" relationship at issue here. To begin with, many authorities apparently consider these categories indistinct. *See, e.g.*, *Sec. & Exch. Comm'n v. Homa*, 514 F.3d 661, 668 n.15 (7th Cir. 2008) ("A correspondent bank is an intermediary bank that a primary bank uses to facilitate currency transactions in the country in which the intermediary bank is located."). More importantly, however, our precedents interpreting N.Y. UCC Article 4 render the asserted distinction irrelevant. As the district court properly held, the purported distinction between correspondent and intermediary banks "is a distinction without a difference, at least as it relates to the Second Circuit's rule in *Hausler*." *Levin*, 2017 WL 4863094, at *4. Regardless of the particular relationship between the immediate transferor of the funds and the entity that held title to those funds at the beginning of the transaction, the ownership of blocked EFT ***149** funds is clearly assigned by *Calderon-Cardona* and *Hausler*. "[E]ven where an EFT is transferred to a blocking bank by a 'correspondent bank,' the transferred asset is considered the 'sole property' of the correspondent bank, rather than the 'principal' bank (i.e., Bank Saderat)." *Id.* (citing *Doe v. Ejercito De Liberacion Nacional*, No. 15 Civ. 8652-LTS, 2017 WL 591193, at *1-3 (S.D.N.Y. Feb. 14, 2017), *aff'd*, 899 F.3d 152 (2d Cir. 2018)).

Finally, we note that our circuit's recent opinion in *Doe v. JPMorgan Chase Bank, N.A.*, 899 F.3d 152 (2d Cir. 2018), further bolsters our conclusion that the funds blocked by JPMCB are not attachable. In *Doe*, a terrorist entity, Tajco Ltd. ("Tajco"), originated an EFT that flowed to an intermediary bank, AHLI United Bank UK PLC ("AHLI"), which then transmitted the funds to JPMCB, which then blocked the funds. *Id.* at 155. That sequence of events is highly analogous to the one at issue here, with Tajco taking the place of Iran, AHLI taking the place of Lloyds, and JPMCB playing the same role. *Doe* applied *Calderon-Cardona* and *Hausler* in upholding the district court's ruling that the funds were not attachable. *See id.* at 157 ("[O]ur decisions in *Calderon-Cardona* and *Hausler* compel the conclusion that neither Grand Stores nor Tajco has any attachable property interest in the blocked funds at JPMorgan since they were not the entities that directly passed the EFTs to JPMorgan."). We do the same.

* * *

We have considered the Levins' remaining arguments and find them to be without merit. Accordingly, we **AFFIRM**

the judgment of the district court. 751 Fed.Appx. 143

All Citations

Footnotes

† The Clerk of Court is respectfully instructed to amend the caption as set forth above.

* Chief Judge Geoffrey W. Crawford, of the United States District Court for the District of Vermont, sitting by designation.

1 Section 1605(a)(7) has since been repealed and replaced. Pub. L. No. 110-181, Div. A., § 1083(b)(1)(A)(iii), 122 Stat. 341 (2008). The new provision, 28 U.S.C. § 1605A, now provides an exception to the general immunity from suit of foreign governments where "the foreign state [has been] designated as a state sponsor of terrorism" by the U.S. Department of State. § 1605A(a)(2)(A)(i)(I).

2 Section 201(a) of the TRIA provides:

> Notwithstanding any other provision of law, and except as provided in subsection (b), in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

TRIA, Pub. L. No. 107-297, 116 Stat. 2322 (2002) (reprinted following 28 U.S.C. § 1610).

3 Section 1610 of FSIA provides, in pertinent part:

> (f)(1)(A) Notwithstanding any other provision of law ... any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality of such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.
>
> ...
>
> [(g)(1)] Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section....

28 U.S.C. § 1610.

4 Both parties agree, for the purposes of this appeal, that Saderat qualifies as an "agency or instrumentality" of Iran.

End of Document

ANNEX 351

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ESTATE OF MICHAEL HEISER, *et al.*, Plaintiffs, v. ISLAMIC REPUBLIC OF IRAN, *et al.*, Defendants.	Civil Action No. 00-2329 (RCL)
	Consolidated With
ESTATE OF MILLARD D. CAMPBELL, *et al.*, Plaintiffs, v. ISLAMIC REPUBLIC OF IRAN, *et al.*, Defendants.	Civil Action No. 01-2104 (RCL)

STATEMENT OF INTEREST OF THE UNITED STATES

The United States of America, by and through the undersigned counsel, respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517[1] and in response to the Court's order of May 30, 2012, Dkt. No. 226.

Plaintiffs obtained a default judgment against Iran that they are attempting to satisfy by attaching assets held in blocked accounts at Bank of America and Wells Fargo ("Garnishee

[1] Title 28, Section 517 of the United States Code provides that "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

Banks"). *See* Pls.' Mot. for J. against Garnishees ("Pls.' Mot."), Dkt. No. 206, filed Nov. 21, 2011, at 3-4. These assets include proceeds from electronic funds transfers ("EFTs") and other assets that were blocked under regulations of the U.S. Department of the Treasury, Office of Foreign Asset Control ("OFAC"). *Id*. 10-13. Plaintiffs contend that these blocked assets are subject to attachment under Section 201(a) of the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, 116 Stat. 2322 (codified at 28 U.S.C. § 1610 note), and a provision of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1610(g)(1), on the theory that Iran or one of its agencies or instrumentalities has an interest of some sort in all of these assets. *See, e.g.*, Pls.' Mot. at 8; Pls.' Reply in Further Supp. of Mot. for J. ("Pls.' Reply"), Dkt. No. 220, filed Jan. 17, 2012, at 10. Garnishee Banks have opposed some of these attempted attachments, arguing that property can only be attached under TRIA Section 201(a) or FSIA Section 1610(g)(1) if the judgment debtor has an ownership interest in that property. *See* Garnishee Banks' Counter-Mot. for J., Dkt. No. 212, filed Dec. 16, 2011, at 13, 15, 36, 41.

Plaintiffs and Garnishee Banks have filed cross-motions on these issues. *Id*.; Pls.' Mot., Dkt. No. 206. Before ruling on these motions, the Court has invited the United States to submit its views regarding three questions:

1. Whether TRIA Section 201(a) requires that the judgment debtor "terrorist party" have an ownership interest in the property targeted for attachment or execution;

2. Whether FSIA Section 1610(g)(1) requires that the judgment debtor "foreign state" have an ownership interest in the property targeted for attachment or execution;

3. Whether the property interests subject to attachment or execution under TRIA Section 201(a) are the same as the property interests subject to attachment or execution under FSIA Section 1610(g).

Order, Dkt. No. 226, filed May 30, 2012.

As further explained below, the United States' view is that both TRIA Section 201(a) and FSIA Section 1610(g)(1) require that the judgment debtor have an ownership interest in the

property targeted for attachment or execution. But the assets subject to attachment or execution under TRIA Section 201(a) and under FSIA Section 1610(g) are not entirely the same, at least insofar as TRIA Section 201(a) applies only to blocked assets whereas FSIA Section 1610(g) is not limited in that respect.

INTEREST OF THE UNITED STATES

The United States emphatically condemns the act of terrorism underlying this case and has deep sympathy for Plaintiffs' suffering. The United States remains committed to disrupting terrorist financing and to aggressively pursuing those responsible for committing terrorist acts against U.S. nationals. The United States, however, also has a strong interest in ensuring that courts properly interpret TRIA's and FSIA's scopes. Normally, unless a person obtains a license from OFAC, that person is barred from attaching assets that are blocked under various sanctions programs. *See, e.g.*, 31 C.F.R. §§ 535.201, 535.310 (Iranian Assets Control Regulations) (requiring a license for attachment); *id.* §§ 515.201, 515.310 (Cuban Assets Control Regulations ("CACR")) (same); *id.* §§ 594.201, 594.312 (Global Terrorism Sanction Regulations ("GTSR")) (same). This licensing system lets the Executive Branch exercise control over access to blocked assets in order to effectuate the United States' broad policy interests. But when a blocked asset comes within TRIA's scope, TRIA generally overrides OFAC's regulations requiring that a license be obtained before the asset is attached. Accordingly, any judicial application of TRIA has important consequences for the Executive Branch's implementation of sanctions regimes in the public interest. Moreover, because TRIA and FSIA affect foreign states and entities with assets subject to United States jurisdiction, judicial interpretations of TRIA and FSIA can have important consequences for foreign policy.

STATUTORY BACKGROUND

A. TRIA

In 2002, Congress passed TRIA, which governs post-judgment attachment proceedings in certain cases arising out of terrorist acts. TRIA Section 201(a) provides:

> Notwithstanding any other provision of law . . . , in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under [28 U.S.C. § 1605(a)(7) (2000)], the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

TRIA § 201(a). TRIA defines the term "blocked asset" to mean "any asset seized or frozen by the United States" under Sections 202 and 203 of International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701 *et seq*,[2] or Section 5(b) of the Trading with the Enemy Act ("TWEA"), 50 U.S.C. app. § 1 *et seq*.[3] TRIA § 201(d)(2)(A).[4]

Through Section 201(a), TRIA permits attachment of property in certain cases where attachment might otherwise have been precluded by principles of sovereign immunity under FSIA, at least prior to FSIA's amendment in 2008. *See Bennett v. Islamic Republic of Iran*, 618 F.3d 19, 21 (D.C. Cir. 2010); *Weininger v. Castro*, 462 F. Supp. 2d 457, 483-89 (S.D.N.Y.

[2] IEEPA confers "broad and flexible power upon the President to impose and enforce economic sanctions against nations that the President deems a threat to national security interests." *United States v. McKeeve,* 131 F.3d 1, 10 (1st Cir. 1997). OFAC administers sanctions imposed under the statute.

[3] TWEA, first enacted in 1917, authorizes the President in certain conditions to impose embargoes on foreign nations. *See generally Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dep't of the Treasury*, 638 F.3d 794, 795-96 (D.C. Cir. 2011).

[4] TRIA excludes from the definition of "blocked asset" any property "subject to a license" issued by the United States "for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States," if the license was required by a statute other than IEEPA or the United Nations Participation Act of 1945. *See* TRIA § 201(d)(2)(B)(i). Certain categories of diplomatic property are also excluded. *See id.* § 201(d)(2)(B)(ii).

2006). It also permits terrorism victims to attach blocked assets by allowing them to bypass the usual requirement that a litigant first obtain a license from OFAC. *See, e.g.*, 31 C.F.R. §§ 515.201, 515.310 (CACR) (requiring a license for attachment); *id.* §§ 535.201, 535.310 (Iran Assets Control Regulations) (same); *id.* §§ 594.201, 594.312 (GTSR) (same).

B. FSIA

Under FSIA, a "foreign state" is "immune from the jurisdiction" of federal and state courts except as provided by certain international agreements, and by the exceptions to immunity in 28 U.S.C. §§ 1605-1607. *See* 28 U.S.C. § 1604. As originally enacted in 1976, FSIA did not contain any exception to a foreign state's immunity from suit in cases involving terrorism. *See* Pub. L. No. 94-583, 90 Stat. 2891 (1976). In 1996, Congress amended FSIA to include the so-called "terrorism exception" to sovereign immunity, which was codified at 28 U.S.C. § 1605(a)(7). *See* Pub. L. No. 104-132, § 221(a)(1)(C), 110 Stat. 1214, 1241. Under the terrorism exception, a foreign state lost its immunity in certain terrorism-related lawsuits if the Secretary of State designated it as a state sponsor of terrorism. 28 U.S.C. § 1605(a)(7).

Congress further amended FSIA in 2008, repealing Section 1605(a)(7) and adding Section 1605A, which, like Section 1605(a)(7), abrogates foreign states' sovereign immunity in cases involving terrorist acts. *See* National Defense Authorization Act for Fiscal Year 2008 ("NDAA"), Pub. L. No. 110-181, § 1083(a), (b)(1)(A)(iii), 122 Stat. 3, 338-41. Section 1605A also expressly creates a private right of action for U.S. citizens injured by state sponsors of terrorism and by the agents of such a state. 28 U.S.C. § 1605A(c).

As part of these 2008 amendments, Congress also enacted a new provision related to attachment for plaintiffs who hold a Section 1605A judgment against a foreign state. Pub. L. No.

110-181, § 1083(b)(3)(D), 122 Stat. 341-42. Under this new provision, codified at 28 U.S.C. § 1610(g)(1):

> [T]he property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, upon that judgment as provided in this section, regardless of –
>
> (A) the level of economic control over the property by the government of the foreign state;
>
> (B) whether the profits of the property go to that government;
>
> (C) the degree to which officials of that government manage that property or otherwise control its daily affairs;
>
> (D) whether that government is the sole beneficiary in interest of the property; or
>
> (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

This provision is made subject to 28 U.S.C. § 1610(g)(3), which provides:

> Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid or execution, or execution, upon such judgment.

DISCUSSION

I. TRIA Authorizes Attachment Only of Property in Which a Terrorist Party Has an Ownership Interest.

TRIA provides that "[n]otwithstanding any other provision of law," a victim of terrorism who has obtained a judgment against a terrorist party may attach "the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)." TRIA § 201(a). Thus, to attach assets under TRIA, a plaintiff must demonstrate that the assets are "of" the terrorist party and are "blocked" under a TWEA or IEEPA sanctions program. It is not sufficient under TRIA to show only that the assets are subject to an OFAC regulation

blocking all property in which the terrorist party has "any interest of any nature whatsoever," *e.g.*, 31 C.F.R. § 535.201 (Iranian Assets Control Regulations).

The language of TRIA Section 201(a) does not extend as broadly as the language of OFAC's blocking regulations, which existed before Congress enacted TRIA. TRIA states that a victim of terrorism who has obtained a judgment against a terrorist party may attach "the blocked assets *of* that terrorist party (including the blocked assets *of* any agency of instrumentality of that terrorist party.)" TRIA § 201(a) (emphases added). TRIA does not employ the more expansive terms used in many OFAC sanction programs. *See, e.g.*, 31 C.F.R. § 515.201 (CACR, which apply to property in which Cuba or a Cuban national has "any interest of any nature whatsoever"); *id.* §§ 538.201, 538.307 (Sudan sanctions, which apply to property in which the Sudanese government has "an interest of any nature whatsoever); *id.* §§ 594.201, 594.306 (blocking property in which various specially designated terrorists have "an interest of any nature whatsoever"). When it enacted TRIA, Congress was presumably aware of the more expansive language used in such regulations, *see, e.g., McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1076 (D.C. Cir. 2012) (holding that the court must assume "that Congress was aware of all pertinent legal developments when it drafted the FSIA"), and a court should not effectively amend the statute to incorporate the broader language that Congress chose not to employ.

Case law in a variety of contexts supports the conclusion that assets "of" Iran are a narrower category than assets in which Iran has "any interest of any nature whatsoever." The Supreme Court has repeatedly observed that the "'use of the word "of" denotes ownership.'" *Bd. of Trs. of the Leland Stanford Jr. Univ. v. Roche Molecular Sys.*, 131 S. Ct. 2188, 2196 (2011) (quoting *Poe v. Seaborn*, 282 U.S. 101, 109 (1930)); *see also id.* (describing *Flores-Figueroa v.*

United States, 556 U.S. 646, 648, 657 (2009), as treating the phrase "identification [papers] of another person" as meaning such items belonging to another person (internal quotation marks omitted)); *Ellis v. United States*, 206 U.S. 246, 259 (1907) (interpreting the phrase "works of the United States" to mean "works belonging to the United States" (internal quotation marks omitted)). Applying that understanding in interpreting a disputed provision of patent law, the Court in *Stanford* concluded that "invention of the contractor" is naturally read to mean "invention owned by the contractor" or "invention belonging to the contractor." 131 S. Ct. at 2196.

In contrast, in *United States v. Rodgers*, the Court held that the IRS could execute against property in which a tax delinquent had only a partial interest, but the relevant statute permitted execution with respect not only to "any property, of whatever nature, *of* the delinquent," but also to property "*in which* he has *any* right, title, or interest." 461 U.S. 677, 692-94 (1983) (quoting 26 U.S.C. § 7403(a) (emphases added)). In so holding, the Court found important that the statute at issue included this broader second clause. *Id.* TRIA does not include any such additional phrase, and instead applies only to the blocked assets "of" a terrorist party. *See* TRIA § 201(a).

Reading TRIA to allow attachment of all blocked assets would expand the statute well beyond common law principles regarding execution of a judgment against property in the possession of a third party. As both the majority and the dissent recognized in *Rodgers*, it "is basic in the common law that a lienholder enjoys rights in property no greater than those of the debtor himself; . . . the lienholder does no more than step into the debtor's shoes." *Rodgers*, 461 U.S. at 713 (Blackmun, J., concurring in part and dissenting in part); *see also id.* at 702 (majority op.) (implicitly agreeing with this description of the traditional common law rule); 50 C.J.S. Judgments § 787 (2012) ("A judgment lien attaches only to the judgment debtor's interest . . . .

Stated another way, a judgment creditor cannot acquire more property rights in a property than those already held by the judgment debtor." (citations omitted)). Congress enacted TRIA against the background of these principles, and the legislation should be interpreted to be consistent with these common-law precepts. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107-10 (1991); *see also United States v. Pacheco*, 225 F.3d 148, 157 (2d Cir. 2000) ("Congress will be presumed to have legislated against the background of our traditional legal concepts. . . ." (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978))). Interpreting TRIA to allow attachment of all blocked assets runs against these principles because it would let a judgment creditor attach an entire asset, and not just the judgment debtor's interest.

Finally, such a broad reading does little to advance TRIA's aim of punishing terrorist entities or deterring future terrorism and is thus in tension with its legislative history. As Senator Harkin observed, "making the state sponsors [of terrorism] actually lose" money will be a particularly effective deterrent against future terrorist acts. 148 Cong. Rec. S11,527 (daily ed. Nov. 19, 2002) (statement of Sen. Harkin). Yet paying judgments from assets that are *not* owned by the terrorist party does not impose a similar cost on the terrorist party. It does, however, impose a heavy cost on non-terrorist property owners – and not a cost that Congress demonstrably chose to impose.

The United States notes that such arguments were rejected by the district court in *Hausler v. JP Morgan Chase Bank, N.A.* ("*Hausler I*"), 740 F. Supp. 2d 525, 529-41 (S.D.N.Y 2010) and *Hausler v. JP Morgan Chase Bank, N.A.* ("*Hausler II*"), --- F. Supp. 2d ---, No. 09 Civ 10289, 2012 WL 601034, at *5-10 (S.D.N.Y Feb. 22, 2012), *appeal docketed*, Nos. 12-1264 & 1272 (2d Cir.).[5] For reasons discussed here, however, the analysis in *Hausler* cannot be squared with

[5] *Accord Levin v. Bank of New York*, No. 09 Civ 5900, 2011 WL 812032, at *14-17 (S.D.N.Y. Mar. 4, 2011).

TRIA's language, and a recent decision from the Southern District of New York correctly rejected *Hauler*'s reasoning. *See Calderon-Cardona v. JP Morgan Chase Bank, N.A.*, --- F. Supp. 2d ---, No. 11 Civ. 3283, 2011 WL 6155987, at *8-14 (S.D.N.Y. Dec. 7, 2011), *appeal docketed*, No. 12-75 (2d Cir.).

In its initial opinion, the *Hausler* district court provided no explanation why, if its reading of TRIA were correct, Congress had used the narrow phrase "blocked assets of that terrorist party" in Section 201(a), and not the broader (and simpler) phrase "blocked assets." *See Hausler I*, 740 F. Supp. 2d at 533. In its subsequent ruling on the turnover petitions, responding to criticism of its analysis by the court in *Calderon-Cardona*, *see* 2011 WL 6155987, at *13, the *Hausler* court suggested that TRIA refers to assets "of that terrorist party" merely to clarify that a plaintiff can attach only assets that are blocked under "the particular regulation or administrative action directed at the particular . . . judgment debtor." *See Hausler II*, 2012 WL 601034, at *9. In other words, the *Hausler* district court opined that Congress used narrower language in TRIA than in OFAC's blocking regulations so as to establish that a particular judgment creditor can pursue only assets blocked under a sanctions scheme targeting that terrorist party and cannot pursue assets blocked under sanctions targeting another terrorist party. *See id*.

But this is an unpersuasive reading of the language that Congress employed, which, as discussed above, both intrinsically and as interpreted by prior case law (in other contexts) connotes an ownership interest held by whomever that the asset in question is "of." Moreover, the *Hausler* district court's reading also is implausible because there is no reason to believe that Congress saw any need to specify so obvious a proposition, *i.e.*, that terror victims with judgments against terrorist parties could look for relief to assets blocked by a sanctions regime but only if that sanctions regime as a whole targets the relevant terrorist nation or parties. And,

even if Congress could have believed it necessary to specify that TRIA was authorizing terrorism victims to collect only from funds blocked under sanctions regulations that relate to the responsible sanctioned nation or parties, TRIA should not be so interpreted because its language serves this supposed purpose obliquely if at all, and because a far more natural reading is that TRIA applies to assets in which the judgment debtor terrorist party has an ownership interest. At bottom, the *Hausler* court implausibly equated assets "of that terrorist party" with assets "blocked under the sanctions regime associated with that terrorist party."

The *Hausler* court's interpretation also misapprehends how sanctions regimes function. Some blocking regimes, such as those relating to Cuba, apply not just to a terrorist country itself, but also to any national of that country. *See, e.g.*, 31 C.F.R. § 515.201 (CACR). That assets of foreign nationals are subject to a blocking regulation directed at a particular country does not necessarily make those assets the property of that country. Moreover, some blocking regimes are not directed at an individual terrorist entity, and are instead directed at certain categories of terrorist entities – many of which have nothing to do with each other. For instance, hundreds of different terrorist entities and individuals have their assets blocked under Executive Order 13,224, which targets terrorists across the globe. *See* Global Terrorism Sanctions Regulations, 68 Fed. Reg. 34,196 (June 6, 2003); OFAC, *Terrorism: What You Need To Know About U.S. Sanctions* (hereinafter "*Terrorism*"), *available at* http://www.treasury.gov/resource-center/sanctions/Programs/Documents/terror.pdf, at 2-24 (last updated July 17, 2012). Entities currently blocked under this program include such diverse groups as the FARC (a Colombian narco-terrorist organization, *see Tamara-Gomez v. Gonzales*, 447 F.3d 343, 345 (5th Cir. 2006)), the Tamil Tigers (a violent Sri Lankan rebel group, *see Don v. Gonzales*, 476 F.3d 738, 739 (9th Cir. 2007)), and al-Qaida. *Terrorism* at 2, 54. The *Hausler* district court's logic would suggest

that an individual with a judgment against one of these entities would be able to attach assets wholly owned by an entirely separate group, half a world away, whose only connection is that both have their assets blocked under the same broad sanctions regime. The unlikeliness that Congress intended such a result in enacting TRIA counsels against the *Hausler* district court's interpretation.

While these considerations alone are dispositive, the United States notes that the *Hausler* district court further erred by mischaracterizing the relationship between OFAC sanctions regimes and existing sources of property law, and based on that overbroad understanding concluded that TRIA's reference to OFAC's sanctions had preemptive effect over concepts of state property law. *See Hausler I*, 740 F. Supp. 2d at 530-32. While the United States takes no position here on TRIA's preemptive force, we note that neither TRIA nor OFAC's regulations attempt to define whether particular assets are "of" or "owned by" a terrorist party. Accordingly, neither the statutory text nor the regulations support the district court's assertion that TRIA somehow itself opens up attachment more broadly than to blocked assets "of" a terrorist party. Instead, while OFAC's regulations contain definitions for terms like "property" and "interest," *see, e.g.*, 31 C.F.R. §§ 515.311, 515.312; *id.* §§ 535.311, 535.312, the purpose of those definitions is to explain the kinds of assets that come within OFAC's various blocking regulations – regulations that extend beyond assets owned by the relevant sanctions target. *See, e.g.*, *id*. § 515.201 (barring transactions in "property" in which Cuba or one of its nationals has had an "interest"); *id*. § 535.201 (barring transactions in "property" in which Iran has an "interest"). These provisions serve purposes unrelated to TRIA's attachment authorization, and so are not a logical source to draw upon in determining how TRIA Section 201 is to operate.

Finally, the *Hausler* district court mistakenly believed that its conclusions were needed to ensure that the success of a TRIA execution did not depend on which state happened to be the forum in an attachment proceeding. *Hausler II*, 2012 WL 601034, at *6. If TRIA did preempt state law in any respect, and if such uniformity were a concern, courts could achieve the desired uniformity through the development of federal common law or its functional equivalent to govern attachment, without disregarding common law norms of attachment and execution, and without misconstruing TRIA's language as calling for an expansion of collection remedies to the outer bounds of whatever property is blocked under the relevant IEEPA or TWEA program. *See, e.g.*, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998) (where Congress instructed that Title VII was to incorporate principles of agency yet uniform standards were needed, "a uniform and predictable standard must be established as a matter of federal law"); *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989) (in construing federal statute that uses common law terms, court relied on "general common law of agency, rather than on the law of any particular state"). There is no need – and no justifiable basis – to force OFAC's regulations into serving a role they were not intended to perform.

II. FSIA Authorizes Attachment Only of Property in Which a Foreign State Has an Ownership Interest.

When a plaintiff has satisfied the requirements of FSIA Section 1610(a) or Section 1610(b), FSIA Section 1610(g)(1) permits that plaintiff to attach "the property *of* a foreign state against which a judgment is entered under section 1605A, and the property *of* an agency or instrumentality of such a state." 28 U.S.C. § 1610(g)(1) (emphases added). Thus, as under TRIA, to rely on Section 1610(g)(1), a plaintiff must first demonstrate that the targeted assets are "of" that foreign state.

As explained above, Supreme Court decisions indicate that the word "of" in this context denotes ownership, and accordingly FSIA only reaches property interests actually owned by the judgment debtor foreign state. If Congress had wanted to reach all interests of any nature in property, it would have used broader language, such as that in the OFAC regulations. *See, e.g.*, 31 C.F.R. § 535.201 (applying to property in which "Iran has any interest of any nature whatsoever"). Likewise, as with TRIA, restricting FSIA's application to property owned by a foreign state is consistent with common law principles, which direct that a party cannot attach an interest in property greater than that possessed by the judgment debtor. And, as with TRIA, allowing terrorism victims to satisfy their judgment debts against a foreign state by attaching the property owned by third parties would do nothing to punish that foreign state or deter terrorism, but would impose a heavy cost on non-terrorist property owners.

Interpreting Section 1610(g)(1) to require ownership also accords with its legislative history. The NDAA Conference Committee Report explained that Section 1610(g)(1) was intended to permit the attachment of any property "in which the foreign state has a *beneficial ownership*." H.R. Rep. No. 110-477, at 1001 (2007) (Conf. Rep.) (emphasis added); *see also id.* ("[T]he provision is written to subject any property interest in which the foreign statue enjoys a *beneficial ownership* to attachment and execution." (emphasis added)).[6] Nothing in this Report remotely suggests that Section 1610(g)(1) was intended to apply to any property in which the foreign state has any interest of any nature.

[6] In the securities context, beneficial ownership generally refers to "a corporate shareholder's power to buy or sell the shares, though the shareholder is not registered on the corporation's books as the owner." *Black's Law Dictionary* (9th ed. 2009) (definition of "ownership"). *See also* 17 C.F.R. § 240.13d-3(a) (defining "beneficial owner" of a security to include anyone with voting or investment power over the security.). Thus, the Conference Report likely states that Section 1610(g)(1) allows attachment when the foreign state at issue has a "beneficial ownership" – as opposed to just an "ownership" – to make clear that Section 1610(g)(1) applies when the foreign state owns the property indirectly through an agency or instrumentality, an aspect of Section 1610(g)(1) not otherwise discussed in the Conference Committee Report.

The language of Section 1610(g)(1) reflects a congressional intent to reach property of the foreign state, regardless of *how* it is owned, but not to reach beyond the foreign state's property to property in which it does not have an ownership interest. Section 1610(g)(1) permits a plaintiff who has satisfied the requirements of Section 1610(a) or Section 1610(b) to attach property of an agency or instrumentality of a foreign state, "including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity." Some might argue that this means that any property in which the foreign state has any interest of any nature can be attached, but that is not what Section 1610(g)(1) says. These "interests," rather, are a subset of "the property of an agency or instrumentality of [the foreign] state" – which, as described above, indicates ownership. FSIA, moreover, defines an "agency or instrumentality" of a foreign state, *inter alia*, as an entity "a majority of whose shares or other *ownership interest* is owned by a foreign state or political subdivision thereof." 28 U.S.C. § 1603(b)(2) (emphasis added). Thus, Section 1610(g)(1)'s reference to property "interests" of a foreign state, agency, or instrumentality is a reference to such ownership interests.

Indeed, rather than seeking to expand attachment beyond ownership interests, Congress likely included this reference to "interests held directly or indirectly" in Section 1610(g)(1) to overcome the barrier to attachment created by *Dole Food Company v. Patrickson*, 538 U.S. 468 (2003). *See Calderon-Cardona*, 2011 WL 6155987, at *15 (noting that, by using this language, "Congress likely sought to overcome the effect of *Dole Food Company*"). In *Dole Food Company*, decided before the 2008 amendments that added Section 1610(g)(1), the Supreme Court held that FSIA required formal ownership, and accordingly that a corporation was not an instrumentality of a foreign state if the state owned the corporation informally or indirectly via intermediaries. 538 U.S. at 475-77. "Where Congress intends to refer to ownership in other than

the formal sense, it knows how to do so. Various federal statues refer to 'direct and indirect ownership.' . . . The absence of this language . . . instructs us that Congress did not intend to disregard structural ownership rules." *Id*. at 476. Thus, Congress appears to have responded to this admonition in Section 1610(g)(1) by explicitly stating that property interests "held directly or indirectly in a separate juridical entity" could be attached under FSIA.

Similarly, Section 1610(g)(1)'s list of factors that are not relevant to FSIA attachment, Section 1610(g)(1)(A)-(E), does not expand FSIA attachment beyond ownership interests, but instead appears to be Congress's effort to overcome the barrier to attaching property owned by foreign states via instrumentalities created by *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"). *Bancec* held that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such," and thus that "duly created instrumentalities of a foreign state are to be accorded a presumption of independent status." *Id*. at 626-27. Accordingly, under *Bancec*, plaintiffs with a judgment against a foreign state could not automatically attach the assets of one of its instrumentalities. *See* Mem. Op., Dkt. No. 197, filed Aug. 10, 2011, at 6 (describing *Bancec* as "a substantial obstacle to FSIA plaintiffs' attempts to satisfy judgments").

Bancec's presumption of instrumentality independence could only be overcome in special circumstances, such as when the instrumentality was "so extensively controlled by its owner that a relationship of principal and agent is created" or when not doing so "would work fraud or injustice." 462 U.S. at 629. Although the Supreme Court in *Bancec* declined to create any "mechanical formula" for determining when an instrumentality could be considered part of its state owner, *id*. at 633, lower courts eventually attempted to create such a test, articulating five

"*Bancec* factors" for determining when the assets owned by an instrumentality could be looked to for satisfying the debts of a foreign state:

> (1) the level of economic control by the government; (2) whether the entity's profits go to that government; (3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs; (4) whether the government is the real beneficiary of the entity's conduct; and (5) whether adherence to separate identities would entitle the foreign state to benefits in United States courts while avoiding its obligations.

Flatow v. Islamic Republic of Iran, 308 F.3d 1065, 1071 n.9 (9th Cir. 2002); *Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines*, 965 F.2d 1375, 1380 n.7 (5th Cir. 1992).

Section 1610(g)(1)(A)-(E) thus appears to be responding to *Bancec* when it states that these factors are *not* relevant to determining what property can be attached under FSIA. By directing that attachment would apply to "separate juridical entities" and specifying that these factors were not to be considered, Congress was evidently attempting to override the holding of *Bancec* and ensure that property that a foreign state owned through an instrumentality could be attached regardless of the nature of that instrumentality. Nothing suggests that Congress was trying to extend the scope of attachment any farther.

Section 1610(g)(3) also supports limiting attachment under FSIA to ownership interests of the foreign state. Section 1610(g)(3) directs that the rest of Section 1610(g) should not be construed in a way that prevents the Court from protecting interests held by third parties in property subject to attachment. 28 U.S.C. § 1610(g)(3). Plaintiffs contend that, if Section 1610(g)(1) only applies to property owned by foreign states, there are no third party interests in such property to protect, and thus that such an interpretation of Section 1610(g)(1) renders Section 1610(g)(3) superfluous. *See* Pls.' Reply, Dkt. No. 220, at 17-18. But Section 1610(g)(1) applies not only to property the foreign state owns exclusively, but also to property the state owns jointly with others – for example, the assets of a corporation in which the foreign state is

the majority shareholder, but that has non-state minority shareholders. Indeed, the Conference Committee Report gives "the value of an ongoing business enterprise in which a third party may be a joint venture partner" as the paradigmatic example of what Section 1610(g)(3) is designed to protect. *See* H.R. Rep. 110-477, at 1002. Thus, far from being superfluous, Section 1610(g)(3) demonstrates that Congress did not want courts to ignore interests of third parties when applying Section 1610(g)(1), even when those interests are inferior to those of the foreign state, and thus would be in tension with an interpretation of Section 1610(g)(1) that allowed FSIA plaintiffs to attach assets owned entirely by third parties.

Therefore, although Section 1610(g)(1) does expand the circumstances under which plaintiffs can attach the property of foreign states, it does not remove the requirement that the foreign state must, either directly or indirectly, own property for it to be attached, a requirement important to protecting the interests of non-terrorist third parties in such property.

III. The Statutory Frameworks for Attachment under TRIA and FSIA Are Not Entirely the Same.

The assets subject to attachment under TRIA Section 201(a) differ from those subject to attachment under FSIA Section 1610(g). TRIA clearly allows for the attachment of "blocked assets" of the terrorist party. TRIA § 201(a). FSIA Section 1610(g) extends to property that is "regulated" under TWEA or IEEPA as well as otherwise available property that is not subject to regulation. 28 U.S.C. § 1610(g)(1), (2). The United States respectfully notes that it does not intend to address further the parameters of attachment authorized under TRIA and FSIA. The United States appreciates the Court's request for its views as well as its patience in this matter.

CONCLUSION

For the foregoing reasons, the United States' view is that TRIA Section 201(a) and FSIA Section 1610(g)(1) authorize attachment only of assets in which the relevant terrorist party or foreign state has an ownership interest.

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Respectfully submitted,

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ANNEX 352

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ESTATE OF MICHAEL HEISER, *et al.* Plaintiffs v. ISLAMIC REPUBLIC OF IRAN, *et al.* Defendants	Case No.: 00-CV-02329 (RCL) **Consolidated with**
ESTATE OF MILLARD D. CAMPBELL, *et al.* Plaintiffs v. ISLAMIC REPUBLIC OF IRAN, *et al.* Defendants	Case No.: 01-CV-02104 (RCL)

RESPONSE TO STATEMENT OF INTEREST OF THE UNITED STATES[1]

The Estate of Michael Heiser, *et al*. (the "Heisers"), by their undersigned attorneys, hereby respond to the Statement of Interest Submitted by the United States (the "Statement of Interest") (ECF Dkt. No. 230), and the three questions that the Court invited the United States to address. As discussed below, the United States' assertion that both TRIA[2] Section 201(a) and 28 U.S.C. § 1610(g)(1) require that the judgment debtor have an ownership interest in the property targeted for attachment or execution cannot be squared with the defined terms, statutory text or

[1] On May 30, 2012, the Court entered an Order Soliciting the View of the United States in which the Court invited the United States Government to file a brief stating its views on certain issues related to the cross-motions pending before the Court within twenty (20) days of the date of order (ECF Dkt. No. 226). In response, on June 19, 2012, the United States filed a Status Report in which it requested an additional forty-five (45) days (until August 3, 2012) to "complete deliberations" on whether to even a file a brief (ECF Dkt. No. 228). The Heisers opposed to Government's request for an extension (ECF Dkt. No. 229). No extension was ever granted to the United States and, therefore, its Statement of Interest is untimely.

[2] Capitalized terms have the meaning ascribed to them in the Heisers' Reply in Further Support of Motion for Judgment against Garnishees and (I) Response in Opposition to Garnishees' Counter-Motion for Judgment as a Matter of Law and Their Motion for Interpleader Relief and (II) Limited Response to Motion for Leave to File Third-Party Petition Alleging Claims in the Nature of Interpleader (the "Heiser Response") (ECF Dkt. No. 220).

legislative purpose of the statutes. Moreover, the Heisers submit that the United States' assertions with respect to TRIA and section 1610(g)(1) should be afforded little weight given the Executive Branch's well-documented efforts to thwart the good faith efforts of terrorism victims to collect upon their judgments.[3]

ARGUMENT

I. TRIA § 201(a) and 28 U.S.C. § 1610(g) do not Require an "Ownership" Interest

TRIA and section 1610(g)(1) are remedial statutes that subject assets in which an agency and instrumentality of Iran has any interest to execution. *See*, *e.g.*, *Levin v. Bank of New York*, No. 09-5900, 2011 WL 812032 (S.D.N.Y. Mar. 4, 2011) (awarding turnover of Iranian assets blocked pursuant to OFAC sanctions, including EFTs, to judgment creditors of Iran under TRIA and holding that "[t]he language of TRIA is broad, subjecting *any asset* to execution that is seized or frozen pursuant to the applicable sanctions schemes" (emphasis in original)); *Hausler v. JPMorgan Chase Bank, N.A.* ("*Hausler I*"), 740 F. Supp. 2d 525 (S.D.N.Y. 2010) (awarding turnover of EFTs under TRIA in which Cuba and its agencies and instrumentalities held an interest because the EFTs were blocked pursuant to OFAC regulations); *see also Estate of Heiser v. Islamic Republic of Iran*, 807 F. Supp. 2d 9, 18 (D.D.C. 2011) ("This provision [section 1610(g)] 'expand[s] the category of foreign sovereign property that can be attached; judgment creditors can now reach ***any*** U.S. property ***in which Iran has any interest***....'") (quoting *Peterson*, 627 F.3d at 1123 n.2) (emphasis added). *See also* Heiser Response. The United States' assertions with respect to TRIA and 28 U.S.C. § 1610(g) are another attempt to frustrate terrorism victims' efforts to execute upon their judgments by narrowing the scope of assets

[3] The Heisers do agree with the United States that 28 U.S.C. § 1610(g) is broader than TRIA § 201(a) insofar as TRIA Section 201(a) applies only to blocked assets whereas section 1610(g) is not limited to blocked assets.

available to them and cannot be squared with the defined terms, statutory text and legislative purposes of deterring terrorist acts and compensating terrorism victims.

A. The Executive Branch's Repeated Efforts to Thwart Terrorism-Victims' Collection Efforts

As this Court has repeatedly recognized, the Executive Branch, over the objections of Congress, has continued to advocate against the rights of terrorism victims to satisfy their terrorism-related judgments against terrorist states. *See*, *e.g.*, *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 53 (D.D.C. 2009) (discussing how "plaintiffs' efforts to enforce judgments under the FSIA have often pitted victims of terrorism against the Executive Branch"); *id*. at 58 ("[T]he TRIA appears to represent something of a victory for these terrorism victims—whose interests have been most vigorously advanced by member of Congress—over the longstanding objections of the Executive Branch."); *see also U.S. v. Holy Land Found. For Relief and Dev.*, No. 04-CR-0240, 2011 WL 3703333, at *5-6 (N.D. Tex. Aug. 19, 2011) (discussing history of Congress's efforts, over the objection of the Executive Branch, to enact TRIA). Other courts have also recognized the lack of any precedential value that should be afforded to the Executive Branch's interpretation of TRIA. *See Hausler v. JPMorgan Chase Bank, N.A.*, 740 F. Supp. 2d 525, 537 (S.D.N.Y. 2010) ("*Hausler I*") (interpreting TRIA and noting that "[c]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there, notwithstanding any contrary interpretation by the Executive Branch") (internal quotation omitted); *Rux v. ABN AMRO Bank N.V.*, No. 08 Civ. 06588 (AKH) (SDNY) (Apr. 14, 2009) (Judgment and Order Directing Turnover of Funds to Petitioners and Discharge of Respondents at 12-15) (disregarding interpretation of TRIA advocated in Statement

of Interest filed by the United States). Against this backdrop, the Court should afford little weight to the positions advocated by the United States.

B. Neither TRIA nor Section 1610(g) require an "Ownership Interest"

1. TRIA must be read in conjunction with its defined terms

TRIA expressly defines "blocked asset" as

> ***any*** asset seized or frozen by the United States under section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)) or under section 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702)

TRIA § 201(d)(2) (emphasis added). "'It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Roberts v. Sea-Land Services, Inc.*, 132 S.Ct. 1350, 1357 (2012) (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)).

The interpretation advocated by the United States effectively reads the defined term "blocked asset" out of the statute. In *Hausler v. JPMorgan Chase Bank, N.A.*, 845 F. Supp. 2d 553, 2012 WL 601034, at *9-10 (S.D.N.Y. Feb. 22, 2012) ("*Hausler II*"), the court, in rejecting the decision of *Calderon-Cardona v. JPMorgan Chase Bank, N.A.*, No. 11 Civ. 3283, 2011 WL 6155987 (S.D.N.Y. Dec. 7, 2011), held that TRIA refers to assets "of that terrorist party" to clarify that a plaintiff can attach only assets that are blocked under "the particular regulation or administrative action directed at the particular … judgment debtor." *Hausler II*, 2012 WL 601034, at *9. In fact, in light of TRIA's definition of "blocked asset," which applies to *any* asset seized or frozen by the United States, it is clear Congress found it necessary to insert this limiting language into TRIA to clarify that only the victims of the *particular terrorist party* whose assets have been blocked may collect against *those particular assets*. *Id.*

Moreover, this interpretation is wholly consistent with the United States' description of OFAC's blocking regimes, some of which are not directed at an individual terrorist entity, but instead categories of terrorist entities. *See* Statement of Interest at 11. As *Hausler II* held, judgment creditors of al-Qaida (*i.e.*, "that terrorist party") cannot execute upon blocked assets of FARC, even though their assets may be blocked under the same blocking regime. *See id.*; *Hausler II*, 2012 WL 601034, at *9. Therefore, the United States misinterprets the phrase "blocked assets of that terrorist party" by assigning dispositive significance to the word "of" instead of interpreting TRIA § 201(a)'s meaning as a whole. *Hausler II*, 2012 WL 601034, at *8-9

2. The statutory text of TRIA and section 1610(g) do not support the United States' argument

The United States' "ownership interest" argument ignores the text that directly follows the words that the United States finds dispositive. Specifically, TRIA § 201(a) provides that "the blocked assets *of that terrorist party* [*i.e.,* the one against whom the plaintiff holds a judgment] (including the blocked assets of any agency or instrumentality *of that terrorist party*) shall be subject to execution . . ." Section 1610(g)(1) uses an almost identical phrase. *See* 28 U.S.C. § 1610(g)(1). The United States argues that the word "of" in the first emphasized prepositional phrase could only signify a Congressional requirement of an ownership interest of the relevant blocked assets. That interpretation crumbles, however, when one considers that the second highlighted prepositional phrase – which is worded *identically* to the first – cannot possibly support this construction of the first phrase. That is, the word "of" in the second phrase unquestionably does not indicate a Congressional intention to require plaintiffs to demonstrate that the referenced agency or instrumentality is "owned" by the terrorist party. *See* 28 U.S.C. §

1603 (defining an agency and instrumentality of foreign state). Accordingly, one need only look one line further in TRIA § 201(a) to find persuasive proof that the word "of" displays far more flexibility than the rigid definition that the United States assigns to that term.

Furthermore, the United States' argument with respect to the word "of" seeks to put a gloss on the statute that Congress did not impose. *See Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest."). In the FSIA, Congress distinguishes between "interests in property" and "ownership," "ownership interests," or "title." For example, in 28 U.S.C. § 1605A(g)(1), Congress demonstrated a clear ability to differentiate between traditional notions of "title" ownership and mere interests in property. Specifically, section 1605(A)(g)(1) provides for prejudgment liens of lis pendens and requires that the property in which a judgment creditor seeks to establish a lien must be "*titled* in the name of any defendant, or *titled* in the name of any entity controlled by any defendant if such notice [of lis pendens] contains a statement listing such controlled entity." 28 U.S.C. § 1605(A)(g)(1) (emphasis added). Similarly, 28 U.S.C. § 1603(b)(2) defines an agency or instrumentality as "an organ of a foreign state or political subdivision thereof, or a majority of whose shares *or other ownership interest is owned by* a foreign state or political subdivision thereof." 28 U.S.C. § 1603(b)(2) (emphasis added). However, in TRIA and section 1610(g), Congress excluded any requirement that judgment creditors establish an "ownership interest" in assets to subject them to execution despite its express use of the term in other provisions.

In support of the United States' misguided argument, it relies upon a select body of case law interpreting inapposite statutes. *See Bd. Of Trs. Of the Leland Stanford Jr. Univ. v. Roche Molecular Sys.*, 131 S. Ct. 2188, 2196 (2011) (noting that although a separate interpretation of the phrase "of the contract" was plausible in other contexts, "patent law has always been different…"); *Flores-Figueroa v. United States*, 556 U.S. 646 (2009) (interpreting the "knowingly" requirement of a criminal identity theft statute); *Ellis v. United States*, 206 U.S. 246 (1907) (interpreting statute imposing fines and penalties for employers whose employees work above the maximum amount of hours employees may work on "public works of the United States"); *see also Hausler II*, 2012 WL 601034, at *9-10 (distinguishing *Stanford* because its "conclusion was based on several characteristics of the patent statutes at issue there that are materially absent in the TRIA and related statutes.").

TRIA, section 1610(g)(1) and the majority of cases interpreting those statutes establish that if a terrorist state has an interest in an asset sufficient to justify blocking under the IEEPA, TWEA, and/or OFAC's sanctions, that asset is subject to execution by terrorism victims holding judgment against that terrorist state. *See Hausler I,* 740 F. Supp. 2d at 533-34 (". . . TRIA § 201(d)(2) defines 'blocked assets' to include all assets blocked under [OFAC's regulations regarding sanctions against Cuba], and . . . the Court is not persuaded that the word 'of' equates to actual ownership or title . . . ."); *Levin*, 2011 WL 812032, at *16 ("The language of TRIA is broad, subjecting *any asset* to execution that is seized or frozen pursuant to the applicable sanctions schemes. The breadth is unsurprising in light of TRIA's remedial purpose." (emphasis in original)). The United States fails to address the well-reasoned analysis in *Hausler I*, *Levin*, and *Hausler II*, which held that under TRIA Congress established a "comprehensive statutory scheme" that encompasses OFAC's definitions of "property" and "interests." *See Hausler*, 740

F. Supp. 2d at 532 ("[T]he Court finds that Congress explicitly directed that TRIA and the [NPWMD/SDGT]s are to be considered in tandem, which establishes a comprehensive statutory scheme that eschews any need for the consideration of state definitions of property."); *Levin*, 2011 WL 812032, at *17 ("TRIA's definition of 'blocked assets' defines which assets are subject to attachment by reference to the regulations pursuant to which the assets are blocked, and it is this definition that dictates what interest in property subjects a judgment debtor's property to attachment."); *Hausler II*, 2012 WL 601034, at *5 (reaffirming holding in *Hausler I* that "TRIA preempts state property law because, when read in conjunction with [OFAC's regulations], the TRIA defines the range of [terrorist party] property interests in assets frozen in the United States that constitute 'blocked assets of [a] terrorist party"); *see also Smith v. Federal Reserve Bank of New York*, 346 F. 3d 264, 271 (2d. Cir. 2003) (noting that TRIA's definition of blocked assets must be interpreted in accordance with the IEEPA).

The United States cites the decision in *Calderon-Cardona* as allegedly rejecting the reasoning in *Hausler I*. Notably, however, the United States does not argue that blocked EFTs are not subject to execution. Also, the United States takes no position on whether TRIA or section 1610(g) preempt state property law. *See* Statement of Interest at 12. The United States' election not to take a position is telling and can properly be deemed agreement by the United States that UCC Article 4A must be preempted by OFAC's sanctions programs and TRIA because the federal definitions of property and interests directly conflict with UCC Article 4A. *See* Heiser Response at 29-30 (discussing provisions of UCC Article 4A that expressly contemplate preemption by federal law). A contrary holding could put OFAC's blocking regimes in jeopardy where the Iranian Banks were determined to have a property interest in the Blocked Assets.

3. Subjecting "interests" in property to execution has a deterrent effect on terrorist parties.

The United States also argues that the Heisers' interpretation does not punish terrorist entities or deter future terrorism. Statement of Interest at 9. However, subjecting to execution blocked assets in which Iran and its agencies and instrumentalities have any interest has crippling financial consequences and furthers Congress's goal of deterring third-parties from engaging in business transactions with terrorist parties. *See Hausler II*, 845 F. Supp. 2d 553, 2012 WL 601034, at *4 ("Congress's purpose in enacting the TRIA was to address foreign policy goals such as deterring acts of terrorism and restricting the economic activity of terrorist parties."); *id*. at *12 ("The TRIA is part of a statutory framework created to inhibit business with specified terrorist states" like Iran.); *id*. at *17 (purposes of TRIA include "to provide redress to victims of terrorism, to punish terrorist entities by making their frozen assets subject to execution, and to discourage economic activity involving American financial institutions benefitting terrorist entities"). This deterrent effect cuts terrorist parties off from the business and financial opportunities needed to continue to fund terrorism. As set forth in the Heiser Response, the President has stated:[4]

> We're putting banks and financial institutions around the world on notice, we will work with their governments, ask them to freeze or block terrorist's ability to access funds in foreign accounts. If they fail to help us by sharing information or freezing accounts, the Department of the Treasury now has the authority to freeze their bank's assets and transactions in the United States.

"President Freezes Terrorists' Assets: Remarks by the President, Secretary of the Treasury O'Neill and Secretary of State Powell on Executive Order," White House: Office of the Press Secretary, Sept. 24, 2001. Indeed, all of the blocked monies held by the Garnishees were being

[4] At times the Executive Branch has voiced support for victims; unfortunately, the Executive Branch's actions do not match their words.

sent to, from, or through the Iranian Banks, and thus the blocking impacted their ability to transact business and cause them (either directly or indirectly) to "actually lose money."

C. Even if the Court Adopts the Government's "Ownership Interest" Argument, the Blocked Assets Held by the Garnishees Remain Subject to Attachment and Execution

The United States has not argued that the Blocked Assets held by the Garnishees are not subject to execution under TRIA or section 1610(g). Moreover, the Government has not adopted or even endorsed the holding in *Calderon-Cardona*, which was advocated by the Garnishee Banks. Neither the Government nor any precedent cited suggests that a beneficial interest in an asset fails to also qualify as an "ownership interest" in that asset. The "ownership interest" of the Iranian Banks which TRIA and section 1610(g) would require under the United States' argument should remain any blocked asset in which the terrorist party has an interest that would justify a blocking. *See Levin*, 2011 WL 812032, at *20. Property "[o]wnership comprises the right to possess, the right to use, the right to manage, the right to income of the thing,… the rights or incidents of transmissibility,… [and] liability to execute…" *Burns v. PA Dept. of Correction*, 544 F. 3d 279, 287 (3d Cir. 2008) (quoting A.M. Honore, *Ownership*, in *Oxford Essays in Jurisprudence,* 112-13 (A.G. Guest, ed. 1961)); *see also Fresh Pond Shopping Ctr., Inc. v. Callahan*, 464 U.S. 875, 878 (1983) ("[P]roperty ownership carries with it a bundle of rights, including the right to possess, use and dispose of it").

