

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Case No.: 10 CIV 4518 (BSJ) (GWG)

Plaintiffs,

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

v.

ISLAMIC REPUBLIC OF IRAN, BANK
MARKAZI a/k/a CENTRAL BANK OF
IRAN, BANCA UBAE SpA, CITIBANK,
N.A., and CLEARSTREAM BANKING, S.A.,

Defendants.

**PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF
THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT**

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Plaintiffs respectfully submit this Reply Memorandum of Law in support of their motion for partial summary judgment against defendants Iran, Bank Markazi, Clearstream, Citibank, and UBAE.¹ As Plaintiffs anticipated when they filed their moving papers, they have reached agreement regarding the manner in which the Blocked Assets should be split among the various Plaintiffs. Thus, no need exists for the Court to resolve priority issues among the Plaintiffs.

PRELIMINARY STATEMENT

Defendants have endeavored to make a simple motion appear complex. The path to resolving Plaintiffs' TRIA claim is quite straightforward, however. To establish their entitlement under TRIA to execute against the Blocked Assets, Plaintiffs need only show that the cash now housed at Citibank qualifies as an "asset[] of" Markazi. Time after time, Markazi has admitted that those assets are the "property of" the bank, that it is the 100% "beneficial owner" of those assets and that it recorded those assets as such in its financial statements. In light of those concessions and TRIA's plain meaning, Defendants' principal argument – the erroneous contention that the Blocked Assets are not subject to execution under TRIA because they do not qualify as the *nominally-titled* property of Markazi under the UCC – is simply irrelevant.

Even if, despite TRIA's broadly preemptive "notwithstanding clause," the Court had to resort to the UCC to determine whether Markazi has a sufficient interest in the Blocked Assets to support execution under TRIA, the same result would follow. Under UCC § 8-503 Markazi is the only owner of the Blocked Assets. Furthermore, in the absence of the Restraints and the blocking mandated by E.O. 13599, UCC § 8-505 would provide Markazi with an absolute right to the payment of the cash in the Blocked Account. Thus, the UCC fully supports the conclusion that the Blocked Assets are the "assets of" Markazi.

¹ Plaintiffs utilize the same abbreviations in this memorandum that they employed in Plaintiffs' Opening Brief.

Defendants also advance a series of meritless, technical arguments that the CPLR does not permit Plaintiffs to execute upon the cash at Citibank because the only rights that Markazi has in that cash supposedly reside 3,800 miles away in Luxembourg. In making those arguments, Defendants again ignore TRIA's plain meaning. Unlike certain other sections of the FSIA that Defendants misleadingly cite, TRIA contains *no* requirements in terms of the location of the relevant assets. If the assets are blocked and they are the "assets of" an instrumentality of a terrorist state against which a plaintiff has secured a judgment based upon an act of terrorism, TRIA subjects those assets to execution to satisfy the judgment.

Even if TRIA could be interpreted to allow for execution against only those Markazi assets located in New York, Defendants' UCC contentions would pose no obstacle to Plaintiffs' TRIA claims. CPLR § 5201(b) allows for execution here because Markazi's admitted interest in the Blocked Assets constitutes property that could be sold or transferred by Markazi. Defendants also ignore CPLR § 5225(b), which allows judgment creditors to execute against "money . . . in which the judgment debtor has an interest," to the extent of that interest, which here equates to Markazi's 100% stake in the Blocked Assets. The very fact of Markazi's strenuous opposition to Plaintiffs' motion confirms that Markazi has a very real property interest in the \$1.75 billion in cash blocked at Citibank – a property interest that is subject to execution under the CPLR.

Defendants' remaining arguments occupy a good deal of space, but display no merit.

- While Defendants now claim that Plaintiffs' Restraints were invalid when issued, Clearstream previously moved to vacate the Restraints in 2008 without so much as mentioning that contention. In any event, both New York law and TRIA provide for execution against Blocked Assets and neither requires no pre-existing restraints.
- Clearstream's contention that it is an "innocent third party" that would face grievous financial injury if the Court issued a turnover order is: (a) difficult to stomach in light of Clearstream's significant affirmative efforts to facilitate Markazi's concealment of its assets; and (b) legally incorrect because Clearstream's customer agreement and the

UCC both provide that Clearstream has no financial obligations to Markazi unless and until Clearstream itself receives funds ultimately payable to Markazi.

- Defendants conjure a host of purported conflicts between E.O. 13599 and a freezing order adopted by E.U. regulators. It is apparent, however, that no conflict exists because – among other reasons – the E.U. provision does not apply to assets held by an American entity (Citibank) in the U.S. For this and other reasons, Defendants’ “political question” and “foreign compulsion” defenses are without any substance.
- In arguing that the Court’s recent decision in *Bank of Tokyo* establishes a collateral estoppel defense or constitutes dispositive “law of the case,” Defendants ignore virtually all of the requirements of those doctrines. In particular, *Bank of Tokyo* involved neither blocked assets nor cash located in a bank account housed in New York. Thus, this action and *Bank of Tokyo* simply do not present “identical” issues.

ARGUMENT

POINT I

THE BLOCKED ASSETS ARE SUBJECT TO TURNOVER UNDER TRIA AND NEW YORK LAW

A. Defendants’ Contention That TRIA Does Not Permit Execution Against The Blocked Assets Ignores The Statute’s Plain Meaning

Attempt as they may, Defendants cannot run from Markazi’s *repeated* admissions, in the unguarded moments of truth that preceded their recent efforts at revisionist history, that the Blocked Assets are the “assets of” Markazi. Defendants’ assertion that the question of whether the Blocked Assets constitute Markazi’s assets presents a matter of law, not fact, and lacks any significance in light of the Court’s fundamental obligation to determine TRIA’s plain meaning. *See, e.g., Engine Mfrs. Ass’n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004). The following table leaves no doubt that Markazi’s interest in the Blocked Assets – as described by Markazi’s “Head of Foreign Exchange Negotiable Securities Section” and the bank’s counsel – satisfies TRIA’s “blocked assets of that terrorist party” requirement.

TRIA's Language	Markazi's Admissions (SUF at ¶¶ 12, 13, 14)
<p>"[T]he blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable." TRIA § 201(a) (emphasis added).</p>	<p>"The Restrained Securities are the <i>Property</i> 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." Markazi First MOL (Vogel Decl., Ex. I) at 9 (emphasis added).</p>
	<p>"The Restraining Notices are Invalid Because the Restrained Securities are Prima Facie the <i>Property</i> of a Third Party, Bank Markazi – Not the Judgment Debtors." <i>Id.</i> at 36 (emphasis added).</p>
	<p>"It is undisputed that <i>Bank Markazi is the beneficial owner</i> of the Restrained Securities." <i>Id.</i> at 1 (emphasis added).</p>
	<p>"The Restrained Securities are the <i>property</i> of Bank Markazi, the Central Bank of Iran." <i>Id.</i> (emphasis added)</p>
	<p>"Under these circumstances, the Restrained Securities are presumed to be the <i>property</i> of Bank Markazi." <i>Id.</i> at 10 (emphasis added).</p>
	<p>"Plaintiffs Acknowledge that Bank Markazi is the Central Bank of Iran, a Sovereign Instrumentality, and the <i>Beneficial Owner</i> of the Restrained Securities." <i>Id.</i> at 9 (emphasis added).</p>
	<p>"Yet this allegation has no bearing whatsoever on the immunity of <i>Bank Markazi's property</i>, which is protected under section 1611(b)(1) of the FSIA." <i>Id.</i> at 15-16 (emphasis in original).</p>
	<p>"On the contrary, as Mr. Massoumi explains, Bank Markazi is the <i>sole beneficial owner</i> of its foreign currency reserves [<i>i.e.</i>, the Blocked Assets]." <i>Id.</i> at 31 (emphasis added).</p>
	<p>"The aggregate face value of the remaining bond instruments – <i>i.e.</i>, the Restrained Securities that are the <i>property</i> of Bank Markazi and the subject of this Turnover Action – is thus \$1.753 billion," <i>Id.</i> at 5 (emphasis added).</p>
	<p>"Therefore, by plaintiffs' own admission, the Restrained Securities constitute the <i>property</i> of Bank Markazi, a third party that is not a judgment debtor with respect to plaintiffs' underlying judgment." <i>Id.</i> at 37 (emphasis added).</p>
	<p>"The Restrained Securities Are Bank Markazi's Exclusive Property" Affidavit of Ali Asghar Massoumi (Vogel Decl., Ex. K) at p. 1 (emphasis in original).</p>
	<p>"Bank Markazi is the <i>sole beneficial owner</i> of the Restrained Securities." <i>Id.</i> at ¶ 6 (emphasis added).</p>
	<p>"Today, <i>no other party than Bank Markazi has a legitimate interest in the Restrained Securities</i> or in the assets in the Account." <i>Id.</i> at ¶ 30 (emphasis added).</p>

These repeated admissions vitiate Defendants' contention that the Blocked Assets are not "assets of" Markazi. Indeed, Markazi must concede that it is the only owner of the Blocked Assets and the only party that will derive any financial benefit from those assets if they are unblocked. Accordingly, any fair interpretation of the phrase "blocked assets of" Markazi yields the conclusion that the Blocked Assets satisfy TRIA's requirements.

Defendants assiduously avoid any analysis of the relevant question under TRIA, *i.e.*, whether the Blocked Assets constitute the "assets of" Markazi. TRIA § 201(a) (emphasis added). Instead, Defendants pose a different question – whether the Blocked Assets qualify as the "property of" Markazi under the UCC despite the fact that TRIA § 201(a) *nowhere* utilizes the term "property."

Defendants engage in this subterfuge because the term "asset" encompasses a broader scope of financial interests than the type of nominally-titled "property" under the UCC that Defendants consider. In particular, courts have consistently recognized that an entity's "assets" include all property in which it holds *beneficial ownership*. In *Secretary of Labor v. Doyle*, 675 F.3d 187 (3d Cir. 2012), for example, the court considered the meaning of the term "plan assets" under ERISA. Instead of turning to the irrelevant issue of what constitutes titled "property" under the UCC, *Doyle* determined that the "ordinary meaning" of "plan assets" "would include any property, tangible or intangible, *in which the plan has a beneficial ownership interest*." *Id.* at 204 (emphasis added) (quoting Department of Labor, Advisory Op. No. 93-14A, 1993 WL 188473, at *4 (May 5, 1993)) ("DOL Advisory Opinion").

The Third Circuit's interpretation of "plan assets" in *Doyle* parallels the Tenth Circuit's ruling in *In re Luna*, 406 F.3d 1192, 1199 (10th Cir. 2005), where the court noted that "ERISA itself does not define what constitutes an 'asset' of an ERISA fund." Defendants assign great

significance to the fact that TRIA also provides no definition of the term “assets of” an agency or instrumentality. *Luna*, however, shows that Defendants err by looking to UCC concepts of titled ownership for guidance regarding the meaning of “asset” – a common term that the UCC does not utilize and that courts have defined repeatedly without resorting to the UCC.

The *Luna* court determined the plain meaning of the term “asset” by referring to *Black’s Law Dictionary*, which defines an asset as:

1. An item that is owned and has value.
2. The entries on a balance sheet showing the items of property owned, including cash, inventory, equipment, real estate, accounts receivable, and goodwill.
3. All the property of a person available for paying debts.

Luna, 406 F.3d at 1199 (quoting *Black’s Law Dictionary* 112 (7th ed. 1999)). Applying that definition, the *Luna* court determined that the “common law of property” dictates that “the assets of a welfare plan would include any property, tangible or intangible, *in which the plan has a beneficial ownership interest.*” *Id.* (quoting DOL Advisory Opinion) (emphasis added).² Thus, the court concluded that unpaid contributions owed to an ERISA plan constitute “assets” of the plan because, “although the plan does not possess the unpaid contributions themselves, it does possess the *contractual right* to collect them.” *Id.* at 1200 (emphasis in original).

Markazi’s interest in the Blocked Assets easily satisfies the *Luna* court’s test and the *Black’s Law Dictionary* definition of an asset. Ali Asghar Massoumi, the Head of Markazi’s Foreign Exchange Negotiable Securities Section, described in detail Markazi’s full beneficial ownership interest in the Blocked Assets and the precise manner in which Markazi records those

² The statutory interpretation cases that Defendants cite also turn to dictionary definitions, rather than other statutes, to interpret the meaning of commonly utilized terms. *E.g.*, *Roberts v. Sea-Land Servs., Inc.*, 132 S.Ct. 1350, 1356, 1364 (2012) (utilizing dictionary to assist in defining the term “award” in a workers’ compensation statute); *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 556 U.S. 366, 382 (2009) (citing *Black’s Law Dictionary* in interpreting the meaning of the term “at issue” in TRIA and concluding that “the language of the statute suggests that Congress meant the words ‘at issue’ to carry the ordinary meaning”).

assets in the bank's financial records.³ That ownership interest is a far more concrete and valuable asset than the speculative "contractual right" to collect future contributions that *Luna* found to constitute an ERISA plan asset. In any event, Clearstream's General Terms and Conditions also provide Markazi with a contractual right to the payment of the proceeds of the Blocked Assets. *See* Reply SUF at ¶ 22.

The Second Circuit's ruling in *U.S. v. LaBarbara*, 129 F.3d 81 (2d Cir. 1997), also fully supports finding that the Blocked Assets are the "assets of" Markazi. In *LaBarbara*, the Second Circuit concluded that an employer's contractual obligation to make contributions to ERISA funds "constituted 'assets' of the Funds by any common definition." *Id.* at 88. The court emphasized that its reasoning was supported by the fact that "an audit of the Funds would have to include such fixed obligations as assets." *Id.* Massoumi's affidavit likewise confirms that Markazi treated the Blocked Assets as assets on its financial statements.

The decision in *F.D.I.C. v. Garner*, 125 F.3d 1272 (9th Cir. 1997), is also instructive. The *Garner* court considered whether the FDIC was entitled to an injunction under the asset freeze provisions of a statute that provided that a court can issue an "order placing the *assets of* any person designated by the [movant] under the control of the court and appointing a trustee to hold such assets." 125 F.3d at 1277 (quoting 12 U.S.C. § 1821(d)(18)) (emphasis added). The *Garner* court concluded that trusts that the defendant exercised some control over and "used for his personal benefit" were subject to freezing as the "assets of" the defendant under § 1821(d)(18). *Id.* at 1281. Markazi's 100% beneficial interest in the Blocked Assets constitutes a far more substantial interest than the defendant held in the trusts at issue in *Garner*. Given that

³ *See, e.g.,* Vogel Decl., Ex. K (Massoumi Aff.) at ¶ 10 ("Once oil export proceeds are credited to Bank Markazi's foreign currency accounts, Bank Markazi in turn credits Iranian Government Treasury Accounts maintained in its books with the local currency counter-value. From this point on, Bank Markazi effectively becomes the sole beneficial owner of such foreign currency amounts.").

the statute at issue in *Garner* utilized the same “assets of” formulation as TRIA, *Garner* strongly supports the conclusion that the Blocked Assets qualify as the “assets of” Markazi under TRIA.

