UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RUTH CALDERON-CARDONA, *et al.*,	:	
	:	
Petitioners/Judgment Creditors,	:	No. 11 Civ. 3288 (DLC)
	:	
- against -	:	
	:	
DEUTSCHE BANK TRUST COMPANY AMERICAS,	:	
	:	
Respondent/Garnishee.	:	

STATEMENT OF INTEREST
OF THE UNITED STATES OF AMERICA

PREET BHARARA
United States Attorney for the
Southern District of New York
86 Chambers Street, Third Floor
New York, New York 10007
Tel.: (212) 637-2774
Fax: (212) 637-2702
Email: rebecca.tinio@usdoj.gov

REBECCA S. TINIO
Assistant United States Attorney
- Of Counsel -

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PRELIMINARY STATEMENT

The United States of America, by and through its attorney, Preet Bharara, United States Attorney for the Southern District of New York, respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517,[1] on the issue of whether funds held in certain blocked accounts at Deutsche Bank Trust Company Americas ("DBTCA") are properly subject to attachment pursuant to Section 1610(g) of the Foreign Sovereign Immunities Act (the "FSIA"). DBTCA has entered into a Stipulation with the petitioners in this matter pursuant to which, subject to the views of the United States set forth in this Statement, DBTCA will voluntarily turn over the assets in three DBTCA blocked accounts. *See* Dkt. No. 75.

The funds at issue are blocked pursuant to the North Korean Sanctions Regulations, 31 C.F.R. Part 510. Petitioners are attempting to attach these assets pursuant to Section 1610(g) of the FSIA, but petitioners have not demonstrated, either through development of the factual record or by performing the requisite ownership analysis, that North Korea, or an agency or instrumentality of North Korea, actually owns the accounts, which would trigger the applicability of Section 1610(g). Nor have petitioners demonstrated that the assets satisfy other mandatory requirements of Section 1610 of the FSIA, including the "commercial activity" requirement. Moreover, the Department of the Treasury's Office of Foreign Assets Control ("OFAC"), has not licensed the transfer of these blocked assets, and no other law permits transfer of these assets. Accordingly, the Court should not enter petitioners' proposed Judgment and Order directing the turnover of these funds. *See* Dkt. No. 74-1.

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[1] Pursuant to 28 U.S.C. § 517, "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

Economic sanctions regulations are an important tool in furtherance of the foreign policy and national security of the United States, and the Government has a significant national interest in ensuring the effectiveness and lawful administration of the regulations at issue in this case. While the United States supports lawful remedies for victims of terrorism, including attachment of blocked assets where provided for by law, allowing the attachment of blocked assets in circumstances not authorized by Congress is harmful to public policy, most notably because the dissipation of blocked funds diminishes the President's ability to use blocked assets as a tool in the conduct of foreign policy. The United States also has a significant interest in ensuring that courts correctly construe the North Korean Sanctions Regulations and the FSIA, laws that govern foreign sovereign immunity and the enforcement of judgments against the property of foreign states. In making this submission, the United States in no way condones acts of terrorism and remains committed to aggressively pursuing those responsible for violence against U.S. nationals. We nevertheless respectfully submit that petitioners have not established their entitlement to attach the assets in question here.

BACKGROUND

A. Statutory and Regulatory Background

1. The IEEPA and the North Korean Sanctions Regulations

The United States has implemented a number of economic sanctions programs in furtherance of its national security and foreign policy interests. The primary statutory authority for most of these programs, including those implicated by the present case, is the International Emergency Economic Powers Act (the "IEEPA"), 50 U.S.C. §§ 1701-1706, which grants the President broad authority to, among other things, issue regulations that regulate transactions involving any property in which foreign persons have interests, when he declares a "national

emergency" with respect to an "unusual and extraordinary" threat to the national security, foreign policy, or economy of the United States. *See generally* 50 U.S.C. § 1701. 50 U.S.C. § 1702 grants the President broad sanctions powers, and 50 U.S.C. § 1704 authorizes the promulgation of regulations to implement the statute.

Pursuant to Executive Order 13,466, issued on June 26, 2008, various property and interests in property of North Korea and North Korean nationals have been blocked under the IEEPA. *See* Executive Order 13,466, Section 1 (with certain exceptions, "the following are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in: all property and interests in property of North Korea or a North Korean national that . . . were blocked as of June 16, 2000, and remained blocked immediately prior to the date of this order").[2] The applicable regulations prohibit all transactions prohibited by Executive Order 13,466. *See* 31 C.F.R. §§ 510.201 *et seq*. Among other things, the regulations provide that any attachment or judgment concerning any property or interest in property blocked pursuant to the North Korean Sanctions Regulations, "[u]nless licensed pursuant to this part," is "null and void." 31 C.F.R. § 510.202(e). OFAC is the body authorized to issue such a license or other authorization.[3] *See* Executive Order 13,466 § 5; 31 C.F.R. § 510.802.

