

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEBORAH D. PETERSON,
Personal Representative of the Estate of
James C. Knipple (Dec.) et al.,

Plaintiffs,

v.

ISLAMIC REPUBLIC OF IRAN, et al.

Defendants.

Case No. 10 CIV 4518 (BSJ)

**FILED UNDER SEAL
CONTAINS CONFIDENTIAL
MATERIAL SUBJECT TO
PROTECTIVE ORDER**

**DEFENDANT BANK MARKAZI'S MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION TO DISMISS THE AMENDED COMPLAINT FOR
LACK OF SUBJECT MATTER JURISDICTION**

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Defendant Bank Markazi (“Bank Markazi” or “the Bank”), which is the Central Bank of Iran, respectfully submits this Memorandum of Law in support of its Motion pursuant to Fed. R. Civ. P. 12(b)(1) to dismiss the Amended Complaint dated October 19, 2010 (the “Complaint”) in this action (the “Turnover Action”) for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act (the “FSIA” or the “Act”), 28 U.S.C. §§ 1602-1611.

PRELIMINARY STATEMENT

Over \$1.75 billion in securities belonging to Bank Markazi (the “Restrained Securities”) are frozen in a custodial omnibus account at Citibank N.A. (“Citibank”). Citibank serves as a sub-custodian for Clearstream Banking, S.A. (“Clearstream”) on behalf of Clearstream’s client, Banca UBAE SpA (“UBAE”). UBAE’s client is Bank Markazi. It is undisputed that Bank Markazi is the beneficial owner of the Restrained Securities. It is further undisputed that Bank Markazi is the Central Bank of Iran—a sovereign instrumentality.

Plaintiffs seek to seize the Restrained Securities to satisfy a judgment they have obtained against the Islamic Republic of Iran (“IRI”) and the Iranian Ministry of Information and Security (“MOIS”)—not Bank Markazi. The Bank is not alleged to have had any involvement in the acts for which the IRI and MOIS were found liable.

Because Bank Markazi is a sovereign entity, this Court has subject matter jurisdiction only as provided in the FSIA. Here, the Court lacks subject matter jurisdiction under the FSIA for two independent reasons: (1) the Restrained Securities are immune from attachment and execution, and (2) Bank Markazi is immune from suit.

First, section 1611(b)(1) of the FSIA expressly immunizes the property of a foreign central bank from attachment and execution. The Restrained Securities are the property of Bank Markazi, the Central Bank of Iran. Accordingly, the FSIA precludes this attempt by plaintiffs to seize the Restrained Securities.

The plain language of section 1611(b)(1) requires only that the assets in question must be held for the foreign central bank's "own account" in order to qualify for immunity. This requirement is fulfilled as long as the assets are used for central banking purposes.

The very nature of the Restrained Securities as debt instruments denominated in United States dollars suggests that they are held by Bank Markazi as part of its foreign currency reserves—a core central banking function. The evidence proffered by Bank Markazi further confirms that the Restrained Securities are used for central banking purposes. Plaintiffs' failure to allege any facts that could support a contrary conclusion requires dismissal of the Complaint.

Second, as a sovereign instrumentality, Bank Markazi is immune from this Court's jurisdiction under section 1604 of the FSIA "except as provided in sections 1605 to 1607" of the Act. Yet none of the exceptions enumerated in sections 1605 to 1607 of the FSIA even arguably provides a basis to overcome Bank Markazi's immunity from suit in this Turnover Action.

Where, as here, a judgment creditor seeks to shift liability from the judgment debtors onto a third party, United States Supreme Court and Second Circuit precedent unambiguously requires an independent basis in federal law for subject matter jurisdiction. Because Bank Markazi is a sovereign instrumentality, only the FSIA can provide that independent basis here.

The Complaint relies solely on the antiterrorism exceptions to immunity codified in former section 1605(a)(7) and new section 1605A of the FSIA. But those provisions cannot provide a basis to overcome Bank Markazi's immunity from suit in the absence of any allegation that the Bank had any involvement in the acts for which the IRI and MOIS were found liable under former section 1605(a)(7)—that is, the provision of material support to Hezbollah in connection with the bombing of the United States Marine barracks in Beirut in 1983.

Even assuming that plaintiffs could allege a viable basis to overcome Bank Markazi's immunity from suit, the Restrained Securities would still be immune from attachment and execution under section 1611(b)(1) of the FSIA. As the United States Court of Appeals for the Ninth Circuit recently stated in another case in which these same plaintiffs sought to enforce their judgment against assets that were immune under the FSIA:

[T]he exceptions to immunity from execution are more narrow than the exceptions from immunity from suit. Congress fully intended to create rights without remedies, aware that plaintiffs would often have to rely on foreign states to voluntarily comply with U.S. court judgments.

Peterson v. Islamic Republic of Iran, 627 F.3d 1117, 1128 (9th Cir. 2010). Here, however, **both** forms of immunity apply: the Restrained Securities are immune from attachment and execution, and Bank Markazi is immune from suit.

Finally, jurisdictional discovery is not appropriate in this case. Dismissal of the instant Complaint does not hinge on any disputed issue of material fact. On the contrary, plaintiffs have conceded all of the material facts required to establish the immunity of Bank Markazi and its property under the FSIA—in many instances explicitly, and otherwise implicitly by their inability to allege any facts to the contrary. Accordingly, any jurisdictional discovery would be futile.

PROCEDURAL AND FACTUAL BACKGROUND

A. Plaintiffs' Underlying Judgment Against the IRI and MOIS

Plaintiffs are judgment creditors with respect to a \$2.65 billion default judgment they obtained against the IRI and MOIS in the United States District Court for the District of Columbia. On May 30, 2003, Judge Royce C. Lamberth of that court entered judgment on liability against the IRI and MOIS pursuant to former section 1605(a)(7) of the FSIA based on a finding that the IRI and MOIS had provided material support to Hezbollah in connection with the bombing of the United States Marine barracks in Beirut, Lebanon on October 23, 1983. *See Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 60-61 (D.D.C. 2003).

In a subsequent judgment dated September 7, 2007 and attached as Exhibit A to the Complaint, Judge Lamberth entered judgment in favor of plaintiffs in the aggregate amount of \$2,656,944,877.00 and allocated the amount awarded among the individual plaintiffs.

There was never any allegation in the underlying action in the District of Columbia, nor is there any allegation in the present Complaint, that Bank Markazi played any role in the bombing of the United States Marine barracks in Beirut in 1983.

B. The Enforcement Proceeding

In response to a subpoena from plaintiffs, the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC") disclosed to plaintiffs on June 11, 2008 that it was in receipt of information indicating *inter alia* that "Clearstream has an Iranian government client that has a beneficial ownership interest in assets custodied in the United States . . . held on Clearstream's books, apparently in the Iranian client's name," and that "Clearstream has a sub-custodial account in the United States with Citibank[.]" Compl. ¶ 11. The assets that were the subject of

OFAC's disclosure consisted of U.S. dollar-denominated bond instruments with an aggregate face value of \$2.003 billion. Compl. Ex. B.¹

On the basis of the information disclosed by OFAC, plaintiffs commenced an enforcement proceeding in the Southern District of New York, *Peterson v. Islamic Republic of Iran*, Case. No. 18 Misc. 302 (S.D.N.Y.) (the "Enforcement Proceeding") and, on June 12, 2008, obtained a writ of execution from the Clerk of this court. On its face, the writ of execution was directed at "***goods and chattels of Islamic Republic of Iran*** who has an interest in accounts held by Citibank[.]" Compl. Ex. D (emphasis added). The United States Marshal's Service served the writ of execution on Citibank on June 13, 2008. Plaintiffs subsequently served restraining notices pursuant to section 5222 of the New York Civil Practice Law and Rules ("CPLR") on Clearstream on June 16, 2008 and on Citibank on June 17, 2008. Compl. ¶ 15.

Shortly thereafter, Citibank sought to quash the writ of execution and the restraining notices in the Enforcement Proceeding. Compl. ¶ 17. Following a hearing on June 27, 2008, Judge John G. Koeltl, acting as Part I judge of this court, issued an order vacating the restraints on two of the bond instruments with an aggregate face value of \$250 million, on the apparent basis that those securities were not the property of the IRI or any of its political subdivisions, agencies or instrumentalities. Compl. ¶ 17 & *id.* Ex. F. 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.

¹ OFAC's disclosure to the plaintiffs occurred pursuant to a Protective Order entered by Judge Lamberth on June 11, 2008, which was intended to protect the confidential information disclosed by OFAC. Compl. ¶ 12 & *id.* Ex. C.

C. Clearstream's Motion in the Enforcement Proceeding to Vacate the Writ of Execution and Restraining Notices

By motion dated September 4, 2008 in the Enforcement Proceeding, Clearstream moved to vacate the writ of execution and restraining notices (the "Clearstream Motion"). It is Bank Markazi's understanding that the Clearstream Motion asserts that the Restrained Securities are located outside the United States and are therefore not subject to attachment and execution under the FSIA. *See, e.g., Fidelity Partners, Inc. v. Philippine Export and Foreign Loan Guarantee Corp.*, 921 F. Supp. 1113, 1119 (S.D.N.Y. 1996) ("Under the FSIA, assets of foreign states located outside the United States retain their traditional immunity from execution to satisfy judgments entered in United States courts.").