There is no issue of fact that an agency and instrumentality of Iran was a party in the chain of the wire transfer for each of the Blocked Assets here, either as beneficiary, originator, beneficiary bank or originator bank. And, there is no dispute that the Garnishees deposited monies into blocked deposit accounts in which the Iranian Banks are deemed to have an "ownership interest". Here, absent the blocking of the monies, the Iranian Banks would have

had the right to possess, use and dispose of the funds. The rights possessed by the Iranian Banks are therefore a sufficient "ownership interest" in the Blocked Assets to subject them to execution under TRIA and section 1610(g).

II. 28 U.S.C. § 1610(g) Governs a More Expansive Category of Property Than TRIA.

The Heisers agree with the United States that the assets subject to attachment under TRIA only included "blocked assets" whereas both blocked and unblocked assets are subject to attachment under 28 U.S.C. § 1610(g). As this Court has noted, section 1610(g) was enacted as part of the NDAA of 2008 with the goal of providing victims of terrorism with a more robust enforcement mechanism. *See In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d at 62; *id*. at 79. Section 1610(g) advances Congress's goal "to better promote and execute the federal interest in deterring terrorist attacks and compensating victims," *id*. at 79, and "illustrates the gradual progress that terrorism victims have achieved through Congress … in their efforts to obtain more power to enforce judgments under the FSIA terrorism exception." *Id*. at 121.

As the United States properly recognizes, section 1610(g) authorizes execution of both blocked and unblocked property. Statement of Interest at 18. Thus, consistent with its legislative history, section 1610(g) should be viewed as a broader enforcement provision compared to TRIA. *See also Estate of Heiser*, *supra*, 807 F. Supp. 2d. at 18.

CONCLUSION

Based on the foregoing, and for the reasons stated in the Heiser Response, the Heisers respectfully request that the Court hold that TRIA and section 1610(g)(1) subject any blocked asset in which the terrorist state or agencies or instrumentality thereof has any interest to execution.

Respectfully submitted,

Dated: August 17, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August 2012, copies of the foregoing Response to Statement of Interest of the United States, were served by the Court's electronic CM/ECF delivery service on:

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ANNEX 353

885 F.Supp.2d 429
United States District Court,
District of Columbia.

ESTATE OF Michael HEISER, et al., Plaintiffs,
v.
ISLAMIC REPUBLIC OF IRAN, et al., Defendants.
Estate of Millard D. Campbell, et al., Plaintiffs,
v.
Islamic Republic Of Iran, et al., Defendants.

Nos. 00–cv–2329 (RCL), 01–cv–2104 (RCL).
|
Aug. 31, 2012.

Synopsis

Background: Following grant, 659 F.Supp.2d 20, of amended final judgment for survivors of terrorist bombing of a United States military housing facility in Saudi Arabia and the estates and family members of personnel killed in the bombing, in their consolidated actions, under the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act (FSIA), against, inter alia, the Islamic Republic of Iran, plaintiffs sought to garnish funds in blocked accounts in two American banks. Banks contested turnover as to some of the accounts at issue and moved for leave to file an interpleader complaint to account for potential third-party interests in the remaining accounts. Parties cross-moved for judgment as a matter of law.

Holdings: The District Court, Royce C. Lamberth, Chief Judge, held that:

Iran did not have an ownership interest in the blocked accounts, and

District Court had jurisdiction to consider banks' motion to file a third-party interpleader petition.

Motions granted in part and denied in part.

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MEMORANDUM OPINION

ROYCE C. LAMBERTH, Chief Judge.

I. INTRODUCTION

On the night of June 25, 1996, a tanker truck crept quietly along the streets of Dhahran, coming to rest alongside a fence surrounding the Khobar Towers complex, a residential facility housing United States Air Force personnel stationed in Saudi Arabia. A few minutes later, the truck exploded in a massive fireball that was, at the time, the largest non-nuclear explosion ever recorded on Earth. The devastating blast—felt up to twenty miles away—sheared the face off Building 131 of the Khobar Towers complex and left a crater more than eighty-five feet wide and thirty-five feet deep. The bombing killed nineteen U.S. military personnel and wounded more than 100. Subsequent investigations revealed that members of Hezbollah carried out the attack.

Four years after the bombing, plaintiffs—who are former service members injured in the attack, various family members, and the estates of those killed—brought suit under the "state-sponsored terrorism" exception to the Foreign Sovereign Immunities Act ("FSIA"), then codified at 28 U.S.C. § 1605(a)(7). Plaintiffs alleged that the Islamic Republic of Iran ("Iran"), the Iranian Ministry of Information and Security ("MOIS"), and the Iranian Islamic Revolutionary Guard Corps ("IRG") provided material support and assistance to Hezbollah in carrying out the heinous attack. Following Iran's failure to appear and plaintiffs' presentation of evidence to substantiate their claims, the Court found that "the Khobar Towers bombing was planned, funded, and sponsored by senior leadership in the government of the Islamic Republic of Iran; the IRGC had the responsibility and worked with Saudi Hizbollah to execute the plan; and the MOIS participated in the planning and funding of the attack." *Heiser v. Islamic Republic of Iran*, 466 F.Supp.2d 229, 265 (D.D.C.2006) ("*Heiser I* ").[1] The

Court subsequently entered judgment against all defendants for $254 million in compensatory damages. *Id.* at 356.

A few years later, Congress passed the National Defense Authorization Act for Fiscal Year 2008 ("NDAA" or the "2008 Amendments"), which replaced § 1605(a)(7) with a new state-sponsored terrorism exception codified at 28 U.S.C. § 1605A, permitted recovery of punitive damages, and added a new provision concerning the enforcement of judgments. Pub.L. No. 110–181, § 1083, 122 Stat. 3, 338–44 (2008). Invoking the NDAA's procedures for retroactive application, in 2009 the Court entered an amended judgment, holding defendants jointly and severally liable for an additional $36 million in compensatory damages and $300 million in punitive damages. *Heiser v. Islamic Republic of Iran,* 659 F.Supp.2d 20, 31 (D.D.C.2009) ("*Heiser II* ").

Following entry of final judgment, plaintiffs began their journey down the often-frustrating and always-arduous path shared by countless victims of state-sponsored ***432** terrorism attempting to enforce FSIA judgments. On August 10, 2011, this Court ordered Sprint Communications Company LP to turn over $613,587.38 owed to the Telecommunication Infrastructure Company of Iran. *Heiser v. Islamic Republic of Iran,* 807 F.Supp.2d 9 (D.D.C.2011) (*Heiser III*).[2] While this clearly represented a victory for the plaintiffs, this Court noted that "the bleak reality is that today's decisions comes after more than a year of litigation and results in a turnover of funds amounting to less than one-tenth of one-percent of what plaintiffs are entitled to...." *Id.* at 27.

The matter before the Court today requires exploration of two attempts by Congress to aid these victims: Terrorism Risk Insurance Act of 2002 § 201 ("TRIA"), and FSIA § 1610(g). In accordance with these statutes, plaintiffs ultimately seek the turnover of funds held in various blocked accounts at Wells Fargo, N.A., and Bank of America, N.A. (collectively, "the Banks"). The Banks respond in two ways: first, the Banks argue that the TRIA and FSIA require that the terrorist party—Iran—have an "ownership interest" in the blocked funds in order for them to be subject to execution; second, for those accounts in which Iran does have an ownership interest, the Banks argue that they should be permitted to file an interpleader complaint to account for potential third-party interests in the blocked funds. The Court first reviews the regime of legal and regulatory provisions governing execution of FSIA judgments, and then turns to the parties' dispute.

II. BACKGROUND

A. Statutory and Regulatory Framework

1. Iran–Specific Regulations

Relations between the United States and Iran deteriorated following the 1979 revolution in which Iran's monarchy was displaced by an Islamic republic, ruled by the Ayatollahs, that remains in power today. Following the regime change and fueled by the Iran hostage crisis, President Carter—exercising the authority granted to him under the International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq.*—blocked the flow of assets between the United States and Iran, and seized Iranian property located within the United States. Executive Order 12170, 44 Fed.Reg. 65,729 (Nov. 14, 1979). Over the next two years, Presidents Carter and Reagan issued numerous Executive Orders seizing additional assets, while the Office of Foreign Assets Control ("OFAC")—a component of the Department of the Treasury that administers and enforces economic and trade sanctions—promulgated regulations concerning transactions between persons in the United States and Iran. In 1981, the United States and Iran reached an agreement, known as the Algiers Accords, which led to the release of the hostages and the unfreezing of most Iranian assets. Over the following decades, sanctions regimes instituted by Executive Orders and rules promulgated by OFAC evolved into the complex web of regulations governing Iranian assets in the United States, as well as transactions with Iran.[3]

***433** Today, the basic framework for the treatment of Iranian property and trade with Iran is set forth in two complementary sets of provisions promulgated by OFAC that generally bar all transactions either with Iran or involving Iranian interests and then carve out limited exceptions to that embargo. The first, known as the Iranian Assets Control Regulations ("IACR") and codified at 31 C.F.R. Part 535, was implemented in 1980 during the Iran Hostage Crisis, 45 Fed.Reg. 24,432 (Apr. 9, 1980), and "broadly prohibits unauthorized transactions involving property in which Iran has any interest," while granting specific licenses for certain transactions. *Flatow v. Islamic Republic of Iran,* 305 F.3d 1249, 1255 (D.C.Cir.2002). The second, known as the Iranian Transactions Regulations ("ITR") and codified at 31 C.F.R. Part 560, "confirms the broad reach of OFAC's Iranian sanctions programs by establishing controls on Iranian trade, investments, and services.... As under the IACR, there

is a general prohibition under the ITR of unauthorized transactions, coupled with specific licenses permitting certain kinds of transactions." *Flatow,* 305 F.3d at 1255; *see also Weinstein v. Islamic Republic of Iran,* 299 F.Supp.2d 63, 68 (E.D.N.Y.2004) ("The ITR prohibited, *inter alia,* the importation of goods and services from Iran, and the exportation, reexportation, and sale or supply of goods, technology or services to Iran.").

B. Procedural History

After securing judgment against defendants and properly serving them with copies of that judgment as required under the FSIA, *see* Order, May 10, 2010, ECF No. 158, plaintiffs issued writs of attachment to garnishees Bank of America, N.A., and Wells Fargo, N.A., asking, *inter alia,* whether each company was indebted to defendants.

Bank of America answered its writ on July 19, 2011. Answer to Writ of Garnishment, ECF No. 191. Bank of America responded that it holds the proceeds of various Iranian-related transactions that it blocked pursuant to OFAC regulations. Specifically, Bank of America holds the following blocked asset accounts:

Amount	Iranian Entity(ies)	Type of Blocked Account
$34,453.88	Iran Marine and Industrial	Deposit Account
$11,717.00	SedIran Drilling Company	Deposit Account
$ 5,939.97	**Bank Sepah**	**EFT**
$ 9,721.85	Iran Air & Melli Bank Plc UK	Check Proceeds
$38,469.57	**Bank Melli Iran**	**EFT**

Bank of America contests the turnover of only the two blocked Electronic Funds Transfer ("EFT") accounts in its possession. These are the accounts involving Bank Sepah and Bank Melli Iran (bolded above). The remaining three accounts are uncontested and subject to the Banks' motion to file an interpleader complaint.

Wells Fargo answered its writ on September 8, 2011. Answer to Writ of Garnishment, ECF No. 201. Wells Fargo also responded that it holds the proceeds of various Iranian-related transactions that it blocked pursuant to OFAC regulations. Specifically, Wells Fargo holds the following blocked asset accounts:

Amount	Iranian Entity(ies)	Type of Blocked Account
$207,873.00	Iranian Navy	Deposit Account
$ 20,000.00	Bank Saderat Iran	EFT
$ 50,000.00	**Bank Mellat, Korea**	**EFT**
$ 13,000.00	**Bank Mellat, London**	**EFT**
$ 71,673.70	**Bank Mellat Iran**	**EFT**

$ 11,907.00	**Bank Saderat Iran**	**EFT**
$7 4,850.44	Bank Mellat	EFT
$ 6,500.00	**Bank Saderat Iran**	**EFT**
$ 34,298.81	**Bank Saderat Iran**	**EFT**
$105,000.00	**Export Dev. Bank of Iran**	**EFT**
$ 6,300.00	**Export Dev. Bank of Iran**	**EFT**
$ 5,562.36	Iranian IRG	EFT
$ 10,000.00	**Bank Mellat, Turkey**	**EFT**
$ 12,979.07	Khazar Shipping	EFT

***434** Wells Fargo contests the turnover of only nine of the blocked EFT accounts in its possession. These are the accounts involving Bank Mellat, Korea; Bank Mellat, London; Bank Mellat Iran; Bank Saderat Iran; Export Dev. Bank of Iran; and Bank Mellat, Turkey (bolded above). The remaining five accounts are uncontested and subject to the Banks' motion to file an interpleader complaint.

Throughout this opinion, this Court refers to the eleven blocked accounts that the Banks contest turning over as "the Contested Accounts." This Court refers to the remaining eight accounts as "the Uncontested Accounts."

III. ANALYSIS

This Court will first discuss the cross-motions for judgment as a matter of law raised by plaintiffs and the Banks. ECF Nos. 206, 212. Subsequently, this Court will consider the Banks' Motion for Leave to File Third Party Petition Alleging Claims in the Nature of Interpleader. ECF No. 213.

A. Contested Accounts—Cross–Motions for Judgment as a Matter of Law

Both plaintiffs and the Banks have moved for judgment as a matter of law with respect to turnover of the funds contained in the eleven Contested Accounts. Plaintiffs invoke FSIA § 1610(g) and TRIA § 201(a) as authority to execute on these funds. This Court begins with an overview of attachment and execution provisions of the FSIA and then discusses whether TRIA § 201(a) or FSIA § 1610(g) permit execution on the Contested Accounts.

1. Attachment & Execution under the FSIA

"It is a well-established rule of international law that the public property of a foreign sovereign is immune from legal process without the consent of that sovereign." *Loomis v. Rogers,* 254 F.2d 941, 943 (D.C.Cir.1958); *see also Weinstein v. Islamic Republic of Iran,* 274 F.Supp.2d 53, 56 (D.D.C.2003) ("[T]he principles of sovereign immunity 'apply with equal force to attachments and garnishments.' ") (quoting *Flatow v. Islamic Republic of Iran,* 74 F.Supp.2d 18, 21 (D.D.C.1999)). To promote this general principle, the FSIA broadly designates all foreign-owned property as immune, and then articulates limited exceptions to that immunity. *See* 28 U.S.C. § 1609 ("[T]he property in the United States of a foreign state shall be immune from attachment, arrest and execution except as provided in sections 1610 and 1611 of this chapter."). Though providing

a workable framework in theory, the past decade of litigation under the Act has proved, for victims of state-sponsored ***435** terrorism, to be a journey down a never-ending road littered with barriers and often obstructed entirely. Two particular roadblocks merit greater discussion.

The first difficulty plaintiffs holding judgments against Iran often faced was the limited number of Iranian assets remaining in the United States. Attempting to overcome this shortfall, plaintiffs targeted property in which an Iranian entity—often a financial institution owned or controlled by Iran—had an interest. Though expressly sanctioned by § 1610(b), this strategy was undercut by the Supreme Court's decision in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba,* which involved a U.S. financial institution's attempt to collect money owed to it by the Cuban government through the seizure of funds deposited in the institution by a Cuban bank. 462 U.S. 611, 613, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983). In its opinion, the Supreme Court observed that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such," and determined that Congress "clearly expressed its intention that duly created instrumentalities of a foreign state are to be accorded a presumption of independent status." *Id.* at 626–27, 103 S.Ct. 2591. According to the *First Nat'l* Court, this presumption may be overridden *only* where the plaintiff demonstrates that the foreign entity is exclusively controlled by the foreign state or where recognizing the separateness of that entity and the foreign state "would work fraud or injustice." *Id.* at 629–30, 103 S.Ct. 2591. The practical effect of this holding was to shield the property of instrumentalities of foreign states from attachment or execution absent evidence of a connection between the instrumentality and the foreign state so strong as to render any distinction irrelevant. And by placing the burden of proof on this issue squarely on plaintiffs, the *First Nat'l* holding became a substantial obstacle to FSIA plaintiffs' attempts to satisfy judgments. *See, e.g., Oster v. Republic of S. Afr.,* 530 F.Supp.2d 92, 97–100 (D.D.C.2007); *Bayer & Willis Inc. v. Republic of the Gam.,* 283 F.Supp.2d 1, 4–5 (D.D.C.2003).

The second hurdle facing FSIA plaintiffs involved assets that once belonged to Iran or its agencies but had been seized and retained by the United States. As a legal matter, "assets held within United State Treasury accounts that might otherwise be attributed to Iran are the property of the United States and are therefore exempt from attachment or execution by virtue of the federal government's sovereign immunity." *In re Islamic Republic of Terrorism Litig.,* 659 F.Supp.2d 31, 53 (D.D.C.2009) (citing *Dep't of the Army v. Blue Fox, Inc.,* 525 U.S. 255, 119 S.Ct. 687, 142 L.Ed.2d 718 (1999)). Victims of state-sponsored terrorism attempting to seize such assets were thus put in the perverse position of litigating against their own government, *see Weinstein,* 274 F.Supp.2d at 56 ("[I]f a litigant seeks to attach funds held in the United States Treasury, he or she must demonstrate that the United States has waived its sovereign immunity with respect to those funds."), which strongly opposed attempts to attach such assets. As one commentator explains:

> As a matter of foreign policy, the President regards frozen assets as a powerful bargaining chip to induce behavior desirable to the United States; accordingly, allowing private plaintiffs to file civil lawsuits and tap into the frozen assets located in the United States may weaken the executive branch's negotiating position with other countries. For this reason, several U.S. presidents have opposed giving victims access to these funds.

***436** Debra M. Strauss, *Reaching Out to the International Community: Civil Lawsuits as the Common Ground in the Battle against Terrorism,* 19 Duke J. Comp. & Int'l L. 307, 322 (2009). The Executive Branch has consistently succeeded in arguing that the FSIA does not waive the United States' immunity with respect to seized Iranian assets. *See, e.g., Flatow,* 74 F.Supp.2d 18.

Eventually Congress enacted the Terrorism Risk Insurance Act ("TRIA"), Pub.L. No. 107–297, 116 Stat. 2322 (2002), "to 'deal comprehensively with the problem of enforcement of judgments rendered on behalf of victims of terrorism in any court of competent jurisdiction by enabling them to satisfy such judgments through the attachment of blocked assets of terrorist parties.' " *Weininger v. Castro,* 462 F.Supp.2d 457, 483 (S.D.N.Y.2006) (quoting H.R. Conf. Rep. 107–779, at 27 (2002), 2002 U.S.C.C.A.N. 1430, 1434). The TRIA declares that

> [n]otwithstanding any other provision of law, ... in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, ... the blocked assets of the terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

§ 201(a). In other words, the TRIA "subjects the assets of state sponsors of terrorism to attachment and execution in

satisfaction of judgments under § 1605(a)(7)," *In re Terrorism Litig.*, 659 F.Supp.2d at 57, by "authoriz[ing] holders of terrorism-related judgments against Iran ... to attach Iranian assets that the United States has *blocked*." *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 556 U.S. 366, 129 S.Ct. 1732, 1735, 173 L.Ed.2d 511 (2009) (quotations omitted; emphasis in original).

The TRIA was designed to remedy many of the problems that previously plagued victims of state-sponsored terrorism; in practice, however, it led to very few successes. Victims discovered that, at least with respect to Iran, "very few blocked assets exist." *In re Terrorism Litig.*, 659 F.Supp.2d at 58. And the barren landscape facing these FSIA plaintiffs was only further depleted by the exclusion of diplomatic properties from the TRIA's reach. *See Bennett v. Islamic Republic of Iran*, 604 F.Supp.2d 152, 161 (D.D.C.2009) ("[The TRIA] expressly excludes 'property subject to Vienna Convention on Diplomatic relations, or that enjoys equivalent privileges and immunities under the law of the United States, being used for exclusively for diplomatic or consular purposes.' ") (quoting TRIA § 201(d)(2)(B)(ii)).

Against this desolate backdrop, Congress enacted the NDAA, which added paragraph (g) to the execution section of the FSIA. This new provision, in its entirety, declares: (g) Property in Certain Actions.-

> (1) In general.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—
>
> (A) the level of economic control over the property by the government of the foreign state;
>
> (B) whether the profits of the property go to that government;
>
> ***437** (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
>
> (D) whether that government is the sole beneficiary in interest of the property; or
>
> (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.
>
> (2) United states sovereign immunity inapplicable.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the [TWEA] or the [IEEPA].
>
> (3) Third-party joint property holders.—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

28 U.S.C. § 1610(g). Courts have had little opportunity to explore the full implications of § 1610(g), though at least one court has observed that the NDAA will have a significant impact on plaintiffs' attempts to enforce FSIA judgments. *See Calderon–Cardona v. Dem. People's Rep. of Korea*, 723 F.Supp.2d 441, 458 (D.P.R.2010) ("Section 1083 adds a new subsection, section 1610(g)(1), which significantly eases enforcement of judgments entered under section 1605A.").

2. Attachment and Execution on the Contested Accounts

Plaintiffs claim that they have met all of the elements necessary to satisfy both FSIA § 1610(g) and TRIA § 201(a), with satisfaction of either section being sufficient to execute on the Contested Accounts. The Banks respond that both statutes require plaintiffs to show that Iran has an ownership interest in the blocked assets—and Iran has no ownership interest in the Contested Accounts. The Banks concede that Iran has an ownership interest in the Uncontested Accounts. Accordingly, this Court must determine what, if any, ownership interest is required to execute on the Contested Accounts.

a. TRIA § 201(a) Requires an Iranian Ownership Interest

As with any question of statutory interpretation, this Court's analysis begins with the plain language of the statute. *Jimenez v. Quarterman*, 555 U.S. 113, 118, 129 S.Ct. 681, 172 L.Ed.2d

475 (2009) (citations omitted). When the statutory language is clear, it must be enforced according to its own terms so long as "the disposition required by the text is not absurd." *Lamie v. U.S. Trustee,* 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004). Therefore, this Court must first determine whether the statutory language contained in TRIA § 201(a) is clear.

TRIA § 201(a) allows a person holding a judgment against a state-sponsor of terrorism to attach and execute on "the blocked assets of that terrorist party." The parties agree that the Contested Accounts meet the definition of "blocked assets" provided in TRIA § 201(d)(2). The parties also agree that Iran qualifies as a "terrorist party" under TRIA § 201(d)(4). The issue is whether Congress' use of the word "of" requires plaintiff to prove that ***438** Iran has an ownership interest in the Contested Accounts.

In *Board of Trustees of the Leland Stanford Junior University v. Roche Molecular Systems, Inc.,* —— U.S. ——, 131 S.Ct. 2188, 2196, 180 L.Ed.2d 1 (2011), the Supreme Court reaffirmed its longstanding precedent that "the use of the word 'of' denotes ownership." *Id.* (quoting *Poe v. Seaborn,* 282 U.S. 101, 109, 51 S.Ct. 58, 75 L.Ed. 239 (1930)); *see Flores–Figueroa v. United States,* 556 U.S. 646, 648–49, 657, 129 S.Ct. 1886, 173 L.Ed.2d 853 (2009) (treating the phrase "identification [papers] of another person" as meaning such items *belonging to* another person); *Ellis v. United States,* 206 U.S. 246, 259, 27 S.Ct. 600, 51 L.Ed. 1047 (1907) (interpreting the phrase "works of the United States" to mean "works *belonging to* the United States") (internal citations and quotations omitted). As the *Stanford* Court noted, this reading is consistent with a common definition of the word "of" denoting a possessive relationship. *Stanford,* 131 S.Ct. at 2196 (citing Webster's Third New International Dictionary 1565 (2002)).

Applying *Stanford* and interpreting the word "of" in TRIA § 201(a) to mean "belonging to" makes sense: judgment debtors normally pay for whatever caused the adverse judgment against them—third parties do not usually pick up the tab. Additionally, the common law historically provided that "[t]he lien of a judgment attaches to the precise interest or estate which the judgment debtor has actually and effectively in the property, and only to such interest." 50 C.J.S. Judgments § 787 (2012); *see also U.S. v. Rodgers,* 461 U.S. 677, 713, 103 S.Ct. 2132, 76 L.Ed.2d 236 (1983). Thus, the plain language, as informed by the common law, strongly indicates that Congress intended to permit terrorist victims to execute on only the assets "of"—or, in other words, "belonging to"—the terrorist state committing the act. At least one other district court has come to this same conclusion regarding TRIA § 201(a). *See Ruth Calderon–Cardona v. JPMorgan Chase Bank, N.A.,* 867 F.Supp.2d 389, 405 (S.D.N.Y.2011) ("TRIA § 201 *requires* property ownership").

Unwilling to concede defeat on a plain language analysis, plaintiffs seek refuge in the expansive definition of "blocked asset" found in TRIA § 201(d)(2):

> **(2) Blocked asset.**—The term 'blocked asset' means—
>
> **(A)** *any asset seized or frozen* by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C.App. 5(b)) or under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702); and
>
> **(B)** Does not include property that—
>
> **(i)** is subject to a license issued by the United States Government for final payment, transfer or disposition by or to a person subject to the jurisdictions of the United States in connection with a transaction for which the issuance of such license has been specifically required by statute other than the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) or the United Nations Participation Act of 1945 (22 U.S.C. 287 et seq.); or
>
> **(ii)** in the case of property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, or that enjoys similar privileges and immunities under the law of the United States, is being used exclusively for diplomatic or consular purposes.

(emphasis added). Plaintiffs argue that Congress intended the phrase "of that terrorist party" to limit the expansive definition of "blocked asset" in one way—to restrict a judgment creditor to pursuing ***439** only assets blocked under a sanctions scheme targeting *that* terrorist party. In other words, TRIA permits an *Iranian* judgment creditor to attach assets blocked only under the *Iranian* sanctions regulations; simultaneously, TRIA prohibits an Iranian judgment creditor from attaching assets blocked under Cuban, Syrian, or other sanctions regimes. Judge Marrero's decision in *Hausler v. JPMorgan Chase Bank, N.A.,* 845 F.Supp.2d 553, 566–67 (S.D.N.Y.2012), agrees with plaintiffs

argument.[4] Judge Marrero reasoned that an ownership requirement

> overlooks a very basic aspect of the TRIA: The statute is not directed at a single terrorist entity and does not relate to a single set of blocking regulations. The TRIA expressly defines "[t]he term 'blocked asset' [to] mean [ ] ... any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C.App. 5(b)) or under sections 202 and 203 of the International Emergency Economic Powers Act...." The phrase "of that terrorist party" provides the necessary, though perhaps perfunctory, instruction that the "blocked assets" available for execution are only those assets blocked pursuant to the particular regulation or administrative action directed at the particular terrorist-party judgment debtor. In other words, the TRIA does not permit a party with a judgment against Iran to execute against funds blocked pursuant to the CACRs, regulations which are, of course, targeted at Cuba.
>
> *Id.* (citations omitted).

The Banks agree that, as Iran's judgment creditors under TRIA § 201(a), plaintiffs may execute on only the assets blocked pursuant to the Iranian sanctions regimes and not on assets blocked pursuant to other sanctions regimes. To otherwise interpret the statute would read "that" out of the phrase "blocked assets of *that* terrorist party." But plaintiffs go too far in presuming that the scope of the OFAC blocking regulations is coextensive with the scope of attachment authorized by TRIA. Examining OFAC regulations, it is quite apparent that OFAC blocks a much broader category of assets than those "of" a terrorist party.

OFAC regulations provide the following:

> No property subject to the jurisdiction of the United States or which is in the possession of or control of persons subject to the jurisdiction of the United States in which on or after the effective date Iran has *any interest of any nature whatsoever* may be transferred, paid, exported, withdrawn or otherwise dealt in except as authorized.

31 C.F.R. § 535.201 (emphasis added). While this language is broad, OFAC regulations go one step further by defining "interest" as "any interest of any nature whatsoever, direct or indirect." § 535.312. Moreover, "property" includes a laundry list of items such as "money, checks, ... obligations ... pledges, liens or other rights in the nature of security ... contracts of any nature whatsoever, and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future or contingent." § 535.311. Applying these regulations literally, OFAC apparently may block a transaction involving an indirect, intangible, future, contingent Iranian interest of any nature whatsoever.

The expansive language OFAC employs to block transactions with Iranian entities stands in stark contrast to the language employed in TRIA § 201(a) where Congress chose to allow execution on only a subset of blocked assets: those "of" a terrorist ***440** party. Every word in a statute must be given effect, including the seemingly trivial word "of." *Kawasaki Kisen Kaisha Ltd. v. Regal–Beloit Corp.*, —— U.S. ——, 130 S.Ct. 2433, 2445, 177 L.Ed.2d 424 (2010) (*citing Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979) (courts are "obliged to give effect, if possible, to every word Congress used")). The Court must also presume that Congress was aware of the breadth of OFAC blocking regulations when it authored TRIA § 201(a). *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990) ("We assume that Congress is aware of existing law when it passes legislation"). OFAC has used the "any interest of any nature whatsoever" and other broad language since at least 1979. *See* Iranian Assets Control Regulations, 44 Fed.Reg. 65956, 65956–65957 (Nov. 17, 1979). Congress could have written—and could rewrite—TRIA § 201(a) to say "blocked assets related to that terrorist party" or "blocked assets in which that terrorist party has any property interest" and avoided creating an ownership requirement. Unfortunately for plaintiffs, the inescapable conclusion is that Congress intentionally used narrower language to permit attachment and execution only on a subset of blocked assets —those "of" ("owned by" or "belonging to") a terrorist state.

At first glance, it might appear strange for a sanctions regime to block transfers of assets that a terrorist state—in this case, Iran—did not legally own. Why cast such a broad net? John E. Smith, Associate Director of OFAC's Office of Policy and Implementation, explains that blocking serves a number of goals: providing the President with leverage to negotiate in resolving foreign policy disputes, depriving Iran of property that it might otherwise use contrary to U.S. interests, preventing Iran from transacting with U.S. persons or the U.S. financial market, limiting the flow of goods and U.S. dollars Iran has available, and making it more difficult for third parties to transact with Iran. Decl. of James Kerr, ECF No. 212–7, Ex. D, ¶ 10.

On the other hand, OFAC blocking regulations implicate a different set of interests than TRIA § 201. Congress intended TRIA as a vehicle to compensate victims of terrorist

attacks while also punishing terrorist states by making them pay for their acts. However, under plaintiffs' interpretation, virtually all blocked assets—regardless of whether Iran has an ownership interest in them—could be used to compensate victims. Such an attachment would actually *reduce* Iran's liability for the judgments entered against it while imposing a potentially heavy cost on innocent property owners. For example, if a foreign national living and working in a different country attempted to send money to his personal bank account in Iran, this transfer could be blocked and, under plaintiffs' reading of TRIA, be subject to attachment. *See Calderon–Cardona,* 867 F.Supp.2d at 402–03.

Because the plain language of the statute cuts against plaintiffs' interpretation, plaintiffs seek refuge in the traditional cannon of statutory interpretation that remedial statutes are to be liberally construed. *See* 3 *Sutherland Statutory Construction* § 60:1 (7th ed.). Justice Scalia describes this cannon as "surely among the prime examples of lego-babble." Antonin Scalia, *Assorted Cannards of Contemporary Legal Analysis,* 40 Case W. Res. L.Rev. 581, 581–582 (1990) ("It is so wonderfully indeterminate, as both when it applies and what it achieves, that it can be used, or not used, or half-used, almost *ad libitum,* depending mostly upon whether its use, or nonuse, or half-use, will assist in reaching the result the court wishes to achieve.). Thankfully, this Court does not have to decide what a liberal interpretation ***441** of this statute would mean because the plain meaning of "of" requires ownership—and plain meaning wins. 3 *Sutherland* § 60.1 ("The rule of liberal construction does not override other rules where its application ... defeats the evident meaning of an act.").

The Court also hesitates to interpret TRIA § 201(a) broadly in light of the important role blocked assets play in foreign policy—an area where the Courts have traditionally accorded some weight to the views of the Executive Branch. *See Republic of Austria v. Altmann,* 541 U.S. 677, 701–702, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004); *Sosa v. Alvarez–Machain,* 542 U.S. 692, 733 n. 21, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004); *Doe v. Exxon Mobil Corp.* 473 F.3d 345, 354 (D.C.Cir.2007). This Court will accord the Government's interpretation, advanced in this case through its Statement of Interest and other related declarations, "a measure of deference proportional to the 'thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.' " *Christopher v. SmithKline Beecham Corp.,* ——U.S. ——, 132 S.Ct. 2156, 2169, 183 L.Ed.2d 153 (2012) (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)).

The Government notes that "any judicial application of TRIA has important consequences for the Executive Branch's implementation of sanctions regimes in the public interest." ECF No. 230, at 3. Historically, the Executive Branch has viewed blocked assets as important "leverage in working out policy disputes with other countries...." Jennifer K. Elsea, Congressional Research Serv., Suits Against Terrorist States by Victims of Terrorism, at 9 (2008), *available at* http://www.fas.org/sgp/crs/terror/RL31258.pdf (last accessed August 21, 2012); *see also* Decl. of James Kerr, ECF No. 212–7, Ex. D, ¶ 10. The Executive Branch also worries that attachment "exposes the United States to the risk of reciprocal actions against U.S. assets by other States." Elsea, at 9.

Plaintiffs' sweeping interpretation would effectively—through future attachments and executions—eliminate the President's ability to use blocked assets as bargaining chips in solving foreign policy disputes. This is especially true as the amount of outstanding judgments against terrorist states greatly exceed the amount of blocked assets. *Compare* U.S. Dep't of the Treasury, Office of Foreign Assets Control, *Terrorist Assets Report Calendar Year 2011,* at 13, *available at* http://www.treasury.gov/resource-center/sanctions/Programs/Documents/tar2011.pdf ($72 million in blocked assets relating to Iran exist) *with Taylor v. Islamic Republic of Iran,* 881 F.Supp.2d 19, 25–26, 2012 WL 3126774, at *4 (D.D.C. Aug. 2, 2012) ($9.5 billion in outstanding judgments against Iran exist from the 1983 Beirut bombing). Absent an express indication that Congress intended attachment and execution of all blocked assets[5]—including blocked assets totally unowned by terrorist states—this Court will not interpret TRIA § 201(a) to conflict with both its plain language and decades of practice.

b. FSIA § 1610(g) Requires an Iranian Ownership Interest

In the alternative, plaintiffs argue that they may execute on the Contested accounts under FSIA § 1610(g). Section 1610(g), passed in 2008, contains language ***442** very similar to that of TRIA § 201(a). The relevant section provides:

> **(g) Property in certain actions.**—
>
> **(1) In general.**—Subject to paragraph (3), the *property of a foreign state* against which a judgment is entered

> under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—
>
> **(A)** the level of economic control over the property by the government of the foreign state;
>
> **(B)** whether the profits of the property go to that government;
>
> **(C)** the degree to which officials of that government manage the property or otherwise control its daily affairs;
>
> **(D)** whether that government is the sole beneficiary in interest of the property; or
>
> **(E)** whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

28 U.S.C. § 1610(g) (emphasis added). Again, the textual issue under § 1610(g) is the same: does the word "of" require plaintiff to prove that Iran had an ownership interest in the Contested Accounts? For the same textual reasons previously discussed in reference to TRIA § 201(a), the answer remains yes. *See* Part III.A.2.a. Nonetheless, three unique aspects of § 1610(g) merit separate discussion.

First, the language in § 1610(g)(1) specifically permitting attachment of "an interest held directly or indirectly in a separate juridical entity" is inapplicable here. Congress included this language "to overcome the effect of *Dole Food Co. v. Patrickson,* which held that an entity owned indirectly by a foreign state, through another wholly-owned entity, was not an 'agency or instrumentality' of the foreign state." *Calderon–Cardona,* 867 F.Supp.2d at 407 (citing *Dole Food Co.,* 538 U.S. at 473, 123 S.Ct. 1655 ("[A] subsidiary of an instrumentality is not itself entitled to instrumentality status."). *Dole Food* followed the earlier *Bancec,* 462 U.S. 611, 103 S.Ct. 2591, decision. Courts applying *Bancec* fashioned a five-factor test to determine whether an instrumentality served merely as the *alter ego* of the foreign state. *See Flatow v. Islamic Republic of Iran,* 308 F.3d 1065, 1071 n. 9 (9th Cir.2002). Section § 1610(g) subparagraphs (A)–(E) explicitly prohibit consideration of each of the five *Bancec* factors. By abrogating *Dole Food* and *Bancec,* § 1610(g)(1) made property that a foreign state owns through an instrumentality—or a subsidiary of an instrumentality—attachable. Nonetheless, these sections do nothing to modify § 1610(g)(1)'s requirement that the Contested Accounts be "the property *of* a foreign state." As with TRIA § 201(a), this "of" cannot be ignored.

Second, when this Court first described § 1610(g)'s attachment provisions in 2009, it found that § 1610(g) permitted "attachment or execution with respect to property *belonging to* designated state sponsors of terrorism." *In re Terrorism Litig.,* 659 F.Supp.2d at 62. While perhaps dicta in the 2009 opinion, this finding was consistent with the Conference Committee Report adopted prior to enactment of § 1610(g). H.R.Rep. No. 110–447, at 1001. The Report stated that § 1610(g) "is written to subject any property interest in which the foreign state enjoys *a beneficial ownership* to attachment and execution...." H.R.Rep. No. 110–447, at 1001 (2007) (emphasis added).

***443** Third, plaintiffs argue that § 1610(g)(3) is rendered superfluous by the Banks' reading of the statute. Section 1610(g)(3) provides the following:

> **(3) Third-party joint property holders.**—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

Plaintiffs argue that "if property 'owned' only by Iran were subject to attachment, there would be no need for Congress to protect third-party 'interests.' " Pls.' Reply, ECF No. 220, at 17. This argument, however, fails to account for a number of possible situations. For example, Iran may jointly own property with a number of innocent third-parties who could have joint ownership rights that 1610(g)(3) protects. Or, Iran may wholly own an asset in which an innocent third-party holds a lesser interest—like a right of first refusal—that carries some economic value which 1610(g)(3) protects. Far from being superfluous, 1610(g)(3) provides courts with the important power to protect interests held by third-parties where Iran has some ownership of a property.

3. Iran Does Not Have an Ownership Interest in the Contested Accounts

In light of this Court's ruling that both "blocked assets *of* that terrorist party" in TRIA § 201(a) and "property *of* a foreign state" in FSIA § 1610(g)(1) require plaintiffs to prove some

terrorist state ownership in order to attach and execute on property, this Court must do two things: decide what law should be applied to determine whether Iran has an ownership interest, and apply that law to the Contested Accounts.

a. Federal Law Preempts D.C. Law

Federal Rule of Civil Procedure 69 provides that "[t]he procedure on execution ... must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies." Both parties concede that this Court must follow District of Columbia procedure for execution on both the Contested and Uncontested Accounts. Plaintiffs, however, argue that the substantive basis for their right to execution is found in federal law—specifically, TRIA § 201, FSIA § 1610(g), and OFAC regulations. Pls.' Reply, ECF 220, at 34 (citing *Heiser III*, 807 F.Supp.2d at 25–26). Plaintiffs contend that federal law and OFAC regulations govern all property in which Iran has any interest, therefore preempting the entire field and leaving no room for state law to supplement or contradict District of Columbia law. Plaintiffs also argue that a conflict exists between the OFAC definitions of "blocked assets"—which are incorporated into TRIA § 201 and FSIA § 1610(g)—and D.C. law defining ownership interests more narrowly.

The Banks respond that neither the TRIA, FSIA, nor OFAC regulations define whether Iran has an ownership interest Contested Accounts, and that therefore state law must apply. The Banks propose that the substantive District of Columbia law which applies to this case is Uniform Commercial Code Article 4A, as codified in D.C.Code § 28:4A *et seq.* The Banks rely on Second Circuit precedent stating that "[i]n the absence of a superseding federal statute or regulation, state law generally governs the nature of any interests in or rights to property that an entity may have." *Export–Import Bank of the United States v. Asia Pulp & Paper Co.*, 609 F.3d 111 (2d Cir.2010) ("*Asia Pulp* ").

State law must give way to federal law in at least three circumstances: (1) ***444** when Congress expressly preempts state law, (2) when Congress undertakes so-called "field preemption," and (3) when state law conflicts with federal law. *Arizona v. U.S.*, — U.S. —, 132 S.Ct. 2492, 2501, 183 L.Ed.2d 351 (2012). Neither party asserts that TRIA § 201 or FSIA § 1610 expressly preempt state property law. Therefore, the first question this Court must ask is whether field preemption applies. Because this Court finds that field preemption does apply, it need not address the Banks' conflict preemption argument.

Field preemption forecloses states from regulating an area of law—whether that state law conflicts with federal law or complements federal law. *Arizona v. U.S.*, — U.S. —, 132 S.Ct. 2492, 2502, 183 L.Ed.2d 351 (2012). The purpose of Congress is the ultimate touchstone in every preemption case. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (citations and quotations omitted). Courts look to see if a federal law is designed to function as a "harmonious whole." *Hines v. Davidowitz*, 312 U.S. 52, 72, 61 S.Ct. 399, 85 L.Ed. 581 (1941). "The intent to displace state law altogether can be inferred from a framework of regulation so pervasive ... the Congress left no room for the States to supplement it or where there is a federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Arizona*, 132 S.Ct. at 2501 (citations and quotations omitted).

The Supreme Court has emphasized the paramount federal interest that exists in the conduct of our foreign relations. In a recent pronouncement in this area, the Supreme Court stated that "[t]here is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy...." *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003); *accord Hines*, 312 U.S. at 63, 61 S.Ct. 399 ("Our system of government ... imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."). The founders surely agreed with this sentiment. Alexander Hamilton implored that "The Peace of the WHOLE ought not to be left at the disposal of a PART." The Federalist No. 80, 535–36 (Jacob E. Cooke ed., 1961). James Madison similarly urged uniformity in our infant nation's dealings with other countries. The Federalist No. 42, at 279 ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations.").

TRIA § 201 and FSIA § 1610(g) implicate exclusively federal interests and, therefore, preempt District of Columbia law. These statutes concern property "of" a foreign sovereign, and not just any foreign sovereign—only those designated as state-sponsors of terror. TRIA § 201(d)(4); FSIA §§ 1610(g)(1), 1605A(h)(6). Designating a country as a state-sponsor of terrorism is a drastic decision that the Executive Branch does not make on a whim; serious political and economic consequences result from this designation. One such consequence is that the "property of" a designated

state-sponsor of terror loses its sovereign immunity and may become subject to attachment and execution. FSIA § 1610(g)(1). The idea that *state* property law definitions of ownership should control the disposition of these assets flies in the face of the dominant *federal* interest in our relations with terrorist states. *Cf. Crosby v. National Foreign Trade Council,* 530 U.S. 363, 375, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000) ("It is simply implausible that Congress would have gone to such lengths to empower the President if it had been willing to compromise his effectiveness by deference to every ***445** provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary Presidential action.").

Additionally, the National Defense Authorization Act of 2008 ("NDAA"), which created FSIA § 1610(g), shows that Congress intends for the federal government to wholly occupy this field. From 2004 when the D.C. Circuit decided *Cicippio–Puleo* until 2008, the state-sponsored terrorism exception (then codified at 28 U.S.C. § 1605(a)(7)) acted only as a jurisdiction-conferring provision—the substantive causes of action against foreign state-sponsors of terrorism were found in state law. *See Cicippio–Puleo v. Islamic Republic of Iran,* 353 F.3d 1024, 1027 (D.C.Cir.2004). Congress became unhappy with this pass-through approach and the "lack of uniformity in the underlying state sources of law." *In re Terrorism Litig.,* 659 F.Supp.2d at 60. As this Court noted, this pass-through approach often caused "equally deserving plaintiffs to have their claims denied because they were domiciled in jurisdictions that did not afford them a substantive [state law] claim." *Id.* at 59. Congress responded to this unfairness with § 1083 of the 2008 NDAA. *Id.* at 58–59. This statute (1) took the extraordinary step of creating a federal cause of action against designated state-sponsors of terrorism (now codified at FSIA § 1605A), (2) provided for punitive damage awards against state-sponsors of terrorism, (3) provided federal funding for special masters assisting the Court in these cases, and (4) created the broader attachment and execution rights found in FSIA § 1610(g). *Id.* at 58–62. The FSIA already contained provisions related to damages, counterclaims, service, venue, default, in addition to a laundry list of exceptions to foreign sovereign immunity, all of which can be found in FSIA §§ 1603–1611. Reading TRIA § 201 and FSIA § 1610(g) in conjunction with the entire FSIA and the 2008 NDAA amendments shows that Congress intended to create a "harmonious whole" and intended that the federal government occupy this field.

b. Federal Common Law Applies and Iran Does Not Have an Ownership Interest in the Contested Accounts.

Since Congress has preempted District of Columbia law in this area, the Court is left with a puzzling situation: how to determine the level of ownership TRIA § 201(a) and FSIA § 1610(g) require Iran to have in the Contested Accounts. The Government suggests that in this situation, "courts could achieve the desired uniformity through the development of federal common law or its functional equivalent to govern attachment." Statement of Interest, ECF No. 230, at 13. This Court agrees. The D.C. Circuit has, however, long cautioned that "it is a mistake ... to label actions under the FSIA as 'federal common law' cases, for these actions are based on *statutory* rights." *Bettis v. Islamic Republic of Iran,* 315 F.3d 325, 333 (2003).

In such cases, this Court "look[s] to Restatements, legal treatises, and state decisional law to find and apply what are generally considered to be the well-established standards of state common law, a method of evaluation which mirrors—but is distinct from—the 'federal common law' approach." *Estate of Doe v. Islamic Republic of Iran,* 808 F.Supp.2d 1, 23 n. 7 (D.D.C.2011); *see also Owens v. Republic of Sudan,* 826 F.Supp.2d 128, 157 n. 3 (D.D.C.2011). The D.C. Circuit in *Bettis* adopted this approach when it applied Restatement (Second) of Torts § 46 to FSIA intentional infliction of emotional distress claims, a practice that continues to this day. *See Oveissi v. Islamic Republic of Iran,* 879 F.Supp.2d 44, 53–54, 2012 WL 3024758, at *7 (D.D.C. July 25, 2012). In ***446** light of this, the Court will now examine the Restatement (First) of Property, relevant legal treatises, and state decisional law to determine whether Iran has an ownership interest that sufficient for attachment and execution under TRIA § 201(a) or FSIA § 1610(g).

Comment b to the Restatement (First) of Property § 10 states that "[a] person who has the totality of rights, power, privileges and immunities which constitute complete property in a thing [ ] is the 'owner' of the 'thing,' or 'owns' the 'thing.' " The Restatement recognizes that the owner's control is not necessarily absolute:

> *Ownership despite decrease in interests.* The owner may part with many of the rights, powers, privileges and immunities that constitute complete property and his relation to the thing is still termed ownership both in this Restatement and as a matter of popular usage. Thus

> an owner of an automobile may mortgage it, or have it subjected to a mechanic's lien, and still properly be said to be the owner. It is characteristic of ownership that upon the termination of any lesser interests, the interests of the owner are thereby automatically increased.

Id. at § 10 cmt. c. OFAC regulations blocked the Contested Accounts because an Iranian bank had a "contingent, future, interest" in the funds. Pls.' at 33, 36. This description of Iran's interest in the Contested Accounts could hardly sound less absolute. Common sense—and the Restatement's definition of ownership—support the finding that Iran's indefinite, ephemeral interest in the Contested Accounts does not rise to the level that would typically be considered "of," "belonging to," or "owned by" Iran.

However, while applying the Restatement's skeletal definition of ownership may be quite simple, in "finding" the federal common law, *Bettis* was also guided by FSIA § 1606. *Bettis*, 315 F.3d at 333. This section provides that "foreign state[s] shall be liable in the same manner and to the same extent as a private individual under like circumstances." *Id.* *Bettis* and FSIA § 1606 counsel the Court to examine how ownership interests in Electronic Funds Transfers ("EFTs")—like those blocked by the Banks in this case—are treated under state law.

The operation of an EFT can appear quite complicated. Fortunately, the Second Circuit has outlined the EFT process:

> An EFT is nothing other than an instruction to transfer funds from one account to another. When the originator and the beneficiary each have accounts in the same bank that bank simply debits the originator's account and credits the beneficiary's account. When the originator and beneficiary have accounts in different banks, the method for transferring funds depends on whether the banks are members of the same wire transfer consortium. If the banks are in the same consortium, the originator's bank debits the originator's account and sends instructions directly to the beneficiary's bank upon which the beneficiary's bank credits the beneficiary's account. If the banks are not in the same consortium—as is often true in international transactions—then the banks must use an intermediary bank. To use an intermediary bank to complete the transfer, the banks must each have an account at the intermediary bank (or at different banks in the same consortium). After the originator directs its bank to commence an EFT, the originator's bank would instruct the intermediary to begin the transfer of funds. The intermediary bank would then debit the account of the bank where the originator has an account and credit the account of the bank where the beneficiary has an ***447** account. The originator's bank and the beneficiary's bank would then adjust the accounts of their respective clients.

Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd., 585 F.3d 58, 60 n. 1 (2d Cir.2009). The Contested Accounts contain the proceeds of EFTs that were blocked by the Banks pursuant to OFAC regulations in the Banks' role as U.S. intermediary banks. EFTs passing through intermediary banks are sometimes referred to as "midstream" EFTs. With respect each of the Contested Accounts, the Iranian government party triggering the EFT block was the beneficiary's bank.[6]

Property rights in EFTs are covered under Article 4A of the Uniform Commercial Code, which every state (including the District of Columbia) has adopted and which the Federal Reserve applies to its Federal Reserve Wire Transfer Network through Regulation J. *See* Gary D. Spivey, Annotation, *Effect of Uniform Commercial Code Article 4A on Attachment, Garnishment, Forfeiture or Other Third–Party Process Against Funds Transfers*, 66 A.L.R. 6th 567, § 2 (2011). The universal adoption of Article 4A makes it of great importance to this Court in finding principles of law to apply to the Contested Accounts. In examining Article 4A, three things are clear.

First, "[a] creditor of the *originator* can levy on the account of the originator in the originator's bank before the funds transfer is initiated." U.C.C. Article 4A–502 official cmt. 4 (emphasis added). Once the EFT process has commenced, "[t]he creditor of the originator cannot reach any other funds because no property of the originator is being transferred." *Id.* This is because, under Article 4A, "title to the funds passed when the originator's payment order was executed upon transmittal to the intermediary bank." *Palestine Monetary Authority v. Strachman*, 62 A.D.3d 213, 225, 873 N.Y.S.2d 281 (N.Y.Sup.Ct.App.Div.2009); *accord Asia Pulp*, 609 F.3d at 120.

Second, "[a] creditor of the *beneficiary* cannot levy on property of the originator." U.C.C. Article 4A–502 official cmt. 4 (emphasis added). Additionally, "until the funds transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary, the beneficiary has no property interest in the funds transfer which the beneficiary's creditor can reach." *Id.* This is because, under Article 4A, title passes when the beneficiary's bank accepts the payment order from the intermediary bank. *See Asia Pulp*, 609 F.3d at 120 (citing *Bank of New York*

v. Nickel, 14 A.D.3d 140, 145–47 (N.Y.App.Div. 1st Dep't 2004)).

