

**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 (KBF)

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

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

PRELIMINARY STATEMENT

As Defendants tacitly acknowledge, the Act has eliminated the UCC-based defenses that Defendants previously emphasized in challenging the turnover of the Blocked Assets. Clearstream's only non-constitutional challenge to summary judgment – its contention that it does not satisfy the Act's "doing business" requirement – merits scant attention in light of the significant business operations that it undertakes in New York and elsewhere in the U.S.

Defendants' supposed constitutional defenses also pose no obstacle to turnover. The Act does not violate Article III separation of powers principles because it preserves Defendants' ability to assert defenses to turnover and the Court's role in adjudicating those defenses. Nor does the Act constitute an unlawful taking under the Fifth Amendment. Clearstream cannot establish a takings defense, or any other constitutional defense, because it does not own the Blocked Assets and will therefore suffer no adverse consequence from a turnover order (which will legally extinguish its obligations to account holders). Even if Clearstream did possess a constitutionally protected property interest in the Blocked Assets, Congress' decision to adopt the Act to further the goals of deterring further Iranian terrorism and efforts to create weapons of mass destruction and to provide a potential means for victims of Iranian terrorism to collect upon their judgments is a valid regulatory measure that cannot amount to an unlawful taking.

Markazi's takings arguments also fail because – contrary to Markazi's suggestions – providing an additional avenue for the victims of Iranian terrorism to obtain redress constitutes a permissible public purpose. Furthermore, Markazi's contention that Plaintiffs cannot execute upon the Blocked Assets because the Court improperly restrained those assets both ignores the

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

Court's prior determinations regarding the propriety of the Restraints and makes no sense in light of the current, frozen status of those funds.

Clearstream's subsidiary constitutional arguments also lack merit. The Act does not create an Equal Protection violation because Clearstream has suffered no discrimination and compelling, not merely rational, bases exist for the Act's adoption. Furthermore, the Act violates neither the Ex Post Facto Clause nor constitutes an unlawful bill of attainder because, among other reasons, it imposes no constitutionally impermissible "punishment" upon Clearstream, which will have all of its financial obligations to others expunged by a turnover order.

For decades, Iran has evaded its legal and moral obligation to compensate the victims of its heinous terrorism. The Act provides Plaintiffs a clear-cut right to turnover of the Blocked Assets. Accordingly, the Court should grant their motion for summary judgment in all respects.

ARGUMENT

POINT I.

NO QUESTION OF FACT OR LAW EXISTS WITH RESPECT TO WHETHER PLAINTIFFS SATISFY THE ACT'S REQUIREMENTS FOR TURNOVER

A. Clearstream's Activities In The United States Easily Satisfy The Act's "Doing Business" Requirement

Clearstream's sole non-Constitutional attack against granting Plaintiffs turnover pursuant to the Act is its incredible suggestion that it is not "doing business" in the U.S. In large part, Clearstream advances that argument by making misleading and inconsequential observations that certain of the factors Plaintiffs outlined in their Supplemental Brief do not – in isolation – establish that Clearstream does business in the U.S.

Case law, and common sense, dictate, however, that the Court must consider *all* of Clearstream's ties to this country *in combination* to determine whether it does business here. *See*

Pl. Supp. Mem. at 14-15.² Furthermore, the plain meaning of the phrase “doing business” in the Act is broader than the language considered in many of the cases that Clearstream cites, which focused on whether a particular entity “regularly does or solicits business” in New York for purposes of CPLR § 302(a)(3)(1)’s general jurisdiction provisions. A closer analogy to the Act’s language is supplied by CPLR § 302(a)(1), which provides specific jurisdiction over an entity that “transacts any business within the state.” To the extent that the Court agrees that § 302(a)(1) provides the more apt analogy, the New York Court of Appeals’ recent decision in *Licci v. Lebanese Canadian Bank, SAL*, __ N.Y. 2d __, 2012 WL 5844997 (Nov. 20, 2012) illustrates the misguided nature of Clearstream’s argument. *Licci* found that a foreign bank “transact[ed] business” in New York under § 302(a)(1) although its *only* contact with NY was its “repeated use of a correspondent account in New York on behalf of a client.” *Id.*; accord, e.g., *Altmann v. Republic of Austria*, 317 F.3d 954, 972 (9th Cir. 2002) (by distributing leaflets in California that advertised an art exhibition in Austria, an Austrian instrumentality was “doing business” in California under a federal venue statute).

Nevertheless, the Court need not resolve the precise meaning of the term “doing business” in the Act because Clearstream’s activities in the U.S. suffice to support the required factual determination under any conceivable interpretation of that phrase. The holdings of cases like *Bryant* and *Wiwa*, the courts’ holistic approach to making “doing business” assessments, and Clearstream’s widespread U.S. operations render irrelevant Clearstream’s assertion that it does

² E.g., *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 98 (2d Cir. 2000) (“In assessing whether jurisdiction lies against a foreign corporation . . . courts have focused on a traditional set of indicia: for example, whether the company has an office in the state, whether it has any bank accounts or other property in the state, whether it has a phone listing in the state, whether it does public relations work there, and whether it has individuals permanently located in the state to promote its interest.”); *Bryant v. Finnish Nat’l Airline*, 15 N.Y.2d 426, 432 (1965) (foreign airline satisfied “doing business” test although it did not “make reservations or sell tickets” in New York where the airline maintained a leased office in New York, employed “several people” and maintained “a bank account here,” and performed “public relations and publicity work” in New York).

not actually sell securities or enter contracts with securities account holders in the U.S.³

Moreover, the cases that Clearstream cites in contending that its maintenance of custody and correspondent accounts with Citibank and JPMorgan Chase does not support the conclusion that Clearstream is doing business in the United States are inapposite because those decisions did not present anything remotely similar to Clearstream's array of relevant contacts.⁴

Similarly, while the court in *Landoil Res. Corp. v. Alexander & Alexander Svcs., Inc.*, 918 F.2d 1039 (2d Cir. 1990) found that solicitation *alone* will not suffice to support a determination that defendants are doing business in New York, the facts presented in *Landoil* find no parallel here. The *Landoil* court found that the defendants were not doing business in New York only because "neither company has ever been incorporated or licensed to do business in the State of New York, . . . has offices, bank accounts, telephone listings, or mailing addresses in the State of New York, or employees or agents residing there, . . . owns, leases or has any interest whatsoever in any real property in New York, . . . possesses assets or personal property in the State of New York [or] . . . has ever paid taxes in the State of New York." *Id.* at 1042-44, 1046 n.10. In sharp contrast to the *Landoil* defendants, Clearstream regularly engages, within the U.S., in *every* activity that the Second Circuit deemed relevant in *Landoil*.⁵

³ The following record evidence, among other authorities, demonstrates that Clearstream engages in extensive business operations in the United States. Plaintiffs' Reply SUF at ¶¶ 25-34 (Vogel Reply Decl. at ¶¶ 30-33, 35-41 and Exs. 17-19); Plaintiffs' Supp. SUF at ¶ 5 (Vogel Supp. Decl. at ¶¶ 15-22 and Exs. 28, 32-35; Vogel Reply Decl., Exs. 5, 7, 14(I), 17-18); Declaration of Acelina Ducey (October 24, 2012) (Panopoulos Decl. in Support of Clearstream's Supplemental Opposition to Plaintiffs' Motion for Partial Summary Judgment, Ex. 54).

⁴ See *Nat'l Sun Indus., Inc. v. Dakahlia Comm. Bank, Cairo*, 1997 U.S. App. Lexis 9662, at *3 (2d Cir. 1997) (non-precedential decision in which the court merely noted that "[t]he maintenance of an active correspondent bank account in New York does not, *without more*, demonstrate a foreign corporation's 'presence' in New York") (emphasis added); *J.L.B. Equities, Inc. v. Ocwen Fin. Corp.*, 131 F.Supp.2d 544, 548-49 (S.D.N.Y. 2001) (buying and selling securities through a custodial account located in New York, standing alone, "do not establish a basis for general jurisdiction under C.P.L.R. § 301").

⁵ Clearstream also cites *Green v. Chicago, Burlington and Quincy Railway Co.*, 205 U.S. 530 (1907), for the proposition that solicitation of business alone will not justify a finding of corporate presence. *Green* is distinguishable, however, because the solicitations in Pennsylvania were for rail service provided entirely outside the state. Moreover, its holding was implicitly rejected in *International Shoe Co. v. State of Washington*, 326 U.S. 310, 315, 319 (1945). See *Hughes v. A.H. Robins Co.*, 490 A.2d 1140, 1146 (D.C. App. 1985).

Landoil also recognizes New York’s “solicitation-plus” rule, which provides that “once solicitation is found in any substantial degree very little more is necessary to [support] a conclusion of ‘doing business.’” *Id.* at 1044 (citing *Aquascutum of London, Inc. v. S.S. American Champion*, 426 F.2d 205, 211 (2d Cir. 1970)). Given Clearstream’s admissions regarding its solicitation of clients from New York and its additional U.S.-based activities, *Landoil* supports a finding that Clearstream does business in the U.S. under the solicitation-plus rule.