It is Bank Markazi's understanding that following the surreply filed by plaintiffs on April 18, 2011, the Clearstream Motion is now fully briefed and awaits a decision by this Court. If the Court grants the Clearstream Motion, it must also dismiss the Complaint in the Turnover Action for lack of subject matter jurisdiction under the FSIA, irrespective of the additional grounds for dismissal identified by Bank Markazi in this Motion to Dismiss (the "Motion").²

D. The Instant Turnover Action

In response to another subpoena from plaintiffs, OFAC disclosed to plaintiffs on April 23, 2010 that the previously unidentified "Iranian governmental client" that has "a beneficial ownership interest" in the Restrained Securities is in fact "the Central Bank of Iran." Compl. ¶ 19. Following this additional disclosure by OFAC, plaintiffs commenced this Turnover Action against Bank Markazi.

² Subject to having an opportunity to review the Enforcement Proceeding file, Bank Markazi adopts Clearstream's argument that the Restrained Securities are not located in the United States as though fully set forth herein.

By Order dated June 8, 2010, the Court permitted plaintiffs to file their initial complaint in the Turnover Action under seal and ordered that all subsequent filings in the Turnover Action likewise would be under seal. The Court's June 8, 2010 Order further directed the Clerk of the Court to "mark this case as related to [the Enforcement Proceeding] being handled by this Court."³ Plaintiffs later filed an Amended Complaint dated October 19, 2010, which is the operative complaint in the Turnover Action and the subject of this Motion.

ARGUMENT

I. Standard Applicable to this Motion

"In a motion to dismiss [for lack of subject matter jurisdiction] pursuant to Fed. R. Civ. P. 12(b)(1), the defendant may challenge either the legal or factual sufficiency of the plaintiff's assertion of jurisdiction, or both." *Robinson v. Government of Malaysia*, 269 F.3d 133, 140 (2d Cir. 2001). Here, Bank Markazi's primary argument goes to the legal sufficiency of the subject matter jurisdiction allegations in the Complaint, as plaintiffs have failed to allege a *prima facie* basis for subject matter jurisdiction under the FSIA.

When considering Bank Markazi's facial challenge to subject matter jurisdiction under the FSIA, the Court "must accept the factual allegations of the complaint as true, but should refrain from drawing inferences favorable to the party asserting jurisdiction." *Standard Inv. Chartered, Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 621 F. Supp. 2d 55, 65 (S.D.N.Y. 2007) (citations omitted).

³ As of the date of filing of this Motion, Bank Markazi has not been granted access to the filings under seal in the Enforcement Proceeding. Bank Markazi therefore reserves its right to supplement or amend this Motion based on any newly discovered facts and circumstances if and when Bank Markazi is granted access to the filings under seal in the Enforcement Proceeding. Throughout the Complaint, plaintiffs rely on prior proceedings in the Enforcement Proceeding generally, and the filings under seal in particular. *See, e.g.*, Compl. ¶¶ 67-68 (relying on "testimony and documents of Clearstream given in Court on June 27, 2008" to support the claim that Clearstream and Citibank should be ordered "to cause the turnover to the Plaintiffs" of the Restrained Securities). In the event that plaintiffs assert any additional arguments purportedly derived from the filings under seal in opposition to this Motion, Bank Markazi further reserves its right to supplement or amend its request for access to the filings under seal on that basis.

If the Court finds that the factual allegations in the Complaint—even if accepted as true for purposes of this Motion—are insufficient as a matter of law to confer subject matter jurisdiction over plaintiffs’ claims against Bank Markazi and its property under the FSIA, then the Court need not consider the evidence proffered by Bank Markazi, although it has discretion to do so if it wishes. *See Robinson*, 269 F.3d at 140 n.6 (a district court **may** consider evidence outside the pleadings on any motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1)).

Should the Court, however, find it necessary to reach the factual underpinnings of Bank Markazi’s challenge to subject matter jurisdiction in this case, then it must consider the competent evidence proffered by Bank Markazi. *See id.*, 269 F.3d at 140 n.6 (a district court **must** consider such evidence where “resolution of a proffered factual issue may result in the dismissal of the complaint for want of jurisdiction”).

In support of this Motion, Bank Markazi has proffered affidavits from two Bank Markazi employees with relevant personal knowledge: Mr. Gholamhossein Arabieh, Director of Bank Markazi’s Legal Studies and Researches Department, and Mr. Ali Asghar Massoumi, Head of the Bank’s Foreign Exchange Negotiable Securities Section.⁴ Bank Markazi has also submitted a declaration by Professor Andreas F. Lowenfeld, the Herbert and Rose Rubin Professor of International Law Emeritus at New York University School of Law, in which Professor

⁴ When drafted and executed, the affidavits of Messrs. Arabieh and Massoumi were expected to be filed in support of (i) a prospective motion by Bank Markazi to intervene in the Enforcement Proceeding; and (ii) a prospective motion to vacate the Restraining Notices issued in that same proceeding. *See Arabieh Aff.* ¶ 2; *Massoumi Aff.* ¶ 2. Bank Markazi intends to submit supplemental affidavits from Messrs. Arabieh and Massoumi confirming that their existing affidavits are now being submitted in support of this Motion to Dismiss. The process of obtaining affidavits from officials in Tehran has taken many months in the past due to the time necessary for translation and notarization, and then legalization at the Swiss Embassy in Tehran. Bank Markazi will submit the short supplemental affidavits as soon as possible.

Lowenfeld provides his expert opinion testimony concerning the immunity of foreign central bank property under the FSIA.

In light of this factual and legal showing by Bank Markazi, plaintiffs will bear the burden, in opposition to this Motion, of “going forward with evidence showing that, under exceptions to the FSIA, immunity should not be granted, although the ultimate burden of persuasion remains with [Bank Markazi].” *Cargill Int’l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993) (citation omitted).

II. 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. Plaintiffs Acknowledge that Bank Markazi is the Central Bank of Iran, a Sovereign Instrumentality, and the Beneficial Owner of the Restrained Securities

Bank Markazi’s status as the Central Bank of Iran is undisputed. Indeed, throughout the Complaint, plaintiffs refer to Bank Markazi as the Central Bank of Iran or “CBI.” *See, e.g.*, Compl. ¶ 4. OFAC likewise identified “the Central Bank of Iran” as the beneficial owner of the Restrained Securities in its April 23, 2010 letter to the plaintiffs on which they rely. Compl. ¶ 19. The Complaint further acknowledges that Bank Markazi is a sovereign instrumentality of the IRI “formed under the Laws of Iran and [with] its principal place of business in the Islamic Republic of Iran.” Compl. ¶ 4.

Plaintiffs have expressly acknowledged that “CBI retained the beneficial ownership of all bonds . . . at all times.” Compl. ¶ 33. It is further undisputed that at all material times, the Restrained Securities have been maintained in an account in Bank Markazi’s name and/or an account maintained by UBAE for Bank Markazi. The April 23, 2010 letter from OFAC relied on by the plaintiffs refers to the Restrained Securities as “*CBI’s securities*” and states that following their transfer “*from the CBI’s account* at Clearstream to a separate custodial account at

Clearstream held in the name of [UBAE] during February 2008, UBAE . . . has held those assets in an account on its books that it has maintained *for the CBI*.” Compl. ¶ 19 (emphasis added).

Under these circumstances, the Restrained Securities are presumed to be the property of Bank Markazi. *See Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (“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.”).

B. The FSIA Extends Special Protection and Immunity from Post-Judgment Attachment and Execution to the Property of a Foreign Central Bank Held for Its Own Account

The property of a foreign state is presumptively immune from attachment and execution unless one of the specific exceptions to immunity enumerated in the FSIA applies.⁵ The property of a “foreign state” in this context includes the property of an instrumentality of a foreign state such as Bank Markazi. *See* 28 U.S.C. § 1603(a). (“A ‘foreign state’ . . . includes . . . an agency or instrumentality of a foreign state . . .”).

Pursuant to section 1611(b)(1) of the FSIA, the property of a foreign central bank—such as the Restrained Securities—is presumptively entitled to heightened immunity from attachment and execution:

§ 1611. Certain types of property immune from execution

(. . .)

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

⁵ *See Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 129-30 (2d Cir. 2009) (“Under section 1609 of the [FSIA], property in the United States of a foreign state is immune from attachment or execution unless the property fits within one of the limited exceptions enumerated in sections 1610 or 1611 of the Act.”); *Rubin v. Islamic Republic of Iran*, --- F.3d ---, No. 08-2805, 2011 WL 1125556, *14 (7th Cir. Mar. 29, 2011) (the FSIA “cloaks the foreign sovereign’s property with a presumption of immunity from attachment and execution unless an exception applies”); *Peterson v. Islamic Republic Of Iran*, 627 F.3d 1117, 1128 (9th Cir. 2010) (“[I]t is the plaintiff’s burden to prove that an exception to immunity applies if it is readily apparent that the property at issue belongs to a foreign state.”).

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution

28 U.S.C. § 1611. As a matter of policy, Congress has determined that the property of foreign central banks in the United States should receive special protection from attachment and execution under section 1611(b)(1) “to provide an incentive for foreign central banks to maintain their reserves in the United States.” *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 473 (2d Cir. 2007).

