13-2952-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

DEBORAH D. PETERSON *et al.*,

Plaintiffs-Appellees.

– against –

ISLAMIC REPUBLIC OF IRAN, *et al.*,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES AND THIRD PARTY DEFENDANTS-APPELLEES

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ISSUES PRESENTED

1. Does 22 U.S.C. §8772 impermissibly intrude upon the judiciary's Article III powers although the statute preserves courts' constitutional role in making the factual and legal determinations necessary to assess whether Plaintiffs satisfied Congressionally adopted standards?

2. Did the government unlawfully "take" the property of defendant Bank Markazi ("Markazi") in violation of the Fifth Amendment by enacting §8772, which, like provisions of the Terrorism Risk Insurance Act of 2002 (28 U.S.C. §1610 (note) ("TRIA")) that this Court previously found constitutional, simply permits victims of Iranian terrorism to execute judgments against assets beneficially owned by Iran's agencies and instrumentalities?

3. Does §8772 conflict with the 1955 Treaty of Amity between the U.S. and Iran (the "Treaty") and, if a conflict exists, does §8772's "notwithstanding" clause preempt the Treaty?

4. Did TRIA, which empowers plaintiffs to execute against the "blocked assets of" agencies and instrumentalities of the terrorist state that injured them, entitle Plaintiffs to execute against assets beneficially owned by Markazi?

5. Can Markazi, a U.S. government-designated money launderer, invoke 28 U.S.C. §1611(b)(1)'s central bank immunity to execution although TRIA applies "[n]otwithstanding any other provision of law?"

STATEMENT OF THE CASE

A. The Parties

The Plaintiffs are: the representatives of hundreds of Americans killed in multiple Iran-sponsored terrorist attacks, including hundreds of Marines and Air Force Airmen murdered in the 1983 and 1996 attacks upon the Marine barracks in Beirut, Lebanon, and the Khobar Towers complex in Saudi Arabia; the survivors of those terrorist attacks; and the family members of those killed and injured. Plaintiffs secured over $3.3 billion in unpaid compensatory damages judgments against Iran and Iranian agencies pursuant to two provisions of the Foreign Sovereign Immunities Act ("FSIA") that authorize claims against state sponsors of terrorism, 28 U.S.C. §§1605(a)(7) (repealed in 2008) and 1605A. A-Vol.XII-3443-44(¶¶33-34); A-Vol.XIII-3704-3770; A-Vol.XIV-3875(¶2); A-Vol.XIV-3877-78; A-Vol.XIV-3884-85(¶¶1-2); A-Vol.XIV-3887-3957; A-Vol.XIV-3967-68(¶¶3-5); A-Vol.XIV-3970-81; A-Vol.XIV-3999-4000(¶¶1-2,4); A-Vol.XIV-4002-30; A-Vol.XIV-4033-63.

Markazi is Iran's 100%-owned central bank. A-Vol.V-1252; A-Vol.XII-3440(¶¶15-16); A-Vol.XIII-3595; A-Vol.XIII-3602.

B. The Markazi Assets And The Restraints

In February 2008, Markazi held roughly $2.1 billion in U.S. dollar-denominated bonds (the "U.S. Bonds") that were sub-custodized in the "Omnibus"

account that its securities intermediary, defendant Clearstream Banking, S.A. ("Clearstream"), held at Citibank, N.A. ("Citibank") in New York. A-Vol.V-1183-86; A-Vol.V-1328-1338(¶¶6-7,23-26); A-Vol.XII-3436-3449(¶14); A-Vol.XIX-5397-5410(¶¶6,35); A-Vol.XIX-5411-14. On January 16, 2008, the U.S. House of Representatives passed a bill that eventually became P.L. 110-181. That law, which added 28 U.S.C. §1610(g) to the FSIA as of January 28, 2008, authorized terrorism victims to enforce judgments against agencies and instrumentalities of state sponsors of terrorism. 154 Cong. Rec. H75 (Jan. 16, 2008); A-Vol.VII-1988-90.

On January 17, 2008, Markazi instructed defendant Banca UBAE, S.p.A. ("UBAE"), an Italian bank controlled by Libya's Gaddafi regime, to open a new Clearstream account to house the U.S. Bonds and to disguise Markazi's ownership of those securities. A-Vol.V-1332(¶¶22-26); A-Vol.VII-1931(¶25); A-Vol.VII-1997-2027; A-Vol.VIII-2028-29. Between February 7 and February 29, 2008, Markazi, Clearstream and UBAE transferred the vast majority of Markazi's U.S. Bonds into the newly established account. A-Vol.V-1332(¶¶22-26); A-Vol.VII-1931(¶25); A-Vol.VII-1997-2027; A-Vol.VIII-2028-29.

On June 11, 2008, Plaintiffs learned from subpoena responses served by the Department of Treasury's Office of Foreign Assets Control ("OFAC") that Markazi held the U.S. Bonds through Clearstream's "Omnibus" account at

Citibank. A-Vol.XIX-5398(¶6); A-Vol.XIX-5411-14. Plaintiffs promptly obtained restraints against the transfer of any interest in the U.S. Bonds (the "Restraints") by serving restraining notices and executions on Citibank and Clearstream. A-Vol.VI-1502; A-Vol.XII-3436-39(¶¶3-12); A-Vol.XII-3452-527; A-Vol.XIII-3528-93.

On June 27, 2008, the District Court granted Clearstream's motion to vacate the Restraints on Markazi's interests in two U.S. Bonds with a face value of $250 million that Markazi sold before the Restraints attached. A-Vol.V-1169-77; A-Vol.VI-1502. The Restraints on the remaining $1.75 billion in U.S. Bonds (the "Markazi Assets") remained in place throughout the District Court action. A-Vol.IV-1078-79; A-Vol.VI-1501-02; A-Vol.XIII-3588-93.

C. EO-13599 And §8772

On June 8, 2010, certain Plaintiffs initiated an action against Markazi, Clearstream, Citibank, and UBAE to obtain turnover of the Markazi Assets and recover the two fraudulently transferred U.S. Bonds. A-Vol.IV-1079; A-Vol.V-1214-15. On February 5, 2012, President Obama issued Executive Order 13599 ("EO-13599"), which condemns the "deceptive practices of [Markazi] and other Iranian banks to conceal transactions of sanctioned parties... and the continuing and unacceptable risk posed to the international financial system by Iran's activities." A-Vol.VII-1935-38; A-Vol.XII-3441(¶20). EO-13599 declared "[a]ll

property and interests in property of" Markazi held in the U.S. or by a "United States person" to be "blocked" pursuant to, among other statutes, the International Emergency Economic Powers Act ("IEEPA"). A-Vol.VII-1935(§1); A-Vol.XII-3440(¶18).

Before President Obama issued EO-13599, Markazi had claimed the Markazi Assets as its property *repeatedly and unambiguously* in this litigation. Markazi even detailed how it recorded them as assets in its financial records. A-Vol.V-1224; A-Vol.V-1228; A-Vol.V-1232-33; A-Vol.V-1259; A-Vol.XII-3439(¶13); pp.42-43, *infra*.

Plaintiffs filed a motion for partial summary judgment regarding their TRIA claim soon after EO-13599 blocked the Markazi Assets. A-Vol.III-784-85; A-Vol.IV-1081. On August 10, 2012, while that motion was pending, President Obama signed §8772 into law. A-Vol.IV-1082. Plaintiffs then filed a supplemental motion for summary judgment pursuant to §8772.

The District Court granted summary judgment with respect to the TRIA and §8772 claims. A-Vol.III-871. Post-judgment, Plaintiffs settled with Clearstream and UBAE, leaving Markazi as the sole appellant.

SUMMARY OF ARGUMENT

Markazi concedes that Plaintiffs proved the statutory elements of their §8772 claim. Thus, Markazi finds itself in the ironic position of advancing

principally constitutional challenges to a claim arising from Iran's terrorist attacks upon Marines, Airmen and other U.S. citizens.

Those supposed constitutional defenses exhibit no merit. Section 8772 violates no Article III separation of powers principles because it preserves courts' constitutional role in adjudicating the statute's elements and defenses. Federal courts have held repeatedly that no constitutional problems arise where, as here, Congress merely adopts new liability standards that courts apply to pending litigation.

Nor does §8772 effect an unlawful taking under the Fifth Amendment. Like TRIA, §8772 codified a substantive rule that the assets of a terrorist state's wholly owned agency are subject to execution to pay terrorism-related judgments against that state. This Court's decision in *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43 (2d Cir. 2010), where the court rejected takings challenges to TRIA indistinguishable from Markazi's §8772 arguments, demonstrates that Congress can constitutionally adopt that substantive rule.

The three factors the Supreme Court has analyzed in considering takings challenges bolster that conclusion. First, the "character of the government action" at issue – a statute facilitating the payment of terrorism judgments and deterring future attacks – is beyond reproach. Second, the "economic impact" of the liability §8772 imposes equals only a fraction of the damages Iran caused. Finally, given

our government's long history of sanctioning Iran and other terrorist states, Markazi cannot credibly contend that it possessed a reasonable "investment-backed expectation" that it could invest its assets in this country without the risk of government interference.

Markazi also cannot establish that §8772 effected a taking by "legalizing" the supposedly improper Restraints. Markazi fails to demonstrate that the District Court could not have preserved the status quo in circumstances where allowing Markazi to move its assets out of the U.S. would have rendered Plaintiffs' judgments against Iran meaningless. In any event, entry of the final judgment has mooted questions regarding the propriety of pre-trial relief. Furthermore, Markazi's implicit supposition that, absent the restraints, it would have moved the Markazi Assets outside of the U.S. before EO-13599 blocked them is wholly speculative and ignores that such transfers would have required assistance from multiple financial institutions barred from providing services to Iranian agencies by OFAC's Iranian Transactions Regulations ("ITRs").

Markazi's only non-constitutional argument regarding the §8772 claim – the contention that the Treaty bars turnover – fails because Markazi has advanced no actual conflict between §8772 and the Treaty. In any event, §8772 applies "notwithstanding any other provision of law." Given the absolute preemptive

power of such "notwithstanding" clauses, §8772 overrides any conflicting Treaty provision.

Plaintiffs' TRIA claim provides a second clear-cut basis for turnover. To establish that claim, Plaintiffs had to show that the Markazi Assets, which consisted solely of cash held in a blocked account at Citibank (the "Blocked Account") when the District Court awarded summary judgment, were "blocked assets of" Markazi. TRIA's plain meaning and legislative history, substantial case law, and common sense dictate that assets that Markazi beneficially owned qualify as the "assets of" Markazi. In contrast, Markazi cannot cite any case finding that the "assets of" an entity are limited to property to which that entity holds legal title.

Applying the beneficial ownership standard to the relevant facts demonstrates that the Markazi Assets were the "blocked assets of" Markazi. Before EO-13599 blocked the Markazi Assets, thereby making them subject to TRIA, Markazi *repeatedly admitted* that the Markazi Assets were the "property of" the bank, that Markazi was the 100% "beneficial owner" of those assets, and that the bank recorded those assets as its property in its financial statements.

