

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

v.

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

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

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

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Plaintiffs respectfully submit this Supplemental Memorandum of Law in further support of their motion for partial summary judgment.¹

PRELIMINARY STATEMENT

On August 10, 2012, President Obama signed into law the Iran Threat Reduction and Syria Human Rights Act of 2012, Public Law No. 112-158, 126 Stat. 1214 (the “Act”), which is codified at 22 U.S.C. § 8701 *et. seq.* Significantly, the Act leaves untouched § 201 of TRIA, which entitles Plaintiffs to partial summary judgment and turnover of the Blocked Assets to the extent of their compensatory damages claims against Iran. At the same time, the Act provides an additional and independent basis for granting Plaintiffs’ motion for partial summary judgment with regard to the Blocked Assets.

Specifically, by voting and signing the Act into law, Congress and the President have unequivocally demonstrated their strong desire to enable Plaintiffs to execute upon the roughly \$1.75 billion in Blocked Assets beneficially owned by Markazi and held in the Blocked Account that Citibank maintains in New York.² Section 502 of the Act (22 U.S.C. § 8772) dictates that, “notwithstanding any other provision of law,” the Blocked Assets (which the Act specifically addresses) are subject to execution to the extent of Plaintiffs’ compensatory damages awards against Iran if Plaintiffs demonstrate that those assets are: (a) “held in the United States for a foreign securities intermediary doing business in the United States,” *i.e.*, Clearstream; (b) the particular blocked assets that the Court restrained; and (c) equal in value to a financial asset of

¹ Plaintiffs utilize the same abbreviations in this memorandum that they employed in their prior summary judgment submissions.

² At the time the Court first issued the Restraints, Clearstream held the Blocked Assets for Markazi’s benefit in an omnibus account that Clearstream maintained at Citibank in New York. *See* Supplemental Rule 56.1 Statement of Facts, dated September 14, 2012 (“Supp. SUF”) at ¶¶ 2, 4, 6.

Iran or any Iranian agency or instrumentality (explicitly including defendant Markazi) that the foreign securities intermediary or a related intermediary holds abroad.

Plaintiffs easily satisfy those three criteria. Obviously, the Blocked Assets are the assets that Congress specifically identifies in the Act. Moreover, Clearstream, Markazi and Citibank have repeatedly acknowledged that Citibank has held, and continues to hold, the Blocked Assets for Clearstream, which itself maintains a mere custodial, non-beneficial interest in those assets in its capacity as a foreign securities intermediary acting for Markazi's ultimate benefit. Finally, the roughly \$1.75 billion in Blocked Assets are exactly equal in value to the interest in those assets that Clearstream and Markazi have consistently described as held by Clearstream for Markazi's benefit in Luxembourg.

For the reasons that Plaintiffs previously addressed in their summary judgment papers, no need exists for the Court to resort to the Act as a basis for granting Plaintiffs' summary judgment. Even standing alone, the TRIA claim that the parties have thoroughly addressed entitles Plaintiffs to turnover of the Blocked Assets. To the extent that the Court determines otherwise, however, § 8772 of the Act provides a clear-cut alternative basis for awarding partial summary judgment and turnover of the Blocked Assets to Plaintiffs.

THE ACT

In relevant part, 22 U.S.C. § 8772 states as follows:

(a) INTERESTS IN BLOCKED ASSETS. –

(1) IN GENERAL. – Subject to paragraph (2), notwithstanding any other provision of law, including any provision of law relating to sovereign immunity, and preempting any inconsistent provision of State Law, a financial asset that is –

(A) held in the United States for a foreign securities intermediary doing business in the United States,

(B) a blocked asset (whether or not subsequently unblocked) that is property described in subsection (b), and

(C) equal in value to a financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran or any agency or instrumentality of that Government, that such foreign securities intermediary or a related intermediary holds abroad,

shall be subject to execution or attachment in aid of execution in order to satisfy any judgment to the extent of any compensatory damages awarded against Iran for damages for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, or hostage-taking, or the provision of material support or resources for such an act.

(2) COURT DETERMINATION REQUIRED. – In order to ensure that Iran is held accountable for paying the judgments described in paragraph (1) and in furtherance of the broader goals of this Act to sanction Iran, prior to an award turning over any asset pursuant to execution or attachment in aid of execution with respect to any judgments against Iran described in paragraph (1), the court shall determine whether Iran holds equitable title to, or the beneficial interest in, the assets described in subsection (b) and that no other person possesses a constitutionally protected interest in the assets described in subsection (b) under the Fifth Amendment to the Constitution of the United States. To the extent the court determines that a person other than Iran holds –

(A) equitable title to, or a beneficial interest in, the assets described in subsection (b) (excluding a custodial interest of a foreign securities intermediary or a related intermediary that holds the assets abroad for the benefit of Iran), or

(B) a constitutionally protected interest in the assets described in subsection (b),

such assets shall be available only for execution or attachment in aid of execution to the extent of Iran's equitable title or beneficial interest therein and to the extent such execution or attachment does not infringe upon such constitutionally protected interest.

Section 8772 thus recognizes that Clearstream and the other securities intermediaries through which Markazi holds the Blocked Assets have no beneficial or equitable property

interest in those assets. The statute therefore negates Clearstream's hyper-technical, erroneous argument that Citibank holds only Clearstream property and that Markazi holds no interest in the Blocked Assets that Plaintiffs can execute upon (an argument that Markazi recently adopted after initially admitting that it is the 100% beneficial owner of the Blocked Assets). *See* 22 U.S.C. § 8772(a)(2)(A).