The heightened immunity of foreign central bank property from attachment and execution under section 1611(b)(1) is supported by important policy considerations. Congress recognized that “execution against the reserves of foreign states could cause significant foreign relations problems.” H.R. Rep. No. 94-1487 (“FSIA House Report”), at 31, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6630. Indeed, the United States recently emphasized the important underlying policy concerns that justify the special protection of foreign central bank property from attachment and execution under section 1611(b)(1). *See* Brief for the United States of America as *Amicus Curiae* in Support of Reversal (“*Amicus* Brief of the United States”), at 10, *NML Capital, Ltd. v. Banco Central de la Republica Argentina*, No. 10-1487-cv(L) (2d Cir. filed Nov. 3, 2010).⁶

As the text of section 1611(b)(1) makes clear, central bank property is immune from attachment and execution *notwithstanding any of the exceptions to immunity enumerated in*

⁶ A true and correct copy of the *Amicus* Brief of the United States is attached as Exhibit A to this memorandum of law.

section 1610. Plaintiffs’ reference to section 1610 as a purported basis for subject matter jurisdiction is therefore unavailing. *See* Compl. ¶ 6.⁷

Under section 1611(b)(1), the Restrained Securities are immune from attachment and execution unless plaintiffs can plausibly allege (i) that Bank Markazi does not hold the Restrained Securities for its “own account,” or (ii) that Bank Markazi or the IRI has *explicitly* waived the immunity of the Restrained Securities from attachment and execution. As demonstrated in Sections II.C and II.D immediately below, however, plaintiffs have failed to allege any facts that would bring the Restrained Securities outside the ambit of section 1611(b)(1) on either of those grounds.

C. The Undisputed Facts Suggest that the Restrained Securities are Held for Bank Markazi’s Own Account

1. The Very Nature of the Restrained Securities as U.S. Dollar Denominated Bond Instruments is Indicative of a Core Central Banking Function—Bank Markazi’s Maintenance and Investment of its Foreign Currency Reserves

On its face, section 1611(b)(1) requires only that the property in question must be held for the central bank’s “own account” in order to qualify for immunity from attachment and execution. As demonstrated by the legislative history, the property of a foreign central bank will be deemed held for the bank’s “own account” as long as the funds in question are “used or held in connection with central banking activity, as distinguished from funds used solely to finance

⁷ The Complaint also asserts in passing that the Restrained Securities are subject to attachment and execution under section 201 of the Terrorism Risk Insurance Act of 2002 (“TRIA”), Pub. L. No. 107-297, 116 Stat. 2322 (2002), codified as a note to 28 U.S.C. § 1610. *See* Compl. ¶ 28. By its terms, however, that provision applies only to “the **blocked assets** of a terrorist party,” or of an agency or instrumentality of a terrorist party. *See* 28 U.S.C. § 1610, Historical and Statutory Notes, “Treatment of Terrorist Assets” (emphasis added); *see Weininger v. Castro*, 462 F. Supp. 2d 457, 487 (S.D.N.Y. 2006) (“TRIA allows for execution of the **blocked assets** of ‘juridically separate’ entities to satisfy a judgment against a designated terrorist party, as defined by TRIA, when such entities are agencies or instrumentalities of that terrorist party.”) (emphasis added). Here, however, the Restrained Securities have never been blocked by the United States Government. Indeed, the current U.S. economic sanctions against Iran do not block the property or the property interests of Bank Markazi. Accordingly, section 201 of TRIA has no bearing on the immunity of the Restrained Securities from attachment and execution.

the commercial transactions of other entities or of foreign states.” FSIA House Report, at 31. Indeed, the United States recently reaffirmed its position that “Congress intended for central bank property held in the United States to be immune whenever it is used for central banking functions.” *Amicus Brief of the United States*, at 11.

Courts have accordingly held that central bank property is immune from attachment and execution as long as the property in question is used for central banking purposes.⁸ Here, any analysis of whether the Restrained Securities are held for Bank Markazi’s own account necessarily begins with the Restrained Securities themselves. Importantly, the very nature of the Restrained Securities as bond instruments denominated in U.S. dollars (*see* Compl. ¶¶ 23, 33) suggests that they are held for Bank Markazi’s own account as an investment of the Bank’s foreign currency reserves—a core central banking function. *See, e.g., Olympic Chartering*, 134 F. Supp. 2d at 534 (funds of Central Bank of Jordan were immune from attachment and execution where they were “employed exclusively for central bank purposes, including . . . the maintenance and investment of foreign currency reserves for the Government of Jordan”).

Indeed, the United States Government has recently stated that “[c]entral banking activities include . . . holding of the country’s currency reserves[.]” *Amicus Brief of the United States*, at 11-12 (citing P. Lee, *Central Banks and Sovereign Immunity*, 41 COLUM. J. TRANSNAT’L L. 327, 352-53 (2003)).

⁸ *See Olympic Chartering, S.A. v. Ministry of Industry and Trade of Jordan*, 134 F.Supp.2d 528, 534 (S.D.N.Y. 2001) (funds of Central Bank of Jordan in New York bank account were immune from attachment and execution where affidavit of central bank employee stated *inter alia* that the funds were “employed exclusively for central bank purposes”); *Weston Compagnie de Finance Et D’Investissement, S.A. v. La Republica del Ecuador*, 823 F. Supp. 1106, 1113 (S.D.N.Y. 1993) (a test that “focus[es] on whether the funds at issue are used for central bank functions . . . respects the terms of the FSIA as written and accords proper recognition to the special status given by Congress to foreign central banks in the FSIA”) (citing Ernest T. Patrikis, *Foreign Central Bank Property: Immunity from Attachment in the United States*, 1982 U. ILL. L. REV. 265 (1982)).

On the other hand, the Complaint is devoid of any allegation (let alone any supporting factual particulars) suggesting that Bank Markazi holds the Restrained Securities for anything other than central banking purposes. In the absence of any such allegation, plaintiffs should not be permitted to engage in a speculative fishing expedition by subjecting Bank Markazi to the burden of jurisdictional discovery in the hope of substantiating an allegation that plaintiffs have not even made. Again, the position of the United States as *amicus curiae* is instructive:

Property held in the name of a central bank should be presumed to meet § 1611(b)(1)'s "held for its own account" requirement, and a plaintiff should be required to allege ***specific facts giving rise to a reasonable inference that the funds are not being used for central banking functions*** before a district court permits discovery to verify those factual allegations or execution against those funds in satisfaction of a judgment.

Amicus Brief of the United States, at 11 (emphasis added); *see also Plenum Financial & Investments Ltd. v. Bank of Zambia*, No. 95-cv-8350, 1995 WL 600818, *3 n.1 (S.D.N.Y. Oct. 11, 1995) (plaintiff opposing motion to vacate temporary restraining order was not entitled to a "factual hearing" where it was clear that the funds in question belonged to a foreign central bank and plaintiff failed to identify any basis for its argument that the funds were not held for the foreign central bank's own account).

Because the Complaint includes no allegation whatsoever that Bank Markazi holds and uses the Restrained Securities for anything other than central banking purposes, the Court should dismiss the Complaint without subjecting Bank Markazi to the burden of jurisdictional discovery. *See* Section IV below.

2. Even if Accepted as True, Plaintiffs' Conclusory Assertion that the Restrained Securities Were "Used for a Commercial Activity in the United States" Would Have No Effect on Immunity Under Section 1611(b)(1)

The Complaint contains a wholly conclusory assertion, unsupported by any particularized factual allegation, that the Restrained Securities were "used for a commercial activity in the

United States.” Compl. ¶ 24. But even if that conclusory assertion were accepted as true for purposes of this motion, it would have no impact on the immunity of the Restrained Securities from attachment and execution under section 1611(b)(1) of the FSIA.

The Second Circuit has stated that section 1611(b)(1) is intended “to shield from attachment the U.S. assets of foreign central banks, many of which might be engaged in commercial activity in the United States while managing reserves and engaging in financial transactions[.]” *EM Ltd.*, 473 F.3d at 473. Accordingly, “a showing that property of a central bank is used for a commercial activity does not, of itself, exclude it from the immunity granted by § 1611(b)(1).” *Weston*, 823 F. Supp. at 1112. As the *Weston* court stated:

Property used for commercial activity and property of a central bank held for its own account are not mutually exclusive categories. Rather, as the structure of the FSIA makes clear, property of a central bank held for its own account is a category of property used for commercial activity.

Id. The court explained that section 1611(b)(1) of the FSIA “is an exception to § 1610, providing for immunity from attachment that would otherwise be allowed by § 1610.”⁹ *Id.* Accordingly, “[i]f the funds at issue are used for central bank functions as these are normally understood, then they are immune from attachment, *even if used for commercial purposes.*” *Olympic Chartering*, 134 F. Supp. 2d at 534 (emphasis added). The Second Circuit has endorsed this conclusion. *See EM Ltd.*, 473 F.3d at 473.

D. The Complaint Fails to Allege An Explicit Waiver of Immunity With Respect to Bank Markazi’s Property as Required by Section 1611(b)(1)

The Complaint contains a wholly conclusory allegation that “[p]ursuant to [FSIA section] 1610(a)(i), . . . Judgment Debtors [*i.e.*, the IRI and MOIS] have waived *their immunity*, either explicitly or by implication.” Compl. ¶ 26 (emphasis added). Yet this allegation has no bearing

⁹ Section 1610 “allows attachment only of property ‘used for a commercial activity.’” *Id.* Therefore, “the property referred to in § 1611(b)(1) . . . must be property used for a commercial activity: if it were not, it would not be attachable at all.” *Id.*

whatsoever on the immunity of *Bank Markazi's property*, which is protected under section 1611(b)(1) of the FSIA. That provision immunizes the Restrained Securities from attachment and execution “[n]otwithstanding the provisions of section 1610.”

Even assuming *arguendo* that the IRI and/or MOIS had waived *their own immunity* under section 1610(a)(i), the Restrained Securities would remain immune from attachment and execution under section 1611(b)(1).¹⁰ See *EM Ltd.*, 473 F.3d at 485 n.22. Quoting the text of section 1611(b)(1), the Second Circuit noted that a “waiver [is] only effective with respect to a ‘bank or authority’ if it, ‘or its parent foreign government, has explicitly waived *its* immunity from attachment in aid of execution.”” *Id.* (emphasis in original). Therefore, although the Republic of Argentina in that case had waived the immunity of its own property from attachment and execution, the Republic’s waiver could not operate as a waiver of immunity with respect to the Central Bank of Argentina’s property under section 1611(b)(1). See *id.*

Further, section 1611(b)(1) requires that any waiver of immunity as to Bank Markazi’s property must be explicit. See 28 U.S.C. § 1611(b)(1). Accordingly, there can be no waiver “by implication,” as alleged in the Complaint. See Compl. ¶ 26.