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[2] Previously, property now blocked pursuant to Section 1 of E.O. 13,466 had been blocked pursuant to regulations promulgated under the Trading With the Enemy Act ("TWEA"), 50 U.S.C. app. § 1 *et seq.*, which then constituted the statutory authority underlying sanctions relating to North Korea. *See* 31 C.F.R. Part 500 (2008).

[3] In 1988, North Korea was designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979, *see Notice*, Determination Pursuant to § 6(j) of the Export Administration Act of 1979, North Korea, 53 Fed. Reg. 3477-01 (Feb. 5, 1988), but this designation was rescinded on October 11, 2008. *See Notice*, Rescission of Determination Regarding North Korea, 73 Fed. Reg. 63540-01 (Oct. 24, 2008).

2. The Foreign Sovereign Immunities Act

The FSIA establishes a comprehensive and exclusive scheme for obtaining and enforcing judgments against a foreign state in civil suits in U.S. courts. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-35 (1989). The FSIA provides that a "foreign state" is "immune from the jurisdiction" of federal and state courts except as provided by the exceptions to immunity in 28 U.S.C. §§ 1605-1607. 28 U.S.C. § 1604. Those statutory exceptions generally "codify the restrictive theory of sovereign immunity," retaining immunity for sovereign or public acts, but abrogating immunity in suits arising from a state's private or commercial activities. *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010). In 1996, Congress amended the FSIA to include the so-called "terrorism exception" to sovereign immunity, which was codified at 28 U.S.C. § 1605(a)(7). Under that exception, a foreign state would not have immunity for certain terrorism-related lawsuits if the Secretary of State had designated the foreign state as a state sponsor of terrorism.

In 2008, Congress repealed FSIA section 1605(a)(7)'s terrorism exception to immunity, and replaced it with section 1605A. *See* National Defense Authorization Act for Fiscal Year 2008 ("NDAA"), Pub. L. No. 110-181, § 1083(a), (b)(1)(A)(iii) and (3)(D), 122 Stat. 338-341 (2008). Like its predecessor, section 1605A abrogated foreign states' sovereign immunity from damages suits arising from certain terrorist acts. *See* 28 U.S.C. § 1605A(a). In addition, the new section expressly created a private right of action for U.S. citizens injured by state sponsors of terrorism. *See id.* § 1605A(c).

The FSIA also addresses the kinds of foreign sovereign property that are not immune from attachment by judgment creditors. The general rule is that "the property in the United States of a foreign state shall be immune from attachment." *See* 28 U.S.C. § 1609. There are a

number of provisions that set out the exceptions to the general immunity from attachment of foreign state property, *see generally* 28 U.S.C. § 1610, but the basis for the turnover request presently before the Court is FSIA § 1610(g), which applies to judgments obtained under section 1605A.[4] Section 1610(g) allows the "property of" a foreign state, or the "property of" an "agency or instrumentality" of such a state, to be attached in certain terrorism-related cases:

> [T]he property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution upon that judgment as provided in this section, regardless of—
>
> (A) the level of economic control over the property by the government of the foreign state;
> (B) whether the profits of the property go to that government;
> (C) the degree to which officials of that government manage that property or otherwise control its daily affairs;
> (D) whether that government is the sole beneficiary in interest of the property; or
> (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

28 U.S.C. § 1610(g)(1). This provision, however, is subject to the following caveat:

> Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid or execution, or execution, upon such judgment.

28 U.S.C. § 1610(g)(3).

[4] Another exception, codified at 28 U.S.C. § 1610(f)(1), was enacted in 1998 to benefit certain terrorism victims, but has already been determined to be inapplicable here, because President Clinton waived the entirety of the attachment remedy relevant to that exception. *See Calderon-Cardona v. Bank of New York Mellon*, 770 F.3d 993, 998 (2014).

3. The Terrorism Risk Insurance Act of 2002 ("TRIA")

In 2002, Congress passed TRIA, Pub. L. No. 107-297, 116 Stat. 2322 (2002), *reprinted in relevant part at* 28 U.S.C. § 1610 note, which permits attachment of certain blocked assets of a terrorist party. TRIA provides:

> Notwithstanding any other provision of law . . . , in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under [28 U.S.C. § 1605(a)(7) (2000)], the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

TRIA § 201(a).

