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 (KBF)

FILED UNDER SEAL

CONTAINS CONFIDENTIAL MATERIAL SUBJECT TO PROTECTIVE ORDER

DEFENDANT BANK MARKAZI'S SUPPLEMENTAL MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

David M. Lindsey
James M. Hosking
Andreas A. Frischknecht
Yasmine Lahlou

CHAFFETZ LINDSEY LLP
505 Fifth Avenue, 4th Floor
New York, NY 10017
Tel. (212) 257-6960
Fax (212) 257-6950
www.chaffetzlindsey.com

Attorneys for Defendant Bank Markazi

October 26, 2012

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Defendant Bank Markazi ("Bank Markazi" or "the Bank"), the Central Bank of Iran, respectfully submits this Supplemental Memorandum of Law in opposition to Plaintiffs' Motion for Partial Summary Judgment ("Plaintiffs' Motion").

PRELIMINARY STATEMENT

Plaintiffs claim that section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012 provides "a clear-cut alternative basis for awarding partial summary judgment" in their favor. They contend that "Congress and the President have unequivocally demonstrated their strong desire to enable Plaintiffs to execute upon the roughly $1.75 billion in Blocked Assets" at issue in this Turnover Action.[1] That "strong desire," Plaintiffs contend, should end the Court's inquiry here.

Bank Markazi's response is clear: Not so fast. Congress's evident attempt in section 502 to determine virtually all of the issues in this Turnover Action in Plaintiffs' favor by legislative *fiat* raises troubling separation-of-powers concerns under Article III of the United States Constitution. And, as with any other Constitutional limitation on the powers of Congress, the risk of Congressional overreach under Article III is invariably at its greatest whenever Congress has a "strong desire" to benefit politically favored individuals or groups at the expense of other, disfavored parties. As demonstrated herein, if section 502 could be deemed Constitutional under Article III, few (if any) limits would remain on Congress's ability to take sides in pending civil cases and to pick winners and losers at will.

While section 502 nominally leaves it to the Court to pronounce that Bank Markazi has a "beneficial interest" in the Blocked Assets before turning those assets over to Plaintiffs, the

[1] This brief refers to the assets at issue in this Turnover Action as the "Blocked Assets" (rather than the "Restrained Bonds," the term used in prior briefing) so as to conform to Plaintiffs' terminology and avoid confusion. Otherwise, this brief incorporates all previously defined terms unless otherwise defined herein.

statute's empty grant of authority is effectively meaningless because Bank Markazi's beneficial interest has already been established—as Plaintiffs, who were closely involved at all stages of the legislative process in drafting the provision that ultimately became section 502, were well aware. Indeed, it is precisely *because* Bank Markazi has a beneficial interest in those assets that they were blocked in the first place pursuant to President Obama's February 2012 Executive Order. Thus, the requirement in section 502 of a finding that Bank Markazi has a beneficial interest in the Blocked Assets is a mere formality that cannot transform an otherwise invalid legislative act of adjudication into one that passes Constitutional muster under Article III.

The turnover of the Blocked Assets to Plaintiffs that section 502 purports to require also would violate both the Takings Clause of the Fifth Amendment to the United States Constitution and the Treaty of Amity between the United States and Iran. The assets at issue in this Turnover Action were first restrained in June 2008—over *three and a half years* before they were blocked in February 2012. As Clearstream has maintained from the very beginning—joined by Bank Markazi when the Bank appeared before this Court in the spring of 2011—Plaintiffs never had a valid basis to restrain those assets to begin with. Plaintiffs failed to rebut that showing by Clearstream and Bank Markazi, yet they managed to stave off the release of the restraints for years prior to the blocking of the assets in February 2012. Plaintiffs then immediately (and successfully) proceeded to lobby Congress to enact retroactive legislation purporting to require the turnover of assets that never should have been restrained in the first place.

Additionally, giving effect to section 502 here would violate multiple other provisions of the Treaty of Amity, including the requirement of fair and equitable treatment and non-discrimination, and recognition of Bank Markazi's juridical status and freedom of access to the courts. Yet section 502, which expressly purports to sweep away any "any provision of law

relating to sovereign immunity" and "any inconsistent provision of State law," makes no mention whatsoever of the Treaty. Had Congress intended to abrogate the Treaty, however, it would have said so in section 502—particularly given that the provision is directed *solely* at assets in which Bank Markazi, an Iranian instrumentality, has an interest, and even more so in light of the fact that Bank Markazi expressly raised the Treaty as a bar to Plaintiffs' claim under TRIA section 201 in this very same Turnover Action months before the wording of section 502 was finalized. Thus, Congress's silence concerning the Treaty of Amity in section 502 suggests that Congress in fact was reluctant to abrogate the Treaty, which U.S. courts have consistently applied and the terms of which frequently have inured to the benefit of American litigants.

Finally, Plaintiffs' strenuous and sustained lobbying for the enactment of section 502 throughout the first half of 2012—while Bank Markazi's pending motion to dismiss, Clearstream's renewed motion to vacate the restraints and Plaintiffs' Motion were being briefed—betrays Plaintiffs' own lack of conviction that they could prevail under pre-section 502 law, including TRIA section 201. In any event, the parties have previously briefed all relevant issues under prior law, and those issues accordingly are ripe for the Court to determine.

FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background and Procedural History Prior to the Enactment of the Iran Threat Reduction and Syria Human Rights Act of 2012 in August 2012

It is (and always has been) undisputed that Bank Markazi has a beneficial interest in the Blocked Assets which, at the time they were first restrained in June 2008, consisted of U.S. dollar-denominated debt securities issued by sovereigns like the Republic of Italy or "supranationals" such as the European Investment Bank. (Compl. ¶¶ 102, 245.) Bank Markazi, however, is not the judgment debtor with respect to any of the underlying judgments that

Plaintiffs seek to enforce in this Turnover Action—Iran is. Nor is Bank Markazi alleged to have had any involvement in the events that gave rise to Plaintiffs' judgments against Iran.