Section 8772 also makes clear Congress' intent to subject the Blocked Assets to execution and turnover in satisfaction of Plaintiffs' judgments against Iran, notwithstanding the faulty contention of Clearstream and Markazi that Markazi holds no ownership interest in the Blocked Assets under the UCC. *See* § 8772(a)(1) (providing that § 8772 applies "notwithstanding any other provision of law, including any provision of law relating to sovereign immunity, *and preempting any inconsistent provision of state law*") (emphasis added). In a similar vein, Section 101 of the Act (22 U.S.C. § 8711) declares:

It is the sense of Congress that the goal of compelling Iran to abandon efforts to acquire a nuclear weapons capability and other threatening activities can be effectively achieved through a comprehensive policy that includes *economic sanctions*, diplomacy, and military planning, capabilities and options, and that this objective is consistent with the one stated by President Barack Obama in the 2012 State of the Union Address: "Let there be no doubt: America is determined to prevent Iran from getting a nuclear weapon, and I will take no options off the table to achieve that goal." Among the economic measures to be taken are

- (i) prompt enforcement of the current multilateral sanctions regime with respect to Iran;
- (ii) *full, timely and vigorous implementation of all sanctions enacted into law, including sanctions imposed or expanded by this Act or amendments made by this Act. . . .*

(Emphasis added).

ARGUMENT

SECTION 8772 OF THE ACT PROVIDES AN ADDITIONAL BASIS FOR PLAINTIFFS TO EXECUTE AGAINST THE BLOCKED ASSETS

A. The Blocked Assets Are Financial Assets Held In The United States For A Foreign Securities Intermediary Doing Business In The United States

1. The Blocked Assets Are Financial Assets

A review of the relevant definitions set forth in § 8772 and the UCC demonstrates that the Blocked Assets qualify as “financial assets,” as the Act utilizes that term. Section 8772(d)(2) expressly incorporates the UCC’s definition of “financial asset.” Crucially, however, the Act *also includes cash* within its definition of “financial asset.” § 8772(d)(2) (“The terms ‘financial asset’ and ‘securities intermediary’ have the meanings given those terms in the Uniform Commercial Code, but the former includes cash.”). UCC § 8-102(a)(9) defines “financial asset” to mean, *inter alia*, “a security.” That UCC provision further notes that, “[a]s context requires, the term means either the interest itself or the means by which a person’s claim to it is evidenced, including . . . a security entitlement.”³ In relevant part, the UCC defines a “security” in § 8-102(a)(15) as “an obligation of an issuer”

Given these definitions, no doubt exists that the Blocked Assets are “financial assets” within the Act’s meaning. Mark Gem, the Clearstream executive who testified before this Court on June 27, 2008, confirmed that the bonds that once composed the Blocked Assets were the debt obligations of various issuers. *See* Reply SUF at ¶ 3. Thus, those bonds are “securities.” *See, e.g.*, 15 U.S.C. § 78c(a)(10) (provision of the Securities Act of 1933 that defines a

³ “A security entitlement means the rights and property interest of a person who holds securities or other financial assets through a securities intermediary. A security entitlement is both a package of personal rights against the securities intermediary and an interest in the property held by the securities intermediary.” UCC § 8-102, Official Comment ¶ 17.

“security” to include, among other instruments, “any note” or “bond”). In any event, all of those bonds have now converted to cash. That cash also fits squarely within § 8772(d)(2)’s definition of a “financial asset.”

2. The Blocked Assets Are Held In The United States

Before the Court issued the Restraints, Clearstream held the Blocked Assets in an omnibus custodial account that it maintained at Citibank in the United States. *See* Supp. SUF at ¶¶ 2-5 [citing Vogel Supp. Decl. at ¶¶ 10-14, 25-28 and Exs. 37-39; Vogel Decl., Exs. J at 26, K at 5, 15, 16, 17, 18 and 19 and L; Vogel Reply Decl., Ex. 19 at 3 and Ex. 5 at 7:9-11 and 23:22-23]. After the Peterson Plaintiffs served a writ of execution on Citibank in New York on June 13, 2008, Citibank placed the Blocked Assets in a separate segregated account, also located in New York, that Citibank controlled. *See* Reply SUF at ¶ 3. On February 14, 2012, Citibank’s counsel reported in a letter to this Court that the “restrained funds at issue in this litigation have been designated as blocked funds and are being held in a Citibank account established in accordance with OFAC regulations.” *See* Vogel Decl., Ex. O. Although counsel’s letter did not specify the location of the Blocked Account reported to OFAC by Citibank, OFAC’s April 23, 2012 response to the Peterson Plaintiffs’ subpoena confirms that Citibank is holding the Blocked Assets “in the United States.” Supp. SUF at ¶ 2.

3. Clearstream Is A Foreign Securities Intermediary

Clearstream also clearly qualifies as a foreign securities intermediary within the meaning of § 8772(a)(1) of the Act. As Clearstream has emphasized repeatedly, it is a *société anonyme* (an entity with certain characteristics of a corporation) formed under Luxembourg law. *See*

Supp. SUF at ¶ 3 [citing Vogel Supp. Decl. at ¶ 7 and Ex. 30]. Thus, no dispute exists regarding Clearstream's status as a foreign entity.