No amount of post-hoc rationalization can obscure the truism that, if a bank owns an asset – such as a bond or cash – that asset is an "asset of" the bank. Markazi's admissions and the record evidence demonstrate that only Markazi enjoyed any dominion over, or derived any return from, the Markazi Assets.

Accordingly, Markazi was the sole beneficial owner of the Markazi Assets, and TRIA's plain meaning demonstrates that the statute authorized execution.

Markazi's various "defenses" to the TRIA claim all fail. Markazi's election to hold its assets through intermediaries contractually obligated and statutorily bound by the Uniform Commercial Code ("UCC") to do Markazi's bidding did not transform the Markazi Assets into the "assets of" those entities. As courts have found, a contrary rule would enable terrorist states to evade TRIA and other sanctions simply by holding assets through intermediaries.

Markazi also errs when it suggests that, in addition to satisfying TRIA's dictates, Plaintiffs must demonstrate that the Markazi Assets were also subject to execution pursuant to particular UCC and CPLR provisions. Rather, TRIA dictates that Plaintiffs can execute against the "blocked assets of" Markazi and that the statute applies "notwithstanding" any contrary law. Thus, TRIA preempts any contrary state law, including the provisions Markazi invokes as imposing *additional* requirements upon Plaintiffs.

Markazi's observations regarding the proper garnishee for "securities entitlements" under the UCC and CPLR provide no support for reversal. Whether one analyzes the collectability of cash (the proper approach given the status of the Markazi Assets when Plaintiffs obtained turnover) or securities entitlements (Markazi's erroneous approach), CPLR §5201(b) permitted execution because

Markazi could "assign[] or transfer[]" its admitted interest in the Markazi Assets. Markazi also ignores that CPLR §5225(b), which allows judgment creditors to execute against "money...in which the judgment debtor has an interest," provided for execution against the cash in the Blocked Account.

Finally, every court that has considered the issue has ruled that TRIA's "notwithstanding" clause negates the immunity that FSIA §1611(b)(1) provides to central banks' assets in non-TRIA cases. Thus, Markazi's supposed §1611(b)(1) defense fares no better than its sophistic contentions that the assets it admittedly owned were not its assets at all.

STANDARD OF REVIEW

This Court reviews summary judgment decisions *de novo* while construing the evidence favorably to the non-moving party. *Rhodes v. U.S.*, 519 Fed.Appx. 703, 704-05 (2d Cir. 2013). Summary judgment is appropriate where "there is 'no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *McElwee v. County of Orange*, 700 F.3d 635, 640 (2d Cir. 2012) (quoting Fed.R.Civ.P. 56(a)).

Plaintiffs bear the initial burden of demonstrating the absence of any genuine issues of material fact. Markazi must then elicit "specific facts showing that there is a *genuine issue for trial*." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted; emphasis in original). While the Court

must credit Markazi's evidence and draw reasonable inferences in its favor, "conclusory statements, conjecture, or speculation...will not defeat summary judgment." *Kulak v. City of N.Y.*, 88 F.3d 63, 71 (2d Cir. 1996).

The abuse of discretion standard governs review of anti-suit injunctions. *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 118-19 (2d Cir. 2007).

ARGUMENT

I.

SECTION 8772 ENTITLES PLAINTIFFS TO TURNOVER

A. Plaintiffs Established The Elements Of Their §8772 Claim

Markazi concedes that Plaintiffs established the elements of their §8772 claim. Thus, the Court need only determine whether the District Court properly rejected Markazi's supposed defenses under: (a) Article III separation of powers principles; (b) the Treaty; and (c) the Fifth Amendment's Takings Clause.

B. Section 8772 Does Not Violate Article III Separation Of Powers Principles

Congress exercises its constitutional power by enacting statutes that "compel[] changes in law, not findings or results under old law." *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 438 (1992). Accordingly, "if Congress changes the law while a case is pending, the courts are obligated to apply the law as they find it at the time of judgment." *National Juvenile Law Center v. Regnery*,

738 F.2d 455, 465 (D.C. Cir. 1984). In particular, Congress may alter the corporate "separateness" rules that protect companies from liabilities of related entities. *Branch ex. rel. Maine Nat'l Bank v. U.S.*, 69 F.3d 1571, 1577-78 (Fed. Cir. 1995) (Congress could make banks liable for debts of other subsidiaries of same bank holding company). Moreover, "[b]y reason of its authority over foreign commerce and foreign relations, Congress has the undisputed power to decide…whether and under what circumstances foreign nations should be amenable to suit in the United States." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983).

Here, §8772 did not interfere with the judiciary's constitutional role in determining the relevant facts and interpreting Congressionally adopted law. Rather, §8772 merely clarified the substantive law applicable to Plaintiffs' claims while requiring Plaintiffs to prove the facts the statute specifies. The fact that §8772(a)(2) is titled "Court determination required" underscores the important fact-finding role that Congress reserved for the courts. In §8772(a)(1)-(2), the statute required the District Court to determine whether Plaintiffs proved a series of facts regarding the Markazi Assets.

Markazi tacitly acknowledges that the District Court was required to, and did, undertake that extensive factual and legal analysis before awarding turnover. It nevertheless contends that §8772 is unconstitutional because requisite findings –

e.g., that Markazi had a beneficial interest in the Markazi Assets and that no other person possessed a constitutionally protected interest – were certain to be decided in Plaintiffs' favor by the District Court. *See* Markazi Br. 53-54. Ultimately, Markazi's actual complaint concerns the supposedly lax standards Congress enacted, but no case identifies difficulty as a proxy for constitutionality.

In any event, Markazi understates the obligations §8772 imposed upon Plaintiffs, including the takings inquiry the statute required. Section 8772(a)(2) dictates that Plaintiffs could not execute upon any portion of the Markazi Assets in which a party other than Iran or its agencies and instrumentalities held a protected Fifth Amendment interest. Clearstream strenuously argued below that awarding turnover to Plaintiffs would unconstitutionally take Clearstream's property. Markazi therefore cannot credibly claim that Congress pre-ordained the results of §8772's takings analysis.

Markazi also ignores several elements that Plaintiffs had to establish to obtain turnover, including whether the Markazi Assets were: (a) held in the U.S. for a foreign securities intermediary doing business here; (b) blocked assets; (c) equal in value to a financial asset of Markazi that Clearstream or a related intermediary held abroad; and (d) sought to be executed upon to satisfy compensatory damages awards against Iran arising from terrorist attacks. 22 U.S.C. §8772(a)(1)-(2).

Markazi's cases, all but one of which discerned no constitutional violation, support finding §8772 a lawful exercise of Congress' legislative power. *See Robertson*, 503 U.S. at 438 (rejecting Article III challenge because, by replacing the statutes the plaintiffs had invoked in two pending cases with standards specified in a new statute, Congress "compelled changes in law, not findings or results under old law"); *Axel Johnson Inc. v. Arthur Anderson & Co.*, 6 F.3d 78, 81-82 (2d Cir. 1993) (new statute of limitations was constitutional because it did "not control courts' determinations with respect to whether particular cases satisf[ied]" the new statute, but rather left "to the courts the task of determining whether a claim falls within the ambit of the statute").

No constitutional significance attaches to Markazi's observation that Congress knew before it adopted §8772 that Markazi beneficially owned the Markazi Assets. In *Axel Johnson*, Congress also recognized that the plaintiffs in the pending matter would satisfy the new statute of limitations. 6 F.3d at 82. *Robertson* and *Axel Johnson* also foreclose Markazi's contention that §8772 violates Article III because the statute applies solely to this action. *Id.* ("Nor is it significant to our separation of powers analysis that [the challenged statute] changed the law for only a limited class of cases, given that the change in law at issue in *Robertson* was limited to only two identified cases.").

The one case cited by Markazi that found a separation of powers violation, *U.S. v. Klein*, 80 U.S. 128 (1872), pre-dates the more apposite *Robertson* and *Axel Johnson* decisions by more than a century and provides no support for reversal. *Klein* held that Congress could not compel courts to interpret Presidential pardons as proof of disloyalty when the Supreme Court had determined they had the opposite effect. Unlike *Klein*, this case involves no Congressional dictate that the courts reach a particular conclusion, much less one directly contrary to Supreme Court precedent. Notably, *Klein* also emphasized that Article III empowers Congress to change the law applicable to pending cases if the statute permits courts to adjudicate those matters under the new legislation. *Id.* at 147; *accord*, *e.g.*, *Benjamin v. Jacobson*, 124 F.3d 162, 174 (2d Cir. 1997) (no violation of *Klein's* separation of powers principles "if legislation can be characterized as changing the underlying law rather than as prescribing a different outcome under the pre-existing law").

Markazi also mistakenly invokes an example utilized in *Lindh v. Murphy*, 96 F.3d 856, 872 (7th Cir. 1996), *rev'd*, 521 U.S. 320 (1997), where the Seventh Circuit observed that "Congress cannot say that a court must award Jones $35,000 for being run over by a postal truck, but it may...provide that victims of torts by federal employees cannot receive punitive damages." Like the provision *Lindh* deemed constitutional, §8772 did not direct the District Court to find for Plaintiffs.

Rather, Congress merely adopted substantive standards while allowing courts to fulfill their Article III role of determining whether Plaintiffs satisfied those requirements.

Markazi's contention that Congress dictated the result here by including the words "shall be subject to execution" in §8772 is defeated by *Weinstein*, which found no Article III violation even though TRIA utilizes *precisely the same wording*. *Weinstein*, 609 F.3d at 48-49; *compare* 22 U.S.C. §8772(a)(1) *with* TRIA §201(a). As *Weinstein's* holding suggests, the "shall be" formulation is not just constitutional, but commonplace. *See, e.g.*, *Axel Johnson*, 6 F.3d at 80 n.1 (new statute of limitations "'shall be the limitation period'" for a specified class of cases) (quoting 15 U.S.C. §78aa-1). Indeed, the FSIA repeatedly employs the words "shall be," both to subject foreign sovereigns to liability and to restrict their liability. *See, e.g.*, 28 U.S.C. §§1604, 1605A(c).

Markazi also ignores that Congress dictated that the Markazi Assets "shall be subject to execution" only if Plaintiffs satisfied the statutory requirements set forth in §8772(a)(1)-(2). In those subsections, §8772 requires significantly more judicial fact-finding and legal interpretation than the statutes found constitutional in *Robertson* and *Axel Johnson*.

Similarly, Markazi cannot demonstrate that §8772(a)(2) violates Article III because it requires the District Court to affirmatively find that Iran holds the

beneficial interest in the Markazi Assets, and that no other person possesses a constitutionally protected interest therein, in order "'*to ensure that* Iran is held accountable *for paying* [Plaintiffs'] judgments.'" Markazi Br. 51 (emphasis original). While Markazi mischaracterizes that text as a Congressional mandate of turnover (*id.* at 52), the provision actually imposes obstacles to turnover, by requiring Plaintiffs to demonstrate that Iran or Markazi, not an innocent party, owned the Markazi Assets and would pay Plaintiffs' judgments. *Robertson* confirms that §8772's "to ensure" language poses no constitutional problems. *Robertson*, 503 U.S. at 439 (statutory text providing that "'Congress…directs that'" particular conduct satisfied the environmental statutes the plaintiffs had previously invoked did not undermine the "conclusion that what Congress directed – to agencies and courts alike – was a change in law, not specific results under old law").