TRIA section 201(a) permits attachment of property in certain cases where attachment might otherwise be precluded by the FSIA. *See, e.g.*, *Bennett v. Islamic Republic of Iran*, 618 F.3d 19, 21 (D.C. Cir. 2010). TRIA, unlike the FSIA, also permits a person holding a judgment under 28 U.S.C. § 1605A to attach assets that have been blocked pursuant to certain economic sanctions laws, without obtaining an OFAC license. *See, e.g.*, *Weininger v. Castro*, 462 F. Supp. 2d 457, 499 (S.D.N.Y. 2006) (quoting DOJ Letter of January 6, 2006, stating that "[i]n the event the Court determines that the funds are subject to TRIA, the funds may be distributed without a license from [OFAC]"). However, the Second Circuit has already held (affirming the decision of this Court) that TRIA is unavailable to Plaintiffs in this case, because "their judgment was not issued against a terrorist party," as TRIA requires. *Calderon-Cardona v. Bank of New York Mellon*, 770 F.3d 993, 999-1000 (2d Cir. 2014) ("*Calderon-Cardona II*").

B. Factual and Procedural Background

1. Underlying Claims, Judgment, and Collection Proceedings in the Southern District of New York

Petitioners are the families and estates of Carmelo Calderon-Molina and Pablo Tirada-Ayala, two American citizens who were, respectively, killed and injured in a 1972 terrorist attack in Israel. The victims' families and estates sued North Korea on March 27, 2008, in the United States District Court for the District of Puerto Rico, alleging that North Korea provided material support to the terrorists. Defendants did not appear in the action. On July 16, 2010, the district court entered a $378 million judgment for the families, and on August 5, 2010, the district court entered an amended judgment. *See Calderon-Cardona v. Democratic People's Republic of Korea*, 723 F. Supp. 2d 441, 460-85 (D.P.R. 2010).

On October 8, 2010, petitioners registered the judgment in the United States District Court for the Southern District of New York. Petitioners then identified a number of electronic fund transfers ("EFTs") that were blocked "midstream" (that is, in the possession of neither the originator nor the intended beneficiary, but rather an intermediary bank) pursuant to Executive Order 13,466, and petitioners filed a number of "turnover" petitions requesting orders directing various respondent banks to turn over the proceeds of these blocked EFTs pursuant to section 201 of TRIA, section 1610(g) of the FSIA, and certain provisions of New York statutory law. During a conference held on July 7, 2011, this Court determined that it would rule on the threshold question of whether petitioners established, as a matter of law, that the blocked EFTs can be subject to attachment. The parties then submitted additional briefing on this question to the Court.

2. This Court's Ruling in *Calderon-Cardona I* and Entry of Judgment

In an Opinion and Order dated December 7, 2011, this Court held that petitioners failed to demonstrate entitlement to relief under TRIA, the FSIA, or state law, and so denied their petitions for turnover of blocked EFTs. *See* Dkt. No. 23; *Calderon-Cardona v. JPMorgan Chase Bank*, 867 F. Supp. 2d 389 (S.D.N.Y. 2011) ("*Calderon-Cardona I*").

This Court held, first, that North Korea was not a "terrorist party" and, therefore, petitioners' judgment did not lie against a "terrorist party," as is required for TRIA section 201 to apply. *Id.* at 399. Further, the Court held, petitioners "cannot attach the blocked EFTs because these accounts do not constitute 'blocked assets of [North Korea].' " *Id.* As this Court noted, TRIA requires that the assets sought to be attached both be "blocked assets" and also be "of that terrorist party." *Id.* Applying the Second Circuit's holding in *Export-Import Bank of United States v. Asia Pulp & Paper Co.*, 609 F.3d 111, 117 (2d Cir. 2010), this Court used a "two step method of analysis" under which, first, the court looks to state law to determine what property interest the judgment debtor has in the property at issue; and second, the court looks to federal law to determine whether those "'state delineated rights constitute a[n] . . . interest in property sufficient to trigger application'" of the relevant statute. *Calderon-Cardona I* at 400. Applying Article 4-A of New York's Uniform Commercial Code ("UCC"), the Court held that "the interest of an originator or a beneficiary in a midstream EFT falls short of property ownership." *Id.*

Further, the Court rejected petitioners' contention that TRIA pre-empts the UCC or authorizes attachment of blocked EFTs. *Id.* at 401. Finally, with respect to TRIA, the Court held, "[e]ven if one were to assume . . . that TRIA § 201 *does* pre-empt state law," TRIA's "plain language dictates that not all 'blocked assets' are attachable," and says nothing about property