Many other courts considering a wide variety of factual and legal issues have reached the same common sense determination that the term “assets” encompasses property in which a party has a “beneficial interest.”⁴ That case law is completely consistent with relevant New York law. 11 Weinstein, Korn & Miller, *New York Civil Practice* ¶ 5225.09 at 52-379 (2004) (under CPLR § 5225(b), “[i]t is not necessary that the judgment debtor have legal title to the property; a *beneficial interest is sufficient*”) (emphasis added). In contrast, Defendants can cite *no case* holding that a party’s 100% beneficial interest in any asset did not constitute an “asset of” that party, much less in circumstances where that entity recorded the asset as such on its financial statements. In combination, therefore, Markazi’s admissions and TRIA’s plain words dictate that Plaintiffs can execute against the Blocked Assets.

None of the authorities that Defendants cite remotely support a contrary conclusion. In

⁴ *E.g.*, *F.D.I.C. v. Meyer*, 781 F.2d 1260, 1261 (7th Cir. 1986) (“Included in the *assets* purchased by the FDIC were the two security agreements dated May 5, 1972 and September 17, 1975, the *assignment of the beneficial interest*, the guaranty and the installment note for \$195,000.”) (emphasis added); *Mimms v. PricewaterhouseCoopers, LLP*, 2012 WL 527205, at *3 (S.D.N.Y. Feb. 16, 2012) (“Assets include ‘any property, tangible or intangible, in which the plan has a beneficial ownership interest’ . . .”) (quoting *In re Halpin*, 566 F.3d 286, 289 (2d Cir. 2009)); *In re Reuter*, 427 B.R. 727, 779 (Bkrcty. W.D. Mo. 2010) (“Debtor’s [beneficial] interest in the Trust Property as a tenant in common is property of the estate.”); *In re Adler, Coleman Clearing Corp.*, 497 F.Supp.2d 520, 523-24 (S.D.N.Y. 2007) (“[T]he Court is persuaded that the Trustee has sufficiently established that Gurian possesses *substantial deliverable assets, including beneficial ownership or control over Benil* . . .”) (emphasis added); *U.S. v. Brown*, 2007 WL 1140638, at *2 (D.N.H. Apr. 18, 2007) (a party’s assets include all “beneficial interests in property” owned by that party); *Independent Trust Corp. v. Fidelity Nat’l Title Ins. Co. of N.Y.*, 2007 WL 1017858, at *6 (N.D. Ill. Mar. 30, 2007) (“ . . . Hargrove provided Defendant with certain assets or pledged certain assets as security, including Hargrove’s interest in the beneficial interests of certain land trusts . . .”); *In re Ontiveros*, 2006 WL 3922114, at *3 (Bkrcty. S.D. Fla. Dec. 5, 2006) (“Property of the estate under section 541 is very broad and includes all forms of assets, including real property, beneficial, legal and equitable interests, lawsuits and claims, and inchoate rights.”); *U.S. v. One 1988 Prevost Liberty Motor Home*, 952 F.Supp. 1180, 1207 (S.D. Tex. 1996) (“[A]t the time of his transfer of these assets, and throughout the pendency of his bankruptcy case, Sheehan had beneficial interests in LMC, in LMC’s assets, Banner and B & B, and the assets of Banner and B & B. These corporations’ assets therefore were property of the bankruptcy estate.”); *U.S. v. O’Brien*, 836 F.Supp. 438, 441-42 (S.D. Ohio 1993) (a “defendant’s control and/or beneficial ownership of assets is sufficient to make them subject to restraint and forfeiture pursuant to 18 U.S.C. § 982”); *In re McCulloch & Son, Inc.*, 30 B.R. 7, 9 (Bkrcty. D. Or. 1983) (“The beneficial interest in the policy constituted an asset of the company which was no different from any other asset of the company.”).

large part, Defendants' arguments rest upon extrapolations from the *amicus* brief filed by the government in *Rubin v. Islamic Republic of Iran*, No. 11-2144 (1st Cir. 2012). Briefs, of course, are precedent for nothing. The *Rubin* brief is particularly unhelpful because that case presents vastly different issues than the relevant question of whether blocked cash that a party has repeatedly identified as its own "property" constitutes an "asset of" that entity under TRIA.

The non-precedential views that the government expressed in the *Rubin* appeal brief must also be seen in the context of the property relevant to that action.⁵ In sharp contrast to this case, the *Rubin* plaintiffs undertook extensive discovery, but elicited no evidence that Iran held *any* ownership interest whatsoever in the antiquities that the Plaintiffs sought to attach. 810 F.Supp.2d at 404; *see also id.* at 406 n.3 ("It is worth noting that the claim of Iran's ownership of the antiquities is made by the plaintiffs here, but no such claim has been made by Iran itself."). Thus, *Rubin* exhibits no parallels to the critical admissions that Markazi and its counsel have made. The views that the government expressed in the completely different circumstances that *Rubin* presents therefore lack any significance here.

It is also noteworthy that Defendants' predictions regarding the content of the *amicus* brief that the government filed in *J.P. Morgan Chase Bank v. Hausler*, 12-1264 L (2d Cir.) have proven erroneous. The more refined views that the government expressed in the *Hausler* appeal fully support Plaintiffs' position here. In discussing the EFTs at issue in *Hausler*, the government emphasized that "[b]oth the plain meaning of the statutory text and case law construing similarly-worded statutes demonstrate that TRIA permits attachment only of assets in which the terrorist party or its agency or instrumentality has *an ownership interest . . .*" *Amicus*

⁵ *See, e.g., Hausler v. JP Morgan Chase Bank, N.A.*, 740 F.Supp. 2d 525, 537 (S.D.N.Y. 2010) ("*Hausler I*") (interpreting TRIA and noting that "[c]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there, notwithstanding any contrary interpretation by the Executive Branch") (internal quotation omitted).

Br. at 2 (emphasis added); *see also id.* at 14 (utilizing the “ownership interest” formulation); *id.* at 16 (same). Neither the government nor any precedent has ever suggested that a 100% beneficial interest in property fails to qualify as an “ownership interest” in that property.

It is also significant that none of the cases Defendants cite considered what constitutes the “asset of” a party or even the significance of beneficial ownership. Moreover, all of those authorities presented factual and legal issues far afield from the straightforward matter of interpreting the commonly utilized phrase “asset of” under TRIA.⁶

Defendants’ principal authority for resorting to UCC definitions of property rights to interpret TRIA’s “assets of” requirement, *Export-Import Bank of U.S. v. Asia Pulp & Paper Co.*, 609 F.3d 111 (2d Cir. 2010), is also inapposite. *Asia Pulp* examined 28 U.S.C. § 3205(a), which authorizes issuance of “a writ of garnishment against *property* . . . in which the debtor has a substantial nonexempt interest.” 28 U.S.C. § 3205(a) (emphasis added). In light of § 3205(a)’s explicit use of the term “property” in a case addressing the characteristics of EFTs – a topic the UCC specifically addresses – the *Asia Pulp* court understandably sought to determine whether the relevant mid-stream EFTs qualified as the judgment debtor’s “property” under the UCC. 609 F.3d at 116-18.

But, as Plaintiffs demonstrate above, “property” and “asset” are not synonymous, the

⁶ See, e.g., *Board of Trs. of the Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 131 S.Ct. 2188, 2196-97 (2011) (phrase “invention of the contractor” within a provision of a patent statute that concerns inventions created in the course of federally-funded research referred only to inventions owned by the contractor after assignment from the inventor, and not to all inventions created by employees of the contractor in the course of a federally-funded project); *Flores-Figueroa v. U.S.*, 556 U.S. 646, 647 (2009) (where identity theft statute barred “knowingly transfer[ing], possess[ing], or us[ing], without lawful authority, a means of identification of another person,” government must prove that defendant knew that “means of identification” belonged to another person, as opposed to being counterfeit); *Ellis v. U.S.*, 206 U.S. 246, 258-59 (1907) (merely noting that, where a statute prohibited employing certain labor “upon any of the public works of the United States” for more than eight hours per day, “the most natural meaning of ‘of the United States’ is ‘belonging to the United States’”); *Holy Land Found. for Relief and Dev. v. Ashcroft*, 333 F.3d 156, 162-63 (D.C. Cir. 2003) (discussing what type of “interest” in property is subject to blocking under IEEPA without considering TRIA or what constitutes an “asset of” an entity).

UCC does not purport to define the term “asset,” and courts have continually interpreted that term without resorting to the UCC. Congress makes the distinction between “property” and “asset” clear by continually utilizing “property” throughout the FSIA, but using the term “asset” only in TRIA. *See, e.g.*, 28 U.S.C. §§ 1605(a)(3)-(5), 1605A(d), 1605A(g), 1609, 1610(a)-(g), 1611(a)-(c); *BFP v. Resolution Trust Co.*, 511 U.S. 531, 537 (1994) (“[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it from another.”) (internal quotation omitted). Indeed, construing “property” and “asset” as synonymous would impermissibly render portions of TRIA (which uses both terms) superfluous. *See* TRIA § 210(d)(3) (differentiating between any “*property*” or “*asset*” “subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations”). Thus, the textual differences between TRIA and the statute at issue in *Asia Pulp* render *Asia Pulp* irrelevant here.

Defendants also mistakenly cite *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70 (2d Cir. 2002), for the proposition that possession of property creates a presumption of ownership. In the sentence following the passage Defendants cite, however, the court emphasized that “[i]t is clear . . . that this presumption may be rebutted by evidence that [Indonesia] actually controlled the disputed funds, or that Pertamina merely held the funds for [Indonesia], in the manner of a trustee” and cited a number of New York cases in which courts found the presumption that accompanies possession rebutted in circumstances far less compelling than those presented here.⁷ *Karaha* therefore supports Plaintiffs’ position

⁷ *Id.* at 86 (citing, *e.g.*, *Fragetti v. Fragetti*, 262 A.D.2d 527, 527-28, 692 N.Y.S.2d 442, 443 (2d Dep’t 1999) (presumption that joint bank account was jointly owned rebutted by contrary evidence of the parties’ intentions and relative control over funds) and *Vergari v. Kraisky*, 120 A.D.2d 739, 739, 502 N.Y.S.2d 788, 789 (2d Dep’t 1986) (title constitutes prima facie evidence of ownership, but presumption was rebutted by contrary evidence of the parties’ relative dominion and control over a vehicle)).

because UCC Article 8 makes clear that, prior to the issuance of the Restraints and E.O. 13599, Markazi exercised exclusive control over the Blocked Assets. *See* Point I.B.⁸

Defendants' effort to transform *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43 (2d Cir. 2010), into support for a requirement under TRIA that an asset be held "in the hands" of a terrorist party's agency or instrumentality fails because *Weinstein* did not examine what constitutes the "assets of" an entity. Thus, the case's isolated use of the phrase "held in the hands of an instrumentality of the judgment-debtor" was not (nor could it be) a repudiation of the statute's plain words, which make no reference to physical possession. *See id.* at 50.

Finally, Defendants expend significant effort arguing that courts in this District wrongly decided *Levin v. Bank of New York*, 2011 WL 812032 (S.D.N.Y. Mar. 4, 2011), *Hausler I*, and *Hausler v. JPMorgan Chase Bank, N.A.*, ___ F.Supp.2d ___, 2012 WL 601034 (S.D.N.Y. Feb. 22, 2012) ("*Hausler II*"). As Plaintiffs explained in their moving papers, those cases closely considered and rejected the precise arguments that Defendants advance. Significantly, those cases concerned efforts to execute against mid-stream EFTs that the defendants did not characterize as their property. Thus, while *Levin* and *Hausler I* and *II* fully support Plaintiffs' positions, even a reversal of the *Hausler* decisions or the affirmance of *Calderon-Cardona v. JPMorgan Chase Bank, N.A.*, 2011 WL 6155987 (S.D.N.Y. Dec. 7, 2011), would not support the denial of Plaintiffs' motion. These cases did not involve cash beneficially owned by a terrorist party's agency or instrumentality or the telling admissions present here. Nor will the forthcoming decisions answer the critical question of whether an asset in which a party holds a 100% beneficial ownership interest qualifies as an "asset of" that party under TRIA.

⁸ Specifically, UCC §§ 8-506 and 8-507(a) require securities intermediaries, such as Clearstream, to exercise rights as directed by the ultimate entitlement holder, in this case Markazi. *See* Carl S. Bjerre & Sandra M. Rocks, *The ABCs of the UCC: Article 8: Investment Securities* (2d ed. 2004).

Defendants' efforts to equate this action to the EFT cases also ignores that the official comment to UCC § 4-A-502 makes clear that a creditor of the beneficiary of an EFT *cannot* levy on property of an originator until the funds transfer is completed because, until completion, the beneficiary has no property interest in the transferred funds. NY UCC § 4-A-502 cmt. 4. In contrast, UCC § 8-503, which arguably governs the Blocked Assets, explicitly recognizes the investor's equitable or beneficial interest in financial assets maintained for its benefit at every level of securities intermediary through which it holds interests in financial assets. *See* Point I.B. While both UCC § 4-A-503 and UCC § 8-112(c) prescribe the bank or securities intermediary upon whom a creditor's legal process must be served, UCC § 8-112(e) recognizes additional legal and *equitable* remedies available from a Court to reach "property that cannot readily be reached by other legal process." By contrast, the Official Comment to § 4-A-503, which governs injunctions or restraining orders with respect to EFTs, provides that "[n]o other injunction is permitted" and that "intermediary banks are protected"

Defendants also fail to provide any reasoned response to Plaintiffs' showing that TRIA § 201(a)'s use of the phrase "*of that terrorist party*" twice within that short statutory provision demonstrates that the preposition "of" has a more flexible meaning than requiring titled ownership. The first use of that phrase provides that plaintiffs may execute against "the blocked assets *of that terrorist party*" while the second use provides that the assets plaintiffs may execute against "*includ[e] the blocked assets of any agency or instrumentality of that terrorist party.*" TRIA § 201(a) (emphases added). Markazi falsely claims that the statutory definition of "agency or instrumentality of a foreign state" supports its narrow reading of the term "of" by misquoting 28 U.S.C. § 1603(b). The relevant portion of the definition provides that "[a]n 'agency or instrumentality of a foreign state' means any entity – . . . [¶] omitted] (2) which is an organ of a

foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof.” 28 U.S.C. § 1603(b). Markazi quotes only the portion of this definition that refers to share ownership, and then claims that the phrase “of any agency or instrumentality of that terrorist party” requires titled ownership. To the contrary, § 1603(b)(2) contemplates that an entity can be “an agency or instrumentality of that terrorist party” if: (a) it is an “organ” or the foreign state; (b) it is a “political subdivision” of that state; (c) the state owns a majority of the shares of that entity; or (d) the state holds some other majority ownership interest. Only the third (and perhaps the fourth) of those possibilities contemplates the type of titled ownership that Defendants advocate.