Clearstream’s misplaced emphasis upon how single factors affect the doing business analysis also renders meaningless the supposed distinctions that it observes between this case and the authorities that Plaintiffs cited in their Supplemental Memorandum. For example, Clearstream attempts to distinguish *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259 (1917) by noting that the defendant corporation continually shipped goods into New York. *Tauza*, however, focused upon the totality of Susquehanna Coal’s contacts with New York in determining that it did business in this state. *Id.* at 265 (citing the maintenance of an office, employees and a bank account in New York, the solicitation of business in New York, and the shipment of goods into this state). Clearstream, unlike Susquehanna Coal, is not a manufacturing company. Clearstream, however, unquestionably engages in a wide variety of business activities in New York, including moving billions of dollars in securities through the state. *See, e.g.*, Aff. of Mary Feniglio at ¶ 3 [Vogel Decl. in Opp. Mot. To Vacate, Ex. 19]. Accordingly, *Tauza*’s multi-factor approach to the doing business test strongly supports a finding that Clearstream does business in the United States. *See Tauza*, 220 N.Y. at 268 (“All that is requisite is that enough be done to say that the corporation is here.”).

Even putting this precedent aside, the flimsy factual “foundation” of Clearstream’s “doing business” argument – its contention that its substantial New York office “only” engages in solicitation activities – is also belied by Clearstream’s prior sworn testimony in this action.

Michael Barrett, the Director of Clearstream's representative office in New York, conceded that Clearstream's New York office: (1) "provid[es] support services for customers, market research, and promotional activities . . ."; and (2) "serves as a customer service center and has two functions: soliciting new customers *and* providing customer support services." Vogel Reply Decl., Ex. 17 at ¶¶ 3-4; Declaration of Acelina Ducey and Bruce Sims (October 24, 2012) (Panopoulos Decl., Ex. 54) at ¶ 2 (reaffirming the accuracy of the Barrett Declaration).

B. The Fact That Clearstream Engages In Substantial Business Activity Outside Of The U.S. Does Not Undermine The Conclusion That It Does Business Here

The vague, incomplete evidence that Clearstream offers regarding what proportion of the assets it manages are held in New York also provides no basis for denying summary judgment. No court has ever held that an entity may only do business in a single jurisdiction or that a corporation must conduct a specific percentage of its overall business operations in a jurisdiction to satisfy the "doing business" test. Rather, as Plaintiffs demonstrate above and in their Supplemental Memorandum, New York courts faced with personal jurisdiction determinations concern themselves with the types and absolute level of activity in which an entity engages.

Nevertheless, it bears emphasis that Clearstream by no means establishes that it conducts a *de minimis* percentage of its operations in New York. Clearstream's online database reveals that its customers can invest in 137,123 securities sub-custodized at Citibank in the U.S. *See* Supp. SUF at ¶ 5. Moreover, Citibank holds thousands of accounts for Clearstream customers. *See* Reply SUF at ¶ 34. Hence, the magnitude of the assets that Clearstream holds in the U.S. is exponentially greater than the \$10 Billion it disclosed with respect to the mere 21 securities at issue in this case (Clearstream held \$2 billion of that amount for Markazi).

Clearstream's authorities offer no support for finding its New York activities insufficient to justify a determination that it does business in the U.S. Given the defendants' lack of

meaningful contacts with New York in *Landoil*, the holding that the “sporadic visits” that the two corporate defendants made to New York (thirteen in total) did not support the exercise of personal jurisdiction over them is entirely consistent with the holistic approach to the “doing business” determination that Plaintiffs advocate and which fully supports rejecting Clearstream’s contentions. *See Landoil*, 918 F.2d at 1046.

Finally, the decision that the court could not exercise jurisdiction in *MacInnes v. Fontainebleau Hotel Corp.*, 257 F.2d 832, 833-34 (2d Cir. 1958) turned upon the unique nature of the defendant corporation – which operated a single hotel located in Florida. The court concluded that the hotel business differed from other commercial activity because hotels can only deliver their services in their home jurisdiction, even when they solicit business elsewhere. *Id.* In contrast to the hotel at issue in *MacInnes*, there is nothing “localized” about Clearstream’s business. It provides services to customers worldwide with respect to hundreds of thousands of securities, few of which were issued in Luxembourg and many of which must be custodized in New York. Furthermore, Clearstream concedes that its New York office performs extensive customer support functions that are essential to the maintenance of Clearstream’s substantial customer base in the Americas. *See, e.g., Vogel Decl.*, Ex. 17.

C. The Court Need Not Obtain Personal Jurisdiction Over Clearstream To Require Turnover Under The Act

Clearstream’s contention that the Court must exercise personal jurisdiction over it to order the turnover of the Blocked Assets ignores the plain language of 22 U.S.C. § 8772, which sets forth various requirements for execution without mentioning personal jurisdiction. Importantly, Clearstream does not maintain custody of the Blocked Assets. Hence, once the Act’s “doing business” requirement and other elements are satisfied, the Court can simply order Citibank, the custodian of the Blocked Assets, to surrender those funds.

POINT II.

THE ACT DOES NOT VIOLATE CONSTITUTIONAL SEPARATION OF POWERS

Markazi's assertion that the Act somehow constitutes an unconstitutional attempt by Congress to adjudicate this case (Markazi Supp. Mem. at 10-16) disregards the plain words of the statute, which requires the Court to make a number of factual and legal determinations before ordering the turnover of the Blocked Assets. *See, e.g.,* 22 U.S.C. § 8772(a)(2) (“*the court shall determine* whether Iran holds equitable title to, or the beneficial interest in” the Blocked Assets) (emphasis added). The mere fact that a new law adversely affects a party's position in pending litigation does not render that statute unconstitutional. Courts have repeatedly held that Congress may change the law applicable to pending cases. *Hyundai Merch. Marine Co. Ltd. v. United States*, 888 F.Supp. 543, 549 (S.D.N.Y. 1995), *aff'd*, 75 F.3d 134 (2d Cir. 1996). “Pending cases are often affected by the actions of coordinate branches of government. . . . [T]he general rule is that, if Congress changes the law while a case is pending, the courts are obligated to apply the law as they find it at the time of judgment (including appellate judgment).” *National Juvenile Law Center v. Regnery*, 738 F.2d 455, 465 (D.C. Cir. 1984).

As Markazi acknowledges, Congress acts within its constitutional power when it enacts a statute that “compel[s] changes in law, not findings or results under old law.” *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 438 (1992); *see also, e.g., Axel Johnson Inc. v. Arthur Anderson & Co.*, 6 F.3d 78, 81-82 (2d Cir. 1993) (new law that revived dismissed case was not unconstitutional because it did not “directly interfere with judicial fact finding”). The case that Markazi principally relies upon, *U.S. v. Klein*, 80 U.S. 128 (1871), does not suggest otherwise. *Axel Johnson*, 6 F.3d at 81 (“The rule of *Klein* precludes Congress from usurping the adjudicative function assigned to the federal courts under Article III. However, *Klein* does not preclude Congress from changing the law applicable to pending cases.”).

Judged by this standard, the Act easily passes constitutional muster. By its express terms, the Act does not interfere with this Court's fact finding. To the contrary, the Act mandates that Plaintiffs prove each of the factors discussed in their Supplemental Memorandum. Indeed, the Act contains an entire subsection entitled "*Court determination required.*" 22 U.S.C. § 8772(a)(2) (emphasis added). The statute's text therefore belies Markazi's characterizations.

Markazi denigrates the Act's requirement of judicial fact finding as "nothing more than a legislative fig leaf because the outcome of the Court's determination is pre-ordained." Markazi Supp. Mem. at 12. While Plaintiffs agree that they can make every factual showing that the Act requires, Defendants' lengthy arguments regarding the Act's "doing business" requirement and the Fifth Amendment's takings clause suggest that Markazi does not believe its own hyperbole. Markazi also ignores that, if this Court ultimately determines that Markazi (and therefore Iran) has a beneficial interest in the Blocked Assets, the Act does not dictate that finding. Rather, that determination arises from the underlying facts concerning Markazi's ownership of the Blocked Assets and Makazi's repeated admissions regarding those facts. *See, e.g., id.* at 13 ("*Bank Markazi has consistently acknowledged [the] obvious, incontrovertible fact*" that it holds a 100% beneficial interest in the Blocked Assets) (emphasis added).

Markazi's admitted beneficial ownership of the Blocked Assets and its undisputed status as an agency and instrumentality of Iran likewise vitiate its argument that the Act supposedly "usurps the Court's authority to make an individualized determination . . . that the totality of facts and circumstances justify piercing the veil of separation between Bank Markazi and Iran." Markazi Supp. Mem. at 15-16. The Act merely defines "Iran" at subsection (d)(3) to include "the central bank or monetary authority of [Iran] and any agency or instrumentality of [Iran]." It does not purport to require the Court to make a veil-piercing finding. Rather, the Act makes a substantive change in the law that obviates the need for any veil-piercing analysis.

Notably, in defining Iran to include Markazi and Iran's other agencies and instrumentalities, the Act simply adopts the approach previously enacted by TRIA and 28 U.S.C. § 1610(g) when they expanded the class of Iranian assets subject to execution by victims of Iran-sponsored terrorism to include those of Iran's agencies and instrumentalities. Yet, Defendants never suggested that those statutes violated constitutional separation of powers principles. And with good reason: the Second Circuit has already held that Congress permissibly exercised its authority in TRIA to abrogate any legal presumption of separateness between a foreign state and its agencies and instrumentalities that otherwise might apply under *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"). *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43, 51 (2d Cir. 2010) ("What the TRIA did . . . was to override the Supreme Court's reading in [*Bancec*] that 'duly created instrumentalities of a foreign state are to be accorded a presumption of independent status.'").