Finally, Markazi's contention that Senator Menendez' press release and a quote allegedly given by his communications director (neither of which remotely suggests that Congress acted improperly) render §8772 unconstitutional deserves little discussion. Markazi's lone authority, *City of N.Y. v. Beretta U.S.A. Corp.*, 524 F.3d 384, 404 (2d Cir. 2008), emphasizes that even *legislative history* reflecting the thoughts of a single legislator merits "limited weight" in statutory interpretation. *See also U.S. v. O'Brien*, 391 U.S. 367, 383 (1968) ("[T]his Court

will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."). Markazi's request that the Court deem §8772 unconstitutional based upon text *that does not even appear in the statute's legislative history* disregards that precedent.

C. The Treaty Poses No Obstacle To Turnover

1. Section 8772 Does Not Violate Any Treaty Provision

Markazi's contention that the Treaty provides a defense to turnover fails because the Treaty terms that Markazi invokes do not conflict with §8772. To the contrary, the Treaty expressly permits measures the U.S. deems necessary "for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests." Treaty, Art. XX.1(d). Because of Iran's terrorism and nuclear aspirations, §8772 undeniably serves those salutary purposes. *See* 22 U.S.C. §8711; 22 U.S.C. §8772(a)(2); *Paradissiotis v. U.S.*, 304 F.3d 1271, 1274 (Fed. Cir. 2002) (deeming Libyan sanctions reasonable means to advance U.S. national security).

Moreover, as Markazi concedes, *Weinstein* found that two of the five Treaty provisions that Markazi cites (the only ones raised in *Weinstein*) did not conflict with TRIA, which is functionally indistinguishable from §8772 for purposes of Markazi's argument. *Weinstein*, 609 F.3d at 53-54 (TRIA did not conflict with Treaty's recognition of the "juridical status" of "companies constituted under the

applicable laws and regulations" of the U.S. and Iran (Treaty Art. III.1) and the Treaty's "takings" clause (Art. IV.2)). *See also* Point I.D, *infra* (addressing Markazi's Fifth Amendment takings arguments).

Weinstein's reasoning dictates that the three additional Treaty provisions Markazi cites pose no obstacle to Plaintiffs' §8772 claim. Just as imposing liability upon an agency of a state sponsor of terrorist attacks does not constitute a taking, finding that entity liable after lengthy District Court and appellate proceedings does not deny "freedom of access to the [U.S.] courts of justice." Treaty Art. III.2; *see Weinstein*, 609 F.3d at 54.

Likewise, §8772 does not violate: (a) Treaty Art. IV.1, which bars "unreasonable or discriminatory measures that would impair" the "legally acquired rights and interests" of Iranian entities and requires "fair and equitable treatment" of Iranian companies; or (b) Treaty Art. V.1., which mandates that the treatment of Iranian entities be no "less favorable than that accorded nationals and companies of" other nations. By financing terrorism and laundering money to support Iran's illicit nuclear program, Markazi differentiated itself from the central banks of every other nation and provided Congress with entirely reasonable, non-discriminatory bases for adopting §8772. *See* EO-13599, Preamble; 22 U.S.C. §8711 (Congress desired to compel "Iran to abandon efforts to acquire a nuclear weapons capability and other threatening activities"); 22 U.S.C. §8513a

(designating Markazi "a primary money laundering concern" because of its participation in "the illicit activities of the Government of Iran," including nuclear proliferation, terrorism, and efforts to evade sanctions). Accordingly, §8772 is an entirely fair, equitable, reasonable, and non-discriminatory statute that lawfully imposes liability where it is richly deserved. *See Weinstein*, 609 F.3d at 54.

Markazi's "fair and equitable treatment" argument relies primarily upon a non-precedential arbitration decision interpreting a U.S.-Argentina treaty: *Azurix Corp. v. Republic of Argentina*, ICSID Case No. ARB/07/12, Award. A-Vol.XX-5833-Vol.XXI-5991. The *Azurix* panel noted that "fair and equitable should be understood to be treatment in an even-handed and just manner" (A-Vol.XXI-5960-61(¶360)) and that unfair, inequitable government actions are marked by the "frustration of expectations that the investor may have legitimately taken into account when it made the investment." A-Vol.XXI-5966(¶372). *Weinstein* and common sense preclude the effort of Markazi – a facilitator of terrorism and nuclear proliferation – to deem §8772 less than evenhanded or just under that standard.[1] *See also* Point I.D, *infra* (Markazi lacked a reasonable "investment-backed expectation" that it could invest in the U.S.).

[1] In any event, *Azurix's* facts bear no resemblance to those presented here. *See* A-Vol.XXI-5956(¶349); Vol.XXI-5967(¶¶375-78) (discussing the inequity of Argentine province's efforts to prevent water utility from charging reasonable rates, to encourage customers not to pay bills, and to frustrate the utility's contractual rights).

The one American decision that Markazi cites in favor of this argument, *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), provides no support for reversal. *Landgraf* addressed whether a new statute, *in the absence of direction from Congress*, applied to pending cases. In contrast, §8772 specifically applies to this matter. Moreover, applying §8772 retroactively is particularly appropriate because it serves the "entirely benign and legitimate purpose[]" of "respond[ing] to emergencies," namely Markazi's facilitation of Iranian terrorism and nuclear proliferation. *See id.* at 267-268.

2. Section 8772 Preempts The Treaty

Even if Markazi were able to establish some conflict between §8772 and the Treaty, §8772 would preempt the Treaty because the statute applies "notwithstanding any other provision of law." 22 U.S.C. §8772(a)(1). Such broad "notwithstanding" clauses preempt *all* other provisions of law, whether set forth in a treaty, statute or otherwise. *See, e.g.*, *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) (the Courts of Appeals have regularly interpreted indistinguishable "notwithstanding" provisions to "'supersede all other laws'") (citation omitted). Even without its notwithstanding clause, §8772 would render any conflicting Treaty provision null under the last-in-time rule. *Breard v. Greene*, 523 U.S. 371, 376 (1998).

Markazi's arguments are precluded by *Weinstein*, 609 F.3d at 53-54, which held that "even assuming, arguendo, that there were a conflict between [TRIA and the Treaty], the TRIA would have to be read to abrogate that portion of the Treaty" because of TRIA's "notwithstanding" clause. Given the *identical* wording of the notwithstanding clauses in TRIA and §8772, Markazi's Treaty arguments are frivolous.

While Markazi "distinguishes" *Weinstein* by noting that §8772 does not specifically mention the Treaty by name, neither does TRIA. Moreover, Congress need not mention *any* law when it preempts *all* other laws by employing a comprehensive "notwithstanding" clause. *E.g.*, *Havana Club Holding, S.A. v. Galleon, S.A.*, 203 F.3d 116, 124 (2d Cir. 2000) ("Congress is not required to investigate the array of international agreements that arguably provide some protection that it wishes to annul and then assemble a check-list reciting each one.").[2]

[2] The decision in *U.S. v. PLO*, 695 F.Supp. 1456 (S.D.N.Y. 1988) (*cited in* Markazi Br. 44) was effectively overruled by *Weinstein's* holding regarding the preemptive power of notwithstanding clauses. Moreover, *PLO* turned on the dubious determination that a "treaty" was not a form of "law" and, therefore, was unaffected by a notwithstanding clause. 695 F.Supp. at 1468. *Contra* U.S. Const., Art. VI, Cl. 2 (the Constitution, "the Laws of the United States" and the nation's Treaties "shall be the supreme Law of the Land"); *Torres v. Immigration & Naturalization Serv.*, 602 F.2d 190, 195 (7th Cir. 1979) (a treaty is a "provision of law"). Markazi's contention that §8772's notwithstanding clause was not intended to abrogate the Treaty is also irreconcilable with the statute's text and legislative

Markazi also cannot dismiss *Weinstein's* holding regarding the preemptive power of TRIA's "notwithstanding" clause as dicta. Rather, this Court outlined two, independently sufficient bases for affirming the determination that the Treaty did not impede execution. 609 F.3d at 52-54. Those alternative holdings are both binding precedent, not dicta. *See, e.g.*, *Pyett v. Pennsylvania Bldg. Co.*, 498 F.3d 88, 92-93 (2d Cir. 2007) (second of two bases for affirming decision "was an alternative holding, not dicta" although the court in the earlier case explicitly recognized that the first basis was "sufficient to decide this case") (citing *Rogers v. N.Y. University*, 220 F.3d 73, 75 (2d Cir. 2000)).[3]

Except for *Calderon-Cardona v. JPMorgan Chase Bank, N.A.*, 867 F.Supp.2d 389 (S.D.N.Y. 2011), Markazi's "dicta" cases involved extraneous discussions of matters not presented for judicial review, not alternative rulings. *See, e.g.*, *Alsol v. Mukasey*, 548 F.3d 207, 218-19 (2d Cir. 2008) (statements in earlier decision regarding whether an offense constituted an aggravated felony was dicta where defendant did not contend otherwise and decision did not turn on that issue). Moreover, *Independent U.S. Tanker Owners Comm. v. Skinner*, 884 F.2d 587, 595 (D.C. Cir. 1989) did not hold, as Markazi suggests, that a court's use of

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history, which – as even Markazi argues – evidence Congress' intention to facilitate enforcement of Plaintiffs' judgments. *See* Markazi Br. 44.

[3] In *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009), the Supreme Court reversed *Pyett* and abrogated *Rogers* on grounds irrelevant here.

the phrase "assuming arguendo" renders what follows dicta. Rather, *Skinner* characterized a particular statement as dicta because it was not a basis for the earlier decision. *Calderon's* characterization of *Weinstein's* alternative holding as dicta is irreconcilable with *Weinstein's* text and the controlling precedent cited above.

Moreover, Markazi misplaces its reliance on *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984), which considered the effect of the *repeal* of an existing law upon an existing treaty, rather than the impact of a new statute's notwithstanding clause upon a preexisting treaty. *Id.* at 252. Notably, cases like *Cisneros* and *Weinstein* long post-date *Trans World* and emphasize the broad preemptive power of "notwithstanding" clauses.

D. Turnover Will Not Effect An Unconstitutional Taking Of Markazi's Property

Weinstein also defeats Markazi's contention that §8772 effects an unlawful taking under the Fifth Amendment and the Treaty. *Weinstein* parallels this case in that: the government blocked the property of the Iranian bank defendant (Bank Melli) because of its support of Iran's terrorism and nuclear proliferation (*compare* EO-13599 at A-Vol.VII-1935 *with Weinstein*, 609 F.3d at 54); and Congress adopted TRIA, and OFAC blocked Bank Melli's assets, *after* the *Weinstein* plaintiffs obtained judgments (*Weinstein*, 609 F.3d at 46). The *Weinstein* Court's rejection of Bank Melli's takings defense in those indistinguishable circumstances

defeats Markazi's contentions. *Id.* at 54 (permitting execution against "an instrumentality of Iran, in satisfaction of [Iran's] liability does not constitute a 'taking' under the 'Takings Clause' or the Treaty because the imposition of liability does not amount to a taking" and "Bank Melli's own conduct as a funder of weapons of mass destruction opened it to liability for judgments already entered against Iran").