Given § 1603(b)’s varied definitions of “an agency or instrumentality of a foreign state” and the fact that at least two of the four prongs of § 1603(b)(2) have nothing to do with titled ownership, the phrase “agency of instrumentality *of* that terrorist party” in TRIA § 201(a) cannot signify that a terrorist party must own a titled interest in another entity for that entity to qualify as an “agency or instrumentality.” (Emphasis added). Accordingly, because Defendants concede that two duplicative phrases in a statute must be read consistently, TRIA contemplates a broader definition of the preposition “of,” as used in the phrase “the blocked assets *of* that terrorist party,” consistent with Plaintiffs’ contention that Markazi’s admitted 100% beneficial property interest in the Blocked Assets satisfies the statute’s requirements. Neither *Calderon-Cardona* nor the government’s brief in *Rubin* considered this issue at all.

B. Even Under The UCC, The Blocked Assets Are “Assets Of” Markazi

Even if the Court decides that it must interpret TRIA’s plain words by resorting to UCC definitions of “ownership” or “property,” Markazi’s interest in the Blocked Assets would easily satisfy that requirement. Article 8 of the UCC distinguishes between the recognition of an

investor's property right in a financial asset (§ 8-503(b)) and the investor's ability to exercise its rights with respect to the financial asset (§ 8-503(c)). The UCC does provide that the investor can exercise those rights only as against its own intermediary. Importantly, however, the statute also recognizes the existence of a beneficial property interest in the financial asset, which the investor may hold through a chain of successive intermediaries who themselves do *not* own the interest in the financial asset. Rather, the intermediaries hold that interest solely as custodian for the benefit of the investor.⁹ UCC § 8-503 (a) specifically states that,

[t]o the extent necessary for a securities intermediary to satisfy all security entitlements with respect to a particular financial asset, all interests in that financial asset held by the securities intermediary are *held by the securities intermediary for the entitlement holders, are not property of the securities intermediary*, and are not subject to claims of creditors of the securities intermediary, except¹⁰ as otherwise provided in Section 8-511.

UCC §8-503(a) (emphasis added).

Given that Citibank, Clearstream, and UBAE are all securities intermediaries acting as custodians for Markazi, the securities entitlement holder, only Markazi can claim that the Blocked Assets are its property and only Markazi holds the beneficial property interest in the Blocked Assets. The Federal Reserve Bank of New York ("FRBNY") has confirmed that, under UCC Article 8, Clearstream "does not own" the property at issue and "exercises ownership rights with respect to financial assets *on behalf of the entitlement holder*," including rights to "make

⁹ The investor's beneficial ownership in the financial asset is recognized in Article 8's declaration of legislative intent:

Because the entitlement holder receives a package of rights that can be asserted directly only against the intermediary, it is essential for the securities intermediary to take appropriate steps to ensure that the entitlement holders receive the *full benefit of the economic and other rights that comprise ownership of a security*.

* * *

The legislature recognizes that investors who hold securities through the indirect holding system expect that a securities intermediary will comply with its duty to obtain and maintain securities entitlements on behalf of its investor.

1997 N.Y. Sess. Laws Ch. 566 (McKinney) (emphasis added).

¹⁰ The exceptions referenced in UCC § 8-511 are not at issue in this case.

demand for payment of an instrument which is a financial asset, and rights to enforce legal obligations.” *See* Vogel Reply Decl., Ex. 21 (E.U. Clearing and Settlement Legal Certainty Group Questionnaire Responses from the FRBNY) at p.7 (*citing* U.C.C. § 8-506) (emphasis added). The FRBNY has also stated that beneficial ownership does not vary even though the books of an upper-tier intermediary, like Citibank, may list the lower-tier intermediary (*i.e.*, Clearstream) as the owner. *See id.* at p.8 (“the securities intermediary *does not ‘own’* the financial assets credited to the securities accounts maintained on its books, although it may be reflected in the books of the issuer or its transfer agent as the registered holder or have a security entitlement (or be an investor/account holder) in respect of an upper-tier intermediary”).¹¹

Section 8-503 further clarifies that an entitlement holder (here, Markazi) has “a *pro rata property interest* in all interests” in the financial assets held by the securities intermediary for the entitlement holder’s benefit. *See* UCC § 8-503(b) (emphasis added). Thus, § 8-503 negates Clearstream’s argument that Citibank holds Clearstream’s property interest in the Blocked Assets because no securities intermediary in the chain has any property interest in the entitlement holder’s financial assets. Securities intermediaries hold interests in financial assets solely for the benefit of the ultimate beneficial owner (here Markazi). Therefore, the UCC recognizes the investor’s property interest in the financial asset at every level in the chain of intermediaries

¹¹ *See also* U.C.C. § 8-511, Official Comment No. 2 (“Intermediaries are required to maintain custody of their customers’ securities through clearing corporation accounts or in other approved locations and are prohibited from using customers’ securities in their own business.”); Controller of the Currency, CS-AM, Comptroller’s Handbook: Custody Services, at p.15 (January, 2002, in effect as of May 17, 2012) (“A custodian’s accounting records and internal controls should ensure that assets of each custody account are kept separate from the assets of the custodian and maintained under joint control.”).

through which it holds its interest. *See* Vogel Reply Decl., Ex. 22 (Opinion Letter of Professor Charles W. Mooney).¹²

Article 8 merely provides a mechanism for smooth transactions among intermediaries by requiring the beneficial owner to exercise its rights via its immediate intermediary. UCC § 8-503(c). Each upstream intermediary is in turn required to follow the instructions of the beneficial owner (Markazi) until the final safekeeping intermediary (Citibank) is reached. Otherwise, the beneficial owner/investor would be unable to enjoy the monetary value of its investment.¹³ The investor has a pro rata property interest in all interests in the financial asset held by each securities intermediary in the chain between the investor and the highest tier intermediary that holds the underlying financial asset.

To the extent that UCC § 8-112(c)¹⁴ and CPLR § 5201(c)(4) purport to prescribe the

¹² Even if Luxembourg law were controlling here, the same result would follow. Luxembourg recognizes that an investor's interest in dematerialized securities deposited with a custodian in a securities account is a right in rem of an intangible nature and that the investor has a right of co-ownership in securities of the kind he invested in that are in turn sub-deposited with another intermediary (*i.e.*, Citibank) by his depository (*i.e.*, Clearstream). The law provides that the investor remains the owner of the securities; that intermediaries must hold the investor's securities segregated from their own assets; and only the investor is entitled to exercise, or benefit from, the rights attached to securities. Moreover, the investor can assert the rights attached to the securities (economic and non-economic rights) against the issuer by means of the production of a certificate issued by the depository (Clearstream) certifying the number of securities booked to the securities account. *See* Vogel Reply Decl., Ex. 24 (Opinion of Vilret Avocats, dated February 23, 2011 ("Vilret I")) and Ex. 26 (European Commission, EU Clearing and Settlement Legal Certainty Group Questionnaire dated April 24, 2006, at Sections 7.14, 12.14 and 36.14). Markazi, and thus judgment creditors standing in its shoes, could obtain such a certificate from Clearstream to enforce rights in the securities against upstream intermediaries. In the event of Clearstream's insolvency, Luxembourg law provides for investors to enforce their rights in rem against Citibank as sub-custodian. Vilret I, at § 4.3 and Vogel Reply Decl., Ex. 26 at § 15.14.

¹³ Indeed "[a] securities intermediary shall take action to obtain a payment or distribution made by the issuer of a financial asset ... [and is then] obligated to its entitlement holder for a payment or distribution made by the issuer of a financial asset if the payment or distribution is received by the securities intermediary." N.Y. UCC § 8-505. The "pay when paid" obligation of each intermediary is an almost absolute obligation to the entitlement holder (subject only to set-off or counterclaim). The obligation to pass through the economic benefits of the financial asset is the only obligation of a securities intermediary not subject to limitation by agreement or a commercial reasonableness standard. *See* U.C.C. § 8-505; *see also* Vogel Reply Decl., Ex. 21 (Federal Reserve Bank of New York response to the E.U. Clearing and Settlement Legal Certainty Group Questionnaire).

¹⁴ UCC § 8-503's explicit recognition of the investor's equitable or beneficial interest in financial assets maintained for its benefit at every level of securities intermediary is confirmed by UCC § 8-112, which governs the manner in which a creditor may reach the investor's security entitlement. While UCC § 8-112(c) prescribes that the investor

exclusive garnishees against which a judgment debtor's security entitlement may be reached, they are pre-empted by TRIA's mandate that the blocked assets of Markazi "shall be subject to execution or attachment in aid of execution in order to satisfy" a judgment against a terrorist party on a claim based upon an act of terrorism. TRIA requires only that the blocked asset be Markazi's, and it does not concern itself with whether the party in whose possession or control the asset has been blocked is a proper garnishee under state law. Fed. R. Civ. P. 69(a) incorporates New York's procedure on execution, "but a federal statute governs to the extent it applies." TRIA clearly applies in these circumstances, and a finding that the Blocked Assets are 100% beneficially owned by Markazi under UCC § 8-503(b) – a fact that Markazi readily admits – suffices to justify turnover of the Blocked Assets to Plaintiffs.

**C. Markazi's Ownership Interest In The Blocked Assets
Is Subject To Turnover Under The CPLR**

Defendants' contention that Markazi's right to the Blocked Assets is not subject to turnover ignores CPLR § 5201(b), which provides: "A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested" Defendants also disregard CPLR § 5225(b), which permits a judgment creditor to bring a proceeding against any person "in possession or custody of money or other personal property in which the judgment debtor has an interest."

As Plaintiffs demonstrated in their Restraints Brief, Markazi's admitted interest in the cash blocked at Citibank constitutes property that can be assigned or transferred. *See* Plaintiffs' Restraints Brief at pp.44-47. Accordingly, that interest is subject to execution and turnover under §§ 5201(b) and 5225(b). *Id.* at pp. 36-39; *see also, e.g., Capital Ventures Int'l v. Republic*

must serve process upon its own securities intermediary, UCC § 8-112(e) recognizes additional legal and *equitable* remedies available from a Court to reach "property that cannot readily be reached by other legal process."

of Argentina, 443 F.3d 214, 220 n.4 (2d Cir. 2006) (creditor is entitled to attachment of debtor's reversionary interest in cash collateral held by garnishee); *NML Capital, Ltd. v. Republic of Argentina*, 2011 WL 1533072, at *4 n.4 (S.D.N.Y. Apr. 22, 2011) (debtor's future interest in equipment held by garnishee that debtor had not paid for was assignable and transferable property interest under CPLR § 5201(b)); 11 Weinstein, Korn & Miller, *New York Civil Practice* ¶ 5225.09 at 52-379 (2004) (under CPLR § 5225(b), “[i]t is not necessary that the judgment debtor have legal title to the property; a beneficial interest is sufficient”) (emphasis added).

Here, Markazi has more than an inchoate beneficial interest in the Blocked Assets. Markazi's contracts with Clearstream and UBAE both provide that Clearstream owes to Markazi all assets that Clearstream held for Markazi's benefit. Indeed, if Markazi has no real ownership interest in the Blocked Assets, why does it adamantly oppose turnover? The question answers itself: as Defendants have repeatedly acknowledged, the Blocked Assets ultimately belong to Markazi. As a result, Article 52 of the CPLR subjects them to turnover.

Clearstream's argument that it actually owns the cash restrained at Citibank and that Markazi has no ownership interest in that cash also ignores that, at the time Plaintiffs obtained the Restraints, none of the restrained bonds had matured to cash. The cash proceeds of the bonds were not received by Citibank until *after* the Restraints issued. That cash was not deposited into Clearstream's cash account, but rather into a segregated account that E.O. 13599 blocked. Thus, the cash at issue here was never Clearstream's property. Moreover, CPLR § 5222, which governs the restraining notice served on Citibank, forbids Citibank from transferring any of the Blocked Assets. Because those Restraints have been in place since June 13, 2008, Citibank could not have deposited any of the cash into Clearstream's normal cash account.

D. Plaintiffs' TRIA Claim Ripened Upon The Issuance of E.O. 13599, And The Validity Of Any Restraint That Preceded That Order Is Irrelevant

Clearstream also erroneously asserts that Plaintiffs' TRIA claim fails because Plaintiffs improperly restrained the Blocked Assets before the President issued E.O. 13599 and the Blocked Assets are therefore tainted as "fruit of the poisonous tree." TRIA, however, provides no defense related to the supposed impropriety of pre-blocking restraints, and Clearstream cites no authority that supports its position.¹⁵ Rather, substantial authority demonstrates that Plaintiffs remain free to obtain the turnover of assets irrespective of whether the assets were ever the subject of judicial restraints. *See, e.g., Garland D. Cox & Assocs., Inc. v. Koffman*, 48 N.Y.2d 878, 879-880, 400 N.E.2d 302, 302, 424 N.Y.S.2d 360, 361 (1979) (judgment creditors need not obtain valid executions before commencing turnover proceedings); *Kitson & Kitson v. City of Yonkers*, 10 A.D.3d 21, 27, 778 N.Y.S.2d 503, 508 (2d Dep't 2004). Plaintiffs' claim under TRIA ripened when President Obama issued E.O. 13599 on February 5, 2012, at which time the Blocked Assets consisted almost entirely of cash located in a segregated Citibank account. Thus, the validity of any other enforcement devices used by the Plaintiffs prior to the accrual of their TRIA claim is irrelevant to the merits of this motion.

E. Clearstream's False Contention That It Is An Innocent Third Party Is Belied By The Record Of Its Conduct

Clearstream's argument that its supposed status as an "innocent third party" prevents the turnover of the Blocked Assets lacks any factual or legal support. Indeed, Clearstream has long and willingly served as the principal banker for Iran's central bank although Iran has been listed as a state sponsor of terrorism by the United States since 1984. *See* Clearstream Exs. 11, 12, and

¹⁵ None of the cases that Clearstream cites (Clearstream Reply Brief at p.38) involved assets that were improperly restrained initially but were blocked under Presidential order or OFAC regulations.

23. Clearstream's dedication to Iran and Markazi was so great that it maintained its Markazi relationship even after the U.S. urged Clearstream to drop Markazi as a customer. *See* Reply SUF at ¶ 12. Clearstream performed that function although it was fully cognizant of the risks posed by Iran's status as an international pariah. Internal Clearstream emails also demonstrate Clearstream's continued concern that its relationship with Markazi posed substantial risks because Iran "is subject to freezes" and because "increasing Russian financial influence may well qualify Iran to become a GAFI [Financial Action Task Force on Money Laundering] blacklist country." *See* Reply SUF at ¶ 11.