In sum, the Act simply extends the government's comprehensive and constitutionally sound scheme of sanctions against Iran and the related remedies that Congress has created to compensate victims of Iran-sponsored terrorism.⁶ Accordingly, the Court should squarely reject Markazi's contention that the Act somehow trespasses upon its Article III powers.⁷

⁶ The irrelevant argument that Markazi devotes to the potential infirmities of § 503 of a prior, unadopted Senate version of the Act demonstrates Markazi's inability to show that the Act violates separation of powers principles. According to Markazi, § 503 of the unadopted Senate Bill would have offended the Constitution by purporting to decree that Iran's property interest in the Blocked Assets "shall be deemed to exist at every tier of securities intermediary" holding an interest in securities or financial assets. Markazi Supp. Mem. at 12 (quoting Senate Bill § 503). Congress, however, *removed* this provision of the Senate Bill from the Act. Markazi's account of the Act's history therefore illustrates how Congress crafted the Act so as *not* to violate separation of powers principles.

⁷ Markazi correctly recognizes (Markazi Supp. Mem. at 16) that the Second Circuit has already rejected its argument that Congressional expansion of the class of Iranian assets subject to execution is impermissibly retroactive. *Weinstein*, 609 F.3d at 50-51 (TRIA's rendering of the assets of Iran's agencies and instrumentalities subject to execution by terror victims did not make the statute unconstitutionally retroactive).

POINT III.

DEFENDANTS CANNOT ESTABLISH A FIFTH AMENDMENT TAKINGS DEFENSE TO TURNOVER

A. Clearstream Lacks Standing To Assert Its Constitutional Challenges to the Act

As an initial matter, Clearstream lacks standing to challenge the Act's constitutionality on any grounds because Clearstream does not own the Blocked Assets and cannot prove that turnover will cause it any injury. To establish standing, Article III and prudential standing doctrines require a party to show (1) an actual or imminent personal injury, (2) fairly traceable to the challenged conduct, that is (3) likely to be redressed by a favorable judicial decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).⁸ Clearstream cannot show an actual or imminent personal injury that is likely to be redressed by a favorable judicial decision because Markazi, *not* Clearstream, owns the Blocked Assets. *See* Plaintiffs' Reply Brief in Support of their Motion for Partial Summary Judgment at 14-18 and 19. Accordingly, Clearstream lacks standing to challenge Act's constitutionality.

B. Clearstream Has No Constitutionally Protected Interest In The Blocked Assets

Clearstream is merely one in a chain of securities intermediaries through which Markazi holds its 100% beneficial interest in the Blocked Assets. Under UCC Article 8, each securities intermediary must treat its customer as if that customer owns the financial asset. *See* UCC § 8-501, Official Comment 2.⁹ Thus, UCC § 8-505(b) obligates Citibank to pay the Blocked Assets

⁸ *See U.S. Federal Communications Com'n v. Cuevas*, 2000 WL 852308 at *5 (D. Conn. March 31, 2000) (defendants must demonstrate their standing to assert affirmative defenses challenging constitutionality of FCC regulations); *U.S. v. Dunifer*, 997 F. Supp. 1235, 1239-40 (N.D. Cal. 1998) (applying Article III and prudential standing requirements to defendant's affirmative defense challenging constitutionality of FCC regulation); *compare Barrows v. Jackson*, 346 U.S. 249 (1953) (applying prudential standing requirements to defendant's assertion of an affirmative defense challenging constitutionality of restrictive covenant in land deed) with *Wynn v. Carey*, 599 F.2d 193, 196 (7th Cir. 1979) (Article III standing doctrine applies only to plaintiffs).

⁹ The UCC's requirement that creditors serve process on the securities intermediary with whom the debtor maintains its securities account is consistent with the principle that each securities intermediary in a chain recognizes only its own customer. *See* Clearstream Supp. Mem. at 12 and n.30 (citing UCC § 8-112(c)). That rule, however, provides no support for Clearstream's claim that it maintains a property interest in the Blocked Assets. Clearstream also misconstrues *Sidwell & Co. v. Kamchatimpex*, 166 Misc.2d 639, 645, 632 N.Y.S.2d 455, 459 (1995), which found that a Russian intermediary bank obtained title to U.S. dollars in its correspondent account at

to Clearstream, which in turn must pay them only to its customer, UBAE. But Citibank's obligation to pay only Clearstream does not transform Clearstream into an owner of the Blocked Assets. To the contrary, UCC § 8-503(a) expressly provides that "all interests in [a] financial asset held by [a] securities intermediary ... are not property of the securities intermediary."

Not surprisingly, Clearstream cannot cite any authority finding that a securities intermediary holds a constitutionally protected property interest in a customer's financial asset.¹⁰ Instead, Clearstream mistakenly cites *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) as holding that a bank's promise to repay its depositor gives the depositor a constitutionally protected property interest in the bank account, irrespective of the beneficial ownership of the funds on deposit. *See* Clearstream Supp. Opp. at 11-12, 16.

The *Webb's* Court actually held that a Florida statute that required courts to retain interest earned on interpleader funds constituted an unconstitutional taking of property from the parties *to whom the court ultimately awarded the funds*. 449 U.S. at 160-163. The Court found that the property interest taken – the use of the funds – belonged to Webb's creditors. Critically, the Supreme Court did not hold that the Clerk of the Florida court, who deposited the interpleader funds into a bank account, maintained any property interest in the funds. *Id.* at 161.¹¹ Like the Clerk in *Webb*, Clearstream was (prior to the issuance of the Restraints and E.O. 13599) entitled to receive payment of the Blocked Assets from Citibank, but was required to pass those funds to others. Thus, the analogy that Clearstream draws between securities accounts and bank deposits

Citibank immediately upon crediting the equivalent amount to its customers' accounts in rubles. Clearstream has neither received the Blocked Assets from Citibank nor credited UBAE with the amount of those proceeds. Hence, *Sidwell* has no relevance here.

¹⁰ Thus, no basis exists for Clearstream's speculation that refusing to recognize the purported Fifth Amendment rights of securities intermediaries in property in which their customers hold a 100% beneficial interest will wreak havoc upon the bond markets. Those markets have long functioned efficiently although no court or commentator has recognized the "right" Clearstream posits. *See* Clearstream Supp. Mem. at 14.

¹¹ *Accord Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164, 172 (1998) (*cited in* Clearstream Supp. Mem. at 13) (client, rather than attorney, has constitutionally protected property interest in the use of client's funds on deposit in attorney's IOLTA account).

serves only to confirm that the Fifth Amendment protects the property interests of beneficial owners, not the rights of financial intermediaries to receive payments from accounts.

Even putting these issues aside, Clearstream cannot claim a constitutionally protected right to payments from Citibank because Iranian Transaction Regulations (“ITR”) in effect since 1995 have barred “U.S. Persons” from providing a service, whether directly or indirectly, to Iran or the Government of Iran. *See* 31 C.F.R. § 560.204, and 560.206.¹² Although Clearstream refused to disclose to Plaintiffs the dates when Markazi first invested in the bonds that the Court ultimately restrained, Markazi’s purchases could not have occurred before January 31, 2000, the earliest date that any of the bonds were first issued for distribution.¹³ Thus, both when Markazi initially purchased the relevant bonds and when it transferred them to the UBAE/Markazi Account (which, as Clearstream knew, Markazi controlled), Clearstream had no reasonable expectation that Citibank, JP Morgan Chase or any other U.S. Person would process payments or provide other financial services for Markazi because those actions were illegal. *See* Plaintiffs’ Reply SUF at ¶¶ 9-16, 19-21 (Vogel Reply Decl. at ¶¶ 12-13, 16, 19-23 and Exs. 5, 9-11, 13, 14(A)-(K); Vogel Decl., Ex. K at ¶¶ 5, 19-23, 26); Vogel Supp. Reply Decl., Ex. 46 at 6-14.

Notably, in a June 5, 2009 letter to UBAE marked “highly confidential,” Clearstream conceded its knowledge that any financial institution that provided such services for Markazi in the U.S. violated the ITRs. *See* Vogel Reply Decl. ISO MSJ, Ex. 14(G) (noting that fund transfers required to process payments on bonds held for Markazi violate 31 C.F.R. Part 560 to the extent that those transfers were performed by institutions that qualify as “U.S. Persons,”

¹² Plaintiffs provide a detailed explanation of the history of the Executive Orders that culminated in the enactment of the ITR and discuss the relevant ITR sections and their interpretation by OFAC and the courts in Plaintiffs’ Memorandum of Law in Opposition to Clearstream’s Second and Third Supplemental Memoranda to Vacate Restraints, dated November 11, 2010, at 40-46. Vogel Supp. Reply Decl., Ex. 46.