It is thus apparent on the face of the Complaint that plaintiffs’ waiver allegations, even if accepted as true for purposes of this Motion, cannot overcome the immunity of the Restrained Securities from attachment and execution under section 1611(b)(1) of the FSIA.

E. The Evidence Proffered by Bank Markazi Confirms that the Restrained Securities are Immune from Attachment and Execution Under Section 1611(b)(1) of the FSIA

As demonstrated above, the undisputed facts within the four corners of the Complaint are consistent with the presumption under section 1611(b)(1) of the FSIA that the Restrained

¹⁰ The unsubstantiated allegation in the Complaint that the IRI and MOIS have waived their own immunity under the FSIA is baseless and inaccurate as a matter of fact. See Section II.E.2 below. In any event, however, that allegation is irrelevant as a matter of law to the Court’s subject matter jurisdiction analysis in this case.

Securities are immune from attachment and execution as the property of a foreign central bank held for its own account. Accordingly, the Complaint must be dismissed for lack of subject matter jurisdiction under the FSIA.

Should the Court, however, find it necessary to consider the affidavit and expert evidence Bank Markazi has submitted with this Motion, the Court will find that Bank Markazi's evidence confirms (i) that Bank Markazi holds the Restrained Securities for its own account; and (ii) that neither Bank Markazi nor the IRI has waived (let alone explicitly waived) the immunity of the Restrained Securities from attachment and execution.¹¹

1. The Restrained Securities are Held For Bank Markazi's Own Account

Consistent with the legislative history and case law (*see* Section II.C above), Professor Lowenfeld has opined that "the decisive criterion" for immunity under section 1611(b)(1) of the FSIA "is whether the funds in question are used or held in connection with central banking activities." Lowenfeld Decl. ¶ 16. Applying that standard, and as demonstrated below, the Restrained Securities are held for Bank Markazi's own account because (i) Bank Markazi maintains exclusive control over the Restrained Securities, which the Bank acquired using its own foreign currency reserves, and (ii) Bank Markazi uses the income generated by the Restrained Securities for central banking purposes.

Bank Markazi holds the Restrained Securities in a custody account with UBAE in Bank Markazi's name. Massoumi Aff. ¶¶ 23-25. No private or governmental entity other than Bank Markazi has an interest in the UBAE account or the Restrained Securities. Massoumi Aff. ¶ 30.

¹¹ The affidavits and expert opinion submitted by Bank Markazi also confirms that the Bank is the Central Bank of Iran and a separate juridical entity from the IRI. *See* Arabieh Aff. ¶¶ 8, 13; Lowenfeld Decl. ¶¶ 13-14. In any event, those facts are undisputed.

The Restrained Securities were acquired using funds belonging exclusively to Bank Markazi. Those funds were generated by the export of Iranian crude oil, which is the main source of foreign currency in Iran. Massoumi Aff. ¶¶ 8-11. The National Iranian Oil Company (“NIOC”) instructs purchasers of oil around the world to remit payments to foreign currency accounts Bank Markazi maintains with various correspondent banks around the globe. Massoumi Aff. ¶ 9.

Bank Markazi, in turn, credits Iranian Government Treasury accounts maintained on its books with the local currency counter-value of those payments. Massoumi Aff. ¶ 10. At that point, Bank Markazi becomes the sole beneficial owner of the foreign currency. *Id.*

While Bank Markazi sells a portion of the foreign currency generated in this manner on the Iranian interbank market, the surplus foreign currency constitutes the Bank’s reserves, which are invested in accordance with investment criteria approved by the Bank’s top management. Massoumi Aff. ¶¶ 10-11. Bank Markazi acquired the Restrained Securities using such foreign currency reserves. Massoumi Aff. ¶ 11.

Bank Markazi’s investment of a portion of its foreign currency reserves in the Restrained Securities is not linked to any specific project but is instead designed to instill market confidence and thus to promote the Bank’s primary objective of price stability. Massoumi Aff. ¶ 11. The income generated by the Restrained Securities contributes to the reserves of Bank Markazi and is used exclusively for central banking purposes, including the conduct of monetary policy in order to promote national economic goals. Massoumi Aff. ¶ 29.

Bank Markazi’s management and investment of foreign currency reserves and implementation of monetary policy are classic central banking functions. *See* Section II.C.1 above. As Professor Lowenfeld has stated, whether funds belonging to a central bank “consist of

cash, bonds, or other instruments of value, so long as they are used to manage the country's reserves or the exchange rate of its currency—traditional central bank functions—the assertion by the central bank that the funds are held ‘for the bank’s own account’ should be accepted.” Lowenfeld Decl. ¶ 16.

2. Neither Bank Markazi Nor the IRI Has Waived the Immunity of the Restrained Securities from Attachment and Execution

For the reasons stated *supra* in Section II.D, the boilerplate allegation in the Complaint that the “Judgment Debtors [i.e., the IRI and MOIS] have waived their immunity, either explicitly or by implication” (Compl. ¶ 26) fails as a matter of law. Nor is there any factual basis for plaintiffs’ waiver claim. Indeed, Mr. Arabieh confirms in his affidavit that neither Bank Markazi nor, to the best of his knowledge, the IRI has ever waived the immunity of the Restrained Securities from attachment and execution. Arabieh Aff. ¶ 7.

3. Bank Markazi’s Evidence Is Merely Confirmatory and Does Not Raise Any Issue of Material Fact Concerning the Immunity of the Restrained Securities

Bank Markazi’s evidence merely confirms what is already apparent on the face of the Complaint itself: (i) the Restrained Securities are immune from attachment and execution under section 1611(b)(1) of the FSIA as the property of a foreign central bank held for its own account, and (ii) there has never been an explicit waiver of immunity with respect to Bank Markazi or its property.

The Complaint alleges no facts that would controvert the evidence submitted by Bank Markazi, and accordingly, there is no issue of material fact that would require further evidence or pleadings with respect to the immunity of the Restrained Securities from attachment and execution.¹² In such circumstances, the Complaint must be dismissed as a matter of law for

¹² See *Orkin v. Swiss Confederation*, No. 09-cv-10013, 2011 WL 167840, *2 (S.D.N.Y. Jan. 13, 2011) (“[I]t is the obligation of the non-moving party to come forward with admissible evidence showing a genuine issue of

failure to allege a *prima facie* basis for subject matter jurisdiction under the FSIA. *See* Section IV below (plaintiffs' failure to establish a basis for jurisdictional discovery).

F. Even if Plaintiffs Could Establish an Exception to Bank Markazi's Immunity from Suit, the Restrained Securities Would Still Be Immune from Attachment and Execution Pursuant to Section 1611(b)(1)

In the Complaint, plaintiffs allege that Bank Markazi should be held liable for the underlying judgment against the IRI and MOIS on an alter ego and fraudulent conveyance theory. For the reasons discussed in Section III below, those allegations fail. Moreover, even assuming *arguendo* that plaintiffs could establish a basis to overcome Bank Markazi's immunity from suit under the FSIA, and that they could then prove liability, they would *still* be precluded from enforcing any eventual judgment against Bank Markazi by means of attachment or execution against the Restrained Securities, because those securities would retain their immunity from attachment and execution pursuant to section 1611(b)(1) of the FSIA.

This is the inevitable result of Congress' determination, as a matter of substantive immunity law, that central bank property is entitled to heightened immunity from attachment and execution. As the Ninth Circuit recently explained in another enforcement action brought by the *Peterson* plaintiffs against the IRI based on the very same underlying default judgment against the IRI and MOIS that plaintiffs now seek to enforce against Bank Markazi:

[T]he exceptions to immunity from execution are more narrow than the exceptions from immunity from suit. ***Congress fully intended to create rights without remedies***, aware that plaintiffs would often have to rely on foreign states to voluntarily comply with U.S. court judgments.

Peterson v. Islamic Republic of Iran, 627 F.3d 1117, 1128 (9th Cir. 2010) (emphasis added) (affirming denial of motion to assign to the *Peterson* plaintiffs the IRI's right to receive payment

material fact as to the existence of subject matter jurisdiction.”); *Exchange Nat'l Bank of Chicago v. Touche Ross & Co.*, 544 F.2d 1126, 1131 (2d Cir. 1976) (“[J]ust as under Rule 56, a party opposing a Rule 12(b)(1) motion cannot rest on the mere assertion that factual issues may exist.”); *see also Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983) (“It is not . . . proper to assume that [a plaintiff] can prove facts that it has not alleged[.]”).

from a French shipping company because the right to receive payment did not constitute “property in the United States” amenable to attachment); *see also Rubin v. Islamic Republic of Iran*, --- F.3d ----, No. 08-2805, 2011 WL 1125556, *12 (7th Cir. Mar. 29, 2011) (even where a foreign state such as the IRI has been found liable, “the options for executing a judgment remain limited. That is the point of § 1609.”). Accordingly, Bank Markazi’s immunity from suit under the FSIA is merely an *additional* reason why the Complaint must be dismissed.