Clearstream's "innocent third party" contentions are also belied by its decision to spearhead Markazi's defense from the outset of these proceedings. *See* Reply SUF at ¶¶ 18-21; *see also* Vogel Reply Decl., Exs. 13 and 14; *see esp.* Ex. 14(H) (October 26, 2009 letter from Clearstream to Markazi). Indeed, Clearstream went so far as to lie to this Court in an attempt to conceal Markazi's ownership of the Blocked Assets. *See* Reply SUF at ¶¶ 19-21; Plaintiffs' Restraints Brief at pp. 10-13.

Even putting those facts aside, Clearstream's "innocence" argument is wholly dependent upon the false premise that Markazi "could potentially demand and be awarded" reimbursement for an amount equivalent to the Blocked Assets if this Court orders turnover. *See* Clearstream SJ Brief at p. 31. Markazi's failure to commence *any* proceeding against Clearstream to obtain the Blocked Assets since the Court first restrained those assets more than four years ago demonstrates the pretextual nature of this supposed defense. In any event, UCC § 8-505 and Clearstream's agreements with Markazi and UBAE completely insulate Clearstream from any such liability. Under UCC § 8-505(b), securities intermediaries' obligations to pay entitlement holders arise only after the intermediaries receive the payment or distribution. Turnover of the

Blocked Assets would prevent Clearstream from ever obtaining those assets. Hence, no basis will exist for Markazi to demand payment from Clearstream.

That conclusion is reinforced by UCC § 8-505(a)(1), which provides that where the entitlement holder and the securities intermediary have a contractual arrangement, the intermediary satisfies its duty to obtain payment for the entitlement holder if the intermediary acts in accordance with the parties' agreement. The Clearstream-Markazi contract requires Clearstream to collect cash distributable or payable with respect to securities held for Markazi (Art. 20), but imposes no liability for Clearstream's failure to fulfill that obligation unless Clearstream acts negligently (Art. 48).¹⁶ *See* Reply SUF at ¶ 22. Moreover, consistent with UCC § 8-505(b), Clearstream has no obligation to credit funds to Markazi until Clearstream actually receives payment in "freely available funds for [its] account at its cash correspondent bank." Art. 24; Reply SUF at ¶ 22.

As demonstrated in Point I.C., the Blocked Assets remain in a segregated Citibank account and have never been credited to Clearstream.¹⁷ As a result, Clearstream never received the cash in freely available funds, and Clearstream has no contractual obligation to Markazi for payment of the restrained cash. *See* Point I.C. The agreement also insulates Clearstream from liability because: (a) Markazi agreed not to hold Clearstream liable for failing to take an action required by the parties' contract if "such failure arises out of or is caused by events beyond [Clearstream's] reasonable control, including without limitation, . . . law, judicial process, decree, regulation, order or other action of any government, governmental body (including any court or tribunal central bank or military authority) or self-regulatory organization" (Art. 48); and

¹⁶ Clearstream's agreement with UBAE is identical to its agreement with Markazi. *See* Reply SUF at ¶ 22.

¹⁷ Clearstream Ex. 7 (Hr'g Tr. at p. 29, lines 2-11).

(b) Markazi agreed to indemnify Clearstream for any loss, damage or expense arising from Markazi's failure to comply with judgments entered by any court. Art. 51.¹⁸

POINT II

PLAINTIFFS' CLAIMS FOR TURNOVER OF THE BLOCKED ASSETS DO NOT RAISE A NON-JUSTICIABLE POLITICAL QUESTION

A. Clearstream's Political Question Defense Fails Because The Blocked Assets Held By Citibank In New York Are Not Frozen Under The E.U. Regulation

Clearstream's contention that this matter presents non-justiciable political questions rests entirely upon the flawed assumption that turnover of the Blocked Assets would create a conflict with the E.U. Regulation. According to Clearstream, that conflict would arise because turnover would require a debit to its account at Citibank and a corresponding debit to funds Clearstream has purportedly credited to Markazi in Luxembourg. *See* Clearstream's SJ Brief at p. 3.

This argument mistakenly assumes that the Blocked Assets are restrained and blocked in *Clearstream's* cash account at Citibank. Due to the Restraints and other creditors' process served by Plaintiffs, Citibank has not credited *any* of the cash constituting the Blocked Assets to Clearstream. Rather, Citibank deposited that cash in a segregated (and now blocked) account of its own. *See* Vogel Reply Decl., Ex. 14(D) (SWIFT Message from Clearstream to UBAE, dated June 27, 2008 stating "Citibank also placed the cash from this redemption in a segregated account and the cash is therefore not available"); Clearstream Ex. 7 (June 27, 2008 Hr'g Tr. at

¹⁸ Markazi's presence as a party to this proceeding provides further protection to Clearstream, as Markazi will be barred from making any adverse claim against Clearstream once the Court enters a final order directing the turnover of the Blocked Assets. CPLR § 5209 provides that Clearstream's obligations to Markazi with respect to the Blocked Assets will be discharged upon payment or delivery of the Blocked Assets to Plaintiffs pursuant to court order. *See also, e.g., Harris v. Balk*, 198 U.S. 215, 226-227 (1905) (garnishee is discharged from its debt to a judgment debtor to the extent of the payment made to a judgment creditor under court order). Furthermore, while Plaintiffs show in Point II. that the E.U. regulation that Clearstream cites as raising non-justiciable "political questions" has no applicability here, that regulation would bar Markazi from bringing any claims against Clearstream related to the Blocked Assets. *See* Council Regulation (E.U.) 267/2012 of 23 March 2012 (the "E.U. Regulation"), Article 38 ("[n]o claims in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed under this Regulation . . . shall be satisfied, if they are made by: (a) designated persons, entities, or bodies listed in Annexes VIII and IX", which includes Markazi).

29:6-13); Clearstream's Restraints Reply Brief ("Clearstream Reply Brief") at p. 10; Clearstream Ex. 22. Consistent with that state of affairs, Clearstream testified at the June 27, 2008 hearing that it reversed credits that it had made to the account that UBAE maintained for Markazi because Clearstream had "*not received the corresponding monies from Citibank*" as a result of the writ served upon Citibank by Plaintiffs. *See* Hr'g. Tr. 58:12-18 (emphasis added). Given that Clearstream never received any cash from Citibank, it is disingenuous for Clearstream to claim it credited funds corresponding to the Blocked Assets to Markazi on Clearstream's books. Accordingly, turnover of the Blocked Assets would require neither a debit to Clearstream's cash account at Citibank nor a debit to any account held for Markazi's benefit at Clearstream.

Indeed, depositing the cash proceeds of the bonds that once comprised the Blocked Assets in Clearstream's cash account at Citibank would have violated the Restraining Notice and Amended Restraining Notice that Plaintiffs served upon Citibank and Clearstream on June 16, 2008 and June 20, 2008. *See* CPLR § 5222 (the recipient of a restraining notice "is forbidden to make or suffer any sale, assignment or transfer of, or any interference with, any such property, or pay over or otherwise dispose of any such debt, to any person other than the sheriff . . . , except upon direction of the sheriff or pursuant to an order of the court"). As a result, CPLR § 5202 dictates that any property interest that Clearstream acquired by means of such a transfer would be ineffective against Plaintiffs because Plaintiffs secured rights superior to Clearstream with respect to any cash proceeds of the Blocked Assets by delivering executions on those assets to the U.S. Marshal in this District prior to any conversion to cash. *See* CPLR § 5202, Practice Comm. by David D. Siegel C. 5202:2.

Moreover, Clearstream cannot benefit from the delay of enforcement of the judgments caused by its own fraudulent conduct in concealing Markazi's ownership of the Blocked Assets

by now arguing that delay transformed Iran's property right into Clearstream's property right by operation of law. N.Y. Debtor & Creditor Law §§ 273-a and 276 would unwind any transfer of title to the cash resulting from deposit into Clearstream's cash account as a fraudulent conveyance entitling Plaintiffs to receive the cash under Debtor & Creditor Law § 278(1)(b).

The fact that none of the Blocked Assets are housed in a Clearstream account defeats Clearstream's contention that a turnover order would produce a conflict with the E.U.

Regulation. The E.U. Regulation applies only:

- (a) within the territory of the [E.U.], including its airspace;
- (b) on board any aircraft or any vessel under the jurisdiction of a Member State;
- (c) to any person inside or outside the territory of the [E.U.] who is a national of a Member State;
- (d) to any legal person, entity or body, inside or outside the territory of the [E.U.], which is incorporated or constituted under the law of a Member State;
- (e) to any legal person entity or body in respect of any business done in whole or in part within the [E.U.].

See Vogel Reply Decl., Ex. 25 (E.U. Regulation) at Article 49.

Here, the Blocked Assets remain firmly in control of Citibank, a U.S. entity, in the U.S. Thus, Article 49 of the E.U. Regulation demonstrates that the Blocked Assets fall outside of the scope of the regulation. Accordingly, the supposed conflict that Defendants imagine between a turnover order and the E.U. Regulation simply does not exist.

It also bears emphasis that the only parties advancing the contention that a conflict between U.S. and E.U. law prevents turnover are the central bank of a terrorist state and that bank's principal banker and co-conspirator in efforts to hide assets from the victims of Iran's terrorism. The U.S. government has closely monitored this action, but has not expressed any concern with turning over the Blocked Assets to Plaintiffs. Undoubtedly, the E.U. would let its

opinion be known if it actually wanted to prevent Plaintiffs from obtaining the assets of a terrorist state that continues to threaten to build weapons of mass destruction. The fact that Markazi and its mouthpiece, Clearstream, are the only entities that believe this case presents a non-justiciable political question highlights the absurdity of their position.

B. Clearstream Offers No Proof That It Has Treated The Blocked Assets As Frozen Under The E.U. Regulation

Clearstream's justiciability argument also fails because Clearstream offers no proof that it has formally acknowledged and treated funds set aside on its books in Luxembourg as frozen pursuant to Article 23 of the E.U. Regulation (as opposed to having simply made an accounting entry because Markazi has an ownership interest in those assets). Article 40 of the E.U. Regulation requires Clearstream to report any "information on accounts and amounts frozen in accordance with Article 23[]" to the competent [Luxembourg] authorities" and to transmit that information to the European Commission.

C. No Conflict Exists Between TRIA And The E.U. Regulation Because The E.U. Regulation Exempts Funds Subject To Judicial Liens

Even assuming, *arguendo*, that the E.U. Regulation applies to "corresponding assets" reflected on Clearstream's books in Luxembourg and that turnover of the Blocked Assets would require Clearstream to debit those accounts, Article 24 of the E.U. Regulation permits Clearstream to record that debit. Specifically, Article 24 expressly provides that competent authorities may authorize, in their discretion, the release of frozen funds to satisfy pre-existing judicial liens, such as those Plaintiffs obtained before the adoption of the E.U. Regulation. Clearstream fails to suggest any reason why the conditions necessary to permit release of the Blocked Assets under Article 24 cannot be met here. Not even Clearstream's expert suggests that, in the present circumstances, Luxembourg authorities would deny an Article 24 request, particularly where a U.S. court had ordered turnover of the Blocked Assets. *See* Vogel Reply

Decl., Ex. 24 (Opinion letter of Clearstream's Luxembourg Attorney dated May 16, 2012) at 1-2; *see also* Clearstream SJ Brief at pp. 11-12. Thus, Clearstream's supposed political question defense fails for this additional reason.

D. Even Assuming The Existence Of A Conflict Between TRIA And The E.U. Regulation, Plaintiffs' Claims Do Not Present A Non-Justiciable Political Question

Even if some conflict actually existed between TRIA and E.U. law, the leading Supreme Court decision in *Baker v. Carr*, 369 U.S. 186, 210 (1962), negates Clearstream's contention that this case presents a non-justiciable political question. The political question doctrine is a prudential doctrine reflecting the Judiciary's concerns regarding the separation of powers; it "excludes from judicial review those controversies which revolve around policy choices and value determinations *constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.*" *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (emphasis added); *see Baker*, 369 U.S. at 210.

The *Baker* Court emphasized that cases presenting non-justiciable political questions will prominently display one or more of the following factors:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217. As Plaintiffs establish below, none of the six *Baker* factors is implicated by the narrow issues raised by Plaintiffs' claims.

1. The First Through Third *Baker* Factors Support Holding That This Case Does Not Present A Non-Justiciable Political Question

The political question doctrine has no relevance where, as here, a case merely requires a court to interpret statutory law.¹⁹ Clearstream simply misses the point when it asserts that Plaintiffs “mischaracterize” its political question argument by addressing the six *Baker* factors “with respect to Section 201 of TRIA rather than U.S. and E.U. blocking regimes.” Clearstream SJ Brief at p.13. As *Japan Whaling* dictates, the political question doctrine excludes from judicial review those controversies that the Constitution provides for Congress or the Executive branch to determine. 478 U.S. at 230. Plaintiffs, however, do not seek to encroach on any decision constitutionally assigned to the Legislative or Executive branches. To the contrary, by enacting TRIA and issuing E.O. 13599, Congress and the President have expressly authorized Plaintiffs to execute upon the Blocked Assets. Thus, Plaintiffs’ claims merely require the Court to interpret and apply the FSIA, TRIA and E.O. 13599 in light of pre-existing decisions of the Legislative and Executive branches. This case therefore presents a quintessential example of the type of decision constitutionally reserved for the Judiciary.

The fact that interpreting TRIA, the FSIA and E.O. 13599 inevitably touches upon foreign relations does not transform a routine matter of statutory interpretation into a non-justiciable political question.²⁰ Rather, as the *Baker* Court emphasized, courts deem cases non-

¹⁹ See, e.g., *Japan Whaling*, 478 U.S. at 230 (“it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts,” and, thus, questions of statutory interpretation are justiciable); *City of N.Y. v. Permanent Mission of India to the U.N.*, 446 F.3d 365, 377 n.17 (2d Cir. 2006) (“[I]nterpretation of the FSIA’s reach is a pure question of statutory interpretation that is well within the province of the Judiciary . . .”) (internal quotation omitted); *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 937 F.2d 44, 49 (2d Cir. 1991) (because tort law has been constitutionally committed to the Judiciary, tort claims against the PLO were justiciable, particularly “given the fact that both the Executive and Legislative Branches have expressly endorsed the concept of suing terrorist organizations”).

²⁰ See, e.g., *Baker*, 369 U.S. at 211 (“it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance”); *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (“Although these cases present issues that arise in a politically charged context, that does not transform them into cases involving

justiciable only when the impropriety of judicial resolution is apparent following “a discriminating analysis of the *particular question posed*, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case.” 369 U.S. at 211 (emphasis added).