¹³ *See* Vogel Supp. Reply Decl., Ex. 45 (Clearstream spreadsheet that lists each of the bonds initially restrained by the Plaintiffs and their distribution dates). *See* Vogel Decl., Ex. 5 at 11:9-17, 20:6-9, 21-25, and 21:1-6.

including the depository of the securities, the cash correspondent bank and the paying agent).¹⁴

Prior to the issuance of the Restraints, the U.S. Persons that performed those functions with respect to the bonds that Markazi then held at Clearstream were Citibank as depository, JP Morgan Chase as correspondent bank and, on most of the bonds, Citibank as paying agent.¹⁵

IEEPA provides that “[i]t shall be unlawful for a person to violate, attempt to violate, conspire to violate, or *cause a violation of* any license, order, regulation, or prohibition issued under this title.” 50 U.S.C. § 1705(a) (emphasis added). Thus, IEEPA’s prohibitions apply to U.S. Persons who violate OFAC’s regulations *and* any entity that causes such a violation. Accordingly, Clearstream subjected itself to civil and criminal penalties by intentionally causing Citibank and JP Morgan Chase to violate the ITRs and IEEPA. 50 U.S.C. § 1705(b)-(c).

Because Clearstream’s efforts to obtain payments from U.S. Persons to Markazi violated criminal law, Clearstream does not have had a constitutionally protected interest in the Blocked Assets. *See, e.g., In re 650 Fifth Ave. and Related Props.*, 777 F.Supp.2d 529, 576 (S.D.N.Y. 2011) (“[T]he Supreme Court has held that an in rem forfeiture of property involved in criminal activity is not a taking for which just compensation is required.”); *National Petrochemical Co. of Iran v. The M/T Stolt Sheaf*, 722 F.Supp. 54, 55 (S.D.N.Y. 1989) (refusing to enforce contract by which an Iranian company subject to an embargo of exports from the United States tried to circumvent an executive order by entering scheme to purchase materials through a series of middlemen because “agreements that would violate foreign or forum laws, and agreements against the public policy of the forum, are all unenforceable” and “[t]he use of agents to effectuate such agreements does not alter their illegality”), *aff’d*, 930 F.2d 240 (2d Cir. 1991).

¹⁴ Although Clearstream’s letter referred to bonds other than the Blocked Assets that were also denominated in U.S. Dollars but custodized with U.S. Persons in Europe (Ex. 51 at pp. 12-14), the admissions equally apply to the Blocked Assets because of the crucial services that U.S. Persons provided in connection with those bonds.

¹⁵ *See* Vogel Decl. in Opp. to Clearstream’s Renewed Motion to Vacate Restraints, dated March 12, 2012, Ex. 18.

C. Turnover Of The Blocked Assets Will Not Effect A Taking Of Clearstream's Right To Payment From Citibank

Even if Clearstream's right to payment from Citibank were a constitutionally protected property interest – which it is not – the frustration of that right as a result of turnover of the Blocked Assets (which will relieve Citibank of its obligation to pay Clearstream¹⁶) does not qualify as a taking requiring just compensation. *See* Plaintiffs' Reply MOL ISO MFPSJ at 50-51.

Clearstream makes no effort to distinguish Plaintiffs' authorities regarding this issue. Moreover, its reliance upon *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) is unavailing. *Lucas* expressly limited its holding that a *per se* taking may arise when a regulation completely extinguishes the value of property to the real property context. 505 U.S. at 1009, 1027-28 (“by reason of the State’s traditionally high degree of control over commercial dealings, [the owner of personal property] ought to be aware of the possibility that new regulation might even render his property economically worthless...”); *see also, e.g., Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 441 (8th Cir. 2007) (“*Lucas* protects real property only”). Thus, *Lucas* is completely consistent with the cases that Plaintiffs cited in which courts found no taking although state action rendered personal property rights worthless.

Clearstream also fails to demonstrate that turnover of the Blocked Assets constitutes a regulatory taking under *Penn Central Transp. Co. v. N.Y.*, 438 U.S. 104, 124 (1978). *Id.* (the “factors that have particular significance” to takings determinations are “[1] economic impact of the regulation on the claimant ... [2] extent to which the regulation has interfered with distinct investment-backed expectations ... [and 3] the character of the governmental action”). Clearstream's claim that it will suffer substantial adverse economic impact from the loss of its right to receive payment from Citibank makes no sense in light of the contractual and statutory

¹⁶ *See Weininger v. Castro*, 462 F.Supp.2d 457, 499-503 (S.D.N.Y. 2006) (bank ordered to turn over blocked assets was entitled to interpleader relief from claims asserted by account holders).

provisions that relieve Clearstream from *any* obligation to its customer once the Court awards turnover of the Blocked Assets. *See* Plaintiffs' Reply MOL ISO MFPSJ at 21-23, 51.

Moreover, Clearstream's contention that these statutory and contractual provisions lack relevance defies both controlling law and common sense. In *Penn Central*, the Supreme Court held that rights that "undoubtedly mitigate whatever financial burdens the law has imposed ... are to be taken into account in considering the impact of regulation." *Penn Central*, 439 U.S. at 137 (landmarking that deprived owner of its rights to develop the air space above property was not a taking because the air rights were transferrable to other properties); *accord, e.g., Carolina Power & Light Co. v. U.S.*, 48 Fed.Cl. 35, 47 (2000) (no taking where electric utility could recoup from its customers the cost of statutorily mandated environmental clean-up).

The decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) provides no support for a contrary determination. The portion of the plurality opinion that Clearstream cites represents the views of only four out of nine justices. *See* Clearstream Supp. Mem. at 16. A majority of the *Eastern Enterprises* Court actually held that the case did not implicate the Takings Clause at all because the regulation at issue merely imposed an obligation to pay money and did not involve any interest in property. 524 U.S. at 540 (*per* Kennedy, J), 554 (*per* Breyer, Stevens, Souter and Ginsburg, JJ). Moreover, contrary to Clearstream's assertion, the four justices in the minority on this point did not suggest that "[a] contractual right to indemnification is irrelevant to a takings analysis." Clearstream Supp. Mem. at 16. Rather, they concluded that the mere "possibility" that the plaintiff may have been able to seek indemnification did not sufficiently mitigate the adverse economic impact of the regulation. *See Carolina Power*, 48 Fed.Cl. at 47 (distinguishing *Eastern Enterprises* because recoupment of the financial burden there had been "possible but not assured" whereas in *Carolina Power* it was "essentially guaranteed"). Here,

the UCC and Clearstream's contract with UBAE assure the complete elimination of any alleged financial burden on Clearstream. *See* Plaintiffs' Reply MOL ISO MFPSJ at 21-23, 51.

With respect to the second *Penn Central* factor – interference with the claimant's reasonable investment-backed expectations – Clearstream has not demonstrated that it invested any of its own resources in obtaining the right to payment of the Blocked Assets from Citibank. Moreover, at all times, the bonds that Clearstream deposited into its Citibank account remained Markazi's property. *See* UCC § 8-503(a); Pl. MOL ISO MFPSJ, dated April 2, 2012, at 10; Pl. Reply MOL ISO MFPSJ, dated August 3, 2012, at 3-19; Pl. Supp. MOL ISO MFPSJ, dated September 14, 2012, at 18-21. In any event, Clearstream could obtain payment for Markazi only by violating the ITRs. *See* pp. 13-15, *supra*. Thus, Clearstream's purported expectation that it could act as Markazi's U.S. securities intermediary free of interference by the U.S. government does not qualify as a reasonable "investment-backed" expectation protected by the Fifth Amendment. *See, e.g., Hodel v. Irving*, 481 U.S. 704, 715 (1987) (expressing doubt that Indian tribe members' expectations that they could devise their individual allotments of reservation land to their heirs were "investment-backed" to the extent that the allotments were unimproved and had been acquired by gift, descent or devise); pp. 13-15, *supra*.

Even putting aside the illegality of Clearstream's conduct under the ITRs, Clearstream's purported expectation was unreasonable as a matter of law. Takings jurisprudence leaves no doubt that "[t]hose who engage in international commerce do so in full awareness that ... the potential for Government involvement in international commerce remains an ever-present fact of life..." *Abraham-Youri v. U.S.*, 36 Fed.Cl. 482, 486, *aff'd*, 139 F.3d 1462 (Fed. Cir. 1997).¹⁷

Clearstream did not merely engage in run-of-the-mill international commerce. Rather, it

¹⁷ *Accord, e.g., 767 Third Ave. Assocs. v. U.S.*, 30 Fed.Cl. 216, 221 (1993) ("[T]hose who enter into contracts with foreign entities 'do so in light of one salient fact of economic life: that their ability to perform and compel performance is contingent upon the continuation of friendly relations between nations.'") (quoting *Chang v. U.S.*, 859 F.2d 893, 897 (Fed. Cir. 1988)), *aff'd*, 48 F.3d 1575 (Fed. Cir. 1995).

knowingly transacted business with the central bank of a U.S.-designated state sponsor of terrorism in violation of U.S. law. Thus, when Clearstream agreed to serve as securities intermediary with respect to the bonds that became the Blocked Assets, it should have anticipated that U.S. law might change in a way that would further affect its ability to pay the Blocked Assets to its customer.

The Third *Penn Central* factor – the character of the governmental action – also precludes Clearstream’s takings defense because “valid regulatory measures taken to serve substantial national security interests ... have not been recognized as compensable takings for Fifth Amendment purposes.” *Paradisiotis v. U.S.*, 304 F.3d 1271, 1275 (Fed. Cir. 2002). The Act unquestionably serves substantial national security interests. *See* Plaintiffs’ Supp. MOL ISO MFPSJ at 20. To advance national security, the government may take without compensation not only property belonging to the targets of economic sanctions, but also the property of U.S. citizens and friendly aliens like Clearstream.¹⁸ The government cannot sanction Markazi without preventing Clearstream from turning the Blocked Assets over to a terrorist state and its central bank. Thus, even if that government action effected a taking of Clearstream’s property – which it does not – it would nevertheless constitute a valid, constitutional exercise of federal power.