We note that one court in this district recently concluded that funds held by the Central Bank of Argentina at the Federal Reserve Bank of New York were not protected from attachment and execution pursuant to section 1611(b)(1) where the central bank was found to be an alter ego of its parent sovereign, the Republic of Argentina. *EM Ltd. v. Republic of Argentina*, 720 F. Supp. 2d 273 (S.D.N.Y. 2010) (Griesa, J.). That case involved claims by bondholders arising from the Republic of Argentina’s default on its debt obligations.¹³

The district court’s decision has since been appealed to the Court of Appeals for the Second Circuit. That appeal has been fully briefed and argued and a decision by the Second Circuit may be expected in the near future. Given the importance of the issues raised on that appeal, the Second Circuit *sua sponte* requested that the United States submit a brief as *amicus curiae* concerning, among other issues, the district court’s alter ego analysis.

In its *amicus* brief, the United States correctly stated that “[b]ecause § 1611(b)(1) bars the attachment of the [central bank’s] funds . . . , it is not necessary for the Court to reach the

¹³ The district court’s opinion in *EM Ltd.* was based on a two-part finding that (1) the funds were in reality the property of Argentina because Argentina was the alter ego of the central bank; and (2) Argentina had expressly waived the immunity of its own property from attachment and execution in the underlying transaction documents. *See id.*, 720 F. Supp. 2d at 302 (“There is no question about the fact that the Republic [of Argentina] has made the requisite waivers of immunity as to its property. The court has now defined this property to include the \$100 million [in the central bank’s account].”). This conclusion by the district court ignores that the alter ego doctrine is, at most, a basis for imposing *liability*. *See Epperson v. Entertainment Express, Inc.*, 242 F.3d 100, 106 (2d Cir. 2001) (an alter ego theory seeks “to shift liability” to the purported alter ego). *See* Section III.A.2 below. However, the alter ego doctrine does not transform the property of one entity into the property of another, even if the two entities are determined to be alter egos.

question of whether the district court was correct in finding that [the central bank] is an alter ego of the Republic.” *Amicus* Brief of the United States, at 17-18; *see also id.* at 22 (“[T]he United States does not believe that it is necessary to reach the alter ego question because the disposition of this case is controlled by application of § 1611(b)(1).”).

In a separate brief as *amicus curiae* in the same case, the Federal Reserve Bank of New York has explicitly stated that under section 1611(b)(1),

the relevant inquiry is not whether the [central bank] is controlled by the Republic to such a degree that it becomes the alter ego of the Republic, but whether the funds . . . are the property of the central bank held for its own account. For the purpose of this inquiry, it is irrelevant how independent the [central bank] is from the Republic.

Brief for Federal Reserve Bank of New York as *Amicus Curiae* (“Federal Reserve *Amicus* Brief”), at 13, *NML Capital, Ltd. v. Banco Central de la Republica Argentina*, No. 10-1487-cv(L) (2d Cir. filed Jul. 26, 2010).¹⁴

Bank Markazi respectfully submits that the stated position of the United States and the Federal Reserve Bank of New York that section 1611(b)(1) leaves no room for an alter ego analysis is correct and should be adopted by this Court.

Accordingly, any attempt by plaintiffs to cure the deficiencies in their Complaint would be futile in the absence of any plausible basis to challenge the immunity of the Restrained Securities from attachment and execution under section 1611(b)(1) of the FSIA. Unless plaintiffs can demonstrate, at a minimum, a genuine factual basis to allege either (i) that the Restrained Securities are not held for Bank Markazi’s own account because they are not used for central banking purposes, or (ii) that the IRI or Bank Markazi has explicitly waived the immunity of Bank Markazi’s property from attachment and execution, the Court should not hesitate to rule

¹⁴ A true and correct copy of the Federal Reserve *Amicus* Brief is attached as Exhibit B to this memorandum of law.

that the Restrained Securities are immune from attachment and execution, and to dismiss the Complaint on that basis without leave to amend.¹⁵

In any event, even if the Court were to consider plaintiffs' alter ego and fraudulent conveyance allegations against Bank Markazi here, those allegations cannot establish an independent basis for subject matter jurisdiction over Bank Markazi under the FSIA, for the reasons discussed in Section III immediately below.

III. Bank Markazi is Immune from Suit in this Turnover Action

A. The Complaint Fails to Allege Any Applicable Exception to Bank Markazi's Immunity from Suit under the FSIA

1. The Allegations in the Complaint Cannot Support Subject Matter Jurisdiction Under Former Section 1605(a)(7) or New Section 1605(A) of the FSIA

Pursuant to section 1604 of the FSIA "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of [the FSIA]," subject to existing treaty obligations. 28 U.S.C. § 1604. Here, the antiterrorism exceptions codified in former section 1605(a)(7) and new section 1605A of the FSIA are the only alleged exceptions to Bank Markazi's immunity from suit identified in the Complaint. *See* Compl. ¶ 6. However, the factual allegations in the Complaint are facially deficient and cannot support subject matter jurisdiction under either of those provisions.

Former section 1605(a)(7) of the FSIA provided that a foreign sovereign was not immune from jurisdiction where a qualifying plaintiff sought money damages "for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act[.]" 28 U.S.C. § 1605(a)(7)

¹⁵ *See, e.g., Dabiri v. Federation of States Medical Boards of the United States, Inc.*, No. 08-cv-4718, 2009 WL 803126, *3 (E.D.N.Y. Mar. 25, 2009) (dismissing complaint without leave to amend where no exception to defendant's immunity from suit existed under the FSIA and "[n]o amendment to the complaint would cure this defect").

(now repealed). The pertinent wording of new section 1605A, the successor provision to former section 1605(a)(7), is virtually identical.¹⁶

Subject matter jurisdiction over plaintiffs' claims against the IRI and MOIS in the underlying action in the District of Columbia was based on former section 1605(a)(7) of the FSIA. In this respect, Judge Lamberth recently reconfirmed his factual finding in the *Peterson* judgment that the IRI and MOIS "provided material support and resources for the Beirut bombing" in another action arising from the 1983 Marine barracks bombing. *Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51, 71 (D.D.C. 2010) (citing *Peterson*, 264 F. Supp. 2d at 60–61).

Here, however, there is not even a hint of an allegation anywhere in the Complaint that Bank Markazi had any involvement in the provision of "material support and resources for the Beirut bombing" for which the IRI and MOIS have been found liable. Accordingly, the Complaint fails to allege a *prima facie* basis for subject matter jurisdiction over plaintiffs' claims against Bank Markazi under former section 1605(a)(7) or new section 1605A of the FSIA.

In his opinion accompanying the underlying judgment as to liability, Judge Lamberth found that MOIS was "[t]he primary agency through which the Iranian government both established and exercised operational control over Hezbollah." *Peterson*, 264 F. Supp. 2d at 53. Bank Markazi is not mentioned anywhere in Judge Lamberth's opinion and findings of fact and, so far as we are aware, plaintiffs never made any reference to Bank Markazi in the underlying proceedings in that court. The reason is obvious: they had no basis then to allege any involvement by Bank Markazi in the underlying acts for which the IRI was found liable, and

¹⁶ New section 1605A provides that a foreign state shall not be immune from jurisdiction where a qualifying plaintiff seeks money damages for "personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act[.]" 28 U.S.C. § 1605A.

they have no basis to do so now. Accordingly, plaintiffs' claims against Bank Markazi must be dismissed.

2. Plaintiffs' Alter Ego Allegations Cannot Confer Subject Matter Jurisdiction

Where, as here, the Complaint fails to allege a viable basis for subject matter jurisdiction under one of the specific exceptions to immunity enumerated in the FSIA, an alter ego theory of liability cannot confer subject matter jurisdiction where none otherwise exists.

In a case with which this Court is well acquainted, *Epperson v. Entertainment Express, Inc.*, 242 F.3d 100 (2d Cir. 2001) (opinion by Hon. Barbara S. Jones, sitting by designation), the Second Circuit held that “in this Circuit, . . . a distinction for jurisdictional purposes exists between an action to collect a judgment . . . and an action to establish liability on the part of a third party.” *Epperson*, 242 F.3d at 104. As the court explained, the practical significance of this distinction is that an action to collect a judgment “does not require an independent jurisdictional basis,” but an action to establish liability on the part of a third party “must have its own source of federal jurisdiction, so that ***absent an independent basis for federal jurisdiction a new defendant may not be haled into federal court.***” *Id.* (emphasis added).

This requirement of an independent basis for federal jurisdiction applies to “claims of alter ego liability and veil-piercing,” as such claims “raise an independent controversy with a new party in an effort to shift liability.” *Id.*, 242 F.3d at 106; *see also Peacock v. Thomas*, 516 U.S. 349, 357 (1996) (“We have never authorized the exercise of ancillary jurisdiction in a subsequent lawsuit to impose an obligation to pay an existing federal judgment on a person not already liable for that judgment.”).¹⁷ It is thus clear that the alter ego doctrine cannot confer

¹⁷ *Accord, e.g., C.G. Holdings, Inc. v. Rum Jungle, Inc.*, 582 F. Supp. 2d 385, 388 (E.D.N.Y. 2008) (“[C]ourts in this circuit have found that enforcement of a judgment against a third party that is predicated on alter-ego and veil piercing theories falls outside the ancillary jurisdiction of the court.”).

subject matter jurisdiction where, as here, a plaintiff seeks to hale the instrumentality of a foreign state into federal court on a theory that the instrumentality is liable as the alter ego of its parent sovereign for a judgment rendered against the sovereign.

Instead, subject matter jurisdiction must be based on one of the specific exceptions to immunity enumerated in the FSIA. *See Butler v. Sukhoi Co.*, 579 F.3d 1307 (11th Cir. 2009). The plaintiffs in *Butler* sought to enforce a default judgment they had obtained against a state-owned Russian company in a separate proceeding commenced against Russia and several other state-owned Russian corporations on the basis that those sovereign defendants were liable for the underlying judgment “as successors in interest and/or alter-egos” of the judgment debtor. *See id.*, 579 F.3d at 1310 n.3. The Eleventh Circuit concluded that dismissal of the complaint was required—and that the plaintiffs were not entitled to discovery—where the claims against the sovereign defendants were based solely on an alter ego theory of liability and did not fall within one of the specific exceptions to immunity enumerated in the FSIA. *Id.*, 579 F.3d at 1313.