Third, a creditor of *the originator or the beneficiary* cannot levy on the property of either while the property is in the possession of an intermediary bank. *Jaldhi,* 585 F.3d at 71. This is because midstream EFTs held by an intermediary bank "are not the property of either the originator or the beneficiary." *Id.* at 71.

These three situations explain when creditors of either the originator of the EFT or creditors of the intended beneficiary of the EFT may attach funds. However, Iran is neither the originator of the blocked EFTs contained in the Contested Accounts nor the intended beneficiary of these funds. Iran's "contingent, future, interest"—the reason these accounts were blocked—stems from the fact that an Iranian instrumentality acted as the *beneficiary's bank.* Plaintiffs here are creditors ***448** of the beneficiary's bank. Therefore, the issue is whether a creditor of a *beneficiary's bank* may attach a midstream EFT held at an intermediary bank. Clearly, a creditor may do no such thing.

Legal title does not pass to the beneficiary's bank until it accepts the payment order from the intermediary bank. *Asia Pulp,* 609 F.3d at 120 (citing reference omitted). The beneficiary's bank then becomes obligated to credit the beneficiary's account or otherwise pay the beneficiary, thus ultimately transferring title to the beneficiary. In this case, the Iranian banks never obtained legal title to the funds in the Contested Accounts because—due to OFAC blocking regulations—they never accepted the intermediary banks' payment orders.

Moreover, Article 4A contains a "money-back guarantee provision" as "an important protection" for the originator. Article 4A–402 cmt. 2. This is because—if an EFT is not completed—the originator likely continues to have an underlying obligation to pay the beneficiary. U.C.C. Article 4A–402(e) provides that when "an intermediary bank is obliged to refund payment ... but is unable to do so because not permitted by applicable law," the originator may be "subrogated to the right of the bank that paid the intermediary bank to refund." In other words, the originator and the originator's banks have claims to an interrupted EFT and *not* the beneficiary or the beneficiary's banks.

Plaintiffs argue that the money-back guarantee cannot apply to blocked accounts because OFAC regulations preclude such a refund from issuing absent a specific OFAC license. Pls.' Reply at 35. While this may be true, OFAC blocking only inhibits the originator and the originator's bank from pursuing a refund, it does not vest title in the beneficiary or the beneficiary's bank. Under Article 4A, property rights do not pass to the beneficiary's bank until it has accepted the intermediary bank's payment order. U.C.C. Article 4A–402(c).

Plaintiffs also rely on the one-year statute of repose contained Article 4A. U.C.C. Article 4A–505. This provision extinguishes the right of an originator and an originator's bank to seek a refund of an incomplete EFT. Again, plaintiffs' argument fails because the statute of repose—if it applies—only extinguishes an originator's or an originator's banks right of refund. That provision does not magically vest property rights forward in the EFT transaction process to the beneficiary or the beneficiary's bank. *Cf. India Steamship v. Kobil Petroleum Ltd.,* 663 F.3d 118, 121 (2d Cir.2011) ("no alchemy by the bank can transform EFT's that cannot be attached into property ... that can be attached.").

Applying both the Restatement and U.C.C. Article 4A, plaintiffs cannot show that Iran has any ownership interest in the Contested Accounts. Plaintiffs alternatively argue that OFAC regulations contain broad definitions of property that should control. The Banks—correctly—respond that OFAC regulations have nothing to do with defining what constitutes an Iranian ownership interest in property. While OFAC regulations may provide a broad definition of "property" for the purposes of FSIA § 1610(g) and a similarly broad definition of "blocked assets" for the purposes of TRIA § 201(a), plaintiff again mistakenly interprets these broad regulations coextensively with the narrower language requiring the Contested Accounts to be the property "of" Iran. The Government concurs, stating that "[t]here is no need—and no justifiable basis—to force OFAC's regulations into serving a role they were not intended to perform."

Even if OFAC regulations were ambiguous on the question of ownership, OFAC's narrower interpretation would ordinarily ***449** be entitled to deference unless "plainly erroneous or inconsistent with regulation." *See Auer v. Robbins,* 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (citing reference omitted). That standard is easily met here. As explained earlier, the expansive language OFAC employs in 31 C.F.R. § 535 to block transactions with Iranian entities stands in stark contrast to the language employed in TRIA § 201(a) and FSIA § 1610(g) where Congress chose to allow

execution on only a subset of blocked assets: those "of" a terrorist party.

Accordingly, the Banks' motion for judgment as a matter of law is granted and plaintiffs' motion for judgment as a matter of law is denied as to the Contested Accounts.

B. Uncontested Accounts—Garnishees' Motion for Interpleader

The Banks move for leave to file a third-party petition alleging claims in the nature of interpleader against parties that the Banks believe may assert an interest in the Uncontested Accounts. Garnishee Banks' Mot. for Leave to File Third Party Petition, ECF No. 213. Plaintiffs take no position on the Banks' motion.

Interpleader is a tool which protects a stakeholder—here, the Banks—from multiple liability arising from multiple claims to the same fund. *See Commercial Union Ins. Co. v. U.S.*, 999 F.2d 581, 583 (D.C.Cir.1993). "Where a party in control of contested property, the stakeholder, makes no claim on the property and is willing to release it to the rightful claimant, interpleader allows him 'to put the money or other property in dispute into court, withdraw from the proceeding, and leave the claimants to litigate between themselves the ownership of the fund in court.' " *Id.* (citations omitted). Interpleader may be brought in federal court under either the Federal Interpleader Act, 28 U.S.C. § 1335, or under Rule 22 of the Federal Rules of Civil Procedure. *Id.* Here, the Banks propose to use Rule 22 interpleader.

Rule 22 is "merely a procedural device; it confers no jurisdiction on the federal courts." *Morongo Band of Mission Indians v. California State Bd. of Equalization*, 858 F.2d 1376, 1382 (9th Cir.1988). In light of this, the Banks' proposed interpleader action must fall within a statutory grant of federal jurisdiction. *See Commercial Union*, 999 F.2d at 584. Here, three statutory grants of authority exist: the interpleader action arises under federal law, satisfying 28 U.S.C. § 1331, is against a foreign state, satisfying 28 U.S.C. § 1330, and arises out of transactions involving international or foreign banking, satisfying 12 U.S.C. § 632. *Id.* Assured of its jurisdiction, this Court will grant the Banks' Motion for Leave to File a Third Party Petition.

IV. CONCLUSION

This Court lamented in its *In re Islamic Republic of Iran Terrorism Litigation* treatise that FSIA terrorism cases often "turn[ ] into a long and [ ] futile quest for justice...." 659 F.Supp.2d at 138. The victims and their families "have often been opposed by the Executive Branch and their struggles have rarely produced positive results." *Id.* The recent passage of the Iran Sanctions, Accountability, and Human Rights Act of 2012 gives this Court some hope that victims of terrorism may finally see substantial compensation. *See* Pub.L. No. 112–158, § 501 *et seq.*, 126 Stat. 1214; Basil Katz, *Tweak to U.S. bill on Iran sanctions opens door to damages* (Aug. 27, 2012, 7:00am EDT), http://www.reuters.com/article/2012/08/27/usa-iranidUSL2E8 JO8W920120827 (nothing that this ***450** new law targets over $1.75 billion in Iranian securities frozen in a New York bank account).

Nevertheless, this Court is under no illusions that the path ahead will be much easier for victims than it has been in the past. The Uncontested Accounts contain $364,572, which is less than one-tenth of one percent of the approximately $591 million awarded against Iran in this case. This tiny sum is dwarfed by even greater magnitudes when compared to the endless suffering of these victims. "A step in the right direction, to be sure. But a very small one." *Heiser III*, 807 F.Supp.2d at 27.

A separate Order consistent with this opinion shall issue this date.

All Citations

885 F.Supp.2d 429

Footnotes

1 Hezbollah is synonymous with "Hizbollah," which is merely a "variant transliteration[ ] of the same name." *Oveissi v. Islamic Republic of Iran*, 498 F.Supp.2d 268, 273 n. 3 (D.D.C.2007), *rev'd on other grounds*, 573 F.3d 835 (D.C.Cir.2009).

2 In the interest of efficiency because of the number of potential turnover cases related to the *Heiser I* and *Heiser II* judgments, substantial parts of the introduction, background, and procedural history section of this Memorandum Opinion are taken from this Court's August 10, 2011 *Heiser III* opinion. *See* 659 F.Supp.2d 20.

3 The Court here only briefly recounts the relevant background to place the current regulatory framework in proper context. For an extensive history of regulations and Executive Orders concerning Iran, see Judge Wexler's excellent summary in *Weinstein v. Islamic Republic of Iran,* 299 F.Supp.2d 63, 65–68 (E.D.N.Y.2004).

4 *Accord Levin v. Bank of New York,* 2011 WL 812032 (S.D.N.Y. Mar. 4, 2011).

5 Except, of course, diplomatic assets exempt under TRIA § 201(d)(2)(B)(ii), which have long been treated as *sui generis.*

6 The Uncontested Accounts contain, among other types of accounts, four blocked EFTs. In each of these four EFTs, Iran or its instrumentality functioned as the originator, the originator's bank, or in some role that is unclear from the record. The Banks concede that Iran has a sufficient ownership interest in these accounts to permit attachment.

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ANNEX 354

735 F.3d 934
United States Court of Appeals,
District of Columbia Circuit.

Fran HEISER, Individually and as Co–Administrator of the Estate of Michael Heiser, et al., Appellants
v.
ISLAMIC REPUBLIC OF IRAN, et al., Appellees.

No. 12–7101.
|
Argued Sept. 24, 2013.
|
Decided Nov. 19, 2013.

Synopsis

Background: Following grant, 659 F.Supp.2d 20, of amended final judgment for survivors of terrorist bombing of a United States military housing facility in Saudi Arabia and the estates and family members of personnel killed in the bombing, in their consolidated actions, under the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act (FSIA), against, inter alia, the Islamic Republic of Iran, judgment creditors sought to garnish funds in blocked accounts in two American banks. Banks contested turnover as to some of the accounts at issue and moved for leave to file an interpleader complaint to account for potential third-party interests in the remaining accounts. The United States District Court for the District of Columbia, 885 F.Supp.2d 429, prohibited attachment of accounts containing the proceeds of electronic funds transfers that were blocked under various sanctions programs implemented by the Treasury Department's Office of Foreign Assets Control on ground that Iran did not have an ownership interest in the blocked accounts, and judgment creditors appealed.

Holdings: The Court of Appeals, Randolph, Senior Circuit Judge, held that:

neither Terrorism Risk Insurance Act (TRIA) nor Foreign Sovereign Immunities Act (FSIA) permits judgment creditors of foreign states to attach property those states do not own, and

Iran, which was owner of the beneficiary's bank for each funds transfer, was not owner of electronic funds transfers, and therefore those funds were not subject to attachment.

Affirmed.

Attorneys and Law Firms

***935** Dale K. Cathell argued the cause for appellants. With him on the briefs was Richard M. Kremen.

James L. Kerr argued the cause for appellees Wells Fargo Bank, N.A., et al. With him on the brief was Karen E. Wagner.

Benjamin M. Shultz, Attorney, U.S. Department of Justice, argued the cause for amicus curiae United States of America. With him on the brief were Stuart F. Delery, Principal Deputy Assistant Attorney General, Ronald C. Machen, U.S. Attorney, and Mark B. Stern and Sharon Swingle, Attorneys.

Before: BROWN, Circuit Judge, and EDWARDS and RANDOLPH, Senior Circuit Judges.

Opinion

Opinion for the court filed by Senior Circuit Judge RANDOLPH.

RANDOLPH, Senior Circuit Judge:

****182** In 1996, an explosion tore apart the Khobar Towers apartment complex in Dhahran, Saudi Arabia. Nineteen American military personnel died and hundreds of others were wounded. Investigations revealed that the terrorist organization Hezbollah had attacked the Towers with Iran's assistance. The opinion in *Estate of Heiser v. Islamic Republic of Iran (Heiser I)*, 466 F.Supp.2d 229, 252–54, 260–65 (D.D.C.2006), describes Iran's intimate involvement in planning, supporting, and approving the attack.

The estate of Michael Heiser, one of the victims, and other victims' families and estates, sued Iran and several of its agencies and instrumentalities alleging their liability

for the attacks. Plaintiffs obtained a default judgment, *id.* at 356, later modified under the 2008 National Defense Authorization Act, *Estate of Heiser v. Islamic Republic of Iran (Heiser II)*, 659 F.Supp.2d 20, 22–23, 30–31 (D.D.C.2009). The judgment now totals approximately $591 million in punitive and compensatory damages. *Estate of Heiser v. Islamic Republic of Iran (Heiser III)*, 885 F.Supp.2d 429, 450 (D.D.C.2012). The propriety of that judgment is not before us.

Plaintiffs, attempting to collect on this judgment, had writs of attachment issued to Bank of America, N.A., and Wells Fargo, N.A., seeking any assets held by the banks in which Iran had an interest. The banks responded with lists of accounts having some connection to Iran, after which plaintiffs moved for the banks to turn over the funds in these accounts. In response, the banks conceded that some accounts were potentially subject to attachment. *Id.* at 447 n. 6. These "uncontested accounts" are the subject of an interpleader action in the district court. *Id.* at 434, 449.

The remaining "contested accounts" are the subject of this appeal. *Id.* at 432. The accounts contain the proceeds of electronic funds transfers that were blocked under various sanctions programs the Treasury Department's Office of Foreign Assets Control implemented. *Id.* at 432–33, 446. These concepts need to be explained.

An electronic funds transfer is a series of transactions by which one party, called the "originator," transfers money through the banking system to another party, called the "beneficiary." *See* ****183 *936** U.C.C. § 4A–104(a).[1] Suppose O wants to transfer $100 to B. If O and B have an account at Bank X, then the transaction is simple. O can instruct Bank X, which will debit O's account and credit B's account with $100. But suppose O has an account at Bank X, and B has an account at Bank Y. Unless Banks X and Y are members of the same lending consortium, they must involve a third " intermediary" bank with which Banks X and Y both have accounts. The transaction would proceed as follows: (1) O instructs Bank X to pay B; (2) Bank X debits O's account and forwards instructions to the intermediary bank; (3) the intermediary bank debits Bank X's account, credits Bank Y's account, and forwards instructions to Bank Y; and (4) Bank Y credits B's account. The entire process occurs rapidly through a sequence of electronic debits and credits.

In this case, electronic funds transfers were never completed because of blocking regulations.[2] The intermediary banks—affiliated with either Wells Fargo or Bank of America—electronically screened each funds transfer they received. The screening found references to one of several designated Iranian banks. Because of those references, the banks froze the transfers and deposited the proceeds in separate accounts. The money never reached the beneficiaries or their banks, but instead became the subject of litigation.

The blocking regulations cast a wide net. The regulations froze and prohibited the "transfer[ ]" of "property and interests in property" of designated entities. *See* 31 C.F.R. §§ 544.201(a), 594.201(a). These terms were defined broadly. *See id.* §§ 544.308, 544.309, 594.309, 594.312. Assets could be blocked even though Iran had no "traditional legal interests" in them. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 162–63 (D.C.Cir.2003) (internal quotation marks omitted). Blocking was not based on legal ownership.

The breadth of the blocking regulations is evident here. Iranian entities were not the originators of the funds transfers.[3] Nor were they the ultimate beneficiaries. The transfers were blocked because the beneficiaries' banks were Iranian. They were blocked, in other words, because Iranian ****184 *937** banks would have had a contingent future possessory interest in the funds.

These are the funds that plaintiffs seek in satisfaction of their judgment against Iran. Plaintiffs argue that the Iranian banks' contingent possessory interests are sufficient for them to attach the contested accounts under two statutes. The first, 28 U.S.C. § 1610(g), "subject[s] to attachment" "the property of a foreign state ... and the property of an agency or instrumentality of such a state" against which a plaintiff holds a judgment under 28 U.S.C. § 1605A. The second, § 201(a) of the Terrorism Risk Insurance Act of 2002, Pub.L. No. 107–297, 116 Stat. 2322, 2337 (codified at 28 U.S.C. § 1610 Note "Satisfaction of Judgments from Blocked Assets of Terrorists, Terrorist Organizations, and State Sponsors of Terrorism"), "subject[s] to execution or attachment" "the blocked assets of [a] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)" against which a plaintiff holds a judgment under 28 U.S.C. § 1605(a)(7).[4]

The United States submitted a statement of interest to the district court, and has filed a brief amicus curiae in this appeal. The government took "no position" on the question whether Iran owns the contested accounts. United States Amicus Br. at 1. It addressed only the proper construction of § 201 and § 1610(g). The government argued that the statutes "do not ... permit a plaintiff to satisfy a judgment against a terrorist party by attaching property that the terrorist party does not own."

United States Amicus Br. at 2. The government's interpretation of § 201 and § 1610(g) is the same as the banks'.

The district court held that the contested accounts were not attachable under either statute. It first held that the word "of" in § 201 and § 1610(g) denotes ownership and that Iran must therefore own any accounts plaintiffs may seek to attach. *Heiser III,* 885 F.Supp.2d at 437–43. It then determined that ownership of the contested accounts should be governed by a federal rule of decision because the Foreign Sovereign Immunities Act, which includes both § 201 and § 1610(g), preempts state law. *Id.* at 443–45. The court adopted Uniform Commercial Code Article 4A as a federal rule of decision. *Id.* at 445–47. Applying Article 4A principles, the district court found that Iran did not own the contested accounts. The court therefore denied plaintiffs' motion for a turnover of the funds. *Id.* at 447–49.[5]

The parties agree that most of the requirements of § 201 and § 1610(g) are satisfied. Iran is obviously a "foreign state." Section 201 defines a "terrorist party" as "a foreign state designated as a state sponsor of terrorism," 28 U.S.C. § 1610 Note (d)(4), and Iran has been so designated, *Valore v. Islamic Republic of Iran,* 700 F.Supp.2d 52, 67–68 (D.D.C.2010). The funds are also property and blocked assets. ****185 *938** *Heiser III,* 885 F.Supp.2d at 433, 437, 442. As discussed above, plaintiffs hold a judgment under 28 U.S.C. § 1605(a)(7), which was modified under 28 U.S.C. § 1605A. *See supra* note 4.

Whether plaintiffs can attach the contested accounts thus depends on whether those accounts are the "property" or "blocked assets" *of* Iran. Plaintiffs ask us to treat the word "of" as encompassing any Iranian relationship with the contested accounts. Although the word "of" may signify ownership, plaintiffs claim that an ownership definition is inappropriate here. Instead, they say the word "of" should draw its meaning from the surrounding language. In § 201 Congress used "of" to modify "blocked assets," and assets may be blocked on the basis of Iranian interests far less significant than ownership. This language choice, according to plaintiffs, conveys Congress's intent to compensate victims of terrorism with blocked assets. Thus, plaintiffs conclude, the contested accounts may be attached for the same reason they were blocked: because an Iranian bank would have served as a bank to the ultimate beneficiary.

The banks and the United States both reject this interpretation, citing Supreme Court cases defining "of" in various statutes as requiring ownership. *See Bd. of Trs. of the Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.,* — U.S. ——, 131 S.Ct. 2188, 2195–96, 180 L.Ed.2d 1 (2011); *Poe v. Seaborn,* 282 U.S. 101, 109, 51 S.Ct. 58, 75 L.Ed. 239 (1930). The district court relied, in part, on these and other Supreme Court decisions. *Heiser III,* 885 F.Supp.2d at 438. While the decisions establish that "of" denotes ownership in some statutes, the word may carry a different meaning in others. *See, e.g., Prot. & Advocacy for Persons with Disabilities v. Mental Health & Addiction Servs.,* 448 F.3d 119, 125–26 (2d Cir.2006). None of the Supreme Court decisions the parties or the district court cited purport to define "of" conclusively and for all purposes. Its meaning depends on context.

With respect to § 201 and § 1610(g), plaintiffs' interpretation conflicts with the established principle that "a judgment creditor cannot acquire more property rights in a property than those already held by the judgment debtor." 50 C.J.S. *Judgments* § 787 (2013); *see United States v. Winnett,* 165 F.2d 149, 151 (9th Cir.1947); *Zink v. Black Star Line, Inc.,* 18 F.2d 156, 157 (D.C.Cir.1927); *Lewis v. Smith,* 15 F.Cas. 498, 498–99 (C.C.D.C.1825) (No. 8,332). If a debtor merely holds property as an intermediary for a third party, but does not own the property, then a creditor cannot attach it. *See Carpenter v. Nat'l City Bank of Chi.,* 48 App.D.C. 133, 134–35, 136 (D.C.Cir.1918). These principles carry significant weight because "statutes should be interpreted consistently with the common law." *Manoharan v. Rajapaksa,* 711 F.3d 178, 179 (D.C.Cir.2013) (per curiam) (quoting *Samantar v. Yousuf,* 560 U.S. 305, 130 S.Ct. 2278, 2289, 176 L.Ed.2d 1047 (2010)). Congress can "abrogate" the traditional common-law principles governing execution of judgments, but to do so it must "speak directly to the question addressed by the common law." *Id.* at 179–80 (quoting *United States v. Texas,* 507 U.S. 529, 534, 113 S.Ct. 1631, 123 L.Ed.2d 245 (1993) (internal quotation marks omitted)).

Congress has not done so here. The statutory text is silent on this issue. Nothing in the legislative histories of § 201 or § 1610(g) suggests that Congress intended judgment creditors of foreign states to be able to attach property those states do not own. Indeed, a House Report addressing § 1610(g) states that the section was intended to let debtors attach assets in which foreign states have "beneficial ownership." H.R.Rep. No. 110–477, at 1001 (2007) (Conf.Rep.). The House Report ****186 *939** on the Terrorism Risk Insurance Act does state that § 201's purpose "is to deal comprehensively with the problem of enforcement of judgments rendered on behalf of victims of terrorism ... by enabling them to satisfy such judgments through the attachment of blocked assets of terrorist parties." H.R.Rep. No. 107–779, at 27 (2002), 2002 U.S.C.C.A.N. 1430 (Conf.Rep.). But this merely repeats

the language of the statute. It does not show that Congress's " comprehensive [ ]" solution was to abrogate the common law.

Plaintiffs cite the floor debate over § 201 to argue that Congress wanted to compensate terrorism victims with blocked assets. But plaintiffs misinterpret the debate. Congress had a narrower concern. Even before the Terrorism Risk Insurance Act was passed, 28 U.S.C. § 1610(f)(1) purportedly allowed creditors holding judgments under § 1605(a)(7) (and, later, under § 1605A) to attach blocked property. But the President was authorized to "waive any provision" of § 1610(f)(1) "in the interest of national security." 28 U.S.C. § 1610(f)(3). The President waived § 1610(f)(1) in almost all cases after finding that attachment of blocked property would "impede the ability of the President to conduct foreign policy" and "impede the effectiveness of ... prohibitions and regulations upon financial transactions." Determination to Waive Requirements Relating to Blocked Property of Terrorist–List States, 63 Fed.Reg. 59,201 (Oct. 21, 1998).[6] Congress responded to this perceived "flaunting [flouting of?] the law," 148 Cong. Rec. 23,121 (Nov. 19, 2002) (statement of Sen. Harkin), by passing § 201, which "builds upon and extends the principles in section 1610(f)(1) ... and eliminates the effects of any Presidential waiver issued prior to the date of enactment." H.R.Rep. No. 107–779, at 27; *see also Ministry of Def. v. Elahi*, 556 U.S. 366, 386, 129 S.Ct. 1732, 173 L.Ed.2d 511 (2009). The floor debate clearly demonstrates that at least some members of Congress wanted to use Iran's assets to pay its victims, whether or not the executive agreed. But that purpose is a far cry from paying Iran's victims with assets Iran does not own.

Adopting plaintiffs' interpretation of § 201 and § 1610(g) risks punishing innocent third parties. Plaintiffs' position is that these sections allow a creditor to satisfy a judgment with property the debtor does not own. But if the debtor does not own that property, then someone else must. And that someone could, and very well might, be an innocent person who then unjustly bears the costs of the debtor's wrong. This court has construed "strictly against the garnisher" a statute "in derogation of the common law," because it risked penalizing "a garnishee who owed the principal defendant nothing." *Austin v. Smith*, 312 F.2d 337, 340–43 (D.C.Cir.1962); *see also Rieffer v. Home Indem. Co.*, 61 A.2d 26, 27 (D.C.1948) ("The weight of authority clearly favors a strict construction of attachment statutes."), *modified on other grounds*, 62 A.2d 371 (D.C.1948). And the need to protect innocent parties is particularly acute with ****187 *940** blocked assets. In a statement of interest submitted in a different case, the government explained that the Sudan Sanctions Regulations—which have similar breadth to the sanctions in this case, *see* 31 C.F.R. §§ 538.201, 538.301, 538.310, 538.313—could block "personal remittances by persons not subject to sanctions" merely because the remittances were sent through a Sudan-owned bank. Statement of Interest of the United States of America at 6–7, *Rux v. ABN Amro Bank N.V.*, No. 08–CV–6588, 2009 WL 8660085 (S.D.N.Y. Apr. 14, 2009), ECF No. 132. These personal remittances could include tuition payments for health care training or money paid by a Sudanese embassy employee to purchase a personal vehicle. *Id.* Exhibit 1 at ¶¶ 14–15 (Decl. of John E. Smith).

The record does not disclose whether the originators or beneficiaries in this case are entirely innocent. But they may be. And that prospect would be contrary to Congress's intent. If potentially innocent parties pay plaintiffs' judgment, then the punitive purpose of these provisions is not served. Quite the opposite. To the extent innocent parties pay some part of a terrorist state's judgment debt, the terrorist state's liability is ultimately reduced. Congress could not have intended such a result.

Plaintiffs claim that even if Iranian ownership is required, they should still prevail because Iran actually owns the contested accounts. They argue that ownership interests include any interest in the property bundle, including the Iranian banks' contingent future possessory interests in the accounts, an interpretation that harmonizes with the broad definitions of "property" and "interests in property" contained in the blocking regulations. Plaintiffs urge us not to adopt U.C.C. Article 4A as a rule of decision, reasoning that federal law preempts this Uniform Commercial Code provision.

We agree with plaintiffs that Article 4A does not apply of its own force. But it is not correct to treat this as an issue of preemption. Federal law, specifically § 201 and § 1610(g), is controlling. The question is the content of this federal law.

Congress has not provided a rule for determining ownership under § 201 or § 1610(g). Nor has Congress directed the federal courts to adopt state ownership rules under this statutory scheme. *See* Richard H. Fallon, Jr. et al., Hart & Wechsler's The Federal Courts and the Federal System 632–33 (6th ed.2009); Paul J. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L.Rev. 797, 797 n. 1, 811 (1957). Our task is thus the "normal judicial filling of statutory interstices." Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L.Rev. 383, 421 (1964). We must fashion a "rule of decision" for

applying § 201's and § 1610(g)'s ownership requirement, and that rule, though federal, may sometimes "follow state law." *Id.* at 410; *see Clearfield Trust Co. v. United States*, 318 U.S. 363, 366–68, 63 S.Ct. 573, 87 L.Ed. 838 (1943).

Article 4A provides an appropriate rule of decision. Article 4A is a particularly convenient and appropriate measure of ownership because it has been adopted by all fifty states and the District of Columbia, and addresses ownership of electronic funds transfers, the issue presented in this case. *See Heiser III*, 885 F.Supp.2d at 447. The Uniform Commercial Code is often used as the basis of federal common-law rules. *See* Caleb Nelson, *The Persistence of General Law*, 106 Colum. L.Rev. 503, 510–11 & n. 33 (2006). To be clear, we do not hold that the District's or any state's version of Article 4A applies of its own force. Rather, we hold that Article 4A is a proper federal rule of decision for ****188 *941** applying the ownership requirements of § 201 and § 1610(g).

Applying the principles of Article 4A, we agree with the district court that Iran does not own the contested accounts. *Heiser III*, 885 F.Supp.2d at 447–49. Iran was not the beneficiary or originator, but the owner of the beneficiary's bank for each funds transfer, and "[l]egal title does not pass to the beneficiary's bank until it accepts the payment order from the intermediary bank." *Id.* at 448; *see Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 71 (2d Cir.2009); *Regions Bank v. Provident Bank, Inc.*, 345 F.3d 1267, 1277 (11th Cir.2003). The Iranian beneficiary banks never received a payment order because the funds transfers were blocked at the intermediary banks, and they never held legal title to the money in the contested accounts. *Heiser III*, 885 F.Supp.2d at 448. Article 4A's subrogation provisions further support this view. If the intermediary bank is prohibited from completing a transfer, then the originator is subrogated to its bank's right to a refund. U.C.C. § 4A–402(d)–(e). As the district court explained, this provision means that claims on an interrupted funds transfer ultimately belong to the originator, not the beneficiary or its bank. *Heiser III*, 885 F.Supp.2d at 448.

Because plaintiffs could not attach the contested accounts under either § 201 or § 1610(g) without an Iranian ownership interest in the accounts, and because Iran lacked an ownership interest in the accounts, the order of the district court is

Affirmed.

All Citations

735 F.3d 934, 407 U.S.App.D.C. 181

Footnotes

1 The following explanation is drawn from *Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 60 n. 1 (2d Cir.2009) and 3 James J. White & Robert S. Summers, Uniform Commercial Code § 22–1 (5th ed.2008). *See also Heiser III*, 885 F.Supp.2d at 446–47; 7 Lary Lawrence, Anderson on the Uniform Commercial Code §§ 4A–101:1, 4A–101:6, 4A–103:4, 4A–104:4 to 104:11 (rev. ed.2007).

2 Blocking regulations are promulgated under the International Emergency Economic Powers Act, Pub.L. No. 95–223, tit. II, 91 Stat. 1625, 1625–26 (1977) (codified at 50 U.S.C. §§ 1701–1706), which gives the President "broad powers" to impose economic sanctions on actors who threaten American interests. *Consarc Corp. v. U.S. Treasury Dep't*, 71 F.3d 909, 914 (D.C.Cir.1995). Although Iran-specific blocking regulations exist, *see* 31 C.F.R. pts. 535 (Iranian Assets Control Regulations), 560 (Iranian Transactions and Sanctions Regulations), 561 (Iranian Financial Sanctions Regulations), 562 (Iranian Human Rights Abuses Sanctions Regulations), the transfers in this case were blocked under two different programs: Weapons of Mass Destruction Proliferators Sanctions Regulations, 31 C.F.R. pt. 544; *see* Exec. Order No. 13,382, 70 Fed.Reg. 38,567 (June 28, 2005), and Global Terrorism Sanctions Regulations, 31 C.F.R. pt. 594; *see* Exec. Order No. 13,224, 66 Fed.Reg. 49,079 (Sept. 23, 2001).

3 One of the *uncontested* accounts holds the proceeds of a funds transfer for which an Iranian entity was an originator's bank, and another holds proceeds of a transfer with which an Iranian entity had an unknown relationship. The question whether a judgment creditor can attach assets that bear those relationships to Iran is not before the court.

4 The National Defense Authorization Act of 2008 repealed 28 U.S.C. § 1605(a)(7) and replaced it with 28 U.S.C. § 1605A. *Heiser II*, 659 F.Supp.2d at 23. Plaintiffs' original judgment was awarded under the former provision. *Heiser I*, 466 F.Supp.2d at 248, 265–66, 356–59. The modified judgment, including punitive damages, was awarded under the latter. *Heiser II*, 659 F.Supp.2d at 23–24.

5 The district court's holding that § 201 and § 1610(g) require Iran to own the contested accounts accords with

Calderon–Cardona v. JPMorgan Chase Bank, N.A., 867 F.Supp.2d 389, 403–07 (S.D.N.Y.2011). Three other opinions from the same district have disagreed and held that § 201 does not require an ownership interest for attachment. *Hausler v. JPMorgan Chase Bank, N.A.*, 845 F.Supp.2d 553, 562–68 (S.D.N.Y.2012); *Levin v. Bank of N.Y.*, No. 09–CV5900, 2011 WL 812032, at *13–19 (S.D.N.Y. Mar. 4, 2011); *Hausler v. JP Morgan Chase Bank, N.A.*, 740 F.Supp.2d 525, 533–39 (S.D.N.Y.2010).

6 Section 1610(f) was passed as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub.L. No. 105–277, Treasury Department Appropriations Act, tit. I, § 117(d), 112 Stat. 2681–480, 2681–491 to –492. The original language allowing the President to waive the "requirements of this section," was codified as a note to 28 U.S.C. § 1610(g). *See id.* That language was repealed by the Victims of Trafficking and Violence Protection Act of 2000, Pub.L. No. 106–386, div. C, § 2002, 114 Stat. 1464, 1543, which added the current language allowing the President to waive "any provision of paragraph (1)." The President then executed a superseding waiver pursuant to this new language. Determination to Waive Attachment Provisions Relating to Blocked Property of Terrorist–List States, 65 Fed.Reg. 66,483 (Oct. 28, 2000).

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ANNEX 355

923 F.3d 1095
United States Court of Appeals, District of Columbia Circuit.

Henri MAALOUF, et al., Appellants
v.
ISLAMIC REPUBLIC OF IRAN and Iranian Ministry of Information and Security, Appellees
Nasrin Akhtar Sheikh, as the spouse of Fahrat Mahmood Sheikh, an employee of the United States Government or an employee of a contractor for the United States Government Deceased, et al., Appellants
v.
Ministry of the Interior of the Republic of Sudan, et al., Appellees
Rita Bathiard, on her own behalf and as personal representative of the estate of Cesar Bathiard, et al., Appellants
v.
Islamic Republic of Iran and Iranian Ministry of Information and Security, Appellees

No. 18-7052
|
Consolidated with 18-7053
|
No. 18-7060
|
Consolidated with 18-7065
|
18-7090
|
No. 18-7122
|
Argued February 8, 2019
|
Decided May 10, 2019

Synopsis

Background: Victims, family members, and administrators of estates of victims of terrorist bombings, which occurred over 30 years ago outside United States embassies in Lebanon, Kenya, and Tanzania, filed suits under Foreign Sovereign Immunities Act (FSIA) against Islamic Republic of Iran and Republic of Sudan, seeking damages for personal injuries and deaths resulting from attacks. The United States District Court for the District of Columbia, (No. 1:16-cv-00280), (No. 1:16-cv-01507), (No. 1:14-cv-02090), (No. 1:15-cv-00951), (No. 1:14-cv-02118), (No. 1:16-cv-01549), John D. Bates, J., 306 F.Supp.3d 203 and 308 F.Supp.3d 46, issued consolidated opinion granting Sudan's motion to dismiss claims as time barred, denying plaintiffs default judgment against Iran, and sua sponte dismissing claims against Iran as time barred, 326 F.R.D. 16, denied reconsideration, and Christopher R. Cooper, J., 317 F.Supp.3d 134, denied plaintiffs default judgment against Iran and sua sponte dismissed claims as time barred. Plaintiffs appealed dismissal of claims against Iran, and appeals were consolidated.

Holdings: The Court of Appeals, Edwards, Senior Circuit Judge, held that:

Iran forfeited FSIA terrorism exception's statute of limitations defense;

in matter of first impression, district court lacks authority to sua sponte raise forfeited statute of limitations defense in FSIA terrorism exception case against defendant sovereign that fails to appear; and

district court lacked authority to sua sponte raise Iran's forfeited FSIA terrorism exception's statute of limitations defense.

Reversed, vacated, and remanded.

***1099** Appeals from the United States District Court for the District of Columbia (No. 1:16-cv-00280) (No. 1:16-cv-01507)

Appeals from the United States District Court for the District of Columbia (No. 1:14-cv-02090) (No. 1:15-cv-00951) (No. 1:14-cv-02118)

Appeal from the United States District Court for the District of Columbia (No. 1:16-cv-01549)

Attorneys and Law Firms

Steven M. Schneebaum argued the cause and filed the

briefs for appellants Henri Maalouf, et al.

Stuart H. Newberger, Clifton S. Elgarten, Aryeh S. Portnoy, John L. Murino, and Emily M. Alban were on the brief for amici curiae Smith plaintiffs in support of appellants.

Jonathan S. Massey was on the brief for amicus curiae Professor Stephen I. Vladeck supporting plaintiffs-appellants.

Erica Hashimoto, Director, and Marcella Coburn, Attorney, both appointed by the court, argued the causes as amicus curiae in support of the District Courts' Orders in No. 18-7052, et al., No. 18-7060, et al., and No. 18-7122, et al. With them on the brief were Rebecca Deucher, Sean Lavin, and James O'Toole, Student Attorneys.

Christopher M. Curran, Nicole Erb, Claire A. DeLelle, and Celia A. McLaughlin were on the brief for amicus curiae The Republic of Sudan in support of the court appointed amicus curiae.

Derek L. Shaffer argued the cause for appellants Nasrin Sheikh, et al. With him on the briefs were Stephen M. Hauss, Milin Chun, Nazareth M. Haysbert, and Daniel Sage Ward.

Clifton S. Elgarten argued the cause for appellants Rita Bathiard, et al. On the briefs were Thomas Fortune Fay, Amanda Fox Perry, and John Vail.

Before: Srinivasan and Pillard, Circuit Judges, and Edwards, Senior Circuit Judge.

Opinion

Edwards, Senior Circuit Judge:

***1100 **456** On April 18, 1983, and September 20, 1984, the militant group Hezbollah detonated car bombs outside United States diplomatic facilities in Beirut, Lebanon, killing dozens and wounding many more. On August 7, 1998, truck bombs exploded outside the U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, killing more than two hundred and injuring more than a thousand. These two bombings were the work of al Qaeda. In the decades since, the Islamic Republic of Iran has been linked to all four bombings, while the Republic of Sudan's support for al Qaeda has implicated it in the 1998 attacks.

Foreign sovereigns are generally immune from suit in U.S. courts. However, district courts in this Circuit have found Iran and Sudan liable for the attacks in numerous suits filed by victims and their families under the terrorism exception of the Foreign Sovereign Immunities Act (FSIA), the statute governing the amenability of foreign nations to lawsuits in the United States. The FSIA's terrorism exception was first enacted in 1996 but was replaced in 2008 with, *inter alia*, a more expansive provision allowing for suits by non-U.S. nationals.

In this consolidated opinion, we address six cases arising from the Beirut, Nairobi, and Dar es Salaam attacks. Plaintiffs in three of the suits are family members or estates of victims of the 1998 bombings. The plaintiffs in these cases named Sudan and Iran as defendants. The remaining three actions seek damages from Iran for deaths and injuries resulting from the 1983 and 1984 attacks. The first five suits were assigned to the same District Court Judge, including all of the complaints against Sudan, which successfully moved to dismiss the claims against it as untimely. Iran, in contrast, failed to appear to defend the complaints raised against it. The plaintiffs moved for default judgment against Iran. The District Court, however, acted *sua sponte* to consider whether the complaints against Iran were timely. After briefing ***1101 **457** from the parties, the District Court ruled that the claims against Iran were untimely, denied the motions for default judgment, and dismissed plaintiffs' actions. The District Court Judge assigned to the sixth case followed suit on the same grounds.

All plaintiffs now appeal the dismissals of their claims against Iran, contending that the District Courts erred in raising the statute of limitations *sua sponte* and in dismissing their complaints as untimely. One group of plaintiffs also challenges the denial of motions for relief from judgment that they filed after their claims were dismissed.

We do not reach the statute of limitations issue or the post-judgment motions. Rather, we conclude that the District Court lacks authority to *sua sponte* raise a forfeited statute of limitations defense in an FSIA terrorism exception case, at least where the defendant sovereign fails to appear. We therefore reverse the judgments of the District Courts, vacate the dismissals of the complaints, and remand for further proceedings.

I. Background

A. The FSIA and the Terrorism Exception

The FSIA, enacted in 1976, "provides the sole means for suing a foreign sovereign in the courts of the United States." *Owens v. Republic of Sudan*, 864 F.3d 751, 763 (D.C. Cir. 2017). The statute establishes that foreign states are "presumptively immune from the jurisdiction of the federal and state courts, 28 U.S.C. § 1604, subject to several exceptions codified in §§ 1605, 1605A, 1605B, and 1607." *Id.* These include the "terrorism exception," which provides that:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

28 U.S.C. § 1605A(a)(1); *see also id.* § 1605A(a)(2)(A)(i)(I) (stating that the foreign state must have been designated a "state sponsor of terrorism"); *id.* § 1605A(h)(6) (explaining that the term "state sponsor of terrorism" means "a country the government of which the Secretary of State has determined ... is a government that has repeatedly provided support for acts of international terrorism").

Congress adopted the first version of the terrorism exception, codified until its repeal at 28 U.S.C. § 1605(a)(7), as part of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214. *See Owens*, 864 F.3d at 763. A key feature of the original statutory regime was that only U.S. nationals were eligible to file suit. *See* 28 U.S.C. § 1605(a)(7) (repealed 2008); *see also Owens*, 864 F.3d at 763. After several courts adopted narrow interpretations of the exception, including that it did not create a cause of action against foreign states, Congress enacted § 1083 of the National Defense Authorization Act for Fiscal Year 2008 (the NDAA), which repealed § 1605(a)(7) and replaced it with the current terrorism exception, 28 U.S.C. § 1605A. Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338-44 (2008) (codified at 28 U.S.C. § 1605A). Among other new provisions, the revised exception explicitly established a federal cause of action for victims of ***1102** ****458** terror attacks and their families to seek damages from state sponsors of terrorism that took part in an attack or materially supported the perpetrators. *See* 28 U.S.C. § 1605A(c); *see also Owens*, 864 F.3d at 765.

Importantly, the new terrorism exception makes causes of action available not only to U.S. nationals, but also to any "claimant" or "victim" who was an employee of the U.S. government or of a U.S. government contractor at the time of a terrorist act and was acting within the scope of his or her employment, or was a member of the armed forces. 28 U.S.C. § 1605A(a)(2)(A)(ii); *see also Owens*, 864 F.3d at 765. The NDAA also replaced the prior statute of limitations for the exception with the following provision:

> An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) ... not later than the latter of— (1) 10 years after April 24, 1996; or (2) 10 years after the date on which the cause of action arose.

28 U.S.C. § 1605A(b).

Another provision, enacted as § 1083(c) of the NDAA, pertaining to the "Application to Pending Cases," also concerns the timeliness of claims arising under the terrorism exception. This provision states:

> (3) Related actions.—If an action arising out of an act or incident has been timely commenced under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104–208), any other action arising out of the same act or incident may be brought under section 1605A of title 28, United States Code, if the action is commenced not later than the latter of 60 days after— (A) the date of the entry of judgment in the original action; or (B) the date of the enactment of this Act.

122 Stat. at 343 (codified at 28 U.S.C. § 1605A note).

Unaltered by the NDAA is 28 U.S.C. § 1608, which sets out requirements for litigation under any of the FSIA's exceptions. Most of the subsections of § 1608 specify procedures for service on foreign defendants. Section 1608(e), however, concerns default judgments against foreign states. It provides, in relevant part, that

> [n]o judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

This provision is similar to Federal Rule of Civil Procedure 55(d), which provides that default judgment may be entered against the United States "only if the

claimant establishes a claim or right to relief by evidence that satisfies the court." Fed. R. Civ. P. 55(d); *see Owens*, 864 F.3d at 785.

B. Terrorist Attacks and Prior Litigation

The enactment of the original terrorism exception in 1996 led to a significant number of actions in U.S. courts by victims of terror attacks and their families. Iran has been a frequent defendant. *See Owens*, 864 F.3d at 777 n.2 (listing several cases); *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 92–103 (D.D.C. 2009) (describing and ruling on motions in twenty cases against Iran). Although Iran has retained counsel and appeared in other matters in U.S. courts, *see, e.g.*, *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175 (D.C. Cir. 2013), it has repeatedly failed to appear to answer ***1103 **459** FSIA terrorism exception complaints, *see In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d at 43 & n.5.

The four attacks giving rise to the cases at issue here have each been the subject of prior FSIA litigation in which district courts have found that Iran bears partial responsibility for the plaintiffs' injuries. *See, e.g.*, *Dammarell v. Islamic Republic of Iran*, 281 F. Supp. 2d 105, 192–99 (D.D.C. 2003), *vacated on other grounds*, 404 F. Supp. 2d 261 (D.D.C. 2005) (1983 Beirut embassy bombing); *Wagner v. Islamic Republic of Iran*, 172 F. Supp. 2d 128, 132–33 (D.D.C 2001) (1984 Beirut embassy bombing); *Owens v. Republic of Sudan*, 826 F. Supp. 2d 128, 150–51 (D.D.C. 2011) (1998 Nairobi and Dar es Salaam bombings).

C. The Cases on Appeal

The six cases on appeal were filed between 2014 and 2016. The three cases arising out of the 1998 embassy bombings name both Sudan and Iran as defendants, as well as Sudan's Ministry of the Interior and Iran's Ministry of Information and Security. The cases arising out of the Beirut attacks name only Iran and its ministry. The first five cases to be filed were assigned to the same District Court Judge, while the sixth was assigned to a different District Court Judge. As detailed below, the District Courts dismissed each case as untimely, either by granting Sudan's motions to dismiss the claims against it, or by *sua sponte* dismissing the claims against Iran. The plaintiffs now appeal the dismissals of their claims against Iran, arguing that the District Courts erred in raising the statute of limitations *sua sponte* and in dismissing the claims as untimely.

This court appointed counsel to appear as *amicus curiae* ("Appointed Amicus") in support of the District Courts' orders on appeal. We appreciate the outstanding efforts by appointed counsel and the Student Attorneys who appeared with them.

1. Sheikh, Kinyua, *and* Chogo *Cases*

The *Sheikh*, *Kinyua*, and *Chogo* cases, which were considered together in the District Court and consolidated on appeal, arise out of the 1998 embassy bombings in Nairobi and Dar es Salaam and name both Sudan and Iran and their ministries as defendants. The *Sheikh* plaintiffs, who filed a complaint in the District Court on December 11, 2014, are four family members and the administrator of the estate of Fahrat Mahmood Sheikh, who was killed in the Nairobi bombing and was employed by either the embassy or a U.S. government contractor operating there. *See* Complaint at 5–6, *Sheikh v. Republic of the Sudan*, No. 1:14-cv-02090-JDB (D.D.C. Dec. 11, 2014), *reprinted in* Appendix at 101–02, *Sheikh v. Republic of the Sudan*, No. 18-7060 ("*Sheikh* App."). The complaint asserts claims including wrongful death, loss of consortium, intentional infliction of emotional distress, and civil conspiracy. Complaint at 24–29, *Sheikh*, No. 1:14-cv-02090-JDB (D.D.C. Dec. 11, 2014), *Sheikh* App. 120–25. None of the plaintiffs is a U.S. national.

Plaintiffs in *Kinyua*, who filed their complaint on December 15, 2014, are seven family members of Moses Magothe Kinyua, another Nairobi embassy employee or contractor who was severely injured in the bombing and died in 2012. *See* Complaint at 5–6, *Kinyua v. Republic of the Sudan*, No. 1:14-cv-02118-JDB (D.D.C. Dec. 15, 2014), *reprinted in Sheikh* App. 133–34; *Sheikh* App. 229. Plaintiffs in *Chogo*, who include forty-one employee or contractor victims of the Nairobi attack and ten family members, as well as seven employee or contractor victims of the Dar es Salaam bombing, filed their complaint on June 19, 2015. *See* Complaint at 10–20, ***1104 **460** *Chogo v. Republic of the Sudan*, No. 1:15-cv-00951-JDB (D.D.C. June 19, 2015), *reprinted in Sheikh* App. 168–78. Both complaints assert claims that are similar to those in the *Sheikh* complaint, though the *Chogo* complaint also includes an assault and battery claim. *See* Complaint at 25–28, *Kinyua*, No. 1:14-cv-02118-JDB (D.D.C. Dec. 15, 2014), *Sheikh* App. 153–56; Complaint at 42–47, *Chogo*, No. 1:15-cv-00951-JDB (D.D.C. June 19, 2015), *Sheikh*

App. 200–05. With the exception of one U.S. citizen plaintiff in *Chogo*, the plaintiffs in both cases are either Kenyan or Tanzanian nationals.

Each of the foregoing three complaints alleges that both Sudan and Iran provided material support to the members of al Qaeda who perpetrated the embassy bombings and that the terrorism exception therefore applies. *See* Complaint at 2–4, *Sheikh*, No. 1:14-cv-02090-JDB (D.D.C. Dec. 11, 2014), *Sheikh* App. 98–100; Complaint at 2–4, *Kinyua*, No. 1:14-cv-02118-JDB (D.D.C. Dec. 15, 2014), *Sheikh* App. 130–32; Complaint at 7–9, *Chogo*, No. 1:15-cv-00951-JDB (D.D.C. June 19, 2015), *Sheikh* App. 165–67. Iran failed to appear in any of the three cases, and Sudan never returned service of the *Chogo* complaint. However, Sudan moved to dismiss the *Sheikh* and *Kinyua* complaints on various grounds, including that the claims were untimely. *See Sheikh v. Republic of the Sudan*, 172 F. Supp. 3d 124, 127 (D.D.C. 2016). The District Court granted the motion and dismissed the *Sheikh* and *Kinyua* plaintiffs' claims as untimely without addressing Sudan's other arguments. *Id.* at 127–32.

The District Court then addressed the plaintiffs' claims against Iran. Rather than rule on motions for default judgment that the plaintiffs had filed, the District Court indicated that the claims against Iran appeared to be untimely. *Id.* at 132. The court acknowledged that it is "normally inappropriate for a federal court to dismiss claims as untimely *sua sponte*," but suggested that both doctrinal and policy considerations might allow for an exception in the FSIA context. *Id.* at 132–33. The District Court then directed all three sets of plaintiffs to file briefs addressing why their claims should not be dismissed as untimely.

After reviewing the parties' briefs on the statute of limitations issue, the District Court issued a consolidated opinion that denied plaintiffs' pending motions for default judgment against Iran and dismissed the claims against Iran with prejudice. *Sheikh v. Republic of the Sudan*, 308 F. Supp. 3d 46, 55 (D.D.C. 2018). In so doing, the District Court acknowledged that a statute of limitations is an affirmative defense that a defendant "normally" forfeits by failing to raise it. *Id.* at 51. However, the District Court concluded that it had discretion to raise forfeited defenses itself, and that "sua sponte consideration 'might be appropriate in special circumstances,' particularly when an affirmative defense implicates the interests of the judiciary as well as the defendant." *Id.* (quoting *Arizona v. California*, 530 U.S. 392, 412, 120 S.Ct. 2304, 147 L.Ed.2d 374 (2000)).

The District Court thought that "[t]he comity owed to foreign sovereigns, particularly in default scenarios, ... counsels in favor of raising the timeliness issue here." *Id.* at 53. "Whatever Iran's misdeeds," the court asserted, "it remains a foreign country equal in juridical stature to the United States, and the federal courts must respect 'the independence, the equality, and dignity of the sovereign.' " *Id.* at 52 (quoting *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 123, 3 L.Ed. 287 (1812)). Practical comity-related considerations supported acting *sua sponte*, the court explained, including "the reciprocal foreign litigation interests of the United States ***1105 **461** and a concern for judicial efficiency." *Id.* (quoting *Clodfelter v. Republic of Sudan*, 720 F.3d 199, 209 (4th Cir. 2013)). The court also stated that "particular care must be taken with state-sponsored terrorism claims, since the FSIA strikes a 'careful balance' between comity and accountability." *Id.* at 53 (quoting *Rubin v. Islamic Republic of Iran*, — U.S. —, 138 S. Ct. 816, 822, — L.Ed.2d — (2018)).