D. Markazi’s Supposed Takings Defenses Also Lack Merit

Markazi does not dispute the government’s power to appropriate private property in the interests of national security. Nevertheless, Markazi erroneously asserts that the Takings Clause and the Treaty of Amity prohibit Congress from passing legislation that provides for the turnover

¹⁸ *E.g.*, *Paradisiotis*, 304 F.3d at 1275 (Libyan designated terrorist); *Chang*, 859 F.2d at 894 (U.S. citizen); *Sardino v. Fed. Reserve Bank of N.Y.*, 361 F.2d 106, 112 (2d Cir. 1966) (government can seize the assets of a friendly alien without compensation to avoid the “depletion of dollar resources for the benefit of a government seeking to create a base for activities inimical to our national welfare”); *Hausler v. JPMorgan Chase Bank, N.A.*, 845 F.Supp.2d 553, 559, 576 (S.D.N.Y. 2012) (“*Hausler II*”) (turnover under TRIA of blocked EFTs did not effect an unconstitutional taking of the property of the banks and companies that claimed interests in the EFTs).

of the Blocked Assets because turnover: (1) will not serve a “public” use or purpose; and (2) will operate to “retroactively legalize Plaintiffs’ improper restraint of the assets at issue.”

Congress, however, maintains wide discretion to determine what constitutes a public purpose. *See* Plaintiffs’ Reply MOL ISO MFPSJ at 54. By making blocked assets available to the victims of Iranian terrorism, the Act (like TRIA) serves the important public purposes of “provid[ing] redress to victims of terrorism ... and discourag[ing] economic activity involving American financial institutions benefiting terrorist entities.” *Hausler II*, 845 F.Supp.2d at 576; *see also* Plaintiffs’ Supp. MOL ISO MFPSJ at 20.

Contrary to Markazi’s contention, *In re 650 Fifth Ave. and Related Props.*, 777 F.Supp.2d 529, 576-77 (S.D.N.Y. 2011) provides no basis for distinguishing between the forfeiture or blocking of assets, on the one hand, and their distribution to victims of terrorism, on the other. *See* Markazi Supp. Opp. at 19. The court actually found that neither the forfeiture of assets nor the proposed distribution of the forfeited assets to Iran’s judgment creditors violated the Fifth Amendment. 777 F.Supp.2d at 576-77 (“[I]f forfeiture itself advances [the goal of combating the threat Iran poses to the U.S.], distributing the assets to the victims of the very threat that IEEPA is designed to combat would seem to advance the same goal.”).

Similarly, *Hausler II* ruled that “once assets are blocked, parties with an interest in those assets have no reasonable expectation that their interests will not be diminished or extinguished.” 845 F.Supp.2d at 574. For that reason, once President Obama exercised his authority to block the Blocked Assets – a step Markazi has never challenged – Markazi maintained no reasonable expectation of retaining its interest in the Blocked Assets.

Markazi’s “improper restraints” argument also provides no takings defense. According to Markazi’s theory, its property has been taken in violation of the Fifth Amendment and the Treaty of Amity because Plaintiffs’ allegedly “improper restraints” prevented Markazi from

removing the Blocked Assets from the United States before the President issued E.O. 13599. The short answer to this argument is that the Court has already determined that the Restraints were appropriate.

Even assuming that the Court erred in issuing the Restraints before E.O. 13599's adoption, Markazi could not assert a viable takings defense given: (a) the illegality of Clearstream's efforts to obtain payment for Markazi (*see pp. 13-15, supra*); and (b) that "actions taken for national security reasons to freeze the assets of, or prohibit transactions by, foreign entities ... [do] not violate[] the Takings Clause" (*Paradissiotis*, 304 F.3d at 1274). No court has ever considered the reason why assets were present in the United States, and thus subject to blocking or freezing, a relevant factor in a takings analysis. *See Hausler II*, 845 F.Supp.2d at 559-561, 576-77 (no Fifth Amendment violation where TRIA permitted turnover of EFTs that were routed through U.S. banks, and made subject to blocking, only because of clerical errors).

Contrary to Markazi's assertion, the fact that the U.S.-based property of the Iranian bank defendant in *Weinstein*, 609 F.3d at 43 (Bank Melli) was not restrained or attached pre-blocking does not render *Weinstein* distinguishable. *Weinstein* squarely held that the Takings Clause did not impede the plaintiffs' ability to attach Bank Melli's property to satisfy a judgment against Iran because the bank qualified as an instrumentality of Iran under TRIA. 609 F.3d at 54.

Weinstein also rejected Bank Melli's takings arguments because its own conduct "opened it to liability for judgments already entered against Iran." 609 F.3d at 54. Similarly, E.O. 13599 blocked Markazi's assets because of its "deceptive practices ... to conceal transactions of sanctioned parties." E.O. 13599, Preamble. Thus, like Bank Melli, when Markazi engaged in its deceptive practices, it "had clear notice from the TRIA ... that such actions could ... subject [its assets] to attachment." 609 F.3d at 54. Moreover, once its assets were blocked by E.O. 13599, Markazi "could not have had a reasonable expectation that the Blocked [Assets] would be

blocked indefinitely and maintained in safe-keeping, available only to [it].” *Hausler II*, 845 F.Supp.2d at 578 (applying TRIA to assets frozen before its passage).¹⁹

POINT IV.

CLEARSTREAM CANNOT ESTABLISH THAT THE ACT VIOLATES ITS FIFTH AMENDMENT EQUAL PROTECTION RIGHTS

Clearstream also misses the mark with its vague assertions that the Act violates Clearstream’s Equal Protection rights. When faced with Equal Protection challenges, courts follow the “general rule” “that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is *rationally related* to a legitimate state interest.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (emphasis added). That presumption holds equally true where, as here, a statute affects only a small number of entities. *E.g., Atonio v. Wards Cove Packing Co.*, 10 F.3d 1485, 1495 (9th Cir. 1993) (“[W]e generally lack authority to invalidate a public law under the rational basis test merely because that law narrowly targets one or a few individuals.”).

Clearstream bases its contention that the Act improperly discriminates against foreign intermediaries upon the faulty premise that no meaningful difference exists between the foreign entities and their American counterparts. That contention ignores Clearstream’s assertion that Plaintiffs cannot execute against the Blocked Assets because they are located in Clearstream’s home jurisdiction of Luxembourg, not the United States, where Plaintiffs could easily access them. Only a foreign institution could assert this supposed “defense.” Thus, the distinction that Congress made between foreign and domestic securities intermediaries is entirely rational.

¹⁹ Markazi misplaces its reliance upon *Weinstein v. Islamic Republic of Iran*, 299 F.Supp.2d 63, 75-76 (E.D.N.Y. 2004). *See* Markazi Supp. Opp. at 20. The *Weinstein* court held that accounts of Bank Melli and two other Iranian banks at the Bank of New York were not subject to attachment under TRIA because they did not qualify as “blocked assets.” *See id.* at 74-76. Here, by contrast, Defendants do not dispute that E.O. 13599 blocked the relevant assets, which therefore qualify as “blocked assets” under TRIA and the Act.

Clearstream also cannot build a viable defense upon the “class of one” Equal Protection standards that the Supreme Court articulated in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). Class of one violations exist only where a party “‘has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.’” *Analytical Diagnostic Labs, Inc. v. Kusel*, 626 F.3d 135, 139 (2d Cir. 2010) (quoting *Olech*, 528 U.S. at 564). A party can establish “‘intentional disparate treatment’” only where “‘the decisionmakers were aware that there were other similarly-situated individuals who were treated differently.’” *Analytical Diagnostic*, 626 F.3d at 143 (quoting *Giordano v. City of New York*, 274 F.3d 740, 751 (2d Cir. 2001)).

Furthermore, to prove unconstitutionally disparate treatment, “[c]lass-of-one plaintiffs must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves.” *Ruston v. Town Bd. for Town of Skaneateles*, 610 F.3d 55, 59-60 (2d Cir. 2010) (quoting *Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006)). “Indeed, the plaintiff and his comparators must be ‘*prima facie* identical in all relevant respects.’” *Casciani v. Nesbitt*, 659 F.Supp.2d 427, 456 (W.D.N.Y. 2009) (quoting *Neilson v. D’Angelis*, 409 F.3d 100, 105 (2d Cir. 2005), *overruled on other grounds*, *Appel v. Spiridon*, 531 F.3d 138, 139-40 (2d Cir. 2008) (citation and quotation marks omitted)).

Clearstream makes no effort to establish any of these difficult-to-prove facts. *See, e.g., Woodruff v. Mason*, 542 F.3d 545, 554 (7th Cir. 2008) (emphasizing “that it is ‘difficult’ to succeed on a ‘class of one’ theory”) (citation omitted). First, Clearstream points to no “similarly situated” entities, let alone demonstrates that Congress intentionally treated Clearstream differently from those entities.