The now-Blocked Assets were first restrained in June 2008 pursuant to a writ of execution dated June 12, 2008 served on Citibank by the United States Marshal and restraining notices Plaintiffs served on Citibank and Clearstream shortly thereafter. (Compl. ¶¶ 53-55; Apr. 2, 2012 Declaration of Liviu Vogel in Support of Plaintiffs' Motion, ¶¶ 3, 5 & 6 & *id.* Exs. A, C & D.) Section 5222 of the New York Civil Practice Law and Rules ("CPLR"), New York's post-judgment attachment statute, was the purported legal basis for Plaintiffs' restraining notices. (Compl. ¶ 55; Apr. 2, 2012 Vogel Decl. Exs. C & D.)

Clearstream almost immediately challenged the restraints on the assets, which led to a sealed hearing before Judge John G. Koeltl on June 27, 2008. (Apr. 2, 2012 Vogel Decl. ¶ 7.) Following that hearing, on September 4, 2008, Clearstream moved to vacate the restraints. (Dkt. # 111.) On June 23, 2009, the Court (Hon. Barbara S. Jones, J.) issued an order stating that "[t]he Court agrees with Clearstream that the assets that are the subject of Clearstream's September 4, 2008 motion to vacate restraints are governed by NY UCC 8-112(c). Under the plain meaning of NY UCC 8-112(c), Clearstream is not a proper garnishee." (Lindsey Decl. Ex. E, at 1.) The Court further ordered, however, that "[t]he restraints will remain in place until the Court has determined whether Clearstream is, or could be made, a proper garnishee, assuming a fraudulent conveyance could be shown by Plaintiffs" in connection with the transfer of assets from Bank Markazi's account with Clearstream to UBAE's account with Clearstream in February 2008. (*Id.* at 2.) Thereafter, the extensive briefing on Clearstream's motion was not completed until April 18, 2011.

In the interim, Plaintiffs commenced this Turnover Action by filing their initial complaint under seal in June 2010, naming Bank Markazi as a defendant. Plaintiffs subsequently amended their complaint on October 19, 2010. On May 11, 2011, Bank Markazi moved to dismiss that complaint for lack of subject matter jurisdiction under the FSIA. However, further briefing on Bank Markazi's motion was deferred pursuant to the Court's June 27, 2011 Order which, *inter alia,* authorized Citibank to interplead certain additional plaintiffs with judgments or claims against Iran. After Plaintiffs amended their complaint a second time on December 7, 2011, Clearstream renewed its motion to vacate the restraints on December 22, 2011.

Subsequently, the assets at issue in this Turnover Action were blocked pursuant to President Obama's Executive Order No. 13599 dated February 5, 2012 (the "Executive Order"). Thereafter, Bank Markazi again moved to dismiss the operative complaint for lack of subject matter jurisdiction under the FSIA. Plaintiffs, in turn, moved for partial summary judgment under Section 201 of the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, Title II, § 201, 116 Stat. 2337 (2002). As of August 10, 2012, when President Obama signed into law the Iran Threat Reduction and Syria Human Rights Act of 2012 (the "Act"), the briefing on all three pending motions was complete.

B. Legislative History of Section 502 of the Act

The text of the provision that ultimately became section 502 of the Act was first made public in connection with a February 2, 2012 hearing of the Committee on Banking, Housing and Urban Affairs of the United States Senate (the "Senate Banking Committee"), the purpose of which was to "mark-up" broad new sanctions legislation directed at Iran in the form of Senate Bill S.2101, titled the "Iran Sanctions, Accountability, and Human Rights Act of 2012" (the "Senate Bill").

At the February 2, 2012 mark-up hearing, Senator Robert Menendez formally introduced the provision that later became section 502 of the Act as Amendment 11 to the Senate Bill. (Lindsey Decl. Ex. F.) Amendment 11 evidently had been drafted in close collaboration with Plaintiffs' counsel. Indeed, Senator Menendez's communications director was later quoted in the press as stating that the Senator "for months has been working with all of the plaintiff groups to ensure that the approximately $2.5 billion [sic] in Iranian blocked assets located in New York are available." (Lindsey Decl. Ex. G, at 2.)

As originally drafted, Amendment 11 would have applied to any "interest" of a "terrorist party" in "securities or other financial assets" in the United States. (*Id.* at 1-2.) In his remarks at the February 2, 2012 hearing, Senator Menendez stated that Amendment 11 was designed to "ensure that Iranian central bank funds laundered in the United States will be treated the same as any other funds or assets of a state sponsor of terrorism or terrorist entity[.]"[2] Immediately following Senator Menendez's remarks, however, Senator Tim Johnson, the Chairman of the Committee, stated that he was prepared to accept Amendment 11 only "*with the understanding that the language applies only to assets of the Islamic Republic of Iran.*"[3] The Committee then proceeded to approve Amendment 11 on that basis.

As a result, following the February 2, 2012 Senate Banking Committee hearing, all references to a "terrorist party" or "terrorist parties" in Amendment 11 were removed and replaced with references only to "Iran." (Lindsey Decl. Ex. H.) With those changes, Amendment 11 was incorporated as section 503 into the Senate Bill. (Lindsey Decl. Ex. I.) Immediately following the February 2, 2012 mark-up hearing, Senator Menendez issued a press

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[2] Transcribed from video of Feb. 2, 2012 Senate Banking Committee hearing, *available at:* http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=bf9cab04-9f51-4e17-ab0d-c626066aa5d6, at 59:23-59:36.