In light of these and other concerns, the District Court concluded that it was appropriate for it to raise *sua sponte* the statute of limitations, deny the motions for default judgment, and dismiss all three sets of claims against Iran as untimely. *Id.* at 55. The *Chogo* plaintiffs were given additional time to obtain return of service from Sudan, *id.* at 55–56, but they elected to dismiss their Sudan claims instead, *see Sheikh* App. 49–50.

Following the District Court's ruling, the *Kinyua* plaintiffs filed a motion for post-judgment relief under Federal Rules of Civil Procedure 59(e) and 60(b), seeking an opportunity to explain that they did not file their complaint earlier because they had thought they were parties to an earlier suit by other members of their family. *See Sheikh* App. 217–25. The District Court denied the motion. *Kinyua v. Republic of the Sudan*, 326 F.R.D. 16, 23 (D.D.C. 2018). The *Kinyua*, *Sheikh*, and *Chogo* plaintiffs now appeal the dismissal of the claims against Iran. They have not sought review of the decision dismissing the Sudan claims.

2. Maalouf *and* Salazar *Cases*

The *Maalouf* and *Salazar* cases, consolidated for appeal, arise out of the 1984 and 1983 Beirut attacks, respectively. The plaintiffs in *Maalouf*, who filed a complaint against Iran on February 17, 2016, and an amended complaint on July 21, 2016, are the brother and the estates of three other family members of Edward Maalouf, a Lebanese national and employee of the U.S. embassy in Beirut who was killed in the 1984 bombing.

Amended Complaint at 2–4, *Maalouf v. Islamic Republic of Iran*, No. 1:16-cv-00280-JDB (D.D.C. July 21, 2016), *reprinted in* Appendix at 35–37, *Maalouf v. Islamic Republic of Iran*, No. 18-7052 ("*Maalouf* App."). The plaintiffs are also citizens of Lebanon. Amended Complaint at 3–4, *Maalouf*, No. 1:16-cv-00280-JDB (D.D.C. July 21, 2016), *Maalouf* App. 36–37. Asserting claims that include wrongful death, loss of solatium, and intentional infliction of emotional distress, the amended complaint explains that while other family members of the decedent had filed suit and received a final judgment against Iran in *Estate of Doe v. Islamic Republic of Iran*, 808 F. Supp. 2d 1 (D.D.C. 2011), the living plaintiff in this case, Henri Maalouf, was not in contact with those family members and therefore was unaware of the action. *See* Amended Complaint at 2–3, 6–8, *Maalouf*, No. 1:16-cv-00280-JDB (D.D.C. July 21, 2016), *Maalouf* App. 35–36, 39–41.

The *Salazar* plaintiffs, who filed a complaint asserting claims of wrongful death and intentional infliction of emotional distress against Iran on July 22, 2016, are two sons of Staff Sergeant Mark Salazar, a member of the U.S. military killed in the 1983 embassy bombing. *See* Complaint at 1–3, 5–6, *Salazar v. Islamic Republic of Iran*, No. 1:16-cv-01507-JDB (D.D.C. July 22, 2016), *reprinted in Maalouf* App. 72–74, 76–77. Although the Salazars are American citizens and thus were eligible to file suit before the enactment of § 1605A, they assert that until 2016 they were unaware that they could recover damages from Iran through litigation. *See Maalouf* App. 107–08, 116. They further explain that they did not join an earlier suit concerning their father's death, in which final judgment was entered against Iran on May 12, 2005, *Salazar v. Islamic Republic of Iran*, 370 F. Supp. 2d 105 (D.D.C. 2005), ***1106 **462** because they were not told of the suit by the plaintiff, a woman whom they allege unlawfully married their father in 1979 while he remained married to their mother. *See* Complaint at 1–2, *Salazar*, No. 1:16-cv-01507-JDB (D.D.C. July 22, 2016), *Maalouf* App. 72–73.

Both cases were assigned to the same District Court Judge who presided over the *Sheikh*, *Kinyua*, and *Chogo* cases. On the same day when it dismissed the claims against Sudan in *Sheikh* and *Kinyua*, the District Court issued an order to the *Maalouf* plaintiffs to show cause as to why their claims against Iran should not similarly be dismissed as untimely. *See Maalouf* App. 16–17. Upon review of their response, the District Court issued an order declining to dismiss the claims at that time. *See id.* at 33.

The *Maalouf* plaintiffs then filed and served their amended complaint and moved for entry of a default judgment against Iran. *Id.* at 46–54. The *Salazar* plaintiffs, who filed their complaint after the show-cause order in *Maalouf*, also filed a motion for default judgment. *Id.* at 83–92. Despite its earlier decision not to dismiss *Maalouf* on timeliness grounds, the District Court denied the motions for default judgment and dismissed both *Maalouf* and *Salazar* in a consolidated opinion largely identical in structure, reasoning, and language to the opinion dismissing *Sheikh*, *Kinyua*, and *Chogo*, which was issued the same day. *Maalouf v. Islamic Republic of Iran*, 306 F. Supp. 3d 203, 213 (D.D.C. 2018). The plaintiffs now appeal.

3. Bathiard *Case*

Finally, plaintiffs in *Bathiard* are the widow, children, and estate of Cesar Bathiard, a Lebanese national and employee of the U.S. embassy in Beirut who was killed in the 1983 bombing. Complaint at 2–3, *Bathiard v. Islamic Republic of Iran*, No. 1:16-cv-01549-CRC (D.D.C. Aug. 1, 2016), *reprinted in* Appendix at 7–8, *Bathiard v. Islamic Republic of Iran*, No. 18-7122 ("*Bathiard* App."). Their complaint, filed on August 1, 2016, and assigned to a different District Court Judge than the five other cases at issue, names Iran and its Ministry of Information and Security as defendants and asserts claims including wrongful death, survival, and loss of solatium. Complaint at 6–9, *Bathiard*, No. 1:16-cv-01549-CRC (D.D.C. Aug. 1, 2016), *Bathiard* App. 11–14.

When the plaintiffs moved for entry of a default judgment against Iran, which once again failed to appear, the District Court directed them to file supplemental briefing addressing whether the action was timely. *See Bathiard v. Islamic Republic of Iran*, 317 F. Supp. 3d 134, 137 (D.D.C. 2018). After receiving the briefing, the District Court adopted the reasoning from the *Sheikh* and *Maalouf* opinions on the timeliness provisions of the terrorism exception and courts' discretion to raise timeliness *sua sponte*, found that the complaint was untimely, denied the motion for default judgment, and dismissed the case. *See id.* at 138–44. The plaintiffs appeal.

II. Analysis

A. Standard of Review

Whether courts have discretion to invoke a statute of limitations *sua sponte* is a question of law and is therefore reviewed *de novo*. *See Patchak v. Jewell*, 828 F.3d 995, 1001 (D.C. Cir. 2016); *see also Eriline Co. S.A. v. Johnson*, 440 F.3d 648, 653 (4th Cir. 2006) (identifying *de novo* review as appropriate for this question).

B. Discussion

The only question that we must reach is whether a federal court has discretion to *sua sponte* invoke the terrorism exception's statute of limitations on behalf of defendants who have not entered an appearance ***1107 **463** or otherwise sought to respond to complaints against them. After reviewing the applicable principles governing the forfeiture of affirmative defenses, and the Supreme Court's instructive jurisprudence on the narrow set of situations in which a court may raise affirmative defenses on its own motion, we conclude that the District Courts erred in taking *sua sponte* action in the cases presented.

1. *Forfeiture of Affirmative Defenses*

We start with fundamental principles governing affirmative defenses, including statutes of limitations. As the Supreme Court has explained, "[o]rdinarily in civil litigation, a statutory time limitation is forfeited if not raised in a defendant's answer or in an amendment thereto." *Day v. McDonough*, 547 U.S. 198, 202, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006). This rule derives from Federal Rule of Civil Procedure 8(c), which directs that, "[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including ... statute of limitations." Fed. R. Civ. P. 8(c)(1); *see Harris v. Sec'y, U.S. Dep't of Veterans Affairs*, 126 F.3d 339, 343 (D.C. Cir. 1997); *see also Smith-Haynie v. District of Columbia*, 155 F.3d 575, 578 (D.C. Cir. 1998) (clarifying that an affirmative defense may also be raised in a pre-answer motion under Rule 12(b) "when the facts that give rise to the defense are clear from the face of the complaint"). Although the Rules do not explicitly prescribe the consequences of failing to timely raise a defense, *see Harris*, 126 F.3d at 343, the Supreme Court has instructed that "[a]n affirmative defense, once forfeited, is 'exclu[ded] from the case,' " *Wood v. Milyard*, 566 U.S. 463, 470, 132 S.Ct. 1826, 182 L.Ed.2d 733 (2012) (alteration in original) (quoting 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1278 (3d ed. 2004)).

We pause here to note the distinction between forfeiture and waiver, terms which "though often used interchangeably by jurists and litigants ... are not synonymous." *Hamer v. Neighborhood Hous. Servs. of Chi.*, — U.S. —, 138 S. Ct. 13, 17 n.1, 199 L.Ed.2d 249 (2017). "[F]orfeiture is the failure to make the timely assertion of a right[;] waiver is the 'intentional relinquishment or abandonment of a known right.' " *Id.* (alterations in original) (quoting *United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)). We have clarified that "[f]ailure to plead an affirmative defense under Rule 8(c) constitutes failure to make a timely assertion of the defense." *Harris*, 126 F.3d at 343 n.2. While a party may "intelligently choose to waive a statute of limitations defense," *Day*, 547 U.S. at 210 n.11, 126 S.Ct. 1675, "[t]he failure to plead need not be intentional for the party to lose its right to raise the defense," *Harris*, 126 F.3d at 343 n.2.

Some statutes of limitations, of course, are jurisdictional. "When that is so, a litigant's failure to comply with the [time] bar deprives a court of all authority to hear a case." *United States v. Kwai Fun Wong*, — U.S. —, 135 S. Ct. 1625, 1631, 191 L.Ed.2d 533 (2015). Because "[s]ubject-matter jurisdiction can never be waived or forfeited," courts are obligated to raise a *jurisdictional* statute of limitations *sua sponte*, even if "the parties have disclaimed or have not presented" the issue. *Gonzalez v. Thaler*, 565 U.S. 134, 141, 132 S.Ct. 641, 181 L.Ed.2d 619 (2012). Recognizing the "harsh consequences" that a jurisdictional statute of limitations can impose on plaintiffs, however, the Court has established a clear statement rule of statutory interpretation: For a court to conclude that a statute of limitations is indeed jurisdictional, "traditional tools of statutory construction must plainly show ***1108 **464** that Congress imbued a procedural bar with jurisdictional consequences." *Kwai Fun Wong*, 135 S. Ct. at 1632. As a result, most statutes of limitations are not jurisdictional. *See id.*; *see also Musacchio v. United States*, — U.S. —, 136 S. Ct. 709, 716–17, 193 L.Ed.2d 639 (2016).

In *Owens v. Republic of Sudan*, we applied this searching mode of review to examine 28 U.S.C. § 1605A(b), the FSIA terrorism exception's statute of limitations. *See* 864 F.3d at 801–02. Following the Supreme Court's directives, "[w]e look[ed] for the Congress's intent in 'the text, context, and relevant historical treatment' " of the statute. *Id.* at 801 (quoting *Musacchio*, 136 S. Ct. at 717). After finding nothing in the provision's text "refer[ring] to the 'court's power' to hear a case," *id.* at 802 (quoting *Kwai Fun Wong*, 135 S. Ct. at 1633), and "see[ing] 'no authority suggesting the Congress intended courts to read

[§ 1605A(b)] any more narrowly than its terms suggest,' " *id.* at 804 (second alteration in original) (quoting *Simon v. Republic of Iraq*, 529 F.3d 1187, 1196 (D.C. Cir. 2008)), we concluded that § 1605A(b) is not jurisdictional, rejecting the contrary argument by Sudan, *id.*

At issue in *Owens* were eight separate default judgments against Sudan in suits arising from the 1998 embassy bombings. After some of the judgments had been entered, Sudan retained counsel and appeared in the District Court to assert various defenses in motions to vacate, including that three of the suits were untimely. *See id.* at 768. The District Court denied the motions to vacate. *Id.* In its appeal, Sudan argued that the terrorism exception's statute of limitations is jurisdictional, a claim we rejected. *See id.* at 804. We further concluded that, because it had failed to timely raise a statute of limitations defense in the three allegedly untimely suits, Sudan had forfeited that defense. *See id.*; *see also id.* at 801 (citing *Harris*, 126 F.3d at 343). That determination was simply an application of the basic principles articulated above: When a party fails to raise an affirmative defense in responding to a pleading, as Sudan did by defaulting, the defense is forfeited. The same reasoning applies to Iran's absence in the cases now before us.

Iran has failed to enter an appearance or submit a filing at any stage of these cases, let alone timely raise the terrorism exception's statute of limitations. We therefore conclude that it has forfeited the defense. We disagree with assertions and insinuations by appellants and amici supporting them that Iran has *waived* rather than *forfeited* a statute of limitations defense by engaging in a purportedly willful default. Appellants and amici contend that because Iran participates in other litigation in the United States, it has made a deliberate choice in not appearing and asserting any affirmative defenses here. But whatever Iran's decisions with respect to other litigation, we agree with the Appointed Amicus that Iran's complete absence here deprives us of any record or basis upon which to reliably determine that it has intentionally relinquished or abandoned a defense.

We are puzzled, however, by the District Court's statement in *Sheikh* that, in cases of default, "the affirmative defense at issue has not actually been waived, and the normal adversarial model upon which the concept of affirmative defenses is based has broken down." 308 F. Supp. 3d at 52. The court offered this statement to justify its departure from the general rule that, with respect to affirmative defenses, if a defendant fails to "raise the issue early on ... the issue is forfeited." *Id.* at 51 (citing *Day*, 547 U.S. at 202, 126 S.Ct. 1675). We agree that Iran has not "waived" any affirmative defenses. But we reject the District Court's suggestion that ***1109 **465** Iran's failure to raise the statute of limitations defense did not result in a forfeiture. This suggestion finds no support in the law or in the record of the cases before us.

2. Sua Sponte *Action on Affirmative Defenses*

Having found that Iran forfeited a statute of limitations defense in each of these cases by failing to assert it in response to the pleadings in the District Court, the issue we must address is whether, and under what circumstances, a court may nonetheless raise a forfeited affirmative defense on behalf of an absent defendant. Specifically, does the District Court have authority to raise *sua sponte* the FSIA terrorism exception's statute of limitations when it has been forfeited by a defendant who is entirely absent from the proceedings? We conclude that the answer is no.

It is well established that a statute of limitations, like other affirmative defenses, generally may not be invoked by the court on its own motion. *See, e.g.*, *United States v. Mitchell*, 518 F.3d 740, 748 (10th Cir. 2008) (noting that "all circuits to consider this issue have held so explicitly" and collecting cases). A strong justification for this rule is what courts have long identified as the "primar[y]" purpose of nonjurisdictional statutes of limitations: "to protect defendants against stale or unduly delayed claims." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008). As Justice Marshall explained in more detail some decades ago, "[s]tatutes of limitations are designed to insure fairness to defendants by preventing the revival of stale claims in which the defense is hampered by lost evidence, faded memories, and disappearing witnesses, and to avoid unfair surprise." *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 473, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975) (Marshall, J., concurring in part and dissenting in part). When a defendant is entirely absent from the litigation and has forfeited its timeliness defense, however, little if any purpose for a statute of limitations remains.

The purpose of a nonjurisdictional statute of limitations is not to shield courts from challenges that may arise in adjudicating cases in which motions for default judgment have been filed. Regardless of the difficulties such cases can present, courts are constrained by the principle of party presentation, which is "basic to our adversary system." *Wood*, 566 U.S. at 472, 132 S.Ct. 1826. Under that principle, "we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*,

554 U.S. 237, 243, 128 S.Ct. 2559, 171 L.Ed.2d 399 (2008); *see also Keepseagle v. Perdue*, 856 F.3d 1039, 1052–55 (D.C. Cir. 2017). "[A]s a general rule, '[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.' " *Greenlaw*, 554 U.S. at 244, 128 S.Ct. 2559 (second alteration in original) (quoting *Castro v. United States*, 540 U.S. 375, 386, 124 S.Ct. 786, 157 L.Ed.2d 778 (2003) (Scalia, J., concurring in part and concurring in the judgment)).

The Supreme Court has cautioned that freely permitting departures from this foundational norm and allowing courts to *sua sponte* raise affirmative defenses as a matter of course would "erod[e] the principle of party presentation so basic to our system of adjudication." *Arizona v. California*, 530 U.S. 392, 413, 120 S.Ct. 2304, 147 L.Ed.2d 374 (2000). The Court has approved the *sua sponte* consideration of forfeited, nonjurisdictional affirmative defenses in a small number of narrow, carefully defined contexts. However, these cabined ***1110 **466** and rare exceptions to both the party presentation principle and the rules governing forfeiture of affirmative defenses – which otherwise foreclose *sua sponte* action – share a common, defining feature. In each of the cases in which the Court has sanctioned *sua sponte* action by a court to raise a forfeited affirmative defense, the Court has made clear that the circumstances of a case must squarely implicate the institutional interests of the judiciary for such action to be permissible. And in none of these situations was the defendant on whose behalf the court acted entirely absent from the litigation.

Review of the decisions establishing these principles reveals both their narrowness and the common feature that explains the findings made by the Court. We begin with *Day v. McDonough*. In addition to discussing the principles concerning affirmative defenses noted above, the Court in *Day* considered whether a District Court had properly dismissed as untimely a state prisoner's federal habeas corpus petition, even though the respondent state had both answered the petition without raising a statute of limitations defense and had conceded the petition's timeliness. 547 U.S. at 201–04, 126 S.Ct. 1675. Finding that the concession was due to the state's inadvertent miscalculation of the filing period, the Court concluded that in these circumstances, the District Court "had discretion to correct the State's error and, accordingly, to dismiss the petition as untimely under AEDPA's one-year limitation," despite the state's forfeiture of the defense. *Id.* at 202, 126 S.Ct. 1675. Although it would be "an abuse of discretion to override a State's deliberate waiver of a limitations defense," the Court clarified, *id.*, "district courts are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition," *id.* at 209, 126 S.Ct. 1675.

The basis of the Court's judgment in *Day* was its recognition that the AEDPA statute of limitations and "other threshold barriers" facing habeas petitioners "implicat[e] values beyond the concerns of the parties." *Id.* at 205, 126 S.Ct. 1675 (alteration in original) (quoting *Acosta v. Artuz*, 221 F.3d 117, 123 (2d Cir. 2000)). Quoting and adopting the reasoning of the Second Circuit's decision in *Acosta*, the Court explained that "[t]he AEDPA statute of limitation promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh, and lends finality to state court judgments within a reasonable time." *Id.* at 205–06, 126 S.Ct. 1675 (quoting *Acosta*, 221 F.3d at 123). In other words, the interests of the judiciary that were specially implicated in the context at issue justified departure from the foundational party presentation and forfeiture principles that otherwise would apply and bar *sua sponte* action.

In *Wood v. Milyard*, the Court considered whether *Day*'s holding extends to courts of appeals. In doing so, the Court added further clarity to the rationale underlying its conclusions in *Day* and a predecessor case, *Granberry v. Greer*, 481 U.S. 129, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1987), both of which the Court cited as having "establishe[d] that a court may consider a statute of limitations or other threshold bar the State failed to raise in answering a habeas petition." *Wood*, 566 U.S. at 466, 132 S.Ct. 1826. In *Granberry*, the Court explained, it had "recognized a modest exception to the rule that a federal court will not consider a forfeited affirmative defense," there that the habeas petitioner had not exhausted his state remedies. *Wood*, 566 U.S. at 470, 132 S.Ct. 1826. The basis for the outcome in *Granberry* was the Court's determination that "[t]he exhaustion doctrine ... is founded on concerns ***1111 **467** broader than those of the parties; in particular, the doctrine fosters respectful, harmonious relations between the state and federal judiciaries." *Id.* at 471, 132 S.Ct. 1826. "With that comity interest in mind," the Court concluded that "federal appellate courts have discretion, in 'exceptional cases,' to consider a nonexhaustion argument 'inadverten[tly]' overlooked by the State in the District Court." *Id.* (alteration in original) (quoting *Granberry*, 481 U.S. at 132, 134, 107 S.Ct. 1671).

Turning then to *Day*, the Court in *Wood* explained that "[a]ffording federal courts leeway to consider a forfeited timeliness defense was appropriate [in that case] ...

because AEDPA's statute of limitations, like the exhaustion doctrine, 'implicat[es] values beyond the concerns of the parties,' " namely the values that the Second Circuit had identified in *Acosta*. *Id.* at 472, 132 S.Ct. 1826 (third alteration in original) (quoting *Day*, 547 U.S. at 205, 126 S.Ct. 1675). The Court then reached the question before it, and declared that "[c]onsistent with *Granberry* and *Day*, [it would] decline to adopt an absolute rule barring a court of appeals from raising, on its own motion, a forfeited timeliness defense." *Id.* at 473, 132 S.Ct. 1826. The Court recognized that "[t]he *institutional interests* served by AEDPA's statute of limitations are also present when a habeas case moves to the court of appeals, a point *Granberry* recognized with respect to a nonexhaustion defense." *Id.* (emphasis added). The court "accordingly" held that, in the circumstances indicated, "courts of appeals, like district courts, have the authority—though not the obligation—to raise a forfeited timeliness defense on their own initiative." *Id.*

The Supreme Court's analysis in *Wood* thus confirms that the prohibition against *sua sponte* invocation of forfeited affirmative defenses is subject to very narrow exceptions that may exist when certain institutional interests of the judiciary are implicated and both parties are present in the litigation.

The Court's decision in *Arizona v. California* is consistent with the cases addressing *sua sponte* action in the habeas context. In *Arizona*, the Court stated that it "might be appropriate in special circumstances" for a court to raise *res judicata* defenses on its own motion. 530 U.S. at 412, 120 S.Ct. 2304. "[I]f a court is on notice that it has previously decided the issue presented," the Court explained, "[it] may dismiss the action *sua sponte*, even though the defense has not been raised." *Id.* (quoting *United States v. Sioux Nation*, 448 U.S. 371, 432, 100 S.Ct. 2716, 65 L.Ed.2d 844 (1980) (Rehnquist, J., dissenting)). The justification that the Court offered was that institutional judicial interests are involved in "the policies underlying res judicata," which is "not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste." *Id.* (quoting *Sioux Nation*, 448 U.S. at 432, 100 S.Ct. 2716 (Rehnquist, J., dissenting)). The contrast with statutes of limitations, which exist "primarily to protect defendants against stale or unduly delayed claims," *John R. Sand & Gravel Co.*, 552 U.S. at 133, 128 S.Ct. 750, is plain.

In all of these decisions, moreover, the defendant was present and participated in the litigation. *See, e.g.*, *Day*, 547 U.S. at 208, 126 S.Ct. 1675 (noting that the state respondent belatedly pressed the statute of limitations defense); *Granberry*, 481 U.S. at 130, 107 S.Ct. 1671 (noting that the state respondent "for the first time interposed the [exhaustion] defense" on appeal). As a result, before raising the defense *sua sponte*, the court knew that its action was not inconsistent with how the defendant preferred to litigate the matter. ***1112 **468** After all, the defense is for the defendant to choose to assert (or not) in the first instance. And, as we have already noted, it would be an abuse of discretion for a court to override a defendant's deliberate waiver of a defense. *See Wood*, 566 U.S. at 472–73, 132 S.Ct. 1826; *Day*, 547 U.S. at 210 n.11, 126 S.Ct. 1675. When a defendant is entirely absent from the proceedings, however, the court cannot reliably assess whether raising the defense *sua sponte* is consistent with how the defendant might choose to litigate the matter. *Cf. Day*, 547 U.S. at 210, 126 S.Ct. 1675 ("Of course, before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions."). This is not to say that whenever a forfeited affirmative defense implicates the interests of the judiciary as well as the defendant, the court *must* raise it *sua sponte* if the defendant is present and participates in the litigation. *See id.* at 209, 126 S.Ct. 1675; *Wood*, 566 U.S. at 473, 132 S.Ct. 1826. All we mean to say is that when the institutional interests of the judiciary are implicated, the defendant's presence matters.

In sum, it is clear that federal courts may depart from the party presentation principle and rules of forfeiture only in distinct and narrow circumstances in which the judiciary's own interests are implicated and the forfeiting party is present in the litigation. We conclude that no such authority exists for a federal court to raise the FSIA terrorism exception's statute of limitations on behalf of an entirely absent defendant. Unlike in the AEDPA context or in the case of a *res judicata* defense, no institutional interests of the judiciary are implicated when a § 1605A claim against an absent defendant proceeds to a default judgment, regardless of who the defendant is or how much time has passed since the terrorist act giving rise to the action took place. We find no merit in the District Courts' conclusions to the contrary or in the Appointed Amicus' arguments in support of the District Courts' rulings.

To begin, the District Courts were mistaken to raise international comity concerns as a justification for acting *sua sponte*. The Supreme Court has held clearly and repeatedly that with the FSIA, Congress established "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies or instrumentalities."

Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 488, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). And that "comprehensive framework," *Republic of Austria v. Altmann*, 541 U.S. 677, 699, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004), including the terrorism exception at § 1605A, strikes a "careful balance between respecting the immunity historically afforded to foreign sovereigns and holding them accountable, in certain circumstances, for their actions," *Rubin v. Islamic Republic of Iran*, — U.S. —, 138 S. Ct. 816, 822, — L.Ed.2d — (2018).

In other words, as the *Maalouf* and *Bathiard* appellants correctly observe, Congress has already determined the degree of care that courts should show for the interests of foreign sovereigns. Particularly given the Constitution's exclusive assignment of responsibility for international relations to the political branches, *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111, 68 S.Ct. 431, 92 L.Ed. 568 (1948), there is no room for courts to engage in discretionary, comity-based interest-balancing to decide "whether and when to exercise judicial power over foreign states," *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 140, 134 S.Ct. 2250, 189 L.Ed.2d 234 (2014); *see also* Brief of Professor Stephen I. Vladeck as *Amicus Curiae* Supporting Plaintiffs-Appellants and Urging Reversal ***1113 **469** at 11–13, *Maalouf v. Islamic Republic of Iran*, No. 18-7052 (Aug. 7, 2018). The purpose of the FSIA was to put an end to that method of decisionmaking on questions of foreign sovereign immunity. *See NML Capital*, 573 U.S. at 141–42, 134 S.Ct. 2250; *see also Simon v. Republic of Hungary*, 911 F.3d 1172, 1180–81 (D.C. Cir. 2018).

We are unmoved by the Appointed Amicus's argument that foreign nations' treatment in U.S. courts may impact "the reciprocal foreign litigation interests of the United States when it is sued in any foreign court." Brief for Court-Appointed Amicus Curiae in Support of the District Courts' Orders in No. 18-7052, et al., No. 18-7060, et al., and No. 18-7122 at 22–23, *Maalouf v. Islamic Republic of Iran*, No. 18-7052 (Dec. 19, 2018) ("Appointed Amicus Br."). This is a concern for the political branches, not the judiciary. As the *Sheikh* appellants note, the Supreme Court has been clear in its FSIA jurisprudence that it is not for the courts "to consider the worrisome international-relations consequences" of adjudicating actions under the FSIA. *NML Capital*, 573 U.S. at 146, 134 S.Ct. 2250 (cautioning that any such "apprehensions are better directed to that branch of government with authority to amend [the FSIA]").

In enacting the FSIA, Congress directed the courts to respect the sovereignty of foreign nations who respond when sued and assert timely, valid defenses. However, Congress also made it clear that default judgments may issue in actions arising under the terrorism exception. *See* 28 U.S.C. § 1608(e). It is not the responsibility of the courts to act *sua sponte* to raise affirmative defenses on behalf of defendants who do not appear to defend actions against them.

We disagree with the District Courts and the Appointed Amicus that 28 U.S.C. § 1608(e) provides justification for courts to invoke forfeited affirmative defenses on behalf of absent § 1605A defendants. As we explained in *Owens*, § 1608(e), which prevents entry of default judgments against foreign sovereigns unless the "claimant establishes his claim or right to relief by evidence satisfactory to the court," concerns "the quantum and quality of evidence" that an FSIA plaintiff must offer to demonstrate the merits of her claims before the court may issue a default judgment in her favor. 864 F.3d at 785 (quoting *Alameda v. Sec'y of Health, Educ. & Welfare*, 622 F.2d 1044, 1048 (1st Cir. 1980)). The provision "leaves it to the court to determine precisely how much and what kinds of evidence the plaintiff must provide." *Han Kim v. Democratic People's Republic of Korea*, 774 F.3d 1044, 1047 (D.C. Cir. 2014). It imposes no obligation on plaintiffs to rebut a hypothetical statute of limitations defense, which, as we have explained, is the defendant's responsibility to raise or risk forfeiting. Moreover, an issue regarding a nonjurisdictional statute of limitations has no connection to the quantum or quality of the evidence supporting a plaintiff's "claim or right to relief." 28 U.S.C. § 1608(e). Indeed, as a general matter, a plaintiff whose claims are perhaps untimely but otherwise meritorious is not barred from obtaining a judgment in her favor if a defendant fails to assert the applicable statute of limitations. Why? Because a *forfeited* affirmative defense cannot affect the court's consideration of the merits of a claim.

Nor are there any institutional interests of the judiciary implicated by the obligations that § 1608(e) places on district courts. While the statute directs district courts to perform a screening function to evaluate the merits of a case before issuing a default judgment, this certainly does not justify the *sua sponte* invocation of a statute of limitations defense. An argument that institutional interests are implicated ***1114 **470** merely because § 1608(e) requires the district courts to assess the merits of a claim before granting default judgment rings hollow. Such a conclusion would permit the "institutional interest" exception to completely swallow the party presentation principle and rules of forfeiture. In addition, given the complexity of the relevant statute of limitations provisions, 28 U.S.C. § 1605A(b) and § 1083(c)(3) of the NDAA, it is far from clear that resolving claims on

limitations grounds is easier than assessing the merits. Furthermore, in assessing the merits of a claim under § 1608(e), the courts are granted broad discretion to determine what degree and kind of evidence is satisfactory. *See Han Kim*, 774 F.3d at 1047; *Owens*, 864 F.3d at 785. So the burden imposed on district courts is moderated. Moreover, case law shows that District Courts in this circuit routinely perform their § 1608(e) duties in terrorism exception cases with great effectiveness, even in cases concerning attacks that took place overseas decades ago. *See, e.g.*, *Akins v. Islamic Republic of Iran*, 332 F. Supp. 3d 1 (D.D.C. 2018); *Worley v. Islamic Republic of Iran*, 75 F. Supp. 3d 311 (D.D.C. 2014); *Estate of Doe v. Islamic Republic of Iran*, 808 F. Supp. 2d 1 (D.D.C. 2011).

Furthermore, as noted in *Owens*, § 1608(e) "mirrors a provision in Federal Rule of Civil Procedure 55(d) governing default judgments against the U.S. Government." 864 F.3d at 785. Neither the District Courts nor the Appointed Amicus suggest that Rule 55(d) creates institutional interests justifying *sua sponte* action on affirmative defenses, and we see no reason why the Rule's statutory counterpart for foreign sovereign defendants would either. The Appointed Amicus attempts to draw a distinction by arguing that § 1608(e) imposes a greater responsibility on courts than Rule 55(d) because of the "comity considerations" present in FSIA cases. Appointed Amicus Br. at 30. But, as noted above, international comity concerns do not justify district courts' *sua sponte* actions raising forfeited defenses on behalf of defendants who fail to appear in FSIA cases.

The Appointed Amicus also expresses concern that district courts "bear the brunt of the institutional burden when an untimely claim proceeds to the special procedures for default judgment under Section 1608(e)." *Id.* at 31. We disagree with the assumption that underlies this argument, *i.e.*, that a purportedly untimely § 1605A claim necessarily imposes a greater burden on courts than a timely claim. As we recognized in *Owens*, the significant evidentiary challenge in FSIA terrorism cases with a defaulting defendant is that "firsthand evidence and eyewitness testimony is difficult or impossible to obtain from an absent and likely hostile sovereign." 864 F.3d at 785. This poses a greater problem for plaintiffs who must gather the evidence than for the courts that must assess it, regardless of how long ago the attack at issue occurred. We fail to see how the expiration of the nonjurisdictional statutory filing period makes any significant difference in a district court's ability to assess the evidence offered by a plaintiff.

Finally, the Appointed Amicus claims that allowing untimely claims to proceed will reduce the payments from the United States Victims of State Sponsored Terrorism Fund, *see* 34 U.S.C. § 20144, made to judgment holders who filed timely complaints. We decline to reach this issue, or to assess the *Maalouf* appellants' contrary arguments, because the Fund was not addressed by the District Courts. We therefore have no record on which to assess the accuracy or import of the parties' claims.

For the reasons indicated above, we hold that the District Courts here lacked authority or discretion to *sua sponte* raise the terrorism exception's statute ***1115 **471** of limitations to dismiss the six cases before us. As the *Sheikh* appellants cogently observe, approving the approach taken by the District Courts and defended by the Appointed Amicus would be tantamount to giving the courts "*carte blanche* to depart from the principle of party presentation basic to our adversary system," a result that the Supreme Court explicitly warned against in *Wood*. 566 U.S. at 472, 132 S.Ct. 1826. We therefore conclude that when an entirely absent defendant has forfeited the FSIA terrorism exception's statute of limitations, the defense is excluded from the case and may not be raised by the court *sua sponte*. No viable institutional interests have been presented in these cases to justify the actions of the District Courts.

3. *Remaining Issues*

Because we find that the District Courts had no authority to act *sua sponte* in these cases, we have no need to reach the parties' arguments concerning the courts' exercise of the discretion that they claimed, the timeliness of the complaints, or the denial of the *Kinyua* plaintiffs' post-judgment motions. We also take no position on the merits of the six cases.

In addition, we need not address whether a district court would lack authority to raise a statute of limitations defense in an FSIA case in which the United States participates in the proceedings and asks the court to rule in favor of an absent foreign sovereign on statute of limitations grounds. Nor do we address whether the correct interpretation of the terrorism exception's timeliness provisions, 28 U.S.C. § 1605A(b) and § 1083(c)(3) of the NDAA, is in fact as straightforward as the District Courts assumed.

III. Conclusion

For the foregoing reasons, we reverse the judgments of the District Courts, vacate the dismissals of the complaints, and remand the cases for further proceedings.

So ordered.

All Citations

923 F.3d 1095, 440 U.S.App.D.C. 451

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ANNEX 356

128 S.Ct. 2559
Supreme Court of the United States

Michael GREENLAW, aka Mikey,
Petitioner,
v.
UNITED STATES.

No. 07–330.
|
Argued April 15, 2008.
|
Decided June 23, 2008.

Synopsis
Background: Defendant was convicted in the United States District Court for the District of Minnesota, Joan N. Ericksen, J., of various offenses relating to drugs and firearms, and was sentenced to imprisonment for 442 months. Defendant appealed. The Court of Appeals for the Eighth Circuit, Riley, Circuit Judge, 481 F.3d 601, determined, without Government invitation, that the applicable law plainly required a prison sentence 15 years longer than the term the trial court had imposed. Certiorari was granted.

The Supreme Court, Justice Ginsburg, held that absent a government appeal or cross-appeal, the sentence defendant received should not have been increased by the Court of Appeals.

Vacated and remanded.

Justice Breyer concurred in judgment, and filed opinion.

Justice Alito, with whom Justice Stevens joined, and with whom Justice Breyer joined as to Parts I, II, and III, dissented and filed opinion.

****2559** *Syllabus*[*]
Petitioner Greenlaw was convicted of seven drug and firearms charges and was sentenced to imprisonment for 442 months. In calculating this sentence, the District Court made an error. Overlooking this Court's controlling decision in *Deal v. United States*, 508 U.S. 129, 132–137, 113 S.Ct. 1993, 124 L.Ed.2d 44, interpreting 18 U.S.C. § 924(c)(1)(C)(i), and over the Government's objection, the District Court imposed ****2560** a 10–year sentence on a count that carried a 25–year mandatory minimum term. Greenlaw appealed urging, *inter alia,* that the appropriate sentence for all his convictions was 15 years. The Government neither appealed nor cross-appealed. The Eighth Circuit found no merit in any of Greenlaw's arguments, but went on to consider whether his sentence was too low. The court acknowledged that the Government, while it had objected to the trial court's error at sentencing, had elected not to seek alteration of Greenlaw's sentence on appeal. Nonetheless, relying on the "plain-error rule" stated in Federal Rule of Criminal Procedure 52(b), the Court of Appeals ordered the District Court to enlarge Greenlaw's sentence by 15 years, yielding a total prison term of 622 months.

Held: Absent a Government appeal or cross-appeal, the Eighth Circuit could not, on its own initiative, order an increase in Greenlaw's sentence. Pp. 2564 – 2571.

(a) In both civil and criminal cases, in the first instance and on appeal, courts follow the principle of party presentation, *i.e.,* the parties frame the issues for decision and the courts generally serve as neutral arbiters of matters the parties present. To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a *pro se* litigant's rights. See *Castro v. United States,* 540 U.S. 375, 381–383, 124 S.Ct. 786, 157 L.Ed.2d 778. The cross-appeal rule, pivotal in this case, is both informed by, and illustrative of, the party presentation principle. Under that rule, it takes a cross-appeal to justify a remedy in favor of an appellee. See *McDonough v. Dannery,* 3 Dall. 188, 1 L.Ed. 563. This Court has called the rule "inveterate and certain," *Morley Constr. Co. v. Maryland Casualty Co.,* 300 U.S. 185, 191, 57 S.Ct. 325, 81 L.Ed. 593, and has in no case ordered an exception to it, *El Paso Natural Gas Co. v. Neztsosie,* 526 U.S. 473, 480, 119 S.Ct. 1430, 143 L.Ed.2d 635. No exception is warranted here. Congress has specified that when a United States Attorney files a notice of appeal with respect to a criminal sentence, "[t]he Government may not further prosecute [the] appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General." 18 U.S.C. § 3742(b). This provision gives the top representatives of the United States in litigation the prerogative to seek or forgo appellate correction of sentencing errors, however plain they may be. Pp. 2564 – 2566.

(b) The Eighth Circuit held that the plain-error rule, Fed.

Rule Crim. Proc. 52(b), authorized it to order the sentence enhancement *sua sponte*. Nothing in the text or history of Rule 52(b), or in this Court's decisions, suggests that the plain-error rule was meant to override the cross-appeal requirement. In every case in which correction of a plain error would result in modifying a judgment to the advantage of a party who did not seek this Court's review, the Court has invoked the cross-appeal rule to bar the correction. See, *e.g.*, *Chittenden v. Brewster*, 2 Wall. 191, 17 L.Ed. 839; *Strunk v. United States*, 412 U.S. 434, 93 S.Ct. 2260, 37 L.Ed.2d 56. Even if it would be proper for an appeals court to initiate plain-error review in some cases, sentencing errors that the Government has refrained from pursuing would not fit the bill. In § 3742(b), Congress assigned to leading Department of Justice officers responsibility for determining when Government pursuit of a sentencing appeal is in order. Rule 52(b) does not invite appellate court interference with the assessment of those officers. Pp. 2565 – 2567.

(c) *Amicus curiae*, invited by the Court to brief and argue the case in support ****2561** of the Court of Appeals' judgment, links the argument based on Rule 52(b) to a similar argument based on 28 U.S.C. § 2106. For substantially the same reasons that Rule 52(b) does not override the cross-appeal rule, § 2106 does not do so either. P. 2567.

(d) *Amicus* also argues that 18 U.S.C. § 3742, which governs appellate review of criminal sentences, overrides the cross-appeal rule for sentences "imposed in violation of law," § 3742(e). *Amicus'* construction of § 3742 is novel and complex, but ultimately unpersuasive. At the time § 3742 was enacted, the cross-appeal rule was a solidly grounded rule of appellate practice. Congress had crafted explicit exceptions to the cross-appeal rule in earlier statutes governing sentencing appeals, *i.e.*, the Organized Crime Control Act of 1970 and the Controlled Substances Act of 1970. When Congress repealed those exceptions and enacted § 3742, it did not similarly express in the text of § 3742 any exception to the cross-appeal rule. This drafting history suggests that Congress was aware of the cross-appeal rule and framed § 3742 expecting that the new provision would operate in harmony with it. Pp. 2567 – 2569.

(e) In increasing Greenlaw's sentence *sua sponte*, the Eighth Circuit did not advert to the procedural rules setting firm deadlines for launching appeals and cross-appeals. See Fed. Rules App. Proc. 3(a)(1), 4(b)(1)(B)(ii), 4(b)(4), 26(b). The strict time limits on notices of appeal and cross-appeal serve, as the cross-appeal rule does, the interests of the parties and the legal system in fair warning and finality. The time limits would be undermined if an appeals court could modify a judgment in favor of a party who filed no notice of appeal. In a criminal prosecution, moreover, the defendant would appeal at his peril, with nothing to alert him that, on his own appeal, his sentence would be increased until the appeals court so decreed. Pp. 2568 – 2570.

(f) Nothing in this opinion requires courts to modify their current practice in "sentencing package cases" involving multicount indictments and a successful attack on some but not all of the counts of conviction. The appeals court, in such cases, may vacate the entire sentence on all counts so that the trial court can reconfigure the sentencing plan. On remand, trial courts have imposed a sentence on the remaining counts longer than the sentence originally imposed on those particular counts, but yielding an aggregate sentence no longer than the aggregate sentence initially imposed. This practice is not at odds with the cross-appeal rule, which stops appellate judges from adding years to a defendant's sentence on their own initiative. In any event, this is not a "sentencing package" case. Greenlaw was unsuccessful on all his appellate issues. The Eighth Circuit, therefore, had no occasion to vacate his sentence and no warrant, in the absence of a cross-appeal, to order the addition of 15 years to his sentence. Pp. 2569 – 2570.

481 F.3d 601, vacated and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. BREYER, J., filed an opinion concurring in the judgment, *post*, pp. 2570 – 2571. ALITO, J., filed a dissenting opinion, in which STEVENS, J., joined, and in which BREYER, J., joined as to Parts I, II, and III, *post*, pp. 2571 – 2578.

Attorneys and Law Firms

Deanne E. Maynard, for respondent in support of reversal.

Jay T. Jorgensen, as amicus curiae, appointed by this court, Washington, DC, in support of the judgment below.

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Opinion

Justice GINSBURG delivered the opinion of the Court.

***240** This case concerns the role of courts in our adversarial system. The specific question presented: May a United States Court of Appeals, acting on its own initiative, order an increase in a defendant's sentence? Petitioner Michael J. Greenlaw was convicted of various offenses relating to drugs and firearms, and was sentenced to imprisonment for 442 months. He appealed urging, *inter alia,* that his sentence was unreasonably long. After rejecting all of Greenlaw's arguments, the Court of Appeals determined, without Government invitation, that the applicable law plainly required a prison sentence 15 years longer than the term the trial court had imposed. Accordingly, the appeals court instructed the trial court to increase Greenlaw's sentence to 622 months. We hold that, absent a Government appeal or cross-appeal, the sentence Greenlaw received should not have been increased. We therefore vacate the Court of Appeals' judgment.

I

Greenlaw was a member of a gang that, for years, controlled the sale of crack cocaine in a southside Minneapolis neighborhood. See *United States v. Carter,* 481 F.3d 601, 604 (C.A.8 2007) (case below). To protect their drug stash and to prevent rival dealers from moving into their territory, gang members carried and concealed numerous weapons. See *id.,* at 605. For his part in the operation, Greenlaw was charged, in the United States District Court for the District of Minnesota, with eight offenses; after trial, he was found ***241** guilty on seven of the charges. App. to Pet. for Cert. 16a–17a.

Among Greenlaw's convictions were two for violating 18 U.S.C. § 924(c)(1)(A), which prohibits carrying a firearm during and in relation to a crime of violence or a drug trafficking crime: His first § 924(c) conviction was for carrying a firearm in connection with a crime committed in 1998; his second, for both carrying and discharging a firearm in connection with a crime committed in 1999. App. to Pet. for Cert. 17a. A first conviction for violating § 924(c) carries a mandatory minimum term of 5 years, if the firearm is simply carried. § 924(c)(1)(A)(i). If the firearm is also discharged, the mandatory minimum increases to 10 years. § 924(c)(1)(A)(iii). For "a second or subsequent conviction," however, whether the weapon is only carried or discharged as well, the mandatory minimum jumps to 25 years. § 924(c)(1)(C)(i). Any sentence for violating § 924(c), moreover, must run consecutively to "any other term of imprisonment," including any other conviction under § 924(c). § 924(c)(1)(D)(ii).

At sentencing, the District Court made an error. Over the Government's objection, the court held that a § 924(c) conviction does not count as "second or subsequent" when it is "charged in the same ****2563** indictment" as the defendant's first § 924(c) conviction. App. 59, 61–62. The error was plain because this Court had held, in *Deal v. United States,* 508 U.S. 129, 113 S.Ct. 1993, 124 L.Ed.2d 44 (1993), that when a defendant is charged in the same indictment with more than one offense qualifying for punishment under § 924(c), all convictions after the first rank as "second or subsequent," see *id.,* at 132–137, 113 S.Ct. 1993.

As determined by the District Court, Greenlaw's sentence included 262 months (without separately counting sentences that ran concurrently) for all his convictions other than the two under § 924(c). For the first § 924(c) offense, the court imposed a 5–year sentence in accord with § 924(c)(1)(A)(i). As to the second § 924(c) conviction, the District Court rejected ***242** the Government's request for the 25–year minimum prescribed in § 924(c)(1)(C) for "second or subsequent" offenses; instead, it imposed the 10–year term prescribed in § 924(c)(1)(A)(iii) for first-time offenses.[1] The total sentence thus calculated came to 442 months.

Greenlaw appealed to the United States Court of Appeals for the Eighth Circuit, urging, *inter alia,* that the appropriate total sentence for all his crimes was 15 years. See 481 F.3d, at 607. The Court of Appeals found no merit in any of Greenlaw's arguments. *Id.,* at 606–607. Although the Government did not appeal or cross-appeal, *id.,* at 608, it did note, on brief and at oral argument, the District Court's error: Greenlaw's sentence should have been 15 years longer than the 442 months imposed by the District Court, the Government observed, because his second § 924(c) conviction called for a 25–year (not a 10–year) mandatory minimum consecutive sentence.

The Government made the observation that the sentence was 15 years too short only to counter Greenlaw's argument that it was unreasonably long. See App. 84–86; Recording of Oral Arg. in *United States v. Carter,* No.

05–3391 (CA8, Sept. 26, 2006), at 16:53–19:04, available at http://www.ca8.uscourts.gov/oralargs/oaFrame.html (as visited June 13, 2008). Having refrained from seeking correction of the District Court's error by pursuing its own appeal, the Government simply urged that Greenlaw's sentence should be affirmed.

The Court of Appeals acknowledged that the Government, while objecting at sentencing to the trial court's erroneous reading of § 924(c)(1)(C), had elected to seek no appellate court alteration of Greenlaw's sentence. 481 F.3d, at 608. Relying on the "plain-error rule" stated in Federal Rule of Criminal Procedure 52(b), however, the appeals court held ***243** that it had discretion to raise and correct the District Court's error on its own initiative. 481 F.3d, at 608–609. The Court of Appeals therefore vacated the sentence and instructed the District Court "to impose the [statutorily mandated] consecutive minimum sentence of 25 years." *Id.*, at 611.

Petitioning for rehearing and rehearing en banc, Greenlaw asked the Eighth Circuit to adopt the position advanced by the Seventh Circuit in *United States v. Rivera*, 411 F.3d 864 (2005). App. 95. "By deciding not to take a cross-appeal," the Seventh Circuit stated, "the United States has ensured that [the defendant's] sentence cannot be increased." 411 F.3d, at 867. The Eighth Circuit denied rehearing without an opinion. App. to Pet. for Cert. 28a. On remand, as instructed by the Court of ****2564** Appeals, the District Court increased Greenlaw's sentence by 15 years, yielding a total prison term of 622 months. App. 103–104, 109.

Greenlaw petitioned for certiorari noting a division among the Circuits on this question: When a defendant unsuccessfully challenges his sentence as too high, may a court of appeals, on its own initiative, increase the sentence absent a cross-appeal by the Government? In response, the Government "agree[d] with [Greenlaw] that the court of appeals erred in *sua sponte* remanding the case with directions to enhance petitioner's sentence." Brief in Opposition 12. We granted review and invited Jay T. Jorgensen to brief and argue this case, as *amicus curiae*, in support of the Court of Appeals' judgment. 552 U.S. 1087 and 1135, 128 S.Ct. 829, 169 L.Ed.2d 625 (2008). Mr. Jorgensen accepted the appointment and has well fulfilled his assigned responsibility.

II

In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present. To the extent courts ***244** have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a *pro se* litigant's rights. See *Castro v. United States*, 540 U.S. 375, 381–383, 124 S.Ct. 786, 157 L.Ed.2d 778 (2003).[2] But as a general rule, "[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Id.*, at 386, 124 S.Ct. 786 (SCALIA, J., concurring in part and concurring in judgment).[3] As cogently explained:

> "[Courts] do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties. Counsel almost always know a great deal more about their cases than we do, and this must be particularly true of counsel for the United States, the richest, most powerful, and best represented litigant to appear before us." *United States v. Samuels*, 808 F.2d 1298, 1301 (C.A.8 1987) (R. Arnold, J., concurring in denial of reh'g en banc).

The cross-appeal rule, pivotal in this case, is both informed by, and illustrative of, the party presentation principle. Under that unwritten but longstanding rule, an appellate court may not alter a judgment to benefit a nonappealing party. This Court, from its earliest years, has recognized that it takes a cross-appeal to justify a remedy in favor of an ***245** appellee. See *McDonough v. Dannery*, 3 Dall. 188, 198, 1 L.Ed. 563 (1796). We have called the rule "inveterate and certain." *Morley Constr. Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191, 57 S.Ct. 325, 81 L.Ed. 593 (1937).

****2565** Courts of Appeals have disagreed, however, on the proper characterization of the cross-appeal rule: Is it "jurisdictional," and therefore exceptionless, or a "rule of practice," and thus potentially subject to judicially created exceptions? Compare, *e.g.*, *Johnson v. Teamsters Local 559*, 102 F.3d 21, 28–29 (C.A.1 1996) (cross-appeal rule "is mandatory and jurisdictional"), with, *e.g.*, *American Roll–On Roll–Off Carrier, LLC v. P & O Ports Baltimore, Inc.*, 479 F.3d 288, 295–296 (C.A.4 2007) ("cross-appeal requirement [is] one of practice, [not] a strict jurisdictional requirement"). Our own opinions contain statements supporting both characterizations. Compare, *e.g.*, *Morley Constr. Co.*, 300 U.S., at 187, 57 S.Ct. 325 (cross-appeal rule defines "[t]he *power* of an appellate court to modify a decree" (emphasis added)), with, *e.g.*,

Langnes v. Green, 282 U.S. 531, 538, 51 S.Ct. 243, 75 L.Ed. 520 (1931) (cross-appeal requirement is "a rule of practice which generally has been followed").