Accordingly, plaintiffs’ alter ego allegations cannot confer subject matter jurisdiction over their claims against Bank Markazi in the absence of any applicable exception to the Bank’s immunity from suit under the FSIA.¹⁸

¹⁸ Here, plaintiffs’ alter ego theory also fails for the additional reason that Bank Markazi is not alleged to have played any role in the underlying events in 1983. *See Alejandro v. Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277, 1287 (11th Cir. 1999) (rejecting attempt to garnish debts owed to state-owned Cuban telecommunications company to satisfy a judgment under former section 1605(a)(7) of the FSIA against the Cuban Government and Cuban Air Force arising from the shooting down of two unarmed civilian aircraft over international waters where there was no evidence that the Cuban company was involved in the underlying “grave violation of international law”); *General Star Nat’l Ins. Co. v. Administratia Asigurarilor de Stat*, 713 F. Supp. 2d 267, 283 (S.D.N.Y. 2010) (where the instrumentality of a foreign state is alleged to be an alter ego of its parent sovereign, the instrumentality’s “lack of involvement in the underlying transaction militates against piercing the corporate veil”).

3. Plaintiffs' Fraudulent Conveyance Allegations Cannot Confer Subject Matter Jurisdiction

Nor can plaintiffs manufacture a basis for subject matter jurisdiction by alleging that Bank Markazi was an alter ego of the IRI in relation to the purported fraudulent conveyance in March 2008. *See* Compl. ¶¶ 31, 34. Under *Epperson*, ancillary jurisdiction exists where the judgment creditor asserts that the judgment debtor *itself* fraudulently conveyed its own assets to a third party, and where the judgment creditor therefore does not “seek to hold [third parties] liable for the existing judgment against [the judgment debtor] as alter egos of [the judgment debtor] or to pierce the corporate veil of [the judgment debtor].” *Epperson*, 242 F.3d at 107.¹⁹

Here, however, plaintiffs' fraudulent conveyance claim is directed at Bank Markazi—not the IRI, the judgment debtor. The Complaint alleges that “CBI [Bank Markazi] has . . . engaged in a fraudulent conveyance in violation of New York Debtor and Creditor Law sections 273-a and 276 thereby requiring that any veil of separation between CBI and the Islamic Republic of Iran be pierced.” Compl. ¶ 30. The alleged fraudulent conveyance consisted of the transfer of the Restrained Securities “from CBI’s account at Clearstream to UBAE’s custodial account at Clearstream.” *Id.* ¶ 32. Plaintiffs expressly allege that “CBI retained the beneficial ownership of all bonds transferred to UBAE’s customer account at Clearstream at all times.” *Id.* ¶ 33. As established by their own allegations, what plaintiffs seek to do here is precisely what they are prohibited from doing under *Epperson*, which is to “raise an independent controversy with a new party in an effort to shift liability.” *Epperson*, 242 F.3d at 106.

A plaintiff may, of course, assert a claim that an alleged alter ego of the judgment debtor engaged in a fraudulent conveyance where there is another, independent basis for subject matter

¹⁹ Under those circumstances, “courts have permitted judgment creditors to pursue, under the ancillary enforcement jurisdiction of the court, the *assets of the judgment debtor* even though the assets are found in the hands of a third party.” *Epperson*, 242 F.3d at 106 (emphasis added).

jurisdiction, such as diversity of citizenship in a case not arising under the FSIA. *Cf. JSC Foreign Economic Ass'n Technostroyexport v. Int'l Development and Trade Services, Inc.*, 295 F. Supp. 2d 366 (S.D.N.Y. 2003) (subject matter jurisdiction existed on diversity grounds). Here, however, subject matter jurisdiction either exists under one of the statutory exceptions to immunity enumerated in the FSIA—or not at all. As none of the exceptions to immunity that plaintiffs have invoked in the Complaint even arguably confers subject matter jurisdiction over their claims against Bank Markazi, dismissal is required.

B. The Evidence Proffered by Bank Markazi Confirms that Plaintiffs' Alter Ego and Fraudulent Conveyance Allegations are Baseless

1. Bank Markazi Meets the Requirements of a "Typical Government Instrumentality" Under *Bancec* and is Thus Entitled to a Presumption of Separateness from its Parent Sovereign, the IRI

As demonstrated above, plaintiffs' alter ego and fraudulent conveyance theories cannot possibly confer subject matter jurisdiction over their claims against Bank Markazi, even if all of the factual allegations in the Complaint were accepted as true for purposes of this motion. *See* Section III.A above. Should the Court, however, find it necessary to consider the affidavit and expert evidence Bank Markazi has submitted with this Motion, that evidence will confirm that plaintiffs' alter ego and fraudulent conveyance allegations are not only irrelevant as a matter of law, but also factually inaccurate and baseless.

The United States Supreme Court has instructed that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611, 626-27 (1983). *Bancec* thus established "a strong presumption that a government instrumentality is legally separate from its government owner." *Minpeco, S.A. v.*

Hunt, 686 F. Supp. 427, 431 (S.D.N.Y. 1988).²⁰ Plaintiffs bear the heavy burden of overcoming that presumption. *See, e.g., De Letelier v. Republic of Chile*, 748 F.2d 790, 795 (2d Cir. 1984) (“Plaintiffs had the burden of proving that [the instrumentality] was not entitled to separate recognition.”).

Here, it is undisputed that Bank Markazi is the Central Bank of Iran and, as such, is a sovereign instrumentality²¹ and a juridical entity distinct from the IRI. *See* Section II.A above; *see also* Arabieh Aff. ¶¶ 8, 13; Lowenfeld Decl. ¶¶ 13-14. Bank Markazi was established pursuant to an enabling statute, the Banking and Monetary Act of Iran of May 27, 1960 (as amended) and commenced operations in August 1960. Arabieh Aff. ¶ 9. Ever since, it has fulfilled its mandate as the Central Bank of Iran, which includes (i) formulating and implementing Iran’s monetary policy; (ii) issuing Iran’s currency; (iii) maintaining custody of the country’s foreign currency and precious metals reserves; and (iv) supervising and policing Iran’s banking system. Arabieh Aff. ¶¶ 27-32.

Under Iranian law, the Bank is an independent legal entity with full financial, legal and administrative autonomy. Arabieh Aff. ¶¶ 12-14. It is presumptively not subject to the general laws, regulations and administrative decrees promulgated by the Iranian Government unless

²⁰ On the facts presented in *Bancec*, the Court ultimately found that this presumption of separateness had been overcome with respect to the Cuban instrumentality at issue in that case. The Court’s conclusion relied heavily on two specific factors, neither of which is present here. *First*, the instrumentality in *Bancec* had “long been dissolved” and its assets transferred to other entities. *See Bancec*, 462 U.S. at 630-631. *Second*, the plaintiff state-owned Cuban bank brought suit against Citibank to collect on an unpaid letter of credit while simultaneously attempting to use the separate juridical status of the long-dissolved Cuban instrumentality as a shield against a setoff asserted by Citibank for the value of forcibly expropriated Citibank branches in Cuba. *See id.* Under those circumstances, the Court concluded that disregarding the separate juridical status of the dissolved Cuban instrumentality was necessary “to avoid the injustice that would result from permitting a foreign state to reap the benefits of our courts while avoiding the obligations of international law.” *Id.*, 462 U.S. at 633-34.

²¹ Under the FSIA, Bank Markazi plainly qualifies as an instrumentality of the IRI. Section 1603(b) of the FSIA defines an “agency or instrumentality of a foreign state” as (i) any entity which is a separate legal person; (ii) a majority of whose shares or other ownership interest is owned by a foreign state; and (iii) which is neither a citizen of a State of the United States nor created under the laws of any other country. 28 U.S.C. § 1603(b).

specific reference is made therein to the Bank. Arabieh Aff. ¶¶ 11, 14. Bank Markazi can (i) own and sell property, (ii) establish and maintain bank accounts, and (iii) sue or be sued—all in its own name. Arabieh Aff. ¶ 15. While its capital is wholly owned by the Government of Iran, the Government is not involved in the Bank’s day-to-day management and, in particular, does not interfere with the Bank’s implementation of monetary and credit policy. Arabieh Aff. ¶ 25.

The Bank is managed by an Executive Board, consisting of the Bank’s Governor, a Deputy Governor, a Secretary-General, and three Vice-Governors. Arabieh Aff. ¶ 17. The Bank’s Governor is appointed by the President of the IRI for a term of five years. Arabieh Aff. ¶ 18. Bank Markazi’s employees are employees of the Bank—not the Government of Iran—and the Bank maintains its own internal rules of employment. Arabieh Aff. ¶¶ 14, 19.

Bank Markazi thus fits comfortably within the Supreme Court’s definition of the kind of “typical government instrumentality” that ordinarily should be treated as a separate entity:

A typical government instrumentality, if one can be said to exist, is created by an enabling statute that prescribes the powers and duties of the instrumentality, and specifies that it is to be managed by a board selected by the government in a manner consistent with the enabling law. The instrumentality is typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued. Except for appropriations to provide capital or to cover losses, the instrumentality is primarily responsible for its own finances. The instrumentality is run as a distinct economic enterprise; often it is not subject to the same budgetary and personnel requirements with which government agencies must comply.

Bancec, 462 U.S. at 624.