"ownership" or about what property is "'of' a designated foreign country." *Id.* at 405. Because petitioners "cannot, and therefore do not," claim property ownership by North Korea in the blocked EFTs at issue, the Court held, their TRIA claims fail. *Id.*

Turning to 28 U.S.C. § 1610(g), the Court observed that, "[l]ike TRIA § 201," section 1610(g) "'creates no property rights but merely attaches consequences, federally defined, to rights created under state law.'" *Id.* at 406. Because in key part section 1610(g) permits attachment of "*property of*" a "foreign state against which a judgment is entered under section 1605A," "petitioners cannot attach the blocked EFTs under FSIA § 1610(g) because neither North Korea no[r] any of its agencies or instrumentalities owns this property." *Id.* Rejecting petitioners' other contentions as inconsistent with section 1610(g)'s "plain meaning," *id.* at 406-07, and rejecting preemption arguments as even weaker under section 1610(g) than under TRIA given section 1610(g)'s omission of TRIA's "notwithstanding" clause, *id.* at 407, the district court rejected petitioners' FSIA claim. Judgment was entered for respondents on December 8, 2011. *See* Dkt. No. 24. Petitioners appealed.

3. The Second Circuit's Decision in *Calderon-Cardona II*

On appeal, the Second Circuit affirmed this Court's rulings that: (1) TRIA was unavailable to petitioners because "their judgment was not issued against a terrorist party," *Calderon-Cardona II* at 1000; and (2) section 1610(g) of the FSIA "does not preempt state law applicable to the execution of judgments in this case," *id.* at 1001.[5] With respect to the ownership of midstream EFTs, the Second Circuit consulted New York state law, as this Court did, and concluded that "under the N.Y. UCC's statutory scheme," and "[i]n the context of a

[5] The United States filed an amicus brief before the Circuit in this matter. *See* Amicus Brief for the United States, *Calderon-Cardona v. Bank of New York Mellon*, Case No. 12-75, ECF No. 210 (2d Cir. Sept. 21, 2012).

blocked transaction," "the only entity with a property interest in the stopped EFT is the entity that passed the EFT on to the bank where it presently rests." *Id.* at 1002. Therefore, an EFT "blocked midstream" is "property of a foreign state" or "the property of an agency or instrumentality of such a state," and attachable under section 1610(g), "only where either the state itself or an agency or instrumentality thereof (such as a state-owned financial institution) transmitted the EFT directly to the bank where the EFT is held pursuant to the block." *Id.* In other words, if petitioners could show that either North Korea itself, or an agency or instrumentality of North Korea, directly transmitted one of the stopped EFTs to the intermediary bank where it presently resides, that EFT could be attachable under section 1610(g). The Second Circuit remanded this matter so that the parties could "conduct discovery aimed at resolving the factual issues surrounding whether the entities that transmitted the EFTs to the respondent banks were agencies or instrumentalities of North Korea." *Id.*

4. Post-Remand Proceedings in this Court

Upon remand, this Court agreed to stay proceedings pending the United States Supreme Court's consideration of petitions for certiorari from the Second Circuit's opinion, which were ultimately denied. *See* Dkt. Nos. 38, 39. In order to address the factual question posed by the Second Circuit, this Court directed the parties to confer and, "to the extent feasible," "divide the list of direct transmitters to the respondent banks of the EFTs at issue into the following three categories: whether the transmitter is (a) an agency or instrumentality of North Korea, (b) not such an agency or instrumentality, or (c) of unknown or disputed status." Dkt. No. 44. Along with other respondent banks, Deutsche Bank Trust Company Americas ("DBTCA") filed a redacted schedule of the blocked accounts at DBTCA sought by petitioners, which identified the

transmitter associated with each account as "not, to DBTCA's knowledge, an agency or instrumentality of North Korea." *See* Dkt. No. 49-1, n.1.