In *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 480, 119 S.Ct. 1430, 143 L.Ed.2d 635 (1999), we declined to decide "the theoretical status" of the cross-appeal rule. It sufficed to point out that the rule was "firmly entrenched" and served to advance "institutional interests in fair notice and repose." *Ibid.* "Indeed," we noted, "in more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of our holdings has ever recognized an exception to the rule." *Ibid.* Following the approach taken in *Neztsosie*, we again need not type the rule "jurisdictional" in order to decide this case.

Congress has eased our decision by specifying the instances in which the Government may seek appellate review of a sentence, and then adding this clear instruction: Even when a United States Attorney files a notice of appeal with ***246** respect to a sentence qualifying for review, "[t]he Government may not further prosecute [the] appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General." 18 U.S.C. § 3742(b). Congress thus entrusted to named high-ranking officials within the Department of Justice responsibility for determining whether the Government, on behalf of the public, should seek a sentence higher than the one imposed. It would severely undermine Congress' instruction were appellate judges to "sally forth" on their own motion, cf. *supra*, at 2577, to take up errors adverse to the Government when the designated Department of Justice officials have not authorized an appeal from the sentence the trial court imposed.[4]

This Court has recognized that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). We need not decide whether comparable authority and discretion are lodged in the Executive Branch with respect to the pursuit of issues on appeal. We need only recognize that Congress, in § 3742(b), has accorded to the top ****2566** representatives of the United States in litigation the prerogative to seek or forgo appellate correction of sentencing errors, however plain they may be. That measure should garner the Judiciary's full respect.

***247** III

A

In ordering the District Court to add 15 years to Greenlaw's sentence, despite the absence of a cross-appeal by the Government, the Court of Appeals identified Federal Rule of Criminal Procedure 52(b) as the source of its authority. See 481 F.3d, at 608–609, and n. 5. Rule 52(b) reads: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Nothing in the text or history of Rule 52(b) suggests that the rulemakers, in codifying the plain-error doctrine, meant to override the cross-appeal requirement. See Advisory Committee's Notes on Fed. Rule Crim. Proc. 52, 18 U.S.C.App., p. 1664 (describing Rule 52(b) as "a restatement of existing law").

Nor do our opinions support a plain-error exception to the cross-appeal rule. This Court has indeed noticed, and ordered correction of, plain errors not raised by defendants, but we have done so only to benefit a defendant who had himself petitioned the Court for review on other grounds. See, *e.g.*, *Silber v. United States*, 370 U.S. 717, 82 S.Ct. 1287, 8 L.Ed.2d 798 (1962) *(per curiam)*. In no case have we applied plain-error doctrine to the detriment of a petitioning party. Rather, in every case in which correction of a plain error would result in modification of a judgment to the advantage of a party who did not seek this Court's review, we have invoked the cross-appeal rule to bar the correction.

In *Chittenden v. Brewster*, 2 Wall. 191, 17 L.Ed. 839 (1865), for example, the appellants asserted that an award entered in their favor was too small. A prior decision of this Court, however, made it plain that they were entitled to no award at all. See *id.*, at 195–196 (citing *Jones v. Green*, 1 Wall. 330, 17 L.Ed. 553 (1864)). But because the appellee had not filed a cross-appeal, the Court left the award undisturbed. See 2 Wall., at 196, 17 L.Ed. 839. *Strunk v. United States*, 412 U.S. 434, 93 S.Ct. 2260, 37 L.Ed.2d 56 (1973), decided over a ***248** century later, is similarly illustrative. There, the Court of Appeals had determined that the defendant was denied his right to a speedy trial, but held that the proper remedy was reduction of his sentence as compensation for the delay, not dismissal of the charges against him. As petitioner in this Court, the defendant sought review of the remedial order. See *id.*, at 435, 93 S.Ct. 2260. The Court suggested that there may have been no speedy trial violation, as "it seem[ed] clear that [the defendant] was responsible for a

large part of the ... delay." *Id.*, at 436, 93 S.Ct. 2260. But because the Government had not raised the issue by cross-petition, we considered the case on the premise that the defendant had been deprived of his Sixth Amendment right, *id.*, at 437, 93 S.Ct. 2260, and ruled that dismissal of the indictment was the proper remedy, *id.*, at 439–440, 93 S.Ct. 2260.

Even if there might be circumstances in which it would be proper for an appellate court to initiate plain-error review, sentencing errors that the Government refrained from pursuing would not fit the bill. Heightening the generally applicable party presentation principle, Congress has provided a dispositive direction regarding sentencing errors that aggrieve the Government. In § 3742(b), as earlier explained, see *supra,* at 2576 – 2577, Congress designated leading Department of **2567 Justice officers as the decisionmakers responsible for determining when Government pursuit of a sentencing appeal is in order. Those high officers, Congress recognized, are best equipped to determine where the Government's interest lies. Rule 52(b) does not invite appellate court interference with their assessment.

B

Amicus supporting the Eighth Circuit's judgment links the argument based on Rule 52(b) to a similar argument based on 28 U.S.C. § 2106. See Brief for *Amicus Curiae* by Invitation of the Court 40–43 (hereinafter Jorgensen Brief). Section 2106 states that federal appellate courts "may affirm, modify, vacate, set aside or reverse any judgment ... lawfully *249 brought before it for review." For substantially the same reasons that Rule 52(b) does not override the cross-appeal requirement, § 2106 does not do so either. Section 2106 is not limited to plain errors, much less to sentencing errors in criminal cases—it applies to all cases, civil and criminal, and to all errors. Were the construction *amicus* offers correct, § 2106 would displace the cross-appeal rule cross the board. The authority described in § 2106, we have observed, "must be exercised consistent with the requirements of the Federal Rules of Civil Procedure as interpreted by this Court." *Unitherm Food Systems, Inc. v. Swift–Eckrich, Inc.*, 546 U.S. 394, 402–403, n. 4, 126 S.Ct. 980, 163 L.Ed.2d 974 (2006). No different conclusion is warranted with respect to the "inveterate and certain" cross-appeal rule. *Morley Constr. Co.*, 300 U.S., at 191, 57 S.Ct. 325.

C

In defending the Court of Appeals' judgment, *amicus* places heavy weight on an argument pinned not to Rule 52(b) or 28 U.S.C. § 2106, but to the text of 18 U.S.C. § 3742, the Criminal Code provision governing appellate review of criminal sentences. As *amicus* reads § 3742, once either party appeals a sentence, the Court of Appeals must remand "any illegal sentence regardless of whether the remand hurts or helps the appealing party." Jorgensen Brief 9. Congress so directed, *amicus* argues, by instructing that, upon review of the record, a court of appeals "*shall determine* whether the sentence ... was imposed in violation of law," § 3742(e) (20000 ed. and Supp. V) (emphasis added), and "*shall remand*" if it so determines, § 3742(f)(1) (2000 ed., Supp. V) (emphasis added). See Jorgensen Brief 10–11, and n. 3.

Amicus makes a further text-based observation. He notes that § 3742(f)(2)—the provision covering sentences "outside the applicable [G]uideline range"—calls for a remand only where a departure from the Federal Sentencing Guidelines harms the appellant. In contrast, *amicus* emphasizes, § 3742(f)(1)—the provision controlling sentences *250 imposed "in violation of law" and Guidelines application errors—contains no such appellant-linked limitation. The inference *amicus* draws from this distinction is that Congress intended to override the cross-appeal rule for sentences controlled by § 3742(f)(1), *i.e.*, those imposed "in violation of law" (or incorrectly applying the Guidelines), but not for Guidelines departure errors, the category covered by § 3742(f)(2). See *id.*, at 14–15.

This novel construction of § 3742, presented for the first time in the brief *amicus* filed in this Court,[5] is clever and **2568 complex, but ultimately unpersuasive. Congress enacted § 3742 in 1984. See Sentencing Reform Act, § 213(a), 98 Stat. 2011. At that time, the cross-appeal requirement was a solidly grounded rule of appellate practice. See *supra,* at 2573 – 2574. The inference properly drawn, we think, is that Congress was aware of the cross-appeal rule, and framed § 3742 expecting that the new provision would operate in harmony with the "inveterate and certain" bar to enlarging judgments in favor of an appellee who filed no cross-appeal. Cf. *Astoria Fed. Sav. & Loan Assn. v. Solimino,* 501 U.S. 104, 108, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991) ("Congress is understood to legislate against a background of common-law adjudicatory principles.").

Congress indicated awareness of the cross-appeal rule in an earlier measure, the Organized Crime Control Act of 1970 (OCCA), Pub.L. 91–452, 84 Stat. 922, which provided for review of sentences of "dangerous special offenders." See § 1001(a), *id.*, at 948–951. For that Act, Congress crafted an explicit exception to the cross-appeal rule. It ordered that an appeal of a sentence taken by the Government "shall be deemed the taking of [an appeal] by the defendant." *Id.*, at 950. But the "deeming" ran in only one direction: "[A] ***251** sentence may be made more severe," OCCA provided, "only on review ... taken by the United States." *Id.*, at 950–951.[6] When Congress repealed this provision and, in § 3742, broadly provided for appellate review of sentences, it did not similarly express in the new text any exception to the cross-appeal rule. In short, Congress formulated a precise exception to the cross-appeal rule when that was its intention. Notably, the exception Congress legislated did not expose a defendant to a higher sentence in response to his own appeal. Congress spoke plainly in the 1970 legislation, leaving nothing for a court to infer. We therefore see no reason to read the current statute in the inventive manner *amicus* proposes, inferring so much from so little.

Amicus' reading of § 3742, moreover, would yield some strange results. We note two, in particular. Under his construction, § 3742 would give with one hand what it takes away with the other: Section 3742(b) entrusts to certain Government officials the decision whether to appeal an illegally low sentence, see *supra,* at 2574; but according to *amicus,* §§ 3742(e) and (f) would instruct appellate courts to correct an error of that order on their own initiative, thereby trumping the officials' decision. We resist attributing to Congress an intention to render a statute so internally inconsistent. Cf. *Western Air Lines, Inc. v. Board of Equalization of S. D.*, 480 U.S. 123, 133, 107 S.Ct. 1038, 94 L.Ed.2d 112 (1987) ("The illogical results of applying [a proffered] interpretation ... argue strongly against the conclusion that Congress intended th[o]se results...."). Further, the construction proposed by *amicus* would draw a puzzling distinction between incorrect applications of the Sentencing Guidelines, controlled by § 3742(f)(1), and erroneous departures from the Guidelines, covered by ***252** § 3742(f)(2). The latter would be subject to the cross-appeal rule, the former would not. We do not see why Congress would want to differentiate Guidelines decisions this way.[7]

In increasing Greenlaw's sentence by 15 years on its own initiative, the Eighth Circuit did not advert to the procedural rules setting deadlines for launching appeals and cross-appeals. Unyielding in character, these rules may be seen as auxiliary to the cross-appeal rule and the party presentation principle served by that rule. Federal Rule of Appellate Procedure 3(a)(1) provides that "[a]n appeal permitted by law ... may be taken *only by filing a notice of appeal* ... within the [prescribed] time." (Emphasis added.) Complementing Rule 3(a)(1), Rule 4(b)(1)(B)(ii) instructs that, when the Government has the right to cross-appeal in a criminal case, its notice "*must be filed* ... within 30 days after ... the filing of a notice of appeal by any defendant." (Emphasis added.) The filing time for a notice of appeal or cross-appeal, Rule 4(b)(4) states, may be extended "for a period not to exceed 30 days." Rule 26(b) bars any extension beyond that time.

The firm deadlines set by the Appellate Rules advance the interests of the parties and the legal system in fair notice and finality. Thus a defendant who appeals but faces no cross-appeal can proceed anticipating that the appellate court will not enlarge his sentence. And if the Government ***253** files a cross-appeal, the defendant will have fair warning, well in advance of briefing and argument, that pursuit of his appeal exposes him to the risk of a higher sentence. Given early warning, he can tailor his arguments to take account of that risk. Or he can seek the Government's agreement to voluntary dismissal of the competing appeals, see Fed. Rule App. Proc. 42(b), before positions become hardened during the hours invested in preparing the case for appellate court consideration.

The strict time limits on notices of appeal and cross-appeal would be undermined, in both civil and criminal cases, if an appeals court could modify a judgment in favor of a party who filed no notice of appeal. In a criminal prosecution, moreover, the defendant would appeal at his peril, with nothing to alert him that, on his own appeal, his sentence would be increased until the appeals court so decreed. In this very case, Greenlaw might have made different strategic decisions had he known soon after filing his notice of appeal that he risked a 15–year increase in an already lengthy sentence.

****2569** D

E

We note that nothing we have said in this opinion requires courts to modify their current practice in so-called

"sentencing package cases." Those cases typically involve multicount indictments and a successful attack by a defendant on some but not all of the counts of conviction. The appeals court, in such instances, may vacate the entire sentence on all counts so that, on remand, the trial court can reconfigure the sentencing plan to ensure that it remains adequate to satisfy the sentencing factors in 18 U.S.C. § 3553(a) (2000 ed. and Supp. V). In remanded cases, the Government relates, trial courts have imposed a sentence on the remaining counts **2570 longer than the sentence originally imposed on those particular counts, but yielding an aggregate sentence no longer than the aggregate sentence initially imposed. See Brief for United States 23, n. 11 (citing, *inter alia*, *United States v.* *254 *Pimienta–Redondo*, 874 F.2d 9 (C.A.1 1989) (en banc)). Thus the defendant ultimately may gain nothing from his limited success on appeal, but he will also lose nothing, as he will serve no more time than the trial court originally ordered.

The practice the Government describes is not at odds with the cross-appeal rule, which stops appellate judges from adding years to a defendant's sentence on their own initiative. It simply ensures that the sentence " 'will suit not merely the offense but the individual defendant.' " *Pimienta–Redondo*, 874 F.2d, at 14 (quoting *Wasman v. United States*, 468 U.S. 559, 564, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984)). And the assessment will be made by the sentencing judge exercising discretion, not by an appellate panel ruling on an issue of law no party tendered to the court.[8]

This is not a "sentencing package" case. Greenlaw was unsuccessful on all his appellate issues. There was no occasion for the Court of Appeals to vacate his sentence and no warrant, in the absence of a cross-appeal, to order the addition of 15 years to his sentence.[9]

*255 * * *

For the reasons stated, the judgment of the United States Court of Appeals for the Eighth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice BREYER, concurring in the judgment.

I agree with Justice ALITO that the cross-appeal requirement is simply a rule **2571 of practice for appellate courts, rather than a limitation on their power, and I therefore join Parts I–III of his opinion. Moreover, as a general matter, I would leave application of the rule to the courts of appeals, with our power to review their discretion "seldom to be called into action." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490, 71 S.Ct. 456, 95 L.Ed. 456 (1951). But since this case is now before us, I would consider whether the Court of Appeals here acted properly. Primarily for the reasons stated by the majority in footnote 9 of its opinion, I believe that the court abused its discretion in *sua sponte* increasing petitioner's sentence. Our precedent precludes the creation of an exception to the cross-appeal requirement based solely on the obviousness of the *256 lower court's error. See, *e.g.*, *Chittenden v. Brewster*, 2 Wall. 191, 195–196, 17 L.Ed. 839 (1865). And I cannot see how the interests of justice are significantly disserved by permitting petitioner's release from prison at roughly age 62, after almost 37 years behind bars, as opposed to age 77.

Justice ALITO, with whom Justice STEVENS joins, and with whom Justice BREYER joins as to Parts I, II, and III, dissenting.

I respectfully dissent because I view the cross-appeal requirement as a rule of appellate practice. It is akin to the rule that courts invoke when they decline to consider arguments that the parties have not raised. Both rules rest on premises about the efficient use of judicial resources and the proper role of the tribunal in an adversary system. Both are sound and should generally be followed. But just as the courts have made them, the courts may make exceptions to them, and I do not understand why a reviewing court should enjoy less discretion to correct an error *sua sponte* than it enjoys to raise and address an argument *sua sponte*. Absent congressional direction to the contrary, and subject to our limited oversight as a supervisory court, we should entrust the decision to initiate error correction to the sound discretion of the courts of appeals.

I

Before laying out my view in more detail, I must first address the question whether federal courts have subject-matter jurisdiction to enlarge an appellee's judgment in the absence of a cross-appeal. Because the Court would not recognize any exceptions to the cross-appeal requirement when the defendant appeals his sentence, it does not decide that question. See *ante,* at 2565. I must confront it, though I do not regard it as a substantial question. The cross-appeal requirement seems to me a prime example of a " 'rule of ***257** practice,' subject to exceptions, not an unqualified limit on the power of appellate courts." *El Paso Natural Gas Co. v. Neztsosie,* 526 U.S. 473, 480, 119 S.Ct. 1430, 143 L.Ed.2d 635 (1999). While a court should generally enforce the cross-appeal requirement, a departure from it would not divest the court of jurisdiction.

This Court has never addressed whether an appellate court's jurisdiction to enlarge a judgment in favor of an appellee is contingent on a duly filed cross-appeal. The majority's contention that "[o]ur own opinions contain statements supporting" the " 'jurisdictional' " characterization of the requirement, *ante,* at 2564 – 2565, relies on a misreading of that precedent. The Court may have previously characterized the cross-appeal requirement as limiting " '[t]he *power* of an appellate court to modify a decree,' " *ibid.* (quoting *Morley Constr. Co. v. Maryland Casualty Co.,* 300 U.S. 185, 187, 57 S.Ct. 325, 81 L.Ed. 593 (1937)), but it does not follow that jurisdiction is conditioned on a properly filed ****2572** cross-appeal. A court may lack the power to do something for reasons other than want of jurisdiction, and a rule can be inflexible without being jurisdictional. See *Eberhart v. United States,* 546 U.S. 12, 19, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005) *(per curiam).*

The jurisdiction of the courts of appeals is fixed by Congress. See *Bowles v. Russell,* 551 U.S. 205, 212, 127 S.Ct. 2360, 2364–2365, 168 L.Ed.2d 96 (2007); *Ankenbrandt v. Richards,* 504 U.S. 689, 698, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992) (" '[T]he judicial power of the United States ... is (except in enumerated instances, applicable exclusively to this Court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress' " (quoting *Cary v. Curtis,* 3 How. 236, 245, 11 L.Ed. 576 (1845))). If Congress wants to withhold from the courts of appeals the power to decide questions that expand the rights of nonappealing parties, it may do so. See U.S. Const., Art. III, § 1 (authorizing Congress to establish the lower courts and, by corollary, to fix their jurisdiction); *Kontrick v. Ryan,* 540 U.S. 443, 452, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004) ("Only Congress may determine a lower federal ***258** court's subject-matter jurisdiction"). The jurisdictional question thus reduces to whether Congress intended to make a cross-appeal a condition precedent to the appellate court's jurisdiction to enlarge a judgment in favor of a nonappealing party.

As always with such questions, the text of the relevant statute provides the best evidence of congressional intent. The relevant statute in this case is 18 U.S.C. § 3742 (2000 ed. and Supp. V). Section 3742(a) authorizes a criminal defendant to "file a notice of appeal" to review a sentence that was, among other possibilities, "imposed in violation of law." *E.g.,* § 3742(a)(1). Section 3742(b) provides parallel authority for the Government to "file a notice of appeal" to review unlawful sentences. *E.g.,* § 3742(b)(1). The statute conditions the Government's authority to further prosecute its appeal on "the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General." § 3742(b).

Nothing in this language remotely suggests that a court of appeals lacks subject-matter jurisdiction to increase a defendant's sentence in the absence of a cross-appeal by the Government. In fact, the statute does not even mention cross-appeals. It separately authorizes either party to "file a notice of appeal," but it never suggests that the reviewing court's power is limited to correcting errors for the benefit of the appealing party. If anything, it suggests the opposite. Without qualifying the appellate court's power in any way, § 3742(e) instructs the court to determine, among other things, whether the sentence was "imposed in violation of law." § 3742(e)(1). And while § 3742(f)(2) limits the action that a court of appeals can take depending on which party filed the appeal, compare § 3742(f)(2)(A) (sentences set aside as "too high" if defendant filed) with § 3742(f)(2)(B) (sentences set aside as "too low" if Government filed), no such limitation appears in § 3742(f)(1). That paragraph requires ***259** a court of appeals simply to set aside any sentence "imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines."

II

Since a cross-appeal has no effect on the appellate court's subject-matter jurisdiction, the cross-appeal requirement is best characterized as a rule of practice. It is a rule created by the courts to serve interests that are important to the Judiciary. ****2573** The Court identifies two of these

interests: notice to litigants and finality. *Ante*, at 2565 – 2566; see also *Neztsosie, supra*, at 480, 119 S.Ct. 1430. One might add that the cross-appeal requirement also serves a third interest: the appellate court's interest in being adequately briefed on the issues that it decides. See Fed. Rule App. Proc. 28.1(c) and Advisory Committee's Notes, 28 U.S.C.App., pp. 615–616. Although these are substantial interests in the abstract, I question how well an inflexible cross-appeal requirement serves them.

Notice. With respect to notice, the benefits of an unyielding cross-appeal requirement are insubstantial. When the Government files a notice of cross-appeal, the defendant is alerted to the possibility that his or her sentence may be increased as a result of the appellate decision. But if the cross-appeal rule is, as I would hold, a strong rule of practice that should be followed in all but exceptional instances, the Government's failure to file a notice of cross-appeal would mean in the vast majority of cases that the defendant thereafter ran little risk of an increased sentence. And the rare cases where that possibility arose would generally involve errors so plain that no conceivable response by the defendant could alter the result. It is not unreasonable to consider an appealing party to be on notice as to such serious errors of law in his favor. And while there may be rare cases in which the existence of such a legal error would come as a complete surprise to the defendant or in which argument ***260** from the parties would be of assistance to the court, the solution to such a problem is not to eliminate the courts of appeals' authority to correct egregious errors. Rather, the appropriate response is for the court of appeals to request supplemental briefing or—if it deems that insufficient—simply to refuse to exercise its authority. Cf. *Irizarry v. United States*, 553 U.S. 708, 716, 128 S.Ct. 2198, 171 L.Ed.2d 28, 2008 WL 2369164, *5–6 (2008). In short, the Court's holding does not increase the substance of the notice that a defendant receives; it merely accelerates that notice by at most a few weeks in a very small number of cases.

The Court contends that "[g]iven early warning, [the defendant] can tailor his arguments to take account of [the risk of a higher sentence] ... [o]r he can seek the Government's agreement to voluntary dismissal of the competing appeals." *Ante*, at 2569 (citing Fed. Rule App. Proc. 42(b)). But the Court does not explain how a notice of cross-appeal, a boilerplate document, helps the defendant "tailor his arguments." Whether the cross-appeal rule is ironclad, as the Court believes, or simply a strong rule of practice, a defendant who wishes to appeal his or her sentence is always free to seek the Government's commitment not to cross-appeal or to terminate a cross-appeal that the Government has already taken. Rule 42(b).

Finality. An inflexible cross-appeal rule also does little to further the interest of the parties and the Judiciary in the finality of decisions. An appellate court's decision to grant a nonappealing party additional relief does not interrupt a long, undisturbed slumber. The error's repose begins no earlier than the deadline for filing a cross-appeal, and it ends as soon as the reviewing court issues its opinion—and often much sooner. Here, for example, the slumber was broken when the Government identified the error in its brief as appellee. See Brief for United States 5.

Orderly Briefing. I do not doubt that adversarial briefing improves the quality of appellate decisionmaking, but it ***261** hardly follows that appellate courts should be denied the authority to correct errors that seriously prejudice nonappealing ****2574** parties. Under my interpretation of the cross-appeal rule, a court of appeals would not be obligated to address errors that are prejudicial to a nonappealing party; a court of appeals would merely have the authority to do so in appropriate cases. If a court of appeals noticed such an error and concluded that it was appropriate to address the issue, the court could, if it wished, order additional briefing. If, on the other hand, the court concluded that the issue was not adequately addressed by the briefs filed by the parties in the ordinary course and that additional briefing would interfere with the efficient administration of the court's work, the court would not be required to decide the issue. Therefore, I do not see how the courts of appeals' interest in orderly briefing is furthered by denying those courts the discretionary authority to address important issues that they find it appropriate to decide.

Indeed, the inflexible cross-appeal rule that the Court adopts may disserve the interest in judicial efficiency in some cases. For example, correcting an error that prejudiced a nonappealing defendant on direct review might obviate the need for a collateral attack. Cf. *Granberry v. Greer*, 481 U.S. 129, 134, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1987) (allowing the Court of Appeals to address the merits of an unexhausted habeas corpus petition if "the interests of comity and federalism will be better served by addressing the merits forthwith [than] by requiring a series of additional state and district court proceedings before reviewing the merits of the petitioner's claim"); *Munaf v. Geren*, 553 U.S. 674, 691, 128 S.Ct. 2207, 2219, 171 L.Ed.2d 1, 2008 WL 2369260, *12 (2008) (recognizing "occasions ... when it is appropriate to proceed further and address the merits" of a habeas corpus petition rather than reverse and remand on threshold matters). Because the reviewing court is in the

best position to decide whether a departure from the cross-appeal rule would be efficient, rigid enforcement of ***262** that rule is more likely to waste judicial resources than to conserve them.

In sum, the Court exaggerates the interests served by the cross-appeal requirement. At the same time, it overlooks an important interest that the rule disserves: the interest of the Judiciary and the public in correcting grossly prejudicial errors of law that undermine confidence in our legal system. We have repeatedly stressed the importance of that interest, see, *e.g.*, *United States v. Olano*, 507 U.S. 725, 736–737, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); *Press–Enterprise Co. v. Superior Court of Cal., Riverside Cty.*, 464 U.S. 501, 507, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984); *New York Central R. Co. v. Johnson*, 279 U.S. 310, 318, 49 S.Ct. 300, 73 L.Ed. 706 (1929), and it has justified departures from our traditional adversary framework in other contexts. The Court mentions one of those contexts, see *ante*, at 2564 (*pro se* litigation), but there are others that deserve mention.

The most well known is plain-error review. Federal Rule of Criminal Procedure 52(b) authorizes reviewing courts to correct "[a] plain error that affects substantial rights ... even though it was not brought to the court's attention." Although I agree with the Court that this Rule does not independently justify the Eighth Circuit's decision, see *ante*, at 2565 – 2566, I believe that the Rule's underlying policy sheds some light on the issue before us. We have explained that courts may rely on Rule 52(b) to correct only those plain errors that " 'seriously affec[t] the fairness, integrity or public reputation of judicial proceedings.' " *Olano*, *supra*, at 736, 113 S.Ct. 1770 (quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 80 L.Ed. 555 (1936)). We have thus recognized that preservation of the "fairness, ****2575** integrity or public reputation of judicial proceedings" may sometimes justify a departure from the traditional adversarial framework of issue presentation.

Perhaps the closest analogue to the cross-appeal requirement is the rule of appellate practice that restrains reviewing courts from addressing arguments that the parties have ***263** not made. Courts typically invoke this rule to avoid resolving a case based on an unaired argument, even if the argument could change the outcome. See, *e.g.*, *Santiago v. Rumsfeld*, 425 F.3d 549, 552, n. 1 (C.A.9 2005); *United States v. Cervini*, 379 F.3d 987, 994, n. 5 (C.A.10 2004). But courts also recognize that the rule is not inflexible, see, *e.g.*, *Santiago*, *supra*, at 552, n. 1, and sometimes they depart from it, see, *e.g.*, *United States Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 448, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993) ("After giving the parties ample opportunity to address the issue, the Court of Appeals acted without any impropriety in refusing to accept what in effect was a stipulation on a question of law" (citing *Swift & Co. v. Hocking Valley R. Co.*, 243 U.S. 281, 289, 37 S.Ct. 287, 61 L.Ed. 722 (1917))); *United States v. Moyer*, 282 F.3d 1311, 1317–1318 (C.A.10 2002); *Dorris v. Absher*, 179 F.3d 420, 425–426 (C.A.6 1999).

A reviewing court will generally address an argument *sua sponte* only to correct the most patent and serious errors. See, *e.g.*, *id.*, at 426 (concluding that the error, if overlooked, would result in "a miscarriage of justice"); *Consumers Union of U.S., Inc. v. Federal Power Comm'n*, 510 F.2d 656, 662 (C.A.D.C.1974) (balancing "considerations of judicial orderliness and efficiency against the need for the greatest possible accuracy in judicial decisionmaking"). Because the prejudicial effect of the error and the impact of error correction on judicial resources are matters best determined by the reviewing court, the court's decision to go beyond the arguments made by the parties is committed to its sound discretion. See *United States Nat. Bank of Ore.*, *supra*, at 448, 113 S.Ct. 2173 (reviewing an appellate court's decision to address an argument *sua sponte* for abuse of discretion).

This authority provides a good model for our decision in this case. The Court has not persuaded me that the ***264** interests at stake when a reviewing court awards a nonappealing party additional relief are qualitatively different from the interests at stake when a reviewing court raises an issue *sua sponte*. Authority on the latter point recognizes that the interest of the public and the Judiciary in correcting grossly prejudicial errors of law may sometimes outweigh other interests normally furthered by fidelity to our adversarial tradition. I would recognize the same possibility here. And just as reviewing courts enjoy discretion to decide for themselves when to raise and decide arguments *sua sponte*, I would grant them substantial latitude to decide when to enlarge an appellee's judgment in the absence of a cross-appeal.[1]

III

The approach I advocate is not out of step with our precedent. The Court has never decided whether the cross-appeal requirement is "subject to exceptions [or] ****2576** an unqualified limit on the power of appellate

courts." *Neztsosie*, 526 U.S., at 480, 119 S.Ct. 1430. That question was reserved in *Neztsosie, ibid.*, even as the Court recognized that lower courts had reached different conclusions, see *ibid.*, n. 2, 119 S.Ct. 1430. I would simply confirm what our precedent had assumed: that there are exceptional circumstances when it is appropriate for a reviewing court to correct an error for the benefit of a party that has not cross-appealed the decision below.

Indeed, the Court has already reached the very result that it claims to disavow today. We have long held that a sentencing court confronted with new circumstances may impose a stiffer sentence on remand than the defendant received prior to a successful appeal. See *Chaffin v.* ***265** *Stynchcombe*, 412 U.S. 17, 23, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973); *North Carolina v. Pearce*, 395 U.S. 711, 719–720, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on other grounds, *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). The Court makes no effort to explain the analytical difference between those cases and this one. If a sentencing court may rely on new circumstances to justify a longer sentence on remand, why cannot one of the new circumstances be the court's discovery (by dint of appellate review) that its first sentence was based on an error of law?[2]

Even today, the Court refuses to decide whether the cross-appeal requirement admits of exceptions in appropriate cases. While calling the rule " 'inveterate and certain,' " *ante*, at 2564 – 2565 (quoting ***266** *Morley Constr. Co.*, 300 U.S., at 191, 57 S.Ct. 325), the Court allows that "there might be circumstances in which it would be proper for an appellate court to initiate plain-error review," *ante*, at 2566 – 2567; see also *ante*, at 2564, n. 2. The Court's mandate is limited to a single class of cases—sentencing appeals, and then only when the appeal is brought by the Government.

The Court justifies the asymmetry in its decision by pointing to 18 U.S.C. § 3742(b), which provides that "[t]he Government may not further prosecute [the] appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General." According to ****2577** the majority, "[i]t would severely undermine Congress' instruction were appellate judges to 'sally forth' on their own motion to take up errors adverse to the Government when the designated Department of Justice officials have not authorized an appeal from the sentence the trial court imposed." *Ante*, at 2565 (citation omitted).

The problem with this argument is that § 3742(b) does not apportion authority over sentencing appeals between the Executive and Judicial Branches. By its terms, § 3742(b) simply apportions that authority *within* an executive department. It provides that "[t]he Government" may not "prosecute" the appeal without approval from one of the listed officials. It says nothing about the power of the courts to correct error in the absence of a Government appeal. Had Congress intended to restrict the power of the courts, the statute would not stop "[t]he Government" from "prosecut[ing]" unauthorized appeals; instead, it would stop "the Court of Appeals" from "deciding" them.

The design that the Court imputes to the drafters of § 3742(b) is inconsistent with the text in another important respect. Suppose that the District Court imposes a sentence below the range set forth in the Federal Sentencing Guidelines, and the Government files an authorized appeal on the ground that the sentence is unreasonable. Suppose further that the reviewing court discovers, to the surprise of ***267** both parties, that the District Court made a further error by overlooking a mandatory minimum to which the defendant was subject. The mandatory minimum would raise the defendant's sentence beyond what even the Government had wanted. Under the majority's theory, see *ante*, at 2565, the reviewing court should not remand for imposition of the mandatory minimum, since the decision to seek the higher sentence belonged to the Government alone. But that conclusion is plainly at odds with the text of the statute, which imposes no limits on sentencing review once the named officials have signed off on the appeal.

Section 3742(b)'s limited effect on sentencing review implies that the statute was not designed to prevent judicial encroachment on the prerogatives of the Executive. It is more likely that Congress wanted to withhold from the Executive the power to force the courts of appeals to entertain Government appeals that are not regarded as sufficiently important by the leadership of the Department of Justice. Allowing the courts of appeals, in their discretion, to remedy errors not raised in a cross-appeal in no way trenches on the authority of the Executive. Section 3742(b) may have also been designed to serve the Executive's institutional interests. Congress may have wanted to ensure that the Government maintained a consistent legal position across different sentencing appeals. Or perhaps Congress wanted to maximize the impact of the Government's sentencing appeals by giving high-level officials the authority to nix meritless or marginal ones. These institutional interests of the Executive do not undermine the Judiciary's authority to correct unlawful sentences in the absence of a Government appeal, and they do not justify the Court's decision today.

IV

For the reasons given above, I would hold that the courts of appeals enjoy the discretion to correct error *sua sponte* ***268** for the benefit of nonappealing parties. ****2578** The Court errs in vacating the judgment of the Eighth Circuit, and I respectfully dissent.[3]

All Citations

554 U.S. 237, 128 S.Ct. 2559, 171 L.Ed.2d 399, 76 USLW 4533, 08 Cal. Daily Op. Serv. 7716, 2008 Daily Journal D.A.R. 9297, 21 Fla. L. Weekly Fed. S 421

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The court added 10 years rather than 5 based on the jury's finding that the firearm Greenlaw carried in connection with the second § 924(c) offense had been discharged. See App. 44–45, 59–60.

2 Because this case does not present the issue, we take no position on whether correction of an error prejudicial to a nonappealing criminal defendant might be justified as a measure to obviate the need for a collateral attack. See *post,* at 2573 – 2574 (Alito, J., dissenting).

3 Cf. Kaplan, Civil Procedure—Reflections on the Comparison of Systems, 9 Buffalo L.Rev. 409, 431–432 (1960) (U.S. system "exploits the free-wheeling energies of counsel and places them in adversary confrontation before a detached judge"; "German system puts its trust in a judge of paternalistic bent acting in cooperation with counsel of somewhat muted adversary zeal").

4 The dissent reads § 3742(b) not as a restraint on *sua sponte* error correction by appellate courts, but simply as apportioning "authority *within* an executive department." *Post,* at 2576 – 2577; see *post,* at 2577 ("[P]erhaps Congress wanted to ... giv[e] high-level officials the authority to nix meritless or marginal [sentencing appeals]."). A statute is hardly needed to establish the authority of the Attorney General and Solicitor General over local U.S. Attorneys on matters relating to the prosecution of criminal cases, including appeals of sentences. It seems unlikely, moreover, that Congress, having lodged discretion in top-ranking Department of Justice officers, meant that discretion to be shared with more than 200 appellate judges.

5 An appellee or respondent may defend the judgment below on a ground not earlier aired. See *United States v. American Railway Express Co.*, 265 U.S. 425, 435, 44 S.Ct. 560, 68 L.Ed. 1087 (1924) ("[T]he appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record ....").

6 The Controlled Substances Act of 1970, § 409(h), 84 Stat. 1268–1269, contained matching instructions applicable to "dangerous special drug offender[s]." The prescriptions in both Acts were replaced by § 3742. See Sentencing Reform Act of 1984, §§ 212(2), 213(a), 219, 98 Stat. 1987, 2011, 2027.

7 In rejecting the interpretation of §§ 3742(e) and (f) proffered by *amicus,* we take no position on the extent to which the remedial opinion in *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), excised those provisions. Compare *Rita v. United States,* 551 U.S. 338, 361 – 362, 127 S.Ct. 2456, 2471, 168 L.Ed.2d 203 (2007) (STEVENS, J., concurring) (*Booker* excised only the portions of § 3742(e) that required *de novo* review by courts of appeals), with 551 U.S., at 382, 383, 127 S.Ct. 2456, 2483 (SCALIA, J., concurring in part and concurring in judgment) (*Booker* excised *all* of §§ 3742(e) and (f)). See also *Kimbrough v. United States,* 552 U.S. 85, 116, 128 S.Ct. 558, 578, 169 L.Ed.2d 481 (2007) (THOMAS, J., dissenting) (the *Booker* remedial opinion, whatever it held, cannot be followed).

8 The dissent suggests that our reading of the cross-appeal rule is anomalous because it could bar a court of appeals from correcting an error that would increase a defendant's sentence, but after a "successful" appeal the district court itself could rely on that same error to increase the sentence. See *post,* at 2576 – 2577, and n. 2. The cross-appeal rule, we of course agree, does not confine the trial court. But default and forfeiture doctrines do. It would therefore be hard to imagine a case in which a district court, after a court of appeals vacated a criminal sentence, could properly increase

the sentence based on an error the appeals court left uncorrected because of the cross-appeal rule. What of cases remanded post-*Booker* on defendants' appeals, the dissent asks? *Post,* at 2576, n. 2. In those cases, defendants invited and received precisely the relief they sought, and the Sixth Amendment required. Neither the cross-appeal rule nor default and forfeiture had any role to play.

9 For all its spirited argument, the dissent recognizes the narrow gap between its core position and the Court's. The cross-appeal rule, rooted in the principle of party presentation, the dissent concedes, should hold sway in the "vast majority of cases." *Post,* at 2573. Does this case qualify as the "rare" exception to the "strong rule of practice" the dissent advocates? See *ibid.* Greenlaw was sentenced to imprisonment for 442 months. The Government might have chosen to insist on 180 months more, but it elected not to do so. Was the error so "grossly prejudicial," *post,* at 2574, 2575 – 2576, so harmful to our system of justice, see *post,* at 2574 – 2575, as to warrant *sua sponte* correction? By what standard is the Court of Appeals to make such an assessment? Without venturing to answer these questions, see *post,* at 2578, n. 3, the dissent would simply "entrust the decision to initiate error correction to the sound discretion of the courts of appeals," *post,* at 2571. The "strong rule" thus may be broken whenever the particular three judges composing the appellate panel see the sentence as a "wron[g] to right." See *supra,* at 2573 (internal quotation marks omitted). The better answer, consistent with our jurisprudence, as reinforced by Congress, entrusts "the decision [whether] to initiate error correction" in this matter to top counsel for the United States. See *supra,* at 2574.

1 The Court argues that petitioner's original sentence was neither so fundamentally unfair nor so harmful to our system of justice as to warrant *sua sponte* correction by the Court of Appeals. *Ante,* at 2570, n. 9. But these considerations, which may well support a conclusion that the Court of Appeals should not have exercised its authority in this case, cf. n. 3, *infra,* surely do not justify the Court's broad rule that *sua sponte* error correction on behalf of the Government is inappropriate in all cases.

2 The Court finds it "hard to imagine a case in which a district court, after a court of appeals vacated a criminal sentence, could properly increase the sentence based on an error the appeals court left uncorrected because of the cross-appeal rule." *Ante,* at 2570, n. 8. Happily, we need not imagine such cases, since they come before our courts every day.

For examples, we have no further to look than the sentencing cases remanded en masse following our recent decision in *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). In *Booker*'s wake, it was common for newly convicted defendants to appeal their sentences, claiming that they received enhancements that they would not have received under the advisory guidelines. Many of those cases were remanded for resentencing, and some defendants wound up with even longer sentences on remand. See, *e.g., United States v. Singletary,* 458 F.3d 72, 77(CA2) (affirming a sentence lengthened by 12 months following a *Booker* remand), cert. denied, 549 U.S. 1047, 127 S.Ct. 616, 166 L.Ed.2d 457 (2006); *United States v. Reinhart,* 442 F.3d 857, 860–861 (C.A.5 2006) (affirming a sentence lengthened from 210 months to 235 months following a *Booker* remand).

These cases represent straightforward applications of the cross-appeal rule: The Government had not cross-appealed the sentence, so the reviewing court did not order the defendant's sentence lengthened. And yet the sentence *was* ultimately lengthened when the error was corrected on remand. The Court fails to explain the conceptual distinction between those cases and this one. If the Court permits sentencing courts to correct unappealed errors on remand, why does it not permit the courts of appeals to do the same on appeal?

3 Neither the parties nor our *amicus* have addressed whether, under the assumption that the Court of Appeals enjoys discretion to initiate error correction for the benefit of a nonappealing party, the Eighth Circuit abused that discretion in this case. As framed by petitioner, the question presented asked only whether the cross-appeal requirement is subject to exceptions. Because the parties have not addressed the fact-bound subsidiary question, I would affirm without reaching it. See *United States v. International Business Machines Corp.,* 517 U.S. 843, 855, n. 3, 116 S.Ct. 1793, 135 L.Ed.2d 124 (1996).

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ANNEX 357

2011 WL 13244047
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

IN RE TERRORIST ATTACKS ON SEPTEMBER 11, 2001

Fiona Havlish, in her own right and as Executrix of the Estate of Donald G. Havlish, Jr., Deceased, et al., Plaintiffs,

v.

Usama Bin Laden, Al–Qaeda/Islamic Army, The Taliban, a.k.a. the Islamic Emirate of Afghanistan, Muhammad Omar, The Islamic Republic of Iran, Ayatollah Ali Hoseini Khamenei, Ali Akbar Hashemi Rafsanjani, Information and Security, The Islamic Revolutionary Guard Corps, Hezbollah, The Iranian Ministry of Petroleum, The National Iranian Tanker Corporation, The National Iranian Oil Corporation, The National Iranian Gas Company, Iran Airlines, The National Iranian Petrochemical Company, Iranian Ministry of Economic Affairs and Finance, Iranian Ministry of Commerce, Iranian Ministry of Defense and Armed Forces Logistics, the Central Bank of The Islamic Republic of Iran, et al., Defendants.

Civil Action No. 03 MDL 1570 (GBD), Civil Action No. 03–CV–9848–GBD
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Signed 12/22/2011

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

George B. Daniels, United States District Judge

Background and Procedural History

***1** On September 11, 2001, nineteen (19) members of the al Qaeda terrorist network hijacked four (4) United States passenger airplanes and flew them into the twin towers of the World Trade Center in New York City, the Pentagon in Arlington, Virginia, and, due to passengers' efforts to foil the hijackers, an open field near Shanksville, Pennsylvania. Thousands of people on the planes and in the buildings, including first responders at the New York crash site, were killed in those attacks. Countless others were injured, and property worth billions of dollars was destroyed. *In Re Terrorist Attacks on September* 11, 2001, 349 F.Supp.2d 765, 779 (S.D.N.Y. 2005, Casey, J.).

Plaintiffs in this action are family members and legal representatives of victims of the 9/11 attacks who seek to hold accountable the persons, entities,

and foreign sovereigns that directly and materially supported al Qaeda. In particular, plaintiffs seek entry of a judgment against the Islamic Republic of Iran, two (2) of its top leaders, and a number of Iran's political and military subdivisions, agencies, and instrumentalities based on Iran's provision of material support to al Qaeda and direct support for, and sponsorship of, the September 11, 2001 terrorist attacks.[1] The officials, subdivisions, and agencies and instrumentalities of Iran named as defendants (collectively referred to as the "agency and instrumentality Defendants") are Ayatollah Ali Hoseini Khamenei, Ali Akbar Hashemi Rafsanjani, Hezbollah (a./k./a. Hizballah), the Iranian Ministry of Information and Security ("MOIS"), the Islamic Revolutionary Guard Corps ("IRGC"), the Iranian Ministry of Petroleum, the Iranian Ministry of Economic Affairs and Finance, the Iranian Ministry of Commerce, the Iranian Ministry of Defense and Armed Forces Logistics, the National Iranian Tanker Corporation, the National Iranian Oil Corporation, the National Iranian Gas Company, Iran Airlines, the National Iranian Petrochemical Company, and the Central Bank of the Islamic Republic of Iran.

The Court's jurisdiction over Iran and the agency and instrumentality Defendants is grounded in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602, *et seq.* Section 1605 A of the FSIA also serves as the basis for liability claims asserted by plaintiffs who are United States nationals.

This action was initiated in the United States District Court for the District of Columbia on February 19, 2002. Plaintiffs served Iran and the agency and instrumentality Defendants with summonses and copies of the Amended Complaint pursuant to 28 U.S.C. § 1608.[2] On November 1, 2002, plaintiffs' counsel filed an Affidavit of Service of Original Process Upon All Defendants, providing the Court with a detailed description of how the Amended Complaint and Summons were served upon each Defendant. No Defendant answered or responded to the Amended Complaint, nor did any person enter an appearance on behalf of any Defendant. The Clerk of the U.S. District Court for the District of Columbia then entered a Rule 55(a) Default against each of the Defendants.[3] Fed. R. Civ. P. 55(a).

***2** After the case was consolidated into the present MDL proceedings, this Court granted plaintiffs' Motion for Leave to File a Second Amended Complaint, which plaintiffs filed on September 7, 2006 (*Havlish* Docket no. 214).[4] Although plaintiffs had already served Defendants with the Amended Complaint and obtained Rule 55(a) defaults against them, plaintiffs again served Iran and the agency and instrumentality Defendants with the Second Amended Complaint. Such service was again made pursuant to 28 U.S.C. § 1608. On August 24, 2007, plaintiffs' counsel filed an Affidavit of Service of the Second Amended Complaint (MDL Docket Document No. 2033). Still, none of the defendants made an appearance or otherwise responded to the Second Amended Complaint. On December 27, 2007, the Clerk of Court entered a Clerk's Certificate for Default as to each Defendant. (*See also* n. 3, *supra*.)

In order to revise their pleading to conform to the new provisions of the FSIA enacted in section 1083 of the National Defense Authorization Act for Fiscal Year 2008 (the "NDAA"), Pub.L. No. 110–181, § 1083, 122 Stat. 341 (2008) (codified at 28 U.S.C. § 1605A (2009)), plaintiffs filed a motion for leave to file a Third Amended Complaint, which was granted by the Court. (*Havlish* docket no. 262.) The Third Amended Complaint (*Havlish* docket no. 363) asserts a claim by U.S. citizen plaintiffs against Iran and the agency and instrumentality defendants under § 1605A and a claim by non–U.S. citizens against those defendants under the Alien Tort Claims Act, 28 U.S.C. § 1350 (the "ATCA").[5]

This matter now comes before the Court upon plaintiffs' motion for entry of judgment by default against defendant Islamic Republic of Iran and the agency and instrumentality defendants. Before plaintiffs can be awarded any relief, this Court must determine whether they have established their claims "by evidence satisfactory to the court." 28 U.S.C. § 1608(e); *see also Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 232 (D.C.Cir. 2003). This "satisfactory to the court" standard is identical to the standard for entry of default judgments against the United States in Federal Rule of Civil Procedure 55(e). *Hill v. Republic of Iraq*, 328 F.3d 680, 684 (D.C.Cir. 2003). In evaluating the Plaintiffs' proof, the Court may "accept as true the plaintiffs' uncontroverted evidence." *Elahi v. Islamic Republic of Iran*, 124 F.Supp.2d 97, 100 (D.D.C. 2000); *Campuzano v. Islamic Republic of Iran*, 281 F.Supp.2d 258, 268 (D.D.C. 2003). In FSIA default judgment proceedings, the plaintiffs may establish proof by

affidavit. *Weinstein v. Islamic Republic of Iran*, 184 F.Supp.2d 13, 19 (D. D.C. 2002).

In support of their motion, plaintiffs have submitted to the Court expert affidavits, fact affidavits, videotaped witness testimony and other exhibits. Such proofs were the subject of an evidentiary hearing on December 15, 2011. Based on the established record, plaintiffs propose the following findings of fact and conclusions of law:

Findings of Fact

Defendants

1. The Islamic Republic of Iran (hereinafter, unless otherwise noted, "Iran") has engaged in, and supported, terrorism as an instrument of foreign policy, virtually from the inception of its existence after the Iranian Revolution in 1979. Ex. 3, Byman Affid. ¶¶ 19–22, 25; Ex. 8, Clawson Affid. Conclusion, p. 35; Ex. 6, Lopez–Tefft Affid. ¶¶ 62–63, 67–95; Ex. 13, State Department Country Reports on Terrorism, Patterns of Global Terrorism [excerpts regarding Iran]; Ex. 2, Timmerman 2nd Affid. ¶2; *see also* Ex. 11, Testimony of Abolhassan Banisadr, p. 16. Plaintiffs' First Memorandum Of Law In Support Of Motion For Entry Of Judgment By Default Against Sovereign Defendants ("First Memo") at pp. 37–42, 44–52, 59–68.

***3** 2. Iran has been waging virtually an undeclared war against both the United States and Israel for thirty years. Ex. 7, Bergman Affid. ¶24; Ex. 6, Lopez–Tefft Affid. ¶60.

3. Iran wages this undeclared war through asymmetrical, or unconventional strategies and terrorism, often through proxies such as Hizballah, Hamas, al Qaeda, and others. Ex. 7, Bergman Affid. ¶¶19–21.

4. The U.S. State Department has designated Iran as a foreign state sponsor of terror every year since 1984. Ex. 3, Byman Affid. ¶15; Ex. 8, Clawson Affid. ¶40; *see Estate of Heiser v. Islamic Republic of Iran*, 466 F.Supp.2d 229 (D.D.C. 2006).

5. Since 1980, each of the State Department's annual reports on terrorism describes the Iranian state's consistent involvement in acts of terror. Ex. 13, State Department *Country Reports on Terrorism*, *Patterns of Global Terrorism* [excerpts regarding Iran] 1980–2009; Appendix F [selected excerpts]; Ex. 6, Lopez–Tefft Affid. ¶¶66–95.

6. Defendants Ali Hoseini Khamenei and Ali Akbar Hashemi Rafsanjani are two of the most important and powerful officials in Iran. Ex. 41, Clawson 2nd Affid. ¶9. Both Khamenei and Rafsanjani occupy positions at the very highest echelon of the Iranian government. Ex. 8, Clawson Affid. ¶18–21;–23–28; Ex. 41, Clawson 2nd Affid. ¶¶9–14.

7. Ayatollah Ali Hoseini Khamenei is, and has been since 1989, the Supreme Leader of the Islamic Republic of Iran. Ex. 41, Clawson 2nd Affid. ¶10; Ex. 35, Iran: U.S. Concerns and Policy Responses, Congressional Research Service.

8. Ayatollah Ali Hoseini Khamenei is the commander-in-chief of the armed forces, appoints the head of each military service, declares war and peace, appoints the head of the judiciary, and may dismiss the elected president of Iran, among many other powers outlined in Article 110 of the Iranian Constitution. He is, as his title suggests, supreme. He is the head of state, and, for all intents and purposes, Khamenei *is* the Iranian government. Khamenei is certainly—by far—the most powerful person in the Iranian government. His term of office is unlimited. Ex. 41, Clawson 2nd Affid. ¶11; Ex. 35, "Iran: U.S. Concerns and Policy Responses," Congressional Research Service (March 4, 2011), pp. 2–3.