It is equally clear that Clearstream has functioned as a securities intermediary with respect to the Blocked Assets. Section 8772(d)(2) incorporates the UCC's definition of a "securities intermediary." In turn, UCC § 8-102(a)(14) defines a securities intermediary as:

- (i) a clearing corporation; or
- (ii) a person, including a bank or broker, that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity.

Furthermore, UCC § 8-501(a) defines a "securities account" as

an account to which a financial asset is or may be credited in accordance with an agreement under which the person maintaining the account undertakes to treat the person for whom the account is maintained as entitled to exercise the rights that comprise the financial asset.

The official comment to UCC § 8-501 provides that the relationship between a bank acting as securities custodian and its custodial customers "clearly fall[s] within the definition of a securities account." UCC § 8-501, Official Comment 1.

Given these definitions, Clearstream unquestionably qualifies as a securities intermediary. Indeed, Clearstream itself has repeatedly argued that it functions as Markazi's securities intermediary with respect to the Blocked Assets. *See* Clearstream's Motion to Vacate Memorandum (dated 12/22/2011) at pp. 1, 12, 21, 23 and 26; Clearstream's Motion to Vacate Reply Memorandum (dated 5/18/2012) at pp. 9-10, 20 and 52; Clearstream's Summary Judgment Opposition Memorandum (dated 6/15/2012) at p. 22; *see also* Supp. SUF at ¶ 3 [citing Vogel Supp. Decl. at ¶ 14 and Ex. 32 ¶¶ 7-9, 18-19 (setting forth Clearstream's obligations as the

custodian of the securities held by its customers, including the obligations to “deliver[] to the Customer or a third party an amount of securities of an issue equivalent to the amount credited to any securities account in the Customer’s name” and to “collect securities (including, without limitation, stock dividends and securities issued upon the exercise of any option, right or warrant of a deposited security or attached thereto) or cash amounts distributable or payable in respect to the principal of, premium or interest on, or dividends or other amounts in respect of securities deposited by the customer with [Clearstream]”).

In his June 27, 2008, testimony, Mr. Gem, a member of Clearstream’s Executive Committee, likewise confirmed that Clearstream: functions as a bank and a securities settlement system; acts as a depository for Eurobonds; and performs custodial services for its customers. *See* Supp. SUF at ¶ 3 [citing Vogel Supp. Decl. at ¶ 8; Vogel Reply. Decl., Ex. 5 at 6:14-18, 7:14-8:7, and 14:15-20]. Consistent with Mr. Gem’s testimony, Clearstream’s website indicates that it continues to hold securities accounts for its customers as part of its normal business operations. *See* Supp. SUF at ¶ 3 [citing Vogel Supp. Decl. at ¶ 9, Ex. 30 at §§ 7 and 8, and Exs. 31-32].

Furthermore, Ali Asghar Massoumi, the Head of Markazi’s Foreign Exchange Negotiable Securities Section, confirmed in his October 17, 2010 affidavit that Clearstream maintained a “custody account” in which Markazi deposited the Blocked Assets. *See* Supp. SUF at ¶ 3 [citing Vogel Supp. Decl. at ¶ 10 and Vogel Decl., Ex. K at ¶¶ 5, 15-19]. The application that Markazi submitted to open its account at Clearstream also stated that Clearstream would maintain a “securities account” for Markazi in tangible form and that Clearstream would report activity in

that account using the ISIN (International Securities Identification Number) securities codification. *See* Supp. SUF at ¶ 3 [citing Vogel Supp. Decl. at ¶ 11; Vogel Decl., Ex. L].

The nature of the holdings that Markazi maintained in the Blocked Account at the time the Court restrained those assets further substantiates Clearstream's status as a securities intermediary. At that time, Clearstream held 19 of the 20 financial assets (*i.e.*, bonds) owned by Markazi in a custodial securities account maintained in the name of defendant UBAE. That account, which Clearstream opened at UBAE's request on January 18, 2008, was governed by the same Clearstream terms as UBAE's pre-existing Clearstream account. UBAE opened the latter account by completing a securities account application similar to the one that Markazi utilized to open its securities account at Clearstream. Like Markazi's application, the UBAE application incorporated Clearstream's General Terms and Conditions. *See* Supp. SUF at ¶ 4 [citing Vogel Supp. Decl. at ¶ 12; Vogel Decl., Ex. J at ¶ 26; and Vogel Reply Decl., Ex. 11]. Before Markazi, Clearstream, and UBAE transferred the Blocked Assets into UBAE's new custodial account in February 2008, UBAE confirmed to Markazi in correspondence dated February 19 and 20, 2008, that Clearstream's General Terms and Conditions governed the new account. *See* Supp. SUF at ¶ 4 [Vogel Supp. Decl. at ¶ 13; Vogel Decl. Ex J at ¶ 26, and Vogel Reply Decl., Ex. 16].

In combination, these facts leave no doubt that Clearstream qualifies as a securities intermediary within the Act's meaning.