[3] Transcribed from video of Feb. 2, 2012 Senate Banking Committee hearing, at 59:42-59:50 (emphasis added).

release hailing the Senate Banking Committee's passage of Amendment 11 and stating that the provision *"makes it so that"* Plaintiffs *"will be able to attach* two billion [sic] in Iranian Central Bank assets being held at a New York Bank." (Lindsey Decl. Ex. J (emphasis added).)

In summary, section 503 of the Senate Bill purported to compel the turnover of the Blocked Assets to Plaintiffs by:

- Providing, "[n]otwithstanding any other provision of law, and preempting any inconsistent provision of State law," that "the property interest of Iran in a blocked asset shall include an interest in property of any nature whatsoever, direct or indirect, including any direct or indirect interest in securities or other financial assets immobilized or in any other manner held in book entry form and credited to a securities account in the United States and the proceeds thereof, or in any funds transfers held in a United States financial institution." (Lindsey Decl. Ex. I, at 5 (Senate Bill § 503(a)).);
- Providing that "[t]he property interest of Iran in securities or other financial assets immobilized or in any other manner held in book entry form and credited to a securities account in the United States and proceeds thereof shall be deemed to exist at every tier of securities intermediary necessary to hold an interest in any such securities or other financial assets," and that "[t]he property interest of Iran in a funds transfer shall exist at any intermediary bank necessary to complete such funds transfer." (*Id.* at 5-6 (Senate Bill § 503(a)).);
- Providing, "[n]otwithstanding any other provision of law," that "the ownership by Iran, or its central bank or monetary authority, of any property . . . shall be deemed to be commercial activity in the United States and that property, including any interest in that

property, shall be deemed not to be held for the central bank's or monetary authority's own account." (*Id.* at 7 (Senate Bill § 503(d)).); and

- Defining the scope of the provision as applying "to all attachments and proceedings in aid of execution issued or obtained before, on, or after the date of the enactment of this Act with respect to judgments entered against Iran for damages for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, or hostage-taking, or the provision of material support or resources for such an act." (*Id.* at 7-8 (Senate Bill § 503(e)).)

Section 503 of the Senate Bill later became section 503 of House Bill H.R.1905 and, as part of that bill, was enacted into law as section 502 of the Act in August 2012. The near-final text of section 502 first appeared as an amendment to H.R.1905 passed by the Senate on May 21, 2012. (Lindsey Decl. Ex. K, at 9-10.)

According to a contemporaneous article in the publication *Roll Call*, "lawyers and lobbyists" for various Plaintiff groups were still "jockeying" over the precise text of the new provision at that time. (Lindsey Decl. Ex. G, at 1.) Plaintiffs' counsel appear to have exercised substantial control over the wording of the final provision: the article quotes a "lobbyist" for one of the Plaintiff groups as stating that the Plaintiffs had reached a "tentative deal to . . . come up with a compromise in the conference committee" but also quotes counsel for another Plaintiff group expressing concern that the other group might "try to 'slip something into a conference version.'" (*Id.* at 1, 2.)

Ultimately, however, the various lawyers and lobbyists involved evidently were able to reach an agreement, and that agreement is reflected in the final wording of section 502. In summary, section 502 purports to compel the turnover of the Blocked Assets to Plaintiffs by:

- specifically identifying the Blocked Assets with reference to the full name and caption of this Turnover Action as "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)." 22 U.S.C. § 8772(b);
- explicitly limiting the provision's scope so that it applies *solely* to this Turnover Action by providing that "[n]othing in this section shall be construed . . . to affect the availability, or lack thereof, of a right to satisfy a judgment in any other action against a terrorist party in any proceedings other than proceedings referred to in subsection (b)." 22 U.S.C. § 8772(c);
- directing the turnover of the Blocked Assets to Plaintiffs "notwithstanding any other provision of law, including any provision of law relating to sovereign immunity, and preempting any inconsistent provision of State law," provided that the Blocked Assets are "held in the United States for a foreign securities intermediary doing business in the United States" and are "equal in value to a financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran or any agency or instrumentality of that Government, that such foreign securities intermediary or a related intermediary holds abroad." 22 U.S.C. § 8772(a)(1)(A) & (C); and
- directing the Court, "prior to an award turning over [the Blocked Assets]" to Plaintiffs, to "determine whether Iran holds equitable title to, or the beneficial interest in," the Blocked Assets. 22 U.S.C. § 8772(a)(2).

ARGUMENT

I. Section 502 Constitutes an Invalid Legislative Act of Adjudication under Article III of the United States Constitution

Where, as here, a court must determine whether a statute such as section 502 violates the separation of powers between the legislative branch and the judiciary under Article III of the Constitution, the key inquiry is whether the statute "usurp[s] the adjudicative function assigned to the federal courts under Article III" or instead merely "chang[es] the law applicable to pending cases." *Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 81 (2d Cir. 1993); *compare Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 438 (1992) (statute was constitutional where it "compelled changes in law, not findings or results under old law") *with U.S. v. Klein*, 80 U.S. 128, 146 (1871) (Congress may not constitutionally "prescribe rules of decision to the Judicial Department of the government in cases pending before it").

As the Second Circuit has stated, "[t]he conceptual line between a valid legislative change in law and an invalid legislative act of adjudication is often difficult to draw." *Axel Johnson Inc.*, 6 F.3d at 81. Thus, "[w]hether a statute provides only the standard to which courts must adhere or compels the result that they must reach can be a vexed question in cases in which, as a practical matter, simple adherence to the 'new' standard in effect mandates a particular result." *Benjamin v. Jacobson*, 124 F.3d 162, 174 (2d Cir. 1997), *vacated on other grounds*, 172 F.3d 144 (2d Cir. 1999).