However, at a February 19, 2016 conference, the Court and the parties apparently initially identified four accounts held by DBTCA, and one account held by JPMorgan Chase Bank, as "having or potentially having a direct transmitter that is an agency or instrumentality of North Korea." *See* Dkt. No. 45 at 1; Dkt. No. 52 at 1. DBTCA's counsel wrote to the Court and averred that "none of [the DBTCA] accounts appears to have a direct transmitter that is an agency or instrumentality of North Korea," but "three of the four are factually-related and differ in potentially material respects from the other blocked accounts at DBTCA." Dkt. No. 52 at 1. These accounts, identified on DBTCA's filed schedule of accounts as ending in 2-956, 2-964, and 2-2972, apparently "each involve transfers of blocked funds between different accounts within DBTCA (or its predecessor Bankers Trust Company). *Id.* at 2. DBTCA then stated that "it appears that the originator of each of these transfers was an insurance company that received certain funds payable to a North Korean entity under a reinsurance treaty and determined that the funds were required to be blocked under sanctions regulations. The insurance company requested that DBTCA transfer the funds from its own account at DBTCA into blocked assets maintained by the bank." *Id.* DBTCA then noted that "[b]ecause these transfers were completed, they may not be governed by the same principles of the UCC that apply to the other ten accounts at DBTCA." *Id.* DBTCA requested additional time to learn more about these three transactions from the originator, and "to determine whether the originator intends to assert a claim to the funds." *Id.* The Court granted this request. *Id.*[6]

[6] It appears that the blocked funds held in the one JPMCB account discussed at the February 19, 2016 conference were identified by JPMCB as having been transmitted by "an instrumentality of North Korea," Dkt. No. 52 at 2, and that a Judgment and Order directing the turnover of those

On April 1, 2016, DBTCA wrote to the Court and identified General Reinsurance Corporation ("General Re") as the party that requested that the funds in the three DBTCA accounts at issue be held by DBTCA in blocked accounts pursuant to the North Korean Sanctions Regulations, and Korea Foreign Insurance Corporation ("KFIC") as the party to whom these payments were owed. *See* Dkt. No. 61 at 1. DBTCA represented that these funds were completed, not midstream, funds transfers, and therefore would not be "governed by the same principles of the Uniform Commercial Code . . . applicable to the ten other blocked accounts held at DBTCA." *Id.* Therefore, DBTCA reported, it "may be possible to release accounts to Petitioners in satisfaction of their judgment against North Korea," if certain conditions were met. *Id.* The Court granted DBTCA additional time to attempt to negotiate a proposed Stipulation and Order regarding the General Re accounts. *Id.* at 2.

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funds was executed and entered on March 15, 2016. *See Calderon-Cardona v. JPMorgan Chase Bank, N.A.*, No. 11 Civ. 3283 (DLC) (S.D.N.Y), Dkt. No. 78 ("JPMCB Order"). The United States was not aware of the JPMCB Order, and did not file a Statement of Interest with respect to the proposed order, because the petitioners and garnishee bank involved failed to comply with their regulatory obligation to report the relevant filings and order to OFAC. *See* 31 C.F.R. § 501.605(a). The United States notes that the JPMCB Order purports to "supersede[] and override[] any provisions of 31 C.F.R. Part 542, any other regulations promulgated by OFAC, or any Presidential Executive Orders that otherwise require JPMCB to hold the funds in the Blocked Account or that prohibit the payment of those funds to Petitioners in satisfaction of this Judgment and Order," apparently relying on the position taken by the United States in a previous case that "[i]n the event the Court determines that the funds are subject to TRIA, the funds may be distributed without a license from [OFAC]." *See* JPMCB Order at 4. (The United States construes this provision as intending to refer to 31 C.F.R. Part 510, the North Korean Sanctions Regulations, rather than 31 C.F.R. Part 542, which relates to Syria.) However, as clearly stated by this Court and the Second Circuit, and as acknowledged in the JPMCB Order itself, the blocked EFTs in this case are not attachable under TRIA, but are only potentially attachable under FSIA section 1610(g). *See* JPMCB Order at 2-3; *see supra* Section B.2, B.3 (Background). Therefore, the assertion in the JPMCB Order that all relevant Executive Orders and OFAC rules and regulations may be "superseded" and "overridden" to allow the turnover of the blocked JPMCB account without a license from OFAC is unsupported and does not correctly reflect the position of the United States or the requirement of the sanctions regulations. *See* 31 C.F.R. §§ 510.202(c), (e).

On April 29, 2016, DBTCA provided, and the Court soon after signed, a stipulation and order regarding the three accounts at DBTCA apparently created at the request of General Re to hold blocked assets. *See* Dkt. No. 75 ("DBTCA Stipulation"). Among other things, the DBTCA Stipulation simply states that KFIC is an "agency or instrumentality of North Korea" based on the assertion that the European Commission has recognized KFIC "as a North Korean governmental entity whose revenue is used to support the regime in North Korea," *id.* at 2, and states that the funds in the blocked accounts are "payable" to KFIC and that DBTCA and General Re "have no objection to the turnover of the KFIC Accounts." *Id.* The DBTCA Stipulation provides the United States with the opportunity to file a Statement of Interest setting forth any objection it may have to the turnover of the KFIC accounts to petitioners. *Id.* at 3.