4. Clearstream Is Doing Business In The United States

The record also compels the conclusion that Clearstream is "doing business in the United States," as § 8772(a)(1)(A) of the Act requires. Clearstream's United States-based business

activities include maintaining a well-staffed representative office in New York City located at 55 Broad Street.⁴ The U.S. Federal Reserve Board of Governors (“Board”) and the New York State Banking Department license Clearstream’s New York office to perform functions “relating to [Clearstream’s] business as a provider of clearing, settlement and custody services for institutional customers, including marketing and promotional activities, providing technical assistance to Clearstream’s customers in North and South America, answering customer inquiries, and engaging in research.” *See* Supp. SUF at ¶ 5 [citing Vogel Supp. Decl. at ¶ 16 and Ex. 34; Vogel Reply Decl., Ex. 17].

Clearstream’s descriptions of the services provided by the employees in its New York office further demonstrate that Clearstream engages in substantial and diverse business activity in this state. The Clearstream-created documents reveal that those employees include: (i) a Senior Expert-Sales and/or Senior Expert Customer Service Manager Head of Unit responsible for creating business plans for Clearstream’s “Americas” region, supervising the other New York employees, performing customer relations functions, and insuring Clearstream’s adherence to its best practice and customer care standards; (ii) a customer service employee providing support services to Clearstream’s customers on all securities clearing, custody, billing, COL, Swift and claim issues; and (iii) an Administrator coordinating day-to-day internal company administrative

⁴ When Plaintiffs served Clearstream with Plaintiffs’ restraining notice and amended restraining notice, Clearstream maintained its representative office at 350 Madison Avenue, New York, New York. *See* Supp. SUF at ¶ 5 [citing Vogel Supp. Decl. at ¶ 15 and Ex. 33]. Thus, Clearstream entered at least two substantial real estate leases for office space in large commercial buildings in Manhattan – one concerning its prior office at 350 Madison and the other for Clearstream’s current location. On June 16, 2008, Plaintiffs’ agent, William Cortellessa, travelled to Clearstream’s office at 350 Madison Avenue to serve the restraining notice. While serving that document, Mr. Cortellessa observed that: (a) the office had a reception area; (b) six to eight Clearstream employees sat at the center of the office; and (c) all of those employees had their own computer and telephone at their desks. Mr. Cortellessa further observed that several perimeter offices surrounded the interior desk spaces. *See* Supp. SUF at ¶ 5 [citing Vogel Supp. Decl. at ¶ 15 and Ex. 33].

requirements. *See* Supp. SUF at ¶ 5 [citing Vogel Supp. Decl. at ¶¶16-17; Vogel Reply Decl., Ex. 17].

The very limited disclosures that Clearstream has made concerning its New York operations further confirm that it engages in substantial business activity from its New York representative office. For example, Clearstream obtained a Federal Employer I.D. Number that allows it to maintain at least 13 employees in New York. *See* Supp. SUF at ¶ 5 [citing Vogel Supp. Decl. at ¶ 18 and Ex. 34; Vogel Reply Decl., Ex. 17 at ¶ 5 and Ex. 18]. Each employee in Clearstream's New York office maintains a separate telephone number, fax number, and email address.⁵ Clearstream compensates those New York-based employees via a payroll account that Clearstream maintains at Citibank in New York. *See* Supp. SUF at ¶ 5 [citing Vogel Reply Decl., Ex. 17 at ¶ 6; Vogel Supp. Decl. at ¶ 20]. Moreover, Clearstream maintains another bank account at Citibank in New York through which Clearstream pays the non-payroll operating expenses associated with its New York office. *See id.*

As a U.S.-based employer, Clearstream also made an application to the United States Department of Labor pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), for permission to employ one of its alien employees (Acelina Santa Rosa) on a permanent basis. By submitting the application on behalf of Ms. Santa Rosa, Clearstream effectively acknowledged that: (a) it maintains a permanent physical presence in the United States; and (b) it engaged in substantial efforts to recruit domestic employees to fill Ms.

⁵ In 2009, Clearstream's website listed each person that it employed at its New York representative office and provided a telephone number, fax number, and email address for each listed employee. Clearstream later removed that information from its website, likely in an effort to conceal the scope of its New York operations. *See* Supp. SUF at ¶ 5 [citing Vogel Supp. Decl. at ¶ 19 and Ex. 34 (copy of the information as it appeared on Clearstream's website in 2009)].

Santa Rosa's position in the New York office before making the application. *See* Supp. SUF at ¶ 5 [citing Vogel Supp. Decl. at ¶ 21 and Ex. 35].⁶

Furthermore, at the June 27, 2008 hearing regarding Defendants' efforts to vacate the Restraints, Clearstream presented evidence that it has long conducted systematic and continuous trading activities on behalf of its clients that involve billions of dollars of securities that are custodized in New York. *See* Reply SUF at ¶ 5. Indeed, as of June 16, 2008, Clearstream's omnibus account at Citibank in New York contained approximately \$10 billion worth of the various bonds that Markazi then owned through Clearstream. *See* Supp. SUF at ¶ 5 [citing Vogel Supp. Decl. at ¶ 22; Vogel Reply Decl., Exs. 5 at 24:8-10 and 7].