In light of Congress's attempt in section 502 to compel the turnover of the Blocked Assets to Plaintiffs legislatively, that "vexed question" is squarely before the Court here. For the reasons discussed immediately below, section 502 impermissibly intrudes on the Court's authority to determine the outcome of this Turnover Action and accordingly should be deemed unconstitutional under Article III of the Constitution.

A. Section 502 is an Invalid Legislative Act of Adjudication Notwithstanding the Statute's Empty Grant of Authority for the Court to Make a Factual Finding with a Predetermined Outcome Concerning Bank Markazi's Beneficial Interest in the Blocked Assets

Section 502's empty grant of authority for the Court to formally pronounce a fact that is already established in this case—that Bank Markazi has a "beneficial interest" in the Blocked Assets—cannot obscure Congress's intent in section 502 to "mandate[] a particular result" in this Turnover Action, namely the distribution of the Blocked Assets to Plaintiffs. As the Solicitor General of the United States explained in his brief on behalf of the petitioners in *Robertson*, "a congressional specification of a finding of fact from the record in a particular case or controversy" would constitute an unconstitutional "invasion of the adjudicative function" by the legislative branch, while "a congressional specification of the significance, or legal characterization of, a finding of fact" would not. Brief for Petitioners in *Robertson v. Seattle Audubon Soc.*, No. 90-1596 (filed Aug. 27, 1991), 1991 WL 521288, at *36. The Solicitor General illustrated this distinction using the following, hypothetical example:

> Suppose that Congress passes a statute requiring means testing for Social Security benefits and prohibiting benefits for "citizens who are self-sufficient"; Congress then amends the statute to provide that, "Any individual found to possess a yacht shall be deemed to be self-sufficient for purposes of the Social Security Act, and this provision shall apply to all pending cases." Because Congress is changing the legal characterization and significance of a fact—yacht ownership—no Article III problem is presented. If Congress, however, enacted legislation providing that, "In the case of George Jones v. Secretary of Health & Human Services, the court shall find that George Jones owns a yacht," a serious Article III problem would be presented because Congress, by specifying a factual finding from the evidentiary record in a particular case, would be invading the court's adjudicative function.

Id., 1991 WL 521288, at *36 n.35. In its earlier incarnation as section 503 of the Senate Bill, the provision that ultimately became section 502 on its face gave rise to the "serious Article III

problem" the Solicitor General described in *Robertson*. Indeed, section 503 of the Senate Bill explicitly provided *inter alia* that "*the property interest of Iran* in securities or other financial assets immobilized or in any other manner held in book entry form and credited to a securities account in the United States and proceeds thereof *shall be deemed to exist* at every tier of securities intermediary necessary to hold an interest in any such securities or other financial assets[,]" and that "*[t]he property interest of Iran* in a funds transfer *shall exist* at any intermediary bank necessary to complete such funds transfer." (Lindsey Decl. Ex. I, at 5-6 (Senate Bill § 503(a)) (emphasis added).) Thus, section 503 of the Senate Bill was akin to the Solicitor General's example of an unconstitutional statutory provision requiring the Court to find that "George Jones owns a yacht."

The manner in which section 502 was amended during the legislative process suggests that Congress subsequently came to recognize that such an overt attempt to determine factual issues in this Turnover Action legislatively would run afoul of Article III. Accordingly, Congress amended section 502 to achieve the same, desired result—legislation designed to guarantee the turnover of the Blocked Assets to Plaintiffs—in a slightly different, but equally impermissible way. Specifically, Congress—evidently with substantial input from Plaintiffs' counsel and lobbyists acting on Plaintiffs' behalf—amended section 502 to require a nominal (but meaningless) factual finding by this Court that Bank Markazi has a beneficial interest in the Blocked Assets before those assets are distributed to Plaintiffs.

Yet the Court's nominal authority under section 502 to make that factual finding amounts to nothing more than a legislative fig leaf because the outcome of the Court's determination is pre-ordained. *By definition*, the fact that the assets at issue in this Turnover Action have been blocked pursuant to the Executive Order means that Bank Markazi has a beneficial interest in

those assets—otherwise, they never would have been blocked in the first place. *See Global Relief Foundation, Inc. v. O'Neill*, 315 F.3d 748, 753 (7th Cir. 2002) (for purposes of determining the interests in property that are subject to blocking, "beneficial rather than legal interests matter"); *accord. Holy Land Foundation for Relief and Development v. Ashcroft*, 333 F.3d 156, 162-63 (D.C. Cir. 2003) (any "interest" in property may be subject to blocking; "[t]he interest need not be a legally protected one"). Bank Markazi has consistently acknowledged this obvious, incontrovertible fact.[4]

However, the fact that Bank Markazi has a beneficial interest in the Blocked Assets does not change the fact that the situs of Bank Markazi's *property* interest is outside the United States, in Luxembourg. *See* 22 U.S.C. § 8772(a)(1)(C) (acknowledging that Bank Markazi's assets are held "*abroad*") (emphasis added). Section 502 purports to sweep away this critical distinction and purports to reach the property interest of a foreign sovereign *outside* the United States, thereby contravening a basic principle of international law,[5] which is also an integral part of U.S. law.[6]

In sum, the requirement in section 502 that this Court make a factual finding concerning Bank Markazi's beneficial interest in the Blocked Assets as to which there can be only one possible outcome is no less a violation of Article III than a statutory provision overtly requiring the Court to find that Bank Markazi has a beneficial interest in those assets would be. As the

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4 *See* Bank Markazi's March 15, 2012 Memorandum of Law in Support of its Motion to Dismiss at 10-12.

5 *Stephens v. Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226, 1234 (2d Cir. 1995) (the FSIA codified pre-existing rules of international law concerning immunity); *Fidelity Partners, Inc. v. Philippine Export & 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.") (emphasis added).

6 *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations"); *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.").