9. Defendant Ali Akbar Hashemi Rafsanjani, one of the wealthiest individuals in Iran, has held a number of top positions in Iran's government: from 1989 to 1997, he was the president of Iran; from 1981 to 1989, he was the speaker of the Iranian parliament. Currently, Rafsanjani heads two important bodies established by the Iranian Constitution: the Assembly of Experts and the Expediency

Council. Ex. 41, Clawson 2nd Affid. ¶12; Ex. 35, "Iran: U.S. Concerns and Policy Responses," Congressional Research Service (March 4, 2011), pp. 2–4.

10. The Assembly of Experts selects a new Supreme Leader when that position becomes vacant. Ex. 41, Clawson 2nd Affid. ¶12; Ex. 35, "Iran: U.S. Concerns and Policy Responses," Congressional Research Service (March 4, 2011), p. 3.

11. The Expediency Council is a uniquely Iranian institution; its members are appointed by the Supreme Leader, and it is charged with responsibility for resolving deadlocks between the parliament and the Guardian Council. Ex. 41, Clawson 2nd Affid. ¶12; Ex. 35, "Iran: U.S. Concerns and Policy Responses," Congressional Research Service (March 4, 2011), p. 3.

***4** 12. The Guardian Council is a body charged with vetting legislation to ensure that it is consistent with Islam and the Iranian Constitution, and which deals with other issues "forwarded to them by the [Supreme] Leader." Ex. 41, Clawson 2nd Affid. ¶12; Ex. 35, "Iran: U.S. Concerns and Policy Responses," Congressional Research Service (March 4, 2011), pp. 2–3.

13. Until Rafsanjani lost a bid for a new presidential term in 2005, he was widely considered to be the second most powerful figure in the Iranian government. Certainly, he was the second most powerful figure from 1989 to 2005. Ex. 41, Clawson 2nd Affid. ¶13.

14. Khamenei and Rafsanjani both have long records of direct involvement in Iran's material support for terrorism, and both have been cited as key figures in numerous U.S. court cases finding Iranian state support for terrorism. Ex. 41, Clawson 2nd Affid. ¶13; regarding Rafsanjani, *see Owens, et al. v. Republic of Sudan, et al.*, Civ. Action No. 01–2244 (JDB), 826 F.Supp.2d 128, 2011 U.S. Dist. LEXIS 135961.

15. As ruled by a German court in the "*Mykonos*" case, both Khamenei and Rafsanjani were named as having been responsible for ordering the assassination of Iranian dissidents in Berlin. Ex. 41, Clawson 2nd Affid. ¶14.

16. Executive power in Iran is held not by the elected head of the government, Iran's president, but rather by the unelected Supreme Leader. *Id.*, pp. 55, 66; 127; Ex. 6, Lopez–Tefft Affid. ¶19; Ex. 8, Clawson Affid. ¶18.

17. Iran's Supreme Leader has the authority to make any decision—religious or political. Ex. 8, Clawson Affid. ¶¶19–20.

18. The political structure of Iran is divided conceptually: there is a formal governmental structure and a revolutionary structure. The Supreme Leader oversees both. Ex. 8, Clawson Affid. ¶25.

19. Iran's Supreme Leader holds power to dismiss the president, overrule the parliament and the courts, and overturn any secular law. Ex. 8, Clawson Affid. ¶21.

20. Iran's Supreme Leader wields sole authority to command, appoint, and dismiss every major leadership figure of any importance in the Iranian government system and the military. Ex. 6, Lopez–Tefft Affid. ¶20.

21. Defendants Iranian Ministry of Information and Security ("MOIS"), the Islamic Revolutionary Guard Corps ("IRGC"), the Iranian Ministry of Petroleum, the Iranian Ministry of Economic Affairs and Finance, the Iranian Ministry of Commerce, and the Iranian Ministry of Defense and Armed Forces Logistics are all political or military subdivisions of the nation-state the Islamic Republic of Iran. Each of these agencies has core functions which are governmental, not commercial, in nature. Ex. 41, Clawson 2nd Affid. ¶¶15–17, 23–28; Plaintiffs' Third Memorandum at pp. 9–14.

22. Except for the IRGC, these governmental ministries in Iran bear much the same relationship to Iran's government as do the cabinet departments in the United States government: they are established by law, their heads are appointed by the president subject to confirmation by the parliament, their budgets are proposed by the president and approved by

the parliament, and their funding comes almost entirely from general tax revenues. Their core functions are governmental, and they are agencies within the government of the Islamic Republic of Iran. Ex. 41, Clawson 2nd Affid. ¶15.

23. The IRGC is a military force parallel to the regular Iranian military and to the formal governmental structure; although it is not subject to supervision by the Iranian parliament, it operates as an agent and instrumentality of the Supreme Leader himself. Ex. 8, Clawson Affid. ¶¶29–35; Ex. 41, Clawson 2nd Affid. ¶16; Plaintiffs' First Memorandum at pp. 43–45; Plaintiffs' Third Memorandum at pp. 9–13, 19.

***5** 24. The IRGC's responsibilities and powers are described in the Iranian Constitution, and the IRGC reports directly to Iran's Supreme Leader rather than to its president. Ex. 41, Clawson 2nd Affid. ¶16.

25. The IRGC, also known as the *Sepah Pasdaran*, is both the guardian and the striking arm of the Islamic Revolution. Ex. 8, Clawson Affid. ¶¶29–35. The IRGC strongly asserts its constitutional role as defender of the Islamic Revolution. Ex. 41, Clawson 2nd Affid. ¶ 16; Plaintiffs' First Memorandum at pp. 43–45 and Ex. 8, Clawson Affid. ¶¶29–35.

26. The IRGC is a governmental agency whose core functions are governmental. Ex. 41, Clawson 2nd Affid. ¶16; Plaintiffs' First Memorandum at pp. 43–45 and Ex. 8, Clawson Affid. ¶¶29–35.

27. The IRGC is a major factor in the Iranian economy: it owns and controls hundreds of companies and commercial interests, particularly in the oil and gas sector, engineering, telecommunications and infrastructure, and it holds billions of dollars in military, business, and other assets and government contracts. One of the IRGC's companies has been awarded contracts worth billions of dollars by government agencies and the National Iranian Oil Company. The IRGC also engages in widespread smuggling, including, but not limited to, drugs and alcohol. Ex. 8, Clawson Affid. ¶37; Ex. 2, Timmerman 2nd Affid. ¶202; *see also* Ex. 11, Testimony of Abolhassan Banisadr, pp. 19–20.

28. The IRGC has a special foreign division, known as the *Qods* (or *Quds* or "Jerusalem") Force, which is the arm of the IRGC that works with militant organizations abroad and promotes terrorism overseas. The *Qods* Force has a long history of engaging in coups, insurgencies, assassinations, kidnappings, bombings, and arms dealing, and it is one of the most organized, disciplined, and violent terrorist organizations in the world. Ex. 3, Byman Affid. ¶62; *see also* Ex. 6, Lopez–Tefft ¶25; Ex. 11, Testimony of Abolhassan Banisadr, p. 19.

29. For more than two decades, the IRGC has provided funding and/or training for terrorism operations targeting American citizens, including support for Hizballah and al Qaeda. In doing so, the IRGC is acting as an official agency whose activities are controlled by the Supreme Leader. Ex. 8, Clawson Affid. ¶36. Terrorism training provided to Hizbollah and al Qaeda by the IRGC is an official policy of the Iranian government. Ex. 8, Clawson Affid. ¶36.

30. The U.S. Treasury Department has designated the IRGC–*Qods* Force as a "terrorist organization" for providing material support to the Taliban and other terrorist organizations, and the U.S. State Department has designated the IRGC as a "foreign terrorist organization." Ex. 6, Lopez–Tefft Affid. ¶65. Plaintiffs' First Memorandum at pp. 43. U.S. Government officials regularly state that the IRGC is considered an active supporter of terrorism. Ex. 41, Clawson 2nd Affid. ¶26.

31. Iran's Ministry of Information and Security ("MOIS") is a well-funded and skilled intelligence agency with an annual budget between $100 million and $400 million. Ex. 8, Clawson Affid. ¶38.

32. MOIS has been involved in kidnappings, assassinations, and terrorism since its inception in 1985 after the ouster of president Abolhassan Banisadr, the Islamic Republic of Iran's first elected president. Ex. 8, Clawson Affid. ¶38; Ex. 11, Testimony of Abolhassan Banisadr, p. 12.

***6** 33. The predecessor of MOIS was not the Shah's intelligence agency, Savak, which was dissolved, but rather the Supreme Leader's own intelligence service, which had no name. This special intelligence service reported directly to the Supreme Leader, who was, at that time, Ayatollah Khomeini, and it was engaged in the business of assassinations. Ex. 11, Testimony of Abolhassan Banisadr, pp. 11–12.

34. Many of the U.S. State Department reports on global terrorism over the past twenty-five (25) years refer to MOIS as Iran's key facilitator and director of terrorist attacks. *See* Ex. 8, Clawson Affid. ¶39; Ex. 13. Witnesses X testifies to MOIS' role (as well as its successor, the Leader's special intelligence apparatus) in conducting and directing acts of international terrorism. Ex. S–3, Testimony of Abolghasem Mesbahi (March 1, 2008), pp. 56–72; Ex. S–4, Testimony of Abolghasem Mesbahi (March 2, 2008), pp. 56–64.

35. After discovery of the involvement of MOIS in a series of assassinations and murders of intellectuals, writers, and dissidents in Iran in the late 1990s, known as the "Chain Murders," led to some reforms in MOIS, Iran's Supreme Leader, Ayatollah Khamenei, again formed a special intelligence apparatus that reported directly to him and worked under his direct control. The Supreme Leaders' special intelligence apparatus was engaged in the planning, support, and direction of terrorism. Ex. S–3, Testimony of Abolghasem Mesbahi (March 1, 2008), pp. 24–41 and Abolghasem Mesbahi Dep. Ex. 14; Ex. S–6, Testimony of Witness Y (February 25, 2008), pp. 6, 14–18, 53–54.; *see also* Lopez–Tefft Affid. ¶206 and p. 83, n. 41; Bergman Affid. ¶¶75–76.

36. As federal courts have found in several cases, MOIS as been a key instrument of the government of Iran for its material support of terrorist groups like Hizballah and as a terrorist agency of the Iranian government. Ex. 41, Clawson 2nd Affid. ¶24. *See, e.g., Dammarell v. Islamic Republic of Iran*, 404 F.Supp.2d 261, 271–72 (D.D.C. 2005) ("through MOIS, Iran materially supported Hizbollah by providing assistance such as money, military arms, training, and recruitment."); *see also Flatow v. Islamic Republic of Iran*, 999 F.Supp. 1 (D.D.C. 1998); *Anderson v. Islamic Republic of Iran*, 90 F.Supp.2d 107, 112–13 (D.D.C. 2000); *Peterson v. Islamic Republic of Iran*, 264 F.Supp.2d 46 (D.D.C. 2003); *Salazar v. Islamic Republic of Iran*, 370 F.Supp.2d 105 (D.D.C. 2005); *Haim v. Islamic Republic of Iran*, 425 F.Supp.2d 56 (D.D.C. 2006); *Blais v. Islamic Republic of Iran*, 459 F.Supp.2d 40 (D.D.C. 2006); *Valore v. Islamic Republic of Iran*, 478 F.Supp.2d 101 (D.D.C. 2007). *See* Plaintiffs' First Memorandum at pp. 45–46.

37. As federal courts have held in several cases, the IRGC and the MOIS are parts of the Iranian state itself. *See Rimkus v. Islamic Republic of Iran*, 575 F.Supp.2d 181, 198–200 (D.D.C. 2008) (Lamberth, C.J.); *Blais v. Islamic Republic of Iran*, 459 F.Supp.2d 40, 60–61 (D.D.C. 2006) (Lamberth, J.) (both MOIS and IRGC must be treated as the state of Iran itself for purposes of liability); *Salazar v. Islamic Republic of Iran*, 370 F.Supp.2d 105, 115–16 (D.D.C. 2005) (Bates, J.) (same).

38. The entire apparatus of the Iranian state and government, and many parts of Iran's private sector, including corporations (*e.g.*, National Iranian Oil Company, Iran Air, Iran Shipping Lines); banks (*e.g.*, Central Bank, Bank *Sepah*); state-run media (*e.g.*, IRIB television, the Islamic Revolution News Agency ("IRNA"), Kayhan, and other daily newspapers); private individuals; and even charities are at the service of the Supreme Leader, the IRGC, and the MOIS when it comes to support of terrorism. Ex. 11, Testimony of Abolhassan Banisadr, pp. 19–20; Ex. 2, Timmerman 2nd Affid. ¶¶91–96, 190–212; Ex. S–3, Testimony of Abolghasem Mesbahi (March 1, 2008), pp. 60–81; Ex. S–4, Testimony of Abolghasem Mesbahi (March 2, 2008), pp. 4–14.

***7** 39. In addition to the MOIS and the IRGC, the Iranian Ministry of Petroleum, the Iranian Ministry of Economic Affairs and Finance, the Iranian Ministry of Commerce, and the Iranian Ministry of Defense and Armed Forces Logistics are all divisions of the Iranian government, and are all part and parcel of the Iranian state. They are all agencies whose core functions are governmental, not commercial, in nature. Ex. 41, Clawson 2nd Affid. ¶¶15–17, 23–28.

40. Iranian government ministries are responsible for carrying out the policies of the Iranian government, and the Iranian government's policies include state support for terrorism. Although much of that state support is done through clandestine means, the government ministries have also been involved in state support for terrorism, generally, and in support for al Qaeda and Hezbollah, in particular. Ex. 41, Clawson 2nd Affid. ¶17; S–4, Testimony of Abolghasem Mesbahi.

41. The Iranian Ministry of Economic Affairs and Finance administers the state budget, which means that it has a key role in transferring state funds to many organizations and in verifying that state funds were properly used; thus, that Ministry had to have been involved in Iran's extensive financial support for terrorists generally and in support for al Qaeda and Hezbollah, in particular. Ex. 41, Clawson 2nd Affid. ¶17.

42. The Iranian Ministry of Commerce and the Iranian Ministry of Petroleum are closely involved in Iran's export/import trade and the shipping used for such trade. On numerous occasions, what has purported to be normal commerce from Iran has been found instead to include shipments of weapons bound for terrorist groups. The Ministries of Commerce and Petroleum must have been aware of the planning and logistics for such disguised shipments. Ex. 41, Clawson 2nd Affid. ¶17; Ex. S–3, Testimony of Abolghasem Mesbahi (March 1, 2008), pp. 68–77; Ex. S–4, Testimony of Abolghasem Mesbahi (March 2, 2008), pp. 4–5, 10–12.

43. The Iranian government, including MOIS and individual defendants Rafsanjani and Khamenei in particular, used Iranian ministries such as the defendant Ministry of Petroleum, to funnel money to terrorist proxy groups through the procurement process, phony banking, and the use of shell companies registered in Nigeria and Cyprus that were fronts for terrorist organizations. Ex. S–3, Testimony of Abolghasem Mesbahi (March 1, 2008), pp. 67–81.

44. Defendants National Iranian Tanker Corporation, the National Iranian Oil Corporation, the National Iranian Gas Company, Iran Airlines, the National Iranian Petrochemical Company, and the Central Bank of the Islamic Republic of Iran are all agencies and instrumentalities of the state of Iran. Each of these corporate defendants has a legal corporate existence outside the government and core functions which are commercial, not governmental, in nature. Each of these corporate defendants is, however, tightly connected to the government of Iran, and each is an organ of the government and/or has been owned, directed, and controlled by the Iranian state. Ex. 41, Clawson 2nd Affid. ¶¶18–22; 29–36.

45. At all material times, each of these agencies/instrumentalities of Iran was "wholly owned and controlled by the government of Iran." Ex. 41, Clawson 2nd Affid. ¶30.

46. Although Iran indicated in 2004 that it would "privatize" many corporations that had been started, operated, and controlled, by the Iranian government, including all of the above-mentioned corporate agency and instrumentality defendants, for the most part, such privatization has not, in fact, occurred, and, on the contrary, the privatization has been a sham. Ex. 41, Clawson 2nd Affid. ¶¶30–31. Shares in the companies have been sold to other companies, such as pension plans of state-controlled firms and state-controlled banks, which themselves are tightly controlled by the government or sold to politically well-connected people. Ex. 41, Clawson 2nd Affid. ¶31. The record of such transfers to date has been that they do not change the reality of Iranian government control. Ex. 41, Clawson 2nd Affid. ¶31. Key decisions about operations of the firms continued to be made by Iranian government officials. The nation-state of Iran continues to own, operate, and control these defendant companies, and they remain agencies and instrumentalities of Iran. Ex. 41, Clawson 2nd Affid. ¶31.

***8** 47. The defendant National Iranian Tanker Corporation is, and has been since 1974, controlled by the Islamic Republic of Iran. Ex. 41, Clawson 2nd Affid. ¶32.

48. As stated by the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC"), the National Iranian Oil Company is owned, controlled, and managed by the

Government of Iran. Ex. 41, Clawson 2nd Affid. ¶33; Ex. S–3, Testimony of Abolghasem Mesbahi (March 1, 2008), p. 75. A large cash flow of money was funneled to terrorist organizations through the NIOC. Ex. S–4, Testimony of Abolghasem Mesbahi (March 2, 2008), pp. 6–7.

49. Because of NIOC's role in material support of terrorism, OFAC has placed NIOC on its List of Specially Designated National and Blocked Persons ("OFAC SDN List"). As of September 11, 2001, the National Iranian Oil Corporation was wholly owned or controlled by the government of Iran. Ex. 41, Clawson 2nd Affid. ¶33.

50. Defendant Iranian Ministry of Petroleum established the defendant National Iranian Gas Company in 1965, initially capitalizing it with Iranian government money. Ex. 41, Clawson 2nd Affid. ¶34.

51. In 2010, Iran's Oil Minister appointed a new managing director of the defendant National Iranian Gas Company, which equates to a continuing ownership and/or controlling interest by the state. Ex. 41, Clawson 2nd Affid. ¶34. Terrorists received monetary commissions from NIGC for operating as go-betweens for arrangements involving long-term payments. Ex. S–4, Testimony of Abolghasem Mesbahi (March 2, 2008), p. 7.

52. The defendant National Petrochemical Company ("NPC") is a subsidiary of the Iranian Petroleum Ministry and is now, and as of September 2001, wholly-owned or controlled by the Government of Iran. Further, because of NPC's material support of terrorism, the OFAC placed NPC on the U.S. Treasury Department's OFAC SDN Fist. As of September, 2001, the defendant National Iranian Petrochemical Company was wholly owned or controlled by the government of Iran. Ex. 41, Clawson 2nd Affid. ¶35. Terrorists acted as go-betweens for arrangements with NPC involving long-term payment promises—that are never kept—and the terrorists receive monetary commissions for the bogus transactions. Ex. S–4, Testimony of Abolghasem Mesbahi (March 2, 2008), pp. 10–11.

53. Defendant Iran Airlines was, for many years, wholly owned by the government of Iran, and, whether or not the government of Iran ever sold its shares in the airline company, and there is no evidence that it ever did, it remained under *de facto* government control. Iranian agents who carried out acts of terrorism left the country in which the act was perpetrated on Iran Air flights which were specially held on the ground until the alleged perpetrator(s) could board the flight. Ex. 41, Clawson 2nd Affid. ¶36.

54. Defendant Iran Air acted as a facilitator for the transfer of cash to terrorists on missions abroad, including one specific incident in which the head of MOIS instructed Abolghasem Mesbahi to tell the head of Iran Air in a particular European country to transfer cash to a member of a Pakistani Shia terrorist organization, who was at that time in that European country on a terrorist operation and was in need of funds. Ex. S–4, Testimony of Abolghasem Mesbahi (March 2, 2008), pp. 7–9.

***9** 55. Defendant Central Bank of Iran (in Farsi, Bank Merkazi Iran or "BMI"), has core functions that are quasi-governmental, but it is a corporation rather than an agency within the government. Ex. 41, Clawson 2nd Affid. ¶18. Under Iranian law, BMI is owned by, and is tightly linked to, the Iranian government. Iran's Monetary and Banking Law ("MBL") provides that BMI is a joint-stock company whose capital is wholly owned by the Government. Ex. 41, Clawson 2nd Affid. ¶19. In practice, the Iranian government exercises tight control over BMI and ignores the law by issuing direct orders to the BMI. Ex. 41, Clawson 2nd Affid. ¶20. Although the BMI's governor has a five-year term specified in the MBL, in fact, he serves at the pleasure of Iran's president. In 2008, the BMI governor was dismissed by presidential decree when he refused to resign. Contrary to procedures set out in the MBL, the government cabinet regularly votes to order BMI to extend loans for specific purposes. Ex. 41, Clawson 2nd Affid. ¶20. From an economic perspective, "BMI has less independence from the Iranian government than do the central banks in most developed countries." Ex. 41, Clawson 2nd Affid. ¶21.

56. The transfers of huge sums of Iranian

money to terrorist organizations such as Hamas and Hizballah, often millions of dollars of cash carried in suitcases, can only be accomplished with the complicity and/or knowledge and acquiescence of BMI. The same must be true in the case of banking transactions between Iranian agencies and instrumentalities and terrorist organizations. Ex. 41, Clawson 2nd Affid. ¶22. The Central Bank of Iran facilitates the transfer of money to terrorist groups. Ex. S–4, Testimony of Abolghasem Mesbahi (March 2, 2008), p. 12.

57. In the early to mid–1980s, Iran created Hizballah (the "Party of God"), an unincorporated association, as an extension of the Iranian Revolution into Lebanon. Iran has been the sponsor of Hizballah since its inception, providing funding, training, and leadership and advice via Hizballah's leadership councils. Ex. 7, Bergman Affid. ¶25; Ex. 6, Lopez–Tefft Affid. ¶28; Ex. 2, Timmerman 2nd Affid. ¶¶12–14; Ex. 8, Clawson Affid. ¶36; Ex. 3, Byman Affid. ¶44; *see also* Ex. 8, Clawson Affid. ¶36; Ex. 7, Bergman Affid. ¶27.

58. For more than a quarter century since its creation, Hizballah has received from Iran $100 million to $500 million in direct financial support annually. Ex. 8, Clawson Affid. ¶66; Ex. 6, Lopez–Tefft Affid. ¶31; Ex. 7, Bergman Affid. ¶26; Ex. 11, Testimony of Abolhassan Banisadr, p. 31.

59. From the beginning, Hizballah served as a terrorist proxy organization for Iran, created specifically for the purpose of serving as a front for Iranian terrorism, in effect, a cover name for terrorist operations run by Iran's IRGC around the world. Ex. 3, Byman Affid. ¶20; Ex. 7, Bergman Affid. ¶¶19–20, 25–28.

60. The U.S. State Department designated Hizballah a "foreign terrorist organization" in 1997. Ex. 6, Lopez–Tefft Affid. ¶63; Ex. 7, Bergman Affid. ¶22.

61. At all relevant times, defendant Hizballah was tightly connected to the government of Iran, was directed and controlled by the Iranian state, and was an agency or instrumentality of the Islamic Republic of Iran. Ex. 2, Timmerman 2nd Affid. ¶¶12–14; Ex. 3, Byman Affid. ¶¶20, 44; Ex. 6, Lopez–Tefft Affid. ¶¶28, 31; Ex. 7, Bergman Affid. ¶¶19–20, 25–28; Ex. 8, Clawson Affid. ¶¶36, 66; Ex. 11, Testimony of Abolhassan Banisadr, p. 31.

62. Imad Fayez Mughniyah (a/k/a Hajj Radwan) was, for decades prior to his death in February 2008, the terrorist operations chief of Hizballah. Mughniyah played a critical role in a series of imaginative high-profile terrorist attacks across the globe, and his abilities as a terrorist coordinator, director, and operative was an order of magnitude beyond anything comparable on the scene between 1980–2008. Ex. 6, Lopez–Tefft Affid. ¶204; Ex. 2, Timmerman 2nd Affid. ¶¶14–46; Ex. 7, Bergman Affid. ¶¶29–32.

63. Mughniyah was, since the early 1980s, an agent of the Islamic Republic of Iran, where he lived for many years. Ex. 7, Bergman Affid. ¶¶31, 40–41.

64. Imad Mughniyah had a direct reporting relationship to Iranian intelligence and a direct role in Iran's sponsorship of terrorist activities. Ex. 6, Lopez–Tefft Affid. ¶205; Ex. 2, Timmerman 2nd Affid. ¶¶14–46; Ex. 7, Bergman Affid. ¶¶40–43; Ex. S–4, Testimony of Abolghasem Mesbahi (March 2, 2008), pp. 61–67, 100–02; Ex. S–6, Testimony of Witness Y (February 25, 2008), pp. 30–31; 40–41; 35–52; *see also* Ex. 7, Affid. of Ronen Bergman, Ex. B (English translation).

***10** 65. Imad Mughniyah, as an agent of Iran, conducted and directed numerous terrorist operations against American citizens during the 1980s and 1990s, and he was on the FBI's "Most Wanted" list for twenty-one (21) years, until his assassination in Damascus, Syria, in February 2008. Ex. 7, Bergman Affid. ¶¶29–32; Ex. 2, Timmerman 2nd Affid. ¶¶14–46.

Bridging of the Sunni–Shia Divide

66. Both Iran and al Qaeda can be ruthlessly pragmatic, cutting deals with potential future adversaries to advance their causes in the short-term. Ex. 3, Byman Affid. ¶¶41–42; *see also* Ex. 2, Timmerman 2nd Affid. ¶4.

67. Members of the Shiite and Sunni sects—particularly at the leadership level—often work together on terrorist operations. The religious differences, to the extent they retain any vitality at the leadership level, are trumped by the leaders' desire to confront and oppose common enemies, particularly the U.S. and Israel. Ex. 7, Bergman Affid. ¶46; Ex. 6, Lopez–Tefft Affid. ¶¶57, 186; Ex. 3, Byman Affid. ¶¶41–44; Ex. 2, Timmerman 2nd Affid. ¶¶112–13; Ex. 11, Testimony of Abolhassan Banisadr at 23.

68. Iran, though Shiite, is willing to use, co-opt, and support Sunnis as proxies to carry out acts of terrorism. Ex. 7, Bergman Affid. ¶46; Ex. 6, Lopez–Tefft Affid. ¶58; Ex. 3 Byman Affid. ¶¶41–44; Ex. 8, Clawson Affid. ¶¶36, 66; Ex. 2, Timmerman 2nd Affid. ¶¶112–13.

69. The factual reality—as found by the 9/11 Report—is that "[t]he relationship between al Qaeda and Iran demonstrated that Sunni–Shia divisions did not necessarily pose an insurmountable barrier to cooperation in terrorist operations." 9/11 Report, p. 61.

70. During the mid-to-late 1980s, Iran began formulating contingency plans for anti–U.S. terrorist operations. Ex. 13 (U.S. Department of State Reports, *Patterns of Global Terrorism / Country Reports on Terrorism*, 1980–2009 (excerpts *re*: Iran)) at p. 56; *see* Ex. 6, Lopez–Tefft Affid. ¶74.

71. In 1991–92, Iran founded a new organization, *al Majma' al Alami lil–Taqrib bayna al Madhahib al Islamiyyah* (International Institute for Rapprochement Among the Islamic Legal Schools) to promote publicly a reconciliation of the rival Sunni and Shi'a sects of Islam. Ex. 2, Timmerman 2nd Affid. ¶47.

72. In the early 1990s, casting aside the historic bitterness between the Sunni and Shi'a sects of Islam, Sudanese religious-political leader Hassan al Turabi and Iran's political leadership and intelligence agencies established close ties, including paramilitary and intelligence connections, beginning a united Sunni–Shiite front against the United States and the West. Ex. 6, Lopez–Tefft Affid. ¶¶132–33; Ex. 2, Timmerman 2nd Affid. ¶48.

73. While Osama bin Laden and al Qaeda were headquartered in Sudan in the early 1990s, Hassan al Turabi fostered the creation of a foundation and alliance for combined Sunni and Shi'a opposition to the United States and the West, an effort that was agreed to and joined by Osama bin Laden and Ayman al Zawahiri, leaders of al Qaeda, and by the leadership of Iran. 9/11 Report, pp. 60–61; Ex. 6, Lopez–Tefft Affid. ¶132; Ex. 3, Byman Affid. ¶23; *see also* ¶¶18–22, 24–28.

74. In the 1990s, Hassan al Turabi and Ayman al Zawahiri became key links between the various radical Islamic terrorists, members of different Islamic sects, both Sunni and Shia, who were assembled in Sudan and Iran. Ex. 6, Lopez–Tefft Affid. ¶¶131–33; Ex. 7, Bergman Affid. ¶54.

***11** 75. In 1991, al Zawahiri paid a clandestine visit to Iran to ask for help in his campaign to overthrow the government of Egypt. There, and in subsequent visits in Iran and Sudan, al Zawahiri met with Imad Mughniyah, who convinced him of the power of suicide bombing, a significant event because suicide was prohibited by most Islamic clerics, both Sunni and Shi'a. Zawarhiri also developed close relations during visits to Iran with Ahmad Vahidi, the commander of the IRGC's *Qods* Force. Ex. 7, Bergman Affid. ¶51; Ex. 2, Timmerman 2nd Affid. ¶54–55.

76. In December 1991, Iran's President Ah Akbar Hashemi Rafsanjani, Intelligence Minister Ali Fallahian, IRGC Commander Mohsen Rezai, and Defense Minister Ali Akbar Torkan paid an official visit to Sudan where, in meetings also attended by Imad Mughniyah, they committed to send weapons shipments and as many as two thousand (2,000) Revolutionary Guards to Sudan. Ex. 6, Lopez–Tefft Affid. ¶136.

77. In 1991 or 1992, discussions in Sudan between al Qaeda and Iranian operatives led to an informal agreement to cooperate in providing support for actions carried out primarily against Israel and the United States. 9/11 Report, p. 61.

78. Thereafter, senior al Qaeda operatives and trainers traveled to Iran to receive training in explosives. Osama bin Laden also sent senior aides to Iran for training with the IRGC and to Lebanon for training with Hizballah. Ex. 1, 9/11 Report, p. 61; Ex. 7, Bergman Affid. ¶58; *see also* Ex. S–5 and S–6, Testimony of Witness Y; Ex. S–11, Timmerman 2nd Affid. ¶95.

79. In 1993, in a meeting in Khartoum, Sudan, arranged by Ah Mohamed, a confessed al Qaeda terrorist and trainer now in a U.S. prison, Ex. 31, Plea allocution, *USA v. Ali Mohamed*, S(7) 98 Cr. 1023 (LBS) (S.D.N.Y. October 20, 2000), Osama bin Laden and Ayman al Zawahiri met directly with Iran's master terrorist Imad Mughniyah and Iranian officials, Ex. 7, Bergman Affid. ¶¶58–61; Ex. 6, Lopez–Tefft Affid. ¶¶137–38; Ex. 8, Clawson Affid. ¶58, including IRGC Brigadier General Mohammad Baqr Zolqadr, "a multipurpose member of the Iranian terrorist structure." Ex. 11, Testimony of Abolhassan Banisadr at 17; Ex. 2, Timmerman 2nd Affid. ¶¶49–51.

80. At the 1993 Khartoum conference, representatives of Iran, Hizballah, and al Qaeda worked out an alliance of joint cooperation and support on terrorism. Ex. 6, Lopez–Tefft Affid. ¶¶135, 137–39; Ex. 7, Bergman Affid. ¶58–61; Ex. 2, Timmerman 2nd Affid. ¶¶48–52.

81. Imad Mughniyah convinced Osama bin Laden of the effectiveness of suicide bombings in driving the U.S. out of Lebanon in the 1980s, and Mughniyah became a major connection point between Iran and al Qaeda. Ex. 7, Bergman Affid. ¶¶58–59; Ex. 6, Lopez–Tefft Affid. ¶187.

82. Osama bin Laden had been a guerilla fighter in Afghanistan and it was Mughniyah who made bin Laden into an accomplished terrorist. Ex. 6, Lopez–Tefft Affid. ¶187.

83. The 1993 meeting in Khartoum led to an ongoing series of communications, training arrangements, and operations among Iran and Hizballah and al Qaeda. Osama bin Laden sent more terrorist operatives, including Saef al Adel (who would become number 3 in al Qaeda and its top "military" commander), to Hizballah training camps operated by Mughniyah and the IRGC in Lebanon and Iran. Among other tactics, Hizballah taught bin Laden's al Qaeda operatives how to bomb large buildings, and Hizballah also gave the al Qaeda operatives training in intelligence and security. Ex. 6, Lopez–Tefft Affid. ¶¶151–52; Ex. 2, Timmerman 2nd Affid. ¶¶56–59.

84. Another al Qaeda group traveled to the Bekaa Valley in Lebanon to receive training in explosives from Hizballah, as well as training in intelligence and security. 9/11 Report, p. 61; *see also* Ex. 6, Lopez–Tefft Affid. ¶151.

***12** 85. Iran's *Charge d'Affaires* in Khartoum, Sudan, Majid Kamal, an IRGC commander, coordinated the training expeditions; Kamal had performed the same function in Beirut, Lebanon, in the early 1980s during the formation of Hizballah. Ex. 6, Lopez–Tefft Affid. ¶152.

86. The well-known historical religious division between Sunnis and Shi'a did not, in fact, pose an insurmountable barrier to cooperation in regard to terrorist operations by radical Islamic leaders and terrorists. Iran, which is largely Shiite, and its terrorist proxy organization, Hizballah, also Shiite, entered into an alliance with al Qaeda, which is Sunni, to work together to conduct terrorist operations against the United States during the 1990s and continuing through, and after, September 11, 2001. 9/11 Report, p. 61; Ex. 7, Bergman Affid. ¶54; Ex. 3, Byman Affid. ¶¶33–43; Ex. 8, Clawson Affid. ¶47; Ex. 6, Lopez–Tefft Affid. ¶¶39, 42, 56; Ex. 2, Timmerman 2nd Affid. ¶¶48, 52, 112–13.

87. As a result of the creation of this terrorist alliance, al Qaeda's Ayman al Zawahiri repeatedly visited Tehran during the 1990s and met with officers of MOIS, including chief Ali Fallahian, and *Qods* Force chief Ahmad Vahidi. Ex. 7, Bergman Affid. ¶67; Ex. 6, Lopez–Tefft Affid. ¶¶170–71; Ex. 2, Timmerman 2nd Affid. ¶55.

88. Throughout the 1990s, the al Qaeda–Iran–Hizballah terrorist training arrangement continued. Imad Mughniyah himself coordinated these training activities, including training of al Qaeda personnel, with

Iranian government officials in Iran and with IRGC officers working undercover at the Iranian embassy in Beirut, Lebanon. At all times, Iran's Supreme Leader was fully aware that Hizballah was training such foreign terrorists. Ex. 6, Lopez–Tefft Affid. ¶¶50, 58, 104, 108–11, 135, 138, 151–52, 169, 179, 182–83, 194, 293, 341–42; Ex. 7, Bergman Affid. ¶¶53, 61, 68; Ex. 2, Timmerman 2nd Affid. 56–67; Ex. 11, Testimony of Abolhassan Banisadr, pp. 32–33; Ex. S–1, Testimony of Witness XAbolghasem Mesbahi and Ex. 8, 9; Ex. S–4, Testimony of Abolghasem Mesbahi and Ex. 18; Ex. S–5 and S–6, Testimony of Witness Y. *See also* Ex. 8, Clawson Affid. ¶36.

89. The IRGC maintained a separate terrorist training camp especially for Saudi nationals because of their distinct cultural habits and religious practices. This training camp was located in Iraqi Kurdistan and controlled first by Iranian intelligence and later by Abu Musab Zarqawi, later to be the notorious head of "al Qaeda in Iraq." Ex. 2, Timmerman 2nd Affid. ¶64.

Terrorist Attacks By the Iran–Hizballah-al Qaeda Terrorist Alliance

90. The creation of the Iran–Hizballah-al Qaeda terrorist alliance was followed by a string of terrorist strikes directly against the U.S. and its allies. 9/11 Report, p. 60 and n. 48, p. 68; Ex. 2, Timmerman 2nd Affid. ¶38–46, 78–86; Ex. 6, Lopez–Tefft Affid. ¶¶148–50, 162–68, 178–83, and p. 66, n. 29; Ex. 7, Bergman Affid. ¶¶42–44, 62–63, 74; Ex. 9, Bruguière Affid. ¶¶18–20; Ex. 10, Adamson Affid. ¶¶21–33; *Heiser v. Islamic Republic of Iran*, 466 F.Supp.2d 229 (D.D.C. 2006).

91. While in Sudan, Osama bin Laden founded and funded *al Shamal* Bank and Taba Investments, through which he financed, in part, various terrorist activities. Through *al Shamal* Bank, bin Laden worked with Iran to fund oil sales that channeled money into terrorist activities. Ex. 6, Lopez–Tefft Affid. ¶¶140–46; Ex. 2–S, Timmerman 1st Affid. ¶¶102–110; Ex. 2, Timmerman 2nd Affid. ¶¶91–96.

***13** 92. In March 1992, a Hizballah terrorist team operating under Mughniyah's command truck-bombed the Israeli embassy in Buenos Aires, Argentina, killing twenty-nine (29) people and wounding two hundred forty-two (242) others. Ex. 7, Bergman Affid. ¶42; Ex. 2, Timmerman 2nd Affid. ¶¶38–39.

93. National Security Administration ("NSA") intercepts of communications from the Iranian embassies in Buenos Aires and Brasilia, Brazil, to the Foreign Ministry in Iran proved Iranian involvement in the 1992 attack on the Israeli embassy in Buenos Aires; the NSA provided Israel with "unequivocal proof-'not a smoking gun, but a blazing cannon' "—that Imad Mughniyah and another senior Hizballah member, Talal Hamiaa, executed the terrorist operation. Ex. 7, Bergman Affid. ¶42; Ex. 2, Timmerman 2nd Affid. ¶39.

94. On February 26, 1993, the first World Trade Center bombing occurred, killing six (6) persons and injuring more than one thousand (1,000). A few months later, an al Qaeda conspiracy to bomb several New York City landmarks, including the Lincoln Tunnel and the Holland Tunnel, was disrupted. Egyptian cleric Omar Abdul Rahman, a/k/a the "Blind Sheikh," whose Egyptian radical group is linked to al Zawahiri and al Qaeda, was convicted of masterminding the plot to engage in urban warfare against the United States. Ex. 6, Lopez–Tefft Affid. ¶150; Ex. 22.

95. In July 1994, Mughniyah and his Hizballah cadres followed up the 1992 bombing of the Israeli embassy in Buenos Aires by again attacking Israeli interests there. A terrorist sleeper network was activated, again under Imad Mughniyah's command, and it detonated a truck bomb to destroy the *Asociación Mutual Israelita Argentina* ("AMIA"), the Jewish cultural center in Buenos Aires. The explosion that killed eighty-six (86) persons and injured two hundred fifty-two (252). "The U.S., Israel, and Argentina all concluded that Iran, Hizballah, and Imad Mughniyah were responsible for the AMIA bombing." Ex. 7, Bergman Affid. ¶43; Ex. 2, Timmerman 2nd Affid. ¶40.

96. Argentine investigators determined that the decision to bomb the AMIA center was taken at the highest levels of Iran's government, which directed Mughniyah and Hizballah to perform the operation. Specifically, this direction was made by Iran's Supreme Leader Khamenei, President Rafsanjani, Foreign Minister Velayati, and MOIS Minister Fallahian—the *"Omar-e Vijeh"* (or Special Matters Committee)—during an August 14, 1993 meeting in Mashad, Iran, also attended by Mohzen Rezai, Ahmad Vahidi, Mohsen Rabbani, and Ahmad Reza Asgari. Ex. 2, Timmerman 2nd Affid. ¶¶38–46.

97. The Argentinean investigation revealed that nine (9) Iranians (including the Iranian agent Mughniyah) were responsible for the AMIA bombing, and the Argentines sought the issuance of Interpol Red Notices on all nine (9). However, Iran took extraordinary measures to try to block the issuance of the Red Notices by Interpol, and Iran succeeded in part, as the General Assembly of Interpol upheld a decision by the Executive Committee to issue only six (6) Red Notices, instead of the nine sought by the Argentines. The six who were the subjects of Red Notices included Imad Mughniyah (Hizballah chief of terrorism), Ali Fallahian (MOIS minister), Mohsen Rabbani (Iranian cultural attache), Ahmad Reza Asgari (senior MOIS official), Ahmad Vahidi (*Qods* Force commander), and Mohsen Rezai (IRGC commander). Ex. 10, Adamson Affid. ¶¶21–33; Ex. 2, Timmerman 2nd Affid. ¶¶40–45; Ex. 7, Bergman Affid. ¶¶43–44.

***14** 98. In December 1994, Algerian terrorists associated with al Qaeda hijacked a French airliner, intending to crash it into the Eiffel Tower in Paris, a precursor to 9/11. They were foiled by a French SWAT team. Ex. 9, Bruguière Declaration ¶¶18–20; Ex. 2, Timmerman 2nd Affid. ¶¶78–80.

99. On July 7, 1995, Ayman al Zawahiri's Egyptian gunmen, supported, trained, and funded by Iran, attempted to assassinate Egyptian President Hosni Mubarak near Addis Ababa, Ethiopia. The attempt failed. The IRGC extricated some of the assassins from Ethiopia and arranged for their protection in Lebanon by Hizballah, and, for the assassins' team leader, Mustafa Hamza, inside Iran itself. Ex. 7, Bergman Affid. ¶74.

100. U.S., Saudi, and Egyptian political pressure on the Sudanese eventually forced them to expel Osama bin Laden in May 1996. Radical Afghan Sunni warlord Gulbuddin Hekmatyar, a strong Iranian ally, invited bin Laden to join him in Afghanistan. Hekmatyar and bin Laden had known each other during the 1980s Afghan *mujaheddin*–Soviet war. Osama bin Laden then relocated to Afghanistan with the assistance of the Iranian intelligence services. Ex. 15, U.S. Embassy (Islamabad) Cable, November 12, 1996; Ex. 7, Bergman Affid. ¶64; Ex. 2, Timmerman 2nd Affid. ¶99; *see also* 9/11 Report at p. 65.

101. On June 25, 1996, terrorists struck the Khobar Towers housing complex in Dhahran, Saudi Arabia, with a powerful truck bomb, killing nineteen (19) U.S. servicemen and wounding some five hundred (500). Ex. 6, Lopez–Tefft Affid. ¶162; Ex. 2, Timmerman 2nd Affid. ¶84. FBI investigators concluded the operation was undertaken on direct orders from senior Iranian government leaders, the bombers had been trained and funded by the IRGC in Lebanon's Bekaa Valley, and senior members of the Iranian government, including Ministry of Defense, Ministry of Intelligence and Security and the Supreme Leader's office had selected Khobar as the target and commissioned the Saudi Hizballah to carry out the operation. Ex. 6, Lopez–Tefft Affid. ¶162.

102. The 9/11 Commission examined classified CIA documents establishing that IRGC–*Qods* Force commander Ahmad Vahidi planned the Khobar Towers attack with Ahmad al Mugassil, a Saudi-born al Qaeda operative. 9/11 Report, p. 60, n. 48. *See* Ex. 2, Timmerman 2nd Affid. ¶¶85–86.

103. A U.S. district court held that Iran was factually and legally responsible for the Khobar Towers bombing. *Heiser v. Islamic Republic of Iran*, 466 F.Supp.2d 229 (D.D.C. 2006).

104. Al Qaeda was involved in the planning and preparations for the Khobar Towers bombing. Osama bin Laden tried to facilitate a shipment of explosives to Saudi Arabia, and,

on the day of the operation, bin Laden was, according to NSA intercepts, congratulated on the telephone. Ex. 6, Lopez–Tefft Affid. ¶¶163–68; 9/11 Report, p. 60.

105. Two months later, in August 1996, Osama bin Laden would cite the Khobar Towers bombing in his first *fatwa*, a "Declaration of War Against the Americans Occupying the Land of the Two Holy Places": "The crusader army became dust *when we detonated* al Khobar ...." Ex. 6, Lopez–Tefft Affid. ¶¶52, 166, p. 66, n. 29 (*emphasis added*).

106. In August 1996—the same month bin Laden issued his first *fatwa* declaring war against the United States, Ex. 6, Lopez–Tefft Affid. ¶52—one of the Iranian intelligence operatives involved in the Khobar Towers attack (in June 1996) traveled to Jalalabad, Afghanistan, to meet with Osama bin Laden. The subject was continuing the secret strategic agreement to undertake a joint terrorism campaign against the U.S. *See* Ex. 6, Lopez–Tefft Affid. ¶172.

***15** 107. At this time, Iranian and Hizballah trainers traveled between Iran and Afghanistan, transferring to al Qaeda operatives such material as blueprints and drawings of bombs, manuals for wireless equipment, and instruction booklets for avoiding detection by unmanned aircraft. Ex. 7, Bergman Affid. ¶68.

108. On February 23, 1998, Osama bin Laden issued his second public *fatwa* in the name of a "World Islamic Front" against America, calling for the murder of Americans "as the individual duty for every Muslim who can do it in any country in which it is possible to do it." 9/11 Report, pp. 47–48, 69.

109. On August 7, 1998, two nearly simultaneous truck bombings destroyed the U.S. embassies in Nairobi, Kenya, and Dar-es–Salaam, Tanzania, killing more than three hundred (300) persons and wounding more than five thousand (5,000). Although known to have been committed by al Qaeda operatives (due to the confession of Ali Mohamed, who led the team that studied the embassy in Nairobi, beginning as early as December 1993, shortly after the Khartoum meeting, 9/11 Report, p. 68, Ex. 6, Lopez–Tefft Affid. ¶180), the twin East Africa U.S. embassy bombings also bore the unmistakable *modus operandi* of Imad Mughniyah, the Hizballah commander and agent of Iran: multiple, simultaneous, spectacular suicide bombings against American symbols. Ex. 6, Lopez–Tefft Affid. ¶¶178–83.

110. A U.S. district court in Washington, D.C. has held that Iran, the IRGC, and MOIS, as well as the Republic of Sudan and its Ministry of the Interior, were factually and legally responsible for the U.S. Embassy bombings in Kenya and Tanzania. "Support from Iran and Hezbollah was critical to al Qaeda's execution of the 1998 embassy bombings." *Owens, et al. v. Republic of Sudan, et al.*, Civ. Action No. 01–2244 (JDB), 826 F.Supp.2d 128, 2011 U.S. Dist. LEXIS 135961.

111. The U.S. District Court also found that the material support of Iran, the IRGC, and MOIS was supplied to al Qaeda through Iran's sponsorship of Hizballah. *Owens, et al. v. Republic of Sudan, et al., supra.*

112. The al Qaeda operatives who carried out the U.S. embassy attacks in East Africa were trained by Hizballah in handling the sophisticated explosives used in those bombings, and "[t]he government of Iran was aware of and authorized this training and assistance." 9/11 Report, p. 68; Ex. 6, Lopez–Tefft Affid. ¶¶179; 182–83; *Owens, et al. v. Republic of Sudan, et al., supra.*

113. One of the specific types of training Hizballah provided was in blowing up large buildings. Among those who trained at the Hizballah camps was Saef al Adel, the al Qaeda chief of terrorist operations, who was convicted *in absentia* in the U.S. for his role in the twin embassy bombings, and who would spend the years after 9/11 in safe haven inside Iran. Ex. 6, Lopez–Tefft Affid. ¶¶194–95; Ex. 2, Timmerman 2nd Affid. ¶¶57–59 and Ex. B–4 thereto; *see also Owens, et al. v. Republic of Sudan, et al, supra.*

114. On October 12, 2000, al Qaeda suicide bombers attacked the *U.S.S. Cole* in the harbor of Aden, Yemen, killing seventeen (17) sailors and injuring thirty-nine (39). At just that time, a U.S. Defense Intelligence Agency analyst was alerting his superiors to a web of connections he was finding between

and among al Qaeda, the Iranian intelligence agencies controlled by Iran's Supreme Leader, Hizballah, and other active terrorist groups. *See* Ex. 6, Lopez–Tefft Affid. ¶¶188–192; 196–97.

***16** 115. As stated in the 9/11 Report, "Iran made a concerted effort to strengthen relations with al Qaeda after the October 2000 attack on the *USS Cole* ... 9/11 Report, p. 240; Ex. 6, Lopez–Tefft Affid. ¶264. It was during this very same time frame that, as documented in the 9/11 Report, Iranian officials facilitated the travel of al Qaeda members—including some of the 9/11 hijackers—through Iran on their way to and from Afghanistan, where the hijackers trained at al Qaeda's terrorist training camps. 9/11 Report at pp. 240–41.

Iran and Terrorist Travel

116. Iran's facilitation of al Qaeda's operatives' travel, including at least eight (8) of the 9/11 hijackers, amounted to essential material support, indeed, direct support, for the 9/11 attacks. Ex. 4, Kephart Affid. ¶71.

117. The 9/11 terrorists engaged in a specific terrorist travel operation. Ex. 4, Kephart Affid. ¶37. As stated in the 9/11 Commission Report, "For terrorists, success is often dependent on travel. ... For terrorists, travel documents are as important as weapons." 9/11 Report, p. 384.

118. There were two separate, but related, ways in which Iran furnished material and direct support for the 9/11 terrorists' specific terrorist travel operation, as set forth below. Ex. 4, Kephart Affid. ¶¶52–70.

119. Travel to training camps in Afghanistan by the future 9/11 hijackers was essential for the success of the 9/11 operation. Ex. 4, Kephart Affid. ¶53.

120. Operatives of al Qaeda knew that the Americans were well aware of the existence of al Qaeda training camps in Afghanistan. Ex. 4, Kephart Affid. ¶52.

121. Evidence reviewed by the 9/11 Commission demonstrated that Al Qaeda's travel planners believed that a terrorist operative trying to obtain a visa at an American embassy or consulate, or trying to enter the United States itself, faced a very serious risk if his passport showed travel to Afghanistan or Iran. Ex. 4, Kephart Affid. ¶52.

122. The first way in which the Iranian government materially and directly supported the 9/11 terrorist travel operation was by ordering its border inspectors not to place telltale stamps in the passports of these future hijackers traveling to and from Afghanistan via Iran. Several of the 9/11 hijackers transited Iran on their way to or from Afghanistan, taking advantage of the Iranian practice of not stamping Saudi passports. Thus, Iran facilitated the transit of al Qaeda members into and out of Afghanistan before 9/11. Some of these were future 9/11 hijackers. 9/11 Report at p. 241; Ex. 5, Snell Affid. ¶¶20–21.

123. National Security Administration intercepts, made available to the 9/11 Commission shortly before publication of the 9/11 Report, showed that Iranian border inspectors had been ordered not to put telltale stamps in the operatives' passports and that the Iranians were aware they were helping operatives who were part of an organization preparing attacks against the United States. Ex. 2, Timmerman 2nd Affid. ¶¶123–24.

124. Of three Saudi hijackers who were carrying passports with possible indicators of extremism, at least one went to Iran. Such indicators were probably al Qaeda "calling cards" used by terrorists to identify themselves covertly. It is likely that the Iranian border authorities were aware of this covert calling card system and, thus, knew when not to stamp Iranian travel stamps into Saudi al Qaeda passports. Ex. 4, Kephart Affid. ¶67.

125. The actions of Iranian border authorities in refraining from stamping the passports of the Saudi hijackers, vastly increased the likelihood of the operational success of the 9/11 plot. 9/11 Report, p. 240.