Clearstream's General Terms and Conditions further confirm that Clearstream engages in substantial business activity in the United States. *See* Supp. SUF at ¶ 5 [citing Vogel Supp. Decl. at ¶ 23 and Ex. 32]. For example, Article 15 of the General Terms and Conditions provides that Clearstream can sub-custodize securities in the United States. *See* Supp. SUF at ¶ 5 [citing Vogel Supp. Decl. at ¶ 23 and Ex. 32]. Moreover, a letter to UBAE drafted by Mr. Gem (Clearstream's Executive Vice President of Business Management) and Christian Heyne (Clearstream's Director of Legal) confirms that Clearstream and the other Defendants knew that all of the bonds that once composed the Blocked Assets *had to be maintained for safekeeping in the United States*. *See* Supp. SUF at ¶ 5 [citing Vogel Reply Decl. at ¶ 24, Ex. 32; Vogel Reply Decl., Ex. 14I (explaining that the relevant bonds "are all issued in dematerialized form in the United States of America and consequently the ultimate place of safekeeping, irrespective of the

⁶ *See* "PERM" regulations at 20 C.F.R. Part 656 (defining an "employer" as "[a] person, association, firm, or corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States," and providing that anyone who is "temporarily" in the United States cannot be an "employer" "for the purpose of obtaining a labor certification for permanent employment.").

choice of principal and intermediate custodians, is necessarily the United States” and that “[i]t is a necessary consequence of this fact that the securities in questions [sic] cannot be held in safe custody without procuring services from US-based persons”).⁷

The fact that Clearstream utilizes Citibank in New York as Clearstream’s sub-custodian for depositing securities in the United States also bolsters the conclusion that Clearstream engages in substantial U.S.-based business activity. *See* Supp. SUF at ¶ 5 [citing Vogel Supp. Decl. at ¶ 25 and Ex. 36 (printout from Clearstream’s website)]. Clearstream conducts transactions for *thousands* of clients through that single, New York-based, omnibus account in which Clearstream and Citibank hold the clients’ combined assets. *See id.* In addition, Clearstream maintains a cash account in New York that is associated with the Clearstream omnibus account at Citibank, and at least one additional cash correspondent account for U.S. dollar transactions at JP Morgan Chase Bank, also here in New York. *See* Supp. SUF at ¶ 5 [citing Vogel Supp. Decl. at ¶ 28 and Ex. 38].

Thus, Clearstream regularly conducts massive securities transactions in New York involving billions of dollars. It solicits clients from the New York representative office that it operates pursuant to licenses granted by the federal and New York State governments and employs numerous individuals who regularly conduct Clearstream business from the New York representative office. Moreover, Clearstream engages in all of the varied economic activity that any substantial U.S.-based employer must undertake – from the payment of employees, to negotiating contracts with vendors, to leasing substantial office space to paying taxes and more.

⁷ The same letter emphasized that “the identity of [the] sub-custodians” utilized by Clearstream “are available at all times on our website.” Consistent with that observation, Clearstream’s website provides a non-exhaustive list of the specific securities custodized at Citibank in New York that Clearstream clients can purchase and sell. Clearstream’s securities database shows 137,123 securities sub-custodized at Citibank in the United States in which Clearstream customers can invest. *See* Supp. SUF at ¶ 5.

Those facts leave no doubt that Clearstream is currently “doing business in the United States” under any possible construction of that term. *See* § 8772(a)(1)(A).

Case law confirms that this substantial economic activity amounts to doing business in the United States. For example, courts have consistently found that banks that operated agencies, branches, or departments in New York were doing business in this state. *See, e.g., Public Administrator of New York County v. Royal Bank of Canada*, 19 N.Y.2d 127, 131-32, 224 N.E.2d 877, 879, 278 N.Y.S.2d 378, 381-82 (1967) (finding that the Royal Bank of Canada was doing business in New York via its New York branch); *Del Dietrich v. Bauer*, 2000 U.S. Dist. LEXIS 11729, at *11-12 (S.D.N.Y. Aug. 9, 2000) (foreign banks that maintain and operate branches in New York are doing business in this state) (citing *Bank of Montreal v. Mitsui Mfrs. Bank*, 1990 U.S. Dist. LEXIS 11907, at *18-24 (S.D.N.Y. Sept. 11, 1990) (foreign bank was subject to personal jurisdiction because it was unquestionably doing business in New York through its New York branch)).

New York authorities concerning the “doing business” test for personal jurisdiction under CPLR § 301 further support the conclusion that Clearstream satisfies § 8772’s “doing business” requirement, even though the New York courts arguably have articulated a “doing business” test more restrictive than Congress intended to be applied with regard to § 8772. For example, in *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000), the Second Circuit held that a company satisfies CPLR § 301’s “doing business” standard when it “does business in New York ‘not occasionally or casually, but with a fair measure of permanence and continuity’.” *Accord, e.g., Landoil Resources Corp. v. Alexander v. Alexander Servs., Inc.*, 918 F.2d 1039, 1043 (2d Cir. 1991); *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 267, 115 N.E. 915, 917-18

(1917). As the *Wiwa* court noted, both the “Second Circuit and the New York courts have focused on a traditional set of indicia” in determining whether foreign corporations were “doing business” in New York. *Wiwa*, 226 F.3d at 98. Those traditional indicia include: “[i] whether the company has an office in the state, [ii] whether it has any bank accounts or other property in the state, [iii] whether it has a phone listing in the state, [iv] whether it does public relations work there, and [v] whether it has individuals permanently located in the state to promote its interests.” *Id.*

Applying that standard, the Second Circuit found that the two foreign corporation defendants in *Wiwa* were subject to general personal jurisdiction in New York pursuant to CPLR § 301 where, among other things, the defendants maintained a single investor relations office in New York City. *Wiwa*, 226 F.3d at 98-99.⁸ Significantly, the *Wiwa* court held that the fact that “the Investor Relations Office was not directly involved with the core functions of the [foreign corporations’] business” did not undermine the conclusion that they satisfied the “doing business” test because the public relations office’s work “was of meaningful importance to the defendants.” *Id.* at 96.