United States Supreme Court made clear nearly 150 years ago, "[t]he Constitution deals with substance, not shadows," and if a Constitutional limitation on the power of Congress could be "evaded by the *form of the enactment,* its insertion in the fundamental law [would be] a vain and futile proceeding." *Cummings v. Missouri*, 71 U.S. 277, 325 (1866) (emphasis added).

B. Section 502 Improperly Usurps this Court's Authority to Make an Individualized Factual Determination that Piercing the Veil of Separation Between Bank Markazi and Iran is Appropriate in Light of All the Facts and Circumstances of this Case

The "invalid legislative act of adjudication" inherent in section 502 is further compounded by the statute's requirement that the court must pierce the veil of separation between Bank Markazi and Iran. Section 502 thus purports to make an individualized, factual determination that veil-piercing is warranted in this case—and in this case only. The authority to make that factual finding is reserved for the Court under Article III.

Section 502 expressly purports to limit the scope of the statute's application to this Turnover Action—and no other case. *See* 22 U.S.C. § 8772(b) ("The financial assets described in this section are the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG) . . . ."); 22 U.S.C. § 8772(c) ("Nothing in this section shall be construed . . . to affect the availability, or lack thereof, of a right to satisfy a judgment in any other action against a terrorist party in any proceedings other than proceedings referred to in subsection (b)."). The statute then purports to compel the Court to pierce the veil of separation between Iran and Bank Markazi by providing that "[t]he term 'Iran' means the Government of Iran, including the central bank or monetary authority of that Government . . . ." 22 U.S.C. § 8772(d)(3); *see also* 22 U.S.C. § 8772(a)(1)(C) (referring to "a

financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran").

The purpose and effect of the veil-piercing section 502 purports to compel this Court to undertake is to "establish liability on the part of a third party"—Bank Markazi—for Plaintiffs' judgments against Iran. *Epperson v. Entertainment Express, Inc.*, 242 F.3d 100, 104 (2d Cir. 2001). Yet, while "the corporate veil may be pierced . . . when, *inter alia,* the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud," *United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998), whether veil-piercing is warranted in a given case ordinarily is a uniquely fact-specific determination reserved for the finder of fact in light of the totality of the evidence.[7] The rule with respect to piercing the corporate veil between foreign states and their instrumentalities in cases arising under the FSIA is no different. Thus, in the FSIA context as well, "[t]he doctrine of piercing the corporate veil . . . is the rare exception, applied in the case of fraud or certain other exceptional circumstances, *and usually determined on a case-by-case basis."* *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003) (citations omitted, emphasis added); *see generally First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 633 (1983) (there is "no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded").

Here, however, section 502 improperly usurps the Court's authority to make an individualized determination in this Turnover Action that the totality of facts and circumstances

[7] *See, e.g., Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*, 933 F.2d 131, 137 (2d Cir. 1991) (whether the factors that "will justify ignoring the corporate form and imposing liability on affiliated corporations or shareholders are present in a given case is the sort of determination usually made by a jury because it is so fact specific"); *Clipper Wonsild Tankers Holding A/S v. Biodiesel Ventures, LLC*, 851 F. Supp. 2d 504, 509 (S.D.N.Y. 2012) ("'Veil piercing determinations are fact specific and differ with the circumstances of each case.' Thus, the alter ego determination must be made in view of 'the totality of the facts.'") (quoting T*homson–CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d, 773, 777–78 (2d Cir. 1995) and *United States v. Funds Held in the Name or for the Benefit of Wetterer*, 210 F.3d 96, 106 (2d Cir. 2000)).

justify piercing the veil of separation between Bank Markazi and Iran. As a result, section 502 purports to allow Plaintiffs to satisfy their judgments against Iran by seizing the assets at issue in this Turnover Action in which Bank Markazi—not Iran—has a beneficial interest. For this reason, too, section 502 constitutes "an invalid legislative act of adjudication" under Article III. *Axel Johnson Inc.*, 6 F.3d at 81.

Additionally, Bank Markazi respectfully submits that by retroactively revising the parties bound by judgments that were already final when the statute was enacted, section 502 violates the United States Supreme Court's holding in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995) (statute was "unconstitutional to the extent that it require[d] federal courts to reopen final judgments entered before its enactment"). Bank Markazi acknowledges that the Second Circuit's opinion in *Weinstein v. Islamic Republic of Iran,* 609 F.3d 43, 50-51 (2d Cir. 2010), *cert. denied,* --- S.Ct. ----, 2012 WL 2368690 (June 25, 2012), which rejected a similar argument by Bank Melli Iran with respect to TRIA section 201, likely binds this Court to reach the same conclusion with respect to section 502 in this case. Bank Markazi accordingly raises this issue here to preserve it for further review as appropriate.

II. The Takings Clause of the Fifth Amendment to the United States Constitution and Article IV.2 of the Treaty of Amity Between the United States and Iran Prohibit Distribution of the Blocked Assets to Plaintiffs Under Section 502

The turnover of the Blocked Assets to Plaintiffs that section 502 purports to require would violate both the Takings Clause of the Fifth Amendment to the United States Constitution and Art. IV.2 of the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, 8 U.S.T. 899 (1955) (the "Treaty of Amity" or the "Treaty") (Lindsey Decl. Exhibit L).[8] The Takings Clause of the Fifth Amendment prohibits the taking of "private

[8] Section 502 does not abrogate the Treaty. *See* Section III.A, *infra.*

property . . . for public use, without just compensation." U.S. Const. Amend. V. Similarly, Art. IV.2 of the Treaty of Amity prohibits the United States from taking the property of Iranian "nationals and companies," "except for a public purpose" and upon "prompt payment of just compensation." Because the wording of the Fifth Amendment and Art. IV.2 of the Treaty, respectively, is so similar, Bank Markazi will address both provisions together here.