***17** 126. Shielding the passports of future

hijackers, who were Saudi members of al Qaeda, from indicia of travel to Iran and Afghanistan, was perceived as essential not only to prevent potential confiscation of passports by Saudi authorities, but also to hide complicity of Iran in supporting al Qaeda. Ex. 4, Kephart Affid. ¶66.

127. In the mid–1990s, when the Iran–Hizballah-al Qaeda terror alliance was forming, al Qaeda operative Mustafa Hamid had "negotiated a secret relationship with Iran that allowed safe transit via Iran to Afghanistan." This safe Iran–Afghanistan passageway was managed by MOIS. Ex. 30, U.S. Treasury Department press release, January 16, 2009; Ex. 3, Byman Affid. ¶47; Ex. 2, Timmerman 2nd Affid. ¶¶115–19, 216.

128. Numerous admissions from lower level al Qaeda members who were interrogated at the detention facility at Guantanamo Bay confirm the existence of the clandestine Iran–Afghanistan passageway, managed by MOIS. *See* Ex. 2, Timmerman 2nd Affid. ¶¶115–19. Al Qaeda had " 'total collaboration with the Iranians,' and had its own organization in Iran 'that takes care of helping the mujahedin brothers cross the border.' " *Id.* ¶119.

129. The 9/11 Commission obtained "evidence that 8 to 10 of the 14 Saudi 'muscle' operatives traveled into or out of Iran between October 2000 and February 2001." 9/11 Report at p. 240.

130. Although al Qaeda operatives Khalid Sheikh Mohammed and Ramzi Binalshibh (now Guantanamo detainees) denied any reason, other than the Iranian's refraining from stamping passports, for the hijackers to have traveled through Iran or any relationship between the hijackers and Hizballah, *see* 9/11 Report at p. 241, their denials are not credible. Ex. 5, Snell Affid. ¶21; Ex. 6, Lopez–Tefft Affid. ¶119.

131. The actions of Iranian border authorities in refraining from stamping the passports of the Saudi hijackers vastly increased the likelihood of the operational success of the 9/11 plot. Ex. 4, Kephart Affid. ¶66.

132. Iran's willingness to permit the undocumented admission and passage of al Qaeda operatives and 9/11 hijackers provided key material support to al Qaeda. By not stamping the hijackers' passports, by providing safe passage through Iran and into Afghanistan, and by permitting Hezbollah to receive the traveling group ... Iran, in essence, acted as a state sponsor of terrorist travel. Ex. 4, Kephart Affid. ¶70.

133. Iran's facilitation of the hijackers' "terrorist travel" operation, including that Iranian border inspectors were directed not to place telltale stamps in the passports of these future hijackers traveling to and from Afghanistan, and that Iran permitted the undocumented admission and passage of al Qaeda operatives and 9/11 hijackers, constituted direct support and material support for al Qaeda's 9/11 attacks. 9/11 Report, pp. 240–41; Ex. 4, Kephart Affid. *passim* and specifically ¶¶3–5, 66, 70, 78; Ex. 3, Byman Affid. ¶¶32; 46–47, 49–50; Ex. 6, Lopez–Tefft Affid. ¶¶104–07; 112–20; 264, 277; Ex. 2, Timmerman 2nd Affid. ¶¶118–19, 120–24; Ex. 7, Bergman Affid. ¶17; Ex. 8, Clawson Affid. ¶¶48–49, 59.

134. The second way in which Iran furnished material and direct support for the 9/11 attacks was that a terrorist agent of Iran and Hizballah helped coordinate travel by future Saudi hijackers. As found by the 9/11 Commission, "[i]n October 2000, a senior operative of Hezbollah visited Saudi Arabia to coordinate activities there. He also planned to assist individuals in Saudi Arabia in traveling to Iran during November. A top Hezbollah commander and Saudi Hezbollah contacts were involved." 9/11 Report at p. 240.

***18** 135. On their travels into and out of Iran, some of them through Beirut, some of the 9/11 hijackers were accompanied by senior Hizballah operatives. 9/11 Report at pp. 240–41.

136. The 9/11 Commission determined that, in November 2000, "muscle" hijacker Ahmed al Ghamdi "flew to Beirut—perhaps by coincidence—on the same flight as a senior Hezbollah operative." 9/11 Report at p. 240.

137. As found by the 9/11 Commission, in mid–November 2000, three muscle hijackers,

having obtained U.S. visas, "traveled in a group from Saudi Arabia to Beirut and then onward to Iran. An associate of a senior Hezbollah operative was on the same flight that took the future hijackers to Iran." 9/11 Report at p. 240.

138. As found by the 9/11 Commission, "Hezbollah officials in Beirut and Iran were expecting the arrival of a group during the same time period. The travel of this group was important enough to merit the attention of senior figures of Hezbollah." 9/11 Report at p. 240.

139. The "senior operative of Hizballah" (or "senior Hizballah operative") referenced in the 9/11 Report was the master terrorist and agent of Hizballah and Iran, Imad Mughniyah. Ex. 2, Timmerman 2nd Affid. ¶¶126–27; Ex. 6, Lopez–Tefft Affid. ¶114–17.

140. The "activities" that Mughniyah went to Saudi Arabia to "coordinate" revolved around the hijackers' travel, their obtaining new Saudi passports and/or U.S. visas for the 9/11 operation, the hijackers' security, and the operation's security. Ex. 4, Kephart Affid. ¶¶60–64 and Ex. A thereto; Ex. 6, Lopez–Tefft Affid. ¶114.

141. All the evidence now available demonstrates that there was no realistic possibility of a "coincidence," as suggested by the 9/11 Report: if a (1) "senior operative of Hizballah [Mughniyah] (2) planned (3) to assist individuals (4) in Saudi Arabia (5) in traveling (6) to Iran (7) in November 2000." Likewise, it could not have been by coincidence that Ahmed al Ghandi (1) "in November" (2) "flew from Saudi Arabia" (3) "to Beirut" (4) "on the same flight" (5) "as a senior Hizballah operative." These travel arrangements were by design, not coincidence. Ex. 6, Lopez–Tefft Affid. ¶114.

142. The confluence of events described above, together with the fact that al Qaeda used travel facilitators and was extremely careful about all aspects of the terrorist travel operation, makes a coincidence of such magnitude in this situation prohibitively unlikely. Ex. 6, Lopez–Tefft Affid. ¶¶115, 117, 120.

143. Iran's agent Imad Mughniyah and other Hizballah officials in Lebanon and in Iran had actual foreknowledge of the 9/11 conspiracy. Ex. 6, Lopez–Tefft Affid. ¶¶117, 120; Ex. 2, Timmerman 2nd Affid. ¶¶123–24.

144. The actions of the "senior Hizballah operative," Imad Mughniyah, and his "associate" and a "top commander" of Hizballah, in escorting 9/11 hijackers on flights to and from Iran, and coordinating passport and visa acquisition activities in Saudi Arabia also constituted direct and material support for the 9/11 conspiracy. 9/11 Report, pp. 240–41; Ex. 4, Kephart Affid. *passim* and specifically ¶¶3–5, 66, 70, 78; Ex. 6, Lopez–Tefft Affid. ¶¶104–07, 112–20, 264, 277; Ex. 3, Byman Affid. ¶¶32; 46–47, 49–50; Ex. 2, Timmerman 2nd Affid. ¶¶118–24; Ex. 7, Bergman Affid. ¶17; Ex. 8, Clawson Affid. ¶¶48–49, 59.

***19** 145. Ramzi Binalshibh was unable to obtain a U.S. visa needed to participate directly as a hijacker in the 9/11 attacks, and instead served as a coordinator for the operation, particularly with regard to the members of the Hamburg, Germany-based cell of Mohammed Atta. 9/11 Report, pp. 161, 167–68; 225, 243–46, Ch. 5, note 46; *see also* Ch. 7, note 52 and Ex. 4, Kephart Affid. ¶¶72–73.

146. Eight (8) months before 9/11, Ramzi Binalshibh stopped in Tehran *en route* to meetings with al Qaeda leaders in Afghanistan. From the Iranian embassy in Berlin, Binalshibh obtained a four-week tourist visa to Iran on December 20, 2000. He flew to Iran on January 31, 2001, via Amsterdam on January 27–28, but Iran was not, contrary to his visa application, his final destination. From Iran, Binalshibh traveled on to Afghanistan, where he delivered a progress report from the operations team to Osama bin Laden and Ayman al Zawahiri. Binalhshibh returned to Germany on February 28, 2001, to clear out the Hamburg cell's apartment. Ex. 18; Ex. 2, Timmerman 2nd Affid. ¶¶148–54 and Ex. B–13 thereto; Ex. 6, Lopez–Tefft Affid. ¶¶272–75.

Testimony of Abolghasem Mesbahi

147. Abolghasem Mesbahi was an Iranian regime "insider" who knew many of the Islamic regime's top leaders during the 1980s and early 1990s, including Ayatollah Ruhollah Khomeinei, the Supreme Leader of Iran until his death in 1989, defendant Ali Akbar Hashemi Rafsanjani, who is a former President of Iran and former Speaker of the Parliament of Iran, and Saeed Emami, who was a top official of MOIS, and many others. Ex. S–1, Testimony of Abolghasem Mesbahi (February 22, 2008), pp. 49–50, 85; Ex. S–3, Testimony of Abolghasem Mesbahi (March 1, 2008), pp. 15–18, 75–81; Ex. S–4, Testimony of Abolghasem Mesbahi (March 2, 2008), pp. 84, 94–102.

148. Mesbahi held a number of prominent positions in the diplomatic and intelligence organs of the Iranian regime, including a position at the Iranian embassy in France. There, he was in charge of espionage for Iran in France until December 1983, when he was expelled by the French government. Mesbahi soon returned to Europe, where, based in Belgium, he ran Iran's espionage operations throughout Western Europe. Ex. S–1, Testimony of Abolghasem Mesbahi (February 22, 2008), pp. 51, 55–71; Ex. S–13, Bergman Affid. ¶¶72–73.

149. Subsequently, Mesbahi played a role in negotiations on behalf of Iran during the "Lebanon Hostage Crisis" of the 1980s. Ex. S–1, Testimony of Abolghasem Mesbahi (February 22, 2008), pp. 93–95, 102–03.

150. Mesbahi returned to Iran in 1984–85 to work on the creation and organization of the new intelligence service, MOIS. Ex. S–1, Testimony of Abolghasem Mesbahi (February 22, 2008), pp. 68–71.

151. During the mid–1980s, the Iranian government believed its best hope to defeat the United States, in case of war, was to engage in unconventional warfare strategies. Therefore, Iran's government formed a MOIS–IRGC task force that created contingency plans for asymmetrical, *i.e.*, unconventional, warfare against the United States. Ex. S–1, Testimony of Abolghasem Mesbahi (February 22, 2008), pp. 78–80, 84–86; 88–89. During the mid-to-late 1980s, Iran began formulating contingency plans for anti–U.S. terrorist operations. *Id.; see also* Ex. 13 (U.S. Department of State Reports, *Patterns of Global Terrorism / Country Reports on Terrorism*, 1980–2009 (excerpts *re*: Iran)) at p. 56.

***20** 152. During the period 1985–86 timeframe, Mesbahi worked on the MOIS–IRGC task force. Ex. S–1, Testimony of Abolghasem Mesbahi (February 22, 2008), pp. 78, 84–85.

153. The MOIS–IRGC task force devised contingency plans aimed at breaking the backbone of the American economy, crippling or disheartening the United States and its people, and disrupting the American economic, social, military, and political order, all without the risk of a head-to-head military confrontation, which Iran knew it would lose. Ex. S–1, Testimony of Abolghasem Mesbahi (February 22, 2008), pp. 77–89.

154. Among other things, this planning group devised a scheme to crash hijacked Boeing 747s into major American cities, principally, the World Trade Center in New York, and the White House and the Pentagon in Washington, D.C. The contingency plan's code name was *"Shaitan dar Atash"* (Farsi for "Satan in Fire" or "Satan in Hell"). Ex. S–1, Testimony of Abolghasem Mesbahi (February 22, 2008), pp. 78–80; Ex. S–2, Testimony of Abolghasem Mesbahi (February 23, 2008), pp. 77–89; Ex. S–3 (Mesbahi Tr. 3/1/08), p. 14.

155. The *Shaitan dar Atash* plan involved the use of tactics such as chemical weapons and radioactive "dirty" bombs; bombings of electrical power plants, gas stations, oil tankers by the hundreds, and railroads; and the use of passenger airliners as bombs to attack U.S. cities, primarily New York, Washington, and Chicago. Boeing 747s were the focus of the MOIS–IRGC task force for aircraft hijackings because their large fuel tanks made them suitable for high value targets such as the World Trade Center and the Empire State Building in New York City, and the White House and the Pentagon in Washington were specifically targeted. Ex. S–1, Testimony of Abolghasem Mesbahi (February 22, 2008), pp. 77–89.

156. After falling into disfavor with certain hardline elements of the Islamic regime, Mesbahi was arrested and imprisoned several times. After his release, he was banned from official government positions. Ex. S–1, Testimony of Abolghasem Mesbahi (February 22, 2008), pp. 103–05.

157. After setting up a private business, Mesbahi was called upon to perform continuing tasks for MOIS, using his business as cover. He worked with MOIS front companies involved in transactions such as Iraqi oil sales using reflagged (Iranian flag) coastal tankers, importation of supercomputers, and weapons procurement deals and other kinds of transactions. Ex. S–1, Testimony of Abolghasem Mesbahi (February 22, 2008), pp. 106–14.

158. Mesbahi left Iran in April 1996 after being informed by Saeed Emami, then the number two official in MOIS, that he was on a list of persons to be killed. Ex. S–1, Testimony of Abolghasem Mesbahi (February 22, 2008), pp. 114–16; Ex. S–3, Testimony of Abolghasem Mesbahi (March 1, 2008), pp. 20–23.

159. Mesbahi obtained a United Nations Refugee card and made his way to Germany, where he lived in hiding for a time. Mesbahi became an informant for the German *Bundeskriminalamt* ("BKA"), and he was placed in a German witness protection program. Ex. S–1, Testimony of Abolghasem Mesbahi (February 22, 2008), pp. 13–18; Mesbahi Ex. 1.

160. Mesbahi was an important witness, at the time anonymously, known as "Witness C" in a German prosecution of Iranian-backed killers who assassinated several Kurdish leaders at the *Mykonos* restaurant in Berlin in September 1992. He was introduced to the German court in the *Mykonos* case by Iran's former president, Abolhassan Banisadr, himself an exile, who was also a witness in this case. Ex. S–1, Testimony of Abolghasem Mesbahi (February 22, 2008), pp. 23–25; Ex. S–4, Testimony of Abolghasem Mesbahi (March 2, 2008), pp. 58–60; Ex. S–10, Timmerman 1st Affid. ¶¶69–71; Ex. S–11, Timmerman 2nd Affid., ¶155 and p. 42, n.51.

***21** 161. The *Mykonos* trial resulted in the convictions of all the defendants and led to a German arrest warrant being issued for MOIS chief Ali Fallahian. The *Mykonos* trial exposed the inner workings of MOIS and the role of the Supreme Leader in matters of terrorism. Ex. S–4, Testimony of Abolghasem Mesbahi (March 2, 2008), pp. 58–60; Ex. S–21, *Mykonos Urteil* (Mykonos Judgment), *Urteil des Kammergerichts Berlin vom* 10. April 1997 (Judgment of the Court of Appeal of Berlin, April 10, 1997), pp. 22–23; *see also* Ex. S–15–20, 22–23.

162. Mesbahi thereafter assisted other Western prosecutors in criminal matters exposing Iran's involvement in acts of terror, including assistance to Argentinean prosecutors in connection with the AMIA bombing in Buenos Aires in 1994, for which nine (9) Iranians, including high governmental officials, as well as Hizballah master terrorist Imad Mughniyah, were all indicted. Mesbahi named Imad Mughniyah as responsible for the AMIA bombing operation and the Supreme Leader Ayatollah Khamenei for the order authorizing the attack. Mesbahi also named others involved in the AMIA bombing and a subsequent cover-up. Ex. S–1, Testimony of Abolghasem Mesbahi (February 22, 2008), pp. 23, 25–26; March 2, 2008, pp. 61–64, 82–85.

163. The Argentines indicted nine (9) Iranian officials for the AMIA bombing, and Interpol issued Red Notices on six (6) of them. Only through a protracted campaign of resistance did Iran avoid three additional Interpol Red Notices naming three (3) very high Iranian officials which would have implicated the state directly in the AMIA bombing. Ex. 10, Adamson Affid. ¶¶21–33; Ex. 2, Timmerman 2nd Affid. ¶¶40–45; Ex. 7, Bergman Affid. ¶¶(43–44.

164. Mesbahi has also assisted other Western prosecutors in criminal investigations and prosecutions exposing Iran's involvement in numerous heinous acts of terror. Ex. S–1, Testimony of Abolghasem Mesbahi (February 22, 2008), pp. 23–24, 26–29; Ex. S–4, Testimony of Abolghasem Mesbahi (March 2, 2008), pp. 67–84; Timmerman 1st Affid. ¶72.

165. Mesbahi left the German witness

protection program in 2000. Ex. S–1, Testimony of Abolghasem Mesbahi (February 22, 2008), pp. 16–18; Ex. S–2, Testimony of Abolghasem Mesbahi (February 23, 2008), pp. 22–23.

166. Mesbahi remained in contact with two police officers of the German *Landeskriminant* ("LKA"), which handles domestic, non-federal criminal matters. Ex. S–2, Testimony of Abolghasem Mesbahi (February 23, 2008), pp. 8–9.

167. Before he left Iran, Mesbahi had established a code methodology for communicating with trusted friends who worked in sensitive positions in the Iranian government and who he had known for years. Ex. S–2, Testimony of Abolghasem Mesbahi (February 23, 2008), pp. 6–7; Ex. S–3, Testimony of Abolghasem Mesbahi (March 1, 2008), pp. 6–7; Ex. S–9, Sealed Affidavit of Abolghasem Mesbahi, ¶¶8, 17.

168. From all his experience in intelligence work, Mesbahi was well versed in sophisticated code methodologies. Knowing the volume of sensitive information he possessed, and having fled Iran on a tip from Saeed Emami that he was to be murdered by the regime, Mesbahi's original motivation for establishing a coded message system was so that his friends could alert him in case MOIS were to discover his location and send assassins his way. Ex. S–3, Testimony of Abolghasem Mesbahi (March 1, 2008), pp. 7, 12, 20–23; Ex. S–2, Testimony of Abolghasem Mesbahi (February 23, 2008), pp. 6–7.

169. On July 23, 2001, Mesbahi received a coded message via an Iranian newspaper from one of these trusted friends inside the Iranian government. Ex. S–2, Testimony of Abolghasem Mesbahi (February 23, 2008), pp. 5–8; Ex. S–9, Sealed Affidavit of Abolghasem Mesbahi, ¶¶17, 61.

***22** 170. The decoded message Mesbahi received was three words: "*Shaitan dar Atash*" which means "Satan in Hell" or "Satan in Fire." Ex. S–2, Testimony of Abolghasem Mesbahi (February 23, 2008), pp. 5–8; Ex. S–1, Testimony of Abolghasem Mesbahi (February 22, 2008), pp. 77–78; Ex. S–9, Sealed Affidavit of Abolghasem Mesbahi, ¶¶17, 61.

171. In Iran's military-intelligence community, including the MOIS, the IRGC, and the Bassij, the word "Satan" is understood to refer to the United States and its government. Ex. S–1, Testimony of Abolghasem Mesbahi (February 22, 2008), pp. 77–78; Ex. S–5, Testimony of Witness Y (February 24, 2008), pp. 71–72.

172. Mesbahi knew what this coded message meant because he had worked on the project code-named "*Shaitan dar Atash*" years before while he worked in MOIS. "*Shaitan dar Atash*" was the contingency plan for waging asymmetrical warfare against the United States. Ex. S–1, Testimony of Abolghasem Mesbahi (February 22, 2008), pp. 77–89.

173. Mesbahi understood that the coded message meant that Iran had activated the "*Shaitan dar Atash*" contingency plan. Ex. S–2, Testimony of Abolghasem Mesbahi (February 23, 2008), pp. 7–8. He did not know which aspect of the contingency plan was being activated, or whether it was some combination of actions, because the "*Shaitan dar Atash*" contingency plan included the use of chemical bombs, "dirty" bombs, attacks on power plants, gas stations, and oil tankers, as well as the hijacking of civilian airliners to be crashed into New York, Washington, and Chicago. Ex. S–9, Sealed Affidavit of Abolghasem Mesbahi, ¶¶65–68.

174. Mesbahi knew the meaning of the message was serious, and he immediately contacted his former handlers in the German *Landeskriminalamt* (LKA). Ex. S–2, Testimony of Abolghasem Mesbahi (February 23, 2008), pp. 8–9.

175. Mesbahi met the officers and told them that a big event was about to happen in America, a huge terrorist operation, and asked the officers to convey this information to relevant authorities. Ex. S–2 (Mesbahi Tr. 2/23/08), p. 11. The officers responded that they would convey the information to the higher authorities and would let him know if the authorities responded.

176. Three (3) weeks later, on August 13,

2001, Mesbahi received another coded message from his sources in Iran, clarifying that the *Shaitan dar Atash* contingency plan that had been activated was the plan to crash hijacked civilian airliners into American cities. Ex. S–2, Testimony of Abolghasem Mesbahi (February 23, 2008), pp. 11–13; Ex. S–9, Sealed Affidavit of Abolghasem Mesbahi, ¶¶ 69–70.

177. Again, Mesbahi immediately contacted the two (2) LKA officers and told them about the message, pleading with them for action. They responded that they had conveyed the earlier message and if there were any developments, they would let him know. *Id.*, p. 14. Mesbahi emphasized to the LKA officers that many lives were at risk. Ex. S–2, Testimony of Abolghasem Mesbahi (February 23, 2008), pp. 14–15.

178. Two (2) more weeks passed, and Mesbahi received a third coded message on August 27, 2001. The third message confirmed the activation of "*Shaitan dar Atash*" but added an unspecified reference to Germany. Ex. S–9, Sealed Affidavit of Abolghasem Mesbahi, ¶¶71–72.

179. The Mohammad Atta–Ramzi Binalshibh al Qaeda terrorist cell that headed the 9/11 attacks was based Hamburg, Germany. 9/11 Report, pp. 160–69.

***23** 180. On September 11, 2001, Mesbahi saw the reports of the 9/11 attacks on television, then he desperately tried to reach the LKA officers, as well as German *Bundeskriminalamt* (BKA) with whom he had previously worked, but he could reach no one. Ex. S–2, Testimony of Abolghasem Mesbahi (February 23, 2008), pp. 15–17.

181. One of the LKA officers called Mesbahi on September 13, 2001, and arranged a meeting where Mesbahi was interviewed by a German regional security official. Mesbahi told the officer that the planning and logistics for the 9/11 attacks were done by Iran. Ex. S–2, Testimony of Abolghasem Mesbahi (February 23, 2008), pp. 17–20. The regional security officer appeared not to believe him. *Id.*, p. 20.

182. A few days later, Mesbahi tried again to convince the regional security officer; this time, the officer phoned the BKA, but he then told Mesbahi that the BKA was not interested in having a meeting. Mesbahi pleaded with the officer to contact American authorities, particularly the FBI or the CIA, but the regional security officer said he would not do it. *Id.*, pp. 23–24.

183. Mesbahi subsequently called the U.S. embassy in Germany, left a voice message identifying himself and noting that he is "Witness C" from the *Mykonos* case. He stated that he had information about the 9/11 attacks and left his phone number. No one called back. Ex. S–2 (Mesbahi Tr. 2/23/08), p. 26.

184. Mesbahi tried, through a German journalist, to reach Dr. Manouchehr Ganji, a former Education Minister under the Shah, who had become a noted dissident and who moved from Paris to Washington, D.C. *Id.*, pp. 25–28. Mesbahi wanted Dr. Ganji to put him in touch with the FBI or CIA. Dr. Ganji apparently tried, as he told Mesbahi that someone from the U.S. embassy would call him. But no one called, except one unidentified person who would not give Mesbahi any name or phone, who just wanted his code information. *Id.*, pp. 24–25, 29–30.

185. Mesbahi then traveled to Berlin and went to the U.S. embassy in person. He told the guard at the door that he is "Witness C of [the] *Mykonos* Court" and that he had important information for the ambassador. He showed his U.N. refugee card to prove his identity. However, Mesbahi was told that under no circumstances would any message be taken inside the embassy after September 11, 2001, as the practice had been banned. Seeing the closed circuit television camera, Mesbahi held up his refugee card in front of it so that there would be a record of his attempt. *Id.*, pp. 31–32.

186. A guard suggested Mesbahi write a letter, so Mesbahi took down the address of the embassy and spent several hours writing what he knew. He brought the letter back to the embassy, but the guards refused to take it. Mesbahi left and mailed the letter. *Id.*, pp. 32–35. Mesbahi never received any response to this letter. *Id.*, pp. 34–35.

187. Dr. Ganji gave Mesbahi the telephone number of a man in Washington, D.C., the investigative journalist Kenneth Timmerman. Mesbahi and Timmerman spoke over the telephone in late September 2001. *Id.*, pp. 29, 34; Ex. S–10, Timmerman 1st Affid. ¶68.

188. Mesbahi telephoned Kenneth Timmerman and told him about the *Shaitan dar Atash* messages he had received in the weeks before 9/11, meaning that an Iranian plan for attacking American cities using civilian airliners had been activated, and that he, Mesbahi, had tried to pass this information on to the U.S. Government, without success. Ex. S–11, Timmerman 2nd Affid. p. 157. Ex. S–2 (Mesbahi Tr. 2/23/08), p. 29–30; Ex. S–10, Timmerman 1st Affid. ¶68; Ex. S–11, Timmerman 2nd Affid. ¶¶155, 157–58, 162.

***24** 189. What Mesabahi told Timmerman in September 2001 regarding the *Shaitan dar Atash* messages was consistent with his testimony in *Havlish*. Ex. S–11, Timmerman 2nd Affid. ¶162.

190. In his videotaped testimony, Mesbahi stated that he received two (2) coded messages concerning "*Shaitan dar Atash*," one in August and the other in early September 2001. As he explained in his separate, sealed affidavit, Mesbahi actually received three (3) such coded messages: the first on July 23, the second on August 13, and the third on August 27, 2001. Ex. S–9, Sealed Affidavit of Abolghasem Mesbahi, ¶¶59–63. Mesbahi refreshed his recollection by finding reproductions of the coded messages from the newspapers. *Id.*, ¶¶13, 19, 69–70.

191. Through his sources inside the Iranian government, Mesbahi also learned that Iran purchased an aircraft flight simulator through a Chinese company called "*Fuktad*," based in Taiwan, with which MOIS had relations. *Fuktad* obtained the simulator from AVIC (Aviation Industries Corporation of China), a Chinese state-owned entity. The simulator was transported to Iran in 2000 by an IRGC front company called "*Safiran*" that was frequently used for clandestine procurement and transport operations. Computer software to program the module to simulate Boeing 757–767–777 aircraft was purchased by for MOIS through East China Airlines. The flight simulator was set up in a very secure, secret facility at *Doshen Tappeh* air base near Tehran. Ex. S–4, Testimony of Abolghasem Mesbahi (March 2, 2008), pp. 15–35, 40, and Mesbahi Ex. 15, 16; Ex. S–11, Timmerman 2nd Affid. ¶¶159–60, and n.53.

192. Based on his source of information, and in light of his professional experience, Mesbahi believes that the simulator was probably used to train the 9/11 hijacker pilots. Ex. S–4 (Mesbahi Tr. 3/2/08), p. 40 and Mesbahi Ex. 16.

193. Iran has never owned any Boeing 757, 767, or 777 aircraft due to international sanctions against their sale to Iran. Ex. S–11, Timmerman 2nd Affid. ¶¶159–60, and n.53; Ex. S–4 (Mesbahi Tr. 3/2/08), p. 35.

194. Each of the four (4) airliners hijacked on September 11, 2001 and used in the 9/11 attacks was a Boeing 757 or 767 model. 9/11 Report, pp. 242, 248; Ex. S–11, Timmerman 2nd Affid. ¶161.

195. In late September, 2001, Mesbahi telephoned Kenneth Timmerman and told him about the information he had received about the flight simulator that was installed at *Doshen Tappeh* air base near Tehran. Ex. S–2 (Mesbahi Tr. 2/23/08), p. 29–30; Ex. S–10, Timmerman 1st Affid. ¶68; Ex. S–11, Timmerman 2nd Affid. ¶¶155, 157, 159, 162.

196. What Mesabahi told Timmerman in September 2001 regarding the flight simulator was consistent with his testimony in *Havlish*. Ex. S–11, Timmerman 2nd Affid. ¶162.

197. Mesbahi also learned from his sources inside the Iranian government that at least one of the 9/11 hijackers was present inside Iran before the 9/11 attacks. Majid Moqed, a muscle hijacker on American Airlines Flight 77 (North Tower WTC) was housed at the Hotel *Sepid*, an IRGC–MOIS safe house, on *Nejatolahi* Street in Tehran. Ex. S–4, Testimony of Abolghasem Mesbahi (March 2, 2008), pp. 37–40, and Mesbahi Dep. Ex. 17.

Iran's Provision of Safe Haven to al Qaeda

***25** 198. Iran provided material support to al Qaeda after the 9/11 attacks in several ways, most significantly by providing safe haven to al Qaeda leaders and operatives, keeping them safe from retaliation by U.S. forces, which invaded Afghanistan.

199. In the late 1990s, Mustafa Hamid passed communications between Osama bin Laden and the Government of Iran. In late 2001, while in Tehran, Hamid negotiated with the Iranians to relocate al Qaeda families to Iran after the 9/11 attacks. Ex. 30, U.S. Treasury Department press release, January 16, 2009; Ex. 8, Clawson Affid. ¶53; Ex. 2, Timmerman 2nd Affid. ¶¶213–15.

200. When the United States-led multi-national coalition attacked the Taliban regime in Afghanistan in the fall of 2001, Iran facilitated the exit from Afghanistan, into Iran, of numerous al Qaeda leaders, operatives, and their families. The Iran–Afghanistan safe passageway, established earlier to get al Qaeda recruits into and out of the training camps in Afghanistan, was utilized to evacuate hundreds of al Qaeda fighters and their families from Afghanistan into Iran for safe haven there. The IRGC knew of, and facilitated, the border crossings of these al Qaeda fighters and their families entering Iran. Ex. 6, Lopez–Tefft Affid. ¶¶278–79; 9/11 and Terrorist Travel, p. 67; Ex. 2, Timmerman 2nd Affid. ¶¶171–73; *see also* Ex. 9, Bruguiere Affid. ¶32.

201. Osama bin Laden's friend, Gulbuddin Hekmatyar, who was then in exile in Iran near the Afghan border, was instrumental in the evacuation of al Qaeda into Iran, as were Imad Mughniyah and Iran's *Qods* Force commander Ahmad Vahidi. Ex. 6, Lopez–Tefft Affid. ¶¶129, 280, 290.

202. Among the high-level al Qaeda officials who arrived in Iran from Afghanistan at this time were Saad bin Laden and the man who would soon lead "al Qaeda in Iraq," Abu Mussab Zarqawi. Ex. 2, Timmerman 2nd Affid. ¶171.

203. The number 2 official of al Qaeda, Ayman al Zawahiri, made particular arrangements for his own family's safe haven in Iran after 9/11, with the aid of his son-in-law Muhammad Rab'a al Sayid al Bahtiyti, an Egyptian-born al Qaeda operative. Ex. 2, Timmerman 2nd Affid. ¶217 and Ex. B–15 thereto; Ex. 8, Clawson Affid. ¶53.

204. In late 2001, Sa'ad bin Laden facilitated the travel of Osama bin Laden's family members from Afghanistan to Iran. Thereafter, Sa'ad bin Laden made key decisions for al Qaeda and was part of a small group of al Qaeda members involved in managing al Qaeda from Iran. Ex. 34; Ex. 2, Timmerman 2nd Affid. Ex. B–15; Clawson Affid ¶¶54, 62.

205. There have been numerous instances of al Qaeda operatives and leaders meeting, planning, and directing international terrorist operations from the safety of Iranian territory. Senior al Qaeda members continued to conduct terrorist operations from inside Iran. The U.S. intercepted communications from Saef al Adel, then in Mashad, Iran, to al Qaeda assassination teams in Saudi Arabia just before their May 12, 2003 assault on three (3) housing compounds in Riyadh. Al Qaeda leaders in Iran planned and ordered the Riyadh bombing. Ex. 2, Timmerman 2nd Affid. ¶¶177, 179, 218–219, and Ex. B–15 thereto; Ex. 3, Byman Affid. ¶55; Ex. 6, Lopez–Tefft Affid. ¶¶292–94, 297–300; Ex. 8, Clawson Affid. ¶61.

Other Findings

***26** 206. A memorandum, dated May 14, 2001, demonstrates Iran's and Hizballah's awareness of, and involvement in, al Qaeda's plans for an impending terrorist strike against the U.S. The memorandum, which has been reviewed and found to be authentic by U.S. and Israeli intelligence, is from Ali Akbar Nateq–Nouri (overseer of the Supreme Leader's intelligence apparatus), speaking for the Supreme Leader, and is addressed to the head of Iran's intelligence operations Mustapha Pourkanad. The memorandum clearly demonstrates Iran's awareness of an upcoming major attack on the United States and directly connects Iran and Imad Mughniyah to al Qaeda and to the planned

attack. The memorandum references Iran's "support for al–Qaeda's future plans," and cautions "to be alert to the [possible] negative future consequences of this cooperation [between Iran and al–Qaeda]." The memorandum also states that, while "expanding the collaboration with the fighters of al–Qaeda and Hizballah [Lebanon]," the Supreme Leader "emphasizes that, with regard to cooperation with al–Qaeda, no traces must be left [ ] that might have negative and irreversible consequences, and that [the activity] must be limited to the existing contacts with [Hizballah Operations Officer Imad] Mughniyeh and [bin Laden's deputy Ayman] al–Zawahiri." Ex. 7, Bergman Affid. ¶¶75–76, and Ex. B thereto.

207. Iran further assisted al Qaeda's preparations for the 9/11 attacks by assisting in the assassination of Ahmad Shah Massoud, the U.S.-allied leader of Afghanistan's Northern Alliance, two (2) days before September 11, 2001. The assassination of Massoud was critical because he would have would have become America's most important military ally in Afghanistan after 9/11 in any retaliatory counterstrike against al Qaeda in Afghanistan. 9/11 Report, pp. 214, 252; Ex. 6, Lopez–Tefft Affid. ¶276; Ex. 7, Bergman Affid. ¶71.

208. On July 28, 2011, the Obama Administration and the U.S. Treasury Department took actions indicating the U.S. Government's finding that Iran has materially assisted al Qaeda by facilitating the transport of money and terrorist recruits across Iran's territory. The U.S. Government concluded that there is "an agreement between al–Qaida and the Iranian government... demonstrate[ing] that Iran is a critical transit point for funding to support al–Qa'ida's activities in Afghanistan and Pakistan." "This network serves as the core pipeline through which al–Qa'ida moves money, facilitators and operatives from across the Middle East to South Asia ...." Ex. 38, U.S. Department of Treasury Press Release (July 28, 2011).

209. Obama Administration officials have stated that senior Iranian officials know about the money transfers and allow the movement of al–Qaeda foot soldiers through Iranian territory. Ex. 38, U.S. Department of Treasury Press Release (July 28, 2011).

Expert Testimony

210. **Dietrich L. Snell**, a highly experienced prosecutor, served as Senior Counsel on the staff of the *National Commission on Terrorist Attacks upon the United States* (commonly known as the "9/11 Commission") between May 2003 and July 2004. Mr. Snell was the Team Leader of the Commission staff assigned to investigate the plot culminated in the 9/11 attack. It was Mr. Snell's responsibility to design and coordinate the staff's investigation of the 9/11 plot ensuring that the Commission considered all relevant evidence gathered from myriad sources—both classified and public record—that were made available to the Commission. Mr. Snell's assignment involved reviewing countless documents and interviewing hundreds of witnesses including law enforcement and intelligence communities in the United States and overseas. Specifically, Mr. Snell supervised the preparation of the Staff Statement on the plot including the drafting and editing of those portions of the 9/11 Commission Report that dealt with the plot. Ex. 5, Snell Affid. ¶7.

211. During Mr. Snell's work with the Commission, he became intimately familiar with the FBI's criminal investigation of the 9/11 attack (the "PENTTBOM investigation"), an investigation of unprecedented scope in the history of the FBI. Mr. Snell states the FBI emphasized its view that a substantial number of the nineteen (19) al Qaeda operatives who hijacked the four (4) targeted US airliners likely transited through Iran on their way to and from Pakistan and Afghanistan during and in furtherance of the conspiracy. Snell states that according to the PENTTBOM Team, the willingness of Iranian border officials to refrain from stamping passports of al Qaeda members help explain the absence of a clear document trail showing the travels of those members to and from Afghanistan, the center of al Qaeda training, starting in the late 1990s and leading up to September 11. Ex. 5, Snell Affid. ¶17.

***27** 212. Snell notes in his affidavit that senior 9/11 conspirators Ramzi Binalshibh and Khalid Sheikh Mohammed (KSM) provided information tending to corroborate the FBI's evidentiary support that already existed regarding the important role played by Iran in facilitating the 9/11 attack. Ex. 5, Snell Affid. ¶¶20 and 21.

213. In sum, Snell concludes, based on his experience as an investigator, prosecutor, and Senior Staff Member of the 9/11 Commission, that his fellow colleagues on the 9/11 Commission, Dr. Daniel L. Byman and Ms. Janice Kephart, are correct in their analysis that **there is clear and convincing evidence pointing to the involvement on the part of Hezbollah and Iran in the 9/11 attack, especially as it pertains to travel facilitation and safe haven**. Ex. 5, Snell Affid. ¶23.

214. **Dr. Daniel L. Byman** is a professor at Georgetown University and a member of the Brookings Institute. He is a regular consultant to the United States government on terrorism and national security-related matters. Previously, Dr. Byman's professional career involved the CIA and as Research Director of the RAND's Center for Middle East Public Policy. During his time at RAND, Dr. Byman worked closely with the U.S. Military, U.S. intelligence communities and other governmental agencies. Upon leaving the RAND Corporation in 2002, Dr. Byman joined the House and Senate Intelligence Committees in a joint investigation regarding the 9/11 terrorist attack (the so-called "9/11 Inquiry"). Dr. Byman served as one of the main investigators for the 9/11 Inquiry spending considerable time on al Qaeda. Thereafter, Dr. Byman joined the *National Commission on Terrorist Attacks on the United States*, better known as the "9/11 Commission," with particular emphasis on al Qaeda operations. For both the 9/11 Inquiry and the 9/11 Commission, Dr. Byman travelled to the Middle East to interview many officials. Ex. 3, Byman Affid. ¶¶5–8.

215. It is Dr. Byman's professional judgment **there is clear and convincing evidence** that Iran has provided material support for al Qaeda in general as defined in 18 U.S.C. § 2339A(b)(1). Dr. Byman notes in his affidavit the Iranian assistance predated the 9/11 attack and continued after it, and it had a profound implication on the 9/11 attack itself. Dr. Byman states that over the years the Iranian support included assistance with travel, unlimited safe haven, and some training at the very least. Byman further states that it is quite possible there was additional and far more considerable support but that Iran has deliberately kept its relationship with al Qaeda shrouded and ambiguous. Ex. 3, Byman Affid. ¶14.

216. Dr. Byman states that one reason for the cooperation between Iran and al Qaeda is that both see the "United States as its enemy ... both believe the United States is an imperialistic power bent on subjugating Muslims and want to weaken its influence." Iran and al Qaeda also have other foes in common, including pro–Western Arab regimes like Saudi Arabia and Egypt. Iran's relationship towards these countries has vacillated from outright hostility and calls for such regimes to be overthrown to efforts toward conciliation, but the use of violence and the threat of force have been part of its foreign policy towards these states. In short, while Iran and al Qaeda often have wildly different goals regarding many issues, they both want to weaken and hurt many of the same adversaries. Ex. 3, Byman Affid. ¶25.

***28** 217. Dr. Byman notes that al Qaeda has admitted some relationship existed with Iran before 9/11 and al Qaeda justified this on the basis of strategic commonality. Al Qaeda leader, Ayman al–Zawahiri, admitted that before 9/11, Iran and al Qaeda worked together "on confronting the American-lead Zionist/Crusader alliance." Ex. 3, Byman Affid. ¶26.

218. Dr. Byman's affidavit notes that after 9/11, and before the U.S.-led invasion of Afghanistan, hundreds of al Qaeda members, including many key al Qaeda leaders, and their families, fled Afghanistan and were permitted to enter and stay in Iran. Ex. 3, Byman Affid. ¶29.

219. In many of its terror operations, Iran used Hizballah as a facilitator [Imad Mughniyah] for many reasons. First, Iran's involvement in Hizballah's creation, large-scale funding, constant provision of training, and role in

Hizballah's leadership councils has given Iran an important role in the Lebanese organization. Iran trusts Hizballah and Hizballah trusts Iran—one of the closest relationships in history between a terrorist group and its sponsor. Second, although Hizballah is a Shi'a organization, it is an Arab group, while Iran is a Persian state. As such, Hizballah has stature in the Arab community and can better bridge the Shi'a–Sunni divide because it is not also suspect due to a difference in ethnicity. Third, Hizballah is highly capable and has a high degree of independence in Lebanon. Thus the training offered at Hizballah camps is superb, and it can be done without having to hide it from the Lebanese government. Finally, working through Hizballah offers Iran some degree of deniability if it chooses, as it places one more degree of separation between the group in question and Iran. Ex. 3, Byman Affid. ¶44.

220. Perhaps the most important form of aid Iran gave al Qaeda prior to 9/11 (and continues to give today) involves the facilitation of travel. Keeping passports "clean" was vital to reducing the risk of discovery and arrest in Saudi Arabia and later the United States. In the mid–1990s, al Qaeda operative Mustafa Hamid negotiated a secret relationship with Iran that allowed safe transit via Iran to Afghanistan. In the years before 9/11, one of al Qaeda's key military commanders, Seif al–Adl, acknowledged transit through Iran to coordinate issues of mutual interest. Ex. 3, Byman Affid. ¶¶46–7.

221. Travel assistance "is invaluable," not only to avoid detection and arrest, but established lines of transit make recruitment and training easier, as individuals can travel to and from training camps without fear of interference. Also, travel facilitation enables better communication and coordination. Even before 9/11, al Qaeda was aware that the United States monitored phones and other forms of communication and recognized that many sensitive deliberations are best done face-to-face. Doing so requires individuals who can travel freely from one area to another. Ex. 3, Byman Affid. ¶50.

222. In the 1990s, individuals linked to al Qaeda received training in explosives in Iran itself. More al Qaeda individuals trained in Hizballah facilities in Lebanon—facilities that were set up by Iran and regularly hosted by Iranian paramilitary personnel. It is Iran's common approach to use both its own people and facilities and "outsourcing" to its close ally Hizballah. Such training included explosives training and on methods pertaining to the collection of intelligence and operational security. Ex. 3, Byman Affid. ¶60.

***29** 223. Dr. Byman summarizes his affidavit with a statement that in his judgment, there is strong support for the claim that Iran has provided important material support for al Qaeda including direct travel facilitation for the so-called muscle hijackers as noted in the 9/11 Commission Report. This support comes from a range of sources including U.S. government documents and even a statement by al Qaeda themselves. This Iranian support has helped make al Qaeda the formidable organization it was on 9/11 and remains today. Ex. 3, Byman Affid. ¶69.

224. **Janice L. Kephart** is a border control expert and is former counsel to the U.S. Senate Judiciary Subcommittee on Technology, Terrorism and Government Information. From 2003 to July 2004 Ms. Kephart served as counsel to the the 9/11 Commission. Ms. Kephart was assigned to the "Border Team" and was one of the principal authors of 9/11 and Terrorist Travel: a Staff Report of the National Commission on Terrorist Attacks Upon the United States. Ex. 4, Kephart Affid. ¶13. Stated otherwise, Ms. Kephart was specifically responsible for all aspects of the 9/11 investigation regarding how and when the 9/11 hijackers attained entry into, and were able to stay in, the United States. Ex. 4, Kephart Affid. ¶26.

225. Ms. Kephart's analysis of the terrorists' "travel operation" or "terrorist travel" was based, in part, on the examination performed by her team of thousands of travel documents, including the six (6) hijackers' passports which were recovered, and approximately two hundred (200) interviews, including speaking with 26 border inspectors as to hijacker entries. Ex. 4, Kephart Affid. ¶¶31, 33, 37.

226. Ms. Kephart's affidavit concludes that: (1) facilitation of terrorist travel is crucial material support to terrorist operations; and

(2) Iran's facilitation of al Qaeda operative travel, including at least eight (8) 9/11 hijackers, amounted to essential material support, indeed direct support, that further enabled al Qaeda to perpetrate the 9/11 attack successfully. Ex. 4, Kephart Affid. ¶3.

227. Iran itself, and through its surrogate, Hezbollah, gave direct support to the 9/11 conspirators by Iran's and Hezbollah's active facilitation of hijackers' travel into and out of Afghanistan and by actions of "a senior Hezbollah operative" [Imad Mughniyeh] and travel into Saudi Arabia "to coordinate activities there" and "to assist individuals in Saudi Arabia in traveling to Iran during November" 2001. Ex. 4, Kephart Affid. ¶3.

228. Ms. Kephart provides expert opinion that al Qaeda's complex and well-executed travel plan that, at a minimum, required complicity by Iranian government officials, including transit through Iran and Afghanistan and into Iran after acquisition of U.S. visas, contributed to the success of the 9/11 operations. Ex. 4, Kephart Affid. ¶3.

229. Ms. Kephart's sworn testimony states that Iran supported 9/11 hijacker travel into Iran and placed a "senior Hezbollah operative" [Imad Mughniyeh] on flights with slated 9/11 hijackers *immediately after* they had acquired U.S. visas in Saudi Arabia. Kephart continues that keeping those passports "clean" of Iranian or Afghani travel stamps was essential since the critical steps in acquiring U.S. visas were achieved. Ex. 4, Kephart Affid. ¶4.

230. Ms. Kephart notes that the 9/11 terrorists had engaged **in a specific terrorist travel operation. Kephart notes that not only did the four (4) nearly simultaneous hijackings of four commercial airplanes constituted a coordinated operation, but so did the hijackers' travel. For terrorists, success is often dependent on travel. "For terrorists, travel documents are as important as weapons."** 9/11 Commission Report at p. 384. Ex. 4, Kephart Affid. ¶¶37–39 (emphasis added).

***30** 231. Ms. Kephart details that the twenty-six (26) al Qaeda terrorist operatives were whittled down to nineteen (19) hijackers mostly due to failure to obtain U.S. visas. Kephart states twenty-three (23) visas were applied for resulting in twenty-two (22) visas being obtained which involved thirty-four (34) hijackers entering into the United States over a period of twenty-one (21) months. Ex. 4, Kephart Affid. ¶¶35–36, 44.

232. Ms. Kephart notes that terrorists must travel clandestinely to meet, train, plan, case targets, and gain access to attack. To terrorists, international travel presents great danger, because the terrorist must surface to pass through regulated channels, present themselves to border security officials, or attempt to circumvent inspection points. Ex. 4, Kephart Affid. ¶41.

233. Ms. Kephart notes that her study of the nineteen (19) hijackers paints a picture of conspirators who put the ability to exploit U.S. border security high on their operational security concerns. *See* 9/11 and Terrorist Travel Staff Report at page 130. Ex. 4, Kephart Affid. ¶51.

234. Ms. Kephart states in her expert opinion the actions of Iranian border authorities in refraining from stamping the passports of Saudi hijackers vastly increased the likelihood of the operational success of the 9/11 plot. **"Thus, Iran's facilitation of the hijackers' terrorist travel operation constituted material support—indeed direct support—for al Qaeda 9/11 attacks,"** says Kephart. Ex. 4, Kephart Affid. ¶66 (emphasis added).

235. Shielding the Saudi passports from indicia of travel to Iran and Afghanistan was perceived as essential to prevent potential confiscation of passports by Saudi officials, in order to hide complicity of Iran in supporting al Qaeda, states Kephart. Ex. 4, Kephart Affid. ¶66.

236. Ms. Kephart notes that Iran's willingness to permit the undocumented admission and passage of al Qaeda operatives and 9/11 hijackers provided key material support to al Qaeda. By not stamping the hijackers' passports, by providing safe passage through Iran and into Afghanistan, and by permitting Hezbollah to receive the traveling group and, apparently, to actively support the human

trafficking of the 9/11 hijackers, Iran, in essence, acted as a state sponsor of terrorist travel. Ex. 4, Kephart Affid. ¶70.

237. Agreeing with her 9/11 Commission Staff colleagues, Dr. Daniel L. Byman and Mr. Dietrich L. Snell, Ms. Janice Kephart concludes that, **"it is my expert opinion that there is clear and convincing evidence that Iran and Hezbollah provided material support to al Qaeda by actively facilitating the travel of eight to ten of the 9/11 hijackers to Iran or Beirut immediately after their acquisition of their U.S. visas and into and out of Afghanistan and that these U.S. visas were garnered specifically for the purpose of terrorist travel into the United States to carry out the 9/11 attacks."** Ex. 4, Kephart Affid. ¶78 (emphasis added).

238. **Dr. Patrick Clawson** is one of the country's foremost experts on all matters pertaining to Iran for the last thirty (30) years. Dr. Clawson has done consulting work for the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and the Defense Department, among other governmental agencies. Dr. Clawson has lectured worldwide on the subject matter of Iran and terrorism. Dr. Clawson has been qualified by federal courts as an expert witness on matters involving Iran approximately twenty-five (25) times. Notably, Dr. Clawson has written widely, including many books and scholarly publications on Iran and terrorism in several languages. Ex. 8, Clawson Affid. ¶¶1–11.

***31** 239. In Dr. Clawson's affidavit, he notes that in the State Department's Annual Reports, dating from 1981 through 2010, Iran is consistently cited as the primary state sponsor of terrorism throughout the world. Additionally, Dr. Clawson notes that the most authoritative U.S. government sources have issued repeated and detailed descriptions of Iranian material support to al Qaeda before, during and after the 9/11 attacks. **Noting the evidence is clear and convincing**, Dr. Clawson states, "there is simply no ambiguity or unclarity in U.S. government statements about this matter." Ex. 8, Clawson Affid. ¶43.

240. Dr. Clawson notes that Executive Order 13224 issued by the United States Treasury Department on January 16, 2009, states that Sa'ad bin Laden, one of Usama bin Laden's sons, made key decisions for al Qaeda and was a small group of al Qaeda members that was involved in managing the terrorist organization from Iran after September 11, 2001. Ex. 8, Clawson Affid. ¶54.

241. Dr. Clawson notes that "few if any noted terrorism experts would dispute that Iran provides material support to al Qaeda within the meaning of 18 U.S.C. § 2339A(b)(1)." Ex. 8, Clawson Affid. ¶56.