Here, the “particular question posed” is Plaintiffs’ entitlement to turnover of the Blocked Assets pursuant to § 201 of TRIA. That question touches upon foreign relations, but *every* FSIA case involves indistinguishable interpretive issues, and the political branches have expressly delegated those determinations to the Judiciary.²¹ Moreover, resolution of this case will not require the Court to make any “initial policy determination[s] of a kind clearly for nonjudicial discretion.” *Baker*, 369 U.S. at 217. To the contrary, the Executive Branch made all of the required policy determinations by designating Iran as a state sponsor of terrorism and terrorist party within the meaning of § 201 of TRIA and blocking Markazi’s property and interests in property by means of E.O. 13599. Accordingly, the first three *Baker* factors strongly support the conclusion that this case does not present any non-justiciable political question.

2. The Fourth Through Sixth *Baker* Factors Further Support The Conclusion That This Case Does Not Present A Non-Justiciable Political Question

“The fourth through sixth *Baker* factors appear to be relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests.” *In re South African Apartheid Litig.*, 617 F.Supp.2d 228, 282 (S.D.N.Y. 2009) (rejecting political

nonjusticiable political questions.”); *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 377 (3rd Cir. 2006) (“[A] predicted negative impact on foreign relations does not, by itself, render a case non-justiciable under the political question doctrine.”).

²¹ E.g., *Permanent Mission of India*, 446 F.3d at 377; *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983) (“In 1976, Congress passed the [FSIA] in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to assure litigants that decisions are made on purely legal grounds and under procedures that insure due process.”) (internal citations omitted).

question defense) (internal quotation omitted). Thus, given that a turnover of the Blocked Assets is completely consistent with the political branches' passage of TRIA, designation of Iran as a terrorist state and blocking of Markazi's assets, Clearstream cannot show that any *Baker* factor suggests that this case presents a non-justiciable political question.

E. Comity Interests Do Not Support Refusing To Enforce TRIA

Clearstream curiously contends that a non-justiciable political question arises in this matter, "not from any conflict of laws (as Plaintiffs suggest)," but rather because turnover of the Blocked Assets would allegedly "undercut" cooperation between the U.S. and the E.U. *See* Clearstream SJ Brief at pp.12-13. The fact that no government body has joined Clearstream in voicing these concerns demonstrates their illegitimate and self-serving nature.

Try as it might to creatively characterize its political question argument, Clearstream cannot escape the fact that its argument boils down to the claim that turnover of the Blocked Assets pursuant to TRIA would require Clearstream to debit certain accounts in Luxembourg in violation of the E.U. Regulation. Clearstream thus alleges nothing more than a traditional conflict of laws question, which – unlike a "political question" that can only be resolved by the political branches of government – falls squarely within the jurisdictional ambit of the Judiciary. Even assuming, then, that a turnover of the Blocked Assets pursuant to TRIA would contravene E.U. law, this Court is empowered to resolve the conflict by applying principles of "comity," *i.e.*, "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *See, e.g., Hilton v. Guyot*, 159 U.S. 113, 164 (1895); *Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru*, 109 F.3d 850, 854-55 (2d Cir. 1997).

"Although courts in this country have long recognized the principles of international comity and have advocated them in order to promote cooperation and reciprocity with foreign lands, comity remains a rule of practice, convenience, and expediency rather than of law."

Pravin Banker, 109 F.3d at 854 (internal citations omitted); *accord Hilton*, 159 U.S. at 163 (“No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived.”). As a result, “courts will not extend comity to foreign proceedings when doing so would be contrary to the policies or prejudicial to the interests of the United States.”²²

The legislative history of TRIA that Plaintiffs cited in their moving brief makes clear the U.S.’s powerful interests in guaranteeing that victims of terrorism can collect their judgments against terrorist states and their agencies and instrumentalities. *See* Plaintiffs’ Opening Brief at pp.14-15. Thus, because comity principles provide the Court with wide discretion to reject Clearstream’s request to defer to E.U. law, even an actual conflict between U.S. and E.U. law would not justify a refusal to enforce TRIA here. *See, e.g., Pravin Banker*, 109 F.3d at 854-55 (comity would not permit foreign law to interfere with enforcement of U.S. judgment); *JW Oilfield Equip., LLC v. Commerzbank, AG*, 764 F.Supp.2d 587, 596-98 (S.D.N.Y. 2011) (comity did not require court to decline to enforce judgment); Plaintiffs’ Restraints Brief at p. 30.

POINT III

TURNOVER OF THE BLOCKED ASSETS COMPORTS WITH CPLR § 5225

Contrary to Clearstream’s contention (*see* Clearstream SJ Brief at p. 34), Plaintiffs never asserted that they need not comply with CPLR § 5225. In fact, Plaintiffs explicitly base their claims for turnover of the Blocked Assets on, *inter alia*, § 5225(b), which permits judgment creditors to bring turnover proceedings against any person “in possession or custody of money or

²² *Pravin Banker*, 109 F.3d at 854; *see also, e.g., id.* (““No nation is under unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum. Thus, from the earliest times, authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act.”) (quoting *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984)); *Allied Bank Int’l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 522 (2d Cir. 1985) (holding that Costa Rican directives were “inconsistent with the law and policy of the United States” and that those directives therefore did *not* excuse the obligations of the Costa Rican banks under U.S. law).

other personal property *in which the judgment debtor has an interest . . .*” CPLR § 5225(b).

Citibank indisputably is in possession or custody of money and other personal property in which Markazi “has an interest.” Indeed, by designating the Blocked Assets as “blocked” under E.O. 13599, Citibank formally acknowledged that Markazi “has an interest” in those assets.

Notwithstanding CPLR § 5225(b)’s plain language, Clearstream cites *Levin*, 2011 WL 812032 at *19, for the proposition that Plaintiffs can execute against the Blocked Assets only if Markazi is “entitled to the possession of” those assets. Clearstream SJ Brief p. 34. Clearstream misreads *Levin*, where the court correctly held that, “[u]nder CPLR § 5225, Plaintiffs are entitled to a turnover order of the assets held in these accounts if Citibank is a ‘person in possession or custody of money’ in which agencies or instrumentalities of Iran *have an interest.*” 2011 WL 812032 at *20 (emphasis added) (citing *Weininger v. Castro*, 462 F.Supp.2d 457, 499 (S.D.N.Y. 2006)). Although *Levin* did consider whether Iranian agencies and instrumentalities were “entitled to possession” of particular assets, that analysis was not necessary to the turnover decision. Indeed, § 5201(b) of the CPLR, which specifies “[p]roperty against which a money judgment may be enforced,” provides that “[a] money judgment may be enforced against any property which could be assigned or transferred, *whether it consists of a present or future right or interest and whether or not it is vested . . .*” CPLR § 5201(b) (emphasis added). Markazi’s right to receive all cash proceeds from the securities once custodied at Clearstream and sub-custodied at Citibank and its right to transfer that entitlement is not in any doubt. The bonds have already matured. Absent the Restraints, Citibank would have an unqualified obligation to credit Clearstream’s cash account and, upon receipt of freely available funds, Clearstream would have an absolute duty to credit Marakzi’s account via UBAE. *See* Point I.E.

To obtain turnover, therefore, Plaintiffs need not establish Markazi's entitlement to immediate possession of the Blocked Assets. Rather, the CPLR requires only that Markazi have a beneficial interest in the Blocked Assets, which are only nominally owed by Citibank to Clearstream as Markazi's securities intermediary. *See, e.g., Weininger*, 462 F.Supp.2d at 462-64, 494, 499 (assets in which Cuba held a beneficial interest but which were titled in the name of AT&T Long Lines and a law firm were subject to turnover pursuant to CPLR §§ 5201 and 5225(b) because both accounts "[were] opened for the benefit of, or to hold payments to or for the account of, various Cuban agencies and instrumentalities"); *EM Ltd. v. Republic of Argentina*, 2009 WL 2568433, at *5 (S.D.N.Y. Aug. 18, 2009) (beneficial ownership interests in corpus of purported trust account constituted property interests capable of being restrained under CPLR § 5222(b), notwithstanding that account was held in trustee's name and was not directly accessible by foreign sovereign judgment debtor or its agencies and instrumentalities), *aff'd*, 389 Fed.Appx. 38 (2d Cir. 2010); *Hausler I*, 740 F.Supp.2d at 533 (TRIA contemplates execution against all blocked assets in which a state sponsor of terrorism possesses a beneficial interest, not just those in which the state has titled ownership); 11 Weinstein, Korn & Miller, *New York Civil Practice*, ¶ 5225.09 at 52-379 (2004) (when seeking debtor property in the hands of a garnishee, "[i]t is not necessary that the judgment debtor have legal title to the property; a beneficial interest is sufficient").²³ Accordingly, whether Markazi is entitled to immediate possession of the Blocked Assets is irrelevant to Plaintiffs' ability to obtain turnover of those assets.

²³ Clearstream's authorities do not support its assertion that turnover of the Blocked Assets requires a showing that Markazi is "entitled to possession" of those assets. *See* Clearstream SJ Brief at p.34 (citing *NML Capital, Ltd. v. Banco Cent. de la Republica Argentina*, 652 F.3d 172, 195 (2d Cir. 2011) and *Bradford v. Chase Nat'l Bank of City of N.Y.*, 24 F.Supp. 28, 38 (S.D.N.Y. 1938)). *NML Capital* and *Bradford* merely found that, for purposes of assessing sovereign immunity, a bank account held in the name of a central bank is presumptively held for that bank's own profit or advantage. Neither case speaks to whether CPLR § 5225(b) limits the assets judgment creditors can execute against to those in which the judgment debtor has an immediate right of possession. *See NML Capital*, 652 F.3d at 172; *Bradford*, 24 F.Supp. at 38.

Defendants' arguments also ignore the preclusive effect TRIA would have if § 5225(b) actually did limit the assets against which judgment creditors could execute to those that debtors were entitled to possess. As Plaintiffs discussed in their moving papers, TRIA's "notwithstanding clause" invests the statute with preemptive effect against contrary provisions of law. *See* Opening Brief at pp.18-19. Moreover, as Plaintiffs establish in Point I.A, the "assets of" Markazi include any assets in which the bank holds a beneficial interest. Thus, because TRIA empowers Plaintiffs to execute against the "assets of" Markazi, without limitation with respect to the party in whose hands those assets reside, basic preemption principles dictate that any inconsistent provision of the CPLR must yield to TRIA's broader standard. *See* Opening Brief at pp.17-19 (discussing TRIA's preemptive effect); *see also* Fed. R. Civ. P. 69(a)(1) (making state law collection principles applicable in federal court but emphasizing that "a federal statute governs to the extent it applies").

Clearstream also fails to provide any support for its contention that Plaintiffs are collaterally estopped from arguing that they need not establish Markazi's entitlement to possession of the Blocked Assets in order to obtain turnover pursuant to CPLR § 5225. While the *Levin* court discussed that issue and certain Plaintiffs were parties to that action, Clearstream misinterprets and misquotes the sole authority that it cites for the theory that *Levin* estops Plaintiffs from advancing their § 5225 argument. Clearstream's suggestion that collateral estoppel applies whenever a litigant was a party to the prior action disregards the actual words of *Zherka v. City of N.Y.*, 459 Fed.Appx. 10 (2d Cir. 2012), which held that "collateral estoppel precludes relitigation where '(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and actually decided, (3) there was full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was

necessary to support a valid and final judgment on the merits.” *Id.* at 12-13 (quoting *N.L.R.B. v. Thalbo Corp.*, 171 F.3d 102, 109 (2d Cir. 1999)). Clearstream cannot demonstrate that any of those requirements are met here because, among other reasons: (a) the type of property involved in the two proceedings is different; (b) *Levin* did not actually determine whether CPLR § 5225 requires a showing that a judgment debtor is entitled to possession of funds; (c) the court’s decision did not turn upon that issue; and (d) the Peterson Plaintiffs withdrew their claim to the assets in *Levin* and did not participate in the action.²⁴ See Reply SUF at ¶ 36.

POINT IV

CLEARSTREAM’S LUXEMBOURG CITIZENSHIP POSES NO IMPEDIMENT TO PLAINTIFFS’ ABILITY TO EXECUTE UPON THE BLOCKED ASSETS

A. Bank of Tokyo Has No Collateral Estoppel Effect With Respect To The Very Different Issues That This Case Presents

Defendants also mistakenly rely on the doctrines of collateral estoppel and law of the case to argue that this Court’s ruling in *Bank of Tokyo-Mitsubishi, UFJ, Ltd. N.Y. Branch v. Peterson*, 2012 WL 1963382 (S.D.N.Y. May 29, 2012), preclude Plaintiffs from litigating certain issues. Defendants fail to satisfy their burden of proving any of the elements of these affirmative defenses. See *In re Eurocrafters, Ltd.*, 183 Fed.Appx. 70, 72 (2d Cir. 2006).

First, *Bank of Tokyo* did not involve the same parties as this case, as none of the defendants and only one of the Plaintiff groups was a party in *Bank of Tokyo*.²⁵ Second,

²⁴ The facts of *Zherka* are also far afield from this matter. The plaintiff in *Zherka* filed three separate actions “collectively premised on *substantially identical factual circumstances*.” *Id.* at 13 (emphasis added). The court held only that collateral estoppel applies “where a party seeks to repeatedly litigate the same issue by means of more specific pleadings, by repackaging the same factual allegations under different causes of action, or by filing identical actions against different defendants.” *Id.* Similarly, *Restatement (Second) of Judgments* § 29 (1982) lacks any relevance because that provision bars re-litigation of issues against entities not involved in an earlier action *only if* both actions involved *identical* issues.

²⁵ Even where the *same* parties are involved in two successive cases, relevant issues do not qualify as “identical” unless both cases presented the same facts. See e.g., *Local 32B-32J Serv. Emps. Int’l Union, AFL-CIO v. N.L.R.B.*, 982 F.2d 845, 849-50 (2d Cir. 1993) (denying collateral estoppel effect of state court determinations that new

Bank of Tokyo did not present issues “identical” to those relevant here, which relate to *different* assets, held by a *different* financial institution in a *different* country (the U.S., not Japan). Defendants advance the contrary contention only by adopting their fiction that assets blocked at Citibank in this District are not located here and, indeed, pretending that those assets are not blocked at all. Third, the Peterson Plaintiffs did not have a full opportunity to litigate the issues in *Bank of Tokyo* because: (a) the Court lifted the restraints on the Japan-based assets before Plaintiffs had *any* opportunity to brief those issues; and (b) appealing the ruling would have required the Peterson Plaintiffs to post an enormous bond far beyond those individuals’ financial means. *See* Reply SUF at ¶ 37. Finally, case law demonstrates that the issues litigated in *Bank of Tokyo* were not “necessary to support a valid and final judgment on the merits” because a ruling rendered in such an abbreviated proceeding does not qualify as a final judgment for collateral estoppel purposes at all.²⁶

B. The Law Of The Case Doctrine Does Not Apply Here

Defendants also miss the mark with the contention that the law of the case doctrine supports dismissing Plaintiffs’ claims. That doctrine is “ordinarily applied in later stages of *the same lawsuit*” or to “different lawsuits *between the same parties*.” *In re PCH*

employers were “successors” under a prior collective bargaining agreements for purposes of compelling arbitration because that issue was not identical to whether those employers were “successors” for other purposes).