A. Section 502's Retroactive Legalization of Plaintiffs' Improper Restraint of the Blocked Assets in June 2008—Some Three and a Half Years Before Those Assets Were Blocked—Violates the Fifth Amendment and Article IV.2 of the Treaty

The retroactive application of civil statutes can constitute a taking where they "deprive citizens of legitimate expectations and upset settled transactions[.]" *E. Enterprises v. Apfel*, 524 U.S. 498, 501 (1998). The "ban on retrospective legislation embrace[s] 'all statutes, which, though operating only from their passage, affect vested rights and past transactions.'" *Landgraf v. USI Film Products*, 511 U.S. 244, 268 (1994) (quoting *Society for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (No. 13,156) (Cir. Ct. D.N.H. 1814) (Story, J.)).

Here, section 502 constitutes an impermissible taking because it purports to retroactively legalize Plaintiffs' improper restraint of the assets at issue in this Turnover Action in June 2008. Even setting aside the immunity of those assets from attachment and execution under FSIA section 1611(b)(1)[9] (which section 502 purports to sweep away), the restraints imposed on those assets were invalid to begin with under CPLR 5222—the purported legal basis for Plaintiffs' restraining notices.[10]

As Bank Markazi has consistently maintained since its very first substantive filing in this case in May 2011, Plaintiffs' theory that Bank Markazi is an alter ego of Iran was not a proper

[9] *See* Bank Markazi's March 15, 2012 Memorandum of Law in Support of its Motion to Dismiss at 26-46; and June 22, 2012 Reply at 9-31.

[10] *See* Compl. ¶ 55; Apr. 2, 2012 Vogel Decl., Exs. C & D.

basis to restrain property in which Bank Markazi has an interest because CPLR 5222 provides only for the attachment of property in which "*the judgment debtor or obligor* has an interest." Yet Bank Markazi is not the judgment debtor with respect to Plaintiffs' underlying judgments—Iran is.[11] As Bank Markazi stated there:

> 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. Accordingly, the defendant's property may not be restrained by means of a post-judgment attachment pursuant to CPLR 5222.
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> 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." (Lindsey Decl. Ex. M, at 36-37).

Plaintiffs have failed to rebut Bank Markazi's showing that the restraints imposed in June 2008 were improper under applicable law at that time (and at all relevant times prior to the blocking of the assets in February 2012). Yet, because further briefing on Bank Markazi's motion to dismiss was deferred for nearly a year until *after* the assets at issue in this Turnover Action had been blocked pursuant to the Executive Order in February 2012, the Court never had an opportunity to rule on this dispositive issue which, standing alone, would have required vacating the restraints.

[11] *See* Bank Markazi's May 11, 2011 Memorandum of Law in Support of the Bank's Motion to Dismiss for Lack of Subject Matter Jurisdiction under the FSIA (Lindsey Decl. Ex. M), at 36-37.

B. Distribution of These Assets to Plaintiffs Does Not Constitute a Valid "Public Purpose" Under the Fifth Amendment's Takings Clause Nor Under Article IV.2 of the Treaty

Distribution of the Blocked Assets to Plaintiffs to satisfy their judgments against Iran and to pay their counsel's attorneys' fees does not constitute a proper "public purpose" under the Fifth Amendment's Takings Clause or Article IV.2 of the Treaty. As a matter of domestic U.S. law, "it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation." *Kelo v. City of New London, Conn.*, 545 U.S. 469, 477 (2005). The same holds true as a matter of international law. Thus, public purposes that may justify expropriation include "reasons of public utility, security or the national interest which are *recognized as overriding purely individual or private interests,* both domestic and foreign." U.N. General Assembly Resolution 1803 (XVII) of 14 December 1962, "Permanent sovereignty over natural resources" (emphasis added).[12]

In re 650 Fifth Ave. & Related Properties, 777 F. Supp. 2d 529, 576-77 (S.D.N.Y. 2011) is instructive in its distinction. There, the court found that a Government forfeiture action against Iranian property owners did not violate the Takings Clause because the Government represented that although it was "exploring the possibility of distributing any forfeited assets to judgment creditors of Iran, . . . that is far from the 'sole purpose' of the forfeiture proceeding here." *Id.* at 576. Here, by contrast, the *sole purpose* of section 502—and the reason why Plaintiffs evidently lobbied so heavily to have that provision enacted into law—is to compel the distribution of the Blocked Assets to Plaintiffs and their counsel.

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[12] *See Texaco Overseas Petroleum Co./California Asiatic Oil Co. (TOPCO) v. Government of the Libyan Arab Republic* (Jan. 19, 1977 arbitral award), *summarized in* Pieter Sanders (ed.), *Yearbook Commercial Arbitration* 1979 - Volume IV (Kluwer Law International 1979), (Lindsey Decl. Ex. N) at pp. 177–87 (Resolution 1803, which was supported by a majority of U.N. Member States representing various shades of opinion, reflects the state of customary international law).

C. The Second Circuit's Opinion in *Weinstein* Concerning TRIA Section 201 Is Plainly Distinguishable

The Second Circuit's conclusion in *Weinstein* that the application of TRIA section 201 to allow the attachment of blocked assets of Bank Melli Iran ("Bank Melli"), a state-owned Iranian commercial bank, to satisfy a judgment against Iran did not constitute a taking under the Fifth Amendment and the Treaty is plainly distinguishable from the retroactive legalization in section 502 of Plaintiffs' improper restraint of the assets at issue in this Turnover Action. In *Weinstein,* the Second Circuit found that "Bank Melli's own conduct . . . opened it to liability for judgments already entered against" Iran because Bank Melli was placed on the list of Specially Designated Nationals, and had its assets blocked, after TRIA had been enacted. *Weinstein,* 609 F.3d at 54.