Supreme Court precedent concerning statutes that retroactively impose liabilities upon defendants also thwarts Markazi's arguments. In *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), the Court rejected a takings challenge to a retroactive provision requiring employers exiting multi-employer pension plans to pay their proportionate shares of the plans' "unfunded vested benefits" although the employers' contracts specifically limited their contributions to amounts previously paid. *Id.* at 223. The Court emphasized that "Congress routinely creates burdens for some that directly benefit others" by, among other means, "creat[ing] causes of action that did not previously exist." *Id.* The Court supported its conclusion by analyzing three factors that have "'particular significance'" to the "ad hoc, factual inquir[y]" regarding whether legislation effects a regulatory taking, namely: "(1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental

action.'" *Id.* at 224-25 (quoting *Penn Central Trans. Co. v. N.Y.C.*, 438 U.S. 104, 124 (1978)).

These "*Penn Central*" factors reinforce that §8772 poses no Fifth Amendment problems. Starting with the last factor, §8772 does not appropriate assets for the government. Instead, it renders the funds of a wholly owned Iranian instrumentality subject to execution by Iran's judgment creditors. Accordingly, "the character of the government action," *i.e.*, adopting §8772, is unassailable. *Connolly*, 475 U.S. at 225 (interference with property rights that "arises from a public program that adjusts the benefits and burdens of economic life to promote the common good" "does not constitute a taking requiring Government compensation"); *Paradissiotis*, 304 F.3d at 1275 ("valid regulatory measures taken to serve substantial national security interests…have not been recognized as compensable takings for Fifth Amendment purposes"); *Chang v. U.S.*, 859 F.2d 893, 896 (Fed. Cir. 1988) (Libyan sanctions did not effect taking because they "'substantially advance[d] legitimate state interests.'") (citation omitted). Moreover, Plaintiffs' execution upon the Markazi Assets pursuant to §8772 reveals the fallacy of Markazi's bald assertion that the statute does not serve Congress' objective of sanctioning Iranian misconduct. *Hausler v. JPMorgan Chase Bank, N.A.*, 845 F.Supp.2d 553, 576 (S.D.N.Y. 2012) ("*Hausler II*") (TRIA effected no taking because providing redress to terrorism victims and punishing terrorist

entities "constitute public purposes beyond the mere redistribution of one private entity's property to another private party").[4]

The fact that Iran, Markazi's 100% owner, will bear the ultimate burden of Plaintiffs' judgment also establishes that the first *Penn Central* factor (the "economic impact" of §8772) supports finding the statute constitutional. Plaintiffs' terrorism judgments, which are far larger than their recovery here, establish that the result in this action is not "out of proportion" with the harm Iran has caused. *See Connolly*, 475 U.S. at 226 (no taking where there was "nothing to show that the withdrawal liability actually imposed on an employer will always be out of proportion to its experience with the plan"); *Branch*, 69 F.3d at 1580 (no Fifth Amendment violation because Congress could "burden related institutions for the failure of their sister banks rather than visiting those costs on unrelated banks...or on taxpayers in general").

Markazi's unconvincing discussion of *Penn Central's* "investment-backed expectations" factor also provides no basis for reversal. As Clearstream

[4] Iran's terrorist conduct differentiates this case from instances where the government "take[s] the property of *A* for the *sole purpose* of transferring it to another private party *B*." *Kelo v. City of New London*, 545 U.S. 469, 477 (2005) (emphasis added). Moreover, neither *Kelo* nor *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) – the cases Markazi cites in discussing §8772's purpose – found that government action failed to serve a public purpose. *Kelo*, 545 U.S. at 489-90 (condemnation of property for development project served public purpose); *Weinberger*, 420 U.S. at 648 (no takings discussion).

acknowledged (*see* A-Vol.XVIII-5154-55), the ITRs barred "U.S. Persons" from providing services necessary to process payments related to the Markazi Assets. *See* 31 C.F.R. §§560.204 and 560.206. Moreover, Congress and the Executive Branch acted repeatedly before the Restraints issued to impose liability upon terrorist states and their agencies and to assist victims of terrorism in collecting their judgments. *E.g.*, 28 U.S.C. §1605(a)(7) (repealed) (adopted in 1996); 28 U.S.C. §1605A (adopted in January 2008); TRIA §201 (adopted in 2002). Hence, Markazi could not reasonably expect in 2008 that Congress would permit Iran's central bank to benefit from American investments indefinitely while Iran evaded Plaintiffs' judgments and promoted terrorism and nuclear proliferation. *See, e.g.*, *Connolly*, 475 U.S. at 226-27 (employers could not expect to avoid liability for additional contributions to pension plans, despite contracts limiting their liability to previously paid amounts, because Congress had long regulated pensions and endeavored to guarantee that pension recipients collected benefits); *Appolo Fuels, Inc. v. U.S.*, 381 F.3d 1338, 1349 (Fed. Cir. 2004) (mining company could not reasonably expect that government would deem leased land suitable for mining because the highly regulated nature of mining industry made administrative decision prohibiting mining easily foreseeable) (*cited in* Markazi Br. 57); *Branch*, 69 F.3d at 1582 ("In light of the historical practices in the bank regulatory field, including the exceptions to the principle of limited liability created by statute,

regulation, and regulatory policy, it would have been unreasonable for the owners of [one bank subsidiary] to expect that [its] assets would never be subject to liability based on losses suffered by other [subsidiaries].").

Markazi's takings argument relies principally upon a plurality opinion in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), that only four Justices joined. A majority of the *Eastern* Court actually held that the case *did not* implicate the Takings Clause because the relevant regulation merely imposed an obligation to pay money and involved no property interest. *Id.* at 540 (*per* Kennedy, J), 554 (*per* Breyer, Stevens, Souter and Ginsburg, JJ); *see also, e.g., Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 659 (3d Cir. 1999) ("we are bound to follow the five-four vote against the takings claim in *Eastern*"). Thus, *Eastern* is no precedent at all for Markazi's arguments. *U.S. v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) (because no rationale commanded a majority of the Court, "the authority of *Eastern Enterprises* is confined to its holding that the Coal Act is unconstitutional as applied to Eastern Enterprises").

Even the *Eastern* plurality opinion does not support finding §8772 unconstitutional. That opinion found a takings violation where: a Coal Act amendment required Eastern to pay lifetime health care benefits for people it employed 30 to 50 years before Congress enacted the statute; and Eastern had exited the coal industry 27 years before Congress acted. The plurality found the

Coal Act provision unconstitutional because Eastern's statutory liability bore no relationship to its responsibilities under any collective bargaining agreement and upset Eastern's longstanding expectations concerning liabilities related to its long-departed employees. 524 U.S. at 530-32.

Those facts find no parallel here, where Markazi faced mounting evidence that Congress and the Executive Branch would act to deter continued Iranian lawlessness. Accordingly, the non-precedential *Eastern* opinion provides no basis for disregarding the takings standards this Circuit established in the indistinguishable *Weinstein* decision long after *Eastern's* publication. That conclusion is bolstered by the numerous cases pre- and post-dating *Eastern* that have rejected takings challenges to statutes imposing liability upon corporations by virtue of their ties to related entities. *E.g.*, *Branch*, 69 F.3d at 1582-83; *Unity*, 178 F.3d at 659 (Coal Act imposition of liability upon related companies); *Nell Jean Indus. v. Barnhart*, 224 F.Supp.2d 10, 20-21 (D.D.C. 2002) (same and collecting cases).

Markazi also cannot establish that §8772 violates the Treaty and the Fifth Amendment by "retroactively legalizing Plaintiffs' improper restraint of the [Markazi Assets]." Markazi Br. 56. As an initial matter, Markazi fails to establish that the District Court could not have preserved the status quo by issuing and

maintaining the Restraints, particularly because Markazi failed to move to vacate them for three years.

Second, Markazi cites *no decision* that considered the reason why assets were present in the U.S. relevant to whether they were properly subject to blocking, freezing, or execution pursuant to TRIA, IEEPA or any other sanctions-related statute. No such authority exists because requiring an examination of the reasons why terrorist states' assets were present in the U.S. in order for blocking or execution to pass constitutional muster would threaten the effectiveness of the government's sanctions regimes.

Substantial authority contradicts Markazi's proposed rule. For example, in *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 556 U.S. 366, 376 (2009), the Supreme Court determined the propriety of a TRIA turnover order by assessing whether the relevant assets "were blocked assets at the time the Court of Appeals issued its decision" in 2007 even though no basis had existed for the lien the plaintiff obtained against Iranian property in 2001. That holding applies the rule that "[w]hether the record adequately supported relief pending trial is of no moment once the trial has been held and permanent relief entered. All that then matters is whether the record supports permanent relief." *Global Relief Foundation, Inc. v. O'Neill*, 315 F.3d 748, 751 (7th Cir. 2002).

Third, as Plaintiffs demonstrate above, Congress may retroactively impose liabilities upon litigants. That power logically entails the ability to adopt legislation that "legitimizes" even improper restraints. In any event, it was not §8772 – but EO-134599 – that perpetuated the Restraints and, as Markazi concedes (Markazi Br. 19), that action by the President clearly did not violate the Takings Clause. *See, e.g.*, *Paradissiotis*, 304 F.3d at 1274-74 ("Economic sanctions would hardly be sanctions if the foreign targets of the sanctions could simply stand in line to be compensated for the losses those sanctions caused them.").

Finally, Markazi provides no evidentiary basis for its implicit suggestion that it would have avoided the blocking of the Markazi Assets by moving them outside of the U.S. before EO-13599 issued. In particular, Markazi introduced *no* evidence: (a) to substantiate its purported intention to transfer the Markazi Assets offshore; or (b) to demonstrate that Citibank, Clearstream and other American financial institutions would have violated the ITRs by processing transfers for Markazi's benefit once its ownership interest was exposed. *See* pp. 56-57, *supra.* Accordingly, even were the propriety of the Restraints relevant (and it is not), Markazi's "conclusory statements, conjecture, [and] speculation" could "not defeat summary judgment." *Kulak*, 88 F.3d at 71.

II.

TRIA ENTITLES PLAINTIFFS TO EXECUTE AGAINST THE MARKAZI ASSETS

A. TRIA's Plain Meaning Dictates That Plaintiffs Need Only Demonstrate That Markazi Held A Beneficial Ownership Interest In The Markazi Assets

1. TRIA's Plain Meaning Determines The Statute's Requirements

The only disputed issue regarding the elements of Plaintiffs' TRIA claim relates to whether the Markazi Assets were the "blocked assets of" Markazi. TRIA's plain meaning determines the resolution of that question. *E.g.*, *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004).[5] A statute's "plain meaning is best discerned by 'looking to the statutory scheme as a whole and placing the particular provision within the context of that statute.'" *Nwozuzu v. Holder*, 726 F.3d 323, 327 (2d Cir. 2013) (citation omitted). Because the words "blocked assets of" Markazi are unambiguous, TRIA's text provides the proper ending point for the Court's analysis. *E.g.*, *Weinstein*, 609 F.3d at 49-50 (judicial interpretation "generally 'ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent'") (citation and internal quotation marks omitted). To the extent the Court views TRIA's text as

[5] Markazi concedes that *Weinstein* precludes its challenges to TRIA under the Treaty and *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). The Treaty arguments also fail for the reasons specified in Point I.C.