²⁶ While a final judgment for collateral estoppel purposes is something less than a final judgment “in the sense of 28 U.S.C. § 1291,” whether the judgment qualifies as “final” “turns upon such factors as the nature of the decision (*i.e.*, that it was not avowedly tentative), the adequacy of the hearing, and the opportunity for review.” *U.S. v. McGann*, 951 F.Supp. 372, 381-82 (E.D.N.Y. 1997) (litigation of a particular issue must “reach[] such a stage that a court sees no really good reason for permitting it to be litigated again” and holding prior decision was “final” because it was “not tentative,” it was the subject of “extensive briefs and comprehensive oral arguments” and “in the nearly five years that has elapsed since, there has been more than ample opportunity for review.”) (internal quotation omitted). Plaintiffs did not brief the defenses presented in *Bank of Tokyo* and had no reasonable route for securing meaningful appellate review of that decision, particularly after the Court lifted the restraints and freed Iran to move its funds.

Assocs., 949 F.2d 585, 592 (2d Cir. 1991) (emphases added). Even where the law of the case doctrine potentially applies, its application “is discretionary and does not limit a court’s power to reconsider its own decisions prior to final judgment.” *Sagendorf-Teal v. County of Rensselaer*, 100 F.3d 270, 277 (2d Cir. 1996) (internal quotation omitted). Defendants attempt to stretch the doctrine beyond its permissible scope by arguing that it applies to “related cases” between different parties, a proposition foreclosed by *PCH*.

Even if the defense did apply to related matters, it would fail here because of the numerous, critical differences between this case and *Bank of Tokyo* that Plaintiffs describe above. In contrast, Defendants’ principal authority – *Ovadia v. Top Ten Jewelry Corp.*, 2005 WL 1949970 (S.D.N.Y. Aug. 12, 2005) – involved two closely related patent infringement actions based upon “‘*identical allegations*’” regarding the *same patents* brought against two defendants. *Id.* at *1; *Ovadia v. Ming Fung Jewelry Corp.*, 2005 WL 78584 at *1 (S.D.N.Y. Jan. 12, 2005) (both cases are “premised on identical allegations”).

Furthermore, while *Ovadia* discussed the law of the case doctrine, the decision more accurately involved collateral estoppel based on identical issues in two separate cases. In holding that the law of the case doctrine may apply in “*closely* related case[s],” *Ovadia* cited only *Heller Int’l Corp. v. Sharp*, 1994 WL 386421, at *3 (N.D. Ill. July 19, 1994). *Ovadia*, 2005 WL 1949970, at *1 (emphasis in original). *Heller*, however, did not involve a “related” case, but rather a single case between the same parties and a straightforward decision that a ruling left undisturbed on appeal remained law of the case following an appellate reversal of other issues. 1994 WL 386421, at *5; *accord, e.g., Johnson v. Holder*, 564 F.3d 95, 99 (2d Cir. 2009) (applying law of the case doctrine to the rulings in the “same case” involving the *same parties*) (*cited in* Markazi SJ Br. at p. 21).

Nor does *Bank of Tokyo* serve as precedent for denying Plaintiffs' motion. In *Bank of Tokyo*, the relevant assets were not blocked. Thus, the court did not even consider Plaintiffs' TRIA claim, much less whether judgment creditors may execute against assets blocked at an American bank despite the existence of foreign securities intermediaries.²⁷ TRIA provisions irrelevant to *Bank of Tokyo* determine Plaintiffs' right to execute against the Blocked Assets here. In addition, it is irrelevant whether Clearstream qualifies as a "United States person" obligated to block the Blocked Assets under E.O. 13599 because Citibank has blocked them in New York.

The fact-intensive ruling that Bank of Tokyo did not qualify as a "United States person" for purposes of E.O. 13599 also provides no support reaching the same conclusion regarding Clearstream. *See* Markazi SJ Brief at pp. 21-22. Plaintiffs have previously outlined the extensive U.S. activities of Clearstream's Luxembourg office, its representative office in New York, and their agents. *See* Plaintiffs' Restraints Brief at pp.14-15; Reply SUF at ¶¶ 25-34. *Bank of Tokyo* presented no similar facts, just a bare allegation that the bank maintained a New York branch.²⁸

C. TRIA's Plain Words Provide For Its Extraterritorial Reach

Defendants' contention that TRIA has no extraterritorial effect lacks significance

²⁷ Because the assets here are blocked and TRIA's "notwithstanding clause" trumps other provisions of the FSIA, the ruling in *Bank of Tokyo* that "attachment and execution of property that is appurtenant to a foreign state and that is located outside the United States would violate [FSIA § 1609]" has no relevance. 2012 WL 1963382, at *2.

²⁸ Unlike Bank of Tokyo, Clearstream has no branch office in New York. Rather, Clearstream has a foreign representative office licensed by the N.Y. Department of Financial Services. Reply SUF at ¶¶ 25, 26, 28, 29, 30. That office is an extension of Clearstream, operates under the name of Clearstream Banking, S.A., and conducts activities and provides services in furtherance of Clearstream's operations in Luxembourg. *Id.* at ¶¶ 26-27. New York's applicable banking regulations make clear that, unlike branch offices, representative offices are a mere enlargement of the foreign bank, allowing it to have a presence in New York, while the foreign bank itself continues to control the representative office and to ensure the representative office's compliance with its legal obligations. *See* N.Y. Banking §§ 221-a, 221-b and 221-h.

here because – as Citibank has conceded – the Blocked Assets are blocked precisely because they are located in the U.S. Even were that not true, Defendants’ arguments would provide no basis for denying Plaintiffs’ motion because TRIA’s plain words demonstrate that Congress intended for the statute to have extraterritorial effect.

In *Morrison v. National Australia Bank, Ltd.*, 130 S.Ct. 2869 (2010), the Supreme Court made clear that a statute need not expressly state “this law applies abroad” to apply extraterritorially. *Id.* at 2883. Rather, extraterritoriality may be gleaned from a statute’s “context.” *Id.*²⁹ TRIA is an essential aspect of the FSIA and applies only to blocked assets of “terrorist part[ies]” and their “agenc[ies] or instrumentalit[ies],” all of whom are foreign entities. TRIA §§ 201(a), 201(d)(4). TRIA also expressly applies to assets frozen pursuant to TWEA and IEEPA, statutes that are undeniably extraterritorial in scope.³⁰ Moreover, the terrorist activity that TRIA addresses necessarily includes acts committed outside the U.S. *See* TRIA § 201(d)(1)(B) (incorporating 8 U.S.C. § 1182(a)(3)(B)(iii)’s broad definition of “terrorist activity,” which includes unlawful acts committed abroad). Accordingly, it is difficult to imagine a statute more clearly intended to have extraterritorial effect than TRIA and a contrary determination would seriously undermine the statute’s goal of punishing international terrorism.

²⁹ In contrast, *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29 (2d Cir. 2010), involved the RICO statute, which Congress expressly adopted to punish domestic racketeering. The *Norex* court held only that despite RICO’s boilerplate reference to “foreign commerce” in its definitions section, the extraterritorial reach of certain predicate acts and the defendants’ limited domestic conduct did not suffice to demonstrate that Congress intended for RICO to have extraterritorial effect. *Id.* at 33.

³⁰ *See, e.g., Wisconsin Project on Nuclear Arms Control v. U.S. Dep’t of Commerce*, 317 F.3d 275, 278 (D.C. Cir. 2003) (“In enacting IEEPA, Congress reaffirmed the President’s regulatory control over exports by broadening the scope of the EAA to include regulation of extraterritorial exports.”); *U.S. v. Plummer*, 221 F.3d 1298, 1310 (11th Cir. 2000) (“Congressional intent to extend the TWEA to acts occurring outside U.S. territory clearly may be inferred from the language of the statute as well as the nature of the harm the statute is designed to prevent; the international focus of the statute is self-evident, and to limit its prohibitions to acts occurring within the United States would undermine the statute’s effectiveness.”).

POINT V

**EVEN IF THE BLOCKED ASSETS WERE NOT BLOCKED
IN THIS DISTRICT AT CITIBANK, *KOEHLER* AND THE
ALL WRITS ACT WOULD EMPOWER THE COURT TO ORDER DEFENDANTS
TO BRING THE BLOCKED ASSETS HERE TO FACILITATE COLLECTION**

**A. Because The Court Has Personal Jurisdiction Over Defendants,
Koehler Permits Plaintiffs To Execute Against Foreign Assets**

Even if the Court concluded that the location of the Blocked Assets had relevance to TRIA claims and that the Blocked Assets are located abroad, *Koehler v. Bank of Bermuda Ltd.*, 12 N.Y.3d 533, 911 N.E.2d 825, 883 N.Y.S.2d 763 (2009), would still entitle Plaintiffs to execute upon those assets, albeit after this Court ordered Defendants to bring them into this District. Defendants cannot contest the four essential elements of Plaintiffs' *Koehler* argument. First, so long as a court maintains personal jurisdiction over a judgment debtor or garnishee, the court can order that entity to bring any of the judgment debtor's property to New York to facilitate collection. *Koehler*, 12 N.Y.3d at 541, 911 N.E.2d at 831, 883 N.Y.S.2d at 769. Second, in FSIA cases, subject matter jurisdiction over sovereign defendants exists in connection with post-judgment proceedings so long as jurisdiction existed at the liability stage of the proceedings. *First City, Texas Houston, N.A. v. Rafidain Bank*, 281 F.3d 48, 52, 53-54 (2d Cir. 2002). Third, as long as subject matter jurisdiction exists over a sovereign defendant in an FSIA case and that defendant has been properly served, *personal* jurisdiction over that defendant also exists. *Weininger*, 462 F. Supp.2d at 470. Fourth, so long as jurisdiction exists over a sovereign defendant in a TRIA collection matter, jurisdiction also exists over that entity's agencies and instrumentalities. *Weinstein*, 609 F.3d at 50; *Weininger*, 462 F.Supp.2d at 475.

Plaintiffs' judgments establish that jurisdiction existed over Iran in connection with the liability proceedings underlying this case. *SUF* at ¶¶ 34, 41, 43, 50, 55, 60. Thus, the foregoing

authorities dictate that: (a) subject matter jurisdiction exists over Markazi, Iran's agency or instrumentality; and (b) by virtue of that fact, the Court has personal jurisdiction over Markazi. Thus, *Koehler* invests the Court with the power to order Markazi to bring its assets into this jurisdiction to facilitate collection by Plaintiffs. *Koehler*, 12 N.Y.3d at 541, 911 N.E.2d at 831, 883 N.Y.S.2d at 769.

The undisputed facts also demonstrate that the Court may exercise personal jurisdiction over Clearstream. Pursuant to N.Y. Banking §§ 221-a(1) and 221-f, Clearstream applied for and received a license from the New York Banking Department to operate a "representative" office in New York. *See* Reply SUF at ¶ 25.³¹ As Plaintiffs demonstrate in Point I.B., under the New York regulatory framework to which Clearstream chose to subject itself, Clearstream and its New York representative office are one and the same.³²

Consistent with New York's regulatory scheme, Clearstream's representative office less than one mile from the Southern District Courthouse carries out substantial business activity in furtherance of Clearstream's objectives at Clearstream's direction. *See* Reply SUF at ¶¶ 25-32. Thus, the Court may exercise personal jurisdiction over Clearstream. *Koehler* therefore dictates that the Court can order Clearstream to bring any Blocked Assets located outside the United States into New York to facilitate execution upon those assets.

³¹ New York's Banking Law defines a "representative" as "any person or entity engaging in any activity in this state for or on behalf of a foreign banking corporation" (N.Y. Bank § 221-b), and the activities of the representative are limited to those that further the foreign bank's business (N.Y. Bank § 221-a).

³² *See N.Y. State Department of Financial Services, Banking Interpretation* NYSBL 221(December 7, 2005), available at http://www.dfs.ny.gov/legal/interpret_opinion/banking/lo051207.htm ("The parent bank [*i.e.*, Clearstream] would be responsible for this representative office in the same manner as if it were an unincorporated office of the bank"); N.Y. Banking Law § 221-h (requiring the licensee (*i.e.*, Clearstream) to ensure that its representative office maintains the records required by the Superintendent of Financial Services).

As support for their contention that *Koehler* has no application in TRIA cases, Defendants primarily rely upon the inapposite decision in *Aurelius Capital Partners, LP v. Republic of Argentina*, 2010 WL 768874 (S.D.N.Y. Mar. 5, 2010). *Aurelius* did not involve a TRIA claim, blocked assets, assets frozen in a New York bank account or the assets of a state sponsor of terrorism. Rather, the court considered whether – in a typical commercial litigation arising under the FSIA – Argentina’s assets were subject to execution under 28 U.S.C. § 1610(a), which expressly requires that the targeted assets be located in the United States. In sharp contrast to § 1610(a), TRIA contains no territorial limitations or requirements. Thus, *Aurelius* – which turned upon that essential aspect of § 1610(a) – has no relevance here.

B. The Separate Entity Rule Does Not Bar Plaintiffs’ Recovery

While debate continues regarding whether *Koehler* overruled the separate entity rule, Defendants ignore the substantial federal authority holding that *Koehler* is irreconcilable with that anachronistic principle in the context of turnover proceedings.³³ As those decisions note, courts adopted the separate entity rule because of the historical burden that banks faced in determining whether garnishees held assets in bank branches unconnected to the branch at which judgment creditors served subpoenas, restraining notices or writs of execution. Courts recognize, however, that the separate entity rule has no justification in the modern era because bank branches now have the ability to instantaneously access banking information regarding customers who opened their accounts elsewhere. *E.g.*, *McCarthy*, 2008 WL 5145602, at *5 (the “separate entity” rule is “outdated in light of current banking transactions”).

³³ *E.g.*, *Eitzen Bulk A/S v. Bank of India*, 827 F.Supp.2d 234, 240–41 (S.D.N.Y. 2011) (“In this proceeding, I am concerned with the procedures for postjudgment enforcement, not prejudgment attachment. Because Bank of India is subject to general personal jurisdiction in New York, I conclude that the separate entity rule has no application here.”); *JW Oilfield*, 764 F.Supp.2d at 595 (“First, *Koehler* indicates that New York courts will not apply the separate entity rule in post-judgment execution proceedings.”); *McCarthy v. Wachovia Bank, N.A.*, 2008 WL 5145602, at *5 (E.D.N.Y. Dec. 4, 2008) (the “separate entity” rule “seems outdated”).