Importantly, however, the attachment of Bank Melli's blocked assets that the Second Circuit found to be proper in *Weinstein* occurred only *after* those assets had been blocked. Here, by contrast, Plaintiffs never had a valid basis to restrain the assets at issue in this Turnover Action; the only reason those assets were still restrained at the time they were blocked pursuant to the Executive Order in February 2012 is that Plaintiffs had managed to avoid a ruling vacating their improper restraints for more than three and a half years. Yet the restraints should have been vacated as baseless long before the assets were blocked in February 2012. Indeed, that is precisely what occurred when the plaintiffs in *Weinstein* improperly sought to attach Bank Melli's assets pursuant to TRIA section 201 in an earlier phase of that case, at a time when Bank Melli's assets were not yet blocked. Because those assets were not blocked, the court ruled that they were not subject to attachment or execution. *Weinstein v. Islamic Republic of Iran*, 299 F. Supp. 2d 63, 75-76 (E.D.N.Y. 2004).

III. Application of Section 502 Would Violate the Treaty of Amity's Prohibitions Against, *Inter Alia*, Unfair, Inequitable and Discriminatory Treatment, Freedom of Access to the Courts and Recognition of Bank Markazi's Juridical Status

In addition to the "takings" provision in Art. IV.2 of the Treaty of Amity (Lindsey Decl. Ex. L) discussed in Section II, *supra*, the Treaty contains a number of other provisions that are relevant here. Thus, under the Treaty, the United States must:

- refrain from "applying unreasonable or discriminatory measures that would impair the[] legally acquired rights and interests" of Iranian "nationals and companies" and from subjecting the acquisition or disposal of property by Iranian "nationals and companies" to treatment "less favorable than that accorded nationals and companies of any third country" (Art. IV.1 and V.1);
- afford "[n]ationals and companies" of Iran "freedom of access to the courts of justice and administrative agencies" in the United States (Art. III.2); and
- "at all times accord fair and equitable treatment to nationals and companies" of Iran and "to their property and enterprises" (Art. IV.1);
- recognize the "juridical status" of "[c]ompanies constituted under the applicable laws and regulations" of Iran (Art. III.1).

As demonstrated immediately below, application of section 502 here to compel distribution of the Blocked Assets, in which Bank Markazi has an interest, to Plaintiffs would violate each of these provisions of the Treaty of Amity.

A. Section 502 Does Not Abrogate the Treaty of Amity

The Treaty of Amity is self-executing and accordingly has "the force and effect of a legislative enactment." *Brzak v. United Nations*, 597 F.3d 107, 111 (2d Cir. 2010) (quoting *Medellin v. Texas*, 552 U.S. 491, 505-06 (2008)). Bank Markazi acknowledges the *dicta* in

Weinstein with respect to TRIA section 201 to the effect that "even assuming, *arguendo*, that there were a conflict between [TRIA section 201 and the Treaty], the TRIA would have to be read to abrogate that portion of the Treaty." *Weinstein*, 609 F.3d at 53. However, as Bank Markazi has previously demonstrated, that *dicta* does not preclude a finding by this Court that in the absence of any indication in the wording or legislative history of TRIA section 201 that Congress intended to override the Treaty of Amity, the generic "notwithstanding any other provision of law" clause in TRIA section 201 cannot be deemed a clear indication of Congressional intent to abrogate the Treaty.[13] *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) ("A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.") (internal quotation and citations omitted).

Further, the "notwithstanding" clause *in section 502* is even harder to interpret as a clear expression of Congressional intent to abrogate the Treaty. Thus, unlike TRIA section 201, section 502 specifies that it applies "notwithstanding any other provision of law, *including any provision of law relating to sovereign immunity, and preempting any inconsistent provision of State law[.]"* 22 U.S.C. § 8772(a)(1) (emphasis added). Yet there is no reference whatsoever to the Treaty in that clause, or anywhere else in the wording or legislative history of section 502.

Congress's failure to reference the Treaty in section 502 is all the more telling given that (1) the provision on its face applies exclusively to assets in which Bank Markazi—an Iranian instrumentality—has an interest, and (2) Bank Markazi had previously argued—months before the wording of section 502 was finalized—that the Treaty precludes Plaintiffs' claim under TRIA section 201 in this very same Turnover Action, a fact that Plaintiffs' counsel, who

[13] *See* Bank Markazi's March 15, 2012 Memorandum of Law in Support of its Motion to Dismiss at 23-24; and June 22, 2012 Reply at 7-9.

evidently were closely involved in the drafting of section 502, cannot have overlooked. Thus, the omission of any reference to the Treaty of Amity in section 502 in spite of the Treaty's obvious relevance to the very issues the statute purports to determine suggests that Congress was reluctant to abrogate the Treaty. Notably, courts in the United States continue to apply the Treaty—and American litigants continue to rely on its provisions for their own benefit.[14]

Finally, federal courts have frequently invited or considered the views of the Executive Branch when weighing treaty-based claims or arguments, including under the Treaty of Amity.[15] In light of the "great weight" afforded to the executive branch's interpretation of international agreements, *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982), Bank Markazi respectfully suggests that the Court may wish to consider inviting the United States Government to state its position as to: (i) whether the Treaty of Amity remains in full force and effect, (ii) if so, whether section 502 could be deemed to override the Treaty in the event of any inconsistency, and (iii) if section 502 does not override the Treaty, whether that provision contravenes any provision of the Treaty, including Articles III.1, III.2, IV.1 and/or V.1.

B. Section 502 Violates Multiple Provisions of the Treaty

Article IV.1 of the Treaty of Amity requires the United States "at all times [t]o accord fair and equitable treatment to nationals and companies" of Iran and "to their property and enterprises." Although no universally recognized definition of "fair and equitable treatment"

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[14] *See McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1078 (D.C. Cir. 2012) ("We hold that the Treaty of Amity, construed under Iranian law, provides McKesson with a private right of action against the government of Iran.").