Accordingly, the district court in *LNC Investments, Inc. v. Republic of Nicaragua*, 115 F. Supp. 2d 358 (S.D.N.Y. 2000), *aff’d sub nom. LNC Investments, Inc. v. Banco Central de Nicaragua*, 228 F.3d 423 (2d Cir. 2000), found that the Central Bank of Nicaragua “possesses most of the characteristics of a typical government instrumentality listed in *Bancec*” and was not an agent or alter ego of the Republic of Nicaragua where the central bank proffered an affidavit

from a central bank employee demonstrating *inter alia* that the central bank “was created by an enabling statute,” that “[t]he Republic of Nicaragua does not have control over the day to day operations of the Central Bank or the monetary policies it adopts,” that “[t]he Central Bank is managed by a board of directors and corporate officers who are appointed by the Republic of Nicaragua with each director and officer serving a five year term,” and that the central bank “can own and sell property in its own name, establish and maintain bank accounts in its own name, and sue and be sued in a court of law in its own name.” *Id.*, 115 F. Supp. 2d at 364-66.

The comparable showing Bank Markazi has made here leads to the same conclusion: Bank Markazi possesses the characteristics of a typical government instrumentality under *Bancec* and is therefore entitled to the presumption that “government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such.” *Bancec*, 462 U.S. at 626-27.

Even taken at face value, none of the alter ego allegations in the Complaint offers any basis to overcome the *Bancec* presumption. *First*, plaintiffs’ allegation that Bank Markazi “conducts financial transactions on behalf of Iran” (Compl. ¶ 34) is utterly unremarkable, and the same could be said of virtually any central bank in the world. By definition, “[a] central bank serves as the bank of its government, and the government maintains accounts with the bank.” Ernest T. Patrikis, *Foreign Central Bank Property: Immunity from Attachment in the United States*, 1982 U. ILL. L. REV. 265, 275 (1982). But it simply does not follow, as plaintiffs claim, that “[t]he monies deposited with [Bank Markazi] belong entirely to the government of Iran.” Compl. ¶ 34. On the contrary, as Mr. Massoumi explains, Bank Markazi is the sole beneficial owner of its foreign currency reserves. Massoumi Aff. ¶ 10.

Second, plaintiffs allege that “[t]he highest ranked officer of [Bank Markazi], its governor, is politically appointed by the government of Iran.” Compl. ¶ 35. But the same holds true in many other countries around the world, including of course in the United States, where the Board of Governors and Chairman of the Federal Reserve are appointed by the President with the advice and consent of the Senate.²² Accordingly, that the Governor of Bank Markazi is appointed by the President of the IRI (Arabieh Aff. ¶ 18) cannot support plaintiffs’ alter ego theory.

Third, plaintiffs misplace reliance on 31 C.F.R. 535.433 (Compl. ¶ 36), a federal regulation resulting from President Carter’s emergency Executive Order in November 1979, literally within days of the taking of U.S. hostages in Tehran. Exec. Order No. 12170, 44 Fed. Reg. 65729 (Nov. 14, 1979). These regulations, which are wholly irrelevant to the instant case, were part of the larger emergency effort by the U.S. government at the time to seize as many Iranian assets as possible with any connection whatsoever to the “Government of Iran, *its instrumentalities and controlled entities and the Central Bank of Iran*” *Id.* (emphasis added). The entire program culminated in a series of January 23, 1981 Executive Orders, whereby in accordance with the Algiers accords all Iranian assets blocked by the United States after the hostage crisis began were transferred to the Federal Reserve Bank of New York and to escrow accounts at the Bank of England. Exec. Order Nos. 12277-81, 46 Fed. Reg. 7915, 7917, 7919, 7921, 7923 (Jan. 23, 1981). In any event, not only is this historical regulation completely irrelevant to the instant case, but the Executive Order on which the regulation was based actually separates the Bank from “controlled entities,” disproving the plaintiffs’ point. Any argument

²² See 12 U.S.C. § 241 (“The Board of Governors of the Federal Reserve System . . . shall be composed of seven members, to be appointed by the President, by and with the advice and consent of the Senate”); 12 U.S.C. § 242 (“Of the persons thus appointed, 1 shall be designated by the President, by and with the advice and consent of the Senate, to serve as Chairman of the Board for a term of 4 years”).

that this regulation somehow shows that the Bank is the IRI's alter ego is at best dubious and certainly misleading.

Finally, plaintiffs quote from a March 20, 2008 advisory from the Financial Crimes Enforcement Network of the United States Department of the Treasury, which states that “[t]hrough state-owned banks, the Government of Iran disguises its involvement in proliferation and terrorism activities through an array of deceptive practices specifically designed to evade detection,” and that “[t]he Central Bank of Iran and Iranian commercial banks have requested that their names be removed from global transactions in order to make it more difficult for intermediary institutions to determine the true parties in the transaction.” Compl. ¶ 37. Whatever the meaning of this isolated and ambiguous reference to Bank Markazi in a 2008 press release may be, one thing is clear: not even plaintiffs claim that it remotely suggests any involvement by Bank Markazi in providing material support for the 1983 bombing.²³

Accordingly, plaintiffs' alter ego allegations not only cannot confer subject matter jurisdiction over their claims against Bank Markazi in this Turnover Action as a matter of law, but they are also inaccurate and baseless as a matter of fact.

2. The Transfer of the Restrained Securities from Bank Markazi's Account to UAE's Custodial Account at Clearstream Had Nothing to Do With the Peterson Plaintiffs' Default Judgment Against the IRI and MOIS

Plaintiffs claim that the transfer of the would-be Restrained Securities from the Bank's custody account at Clearstream to a custody account opened by UAE at Clearstream in approximately February 2008 constituted a fraudulent conveyance. Compl. ¶ 31. They allege that Bank Markazi (purportedly “as the agent of the government of Iran”) participated in this fraudulent conveyance “with actual intent to hinder, delay, or defraud its creditors,” including the

²³ As previously noted, plaintiffs' alter ego theory fails in the absence of any allegation (or any plausible basis to allege) that Bank Markazi played any role in the underlying events in 1983. *See supra*, note 18.

Peterson plaintiffs. Compl. ¶ 38. More specifically, plaintiffs allege that the transfer of the would-be Restrained Securities was motivated by a desire to circumvent an amendment to the FSIA in January 2008 that “vastly increased the enforcement powers of US victims of terrorism.” Compl. ¶ 43.

That is not correct. No-one in the bond group at Bank Markazi was even aware of the existence of the *Peterson* judgment at the time the would-be Restrained Securities were transferred in February 2008. Massoumi Aff. ¶ 27. Bank Markazi first learned of the *Peterson* judgment upon being advised by UBAE in June 2008 that the Restrained Securities had been frozen. *Id.* Accordingly, the transfer of the would-be Restrained Securities in February 2008 was not motivated by a desire to avoid the *Peterson* judgment or to defraud plaintiffs. *Id.*

In reality, the would-be Restrained Securities were transferred for an entirely different reason. As Mr. Massoumi explains, this transfer was the result of increased pressure by OFAC on Clearstream in late 2007 and early 2008 to cease doing business with Bank Markazi as part of a general tightening of U.S. sanctions against Iran that resulted in the elimination of the so-called “u-turn” exception in November 2008.²⁴ Massoumi Aff. ¶¶ 20-22.

From approximately 1995 until its abolition in November 2008, the “u-turn” exception allowed banks in the United States to continue indirectly processing transactions for the benefit of Bank Markazi and others as long as the transactions “began and ended with a non-Iranian bank and only passed through the U.S. financial system on their way between the two offshore non-Iranian financial institutions.” Massoumi Aff. ¶ 20. It was only through the “u-turn” exception that Bank Markazi was able to conduct business directly with Clearstream and, indirectly through Clearstream, to engage in transactions in United States dollars. Massoumi

²⁴ The amendment to the Iranian Transaction Regulations that eliminated the “u-turn” exception, and accompanying comments by OFAC, were published in the Federal Register on November 10, 2008 and took effect immediately. *See* Iranian Transactions Regulations, 73 Fed. Reg. 66541-42 (Nov. 10, 2008).

Aff. ¶ 21. Following the elimination of the “u-turn” exception in November 2008, however, such transactions were no longer permitted.²⁵

The demise of the “u-turn” exception did not come as a surprise. Indeed, as early as late 2007, Clearstream had informed Bank Markazi that it was under pressure from OFAC to cease doing business of any kind with Bank Markazi. Massoumi Aff. ¶ 22. Bank Markazi therefore had no choice but to transfer the would-be Restrained Securities from its custodial account at Clearstream to another custodial agent within a very short period of time during the first months of 2008. *Id.*

In January 2008, Bank Markazi contacted UBAE and arranged to open a total of six foreign currency accounts denominated in various currencies as well as a custodial account, account number [REDACTED], for bond-related activities. Massoumi Aff. ¶¶ 24-25. Subsequently, in February 2008, the would-be Restrained Securities were transferred in several tranches from Bank Markazi’s custody account number 80726 with Clearstream to an account that UBAE had opened with Clearstream, account number 13061. UBAE, in turn, credited Bank Markazi’s custodial account number [REDACTED] at UBAE with the transferred securities. *Id.* ¶ 26.

Accordingly, it is clear that the transfer of the would-be Restrained Securities occurred for reasons that were entirely unrelated to the existence of the *Peterson* judgment, and that the transfer was not motivated by a desire to defraud the *Peterson* plaintiffs or any other judgment creditor of the IRI or MOIS.

²⁵ See *id.*, 73 Fed. Reg. 66541 (stating that “transfers designed to dollarize transactions through the U.S. financial system for the direct or indirect benefit of Iranian banks or other persons in Iran or the Government of Iran” were no longer permitted).