Wiwa’s holding compels the conclusion that Clearstream is doing business in New York. Indeed, Clearstream satisfies each of the five “traditional indicia” of doing business highlighted by the Second Circuit. *Id.* at 98. Specifically, Clearstream “has an office in the state,” maintains “bank accounts or other property in the state,” “has a phone listing in the state,” “does public

⁸ *Wiwa*, 226 F.3d at 96 (“The defendants are huge publicly-traded companies with a need for access to capital markets. The importance of their need to maintain good relationships with existing investors and potential investors is illustrated by the fact that they pay over half a million dollars per year to maintain the Investor Relations office. In our view, the amount invested by the defendants in the U.S. investor relations activity substantially establishes the importance of that activity to the defendants.”).

relations work” here, and “has individuals permanently located in the state to promote its interests.” *Id.*⁹

B. The Assets Restrained By Plaintiffs And Blocked Pursuant To E.O. 13599 Are Blocked Assets

Under § 8772(a)(1)(B), assets are subject to execution if they are “blocked assets,” as defined in § 8772(d)(1). President Obama’s E.O. 13599, which became effective as of February 6, 2012, blocked the Blocked Assets that the Peterson Plaintiffs and this Court had previously restrained in the possession of Citibank. *See* Reply SUF at ¶¶ 16-24. As a result, Citibank designated the assets at issue in this proceeding as blocked funds on or before February 14, 2012. Since that time, Citibank had held the Blocked Assets in the Blocked Account established in accordance with OFAC regulations. *See* Reply SUF at ¶¶ 24-25. The Blocked Assets therefore satisfy § 8772(a)(1)(B)’s “blocked asset” requirement.

⁹ By no means is *Wiwa* an outlier among the New York courts’ “doing business” decisions. To the contrary, courts have consistently found the “doing business” requirement satisfied in circumstances far less compelling than those presented here. *See, e.g., Bryant v. Finnish Nat’l Airlines*, 15 N.Y.2d 426, 432, 208 N.E.2d 439, 441-42, 250 N.Y.S.2d 625, 628-29 (1965) (foreign corporation was doing business in New York where it maintained an office here that did not conduct sales efforts, employed a staff in New York of three full-time and four part-time employees, the New York employees were not authorized to enter contracts on behalf of the foreign corporation, and the foreign corporation maintained a New York bank account to pay the normal operating expenses for the New York office, including salaries); *Lauffer v. Ostrow*, **Error! Main Document Only.** 55 N.Y.2d 305, 310-13, 434 N.E.2d 692, 694-96, 449 N.Y.S.2d 456, 458-60 (1982) (doing business test satisfied where foreign corporation’s New York-based employees solicited and serviced customer accounts on a continuous basis even though corporation did not maintain an office, bank account, property, or telephone number in New York); *Augsbury Corp. v. Petrokey Corp.*, 97 A.D.2d 173, 175-76, 470 N.Y.S.2d 787, 780 (3d Dept. 1983) (foreign corporation constructively consented to personal jurisdiction where it obtained authorization to do certain business in New York and designated the Secretary of State as its agent for service of process); *Georgia-Pacific Corp. v. Multimark’s Int’l, Ltd.*, 265 A.D.2d 109, 111-12, 706 N.Y.S.2d 82, 83-84 (1st Dept. 2000) (doing business test satisfied where foreign corporation maintained a bank account in New York for receipt of substantially all of its income and for payment of substantially all of its business expenses, thereby demonstrating “an intent to take advantage of the benefits and protections of New York law on a continuous and systematic basis so as to create a constructive ‘presence’ within this State,” even though the foreign corporation did not maintain employees or an office in New York).

C. The Blocked Assets Are Equal In Value To Financial Assets Of Markazi Held In Accounts Opened Abroad At Clearstream And UBAE

The Blocked Assets also satisfy § 8772(a)(1)(C)'s requirement that the assets Plaintiffs seek to compel Defendants to turn over be "equal in value to a financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran or any agency or instrumentality of that Government." There appears to be no dispute that the amount of the cash now blocked and restrained at Citibank is exactly equal to the amount of Markazi's interest in the Blocked Assets. No party other than Markazi has ever claimed a beneficial ownership interest in the Blocked Assets. Moreover, the documents produced by Clearstream in connection with its efforts to vacate Plaintiffs' Restraints demonstrate that the monetary value of the assets initially restrained at Citibank equaled exactly the sum of the bond holdings (i) recorded by Clearstream in the custodial account that it still maintained for Markazi at the time the Restraints issued and (ii) recorded by UBAE in the then recently opened Clearstream custodial account that UBAE maintained for Markazi's benefit. *See* Supp. SUF at ¶ 7.¹⁰