[15] *See Sumitomo Shoji Am., Inc.*, 457 U.S. at 184 n.10 (considering United States' brief as *amicus curiae* concerning the proper interpretation of U.S. – Japan Treaty of Amity); *Electronic Data Systems Corp. Iran v. The Social Security Organization of the Government of Iran*, 610 F.2d 94, 95 (2d Cir. 1979) (upon remand, Court of Appeals invited district court to "review its interpretation of the Treaty of Amity [between the] United States [and] Iran, in light of State Department documents made available to this Court by the parties and by Amicus curiae, Department of State"); *McKesson HBOC Inc. v. Islamic Republic of Iran*, 320 F.3d 280, 281 (D.C. Cir. 2003) (upon remand, Court of Appeals invited district court to reexamine issue of plaintiffs' cause of action under U.S. – Iran Treaty of Amity "in light of the representation of the United States that it does not interpret the Treaty of Amity to create such a cause of action.").

appears to exist in international law, similar provisions have been interpreted as requiring states to afford foreign parties a predictable and stable legal environment that protects their legitimate expectations and complies with the rule of law. *See CMS Gas Transmission Company v. the Republic of Argentina*, ICSID Case No. ARB/01/8, Award of May 12, 2005 (Lindsey Decl. Ex. O), at ¶ 274; *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of May 29, 2003 (Lindsey Decl. Ex. P), at ¶ 154. And more specifically, a state may breach its obligation to accord fair and equitable treatment when individualized legislative or regulatory decision-making is primarily driven by political considerations. *Azurix Corp. v. Republic of Argentina*, ICSID Case No. ARB/01/12, July 14, 2006 Award (Lindsey Decl. Ex. Q), at ¶¶ 373-75; *see also Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994) ("[t]he Legislature's . . . responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals[.]").

Under any reasonable definition of "fair and equitable treatment," therefore, section 502's overt targeting of the Bank for the purpose of determining the outcome of pending litigation cannot be deemed to comply with the obligation of the United States under the Treaty to "accord fair and equitable treatment" to Bank Markazi.

The adoption of a statute specifically targeted at the assets of Bank Markazi is also plainly discriminatory for at least two reasons: *First*, section 502 deviates from the otherwise consistent position of the United States Government whereby assets used for central banking purposes should be deemed immune from attachment and execution under FSIA section 1611(b)(1), even where the central bank's "parent" sovereign has failed to honor outstanding

federal court judgments.[16] *Second*, contrary to the original intent of its co-sponsor, Senator Menendez, that the provision would "ensure that Iranian central bank funds . . . will be treated the same as any other funds or assets of a state sponsor of terrorism or terrorist entity,"[17] section 502 was later amended for the express purpose of limiting the statute's application to the Blocked Assets in which Bank Markazi has an interest. Thus, even compared with central banks of other nations characterized as "state sponsors of terrorism," section 502 overtly discriminates against the Bank, contravening Articles IV.1 and V.1 of the Treaty.

Similarly, Congress's unprecedented attempt to determine virtually every issue in this Turnover Action by way of retroactive legislation targeted at Bank Markazi is inconsistent with Article III.2 of the Treaty, pursuant to which "[n]ationals and companies" of Iran "shall have freedom of access to the courts of justice and administrative agencies" in the United States, "both in defense and pursuit of their rights" and "upon terms no less favorable than those applicable to nationals and companies of [the United States] or of any third country." While section 502 does not formally constrain Bank Markazi's "access" to this Court, the statute leaves virtually nothing for the Court to decide, thereby rendering such "access" illusory in contravention of Article III.2.

Finally, the determination in Section 502(d)(3) that Iran and Bank Markazi are one and the same violates the requirement in Article III.1 of the Treaty that the United States must recognize Bank Markazi's "juridical status." Bank Markazi acknowledges that the Second Circuit in *Weinstein* rejected an argument that TRIA section 201 contravenes Article III.1 of the Treaty of Amity, and that the Court may be constrained under *Weinstein* to reach the same conclusion with respect to section 502 here. Bank Markazi raises this issue at this juncture to preserve it for further review as appropriate.

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[16] *See* Brief for the United States of America as Amicus Curiae in Support of Reversal, at 11, *NML Capital, Ltd. v. Banco Central de la República Argentina*, No. 10-1487-cv(L) (Dkt # 276) (2d Cir. filed Nov. 3, 2010).

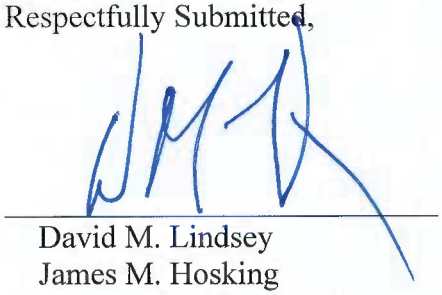
[17] Transcribed from video of Feb. 2, 2012 Senate Banking Committee hearing, at 59:23-59:36.

CONCLUSION

For all of the foregoing reasons, Bank Markazi respectfully requests that the Court deny Plaintiffs' Motion for Partial Summary Judgment.

Dated: New York, New York
October 26, 2012

Respectfully Submitted,



David M. Lindsey
James M. Hosking
Andreas A. Frischknecht
Yasmine Lahlou

CHAFFETZ LINDSEY LLP
505 Fifth Avenue, 4th Floor
New York, NY 10017
Tel. (212) 257-6960
Fax (212) 257-6950
david.lindsey@chaffetzlindsey.com
www.chaffetzlindsey.com

Attorneys for Defendant Bank Markazi