242. It is Dr. Clawson's expert opinion that Iran has provided material support for al Qaeda before, during and after the events of September 11, 2001. Iranian support of al Qaeda through its instrumentalities, the Revolutionary Guard, and MOIS, is consistent with its foreign policy of supporting terrorism against the United States. Dr. Clawson asserts that without the technical training, funding, cash incentives, and other material support provided to terrorist organizations by Iran through its instrumentalities, the IRGC and MOIS, it is accepted by most experts that those organizations, such as al Qaeda, would not be able to carry out many of their most spectacular terrorist actions. The central assistance for material support provided by Iran to al Qaeda regarding September 11, 2001 is on the present state of the record of travel facilitation and safe haven. Ex. 8, Clawson Affid. ¶73, *et seq.*

243. **Claire M. Lopez and Dr. Bruce D. Tefft** have been engaged by the CIA as undercover operations officers and supervisors for over twenty-five (25) years each. While currently retired, both are privately retained by various federal contractors engaged in intelligence gathering and security matters. Specifically, Bruce Tefft has been found to be certified as an expert in the United States District Courts in Washington, DC in approximately seven (7) different cases involving terrorism by Iran and Libya. Ex. 6, Lopez–Tefft Affid. ¶12.

244. Lopez and Tefft conclude in their affidavit that the material support provided by Iran/Hezbollah to al Qaeda both before and after September 11 involved, among other matters, planning, recruitment, training,

financial services, expert advice and assistance, lodging and safe houses, false documentation and identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel and travel facilitation. Ex. 6, Lopez–Tefft Affid. ¶37.

245. Lopez and Tefft also conclude that with regard to the September 11 attacks, Iranian travel facilitation enabled eight (8) to fourteen (14) muscle hijackers to acquire needed Saudi passports and U.S. visas thus ensuring **their continued training** in Afghanistan and access to the United States. This travel facilitation to and from Iran, Saudi Arabia and Afghanistan was a vital link in the 9/11 conspiracy, and an indispensible aspect of the terrorist success. Ex. 6, Lopez–Tefft Affid. ¶38.

***32** 246. Lopez and Tefft conclude that the Iranian/al Qaeda joint terror attacks against the United States were preceded by the Khobar Towers bombing in 1996, the twin bombings of two (2) United States embassies in Africa in 1998, and the boat suicide bombings of the Destroyer *U.S.S. Cole* off the coast of Yemen in 2000. Lopez and Tefft further conclude that Hezbollah and its terror operations chief Imad Mughniyeh provided explosives, operational planning and training support for all of these al Qaeda attacks against America. Ex. 6, Lopez–Tefft Affid. ¶34.

247. Lopez and Tefft conclude their sworn affidavit by stating, "**we are convinced that the overwhelming evidence assembled in this affidavit leaves no doubt that al Qaeda and the official Iranian Regime at the highest levels have been acting in concert to plot and execute attacks against the United States since early 1990s**. The pan-Islamic alliance that was forged across the supposed Sunni–Shi'a divide has been directed by the Iranian Mullahs in close cooperation with Usama bin Laden, Ayman al–Zawahiri, and other top al Qaeda leaders." Ex. 6, Lopez–Tefft Affid. ¶352 (emphasis added).

248. Lopez and Tefft declare that the al Qaeda–Iran alliance was responsible for all of the most significant terrorist attacks against U.S. national interests from the 1990s up to and including the attacks of September 11. Ex. 6, Lopez–Tefft Affid. ¶353.

249. Lopez and Tefft conclude that the sworn testimony of former MOIS officer, Abolghasem Mesbahi, is generally credible, and, of particular significance is his testimony that the Ayatollah Ruhollah Khomeini initiated contingency plans in the mid–1980s for an operation against the United States Government and American cities, called "*Shaitan dar Atash*" ("Satan in the Fire"). This contingency plan for unconventional or asymmetrical warfare against the United States was the origin of subsequent terror attacks against the United States [Khobar Towers (1996), East African Embassy bombings (1998), U.S.S. Cole (2000)], up to and including the terrorist attacks of 9/11. Osama bin Laden and al Qaeda joined the Iranian operational planning in the early to mid–1990s. See Ex. S–12, Lopez–Tefft Affidavit, (unredacted) ¶45.

250. Lopez and Tefft conclude that Abolghasem Mesbahi's testimony concerning his communication sources inside Iran via coded, encrypted messages and the manner and method of such communications is credible. Also, it is consistent with, and indicative of, sophisticated intelligence trade craft, in particular, communication techniques and methodologies. Lopez and Tefft conclude and credit Mesbahi's testimony that he received from high level sources in Tehran advance notice of a major terrorist attack without specifics of time, date and place within two (2) months of September 11, 2001. See Ex. S–12, Lopez–Tefft Affidavit. (unredacted) ¶46.

251. Lopez and Tefft also conclude that Mesbahi's testimony that an MOIS front company purchased and installed a flight simulator with Boeing aircraft software at the IRGC's Doshan–Tappeh Airbase inside Iran to train the 9/11 hijacker pilots on Boeing passenger aircraft is credible. Lopez and Tefft also conclude that the testimony provided to the court under seal regarding witnesses Y and Z is generally credible. See Ex. S–12, Lopez–Tefft Affidavit. (unredacted) ¶¶43–49.

252. Lopez and Tefft state it is their "**expert opinion to a reasonable degree of professional certainty** that the Iranian

Regime's use of terror and, specifically, its material support of al Qaeda and terroristic attacks, including 9/11, is beyond question." See Ex. 6, Lopez–Tefft Affidavit. ¶50 (emphasis added).

***33** 253. **Dr. Ronen Bergman** is an Israeli expert on international intelligence, especially the Mossad and terrorism. Bergman has conducted extensive interviews with many former Iranian intelligence and military personnel, both high-ranking individuals and field operatives, as well as with former political figures of the Iranian Regime. See Ex. 7, Bergman Affidavit at. ¶7.

254. Dr. Bergman is considered one of the principal experts on the Israeli intelligence community's assessment of Iran. See Ex. 7, Bergman Affidavit. ¶9. Dr. Bergman states that his Affidavit is based on "intensive research, including review of thousands of documents, including intelligence material gathered by Israel, United States, France, the United Kingdom, Egypt, Jordan and Germany." See Ex. 7, Bergman Affidavit at. ¶10.

255. Dr. Bergman has lectured widely at universities throughout the world pertaining to issues involving terrorism and is extensively published on the subjects of military, intelligence, espionage, international affairs, law and history. Dr. Bergman has researched and published material about Abolghasem Mesbahi, an Iranian intelligence operative who defected to Germany and became an important intelligence "asset." Dr. Bergman states, "I have read Mesbahi's sworn testimony [in the *Havlish* case] taken February 22 and 23, 2008 in Frankfurt, German and March 1 and 2, 2008 in Paris, regarding his knowledge of an upcoming attack of the West which proved to be the September 11, 2001 attack." See Ex. S–13, Bergman Affidavit. (unredacted) ¶¶10–13.

256. Dr. Bergman notes that Mesbahi is the former head of Iran's entire European intelligence operation. Noting that he engaged "in extensive research of Mesbahi," Dr. Bergman attests that Mesbahi was known to be "an excellent intelligence operative." Dr. Bergman is also familiar with the French intelligence agency (DGSE) information on Mesbahi. As the leader of Iran's MOIS intelligence team in Europe in the 1980s, the Germans recruited Mesbahi as a source of information and evidence. See Ex. S–13, Bergman Affid. (unredacted) ¶72.

257. Dr. Bergman reveals that Mesbahi "became an important asset in the investigation of many assassinations and acts of terror by the Iranian regime and its proxies in several countries... **Mesbahi's testimony has been received with high reliability by the courts and by law enforcement and intelligence agencies worldwide.**" See Ex. S–13, Bergman Affidavit. ¶73 (unredacted) (emphasis added).

258. Dr. Bergman notes the U.S. State Department asserts that Iran was involved in one hundred, thirty-three (133) terrorist operations in the nine (9) years between 1987 and 1995 alone; many other acts of terrorism involving hundreds of fatalities preceded and follows this eight-year period. See Ex. 7, Bergman Affidavit. ¶18.

259. Affirming that Hizballah was an Iranian organization from its inception, Bergman confirmed that Imad Fayez Mughniyah was its military leader. See Ex. 7, Bergman Affidavit. ¶¶25 and 29. Bergman asserts that the authorities in the Israeli and American intelligence services believe that Hizballah's Imad Mughniyah conceived, designed, planned, commanded, and/or carried out terrorist operations involving hundreds of deaths, more than any other single figure in the world before his death in Damascus, Syria in February, 2008. See Ex. 7, Bergman Affidavit. ¶¶29–38.

***34** 260. Bergman asserts that Mughniyah, as the leading figure in Hizballah's military/terrorism arm, and his top lieutenants, all trained in Iran. See Ex. 7, Bergman Affidavit. ¶¶38–39.

261. Bergman reveals that he has had access to two (2) top-secret, highly classified Israeli documents which disclose: "Iran is aided by Hizballah's operational infrastructure abroad... through... Imad Mughniyah, for the purpose of attacks." The documents also reveal Hizbollah's terrorist training in Iran and clearly states, "Iran usually refrains from

carrying out attacks directly, and its involvement usually follows an indirect course." Bergman writes "**that indirect course went through Imad Mughniyah.**" See Ex. 7, Bergman Affidavit. ¶¶40–41 (emphasis added).

262. Dr. Bergman confirms other sources that Imad Mughniyah came to Khartoum, Sudan, for a meeting with bin Laden in 1993. There, Mughniyah told bin Laden about the enormously effective tactic of suicide attacks and their role in driving the American and French out of Lebanon in the early 1980s. From this point on, Mughniyah became a major connection point between Iran and al Qaeda. See Ex. 7, Bergman Affidavit. ¶¶58–59.

263. As a result of the 1993 Khartoum meeting, Iran used Hizballah to supply al Qaeda with explosives instruction and to provide bin Laden with bombs. "Much of the al Qaeda training was carried out in camps in Iran run by MOIS," declares Dr. Bergman. See Ex. 7, Bergman Affidavit. ¶61.

264. In 1996 when Osama bin Laden and al Qaeda were forced to leave Sudan, the Iranian intelligence services assisted al Qaeda in moving their operation and members to Afghanistan, Iran, Pakistan, Yemen and Lebanon. See Ex. 7, Bergman Affidavit. ¶64.

265. Dr. Bergman discloses in February 1998, when the veterans of the Egyptian Islamic Jihad, headed by Ayman al Zawahiri, United with al Qaeda, the link between al Qaeda and Iran was strengthened. Dr. al Zawahiri became the chief go-between of al Qaeda and Iran. According to information gathered by the United States National Security Agency and Mossad, al Zawahiri travelled to Iran several times as the guest of MOIS Chief Ali Fallahian and the MOIS Chief of Iranian Operations Abroad, Ahmad Vahidi. See Ex. 7, Bergman Affidavit. ¶67.

266. Dr. Bergman states Iranian and Lebanese Hizbollah trainers travelled between Iran and Afghanistan, transferring to al Qaeda fighters such material as blueprints and drawings of bombs, manuals for wireless equipment, instruction booklets for avoiding detection by unmanned aircraft. See Ex. 7, Bergman Affid. ¶68.

267. Dr. Bergman reveals that after al Zawahiri's arrival in Afghanistan, Iranian authorities helped him on many occasions to pass weaponry and reinforcements to al Qaeda forces across the border from Iran to Afghanistan. Ayman al Zawahiri, who has been marked as the successor to Osama bin Laden, according to Israeli intelligence, was responsible for planning the attacks on 9/11. See Ex. 7, Bergman Affidavit. ¶69.

268. After 9/11, according to Dr. Bergman, Iran harbored and sheltered many al Qaeda members who fled Afghanistan to avoid the American invasion. In particular, Iran harbored Osama bin Laden's son, Saad bin Laden, and Saif al Adel, the number three man in al Qaeda and head of its military wing. See Ex. 7, Bergman Affidavit. ¶74.

***35** 269. Dr. Bergman states that both Israeli and American intelligence agents have examined the document dated May 14, 2001 from Ali Akbar Nateq Nouri, and concludes that it appears to be authentic. Nateq Nouri's document reveals both high-level links between the Iran Supreme Leader's intelligence apparatus and al Qaeda and involves knowledge and support of a major upcoming operation. See Ex. 7, Bergman Affidavit. ¶75. The document states it is the Iranian government's goal to damage America's and Israel's "economic systems, discrediting [their] institutions... ...as part of political confrontation, and undermining [their] stability and security..."...." The May 14, 2001 memo further states that with regard to cooperation with al Qaeda that no traces must be left and that future activity must be limited to the **"existing contacts"** between Mughniyah and al Zawahiri. See Ex. 7, Bergman Affidavit. ¶76.

270. Dr. Bergman summarizes his Affidavit by attesting that, based on all of his sources, materials, and interviews: " "... it is my expert opinion that the Islamic Republic of Iran was, and is, a benefactor of, and provided material aid, resources and support to Osama bin Laden and al Qaeda both before and after the attacks of September 11, 2001 on the United States.... ...Iran consistently supports terrorist operations against a number of targets

throughout the world, including the United States." See Ex. 7, Bergman Affidavit at ¶16.

271. Dr. Bergman states that his opinions are consistent with the conclusion of the *9/11 Report* that Iran facilitated travel of hijackers between Iran, Saudi Arabia, and Afghanistan within a year before the attacks. Dr. Bergman further attests that travel facilitation enabled the acquisition of important travel documents, passports and visas and therefore entry into the United States. Finally, Dr. Bergman concurs with many other experts that Iran provided safe harbor to the members of the al Qaeda leadership shortly after the 9/11 attacks. See Ex. 7, Bergman Affidavit. ¶17.

272. **Kenneth Timmerman**, investigative journalist, author and noted Iran expert, provides an expert affidavit (his Second Affidavit) in addition to a fact affidavit (First Affidavit, which is sealed). Timmerman's Second Affidavit (Ex. 2, redacted; Ex. S–11, unredacted), comprising two hundred, nineteen (219) paragraphs, lays out his expert analysis of the early connections between Ayatollah Khomeini and Yasser Arafat, Iran's creation of Hizballah in Lebanon, the emergence of Imad Mughniyah and his long terrorist history, connections between Iran, Hizballah, al Qaeda, and the Taliban, Iran as a travel facilitator for terrorists, and other details from the *Havlish* investigation. Ex. 2, Timmerman 2nd Affid. *passim.*

273. Timmerman's Second Affidavit states that the 9/11 Commission was given access to thousands of NSA documents, very shortly before the publication date of the 9/11 Report. Ex. 2, Timmerman 2nd Affid. ¶¶ 120–29. These NSA documents, which included electronic intercepts, were described to Timmerman by a member of the 9/11 Commission staff team that conducted the review as showing that Iran had facilitated the travel of the al Qaeda operatives and that Iranian border inspectors had been ordered not to place telltale stamps in the operatives' passports, thus keeping their travel documents clean. Ex. 2, Timmerman 2nd Affid. ¶¶20–24.

274. In his Second Affidavit, Timmerman states that he was told by the 9/11 Commission staff member that the Iranians were fully aware they were helping operatives who were part of an organization preparing attacks against the United States. Ex. 2, Timmerman 2nd Affid. ¶¶123–24. It was Timmerman who first published the story of the Commission's late discovery of the NSA material. Ex. 2, Timmerman 2nd Affid., ¶¶120–29.

275. In his Second Affidavit, Timmerman reveals information he received from a 9/11 Commission staff member who identified by name the "senior operative of Hezbollah" who, as well as the senior operative's associate, accompanied some of the 9/11 muscle hijackers on airline flights into and out of Iran and Beirut, Lebanon in the fall of 2000. That "senior Hezbollah operative," referenced cryptically, though not identified by name, in pages 240–241 of the 9/11 Report, was the master terrorist Imad Mughniyah—a known agent of Iran. Ex. 2, Timmerman 2nd Affid. ¶¶126–27. Mughniyah, too, was the "senior operative of Hezbollah" who, in October 2000, visited Saudi Arabia to coordinate activities there and who also planned to assist individuals in Saudi Arabia in traveling to Iran during November. Ex. 2, Timmerman 2nd Affid. ¶75.

***36** 276. In his Second Affidavit, Timmerman states: "[I]t is my expert opinion that senior al Qaeda operatives, including their top military planners, sought—and were provided—refuge in Iran after the 9/11 attacks and that they used Iran as a base for additional terrorist attacks after 9/11, with the knowledge, approval, and assistance of the highest levels of Iranian government." Ex. 2, Timmerman 2nd Affid. ¶179; see also ¶¶171–78.

Conclusions of Law

1. The Court finds the affidavits offered by plaintiffs' as expert testimony to be admissible pursuant to Fed. R. Evid. 702 and 703. Each of the proffered witnesses are qualified experts by their knowledge, skill, experience, training and/or education on the subject matters of terrorism, the Iran–Hizbollah-al Qaeda connection, and the 9/11 terrorist attacks.

A. The Court Has Jurisdiction Over All Defendants and All Claims

2. The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611, is the sole basis for obtaining jurisdiction over a foreign state in the United States. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989); *Brewer v. Islamic Republic of Iran*, 664 F.Supp.2d 43, 50 (D.D.C. 2009).

3. Although the FSIA provides that foreign states are generally immune from jurisdiction in U.S. courts, *see* 28 U.S.C. § 1604, a federal district court can obtain personal and subject matter jurisdiction over a foreign entity in certain circumstances. A court can obtain personal jurisdiction over a defendant if the plaintiff properly serves the defendant in accordance with 28 U.S.C. § 1608. *See* 28 U.S.C. § 1330(b).

4. Subject matter jurisdiction exists if the defendant's conduct falls within one of the specific statutory exceptions to immunity. *See* 28 U.S.C. §§ 1330(a) and 1604. *Owens v. Republic of Sudan*, 2011 WL 5966900, 826 F.Supp.2d 128 (D.D.C. Nov. 28, 2011). Here, this Court has jurisdiction because service was proper and defendants' conduct falls within both the "state sponsor of terrorism" exception set forth in 28 U.S.C. § 1605A and the "noncommercial tort" exception of § 1605(a)(5).

1. Jurisdiction Related to Claims of U.S. Citizens: The FSIA's State Sponsor of Terrorism Exception

5. The provisions relating to the waiver of immunity for claims against state-sponsors of terrorism are set forth at 28 U.S.C. § 1605A(a). Section 1605A(a)(l) provides that a foreign state shall not be immune from the jurisdiction of U.S. courts against claims such as those presented here where:

> money damages are sought against [it] for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

6. The FSIA refers to the Torture Victim Protection Act of 1991 ("TVPA") for the definition of "extrajudicial killing." See *28 U.S.C. § 1605A(h)(7)*. The TVPA provides that:

> the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all of the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

***37** *28 U.S.C. § 1350* note; see also *Valore v. Islamic Republic of Iran*, 700 F.Supp.2d 52, 74 (D.D.C. 2010) (adopting the TVPA definition of "extrajudicial killing" in bombing of U.S. Marine barracks in Beirut, Lebanon).

7. Here, plaintiffs have established that their injuries were caused by the defendants' acts of "extrajudicial killing" and/or the provision of "material support" for such acts. *See Doe v. Bin Laden*, 663 F.3d 64 (2nd Cir. 2011).

8. For a claim to be heard under the immunity exception of § 1605A, the foreign state defendant must have been designated by the U.S. Department of State as a "state sponsor of terrorism" at the time the act complained of occurred.[6] *Id.*

9. The U.S. Secretary of State designated Iran as a state sponsor of terrorism on January 19, 1984, and Iran has been so designated ever since. *See* Ex. 8, Clawson Affid. ¶40; Ex. 7, Bergman Affid. ¶18; *see also Estate of Heiser v. Islamic Republic of Iran*, 466 F.Supp.2d 229 (D.D.C. 2006); *Flatow v. Islamic Republic of Iran*, 999 F.Supp. 1, 11 . (D.D.C. 1998).[7]

10. Finally, subsection (a)(2)(A)(ii) requires that claims under the immunity exception of § 1605A may be brought where the "claimant or the victim was, at the time the act... occurred — (I) a national of the United States; (II) a member of the armed forces; or (III) otherwise an employee of the Government of the United States ... acting within the scope of the employee's employment...." 28 U.S.C. § 1605A(a)(2)(A)(ii)

11. Plaintiffs have presented evidence that they were either themselves nationals of the United States at the time of the September 11 attacks, or their claims are derived from injuries to victims who were U.S. nationals. Plaintiffs have satisfied the jurisdictional requirement of § 1605A(a)(2)(A)(ii).

2. Plaintiffs Have Satisfied the Personal Jurisdiction Requirement of Providing Defendants Notice of the Lawsuit Through Proper Service of Process

12. Courts may exercise personal jurisdiction over a foreign state where the defendant is properly served in accordance with 28 U.S.C. § 1608. Plaintiffs satisfied the service requirements of § 1608 as follows:

***38** a. Service of process was completed upon each defendant named in the First Amended Complaint: The Islamic Republic of Iran was served with process on October 9, 2002, pursuant to 28 U.S.C. § 1608(a)(4) [U.S.D.C., District of Columbia Docket No. 1:02–cv–305 (JR) Entry 35 and Entry 36]; Ayatollah Ali Hoseini–Khamenei was served with process on September 30, 2002 and October 3, 2002 by alternative service pursuant to Fed.R.Civ.P. 4(f) and the Order of the Honorable James Robertson dated September 30, 2002 [U.S.D.C., District of Columbia Docket No. 1:02–cv–305 (JR) Entry 32 and Entry 35]; the Iranian Ministry of Information and Security was served with process on October 9, 2002, pursuant to 28 U.S.C. § 1608(a)(4) [U.S.D.C., District of Columbia Docket No. 1:02–cv–305 (JR) Entry 35 and Entry 36]; The Islamic Revolutionary Guard Corps. was served with process on October 9, 2002, pursuant to 28 U.S.C. § 1608(a)(4) [U.S.D.C., District of Columbia Docket No. 1:02–cv–305 (JR) Entry 35 and Entry 36]; Hezbollah was served with process on October 9, 2002, pursuant to 28 U.S.C. § 1608(a)(4) [U.S.D.C., District of Columbia Docket No. 1:02–cv–305 (JR) Entry 35 and Entry 36]; The Iranian Ministry of Petroleum was served with process on October 9, 2002, pursuant to 28 U.S.C. § 1608(a)(4) [U.S.D.C., District of Columbia Docket No. 1:02–cv–305 (JR) Entry 35 and Entry 36]; The Iranian Ministry of Economic Affairs and Finance was served with process on October 9, 2002, pursuant to 28 U.S.C. § 1608(a)(4) [U.S.D.C., District of Columbia Docket No. 1:02–cv–305 (JR) Entry 35 and Entry 36]; The Iranian Ministry of Commerce was served with process on October 9, 2002, pursuant to 28 U.S.C. § 1608(a)(4) [U.S.D.C., District of Columbia Docket No. 1:02–cv–305 (JR) Entry 35 and Entry 36]; the Iranian Ministry of Defense and Armed Forces Logistics was served with process on October 9, 2002, pursuant to 28 U.S.C. § 1608(a)(4) [U.S.D.C., District of Columbia Docket No. 1:02–cv–305 (JR) Entry 35 and Entry 36].

b. Service of process was completed upon each of the non-sovereign defendants named in the First Amended Complaint: Sheik Usamah bin–Muhammad bin–Laden, a/k/a Osama bin–Laden, The Taliban, a/k/a the Islamic Republic of Afghanistan, Muhammed Omar, Al Qaeda/Islamic Army and Unidentified Terrorist Defendants 1–500 were served by publication on September 4, 11, 18, 25 and October 2, 2002 pursuant to Fed.R.Civ.P. 4(f) and the Order of the Honorable James Robertson dated May 9, 2002 [U.S.D.C., District of Columbia Docket No. 1:02–cv–305 (JR) Entry 11, Minute Entry, dated May 9, 2002, granting Motion set forth in Entry 11 and Entry 35].

c. Service of Process was completed upon defendants newly identified in the Second Amended Complaint: The Central Bank of the Islamic Republic of Iran was served January 7, 2007 at 9:49 a.m. pursuant to 28 U.S.C. § 1608(a)(3) [Docket Entry 2033];

the National Iranian Petrochemical Company was served January 8, 2007 at 9:32 a.m. pursuant to 28 U.S.C. § 1608(a)(3) [Docket Entry 2033]; National Iranian Oil Company was served January 7, 2007 at 2:45 p.m. pursuant to 28 U.S.C. § 1608(a)(3) [Docket Entry 2033]; National Iranian Tanker Corporation was served January 9, 2007 at 8:35 a.m. pursuant to 28 U.S.C. § 1608(a)(3) [Docket Entry 2033]; Iran Air was served January 5, 2007 at 1:28 p.m. pursuant to 28 U.S.C. § 1608(a)(3) [Docket Entry 2033]; National Iranian Gas Company was served January 20, 2007 at 11:09 a.m. pursuant to 28 U.S.C. § 1608(a)(3) [Docket Entry 2033].

d. Plaintiffs made additional service of the Second Amended Complaint upon defendants that were previously served with the First Amended Complaint and determined to be in default by Judge Robertson: Iranian Ministry of Petroleum was re-served January 9, 2007 at 7:46 a.m. pursuant to 28 U.S.C. § 1608(a)(3) [Docket Entry 2033]; Iran Ministry of Economic Affairs and Finance was re-served January 9, 2007 at 9:24 a.m. pursuant to 28 U.S.C. § 1608(a)(3) [Docket Entry 2033]; Iran Ministry of Commerce was re-served January 7, 2007 at 2:45 p.m. pursuant to 28 U.S.C. § 1608(a)(3) [Docket Entry 2033].

e. On December 23, 2002, Nancy M. Mayer–Whittington, Clerk of the United States District Court, District of Columbia, entered defaults, pursuant to Fed.R.Civ.P. 55(a) for failure to plead or otherwise defend this action, against the following defendants: The Islamic Republic of Iran; Iranian Ministry of Information and Security; The Islamic Revolutionary Guard Corps.; Hezbollah; Iranian Ministry of Petroleum; Iranian Ministry of Economic Affairs and Finance; Iranian Ministry of Commerce; Iranian Ministry of Defense and Armed Forces Logistics; Ayatollah Ali Hoseini Khamenei.

***39** f. On December 27, 2007 J. Michael McMahon, Clerk of the Court, United States District Court, Southern District of New York, entered defaults, pursuant to Fed.R.Civ.P. 55(a) for failure to plead or otherwise defend this action against the following defendants: Central Bank of the Islamic Republic of Iran; National Iranian Petrochemical Company; National Iranian Oil Company; National Iranian Tanker Company; Iran Air; National Iranian Gas Company; Iran Ministry of Defense and Armed Forces Logistics; Iran Ministry of Petroleum; Iran Ministry of Economic Affairs and Finance; Iran Ministry of Commerce and acknowledged the earlier entry of defaults by the U.S.D.C., District of Columbia [Docket Entry 2124–9].

13. As described above, Plaintiffs properly effected service on all Defendants and Defendants did not respond or make an appearance within 60 days. As Defendants received notice through proper service in accordance with § 1608, this Court has personal jurisdiction over them.

B. Defendants Are Liable for Damages to U.S. National Plaintiffs Under FSIA § 1605A

14. Once jurisdiction has been established over Plaintiffs' FSIA claims, the entry of judgment against defendants is appropriate where plaintiffs have established their claim by evidence satisfactory to the Court. 28 U.S.C. § 1608(e). The Court finds that Plaintiffs have satisfied that burden here.

15. Plaintiffs who are U.S. nationals have asserted claims against Defendants under section 1605A(c) which authorizes claims against state sponsors of terrorism to recover compensatory and punitive damages for personal injury or death as follows:

> (c) Private right of action.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—
>
> (1) a national of the United States,
>
> (2) a member of the armed forces,
>
> (3) an employee of the Government of the United States, or of an individual

performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3), for personal injury or death caused by acts described in subsection (a) (1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

28 U.S.C. § 1605A(c).

16. The 9/11 terrorist attacks are contrary to the guarantees "recognized as indispensable by civilized peoples." 28 U.S.C. § 1350 note. Accordingly, the 9/11 attacks and the resulting deaths constitute "extrajudicial killings" that give rise to private right of action under 28 U.S.C. § 1605A(c).

17. The provision of "material support or resources" includes "any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, [and] personnel." *18 U.S.C. § 2339A(b).* As described in detail above, defendants provided several kinds of material support to al Qaeda.

18. Plaintiffs have established by evidence satisfactory to the Court that the Islamic Republic of Iran provided material support and resources to al Qaeda for acts of terrorism, including the extrajudicial killing of the victims of the September 11, 2001 attacks. The Islamic Republic of Iran provided material support or resources, within the meaning of 28 U.S.C. § 1605A, to al Qaeda generally. Such material support or resources took the form of, *inter alia*, planning, funding, facilitation of the hijackers' travel and training, and logistics, and included the provision of services, money, lodging, training,[8] expert advice or assistance, safehouses, false documentation or identification, and/or transportation.

***40** 19. Beyond the evidence that the Islamic Republic of Iran provided general material support or resources to al Qaeda, plaintiffs have established that Iran provided direct support to al Qaeda specifically for the attacks on the World Trade Center, the Pentagon, and Washington, DC (Shanksville, Pennsylvania), on September 11, 2001. Such material support or resources took the form of, *inter alia*, planning, funding, facilitation of the hijackers' travel and training, and logistics, and included the provision of services, money, lodging, training, expert advice or assistance, safehouses, false documentation or identification, and/or transportation.

20. Such provision of material support or resources by various Iranian officials, including, but not limited to, Iran's Supreme Leader the Ayatollah Ali Khamenei and his subordinates, by officers of the IRGC/Qods Force, by the MOIS, and by the intelligence apparatus of the Supreme Leader, was engaged in by Iranian officials, employees, or agents of Iran while acting within the scope of his or her office, employment, or agency.

21. Hizballah was created by Iran, is funded by, and serves as Iran's proxy and agent, particularly in matters of international terrorism, and was doing so before, contemporaneously with, and after, September 11, 2001.

22. Hizballah provided material support, within the meaning of 28 U.S.C. § 1605A, to al Qaeda generally. Such material support or resources took the form of, *inter alia*, planning, funding, facilitation of the hijackers' travel and training, and logistics. Such material support or resources included services, money, lodging, training, expert advice or assistance, safehouses, false documentation or identification, and/or transportation.

23. Beyond the evidence that Hizballah provided general material support or resources

to al Queda, plaintiffs have established that Hizballah provided direct support to al Qaeda specifically for the attacks on the World Trade Center, the Pentagon, and Washington, D.C. (Shanksville, Pennsylvania), on September 11, 2001. Such material support or resources took the form of, *inter alia*, planning, funding, facilitation of the hijackers' travel and training, and logistics, and included the provision of money, lodging, training, expert advice or assistance, safehouses, false documentation or identification, and/or transportation.

24. Such provision of material support or resources by various Hizballah officials, including, but not limited to, Imad Fayez Mughniyah, was engaged in by such persons as agents of Iran while acting within the scope of their agency.

25. After the 9/11 attacks, Iran again gave material support or resources to al Qaeda by, *inter alia*, facilitating the escape of some of al Qaeda's leaders and many of its operatives from the U.S.-led invasion of Afghanistan in late 2001 and early 2002. Such material support or resources took the form of, *inter alia*, planning, funding, facilitation of the hijackers' travel and training, and logistics, and included the provision of services, money, lodging, training, expert advice or assistance, safehouses, false documentation or identification, and/or transportation.

26. After the 9/11 attacks, Hizballah continued to give material support or resources to al Qaeda by, *inter alia*, facilitating the escape of some of al Qaeda's leaders and many of its operatives from the U.S.-led invasion of Afghanistan in late 2001 and early 2002. Such material support or resources took the form of, *inter alia*, planning, funding, facilitation of the hijackers' travel and training, and logistics, and included the provision of services, money, lodging, training, expert advice or assistance, safehouses, false documentation or identification, and/or transportation.

***41** 27. Since the 9/11 attacks, and continuing to the present day, Iran continues to provide material support and resources to al Qaeda in the form of safe haven for al Qaeda leadership and rank-and-file al Qaeda members.

28. Such provision of material support or resources since the 9/11 attacks by various Iranian officials, including, but not limited to, Iran's Supreme Leader the Ayatollah Ali Khamenei and his subordinates, by officers of the IRGC/Qods Force, by the MOIS, and by the intelligence apparatus of the Supreme Leader, has been engaged in by Iranian officials, employees, or agents of Iran while acting within the scope of his or her office, employment, or agency.

29. Such provision of material support or resources since the 9/11 attacks by various Hizballah officials, including, but not limited to, Imad Fayez Mughniyah, has been engaged in by such persons as agents of Iran while acting within the scope of their agency.

30. The FSIA also requires that the extrajudicial killings be "caused by" the provision of material support. The causation requirement under the statute is satisfied by a showing of proximate cause. Proximate causation may be established by a showing of a "reasonable connection" between the material support provided and the ultimate act of terrorism. *Valore*, 700 F.Supp.2d at 66. "Proximate cause exists so long as there is 'some reasonable connection between the act or omission of the defendant and the damages which the plaintiff has suffered.' " *Id.* (quoting *Brewer*, 664 F.Supp.2d at 54 (construing causation element in 28 U.S.C. § 1605A by reference to cases decided under 28 U.S.C. § 1605(a)(7))).

31. Plaintiffs have demonstrated several reasonable connections between the material support provided by defendants and the 9/11 attacks. Hence, plaintiffs have established that the 9/11 attacks were caused by Defendants' provision of material support to al Qaeda.

32. Under the FSIA, "a 'foreign state' ... includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state" as defined in the FSIA. 28 U.S.C. § 1603(a). The FSIA defines the term "agency or instrumentality of a foreign state" as any entity (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by

a foreign state or political subdivision thereof, and (3) which is neither a citizen of... the United States ... nor created under the laws of any third country. 28 U.S.C. § 1603(b)(1)–(3); *see Estate of Heiser, et al. v. Islamic Republic of Iran*, No. 00–cv–2329 (RCL), Consolidated With No. 01–cv–2104 (RCL) (D.D.C. August 10, 2011). Accordingly, Iran's Ministry of Information and Security, the Islamic Revolutionary Guard Corps, Iran's Ministry of Petroleum, Iran's Ministry of Economic Affairs and Finance, Iran's Ministry of Commerce, and Iran's Ministry of Defense and Armed Forces Logistics, which are all political subdivisions of Defendant Iran, are all legally identical to Defendant Iran for purposes liability under the FSIA.

33. Further, Defendants Hizballah, the National Iranian Tanker Corporation, the National Iranian Oil Corporation, the National Iranian Gas Company, Iran Airlines, the National Iranian Petrochemical Company, and the Central Bank of the Islamic Republic of Iran, at all relevant times acted as agents or instrumentalities of defendant Iran. Each of these Defendants is subject to liability under as agents of Iran under § 1606A(c) of the FSIA and as co-conspirators, aiders and abetters under the ATCA.

***42** 34. The two Iranian individuals, Defendant Ayatollah Ali–Hoseini Khamenei and Ali Akbar Hashemi Rafsanjani, each are an "official, employee, or agent of [Iran] ... acting with the scope of his or her office, employment, or agency" and therefore, Khamenei and Rafsanjani are legal equivalent to defendant Iran for purposes of the FSIA which authorizes against a cause of action against them to the same extent as it does a cause of action against the "foreign state that is or was a state sponsor of terrorism" itself. 28 U.S.C. § 1605A(c). Each of these Defendants is subject to liability under as agents and officials of Iran under § 1606A(c) of the FSIA and as co-conspirators, aiders and abetters under the ATCA.

35. Iran is liable for damages caused by the acts of all agency and instrumentality Defendants because "[i]n any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents." *Id.* 28 U.S.C. § 1605A(c).[9]

The above Findings of Fact and Conclusions of Law are hereby entered.

All Citations

Not Reported in Fed. Supp., 2011 WL 13244047

Footnotes

1 Plaintiffs have also asserted claims against non-sovereign defendants Usama (or Osama) bin Laden, the Taliban, Muhammad Omar, and the al Qaeda/Islamic Army, for wrongful death, survival, intentional infliction of emotional distress, and conspiracy. The non-sovereign defendants were served with the Amended Complaint pursuant to Fed. R. Civ. P. 4 and the alternative forms of service approved by the Court, including service by publication in prominent periodicals in the Middle East. Plaintiffs seek entry of default judgments against these defendants in a separate Motion for Judgment by Default Against Non–Sovereign Defendants (MDL Docket Document No. 2125).

2 Service under the FSIA is governed by 28 U.S.C. § 1608. Subsection (a) provides for service on foreign states, while subsection (b) provides for service on an agency or instrumentality of a foreign state. To determine whether a foreign entity should be treated as the state itself or as an agency or instrumentality, courts apply the "core functions" test: if the core functions of the entity are governmental, it is treated as the state itself; and if the core functions are commercial, it is treated as an agency or instrumentality. *See Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 232 (D.C. Cir. 2003).

3 For details of the steps taken to effectuate service on the defaulting defendants, *see* Plaintiffs' memorandum and supporting documents submitted to the Court via letter dated October 27, 2009.

4 Plaintiffs' Second Amended Complaint amended the prior Complaint in three areas: 1) it added certain named plaintiffs; 2) it removed certain plaintiffs represented by other counsel in other cases; and 3) it substituted certain instrumentality defendants for defendants previously designated as "Unidentified Terrorist Defendants."

5 While plaintiffs' Third Amended Complaint includes a claim under the ATCA, plaintiffs have presented evidence that every plaintiff is either a national of the United States or has asserted a claim that derives from a victim who was a national of the United States at the time of the 9/11 attacks. Accordingly, all plaintiffs meet the requirements established in 28 U.S.C. § 1605A(a)(2)(A)(ii) for recovery under the FSIA.

6 The Secretary of State designates state sponsors of terrorism pursuant to three statutory authorities: § 6(j) of the Export Administration Act of 1979, 50 U.S.C. app. § 2405(j); § 620A of the Foreign Assistance Act, 22 U.S.C. § 2371; and § 40(d) of the Arms Export Control Act, 22 U.S.C. § 2780(d).

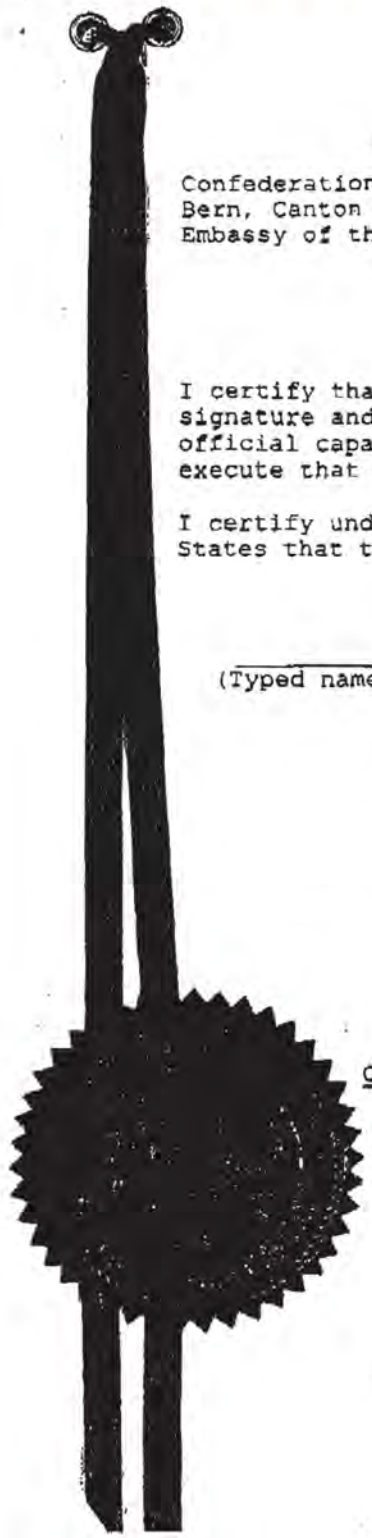
7 In its August 2010 *Country Reports on Terrorism*, the State Department reported that "Iran remained the most active state sponsor of terrorism," and "Iran's financial, material, and logistic support for terrorist and militant groups throughout the Middle East and Central Asia had a direct impact on international efforts to promote peace, threatened economic stability in the Gulf and undermined the growth of democracy." Ex. 13, U.S. Department of State, *Country Reports on Terrorism 2009*, p. 182. *See* http://www.state.gov/s/ct/rls/crt/2009/index.htm. This report echoes similar State Department conclusions about Iran's material support for terrorism for three decades. *See* Ex. 13; Ex. 6, Lopez–Tefft Affid. ¶¶66–95; Ex. 8, Clawson Affid. ¶¶40–42.

8 Plaintiffs established that the Iranian government both trained al Qaeda members and authorized the provision of training by Hizballah. This support qualifies as "training, expert advice or assistance" under *18 U.S.C. § 2339A(b).* See *§ 2339A(b)(2)* and *(3)* (defining "training" as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge" and "expert advice or assistance" as "advice or assistance derived from scientific, technical or other specialized knowledge").

9 Plaintiffs have also asserted state law claims for wrongful death, survival, intentional infliction of emotional distress, and conspiracy. In circumstances where the federal cause of action is not available, courts must determine whether a cause of action is available under state or foreign law and engage in a choice of law analysis. *Owens v. Republic of Sudan,* 2011 WL 5966900, 826 F.Supp.2d 128 (D.D.C. 2011). Because the Court finds that defendants are liable under plaintiffs' federal claims, an analysis of liability under state law is unnecessary.

End of Document

ANNEX 358



SPECIFIC AUTHENTICATION CERTIFICATE

Confederation of Switzerland)
Bern, Canton of Bern) SS:
Embassy of the United States of America)

I certify that the annexed document is executed by the genuine signature and seal of the following named official who, in an official capacity, is empowered by the laws of Switzerland to execute that document.

I certify under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Liliane GYGAX
(Typed name of Official who executed the annexed document)

(Signature of Consular Officer)

Scott D. Boswell
(Typed name of Consular Officer)

Consul of the United States of America
(Title of Consular Officer)

October 17, 2002
(Date)

EMBASSY OF SWITZERLAND

No. 1074-IE

The Embassy of Switzerland , Foreign Interests Section , in Tehran presents its compliments to the Ministry of Foreign Affairs of the Islamic Republic of Iran and has the honor to refer the Ministry of Foreign Affairs of the Islamic Republic of Iran to the lawsuit entitled Fiona Havlish, et al. v. Islamic Republic of Iran , et al. : Civil Case No. 1:02-CV-0305 (JR) in which the Islamic Republic of Iran , the Islamic Revolutionary Guard and Iranian Ministries of Information and Security, of Petroleum, of Economic Affairs and Finance, of Commerce, and of Defense are defendants . The case is pending in United States District Court , District of Columbia . The Embassy herewith transmits a Notice of Suit with Summons and Complaint. This note constitutes service of these documents upon the Government of the Islamic Republic of Iran as contemplated in Title 28, United States Code , Section 1608(a)(4) .

Under applicable United States law a defendant in a lawsuit must file an answer to the Summons and Complaint or some other responsive pleading within 60 days from the date of service of the Summons and Complaint (i.e. the date of this note) or face the possibility of having final judgment entered against it without the opportunity of presenting evidence or arguments in its behalf . Accordingly , the Foreign Interests Section requests that the enclosed summons be forwarded to the appropriate authority of the Government of the Islamic Republic of Iran with a view towards taking whatever steps are necessary to answer the Summons and Complaint .

Please note that under United States law and procedure neither the Embassy nor the Department of State is in a position to comment on the present suit . Under the laws of the United States , any jurisdictional or other defense including claims of sovereign immunity must be addressed to the court before which the matter is pending , for which reason it is advisable to consult an attorney in the United States .

The enclosure includes a copy of pertinent United States laws concerning sovereign immunities .

The Embassy of Switzerland , Foreign Interests Section , avails itself of this opportunity to renew to the Ministry of Foreign Affairs of the Islamic Republic of Iran the assurances of its highest consideration .

Tehran , October 09, 2002 (Mehr 17, 1381)

EMBASSY OF SWITZERLAND FOREIGN INTERESTS

Ministry of Foreign Affairs of the
Islamic Republic of Iran
Tehran

I , Antje Günther , Deputy Head of the Foreign Interests Section of the Embassy of Switzerland in Tehran certify that this is a true copy of the Embassy of Switzerland , Foreign Interests Section diplomatic note number 1074-IE dated October 09, 2002 , and delivered to the Ministry of Foreign Affairs of the Islamic Republic of Iran on October 09, 2002.

Antje Günther
Deputy Head of Foreign Interests Section

Tehran , October 09, 2002

SWISS FEDERAL CHANCELLERY

No. 7978
Seen for legalization of
the above signature
Berne, 15. Okt. 2002
Swiss Federal Chancellery

Liliane Gygax

SPECIFIC AUTHENTICATION CERTIFICATE

Confederation of Switzerland)
Bern, Canton of Bern) SS:
Embassy of the United States of America)

I certify that the annexed document bears the genuine seal of the Swiss Federal Department of Foreign Affairs.

I certify under penalty of perjury under the laws of the United States that the foregoing is true and correct.

(Signature of Consular Officer)

Scott D. Boswell
(Typed name of Consular Officer)

Consul of the United States of America
(Title of Consular Officer)

October 17, 2002
(Date)

20643

EIDGENÖSSISCHES DEPARTEMENT
FÜR AUSWÄRTIGE ANGELEGENHEITEN

DRINGEND
K.252.41 USA/IRAN 3 A

Das Eidgenössische Departement für auswärtige Angelegenheiten, bezieht sich auf die Note CONS No. 13182 vom 30. September 2002 betr. die Übermittlung von Gerichtsakten im Sammelklagefall Fiona Havlish gegen die Islamische Republik Iran, und beehrt sich, der Botschaft der Vereinigten Staaten von Amerika, in der Beilage die acht Sätze der Unterlagen zuzustellen, die es vom Dienst für amerikanische Interessen der Schweizerischen Botschaft in Teheran zurückerhalten hat.

- **8 Sätze Gerichtsakten: Fiona Havlish, et al. v. the Islamic Republic of Iran, et al.; CV No. 1:02-CV-0305 (JR)**
- **"Proof of Service", datiert vom 9. Oktober 2002**

Der genannte Dienst hat die oben erwähnten Gerichtsakten samt seiner Note Nr. 1074-IE, datiert vom 9. Oktober 2002, mit Bestätigung des 'proof of service', datiert vom 9. Oktober 2002 **ohne Kommentar seitens des iranischen Aussenministeriums zurückerhalten.**

Das Departement benützt auch diesen Anlass, um die Botschaft seiner ausgezeichneten Hochachtung zu versichern.

DEPARTEMENT FEDERAL DES AFFAIRES ETRANGERES

Bern, 16. Oktober 2002

Beilagen erwähnt

An die Botschaft der
Vereinigten Staaten von Amerika

Informal Embassy translation from the German of SPP Note No. 20643 dated October 16, 2002:

"The Federal Department of Foreign Affairs, referring to Embassy's note No. 13182 of September 30, 2002 concerning the transmission of the court documents in the case Fiona Havlish, et al. vs. the Islamic Republic of Iran, has the honor to submit to the Embassy of the Untied States of America the following enclosures received from the American Interests Section of the Swiss Embassy in Tehran.

- **8 sets of the court documents: Fiona Havlish, et al. vs. the Islamic Republic of Iran, et al.; CV No. 1:02-CV-0305 (JR)**
- **"Proof of service" dated October 9, 2002**

The Interests Section received back the above mentioned court documents as well as its Note No. 1074-IE dated October 9, 2002 and the confirmation of 'proof of service' dated October 9, 2002 from **the Iranian Ministry of Foreign Affairs with no comments.**

Complimentary close.

Bern, October 16, 2002

Enclosures as stated

SPECIFIC AUTHENTICATION CERTIFICATE

Confederation of Switzerland)
Bern, Canton of Bern) SS:
Embassy of the United States of America)

I, Scott D. BOSWELL, a consular officer at the Embassy of the United States at Bern, Switzerland, certify that this is a true copy of Embassy note number 13182 dated September 30, 2002, which was transmitted to the Swiss Ministry of Foreign Affairs on October 1, 2002 for further transmission to the American Interests Section of the Swiss Embassy in Tehran, Iran.

(Signature of Consular Officer)

Scott D. BOSWELL
(Typed name of Consular Officer)

Consul of the United States of America
(Title of Consular Officer)

October 17, 2002
(Date)

Embassy of the United States of America
September 30, 2002

CONS NO. 13182

U R G E N T!

Federal Department of Foreign
Affairs
Foreign Interests Service
Bundesgasse 32
3003 Bern

Subject: JUDICIAL ASSISTANCE: Service of Summons and Complaint and Notice of Suit Pursuant to the Foreign Sovereign Immunities Act - Fiona Havlish et al. v. Islamic Republic of Iran, et al.; Civil Case No. 1:02-CV-0305 (JR)

REF: ----

The Department of State has requested the delivery of the enclosed Summons and Complaint and Notice of Suit to the Islamic Republic of Iran pursuant to the Foreign Sovereign Immunities Act in the matter of Fiona Havlish, et al. v. Islamic Republic of Iran, et al.; Civil Case No. 1:02-CV-0305 (JR).

The Embassy is herewith requesting the Swiss Ministry of Foreign Affairs to transmit the documents to the American Interests Section of the Swiss Embassy in Tehran. The American Interests Section should transmit the Summons and Complaint and Notice of Suit to the Islamic Republic of Iran under cover of a diplomatic note utilizing the language provided in the enclosed instruction.

Transmittal should be done in a manner which enables the Embassy to confirm delivery. The American Interests Section should execute the certification of the diplomatic note, which will be forwarded by the Department of State to the requesting court in the United States.

Enclosed is the appropriate part of a Memorandum the Embassy received from the Department of State as well as seven sets of the Summons and Complaint and Notice of Suit for the Iranian Ministry of Foreign Affairs.

The Embassy would appreciate being informed of the date the American Interests Section of the Swiss Embassy in Tehran receives the documents as well as the date the Interests Section forwards the Summons and Complaint and Notice of Suit to the Iranian authorities.

SPP's speedy assistance is much appreciated.

ROUTINE PRECEDENCE
COPY 01 OF 03 FOR: OCS

UNCLASSIFIED

Department of State

INCOMING
TELEGRAM

WARSAW 03544 [redacted]

ACTION OCS-03

INFO LOG-00 AID-00 AMAD-00 SRPP-00 EUR-00 UTED-00 TEDE-00
IO-00 JUSE-00 L-00 NEA-00 NSAE-00 TEST-00 LBA-00
SAS-00 [redacted]

R 02[redacted]CT 02
FM AMEMBASSY WARSAW
TO SECSTATE WASHDC 5997

UNCLAS WARSAW 003544

FOR CA/OCS/PRI-LUKE BELLOCCHI

E.O. 12958: N/A
TAGS: CJAN, PL
SUBJECT: JUDICIAL ASSISTANCE - SERVICE OF PROCESS TO IRAQ

REF: DEPARTMENT (CA/OCS/PRI) MEMO DATED 09/13/02

1. Post received a request for service of Summons and Complaint and Notice of Suit on The Republic of Iraq in the matter of Fiona Havlish, et al. v. Islamic Republic of Iraq, et al.; Civil Case No. 1:02-CV-0305 (JR).

2. On October 1, 2002 post delivered the documents to be served, accompanied with a diplomatic note number C-00143, dated October 1, 2002 to the Polish Ministry of Foreign Affairs for transmittal to the American Interests Section in Baghdad.
Hill

2002 OCT -2 A 10:20

Annex 358