"ambiguous or unclear," however, the Court "may consider legislative history and other tools of statutory interpretation." *Nwozuzu*, 726 F.3d at 327.

2. Beneficial Ownership Controls What Constitutes The "Assets Of" Markazi

Markazi misconstrues the role that federal and state law play in determining TRIA's plain meaning. When interpreting federal statutes that implicate state property interests, courts consider state law only to ascertain "the nature of any interests in or rights to property that an entity may have." *Export-Import Bank of U.S. v. Asia Pulp & Paper Co.*, 609 F.3d 111, 117 (2d Cir. 2010). Federal law then determines whether those rights and interests are "sufficient to trigger the application of the [federal statute]." *Id.* Thus, whether state-created property rights satisfy a federal statute's substantive standard is "'ultimately a question of federal law.'" *Id.* (quoting *U.S. v. Craft*, 535 U.S. 274, 278 (2002)).

Accordingly, while the UCC and other state law inform the rights that Markazi possessed in the Markazi Assets, federal law dictates whether those rights suffice to constitute the "assets of" Markazi. *E.g.*, *Drye v. U.S.*, 528 U.S. 49, 52 (1999) (courts must "look to state law for delineation of the taxpayer's rights or interests, but…leave to federal law the determination whether those rights or interests constitute 'property' or 'rights to property' within the meaning of [the federal statute]"); *Asia Pulp*, 609 F.3d at 116-18 (while state law determined the nature of rights originators and beneficiaries had in electronic funds transfers

("EFTs"), federal law determined whether EFTs met the statutory standard of "property…in which the debtor has a substantial nonexempt interest").

Determining the meaning of the phrase "blocked assets of" Markazi under federal law quickly disposes of Markazi's TRIA arguments, all of which derive from a contrived interpretation that would limit Markazi's assets to property in which it holds legal title. That interpretation disregards §8772(a)(2), where Congress dictated that Plaintiffs could execute if Markazi held "equitable title to, or the beneficial interest in" the Markazi Assets. *See AHW Materials Testing, Inc. v. Town of Babylon*, 584 F.3d 436, 447 (2d Cir. 2009) ("'[A] specific policy embodied in a later federal statute should control our construction of the earlier statute, even though [the earlier statute] has not been expressly amended.'") (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000)). Since §8772 comprehensively addresses the ownership interests that qualify as the "assets of" Markazi, no need exists for any consideration of New York law. A-Vol.III-846 ("[S]tate law is expressly preempted by the express language of §8772."). *Accord American Electric Power Co. v. Connecticut*, 131 S.Ct. 2527, 2537 (2011) ("The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute 'speak[s] directly to [the] question' at issue.") (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

Every other potential source for determining the meaning of the phrase "assets of" Markazi under federal law confirms that the statute demands only a beneficial ownership interest. For example, OFAC's Bank Secrecy Act/Anti-Money Laundering Examination Manual provides that an OFAC-designated entity's "[a]ssets and property include[] anything of direct, indirect, present, future, or contingent value (including all types of bank transactions)." BSA/AML Examination Manual 148 (2010).[6] Likewise, the Financial Accounting Standards Board ("FASB"), the entity responsible for formulating Generally Accepted Accounting Principles, defines "assets" as "probable future economic benefits *obtained or controlled* by a particular entity as a result of past transactions or events." FASB, *Elements of Financial Statements*, Statements of Financial Accounting Concepts No. 6, ¶25 (1985) (emphasis added). The FASB commentary clarifying that definition provides, "Cash, accounts and notes receivable, interest and dividends receivable, *investments in securities of other entities*, and similar items *so obviously qualify as assets [that must be reported on companies' financial statements] that they need no further comment*." *Id.* at ¶177 (emphasis added); *see also, e.g.*, I.R.S. Publication 544, at 22 (Rev. 2012) ("[a]lmost everything you own and use for personal purposes, pleasure, or *investment is a capital asset*," including "[s]tocks and bonds") (emphasis added).

[6] Available at www.ffiec.gov/bsa_aml_infobase/documents/bsa_aml_man_2010.pdf.

Federal case law also uniformly holds that entities' "assets" include all property they beneficially own. *E.g.*, *Secretary of Labor v. Doyle*, 675 F.3d 187, 204 (3d Cir. 2012) (under ERISA, the "ordinary meaning" of "'plan assets'" "'would include any property, tangible or intangible, *in which the plan has a beneficial ownership interest*'") (emphasis added) (quoting DOL Advisory Op. No. 93-14A, 1993 ERISA LEXIS 16, at *11 (May 5, 1993)); *In re Luna*, 406 F.3d 1192, 1199 (10th Cir. 2005) (same); *see also, e.g.*, *Aquilino v. U.S.*, 363 U.S. 509, 511 n.1, 515 (1960) (beneficial ownership, not "bare legal title," determined whether property fell within statute granting government lien upon "'all property and rights to property, whether real or personal, belonging to'" the taxpayer) (citation omitted).[7]

Moreover, courts addressing the blocking of assets under IEEPA have confirmed that beneficial ownership, not technical issues of title, controls statutory construction. *E.g.*, *Global Relief*, 315 F.3d at 752-54 (while IEEPA permits blocking of "'property in which any foreign country or a national thereof has any interest,'" government could block assets in which American corporation held

[7] *Many* other cases find that entities' assets include any property they beneficially own. *E.g.*, *F.D.I.C. v. Meyer*, 781 F.2d 1260, 1261 (7th Cir. 1986) ("the assets purchased by the FDIC" included "the assignment of the beneficial interest"); *Mimms v. PricewaterhouseCoopers, LLP*, 2012 U.S. Dist. LEXIS 21741, at *8 (S.D.N.Y. Feb. 16, 2012) ("Assets include 'any property, tangible or intangible, in which the plan has a beneficial ownership interest...'") (quoting *In re Halpin*, 566 F.3d 286, 289 (2d Cir. 2009)).

exclusive legal title because "[t]he function of the IEEPA strongly suggests that beneficial rather than legal interests matter") (quoting 50 U.S.C. §1702(a)(1)(B)); *Holy Land Found. for Relief & Development v. Ashcroft*, 333 F.3d 156, 162-63 (D.C. Cir. 2003) (same). Given that EO-13599 was issued pursuant to IEEPA and that TRIA and IEEPA serve similar counter-terrorism purposes (*see Weinstein*, 609 F.3d at 50), these cases powerfully support the conclusion that the "assets of" an entity for TRIA's purposes include all property it beneficially owns. *See Global Relief*, 315 F.3d at 753 (focusing on legal title would permit terrorists to evade sanctions easily); *Holy Land*, 333 F.3d at 162-63 (same).

Markazi fails to cite *any authority* suggesting that beneficial ownership does not establish ownership of an asset.[8] Rather, both the TRIA and inapposite non-TRIA cases that Markazi cites merely held that the use of the word "of" in a statute denotes some form of ownership, *without* differentiating between titled and beneficial ownership. *See* Markazi Br. 15-16.

[8] Notably, the UCC never defines the term "asset." *In re Pizzano*, 439 B.R. 445, 452 (Bankr. W.D. Mich. 2010). Furthermore, the fact that the FSIA repeatedly utilizes the term "property" but employs the term "asset" only in TRIA demonstrates that the two words are not synonymous and confirms that "asset" is the broader term. *See, e.g.*, 28 U.S.C. §§1605(a)(3)-(5), 1610(a)-(g), 1611(a)-(c); *see also BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) ("It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it from another.") (internal quotation omitted).

Hence, even decisions holding that TRIA requires that the defendant "own" the targeted asset are consistent with permitting execution where the defendant holds a 100% beneficial ownership interest.[9] The same is true of the views expressed by the government in its most recent amicus briefing regarding TRIA. *See* Amicus Brief of U.S. Supporting Appellants at 2 in *JPMorgan Chase Bank v. Hausler*, No.12-1264 L (2d Cir. July 9, 2012) (Docket #133) ("Both the plain meaning of the statutory text and case law construing similarly-worded statutes demonstrate that TRIA permits attachment only of assets in which the terrorist party or its agency or instrumentality has *an ownership interest…*") (emphasis added). Awarding turnover of assets beneficially owned by terrorist states' agencies would not force innocent "third parties" to "pick up the tab" for damages caused by terrorist states – a concern that has motivated courts to rule that TRIA requires some ownership interest in blocked assets. *Heiser*, 885 F.Supp.2d at 440; *accord Calderon*, 867 F.Supp.2d at 403.

Markazi's efforts to transform the word "of" into a requirement that Plaintiffs demonstrate that Markazi held formal "title" to the Markazi Assets also disregards that TRIA §201(a) utilizes the phrase "of that terrorist party" in a

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[9] *See Calderon*, 867 F.Supp.2d at 400 (for asset to be subject to turnover, the defendant "must actually own it"); *Estate of Heiser v. Islamic Republic of Iran*, 885 F.Supp.2d 429, 437, 441 (D.D.C. 2012) ("TRIA §201(a) Requires an Iranian Ownership Interest" and does not permit execution against "blocked assets totally unowned by terrorist states").

manner inconsistent with Markazi's interpretation. Specifically, §201(a) authorizes judgment creditors to execute against "the blocked assets *of* that terrorist party (including the blocked assets of any agency or instrumentality *of* that terrorist party." (Emphasis added.)

The second use of the phrase "of that terrorist party" cannot signify titled ownership because 28 U.S.C. §1603(b) defines the "agency or instrumentality of a foreign state" as "any entity... [¶ omitted] (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." None of those possibilities specifically require title, and a state would be very unlikely to hold title to its "organ" or "political subdivision." Thus, the very words that Markazi cites as supporting its supposed requirement of titled ownership demonstrate that the word "of" requires a more expansive definition in the statute, such as "connected to." *See Reno v. Bossier Parish School Board*, 528 U.S. 320, 329 (2000) ("we refuse to adopt a construction that would attribute different meanings to the same phrase in the same sentence, depending on which object it is modifying"); *see also Hausler II*, 845 F.Supp.2d at 566-67 (the phrase "blocked assets of that terrorist party" signifies that only the victims of the *particular terrorist state* whose assets have been blocked may collect against *those particular assets*).