ARGUMENT

A. Petitioners Have Not Shown That the Blocked Assets Are Subject to Attachment Under FSIA Section 1610

First, petitioners have not sufficiently shown that the assets held in the DBTCA blocked accounts are subject to attachment under FSIA § 1610. In actions under the FSIA, a judgment creditor bears the burden of identifying particular property to be executed against and proving that it falls within a statutory exception to immunity. *See Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 297 (2d Cir. 2011); *see also, e.g.*, *Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 785-86 (7th Cir. 2011). Petitioners here bear the burden of establishing that the blocked accounts are the property of KFIC, that KFIC is an agency or instrumentality of North Korea, and that KFIC engages in commercial activity in the United States. They have not demonstrated that any of these requirements are met.

The FSIA authorizes in appropriate circumstances the attachment of "the property *of* a foreign state . . . and the property *of* an agency or instrumentality of such a state." 28 U.S.C.

§ 1610(g)(1) (emphases added). This textual requirement that the property to be attached must be "of" the foreign state (or agency or instrumentality) in question unmistakably requires actual ownership; indeed, the Supreme Court has held that, in this context, "the use of the word 'of' denotes ownership." *Bd. of Trs. of the Leland Stanford Jr. Univ. v. Roche Molecular Sys., Inc.*, 131 S. Ct. 2188, 2196 (2011) (internal quotation marks omitted). This statutory language is also notably narrower than the language used in OFAC's blocking regulations themselves, which, though codified separately as to separate nations or other subjects of sanctions, generally apply not only to property of the foreign state at issue, but also to that state's "interests in property." *See, e.g.*, 31 C.F.R. § 510.201(a). If Section 1610(g) were intended to extend to all blocked assets, it could have been drafted to include broader language referencing "interests in property," but instead it includes narrower language requiring an ownership interest. *See* 28 U.S.C. § 1610(g)(1).

A number of policy reasons support the conclusion that attachment pursuant to the FSIA applies only to property of a foreign state (or agency or instrumentality of that state), rather than to all property and interests in property. First, an interpretation that permits attachment of blocked assets that the foreign state does not own would have the perverse effect of subsidizing states with outstanding terrorism-related judgments by permitting judgments against them to be satisfied by collections of assets that the state (or its agency or instrumentality) does not own, and that instead are owned by potentially innocent third parties. *See Heiser v. Islamic Republic of Iran*, 735 F.3d 934, 939-40 (D.C. Cir. 2013) (concluding that Congress could not have intended that potentially innocent parties pay some part of a Section 1605A judgment debt). Second, there is a strong public interest in preserving the President's ability to use blocked assets as a tool of foreign policy. A rule that allowed plaintiffs to attach blocked assets that are not

owned by the sanctions target would drain the pool of blocked assets, thereby reducing the leverage that these assets provide in the President's conduct of foreign policy. *See Estate of Heiser v. Islamic Republic of Iran*, 885 F. Supp. 2d 429, 441 (D.D.C. 2012) ("Plaintiffs' sweeping interpretation would effectively—through future attachments and executions—eliminate the President's ability to use blocked assets as bargaining chips in solving foreign policy disputes."), *aff'd*, 735 F.3d 934 (D.C. Cir. 2013); *Villoldo v. Castro Ruz*, 821 F.3d 196, 203 (1st Cir. 2016) (same).

Petitioners have not shown that the assets in the DBTCA blocked accounts are owned by North Korea, or by an agency or instrumentality of North Korea, as the FSIA requires. Indeed, petitioners do not even specifically contend in the DBTCA Stipulation that the blocked assets are the property of KFIC. *See* Dkt. No. 75. Importantly, the Second Circuit's specific holding in this case with respect to the ownership of EFTs blocked midstream does not bear on the ownership of the assets in the DBTCA accounts. The Second Circuit held, with reference to New York law, that where a foreign state itself (or an agency or instrumentality of that state) directly transmitted an EFT to the intermediary bank where that blocked EFT now resides, the EFT is the property of that transmitting state. *Calderon-Cardona II*, at 1001-02; *see supra* Section B.3 (Background). In contrast, the funds held in the blocked DBTCA accounts are, apparently, "completed funds transfers, not midstream EFTs," and no party claims that the funds were directly transmitted by North Korea or by an agency or instrumentality of North Korea; rather, they were transmitted by General Re. *See supra* Section B.4 (Background). The ownership analyses previously performed by this Court and by the Court of Appeals, therefore, do not shed light on the ownership of the assets in the blocked DBTCA accounts. *See supra* Section B.3, B.4 (Background).