For example, Clearstream never identifies another financial institution that: (a) conducted extensive operations in the United States while serving as a securities custodian for Iran and

Markazi; (b) conducted illegal transactions on behalf of Iran and Markazi in violation of the ITR that involved billions of dollars in securities held for safekeeping in the United States; nor (c) sought to evade a turnover order related to billions of dollars beneficially owned by a terrorist state by asserting hypertechnical supposed state law “defenses” concerning the ownership of “securities entitlements” that would undermine the effectiveness of the civil and criminal anti-terrorism laws that Congress has adopted. Accordingly, Clearstream has not come close to sustaining its burden of establishing that it is “*prima facie* identical in all relevant respects” to the unidentified comparator entities.²⁰

Even had Clearstream raised a question of fact regarding whether Congress knowingly treated “similarly situated” entities in a manner different from Clearstream, the supposed Equal Protection defense would fail because Clearstream cannot establish that Congress lacked a “rational basis” for adopting the Act. To succeed in that regard, Clearstream’s “evidence must be such that it allows a reasonable jury to ‘eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification.’” *RJB Properties, Inc. v. Board of Educ. of City of Chicago*, 468 F.3d 1005, 1010 (7th Cir. 2006) (quoting *Discovery House, Inc. v. Consolidated City of Indianapolis*, 319 F.3d 277, 283 (7th Cir. 2003)).

Multiple compelling – not merely rational – bases exist for adopting the Act. Most obviously, the legislation eliminates esoteric supposed state law defenses to the turnover of assets that are 100% owned by a terrorist state to the victims of Iranian terrorism, including Marines and Air Force servicemen involved in peacekeeping operations. Furthermore, forcing

²⁰ See, e.g., *Analytical Diagnostic*, 626 F.3d at 143 (laboratory subject to intense investigatory scrutiny could not establish that it was “similarly situated” to other laboratories when it failed to produce evidence concerning the other laboratories’ “regulatory histories or whether they were similar to [the plaintiff] in [other] relevant respects”); *Ruston*, 610 F.3d at 60 (in action involving denial of permit to proceed with a 14-home real estate development, commercial properties and single homes did not provide appropriate comparators); *Griffin Industries, Inc. v. Irvin*, 496 F.3d 1189, 1206 (11th Cir. 2007) (“In evaluating whether a regulator has treated two facilities differently, all three points – recent substantial changes in the volume of industrial activity, high levels of citizen complaints, and pressure from local politicians – are relevant in the comparison.”).

Iran to compensate Plaintiffs for its terrorist activity is intended to deter future Iranian terrorism.²¹ Congress could also rationally determine that Iran should not escape the turnover of assets in which it holds a 100% ownership interest although those funds are housed in America's largest financial institution within walking distance of the Southern District courthouse. Courts have continually found far less compelling bases for government action sufficiently "rational" to defeat Equal Protection challenges.²²

In sharp contrast to this case, the Equal Protection decisions that Clearstream cites involved circumstances where the government treated factually indistinguishable entities differently, rather than legislation that actually guaranteed that all parties would face identical obligations. *See Olech*, 528 U.S. at 565 (village could not demand a larger easement from one homeowner in exchange for connecting her to water supply than the village required from all other, factually indistinguishable, residents); *F.S. Royster Guano Co. v. Commonwealth of Virginia*, 253 U.S. 412, 415-17 (1920) (Virginia could not maintain a discriminatory tax scheme that treated Virginia companies that did business in the state differently from Virginia companies that did not with respect to income derived from factually indistinguishable out-of-state activities); *Fortress Bible Church v. Feiner*, 694 F.3d 208, 221-24 (2d Cir. 2012) (church

²¹ *See Hausler v. JPMorgan Chase Bank, N.A.*, 845 F. Supp. 2d 553, 563 (S.D.N.Y. 2012) ("Congress's purpose in enacting the TRIA was to address foreign policy goals such as deterring acts of terrorism and restricting the economic activity of terrorist parties."); *and, Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 15 (D.D.C. 1998) ("Congressional intent and legislative purpose demonstrate that 28 U.S.C. § 1605(a)(7)" is intended "to affect the conduct of terrorist states outside the United States, in order to promote the safety of United States citizens traveling overseas.")

²² *E.g., Racine Charter One, Inc. v. Racine Unified School Dist.*, 424 F.3d 677, 681 (7th Cir. 2005) (fact that busing students to charter school would impose additional cost provided a rational basis for refusing to provide transportation to those students); *Warren v. City of Athens, Ohio*, 411 F.3d 697, 711 (6th Cir. 2005) (rational basis existed for decision to erect barricades that cut off access to plaintiff restaurant's drive-through window where responding to citizen complaints regarding safety issues "constituted at least one conceivable basis for the placement of the barricades"); *SeaRiver Maritime Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 680 (9th Cir. 2002) (tanker's previous oil spill in waterway provided an acceptable basis for excluding only that tanker from the waterway because it was "rational for Congress to use this past disaster as a measure of future performance"); *RJB Properties*, 468 F.3d at 1010 (contractor failed to establish a class of one violation although it "offered evidence that the [government] continues to do business with other companies that the [government] investigated for misconduct" because the plaintiff "has not pointed to a company that has been accused of the same types of wrongdoing").

established class of one claim by demonstrating in detail that town treated the approval of church's real estate development project differently from all comparable projects).

POINT V.

THE ACT IS NOT AN UNCONSTITUTIONAL BILL OF ATTAINDER

A. Clearstream Cannot Bear Its Burden Of Making Any Of The Three Showings Required To Establish An Unconstitutional Bill of Attainder

To establish an unconstitutional bill of attainder, Clearstream must demonstrate that the Act: “[1] legislatively determines guilt and [2] inflicts punishment upon an identifiable individual [3] without provision of the protections of a judicial trial.” *Nixon v. Adm'r of Gen. Services*, 433 U.S. 425, 468 (1977). Clearstream cannot meet its burden of proof with respect to any of these elements.

1. The Act Does Not Involve A Legislative Determination That Clearstream Is Guilty Of Wrongdoing

An “indispensable element of a bill of attainder is its retrospective focus: it defines past conduct as wrongdoing and then imposes punishment on that past conduct.... Such a bill attributes guilt to the party or parties singled out in the legislation.” *Consol. Edison Co. v. Pataki*, 292 F.3d 338, 349 (2d Cir. 2002) (“*ConEd*”) (citing, *inter alia*, *Nixon*, 433 U.S. at 472-73); *see also ACORN v. U.S.*, 618 F.3d 125, 136 (2d Cir. 2010) (“The distinguishing feature of a bill of attainder is the initial determination by the legislature of “guilt.””) (quoting *De Veau v. Braisted*, 363 U.S. 144, 160 (1960)). The Act is not a bill of attainder because it does not retrospectively define any past conduct of Clearstream – or of anyone else for that matter – as wrongdoing. Rather, the Act provides for the enforcement of compensatory damages awards that were entered against Iran after judicial determinations that Iran was responsible for causing the deaths and personal injuries of U.S. citizens.

In this respect, the Act is distinguishable from the cases cited by Clearstream, where the U.S. Congress and the N.Y. Legislative Assembly purported to make extra-judicial determinations that identified individuals and entities were guilty of wrongdoing, and sought to overturn judicial determinations in three specific cases. *See* Clearstream Supp. Opp. at 19-21 (citing *ConEd*, 292 F.3d at 349 (statute recited N.Y. legislature’s determination that ConEd had failed to exercise reasonable care in the operation of nuclear power plant); *Foretich v. U.S.*, 351 F.3d 1198, 1223 (D.C. Cir. 2003) (statute memorialized judgment by the U.S. Congress that Dr. Foretich was guilty of sexually abusing his daughter); *McMullen v. U.S.*, 953 F.2d 761, 766 (2d Cir. 1992) (treaty’s purpose was to reverse judicial decisions that McMullen and two others were not extraditable)). Nothing in the Act involves “‘Congress ... encroaching on the judicial function of punishing an individual for blameworthy offenses.’” *McMullen*, 953 F.2d at 768 (quoting *Nixon*, 433 U.S. at 479)).

2. The Act Does Not Inflict Punishment On Clearstream

Even assuming for purposes of argument that the Act targets Clearstream – rather than Iran (which it expressly mentions) or Markazi (which is the beneficial owner of the Blocked Assets) – “[t]o invalidate legislation as a bill of attainder, the Bill of Attainder Clause ‘requires not merely “singling out” but also **punishment**.’” *ConEd*, 292 F.3d at 349 (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995)) (emphasis in original). As an initial matter, the fact that Clearstream will not suffer any economic detriment as a result of turnover of the Blocked Assets to Plaintiffs necessarily precludes a finding that the Act penalizes Clearstream. *See* Point III.B. Even if that were not the case, Clearstream cannot demonstrate that any burden the Act allegedly imposes upon it qualifies as a forbidden legislative punishment. *See Nixon*, 433 U.S. at 742 (“Forbidden legislative punishment is not involved merely because the Act imposes burdensome consequences.”).