3. TRIA's Legislative History Confirms That Plaintiffs Need Only Demonstrate Markazi's Beneficial Ownership Of The Markazi Assets

Even if TRIA were ambiguous, its legislative history would dictate that Congress authorized plaintiffs to execute against assets beneficially owned by agencies of terrorist states. *See, e.g.*, *Nwozuzu*, 726 F.3d at 327 (if a statute is "ambiguous or unclear," the Court "may consider legislative history and other tools of statutory interpretation"). Any ambiguity in TRIA's language should be "resolved in plaintiff's favor by the legislative history." *Weinstein*, 609 F.3d at 50. That history demonstrates that Congress intended TRIA to eliminate all obstacles to terror victims' ability to collect the blocked assets of terrorist states and that TRIA "'establishes once and for all, that such judgments are to be enforced against any assets available in the U.S.'" *Id.* (quoting 148 Cong. Rec. S11524, at S11528 (Nov. 19, 2002) (statement of Sen. Harkin)); *see also Elahi*, 556 U.S. at 383 (TRIA's "purpose leans in the direction of a broader interpretation of the words 'at issue'"). This legislative history is irreconcilable with Markazi's contention that Congress intended to prevent victims of terrorism from executing against assets in which terrorist states own a 100% beneficial interest.

B. Markazi's Repeated Admissions That It Owned The Markazi Assets Demonstrate That Markazi Is The Sole Beneficial Owner Of Those Assets, Which Are Therefore The "Assets Of" Markazi

As the District Court recognized, beneficial ownership exists where "'the property benefitted [the beneficial owner] as if he had received the property directly.'" A-Vol.III-859 (quoting *Asia Pulp*, 609 F.3d at 120); *accord, e.g.*, *Pfizer Inc. v. Teva Pharms. USA, Inc.*, 803 F.Supp.2d 409, 425 (E.D. Va. 2011) (beneficial owners have "most to all of the traditional property rights of the owner, except for actual legal title to the property") (*quoted in* Markazi Br. 22 n.11). Markazi cannot run from the following admissions of beneficial ownership, which were made by the bank, its counsel and the head of Markazi's Foreign Exchange Negotiable Securities Section, in the unguarded moments of truth that preceded Markazi's belated revisionist history.

- "The Restrained Securities are the Property of a Foreign Central Bank Held for Its Own Account and are Therefore Immune from Attachment and Execution Pursuant to Section 1611(b)(1) of the FSIA." A-Vol.V-1232.
- "The Restraining Notices are Invalid Because the Restrained Securities are *Prima Facie* the Property of a Third Party, Bank Markazi – Not the Judgment Debtors." A-Vol.V-1259.
- "It is undisputed that Bank Markazi is the beneficial owner of the Restrained Securities." A-Vol.V-1224.
- "The Restrained Securities are the property of [Markazi]." A-Vol.V-1224.

- "Under these circumstances, the Restrained Securities are presumed to be the property of Bank Markazi." A-Vol.V-1233.
- "Plaintiffs Acknowledge that Bank Markazi is the Central Bank of Iran, a Sovereign Instrumentality, and the Beneficial Owner of the Restrained Securities." A-Vol.V-1232.
- "Yet this allegation has no bearing whatsoever on the immunity of Bank Markazi's property, which is protected under section 1611(b)(1) of the FSIA." A-Vol.V-1238-39.
- "On the contrary, as Mr. Massoumi explains, Bank Markazi is the sole beneficial owner of [the Markazi Assets]." A-Vol.V-1254.
- "The aggregate face value of the remaining bond instruments – *i.e.*, the Restrained Securities that are the property of Bank Markazi and the subject of this Turnover Action – is thus $1.753 billion." A-Vol.V-1228.
- "Therefore, by plaintiffs' own admission, the Restrained Securities constitute the property of Bank Markazi, a third party that is not a judgment debtor with respect to plaintiffs' underlying judgment." A-Vol.V-1260.
- "**The Restrained Securities Are Bank Markazi's Exclusive Property.**" A-Vol.V-1329 (emphasis in original).
- "Bank Markazi is the sole beneficial owner of the Restrained Securities." A-Vol.V-1330(¶7).
- "Once oil export proceeds are credited to Bank Markazi's foreign currency accounts, Bank Markazi in turn credits Iranian Government Treasury accounts maintained in its books with the local currency counter-value." A-Vol.V-1330(¶10).
- "Today, no other party than Bank Markazi has a legitimate interest in the Restrained Securities or in the assets in the Account." A-Vol.V-1332(¶30).

These admissions establish that Markazi was the only entity that exerted any control over or enjoyed the investment returns flowing from the Markazi Assets.

In fact, Ali Asghar Massoumi, a senior Markazi banker, admitted that Markazi recorded the Markazi Assets *as assets* on Markazi's financial statements. A-Vol.V-1330(¶10).

TRIA's plain meaning therefore compels the conclusion that Markazi was the sole beneficial owner of the Markazi Assets and that those assets were the "assets of" Markazi. *Asia Pulp*, 609 F.3d at 120; *Pfizer*, 803 F.Supp.2d at 425. In fact, this Court and others have found that property interests far less substantial than Markazi's full beneficial ownership interest have constituted the "assets of" entities. *E.g.*, *Luna*, 406 F.3d at 1199-1200 (unpaid contributions constitute "assets" of ERISA plan because, "although the plan does not possess the unpaid contributions themselves, it does possess the *contractual right* to collect them") (emphasis in original); *U.S. v. LaBarbara*, 129 F.3d 81, 88 (2d Cir. 1997) (holding that employer's obligation to make contributions to ERISA funds "constituted 'assets' of the Funds by any common definition" and noting that the fact that "an audit of the Funds would have to include such fixed obligations as assets" supported that conclusion).

Markazi misses the mark in two respects with its contention that its admissions lack relevance because whether the Markazi Assets qualify as "assets of" Markazi is a matter of law, not fact. First, that question is a mixed matter of fact and law that requires consideration of the legal issue of what Congress meant

by the language "blocked assets of" a terrorist agency and the factual matter of the nature of Markazi's interest in the Markazi Assets. *E.g.*, *Wilson v. Commissioner of Internal Revenue*, 560 F.2d 687, 690 (5th Cir. 1977) (beneficial ownership is a mixed question of law and fact) (*cited in* Markazi Br. 22).

Second, Markazi's admissions bear heavily on the legal aspect of the Court's analysis. Specifically, those statements provide telling evidence that bankers, lawyers and investors believe that beneficial ownership, not formal title, determines who owns particular assets. *E.g.*, *Engine Mfrs.*, 541 U.S. at 252.

The content of Markazi's admissions distinguish them from the passage in *CSX Corp. v. Children's Investment Fund Mgmt. (UK) LLP*, 654 F.3d 276 (2d Cir. 2011) that Markazi cites without noting that it appears in a concurrence. In *CSX*, a hedgefund made false statements during a proxy battle that inflated its ownership stake in a company. *Id.* at 280-81, 286. Those patently false statements find no parallel in Markazi's repeated, truthful admissions. *See also Pfizer*, 803 F.Supp.2d at 425 n.33 (merely holding that witness' *inability* to provide definition of "beneficial owner" had no significance) (*cited in* Markazi Br. 21-22).

Markazi employs wishful thinking when it contends that the District Court never ruled that Markazi owned the Markazi Assets. Rather, after defining beneficial ownership, the court unequivocally found Markazi was the sole beneficial owner of the Markazi Assets while noting that Clearstream and UBAE

repeatedly concurred that they held no stake in those assets. A-Vol.III-844; A-Vol.III-860-61; A-Vol.III-869; A-Vol.IV-1018. Like Markazi, Clearstream eventually did seek to alter its ownership story. As the District Court held, however, Clearstream introduced *no facts* supporting its conclusory assertion of ownership. A-Vol.IV-1018. Thus, while Markazi faults the brevity of the District Court's analysis regarding the beneficial ownership issue, the obvious nature of the answer eliminated any need for elaborate explication.

C. The UCC Invested Markazi With The Rights Of The Sole Beneficial Owner Of The Markazi Assets

Even if TRIA's plain meaning and legislative history, and Markazi's admissions were insufficient to demonstrate that the Markazi Assets were "assets of" Markazi, New York law would confirm that conclusion. Markazi endeavors to obscure that fact by emphasizing that the UCC invested certain rights and responsibilities related to the U.S. Bonds in the "securities intermediaries" that provided services for Markazi (Citibank, Clearstream and UBAE, among others), rather than Markazi, the "entitlement holder." Markazi's obfuscation cannot hide that the UCC invested Markazi with all of the powers of ownership.

Article 8 of the UCC outlines the rights and responsibilities of securities intermediaries and securities entitlement holders. The statute distinguishes between investors' property rights in financial assets (§8-503(b)) and their ability to exercise their rights with respect to those assets (§8-503(c)).

In particular, §8-503(c) dictates that entitlement holders can exercise their rights only against their immediate intermediaries. More importantly, §8-503(b) provides that investors maintain "a pro rata property interest in all interests" in financial assets held by securities intermediaries for investors' benefit. Likewise, §8-503(a) states that "all interests in [a] financial asset held by the securities intermediary are *held by the securities intermediary for the entitlement holders [and] are not property of the securities intermediary*." (Emphasis added.) Thus, intermediaries hold securities entitlements solely as custodians for the ultimate owners. UCC §8-503(a); A-Vol.XIX-5360 (Federal Reserve Bank of New York ("FRBNY") publication stating that a securities intermediary "does not 'own'" the property at issue); 7A *Hawkland UCC Series* §8-503:01 [Rev.] (§8-503's dictates are "captured by the colloquial notion that when a customer leaves securities with a broker or other intermediary, the securities belong to the customer not the broker").

Entitlement holders' right to receive all benefits of owning securities is enforced by UCC §8-505(a), which obligates intermediaries to secure for their entitlement holders any "payment or distribution made by the issuer of a financial asset." In addition, §8-505(b) requires intermediaries to transfer all such payments to their immediate entitlement holders. *See* UCC §8-505 cmt. 1 (intermediaries are obligated to "pass through" any economic benefit of owning securities to

entitlement holders); *Ellington Long Term Fund, Ltd. v. Goldman, Sachs & Co.*, 2010 U.S. Dist. LEXIS 44570, at *9 (S.D.N.Y. May 4, 2010).

Importantly, Citibank's obligation to pay only its entitlement holder, Clearstream, did not transform Clearstream into the owner of the Markazi Assets, whether beneficial or otherwise. *See, e.g.*, A-Vol.XIX-5360 (FRBNY publication stating that beneficial ownership does not vary although the upper-tier intermediary (Citibank) may record the lower-tier intermediary (Clearstream) as owner). Rather, the UCC vested Markazi with all of the significant rights of ownership. Markazi was the only entity that could derive any financial benefit from the Markazi Assets. UCC §8-505(b); *see also* A-Vol.XVIII-5055(¶¶24-25); A-Vol.XVIII-5168-90; A.Vol.XVIII-5201-05(Art. 20) (Clearstream Customer Agreement protection of Markazi's right to receive all financial benefits of the Markazi Assets). The UCC also guaranteed that Markazi maintained a protected ownership interest at every level of intermediary involved in holding its assets. UCC §8-503(b). Moreover, before the Restraints issued, only Markazi could sell the U.S. Bonds (subject to the ITRs' restrictions). UCC §8-507. Finally, UCC §8-503(a) dictated that no other entity held any ownership stake in the Markazi Assets.