This precedent dictates that the separate entity rule provides no protection for Defendants, particularly given that the Clearstream entity located in New York is not a bank “branch” at all, but rather the very same entity that operates in Luxembourg. The cases that Defendants cite for the contrary position are all inapposite because they involved foreign bank branches, not representative offices. *See Shaheen Sports, Inc. v. Asia Ins. Co.*, 2012 WL 919664, at *3 (S.D.N.Y. Mar. 14, 2012); *E.I. Du Pont De Nemours & Co. v. Kolon Indus., Inc.*, No. 12-mc-00120 (S.D.N.Y. June 1, 2012); *Walters v. Indus. & Commercial Bank of China*, 651 F.3d 280 (2d Cir. 2011); *Walters v. People’s Republic of China*, 672 F. Supp. 2d 573 (S.D.N.Y. 2009). Moreover, not one of those cases involved a TRIA claim or even blocked assets, and the *Walters* decisions required the application of 28 U.S.C. §§ 1610(a) and (b) and, therefore, statutory requirements that the targeted property have a U.S. situs.

**C. The All Writs Act Also Empowers The Court To Issue The Orders
Necessary To Allow Plaintiffs To Execute Against The Blocked Assets**

The All Writs Act empowers the Court to issue a wide variety of orders necessary to enforce its decisions.³⁴ As Plaintiffs demonstrate above, the Court has jurisdiction over both Clearstream and Markazi. Thus, as is true in any other collection action, the Court can simply order Markazi (which, as an agency or instrumentality of judgment debtor Iran, is equivalent to Iran for the purpose of TRIA) to bring all of its interests in the Blocked Assets into the United States to facilitate collection. *See, e.g., Miller v. Doniger*, 28 A.D.3d 405, 405, 814 N.Y.S.2d 141, 141 (1st Dep’t 2006) (affirming order requiring judgment debtor to turn over specified out-

³⁴ *See, e.g., U.S. v. N.Y. Tel. Co.*, 434 U.S. 159, 172 (1977) (“This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained....”); *Ying Fong v. Ashcroft*, 317 F.Supp.2d 398, 404 (S.D.N.Y. 2004) (“It is well settled that the courts of the United States have inherent and statutory (28 U.S.C. § 1651) power and authority to enter such orders as may be necessary to enforce and effectuate their lawful orders and judgments, and to prevent them from being thwarted and interfered with by force, guile, or otherwise.”) (citation omitted).

of-state bank accounts to the New York sheriff). If, as anticipated, Markazi would refuse to follow that Order, the All Writs Act would empower the Court to enter an order designed to achieve the result the Court had intended by requiring Citibank itself to turn over the Blocked Assets to Plaintiffs. *See* Plaintiffs' Restraints Brief at pp.70-76.

D. The E.U. Regulation Does Not Prevent The Use Of The Court's Power Under *Koehler* To Order Blocked Assets Into The United States

Plaintiffs demonstrate in Point II.A that the E.U. Regulation does not apply to the Blocked Assets at all because those assets are located in New York under Citibank's control, not in Luxembourg. Thus, contrary to Defendants' contention, the Blocked Assets are not frozen pursuant to the E.U. Regulation and that regulation has no relevance to the Court's powers under *Koehler* and the All Writs Act.

E. The Foreign Compulsion Doctrine Does Not Limit *Koehler's* Application

Because the E.U. Regulation has no applicability to the Blocked Assets that reside in a Citibank account in this District, the "foreign compulsion doctrine" provides no basis for denying Plaintiffs' motion. A *Koehler* order requiring Defendants to bring the Blocked Assets to New York would not require them "to do an act ... that is prohibited by the [E.U. Regulation]." *See* Clearstream SJ Brief at p.39 (citing *Restatement (Third) of the Foreign Relations Law of the United States* (hereafter "*Restatement*") § 441(1) (1987)).

Even if the E.U. Regulation were applicable here, the foreign compulsion doctrine would provide no obstacle to Plaintiffs' claims. According to the section of the *Restatement* that Clearstream cites, although "a state may not require a person ... to do an act in another state that is prohibited by the law of that [other] state" (§ 441(1)), "a state may require a person of foreign nationality ... to do an act in that state [*i.e.*, the state issuing the command] even if it is prohibited by the law of the state of which [the person] is a national." *Restatement* § 441(2). A

Koehler order would primarily require Clearstream to do an act in New York – *i.e.*, deliver the Blocked Assets to Plaintiffs. Clearstream claims that to comply with a *Koehler* order it would also have to do an act in Luxembourg – *i.e.*, make a debit entry on its books, purportedly in violation of the E.U. Regulation. *See* Clearstream SJ Brief at pp. 3-6. Even if such a book entry were necessary, however, it would not be made at the compulsion of the Court. Thus, the foreign compulsion doctrine has no applicability here.

Moreover, if a turnover order did mandate the book entry that Clearstream references, it does not follow that a *Koehler* order would fall under subsection (1) of § 441 (as requiring an act in Luxembourg) rather than subsection (2) (as requiring an act in the U.S.). The *Restatement* provides that in circumstances where prescribed conduct takes place or has effects in more than one country, “[w]hether a given act or activity comes under Subsection (1) or (2) depends on the center of gravity of the activity, *i.e.*, on the place with which the act or activity has the most significant connection.” *See Restatement* § 441, Reporters’ Notes 1, 2. Here, the center of gravity is New York, where: (a) the cash proceeds of the Blocked Assets now reside; (b) Plaintiffs seek to have the Blocked Assets delivered; and (c) the bonds that once comprised the Blocked Assets were located. By contrast, any entry to Clearstream’s books in Luxembourg would affect only the internal accounts that Clearstream created specifically to record the freezing of the Blocked Assets in New York. *See* Clearstream SJ Brief at pp. 3-6. In light of these facts, *Restatement* § 441(2) would permit the court to compel Clearstream to deliver the Blocked Assets to New York even if that step would require Clearstream to violate E.U. law.

Defendants also ignore that, in circumstances where two states prescribe conflicting regulations for the same person, the *Restatement* provides that the law of the state with the “clearly greater” interest should prevail. *See Restatement* § 403(3). “In weighing the interests of

a foreign state [in regulating a given activity or transaction], a court in the United States may take into account indications of national interest by the foreign government, whether made through a diplomatic note, a brief *amicus curiae*, or a declaration by government officials in parliamentary debates, press conferences, or communiqués. Correspondingly, a court may take into account declarations of United States interest in official statements or records of the Executive Branch.” *Restatement* § 403, Reporters’ Note 6. Here, the interest of the U.S. in this matter is clearly greater than that of the E.U. This action involves the murder of hundreds of American servicemen, cash housed at one of the U.S.’s largest financial institutions, assets that were once comprised of bonds located in the U.S. and a statute that serves substantial American policy interests. On the other hand, Clearstream has presented no evidence that the E.U. has any interest in maintaining exclusive control over the Blocked Assets. *See U.S. v. First Nat’l City Bank*, 396 F.2d 897, 904 (2d Cir. 1968) (“We are fully aware that when foreign governments ... have considered their vital national interests threatened, they have not hesitated to make known their objections to the enforcement of [district court orders].”).

Furthermore, if Clearstream were indeed caught between conflicting demands of U.S. and E.U. law, that circumstance would be the result of Clearstream’s voluntary conduct in choosing to do business in the U.S. for the central bank of Iran. Having obtained the benefits of the U.S. financial system, Clearstream must also expect to be subject to the burdens of complying with U.S. law, even if compliance requires Clearstream to violate E.U. law. In similar contexts, courts have not hesitated to compel foreign institutions to produce records in the U.S. even where production violated bank secrecy laws of countries in which the records were located.³⁵

³⁵ *See, e.g., Gucci Am., Inc. v. Weixing Li*, 2011 WL 6156936, at *10 (S.D.N.Y. Aug. 23, 2011) (“[T]he Bank [of China] has purposely chosen to do business in New York and has availed itself of the myriad benefits that come with establishing a presence in the United States’ premier financial center. Having made such a determination, and

Finally, Clearstream's citation to *Reebok Int'l Ltd. v. McLaughlin*, 49 F.3d 1387 (9th Cir. 1995), does not support its argument that it cannot be ordered to do an act that would, incidentally, involve a violation of the E.U. Regulation. See Clearstream SJ Brief at p.39. The *Reebok* court overturned a sanctions order against a Luxembourg bank for violating a TRO because the Luxembourg bank was not subject to jurisdiction in the U.S. and the TRO had no effect in Luxembourg. 49 F.3d at 1391-92. The *Reebok* court expressly distinguished the case before it from that of a foreign bank that, because it does business in the U.S., can be compelled to comply even with a federal district court order that requires it to violate foreign law. *Id.* at 1391 n.3 (citing *In re Grand Jury Proceedings*, 691 F.2d 1384 (11th Cir. 1982) (holding Bahamian bank in contempt for failure to comply with subpoena where production of the subpoenaed records would have exposed the bank to criminal sanctions under Bahamian law)).

This Court clearly has personal jurisdiction over Clearstream. See Point V.A. Moreover, by falsely claiming at the June 27, 2008 hearing that it did not know the beneficial owner of the restrained bonds, Clearstream knowingly aided and abetted Markazi in its attempt to bypass U.S. sanctions. See Reply SUF at ¶¶ 19-2. In these circumstances, *Reebok* poses no obstacle to the exercise of this Court's inherent authority to enforce its orders against Clearstream. *Reebok*, 49 F.3d at 1391 (noting Court's inherent power to enforce its injunctions against "non-parties who reside outside the territorial jurisdiction of a district court" where they aid and abet a party in violating an order); see also *U.S. v. Davis*, 767 F.2d 1025, 1036 (2d Cir. 1985) ("[A] United States Court also has jurisdiction to prescribe laws concerning conduct outside of the territorial

reaped the rewards that flow therefrom, the Bank can hardly hide behind Chinese bank secrecy laws as a shield against the requirements faced by other United States-based financial institutions."); *Fundacion Museo de Arte Contemporaneo de Caracas - Sofio Imber v. CBI-TDB Union Bancaire Privee*, 1996 WL 243431, at *2 (S.D.N.Y. Feb. 9, 1996) (compelling Swiss bank to produce documents located in Switzerland in violation of Swiss bank secrecy law where "[h]aving availed itself of the benefits of banking in this country, [the bank] must necessarily bear the concomitant burdens").

boundaries of the United States which has or is intended to have a substantial effect within the United States.”).

POINT VI

TRIA APPLIES TO JUDGMENTS OBTAINED UNDER BOTH 28 U.S.C. §§ 1605(A)(7) AND 1605A

TRIA’s plain language belies Clearstream’s contention that plaintiffs who have obtained judgments pursuant to currently enacted 28 U.S.C. § 1605A cannot assert TRIA claims.³⁶

Section 201(a) of TRIA provides for execution against the blocked assets of terrorist parties and their agencies and instrumentalities “*in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code.*” (Emphasis added).

TRIA thus applies “*in every case*” for enforcement of a judgment against a terrorist party based on “*an act of terrorism.*” Defendants offer no response to Plaintiffs’ demonstration that TRIA § 201(d)(1) incorporates the very broad definition of “act of terrorism” from 8 U.S.C. § 1182(a)(3)(B)(iii). *See* Opening Brief at p. 9. In light of that broad statutory definition, proceedings to enforce § 1605A judgments undeniably fall within the all-encompassing class of enforcement actions (“in every case”) to which TRIA applies. *See* 28 U.S.C. § 1605A (abrogating sovereign immunity for foreign state sponsors of terrorism with regard to claims based upon acts of terrorism and creating a private right of action for such claims). Indeed, given that the Second Circuit in *Weinstein* affirmed the attachment and sale of blocked assets in satisfaction of a § 1605(a)(7) judgment pursuant to TRIA, and explicitly noted that a § 1605A judgment *would have produced the same result*, Defendants’ contrary contention is entirely

³⁶ Section 1605A replaced the repealed 28 U.S.C. § 1605(a)(7). Clearstream concedes that those Plaintiffs who obtained § 1605(a)(7) judgments can assert TRIA claims.

frivolous. 609 F.3d at 48 n.4; *accord, e.g., Levin*, 2011 WL 812032, at *18-22 (awarding turnover of blocked assets pursuant to TRIA in satisfaction of § 1605A judgment).

Even putting *Weinstein* aside, Clearstream simply ignores that TRIA's reference to § 1605(a)(7) is disjunctive. That phrasing leaves no doubt that TRIA applies to judgments entered under statutes other than § 1605(a)(7), the most prominent of which is § 1605(a)(7)'s replacement – § 1605A. Moreover, Congress intended the FSIA amendments it adopted in the National Defense Authorization Act ("NDAA") of 2008 (including the repeal of § 1605(a)(7) and the enactment of § 1605A) to enhance and expand victims' rights and facilitate the enforcement of terrorism-based judgments.³⁷ Clearstream's suggestion that Congress intended to deprive § 1605A judgment holders of rights and privileges that it conferred upon holders of § 1605(a)(7) judgments therefore defies common sense and § 1605A's legislative history.

POINT VII

ENFORCING TRIA WILL NOT PRODUCE AN UNCONSTITUTIONAL TAKING OF CLEARSTREAM'S PROPERTY

A. Clearstream Possesses No Property Right That Could Form The Basis For A Takings Claim

To demonstrate that enforcing TRIA will produce an unconstitutional taking, Clearstream "must first establish that [it] is the owner of a compensable interest in property. Only then does the inquiry turn to whether the Government action constitute[s] a taking of that property interest in violation of the Fifth Amendment." *Scrase v. U.S.*, 2012 WL 1645335, at *3 (Fed. Cl. May 10, 2012) (internal quotation and citation omitted). Clearstream's takings argument ignores

³⁷ See, e.g., *Weinstein*, 609 F.3d at 48 n.4 ("... Congress repealed § 1605(a)(7) and created a new section specifically devoted to the terrorism exception to the jurisdictional immunity of a foreign state. To the extent relevant to this case, § 1605A provides for the same exceptions to foreign sovereign immunity as the repealed section.") (internal citation omitted); *In re Islamic Republic of Iran Terrorism Litig.*, 659 F.Supp.2d 31, 36 (D.D.C. 2009) ("[T]he reforms implemented through § 1083 last year add a number of measures that are intended to help plaintiffs succeed in enforcing court judgments against state sponsors of terrorism, such as Iran.").

that UCC § 8-509(d) subordinates securities intermediaries' obligation to pay entitlement holders to the intermediaries' duty to comply with applicable statutes, rules and regulations. UCC § 8-509(d) ("Sections 8-504 through 8-508 do not require a securities intermediary to take any action that is prohibited by other statute, regulation or rule."). Hence, Citibank's duty to comply with CPLR § 5222 and E.O. 13599 trumps its obligation to make payments related to the Blocked Assets to Clearstream, and the same provisions defeat Clearstream's right to payment under UCC 8-505(b). As a result, that right does not qualify as a vested property interest protected by the Takings Clause. *E.g., Vandever v. Lloyd*, 644 F.3d 957, 966-967 (9th Cir. 2011) (permit that granted right to fish "'subject to all applicable regulations adopted by the Board of Fisheries'" was not property for purposes of a takings claim).