The Supreme Court has articulated three factors for determining whether a statute is punitive: “(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish.” *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852 (1984). With respect to the first factor, Clearstream’s claim that “confiscation” of its cash “falls within the historical meaning of punishment” is unavailing. *See* Clearstream Supp. Opp. at 21. While “the punitive confiscation of property by the sovereign” is a traditional punishment (*Nixon*, 433 U.S. at 474), the purpose of the Act’s alleged “confiscation” of the Blocked Assets is not punitive but compensatory: specifically, “to ensure that Iran is held accountable for paying the [Plaintiffs’] judgments.” 22 U.S.C. § 8772(a)(2); *see, e.g., U.S. v. Roberts*, 221 F.3d 1340 (Table), 2000 WL 915113, at *2 (7th Cir. June 19, 2000) (statutory obligation to pay restitution to crime victim unlikely to be “punishment” for bill of attainder purposes); *U.S. v. Monsanto Co.*, 858 F.2d 160, 174-75 (4th Cir. 1988) (CERCLA not a bill of attainder because it “does not exact punishment. Rather it creates a reimbursement obligation on any person judicially determined responsible for the costs of remedying hazardous conditions at a waste disposal facility.”).

With respect to the second factor – the functional test – Clearstream has failed to demonstrate that the burden allegedly imposed upon it is disproportionate to the Act’s nonpunitive purposes of deterring further Iranian terrorism and ensuring that Iran pays Plaintiffs’ judgments. *Compare, e.g., ConEd*, 292 F.3d at 354 (finding punishment where “the legislature piled on a burden that was obviously disproportionate to the harm caused”); *Foretich*, 351 F.3d at 1223 (finding punishment where legislative means did not appear rationally to further the alleged purpose and “extraordinary imbalance” existed between burden imposed and alleged

nonpunitive purpose) *with, e.g., ACORN*, 618 F.3d at 141 (legislation banning ACORN from receiving federal funds was “not so out of proportion to its purported non-punitive goal of protecting public funds from future fraud and waste as to render the funding pans punitive in nature”). Finally, with respect to the third factor, Clearstream cites no evidence of a legislative intent to punish Clearstream. To the contrary, Clearstream cites the Congressional Record as evidencing an intent to ““allow assets seized from the Iranian Government to be allocated to the Beirut and Khobar Towers families to recover the judgments owed to them.”” Clearstream Supp. Opp. at 14-15.

3. The Act Provides Clearstream With The Protections Of A Judicial Trial

Clearstream also cannot demonstrate the third element necessary to establish a bill of attainder defense, *i.e.*, that the Act “fails to provide the protection of judicial process.” *Nixon*, 433 U.S. at 468. Before Plaintiffs can obtain turnover of the Blocked Assets, they must make – before this Court – all of the factual and legal showings discussed in their Supplemental Brief. Thus, the Act in no way interferes with the ability of any party – much less Clearstream – to obtain a trial prior to any determination regarding the turnover of the Blocked Assets. For this reason also, Clearstream’s bill of attainder argument fails.

B. The Act Cannot Constitute An Unconstitutional Bill Of Attainder Because It Validly Exercises Congress’ Foreign Affairs Powers

The Act is not an unconstitutional bill of attainder for the further reason that it is a valid exercise of Congress’ foreign affairs powers against a terrorist party. Even where, unlike the Act involved here, a statute directly targets U.S. citizens for punishment for associating with a terrorist party, this Court has held that such a statute does not constitute a bill of attainder. *See Mendelsohn v. Meese*, 695 F.Supp. 1474, 1488- 89 (S.D.N.Y. 1988) (denying a bill of attainder challenge by a group of American citizens to legislation imposing restrictions upon the PLO’s

activities in the U.S. and Americans' interactions with the PLO, even though the legislation aimed to punish not only the PLO, but also American citizens representing the PLO, because the legislation was "an exercise of Congress' foreign affairs powers" against an entity that Congress declared to be "a terrorist organization" and because "the PLO, as a foreign entity, stands outside the structure of our constitutional system.").

Here, as Plaintiffs demonstrate above, Congress adopted the Act to advance the U.S.' interests in preventing Iran from developing nuclear weapons and to facilitate the payment of damages to victims of Iranian terrorism. Because the Act does not even target Clearstream for punishment, this case provides a far more compelling basis than *Mendelsohn* for upholding the exercise of Congress' foreign affairs powers against a bill of attainder challenge.

POINT VI.

THE ACT DOES NOT VIOLATE THE EX POST FACTO CLAUSE

Clearstream's also fails to establish that the Act constitutes impermissible "punishment" under the Ex Post Facto Clause. "'Ex post facto' is a term of art applicable only to 'punishment' – legislative action that retroactively 'punishes as a crime an act previously committed, which was innocent when done,' 'makes more burdensome the punishment for a crime, after its commission,' or 'deprives one charged with crime of any defense available according to law at the time when the act was committed.'" *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F. 3d 748, 762 (2d Cir. 1998) (quoting *Doe v. Pataki*, 120 F.3d 1263, 1272 (2d Cir. 1997)).

Thus, that prohibition applies only to *penal* statutes that exact punishment, not to remedial civil legislation like the Act. *E.g.*, *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 132 (2d Cir. 2005) (no applicability to civil deportation legislation); *U.S. v. Monsanto Co.*, 858 F.2d 160, 174-75 (4th Cir. 1988) (no Ex Post Facto violation because "CERCLA does not exact punishment" or operate as "a criminal penalty or a punitive deterrent," but rather "creates a

reimbursement obligation on any person judicially determined responsible for the costs of remedying hazardous conditions”). “Where penalties are presented as civil rather than criminal, there can be no ex post facto issue without ‘the clearest proof’ that ‘the statutory scheme was so punitive in purpose or effect as to negate’ the legislature’s designation of the law as civil.” *Rein v. Socialist People’s Libyan Arab Jamahiriya*, 162 F.3d 748, 762 (2d Cir. 1998) (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)); accord, e.g., *Smith v. Doe*, 538 U.S. 84, 92 (2003).

“[I]f a disability is imposed ‘not to punish, but to accomplish some other legitimate governmental purpose,’ then it has been considered ‘nonpenal.’” *Pataki*, 120 F.3d at 1274 (quoting *Trop v. Dulles*, 356 U.S. 86, 96 (1958)).²³ Moreover, “whether a sanction constitutes punishment is not determined from the defendant’s perspective, as even remedial sanctions carry the ‘sting of punishment.’” *Pataki*, 120 F.3d at 1279 (quoting *Montana v. Kurth Ranch*, 511 U.S. 767, 777 n.14 (1994)). Thus, “a statutory scheme that serves a regulatory purpose ‘is not punishment even though it may bear harshly on one affected.’” *Id.* at 1279 (quoting *Flemming v. Nestor*, 363 U.S. 603, 614 (1960)). Indeed, “[n]umerous statutes imposing exceedingly harsh disabilities have been upheld against ex post facto challenges.”²⁴

The Act easily survives Clearstream’s Ex Post Facto challenge under these permissive standards. Congress designated the statute as civil in nature. Moreover, as Plaintiffs establish above, the Act advances significant government interests, including deterring Iran’s terrorism and efforts at nuclear proliferation and providing an avenue for Iran’s victims to achieve redress

²³ Clearstream relies exclusively on the Supreme Court’s 1866 decision in *Cummings v. Missouri*, 71 U.S. 277, 325-26 (1866), where the Court held only that a law imposing permanent disqualification from certain vocations with no remedial purpose violated the ex post facto clause. *Cummings* invalidated a law that imposed imprisonment until a fine was paid and barred a priest from his ministry for failing to subscribe to a post-Civil War loyalty oath. *Id.* The Court noted that it was clear that the oath was enacted not to ensure the fitness of those who practice various professions but to “inflict punishment” on persons who had sided with the Confederacy. *Id.* at 319-20.

²⁴ *Pataki*, 120 F.3d at 1279; see, e.g., *Kansas v. Hendricks*, 521 U.S. 346, 369-70 (1997) (commitment of sex offenders with “mental abnormality”); *Nestor*, 363 U.S. at 612-21 (termination of vested old age social security benefits of eligible persons deported for participating in communist activities); *Hawker v. People of New York*, 170 U.S. 189, 196 (1898) (prohibition of physicians, convicted of felony, from practicing medicine).

for their injuries. Accordingly, Clearstream falls far short of providing the requisite “clearest proof” that the Act imposes an impermissible “criminal penalty.”

POINT VII.

THE TREATY OF AMITY POSES NO OBSTACLE TO TURNOVER

A. 22 U.S.C. § 8772 Trumps The Treaty Of Amity’s Terms

The ruling in *Weinstein v. Islamic Republic of Iran*, 624 F.Supp.2d 272 (E.D.N.Y. 2009), *aff’d*, 609 F.3d 43 (2d Cir. 2010), makes clear that the later-enacted 22 U.S.C. § 8772 trumps any conflicting provisions of the Treaty of Amity between the U.S. and Iran (the “Treaty”). Finding that TRIA’s “notwithstanding any other provision of law” language was a clear expression of Congress’s intent that TRIA supersede all other laws, the *Weinstein* court held that “to the extent that TRIA § 201(a) may conflict with Article III(1) of the Treaty of Amity, the TRIA would ‘trump’ the Treaty of Amity.”²⁵ That ruling is consistent with prior Supreme Court precedent. *See Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) (noting that the Courts of Appeals have regularly interpreted such “notwithstanding” provisions to “supersede all other laws”); *see also Hill v. Republic of Iraq*, 2003 U.S. Dist. LEXIS 3725, at *10 (D.D.C. Mar. 11, 2003) (the use of the phrase “notwithstanding any other provision of law” in a statute is “unambiguous and effectively supersedes all previous laws”).²⁶

TRIA and § 8772 contain identical “notwithstanding any provision of law” language.