Accordingly, every indicia of ownership dictates that Markazi was the sole beneficial owner of the Markazi Assets, which were therefore "assets of" Markazi

under TRIA. *See Asia Pulp*, 609 F.3d at 120. Markazi's inability to demand direct payment from Citibank does not undermine that conclusion. While the procedures mandated by the UCC required Markazi to deliver instructions through its direct intermediary, the UCC guaranteed Markazi's right to force Citibank to do whatever Markazi ordered (through Clearstream). Accordingly, the Markazi Assets were the "assets of" only one entity – Markazi. *See, e.g.*, *Craft*, 535 U.S. at 280-81, 283 (where state adopted "the common-law fiction" that husband and wife who co-owned property as tenants-by-entirety "were one person at law" and that neither spouse "own[ed] any individual interest in the estate," property was nevertheless "'property [or] rights to property…belonging to'" the husband for purposes of federal tax lien statute because state law invested him with "some of the most essential property rights," including the rights to use the property and receive income from it); *Drye*, 528 U.S. at 61 (where taxpayer's disclaimer of inheritance created the fiction under state law that the taxpayer pre-deceased the decedent and insulated the inheritance from tax liens, inheritance still constituted "'property' or 'rights to property'" for purposes of tax lien statute).

The nature of Markazi's rights in the Markazi Assets distinguishes this case from decisions in which courts looked to the UCC to determine judgment creditors' rights in EFTs. Those decisions implicated the UCC's specific statement that EFTs are "'neither the property of the originator nor the beneficiary while

briefly in the possession of an intermediary bank.'" *Asia Pulp*, 609 F.3d at 120 (citation omitted); *see also Shipping Corp. of India v. Jaldhi Overseas PTE Ltd.*, 585 F.3d 58, 60 n.1 (2d Cir. 2009) (explaining mechanics of EFTs). Given the *sui generis* nature of EFTs (*see Asia Pulp*, 609 F.3d at 118), and that EFTs are not the property of the originator or beneficiary while in transit, the EFT cases provide no guidance regarding the appropriate application of TRIA's "assets of" language where a terrorist state owns a 100% beneficial interest in particular assets.

For that reason, even a favorable decision for the defendants in the pending appeals in *Calderon* and *Hausler II* will not suggest a comparable result here. Both *Calderon* and *Hausler II* concern efforts to execute against mid-stream EFTs while those funds briefly passed through banks. Thus, those cases bear no resemblance to this matter, and the pending appeals will not determine whether an asset in which a party holds a 100% beneficial ownership interest qualifies as an "asset of" that party under TRIA. In contrast, given *Hausler II's* broad definition of "blocked asset of" a terrorist entity, a positive result for the plaintiffs in the pending appeals will compel the same result here. *Hausler II*, 845 F.Supp.2d at 532-33 (any asset blocked because a terrorist state or agency has an interest in that asset is a "blocked asset of" that entity).

Markazi also ignores that the Markazi Assets consisted entirely of cash when the District Court awarded summary judgment. Accordingly, UCC §8-110(b)(2),

which applies exclusively to securities entitlements, has no bearing on Markazi's rights. *See Highland Capital Mgmt., L.P. v. Schneider*, 533 F.Supp.2d 345, 351 (S.D.N.Y. 2008) (Article 8 is not a "'comprehensive statement of the law'" and therefore governs only where the statute specifically addresses an issue).[10]

Markazi's contention that UCC §8-110 (which Markazi misidentifies as §8-112) directs the Court to Luxembourg, rather than New York, law to define Markazi's rights in the Markazi Assets lacks any significance. As the party advocating the application of foreign law, Markazi had the burden of demonstrating that New York's choice-of-law rules compel that result. *See, e.g., In re Air Crash at Belle Harbor*, 241 F.R.D. 202, 204 (S.D.N.Y. 2007).

Markazi concedes that no difference exists between Luxembourg and New York law with respect to Markazi's rights in the Markazi Assets. Markazi Br. 28, 33; *see also* A-Vol.XII-3343-50 at ¶4.1. In particular, Markazi cites no basis for concluding that any entity other than Markazi is the beneficial owner of the Markazi Assets under Luxembourg law. Accordingly, because beneficial ownership is the relevant inquiry under TRIA, the Court need not concern itself with the specifics of Luxembourg law. *See, e.g., In re Vivendi Universal S.A.*, 618

[10] The fact that the Markazi Assets were comprised entirely of cash when the District Court ordered turnover distinguishes this case from *Fidelity Partners, Inc. v. First Trust Co.*, 58 F.Supp.2d 52, 53-54 (S.D.N.Y. 1997) and *S.E.C. v. Credit Bancorp, Ltd.*, 2000 U.S. Dist. Lexis 17171, at *33-34 (S.D.N.Y. Nov. 29, 2000), which involved efforts to execute against securities.

F.Supp.2d 335, 340 (S.D.N.Y. 2009) (party contending the foreign law applies must prove that a true conflict exists).

D. UCC And CPLR Limitations Upon The Garnishees Against Which Plaintiffs Can Execute Do Not Impact Plaintiffs' TRIA Claim

Markazi mistakenly bases much of its TRIA argument upon the misleading contention that Plaintiffs did not establish the presence of a proper garnishee of Markazi's "securities entitlements" pursuant to UCC §8-112(c) and CPLR §5201(c)(4). As an initial matter, that contention is misguided because the Markazi Assets consisted exclusively of cash when the District Court awarded turnover (A-Vol.III-807, A-Vol.VII-1939-41), and UCC §8-112(c) and CPLR §5201(c)(4) apply solely to securities entitlements.

Moreover, in advancing this argument, Markazi disingenuously cites a June 2009 Order of Judge Jones identifying UBAE as the proper garnishee for certain claims (*see* Markazi Br. 25-26) without mentioning that: (a) the District Court issued that order *before* EO-13599 blocked the Markazi Assets and Congress adopted §8772; and (b) Plaintiffs later proved sufficient facts to establish jurisdiction over UBAE, thereby mooting any concerns regarding whether it was the appropriate garnishee. Thus, Judge Jones' observations regarding the proper garnishee for claims *other than* §8772 and TRIA are irrelevant.

Importantly, TRIA's text unambiguously mandates that the "blocked assets of" Markazi "shall be subject to execution or attachment in aid of execution in

order to satisfy" Plaintiffs' judgments. TRIA §201(a). Thus, to demonstrate their entitlement to turnover, Plaintiffs need only establish that the Markazi Assets are "blocked assets of" Markazi. Once Plaintiffs make that showing, TRIA's "notwithstanding" clause and the precedent concerning the proper role of federal and state law in interpreting federal statutes render irrelevant any additional restrictions upon execution that state law imposes – whether with respect to proper garnishees or otherwise. *See* Point II.A.2, *supra*; *Craft*, 535 U.S. at 288 (state law immunizing tenancy by entirety from levy did not impact whether IRS could levy pursuant to federal law); *Asia Pulp*, 609 F.3d at 117-18 (while state law determined the rights originators and beneficiaries had in EFTs, federal statute's standard for collectability ("property…in which the debtor has a substantial nonexempt interest") controlled and state rule that "shield[ed] any such interest or right from garnishment" was irrelevant).

E. Even If Plaintiffs Did Need To Satisfy The CPLR's Execution Provisions, Turnover Was Appropriate

Even if TRIA somehow required Plaintiffs to execute pursuant to a particular CPLR section, multiple provisions authorized Plaintiffs to collect the Markazi Assets. Again, the Markazi Assets consisted solely of cash when the District Court awarded turnover. A-Vol.VII-1779; A-Vol.XXI-6002. Thus, New York's standards regarding the collectability of cash would govern. *Hausler v. JPMorgan Chase Bank, N.A.*, 740 F.Supp.2d 525, 540 (S.D.N.Y. 2010) ("*Hausler*

I") (once EFTs were blocked and converted to cash, the rules governing executions against cash controlled); *see Elahi*, 556 U.S. at 368-69 (where assets were blocked post-filing, the Court considered the propriety of execution pursuant to TRIA as of when the Court of Appeals awarded judgment to the plaintiff, rather than when the plaintiff improperly obtained a lien against Iranian assets).

Two CPLR provisions demonstrate, unsurprisingly, that New York law permits execution against cash held in bank accounts in which judgment debtors maintain an interest. The first, CPLR §5201(b), authorizes execution "against any property which could be assigned or transferred, *whether it consists of a present or future right or interest and whether or not it is vested . . . .*" (Emphasis added.)

In the absence of the Restraints and EO-13599, Markazi could easily have "assigned or transferred" its "interest" in the cash in the Blocked Account or the U.S. Bonds. *See* CPLR §5201(b); *Capital Ventures Int'l v. Republic of Argentina*, 443 F.3d 214, 220 n.4 (2d Cir. 2006) (bondholder-creditor could attach sovereign-debtor's potential reversionary interest in cash proceeds from sale of collateral securing payment of bond principal because that interest constituted "property that was assignable and transferrable" under §5201(b)); *Hausler I*, 740 F.Supp.2d at 540 (CPLR §§5201(b) and 5225(b) authorized execution "against any property interest that [judgment debtor] has in a bank account in this jurisdiction"); *NML Capital, Ltd. v. Republic of Argentina*, 2011 U.S. Dist. LEXIS 43753, at *31 n.4

(S.D.N.Y. April 22, 2011) (future interest in satellite equipment that defendant had not yet paid for or received was an assignable and transferrable interest under §5201(b)); *M.F. Hickey Co. v. Port of N.Y. Auth.*, 23 A.D.2d 739, 739-40 (1st Dept. 1965) (judgment debtor's contingent right to payment from third party is an assignable and transferrable property interest under §5201(b)).

Plaintiffs also could have executed against the Markazi Assets pursuant to CPLR §5225(b). That provision authorizes judgment creditors to bring turnover from any person "in possession or custody of money or other personal property *in which the judgment debtor has an interest.*" CPLR §5225(b).

Markazi possessed the type of "interest" that CPLR §5225(b) references in both the cash in the Blocked Account and the U.S. Bonds. *See, e.g., EM Ltd. v. Republic of Argentina*, 2009 U.S. Dist. LEXIS 74184, at *14-21 (S.D.N.Y. Aug. 18, 2009) (beneficial ownership interests in, and right to receive distributions from, corpus of purported trust account constituted "interests" subject to restraint under CPLR §5222(b), although account was held in trustee's name and was not directly accessible by judgment debtor); *aff'd*, 389 Fed.Appx. 38 (2d Cir. Aug. 3, 2010); *Weininger v. Castro*, 462 F.Supp.2d 457, 499 (S.D.N.Y. 2006) (in TRIA action, plaintiff could execute pursuant to §5225(b) against beneficial interests held by Cuban agencies in bank accounts opened by American entities for the benefit of Cuban agencies); Weinstein, Korn & Miller, *New York Civil Practice: CPLR*

¶5225.09 (to execute against property in the hands of a garnishee pursuant to §5225(b), "[i]t is not necessary that the judgment debtor have legal title to the property; a beneficial interest is sufficient"). Indeed, Markazi concedes that EO-13599 blocked the Markazi Assets – which consisted of both cash and certain U.S. Bonds when the blocking order issued – precisely because Markazi possessed an "interest" in those assets. *See* Markazi Br. 19.