3. The Evidence Demonstrating that Plaintiffs’ Alter Ego and Fraudulent Conveyance Allegations are Baseless Does Not Raise Any Issue of Material Fact Concerning Bank Markazi’s Immunity from Suit

As was the case with respect to the immunity of the Restrained Securities from attachment and execution (*see* Section II.E.3 above), the evidence proffered by Bank Markazi demonstrates that plaintiffs’ alter ego and fraudulent conveyance allegations are baseless. The Complaint contains no allegations or factual assertions that would give rise to any genuine issue of material fact with respect to the amply supported and well documented facts established by Bank Markazi in this Motion.

Moreover, as demonstrated above, plaintiffs’ alter ego and fraudulent conveyance allegations, even if accepted as true for purposes of this Motion, cannot confer subject matter jurisdiction under any of the exceptions to immunity enumerated in the FSIA. *See* Sections III.A.2 and III.A.3 above. Accordingly, the Complaint must be dismissed as a matter of law in any event for failure to allege a *prima facie* basis for subject matter jurisdiction under the FSIA. *See* Section IV below.

C. The Restraining Notices are Invalid Because the Restrained Securities are *Prima Facie* the Property of a Third Party, Bank Markazi—Not the Judgment Debtors

The Restraining Notices plaintiffs served on Citibank and Clearstream were issued pursuant to CPLR 5222. Compl. ¶¶ 15, 18. CPLR 5222 provides for the *post*-judgment attachment of property in which “the judgment debtor or obligor has an interest.” CPLR 5222(b). Here, the Restraining Notices are ineffective because the Restrained Securities are *prima facie* the property of a third party, Bank Markazi—not the property of the IRI or MOIS, the judgment debtors with respect to plaintiffs’ underlying judgment.

Plaintiffs first learned from OFAC on June 11, 2008 that an unnamed “Iranian government client . . . has had a beneficial ownership interest” in the Restrained Securities.

Compl. ¶ 11. On the basis of that disclosure by OFAC, plaintiffs obtained an execution from the Clerk of this Court on June 12, 2008 directed at “*goods and chattels of Islamic Republic of Iran* who has an interest in accounts held by Citibank[.]” Compl. Ex. D (emphasis added).

Similarly, the Restraining Notices served on Citibank and Clearstream were issued on the basis that those garnishees purportedly were “in possession or in custody of property in which *the judgment debtors* have a beneficial ownership interest[.]” Compl. Ex. E (emphasis added). However, on April 23, 2010, OFAC disclosed to plaintiffs that the “Iranian government client” and beneficial owner of the Restrained Securities is in fact “the Central Bank of Iran.” Compl. ¶ 19. Indeed, plaintiffs now expressly acknowledge that “*CBI [Bank Markazi] retained the beneficial ownership of all bonds . . . at all times.*” Compl. ¶ 33 (emphasis added).

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. As a result, the Restraining Notices directed at the property of Bank Markazi are invalid.

Where, as here, a judgment creditor commences an action against a third party alleging that the defendant is an alter ego of the judgment debtor, the defendant cannot be held liable for the underlying judgment unless and until the purported alter ego relationship has been established.²⁶ Accordingly, the defendant’s property may not be restrained by means of a post-judgment attachment pursuant to CPLR 5222.

²⁶ See *Southern New England Telephone Co. v. Global NAPs Inc.*, 624 F.3d 123, 147 (2d Cir. 2010) (where district court had entered summary judgment on liability against one defendant, “the . . . question that remained to be resolved” with respect to the remaining defendants alleged to be alter egos of the judgment debtor “was *whether these entities were, in fact, alter egos* of [the judgment debtor]—if they were, [the judgment debtor]’s corporate veil could be pierced and the remaining defendants held liable for the damages [the judgment debtor] owed [plaintiff] pursuant to the district court’s earlier award of summary judgment”) (emphasis added); see also *De Jesus v. Sears, Roebuck & Co., Inc.*, 87 F.3d 65, 70 (2d Cir. 1996) (“To overcome the presumption of separateness afforded to related corporations, Plaintiffs must come forward with the showing of actual domination required to pierce the corporate veil.”) (citations omitted).

In *JSC Foreign Economic Association Technostroyexport v. International Development and Trade Services, Inc.*, 295 F. Supp. 2d 366 (S.D.N.Y. 2003), the district court vacated restraining notices issued pursuant to CPLR 5222 against the assets of third parties alleged to be alter egos of the judgment debtor and permitted only restraining notices directed at the assets of the judgment debtor itself to remain in effect. *See id.*, 295 F. Supp. 2d at 393. As the court explained: “Although the plaintiff may attempt to prove the alter ego liability of [the alleged alter egos] as part of a judgment enforcement proceeding, their assets may not be restrained pursuant to § 5222 until their alleged alter ego status has been adjudicated and their liability for the previous judgment determined.” *Id.*

Unless and until plaintiffs can demonstrate that Bank Markazi is in fact an alter ego of the IRI—which, as set out above, they are not permitted to do absent an independent basis for subject matter jurisdiction under the FSIA—Bank Markazi is entitled to the *Bancec* presumption that “government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such.” *Bancec*, 462 U.S. at 626-27. Accordingly, the Restraining Notices are invalid, and no basis exists to maintain the restraints on Bank Markazi’s property during the pendency of this Turnover Action.

IV. In the Absence of a *Prima Facie* Basis for Subject Matter Jurisdiction Over Plaintiffs’ Claims Against Bank Markazi and its Property Under the FSIA, Plaintiffs are Not Entitled to Jurisdictional Discovery

In opposition to this Motion, plaintiffs will no doubt argue that they require jurisdictional discovery from Bank Markazi in order to substantiate the subject matter jurisdiction allegations in the Complaint. However, any jurisdictional discovery would be futile in this case because dismissal of the Complaint does not depend on any disputed issue of material fact.

A plaintiff’s request for jurisdictional discovery from a sovereign defendant requires the court to balance “discovery to substantiate exceptions to statutory foreign sovereign immunity”

on the one hand against “protecting a sovereign’s or sovereign agency’s legitimate claim to immunity from discovery” on the other. *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 176 (2d Cir. 1998) (citation and internal quotation omitted). Here, that balance tips decisively in Bank Markazi’s favor.

There is no need for any “discovery to substantiate exceptions to statutory foreign sovereign immunity” in this case. *Id.* As demonstrated in this memorandum of law, the undisputed facts establish that the Restrained Securities are *prima facie* immune from attachment and execution under section 1611(b)(1) of the FSIA. *See* Section II above. Further, Bank Markazi enjoys immunity from suit as a sovereign instrumentality, and plaintiffs cannot identify any viable exception to Bank Markazi’s immunity under the FSIA. *See* Section III above.

Under these circumstances, any evidence plaintiffs might seek to obtain from Bank Markazi in discovery could not possibly affect the Court’s subject matter jurisdiction analysis.²⁷ On the other hand, Bank Markazi has a legitimate claim to immunity from discovery and the burden, expense and delay such discovery necessarily entails. *See Olympic Chartering*, 134 F. Supp. 2d at 530 (immunity of central bank property from attachment and execution under the FSIA “provides protection both from liability and the burdens of discovery”). Accordingly, the equities in this case weigh strongly against any jurisdictional discovery.

Indeed, at least one Circuit Court of Appeals has held that it is an abuse of discretion *not* to deny a request for jurisdictional discovery where the complaint “fails to allege an FSIA

²⁷ *See, e.g., EM Ltd.*, 473 F.3d at 486 (“We are mindful that a federal trial court has wide latitude over the management of discovery, but in the FSIA context, discovery should be ordered circumspectly and **only to verify allegations of specific facts crucial to an immunity determination.**”) (internal quotation and citations omitted, emphasis added); *Mwani v. bin Laden*, 417 F.3d 1, 17 (D.C. Cir. 2005) (“[W]e . . . reject the plaintiffs’ contention that the district court abused its discretion by denying them jurisdictional discovery against Afghanistan. . . . [W]hen we do not see what facts additional discovery could produce that would affect our jurisdictional analysis, we must conclude the district court did not abuse its discretion in dismissing the action when it did.”).

statutory exception to sovereign immunity that could be subjected to verification through discovery” and where plaintiffs “simply assert that they are entitled to further discovery regarding [the purported alter ego’s] and [the judgment debtor’s] alter-ego status.” *Butler*, 579 F.3d at 1314 (“Inasmuch as the complaint was insufficient as a matter of law to establish a *prima facie* case that the district court had jurisdiction, the district court abused its discretion in allowing the case to proceed and granting discovery on the jurisdictional issue.”); *see also Sniado v. Bank Austria AG*, No. 00-cv-9123, 2001 WL 812236, *1 (S.D.N.Y. July 18, 2001) (“Discovery is not necessary for a party opposing a facial challenge to subject matter jurisdiction.”).

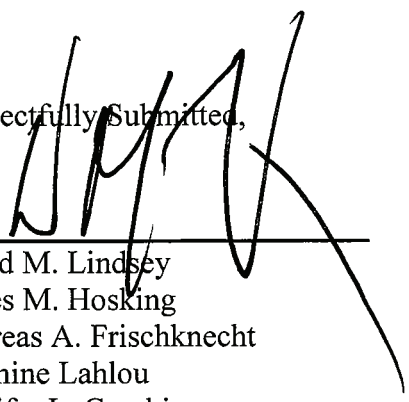
Accordingly, the Court should reject any attempt by plaintiffs here to delay the dismissal of their Complaint based on a claim that they require jurisdictional discovery from Bank Markazi.

CONCLUSION

For all of the foregoing reasons, Bank Markazi respectfully requests that the Court grant this Motion in all respects.

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