The United States does not take a position as to the ownership of the assets held in the DBTCA blocked accounts. However, petitioners have set forth almost no facts, and no legal analysis, to support the proposition that the funds in the DBTCA accounts are the property of North Korea or of an agency or instrumentality of North Korea, and are therefore otherwise subject to attachment under section 1610(g). For example, the details of the relevant agreements between General Re and DBTCA, pursuant to which DBTCA presumably created at least some of the blocked accounts, are not in the record, and it is therefore not clear whether KFIC in fact has any possessory rights to the blocked assets. Nor is it known whether, for example, any entity may have any setoff rights as to the blocked assets. The record also does not reflect the account names under which the blocked accounts are held; this could bear on the ownership of the accounts, as courts in this Circuit have noted that "under New York law, an account is presumed to be the property of the entity in whose name it is held." *Villoldo v. Ruz*, No. 1:14-mc-0025, 2016 WL 81492, at *15 (N.D.N.Y. Jan. 7, 2016) (internal quotation marks omitted); *see also, e.g.*, *Karaha Bodas Co., LLC v. Pertamina*, 313 F.3d 70, 86 (2d Cir. 2002) ("when a party holds funds in a bank account, possession is established, and the presumption of ownership follows"). The ownership of the funds in the DBTCA accounts may also turn on whether the accounts are "general" or "special" under New York law; if the accounts are special, ownership of the funds therein may rest with General Re, because "when funds are deposited into a special account . . . the title . . . remain[s] with the [depositor]." *D.C. Precision, Inc. v. United States Gov't*, 73 F. Supp. 2d 338, 343 (S.D.N.Y. 1999).

Petitioners also have not shown that KFIC is an agency or instrumentality of North Korea, as required to attach KFIC's assets pursuant to FSIA § 1610(g). KFIC is not on OFAC's Special Designated Nationals ("SDN") list, and petitioners have failed to demonstrate how KFIC

qualifies as an agency or instrumentality of a foreign state within the meaning of FSIA § 1603(b).

In addition, petitioners have not demonstrated that KFIC engages in commercial activity in the United States, as required by FSIA § 1610(b). FSIA § 1610(g) does not create an independent, freestanding exception to the baseline immunity from attachment of foreign state property, without need to meet the other requirements of Section 1610. Rather, Section 1610(g) authorizes "attachment in aid of execution, and execution, upon that judgment *as provided in this section*." 28 U.S.C. § 1610(g)(1) (emphasis added); *see also, e.g.*, *Rubin v. Islamic Republic of Iran*, ___F.3d ___, No. 14-1935, 2016 WL 3903409, at *9 (7th Cir. July 19, 2016). Therefore, attachment pursuant to FSIA § 1610(g) must also satisfy the other provisions within Section 1610 governing the exceptions to a foreign state's immunity from attachment and execution on judgments under the terrorism exception set forth in Section 1605A, including the "commercial activity" requirement in Section 1610(b). *See id.* at *13 (holding that "Section 1610(g) is not itself an exception to execution immunity for terrorism-related judgments," and that "terrorism victims with unsatisfied § 1605A judgments against foreign states . . . must satisfy an exception to execution immunity found elsewhere in § 1610—namely, subsections (a) or (b)."); *but see Bennett v. Islamic Republic of Iran*, 817 F.3d 1131, 1141 (9th Cir. 2016) (holding that section 1610(g) contains a freestanding exception to execution immunity).

In sum, petitioners have not met their f to demonstrate that the assets held in the DBTCA blocked accounts may be attached pursuant to FSIA § 1610(g).

B. FSIA Section 1610(g) Does Not Permit the Turnover of the Blocked Assets Without an OFAC License

Second, irrespective of whether petitioners have complied with any other provision of the FSIA, and regardless of whether the funds in the DBTCA blocked accounts are subject to