¹⁰ Clearstream has acknowledged that, when the Restraints initially issued, it maintained a custodial account for Markazi (No. 80726) that held one bond position with a face value of 1,500,000,000 Japanese Yen. *See* Supp. SUF at ¶ 6 [citing Vogel Supp. Decl. at ¶ 33 and Ex. 39; Vogel Reply Decl., Ex. 5 at 50:12-51:11]. Clearstream has also acknowledged that the 19 other securities to which the Restraints applied were held abroad by Clearstream in the new custodial customer account opened by UBAE for Markazi (No. 13061). Those bonds included two securities that matured on June 16, 2008 and 17 additional bonds listed in an inventory that Clearstream produced at the court hearing on June 27, 2008 as Exhibit M. *See* Supp. SUF at ¶ 6 [citing Vogel Supp. Decl. at ¶ 34 and Exs. 40-41]. The 19 bonds held at Clearstream in UBAE's customer account (No. 13061) were in turn credited by UBAE, acting as an intermediary bank, to a custody account it held in Rome, Italy in Markazi's name (No. [REDACTED]). *See* Supp. SUF at ¶ 6 [citing Vogel Supp. Decl. at ¶ 35 and Ex. 41; Vogel Decl., Ex. K at ¶¶ 23-26; Vogel Reply Decl., Ex. 16]. UBAE credited the same amount to Markazi's account No. [REDACTED] that Clearstream credited to UBAE for the 17 securities held in Clearstream account No. 13061. *See* Supp. SUF at ¶ 6 [citing Vogel Decl., Ex. K at ¶ 26 ("In February 2008, in several tranches, Bank Markazi transferred the would-be Restrained Securities from its custody account 80726 with Clearstream to account 13061 UBAE had opened with Clearstream. UBAE in turn credited Bank Markazi's custody account [REDACTED] held with UBAE with the transferred bonds.")]. Exhibit L produced by Clearstream at the June 27, 2008 hearing demonstrates the equivalent value of the 19 bond positions that Markazi held in its Clearstream account and the bonds transferred from that account to UBAE's Clearstream account number 13061. *See* Supp. SUF at ¶ 7. Because Exhibits H, I and L presented by Clearstream at the June 27, 2008 hearing

D. Markazi Is The Sole Beneficial Owner Of The Blocked Assets And No Other Party Has A Protected Fifth Amendment Interest In Those Assets

Section 8772(a)(2) sets forth a requirement that the Court make two determinations prior to awarding turnover to Plaintiffs. First, the Court must assess whether Iran (including its agencies and instrumentalities) holds equitable title in the Blocked Assets. *See* § 8772(a)(2). Second, the Court must determine that no other entity holds a Constitutionally protected interest in the Blocked Assets. *Id.*

Plaintiffs' earlier briefing demonstrates that the first of these statutory criteria is satisfied here. Indeed, Plaintiffs established in those briefs that Markazi has repeatedly acknowledged that it is the sole beneficial owner of the Blocked Assets. *See* Plaintiffs' Summary Judgment Brief at 3, 12; Plaintiffs' Summary Judgment Reply Brief at 3-14. In response to those arguments, no Defendant cited any evidence that indicates that an entity other than Markazi maintains a beneficial interest in the Blocked Assets.

In addition to the repeated Markazi admissions that Plaintiffs cited in the earlier briefing, both Clearstream and UBAE have acknowledged Markazi's status as the sole beneficial owner of the Blocked Assets. For example, at the June 27, 2008 hearing, Clearstream tacitly acknowledged Markazi's status as the sole beneficial owner of the one security remaining in Markazi's proprietary account when Clearstream explicitly refused to challenge the ongoing restraint of that security. *See* Supp. SUF at ¶ 6. At that hearing, Clearstream did falsely disclaim knowledge of the true beneficial owner of the Blocked Assets then housed in the newly opened UBAE/Markazi Account. Nevertheless, Clearstream's testimony effectively admitted that

were formatted in the same manner, the testimony that Mr. Gem delivered concerning Exhibits H and I explains the content of Exhibit L. *See* Supp. SUF at ¶ 7.

UBAE's customer (*i.e.*, Markazi) was the beneficial owner of those securities. *See* Supp. SUF at ¶ 6. Moreover, in correspondence between Clearstream and UBAE that Clearstream did not produce at the June 27 hearing, both entities also explicitly acknowledged Markazi's sole beneficial ownership interest in the bonds that once composed the Blocked Assets. *See* Supp. SUF at ¶ 6 [citing letter from UBAE to Clearstream dated October 26, 2009 that acknowledges that the securities in the UBAE/Markazi Account "were administered by Clearstream *for the same beneficial owner* in the period preceding the above mentioned transfer of those assets to UBAE" and that "Clearstream, *as it was and it is obliged to under existing banking regulations, has always known the identity of the beneficial owner of assets*" (first emphasis added)]; Supp. SUF at ¶ 6 [citing letter from Clearstream to UBAE dated November 11, 2009 that states that "we only learned through your letter of October 26, 2009 that the current beneficial owner" of the assets held in the UBAE/Markazi Account [*i.e.*, Markazi] "is the same as the holder of account no. 80726 in our books")].¹¹

Section 8772(a)(2) also makes clear that any "custodial interest" that Clearstream has in the Blocked Assets poses no obstacle to turnover. § 8772(a)(2)(A) (in determining whether parties other than Iran and its agencies and instrumentalities hold an ownership interest in the Blocked Assets, the court need not consider "a custodial interest of a foreign securities intermediary or a related intermediary that holds the assets abroad for the benefit of Iran [or its agencies or instrumentalities]"). Thus, while Plaintiffs' earlier briefing establishes the meritless quality of Clearstream's contention that it holds some Constitutionally protected Fifth

¹¹ Contrary to Clearstream's assertion in this email, the record demonstrates that Clearstream had full knowledge at least as early as March 3, 2008 that Markazi remained the sole beneficial owner of the bonds held in the UBAE/Markazi Account after Defendants transferred those bonds from Markazi's Clearstream account. *See* SUF at ¶ 6.