B. Even If Clearstream's Right To Payment Qualifies As A Protected Property Interest, Turnover Of The Blocked Assets Will Not Take That Right

Even if Clearstream's right to payment qualified as a cognizable property interest, turnover of the Blocked Assets will not result in a *per se* taking of that right. Clearstream's contrary argument (*see* Clearstream SJ Brief at p. 41) ignores the distinction between Clearstream's right to payment, on the one hand, and the subject matter of that right (*i.e.*, the Blocked Assets), on the other. Government appropriation of the subject-matter of a right does not result in a taking of the right itself. *See, e.g., Omnia Commercial Co. v. U.S.*, 261 U.S. 502, 510-513 (1923) (where government requisitioned steel that claimant was entitled to purchase, no taking occurred; although the government frustrated the steel company's ability to perform the contract by appropriating the steel, it had not taken the claimant's rights under the contract).³⁸

³⁸ *Accord, e.g., 767 Third Ave. Assocs. v. U.S.*, 48 F.3d 1575, 1581 (Fed. Cir. 1995) ("[N]o taking occurs when ... expectations under a contract are merely frustrated by lawful government action not directed against the takings claimant."); *Huntleigh USA Corp. v. U.S.*, 525 F.3d 1370, 1379-82 (Fed. Cir. 2008) (statute that required government to perform screening at U.S. airports did not constitute a compensable taking of plaintiff's contracts to

Turnover of the Blocked Assets will frustrate Clearstream's right to payment because Plaintiffs will receive the subject matter of that obligation (*i.e.*, the Blocked Assets), but it will not appropriate Clearstream's payment right. TRIA does not provide for Plaintiffs to exercise Clearstream's right to receive payment from Citibank. Rather, it makes the Blocked Assets – which are not Clearstream's property – subject to execution to satisfy Plaintiffs' judgments. Under *Omnia* and its progeny, this does not constitute a taking of Clearstream's property.

Clearstream also cannot show that turnover will produce a regulatory taking of its right to payment from Citibank. Courts determine whether government action constitutes a regulatory taking by assessing “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.” *Penn Cent. Transp. Co. v. N.Y.*, 438 U.S. 104, 124 (1978).

As Plaintiffs demonstrate in Point I.E., Clearstream provides no evidence that it will suffer adverse economic impact if it does not receive the Blocked Assets from Citibank. Thus, turnover cannot amount to a taking. *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 234 (2003) (rule requiring lawyers to deposit client funds in IOLTA accounts was not a regulatory taking “because the transaction had no adverse economic impact on [the clients] and did not interfere with any investment-backed expectation”) (*cited in* Clearstream SJ Brief at p.43).

Clearstream also provides no evidence that turnover of the Blocked Assets will impede any of its reasonable, investment-backed expectations. Indeed, Clearstream fails to identify any “investment” underlying its claimed expectation. *See, e.g., Chang v. U.S.*, 859 F.2d 893, 897-98 (Fed. Cir. 1988) (claimants failed to identify any “investment” underlying their contractual

provide those services because, while the government rendered the contracts worthless, it did not assume the plaintiff's rights).

expectations because the claimants were not denied “the right to use [property] in an economically viable manner as contemplated at the time of purchase”). Furthermore, Clearstream’s claimed expectation that the government would never interfere with Clearstream’s commercial dealings with the central bank of a terrorist state is patently unreasonable, particularly given Defendants’ admissions that the government pressured Clearstream to terminate its relationship with Markazi and Clearstream’s expressions of concern at least as early as 2001 that Iran would be blacklisted for money laundering.³⁹

**C. Any Taking That Results From Turnover Pursuant
To TRIA Would Not Violate The Takings Clause**

Even assuming that turnover of the Blocked Assets would constitute the taking of a Clearstream property interest, two lines of authority dictate the TRIA still would not produce an *unconstitutional* taking. First, takings are not unconstitutional when they foreseeably result from the property owner’s voluntary conduct.⁴⁰ Clearstream voluntarily chose to act as the securities intermediary for Markazi with respect to assets located in the U.S. *See* Clearstream Exs. 11, 12, 23. Particularly after TRIA’s 2002 passage and the U.S. government’s efforts to convince Clearstream to discontinue its relationship with Markazi, it was entirely foreseeable that the

³⁹ *See* Point I.E.; *Rockefeller Ctr. Props. v. U.S.*, 32 Fed.Cl. 586, 592-594 (1995) (commercial lessor had no reasonable investment-backed expectation that U.S. government would not impede its ability to draw on a letter of credit executed by the Yugoslavian national airline in light of “widespread public knowledge of the strained and deteriorating relationship with Yugoslavia that existed in the United States”); *see also Chang*, 859 F.2d at 897 (when businesses deal with agencies of foreign governments, “the possibility of changing world circumstances and a corresponding response by the United States government can never be completely discounted”).

⁴⁰ *See, e.g., Weinstein*, 609 F.3d at 54 (rejecting Iranian bank’s takings argument because bank “had clear notice from the TRIA, enacted five years earlier, that [funding WMDs] could result in the designation and blocking of its assets under the TRIA, which could in turn subject them to attachment”); *Paradissiotis v. U.S.*, 304 F.3d 1271, 1276 (Fed. Cir. 2002) (sanctions that rendered stock options worthless did not constitute a taking because, when the plaintiff assumed a directorship in a Libyan-controlled company, “the consequences of his conduct were entirely foreseeable”); *Hausler II*, 2012 WL 601034 at *17-18 (rejecting takings argument made by banks whose assets became available for execution under TRIA “only because of the conduct of the [banks] themselves,” when they “chose to do business with Cuba and its agencies or instrumentalities and they routed that business through” the U.S.).

government would block Markazi's assets and that TRIA would make those assets available for execution. Accordingly, "[t]he fact that [Clearstream's] risk-taking turned out badly for [it] does not render it a taking in violation of the Fifth Amendment." *Paradissiotis*, 304 F.3d at 1276.

Second, Clearstream ignores that no unconstitutional taking exists where "valid regulatory measures taken to serve substantial national security interests ... adversely affect individual contract-based interests and expectations...." *Id.* at 1275 (no unconstitutional taking occurred where Libyan sanctions that froze assets and rendered them worthless "substantially advance[d] the national security of the United States").⁴¹ TRIA serves substantial national security interests, including "hold[ing] terrorist states accountable for their crimes, and ... deter[ring] them from perpetrating acts of terrorism against American citizens in the future." *U.S. v. Holy Land Found. for Relief and Dev.*, 2011 WL 3703333, at *4 (N.D. Tex. Aug. 11, 2011). Thus, Clearstream cannot establish a Fifth Amendment violation, even if turnover would produce a taking of Clearstream's property. *See Hausler II*, 2012 WL 601034, at *17.

**D. Any Taking That Results From Turnover
Pursuant To TRIA Would Be For A Public Use**

While government takings must have a "public use," *Hausler II* decisively rejected Clearstream's argument that the purported taking of its right to payment would not satisfy that very liberal standard. As *Hausler II* recognized, TRIA exhibits "public purposes beyond the mere redistribution of one private entity's property to another private party." 2012 WL 601034, at * 17. Specifically, Congress adopted the statute "to provide redress to victims of terrorism, to

⁴¹ *Accord, e.g., Weinstein v. Islamic Republic of Iran*, 624 F.Supp.2d 272, 276-277 (E.D.N.Y. 2009) (no unconstitutional taking where plaintiffs are "adversely affected by actions taken for national security reasons to freeze the assets of, or prohibit transactions by, foreign entities") *aff'd*, 609 F.3d 43 (2d Cir. 2010); *Hausler II*, 2012 WL 601034, at *16 ("For decades, Courts have rejected Takings Clause challenges to various applications of federal statutes that are related to the TRIA and deal with the execution or disposition of assets held in the United States but subject to foreign claims of interest.").

punish terrorist entities by making their frozen assets subject to execution, and to discourage economic activity involving American financial institutions benefiting terrorist entities.” *Id.*

Clearstream’s contention that Plaintiffs cannot satisfy the “public use” requirement ignores the broad discretion that legislatures have to determine “the public needs to be served by social legislation.” *Berman v. Parker*, 348 U.S. 26, 32 (1954); *accord, e.g., Kelo v. City of New London, Conn.*, 545 U.S. 469, 482-483 (2005) (legislatures have “broad latitude in determining what public needs justify the use of the takings power”). Indeed, “[t]here appears to be no case in which a taking by the United States Government was successfully challenged as not being for a public use.” *Restatement* § 712, Reporters’ Note 4.⁴²

POINT VIII

THE REQUIREMENTS OF 28 U.S.C. § 1610(C) POSE NO OBSTACLE TO THE PETERSON PLAINTIFFS’ CLAIMS

A. Section 1610(c) Has No Application In TRIA Actions⁴³

Markazi’s conclusory assertion that the Peterson Plaintiffs’ June 12, 2008 Writ of Execution (“Writ”) is invalid because it was not issued with prior judicial authorization in accordance with 28 U.S.C. § 1610(c) is meritless. First, contrary to the court’s erroneous ruling in *Levin*, 2011 WL 812032, § 1610(c) applies on its face only to attachments and executions

⁴² Clearstream cites only one decision in which a court found that no public use existed – an 1896 decision in which the Supreme Court considered an administrative order of the Nebraska Board of Transportation. *See Missouri Pacific Ry. Co. v. State of Nebraska*, 164 U.S. 403 (1896). Courts have continually found the requirement satisfied in cases involving far less compelling public uses than the anti-terrorism interests that TRIA advances. *E.g., Kelo*, 545 U.S. at 484 (city’s economic development plan satisfied public use requirement); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241-242 (1984) (Hawaiian statute that transferred ownership of individual tracts of land to current lessees satisfied public use requirement).

⁴³ Markazi directs its § 1610(c) arguments exclusively at the Peterson Plaintiffs. The other Plaintiffs played no role in drafting these arguments and neither express any views nor waive any rights with respect to the Peterson Plaintiffs’ arguments regarding § 1610(c).

“referred to in subsections (a) and (b) of [§ 1610].” Because this motion relates exclusively to Plaintiffs’ TRIA claim, not §§ 1610(a) or (b), the requirements of § 1610(c) do not apply.

B. In Any Event, The Peterson Plaintiffs Obtained A Valid § 1610(c) Order

Even if § 1610(c) were applicable here, Markazi’s supposed defense to the Peterson Plaintiffs’ claims would fail. Section 1610(c) provides only that “[n]o attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.” Markazi contends only that, when the Peterson Plaintiffs initially obtained a writ of execution with respect to the Blocked Assets on June 12, 2008, they had not secured a § 1610(c) order.⁴⁴

That contention lacks any relevance, however, because, on June 25, 2008, Judge Royce Lamberth granted the Peterson Plaintiffs’ motion for the entry of a § 1610(c) order, *nunc pro tunc*, effective March 10, 2008. *See* Reply SUF at ¶ 2. Judge Lamberth issued that order with full knowledge that the Peterson Plaintiffs had already obtained a writ of execution issued by the Clerk of this District and specifically found that the Plaintiffs had complied with all of § 1610(c)’s requirements. *Id.*; *see also* Vogel Reply Decl., Ex.3. Notably, this Court has recognized the legitimacy of Judge Lamberth’s *nunc pro tunc* order on four occasions,⁴⁵ and

⁴⁴ The Peterson Plaintiffs obtained their initial writ of execution prior to obtaining a § 1610(c) order because significant risk existed on June 11, 2008 (the date the Peterson Plaintiffs learned that Markazi maintained the Blocked Assets in the U.S. at Citibank) that Markazi would transfer the Blocked Assets out of the U.S. and thereby frustrate Plaintiffs’ efforts to collect upon their judgments. *See* Vogel Reply Decl., Ex. 1 (OFAC’s Emergency Application for a Protective Order).

⁴⁵ The Restraints upon the Blocked Assets were expressly recognized and extended by this Court on June 28, 2008, June 23, 2009, May 10, 2010, and June 11, 2010. *See* SUF at ¶¶ 6-9. Each of those orders confirmed the legitimacy of Judge Lamberth’s 1610 (c) Order.

Clearstream has never questioned the validity of that order, which served as one of the bases for issuing the Restraints.⁴⁶

Markazi never challenges the legitimacy of Judge Lamberth's § 1610(c) order. Nor does Markazi seek to explain why that order, issued by a coordinate court in the same matter, is not law of the case. *See, e.g., U.S. v. The San Leonardo*, 71 F.Supp. 852, 853-54 (E.D.N.Y. 1947) ("It is well established that a judge may not overrule the decision of another judge of co-ordinate jurisdiction made in the same case.") (quoting *In Re Hines*, 88 F.2d 423, 425 (2d Cir. 1937)). Markazi ignores those issues because courts consistently treat nunc pro tunc orders as if they were issued on their effective dates. *See, e.g., Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation*, 605 F.2d 648, 650-653 (2d Cir. 1979) (FSIA did not apply to levy against assets of an instrumentality of the government of Algeria where 90-day period for perfecting an attachment had expired immediately prior to the enactment of FSIA but was extended nunc pro tunc by an order issued after the enactment of FSIA). In light of that precedent and the foregoing facts, Markazi's § 1610(c) argument has no merit.

Markazi's effort to equate this action to *Walters*, 651 F.3d at 291, is pure wishful thinking. Because the plaintiffs in *Walters* never obtained a § 1610(c) order, that decision has no significance to the issues before the Court.

**C. Even If Judge Lamberth's Nunc Pro Tunc Order Were Invalid,
The Peterson Plaintiffs Could Still Obtain Turnover Of The Blocked Assets**

Even assuming, *arguendo*, that § 1610(c) orders are required in TRIA actions and that the Peterson Plaintiffs' initial writ of execution was invalid, they may obtain a turnover order by way

⁴⁶ Having acknowledged that Plaintiffs obtained a valid § 1610 order at that hearing, Clearstream is estopped from rearguing the issue now. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding.") (quoting 18 Moore's Federal Practice § 134.30 (3d ed. 2000)).

of this motion for summary judgment under CPLR §§ 5225 and 5227 *without* obtaining a prior valid writ of execution. *See* Point I.D. Because the TRIA claim does not arise under §§ 1610(a) or (b), the only requirements mentioned in § 1610(c) that could be applicable here are the obligations to obtain a court determination that a reasonable period of time has elapsed following the entry of judgment and giving the notice required under § 1608(e). As Plaintiffs note above, long before they filed this motion, the Peterson Plaintiffs obtained Judge Lamberth's §1610(c) order, which determined that Plaintiffs had complied with *all* of § 1610(c)'s requirements. The Peterson Plaintiffs' supposed failure to obtain a valid writ of execution therefore poses no obstacle to the turnover of the Blocked Assets.

CONCLUSION

For all of the reasons set forth above, the Court should grant Plaintiffs' motion for partial summary judgment in all respects.

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Respectfully submitted,



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