attachment, those funds may not be turned over without an OFAC license, which petitioners have not obtained.[7] The North Korean Sanctions Regulations provide that any attachment or judgment concerning any property or interest in property blocked pursuant to those regulations and to Executive Order 13,466, "[u]nless licensed pursuant to this part" by OFAC, is "null and void." 31 C.F.R. §§ 510.202(c), (e); *see supra* Section A.1 (Background). The United States has consistently stated that, where "funds at issue fall outside TRIA but somehow are attachable by operation of the FSIA alone . . . an OFAC license would be required before the funds could be transferred to plaintiffs." Statement of Interest of the United States, *Wyatt v. Syrian Arab Republic*, No. 08 Civ. 502, ECF No. 105 (D.D.C. Jan. 23, 2015), at 18. *See also* Amicus Brief of the United States, *Harrison v. Republic of Sudan*, No. 14-121, ECF No. 101 (2d Cir. Nov. 6, 2015), at 7-8 (same); Statement of Interest of the United States, *Martinez v. Republic of Cuba*, No. 07 Civ. 6607, ECF No. 79 (VM) (S.D.N.Y. Oct. 16, 2015), at 15 n.10 (same); *Martinez v. Republic of Cuba*, No. 10-CV-22095, at *2 (EGT) (FAM) (S.D. Fla. Aug. 22, 2011) ("Plaintiff cannot satisfy the default judgment that she obtained against the Government of Cuba by garnishing payments owed by the listed air charter companies. Since Plaintiff does not have the required license from [OFAC], the writs of garnishment are null and void.").

The license requirement of FSIA section 1610(g) contrasts with TRIA, as to which the United States has not required an OFAC license to attach blocked assets of a terrorist party. *See, e.g.*, Amicus Brief of the United States, *Harrison v. Republic of Sudan*, No. 14-121, at 7. The terms of TRIA permit attachment of blocked assets in specified circumstances

[7] The OFAC license requirement was not an issue before the Second Circuit and was not discussed in the United States' amicus brief to the Circuit, because in the underlying district court opinion, this Court focused on whether, as a matter of law, the "property of" requirement of FSIA section 1610(g) could be satisfied by midstream EFTs. *See Calderon-Cardona I* at 407; *see supra* Section B.1, B.2 (Background).

"[n]otwithstanding any other provision of law." TRIA § 201(a); *see supra* Section A.3 (Background). FSIA § 1610(g), by contrast, contains no such "notwithstanding clause," and does not override other applicable rules of the North Korean Sanctions program, including the need to obtain an OFAC license. While FSIA § 1610(g)(2) provides that foreign state property "shall not be immune from attachment" to satisfy a judgment under Section 1605A "because the property is regulated by the United States Government by reason of action taken against that foreign state under . . . [IIEPA]," that provision, consistent with the paragraph's title ("United States sovereign immunity inapplicable"), simply removes a specific sovereign immunity defense. 28 U.S.C. § 1610(g)(2).

In its recent ruling in *Harrison*, the Second Circuit suggested that no OFAC license needs to be obtained in order to attach foreign property pursuant to *both* TRIA and FSIA § 1610(g). *See Harrison v. Republic of Sudan*, 802 F.3d 399, 407-08 (2d Cir. 2015). Respectfully, the United States disagrees with that conclusion and has so advised the Second Circuit in that case. In *Harrison*, both the district court and the court of appeals relied on previous Statements of Interest filed by the United States in TRIA cases, where the United States stated that attachment pursuant to TRIA does not require an OFAC license, but did not reference any Statement of Interest or amicus brief addressing FSIA § 1610(g) and the OFAC license requirement. *Id.* at 406-09. The panel in *Harrison* incorrectly applied, without separate analysis, the Government's construction of TRIA to FSIA § 1610(g). The United States has pointed out this error to the Second Circuit in its Amicus Brief in support of panel rehearing or rehearing *en banc* in *Harrison*. *See* Amicus Brief of the United States, *Harrison v. Republic of the Sudan*, ECF No. 101, at 7-8. The petition for rehearing in *Harrison*, filed by appellant the Republic of Sudan, is still pending.

Accordingly, it remains the Government's position that any attachment of funds in the DBTCA blocked accounts pursuant to FSIA § 1610(g)—apart from any other issue relating to petitioners' compliance with that statute—requires a license from OFAC.

CONCLUSION

For the reasons stated above: (1) petitioners have not shown, on the scant factual record before the Court and with no supporting legal analysis, that the funds held in the three blocked DBTCA accounts are subject to attachment under FSIA § 1610(g) because, among other reasons, petitioners have not established that the funds are "property of" North Korea, or "property of" an agency or instrumentality of North Korea; and (2) FSIA § 1610(g) requires that petitioners seeking to attach property pursuant to that section must obtain a license from OFAC, which petitioners have not done here.

Dated: New York, New York
July 20, 2016

PREET BHARARA
United States Attorney for the
Southern District of New York
Attorney for the United States

/s/ Rebecca S. Tinio

By: REBECCA S. TINIO
Assistant United States Attorney
86 Chambers Street
New York, New York 10007
Tel.: (212) 637-2774
Fax: (212) 637-2702