Markazi nonetheless claims that § 8772’s language does not abrogate the Treaty because § 8772

²⁵ 624 F.Supp.2d at 275 (citing *United States v. Yousef*, 327 F.3d 56, 110 (2d Cir. 2003) (recognizing Supreme Court holdings that subsequent legislative acts trump treaty-made international law) and *Breard v. Greene*, 523 U.S. 371, 376 (1998) (“when a statute which is subsequent in time to a treaty is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null”)).

²⁶ *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) is distinguishable because it dealt with the effect of the repeal of an existing law on an existing treaty. It did not construe the effect of language of a new statute on a prior treaty, as is the case here. Moreover, the Supreme Court decisions in *Breard* and *Cisneros*, were issued after *Trans World* and hold that “notwithstanding” language is a clear indication of Congressional intent to abrogate a treaty.

has *additional* language related to preemption that does not specifically mention the Treaty. Specifically, § 8772 provides: “notwithstanding any other provision of law, *including any provision of law relating to sovereign immunity, and preempting any inconsistent provision of State law,*” while TRIA excludes the emphasized text. *See* 28 U.S.C. § 1610 (note). By emphasizing that the preemptive effect of the “notwithstanding” clause included in § 8772 extended to the law related to supposed sovereign immunity and U.C.C. defenses (matters that Defendants had contested with respect to Plaintiffs’ TRIA claims), Congress did not in any way limit the general applicability of the “notwithstanding” language, or otherwise undermine *Weinstein*’s unequivocal holding or the Supreme Court precedent holding that identical “notwithstanding” language preempted the terms of previously enacted treaties. As a result, *Weinstein* is the death knell to Markazi’s efforts to invoke the Treaty as a defense to Plaintiffs’ claims under the Act.

**B. The Act Is A Permissible Exercise Of The U.S.’s Right
Under The Treaty To Protect National Security**

Even if the Treaty were not abrogated by § 8772’s preemptive “notwithstanding” language, the Treaty expressly permits measures – such as the Act – that the U.S. deems necessary to maintain or restore international peace and security, or to protect its essential security interests. *See* Treaty at Article XX.1. The Act serves all of those salient purposes. *See* 22 U.S.C. § 8711; 22 U.S.C. § 8772(a)(2); *see also, e.g., Paradissiotis*, 304 F.3d at 1274 (Libyan sanctions were reasonable measures taken to advance the national security of the United States); *Weinstein*, 624 F.Supp.2d at 277 (blocking assets in response to Iran’s efforts to develop weapons of mass destruction constituted a reasonable measure taken to advance U.S. security

interests).²⁷ Accordingly, the Act is a permissible response to Iranian actions that threaten U.S. national security under Article XX.1 of the Treaty.

C. 22 U.S.C. § 8772 Does Not Violate the Treaty's Requirement of Fair and Equitable Treatment

Article IV.1 of the Treaty, which requires the U.S. “to accord fair and equitable treatment to nationals and companies of Iran and to their property and enterprises” does not impede the Act’s applicability because Markazi had no legitimate expectation that it could utilize the American financial system for its profit. Markazi contends that “fair and equitable treatment” requires “states to afford foreign parties a predictable and stable legal environment that protects their *legitimate expectations* and complies with the rule of law.” Markazi Supp. Opp. at 24 (emphasis added). Even assuming that this standard applies here, Markazi lacks the required *legitimate* expectation that the Blocked Assets would be protected and any impediments it now faces were entirely foreseeable as a result of its own unlawful misconduct. *See pp. 13-15, supra.*

Executive Orders and OFAC regulations prohibiting or limiting the interactions of U.S. persons with Iran and blocking assets in which Iran or Iranian entities or nationals have an interest have been in effect since November 1979. Markazi has admitted that it was well aware of the laws that prohibited its investments in the U.S.²⁸ At all relevant times, Markazi knew that the Blocked Assets were invested with a U.S. financial institution in violation of U.S. sanctions. *See* Plaintiffs’ Reply SUF at ¶ 20 (Vogel Reply Decl. at ¶¶ 21-22 and Exs. 13 and 14(A)-(K)). Markazi also knew of the potential for new sanctions and that OFAC had pressured Clearstream

²⁷ The Act deals with “blocked assets” seized or frozen under IEEPA. 22 U.S.C. § 8772(d)(1)(A). Thus, its goal is necessarily “to deal with an unusual and extraordinary threat ... to the national security ... of the United States.” 50 U.S.C. § 1701(a). *See also* E.O. 13599 (“the actions and policies of the Government of Iran constitute an unusual and extraordinary threat to the national security, foreign policy and economy of the United States ...”).

²⁸ *See* Vogel Decl., Ex. K at ¶¶ 18-22 [Aff. of Ali Asghar Massoumi, Head of Markazi’s Foreign Exchange Negotiable Securities Section] (acknowledging that, as early as 1995, Markazi was aware of U.S. sanctions that limited the ability of U.S. banks to maintain direct dealings with Iranian banks and that, in late 2007, Clearstream notified Markazi that pending U.S. sanctions made it impossible for Markazi to deal with U.S. banks directly or indirectly); Plaintiffs’ Reply SUF at ¶¶ 12-13 (Vogel Decl. at ¶¶ 5, 19-23 and Ex. K).

to stop doing business with Markazi. *See* Plaintiffs' Reply SUF at ¶¶ 11-12 (Vogel Reply Decl. at ¶ 13 and Ex. 10; Vogel Decl. at ¶¶ 5, 19-22 and Ex. K). In fact, Markazi willfully took active steps in early 2008 to circumvent the U.S. sanctions so that it could continue to invest in securities denominated in U.S. dollars that were immobilized, custodized and maintained for safekeeping in New York City with U.S. financial institutions. *See* Vogel Decl., Ex. K.

Markazi thus had no legitimate expectation that it could protect its assets from seizure in the U.S. by concealing its investment in the Blocked Assets by employing UBAE and Clearstream as intermediaries. Accordingly, § 8772 does not treat Markazi unfairly or inequitably in violation of Article IV.1 of the Treaty. *See Paradissiotis*, 304 F.3d at 1276 (officer of a Libyan agency had no legitimate expectation of recovering his assets blocked in the U.S. because he "took the risk – a big risk, in light of the high visibility of the Libyan sanctions regime – that his involvement with a Libyan-controlled corporation would result in loss of access to his United States assets . . . [and] his risk-taking turned out badly...").

D. Retroactive Application Of 22 U.S.C. § 8772 Does Not Breach Article IV.1 Of The Treaty

Markazi badly mischaracterizes *Landgraf v. USE Film Products*, 511 U.S. 244 (1994), which concerned whether a new statute, *in the absence of guiding instructions from Congress*, should apply to cases arising before its enactment. *Landgraf's* holding is not relevant here because Congress clearly expressed in § 8772 that the statute applies to the Blocked Assets at issue in this pre-existing case. Moreover, retroactive application of § 8772 serves "entirely benign and legitimate purposes" of "respond[ing] to emergencies." *Landgraf*, 511 U.S. at 267-268. E.O. 13599 makes clear that President Obama blocked the Blocked Assets to address the national emergency related to Iran's efforts to obtain weapons of mass destruction first declared by President Clinton on March 15, 1995 by means of Executive Order 12957.

E. 22 U.S.C. § 8772 Does Not Discriminate Against Markazi In Contravention Of The Treaty

Markazi claims that § 8772 is discriminatory and breaches provisions of the Treaty because it results in dissimilar treatment of Markazi when compared with other central banks. Markazi Supp. Opp. at 25. That contention ignores that Markazi's disparate treatment arises from its own rogue status and unlawful conduct, neither of which the Treaty protects. *See* Plaintiffs' Reply SUF at ¶¶ 9-21 (Vogel Reply Decl. at ¶¶ 12-13, 16, 18-23 and Exs. 5, 9-11, 13, 14(A)-(K); Vogel Decl. at ¶¶ 5, 19-23, 26, 29-30 and Ex. K).

Article IV.1 of the Treaty provides that Iran and the U.S. "shall refrain from applying unreasonable or discriminatory measures that would impair their *legally* acquired rights and interests." The Blocked Assets were maintained in the U.S. only through the unlawful efforts of Markazi and its agents. *See* pp. 13-15. Furthermore, a host of entirely reasonable, non-discriminatory bases exist for Congress' decision to adopt the Act and to direct sanctions against Markazi, including: (a) Markazi's efforts to aid the financing of terrorism and proliferation of weapons of mass destruction²⁹; and (b) Congress's desire to compel "Iran to abandon efforts to acquire a nuclear weapons capability and other threatening activities" (22 U.S.C. § 8711). Thus, Markazi cannot establish that the Act is "unreasonable or discriminatory" (other money launderers and supporters of terrorist states are subject to similar sanctions) or that the Act impairs Markazi's "*legally acquired* rights."

²⁹ *See Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act Regulations – Imposition of Special Measure Against the Islamic Republic of Iran as a Jurisdiction of Primary Money Laundering Concern*, 76 Fed. Reg. 228 (Nov. 28, 2011) (to be codified at 31 C.F.R. Part 1060); Executive Order 13599.

CONCLUSION

For all of the additional reasons set forth above and in Plaintiffs' Supplemental Memorandum in Support of Their Motion for Summary Judgment, the Court should grant Plaintiffs summary judgment based upon, *inter alia*, § 8772 of the Act.

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Respectfully submitted,



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