Even if Markazi were correct that Clearstream "owned" the cash held in the Blocked Account when the District Court awarded summary judgment, such ownership does not impede execution under §§5201(b) and 5225(b). Execution pursuant to those provisions does not depend upon whether Markazi could assign or transfer the *actual cash* at Citibank, or exercise any rights regarding that cash directly vis-à-vis Citibank. Rather, because Markazi could assign or transfer its conceded 100% beneficial ownership "*interest*" in, and ultimate entitlement to, that cash, Plaintiffs could execute against Markazi's interests under either provision.

In any event, when Plaintiffs obtained the Restraints, the U.S. Bonds had not matured. A-Vol.XII-3453-54; A-Vol.XVIII-5117. Once the Restraints issued, CPLR §5222 barred Citibank from transferring the Markazi Assets. Thus, the cash proceeds of the U.S. Bonds were deposited by Citibank into the Blocked Account, and Clearstream never possessed, much less "owned," that cash.

Markazi also misses the mark with its contention that Plaintiffs cannot benefit from the purported "alchemy" that occurred when the U.S. Bonds matured and were transformed into cash, supposedly as a result of invalid Restraints. Markazi Br. 31-32. Again, Markazi never explains why the Restraints were improper or why it made the strategic decision to allow the Restraints to remain in effect for nearly three years (and the U.S. Bonds to mature over that time period) before moving to dismiss.

More importantly, this argument ignores that Plaintiffs can execute against the Markazi Assets under TRIA because the President blocked them, not because Plaintiffs restrained them. When EO-13599 issued, nearly all of the Markazi Assets had converted to cash. A-Vol.XVIII-5050-51(¶10); A-Vol.XVIII-5117-18. Soon thereafter, the remaining few U.S. Bonds matured. A-Vol.VII-1779; A-Vol.XXI-6002. Thus, unlike the cases Markazi cites, neither Plaintiffs nor any banking institution caused the Markazi Assets to convert into cash. Rather, that evolution occurred as time passed and as a result of Markazi's apparent recognition that the ITRs would doom any application to permit reinvestment of the U.S. Bonds' proceeds.

In any event, Markazi cites no authority suggesting that courts should examine the reasons why blocked assets were present in the U.S., or otherwise became subject to blocking, before permitting execution pursuant to TRIA.

Indeed, TRIA's text, which only requires that assets be "blocked" prior to enforcement, and its legislative history negate the existence of any such requirement.

Finally, Plaintiffs would have been entitled to turnover even if one makes two false assumptions that Markazi endorses: (a) the Markazi Assets consisted exclusively of securities entitlements; and (b) Plaintiffs had to satisfy the UCC/CPLR garnishee provisions to execute. While Markazi claims that Clearstream was not a proper garnishee, Markazi disregards UBAE's role as a defendant and the District Court's finding that jurisdiction existed over UBAE. A-Vol.III-829-34. Under UCC §8-112(c), creditors can reach their debtors' interests in securities entitlements by serving legal process upon the debtors' securities intermediaries *anywhere* personal jurisdiction exists over the intermediaries. *Hicks v. Midwest Transit, Inc.*, 2006 U.S. Dist. LEXIS 13972, at *20-24 (S.D. Ill. Mar. 9, 2006) (where debtor's intermediary was subject to jurisdiction in Illinois, the Illinois' version of §8-112(c) and the common law permitted creditor to reach debtor's interests in securities entitlements acquired through intermediary's New Jersey office), *aff'd*, 531 F.3d 467 (7th Cir. 2008); *Smith v. Powder Mountain, LLC*, 2011 U.S. Dist. LEXIS 64650, at *2, 26 (S.D. Fla. June 16, 2011) (service of garnishment order upon debtor's Boston-based intermediary pursuant to Florida version of §8-112(c) established plaintiff's priority interest in debtor's securities

entitlements although debtor maintained securities account in Boston). Thus, §8-112(c) permitted Plaintiffs to execute upon any securities entitlements related to the Markazi Assets that UBAE possessed.

F. Markazi Cannot Invoke The Central Bank Immunity Applicable In Non-TRIA Cases

Markazi cannot invoke the immunity from execution that FSIA §1611(b)(1) provides to central bank property "held for its own account" in non-TRIA cases. *Every* district court to address this issue has found that Congress intended TRIA's "notwithstanding" clause to override §1611(b)(1). *Gates v. Syrian Arab Republic*, 2013 U.S. Dist. LEXIS 45327, at *20-21 (N.D. Ill. Mar. 29, 2013) ("Given the explicit language of the TRIA and the purpose behind its enactment, and in light of its enactment occurring subsequent to the enactment of 28 U.S.C. §1611, the conflict between the two must be resolved in favor of the TRIA…"); *Levin v. Bank of N.Y. Mellon*, 2013 U.S. Dist. LEXIS 137399, at *123 (S.D.N.Y. Sept. 19, 2013) (same); *Weininger*, 462 F.Supp.2d at 498-99 (same).

The principle of construction that a specific statute prevails over a general provision does not assist Markazi because TRIA is far more specific than the generally applicable §1611(b)(1). Section 1611(b)(1) applies to *any* claim against *any* foreign state, while TRIA narrowly addresses terrorist acts committed by the four existing state sponsors of terrorism. *See California Pub. Employees' Ret. Sys. v. Worldcom, Inc.*, 368 F.3d 86, 101-02 (2d Cir. 2004) (provision barring removal

of non-class claims brought under the Securities Act of 1933 was not more specific than statute authorizing removal of all claims related to bankruptcies because the former statute covered many claims the latter did not).

Even if §1611(b)(1) were more specific than TRIA, the specific-trumps-general canon of construction would not apply here because it only controls "'[w]here there is no clear intention otherwise.'" *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (citation omitted). In combination, TRIA's "notwithstanding" clause and legislative history (*see* Point II.A.3) evince Congress' unmistakable intention to preempt any provision immunizing the blocked assets of a terrorist state's instrumentality from execution. *See U.S. v. Novak*, 476 F.3d 1041, 1045, 1054-55 (9th Cir. 2007) (language "'[n]otwithstanding any other Federal law'" expressed a clear intention that a general provision supersede a more specific one once the statute was read in the "whole of the statutory context").

Markazi misrepresents *Creque v. Luis*, 803 F.2d 92, 94-95 (3d Cir. 1986), as applying the specific-trumps-general canon although the general statute at issue contained a "notwithstanding" clause. *Creque* actually turned on the legislative intent evidenced by amendment of the specific section *after* enactment of the general provision containing the "notwithstanding" clause, which demonstrated the legislature's intent to preserve the specific provision. *Id.* at 95. *Creque* is

therefore irrelevant because Congress made no comparable post-TRIA amendment to §1611(b)(1).

Finally, TRIA's codification as a statutory note to 28 U.S.C. §1610 does not evidence Congressional intent that §1611(b)(1) prevail over the later-enacted TRIA. While §1611(b)(1) applies "[n]otwithstanding the provisions of [28 U.S.C. §1610]," Congress enacted TRIA §201(a) as a freestanding provision, not an amendment to §1610. P.L. 107-297, 116 Stat. 2322 (2002). The Office of Law Revision Counsel (the "OLRC") made the administrative decision to place TRIA in a statutory note to §1610. That administrative decision provides no indication of Congressional intent. *See About Classification of Laws to the U.S.C.*, OLRC (Jan. 29, 2014), http://uscode.house.gov/about_classification.xhtml (the OLRC's counsel determines where to place freestanding Congressional enactments and the placement of a freestanding provision "does not in any way affect the provision's meaning or validity").

III.

MARKAZI WAIVED THE RIGHT TO OBJECT TO THE VALIDLY ISSUED ANTI-SUIT INJUNCTION

Markazi initially objected to the anti-suit injunction contained in the District Court's final order because the injunction would have discharged Clearstream from liability for claims unrelated to the Markazi Assets. A-Vol.IV-1075-77. At a hearing, the District Court then modified the injunction language, *and Markazi's*

counsel consented in open court to the precise language about which it now complains. *See* Docket #466 at pp. 23-24 ("That's fine with us…your Honor."). Markazi's stipulation precludes its belated efforts to challenge the injunction's terms. *See, e.g., U.S. v. Kapralos*, 1999 U.S. App. Lexis 4655, at *2-4 (2d Cir. Mar. 19, 1999).

Markazi's injunction arguments also ignore that, pursuant to the turnover order, the District Court took jurisdiction over a *res*, *i.e.*, the Markazi Assets. A-Vol.IV-1107(¶1). Because the *re*s originated from a Clearstream account and was turned over from a Citibank-controlled account, CPLR §§5209 and 6204 and Fed.R.Civ.P. 22 entitled Citibank to a discharge and Clearstream to a conditional discharge. A-Vol.IV-1109(¶9); A-Vol.IV-1110(¶12). To protect the discharge orders, the District Court permanently restrained and enjoined the other defendants from asserting claims "arising from or relating to any claim (whether legal or equitable) to the [Markazi] Assets to the full extent of such amounts." A-Vol.IV-1109(¶10); A-Vol.IV-110-11(¶13). That order fell well within the District Court's authority, particularly given §8772(a)(2)'s stated purpose of sanctioning Iran and holding it, not others, accountable for Plaintiffs' judgments. *See, e.g., Karaha Bodas*, 500 F.3d at 120, 124 (district court has inherent power to protect its judgment by issuing an anti-foreign suit injunction even after the judgment is satisfied by the turnover of funds); *U.S. v. Major Oil Corp.*, 583 F.2d 1152, 1158

(10th Cir. 1978) (courts may enjoin actions when "pending or threatened… proceedings will destroy the effectiveness of the interpleader suit or the enforceability of its judgment").

Markazi's reliance on dicta in *EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 208-09 (2d Cir. 2012) is misplaced because the District Court made no attempt to attach foreign assets. Indeed, by recognizing courts' broad power to enforce their judgments, *EM Ltd.* actually supports the anti-suit injunction. *Id.*[11]

Markazi also errs when it suggests that §8772 treats the Markazi Assets as distinct from the "financial asset[s]" that Markazi's "foreign securities intermediary...holds abroad." §8772(a)(1)(C). Markazi ignores that §8772(d)(2) expressly incorporates the UCC's definition of "financial asset." Pursuant to UCC §8-102(a)(9), the term "financial asset" "means either the interest itself or the means by which a person's claim to it is evidenced, including…a security entitlement." Thus, the Markazi Assets sitting in New York and the means by which Markazi's interest therein is evidenced (*i.e.*, securities entitlements held abroad by Clearstream or UBAE) are one and the same under §8772, and both are included in the "financial asset" subject to execution.

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[11] Markazi's reliance on *S&S Machinery Co. v. Masinexportimport*, 706 F.2d 411 (2d Cir. 1982) is also misplaced. *Id.* at 418 (because the FSIA barred *pre-judgment* attachment of the U.S.-based assets of two foreign state instrumentalities, an injunction could not be used to "eviscerate the [FSIA] protections merely by denominating…restraints as injunctions") (*cited in* Markazi Br. 59).

CONCLUSION

For the reasons stated above, the Court should affirm the District Court's ruling in all respects.

February 3, 2014

Respectfully submitted,

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Dated: February 3, 2014

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