Amendment right in the Blocked Assets, § 8772 puts the final nail in that coffin. *See* Plaintiffs’ Summary Judgment Reply Brief at 49-54.

Even assuming *arguendo* that an award of partial summary judgment and turnover of the Blocked Assets to Plaintiffs would constitute a “taking” of Clearstream’s property – which Plaintiffs in no way concede – such a taking would still not infringe upon any Defendant’s Constitutional rights. As is true of TRIA (*see id.* at 53-54), the Act’s text and legislative history leave no doubt that it constitutes a “valid regulatory measure[] . . . taken to serve substantial national security interests.” *See Paradissiotis v. U.S.*, 304 F.3d 1271, 1276 (Fed. Cir. 2002); 22 U.S.C. § 8711 (emphasizing that Congress adopted the Act to advance “the goal of compelling Iran to abandon efforts to acquire a nuclear weapons capability and other threatening activities”); § 8772(a)(2) (noting that Congress adopted the Act “[i]n order to ensure that Iran is held accountable for paying the judgments described in paragraph (1) and in furtherance of the broader goals of this Act to sanction Iran”). Thus, Congress intended the Act to serve much the same function as TRIA; namely, “to provide redress to victims of terrorism, to punish terrorist entities by making their frozen assets subject to execution, and to discourage economic activity involving American financial institutions benefiting terrorist entities.” *Hausler v. JPMorgan Chase Bank, N.A.*, 845 F.Supp.2d 553, 576 (S.D.N.Y. 2012).

These characteristics of the Act preclude a finding that turnover of the Blocked Assets would amount to a Fifth Amendment violation, even if turnover would effect a “taking” of Clearstream’s assets (it would not for the reasons Plaintiffs have outlined previously). *Id.*; *accord, e.g., U.S. v. Holy Land Found. For Relief and Dev.*, 2011 WL 3703333, at *4 (N.D. Tex. Aug. 11, 2011) (TRIA does not produce an unconstitutional taking because the statute advances

the national interests in “hold[ing] terrorist states accountable for their crimes, and . . . deter[ring] them from perpetrating acts of terrorism against American Citizens in the future”); *see also* Plaintiffs’ Summary Judgment Reply Brief at 53. Moreover, as Plaintiffs demonstrate above, § 8772(a)(1)(B) of the Act makes clear that § 8772 only subjects blocked assets, *i.e.*, those seized or frozen by the United States under § 5(b) of the Trading with the Enemy Act (50 U.S.C. App. § 5(b)) or §§ 202 or 203 of the International Emergency Economic Powers Act (50 U.S.C. §§ 1701 and 1702) (“IEEPA”), to execution and attachment in aid of execution. *See* § 8772(d)(1) (defining “Blocked Asset”). As the *Hausler* court recognized, IEEPA “provides the President with the discretion to confiscate assets blocked pursuant to OFAC regulations. This was true before the passage of the TRIA; it is still true.” *Hausler*, 845 F.Supp.2d at 578 (noting that blocked assets “are subject to a myriad of sources of diminution – *including attachment and execution to satisfy judgments.*”) (emphasis added). Thus, “[t]he President’s authority to summarily dispose of blocked assets destroys any claim that [Clearstream or Markazi] could have justifiably relied upon the Blocked [Assets] remaining in interest-bearing accounts until . . . a détente in U.S.-[Iranian] relations.” *Id.*

For these reasons, as well as the additional bases that Plaintiffs outlined in their earlier briefing, Clearstream’s takings contentions cannot prevent turnover of the Blocked Assets.

E. Plaintiffs Hold Judgments For Compensatory Damages Against Iran For Personal Injury Or Death Caused By Acts Described In § 8772

In order to execute on the Blocked Assets under § 8772, Plaintiffs must also demonstrate that they hold compensatory damages awards against Iran for “damages for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, or hostage-taking, or the provision of material support or resources for such an act.” § 8772(a)(1)(c). This language

ensures that all victims of acts of Iranian terrorism who hold compensatory damages awards pursuant to either 28 U.S.C. § 1605(a)(7) (now repealed and replaced by 28 U.S.C. § 1605A) or 28 U.S.C. § 1605A can satisfy those judgments from the Blocked Assets. Both § 1605(a)(7) and § 1605A use the same language as § 8772(a)(1)(c) to describe the acts that impose statutory liability upon terrorists. As a result, the fact that all of the Plaintiffs secured judgments pursuant to § 1605(a)(7) or § 1605A suffices to demonstrate that they also satisfy § 8772(a)(1)(c). *See* SUF at ¶ 6.

CONCLUSION

For all of the additional reasons set forth above, the Court should grant Plaintiffs summary judgment based upon, *inter alia*, § 8772.

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Respectfully submitted,



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