

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

v.

ISLAMIC REPUBLIC OF IRAN, et al.,

Defendants.
-----X

: Case No. 18 Misc. 302 (BSJ)
:
: (Civil Action Nos. 01-2094 (RCL)
: and 1-2684 (RCL) D.D.C.)
:
: **FILED UNDER SEAL**
: **CONTAINS CONFIDENTIAL**
: **MATERIAL SUBJECT TO**
: **PROTECTIVE ORDER**

**MEMORANDUM OF LAW OF THE PETERSON PLAINTIFFS
IN OPPOSITION TO CLEARSTREAM BANKING, S.A.'S
SECOND AND THIRD SUPPLEMENTAL MEMORANDA
TO VACATE RESTRAINTS**

I. INTRODUCTION

Plaintiffs-Judgment Creditors, Deborah D. Peterson, et al., ("Plaintiffs"), submit the following Memorandum of Law and the accompanying Declaration of Liviu Vogel (hereinafter "Vogel Decl."), in Opposition to the Second and Third Supplemental Memoranda To Vacate Restraints submitted by Clearstream Banking S.A. ("Clearstream")¹ in the above-captioned action.

¹ Plaintiffs refer to Clearstream's briefs in support of its motion to vacate the restraints as follows: (1) Clearstream Memorandum of Law in Support of its Motion to Vacate Restraints, dated 09/04/2008, (hereinafter "Clearstream 1st Br."), (2) Clearstream Banking, S.A.'s Second Supplemental Memorandum to Vacate Restraints, dated 07/15/2010 (hereinafter "Clearstream 2^d Br.") and (3) Clearstream Banking S.A.'s Third Supplemental Memorandum to Vacate Restraints, dated 9/13/2010 (hereinafter "Clearstream 3^d Br.").

II. ARGUMENT SUMMARY

Clearstream is a first-tier intermediary of either (1) Bank Markazi, as a result of setting aside the fraudulent conveyance to UBAE or (2) UBAE, as a fraudulent transferee under Debtor and Creditor Law §§ 278(1)(a) and (b), as discussed in prior briefs to the Court. It has now been confirmed by discovery from UBAE that Bank Markazi is the beneficial owner of the restrained assets held in Clearstream's Omnibus account at Citibank; that the restrained bonds were part of a group of bonds valued at \$4.6 Billion denominated in U.S. Dollars transferred in February, 2008 by Bank Markazi from its account at Clearstream to UBAE's customer account at Clearstream, as part of a scheme to delay and defraud creditors, and to induce U.S. financial institutions to provide services for the benefit of Iran in violation of U.S. Regulations; and, that Clearstream at all times knew the identity of Bank Markazi as UBAE's customer since at least March 3, 2008, and has misled the Court and Plaintiffs for the last two years.² Clearstream's arguments and assertions must therefore be measured in view of a lengthy record of misleading the Court.

In light of such new evidence, the restraints should remain in place for the following reasons:

First, contrary to Clearstream's argument, only the investor entitlement holder (here, Iran through its agent and instrumentality, Bank Markazi) has a property interest in the security entitlements held in the Omnibus account at Citibank. U.C.C. § 8-503. Bank Markazi's interest is present at every level of intermediary, albeit enforceable (with an exception not applicable here) only against its immediate intermediary. Clearstream is the immediate intermediary of Bank Markazi and is therefore the proper garnishee under the U.C.C. Any property right of Clearstream in the cash proceeds of the bonds (asserted in the Clearstream 3d Br.) is inferior to the Plaintiffs' judgment lien under CPLR § 5202. There is not a section in the U.C.C. or the CPLR that provides a rule for determining the *situs* of intangible property, like the property restrained herein. Instead, the *situs* of intangible property is determined by common law and

depends entirely on the unique circumstances of each case. If the Court remains unsure as to the *situs* of the intangible property, discovery should be allowed to develop this fact-sensitive issue.

Second, relevant New York cases hold that the *situs* of Bank Markazi's intangible assets is found in New York because the Court can exercise personal jurisdiction over the proper garnishee, Clearstream. *See*, Sec. IV (B)(1)(a), *infra*. Clearstream mistakenly conflates the issue of the proper garnishee under the U.C.C. with *situs* by asserting that It is Clearstream's property rights that are in the United States - not Bank Markazi's. The U.C.C. specifically provides that Clearstream and other intermediaries do not have a property right in financial assets held in the indirect holding system like the bonds held in New York. Only the investor, Bank Markazi has a property right and it exists at every level of intermediary including at Citibank. Because this Court has both general and specific personal jurisdiction over Markazi's immediate intermediary and proper garnishee —Clearstream—"with whom the debtor's securities account is maintained," the *situs* of Markazi's intangible property interest in the bonds is in New York, and this Court can order Clearstream to turn over assets that it holds for the benefit of, or payments owed to Markazi, the Judgment Debtor. *See* N.Y.U.C.C. § 8-112(c). The undisputed facts demonstrate that the Court may assert personal jurisdiction over Clearstream, based on its significant and continuous² business and fraudulent activities in New York. If the Court has any doubt on the issue, Plaintiffs should be given an opportunity to conduct discovery on this issue as well because Clearstream has disputed these facts.

An additional common law standard for finding the *situs* of an intangible property interest is to analyze the location of the parties whose performance of obligations are required to realize the economic benefit of the property. Here, all parties whose performance is required under the bonds as well as the

² All these business activities are directly related to the custodial accounts at issue, and also satisfy New York's "long arm" statute and "due process" requirement for the exercise of personal jurisdiction over Clearstream in New York. *See* N.Y. CPLR §§ 302(a)(1)-(3).

intermediaries and correspondent banks handling transfers of Iran's property interest are located in New York. Moreover, the physical bond certificates are all located at D.T.C. or Federal Reserve Bank in New York. Finally, Bank Markazi placed the bonds with Clearstream for "safekeeping" (at least those that are now restrained by this Court's Order³), knowing they would be kept in a sub-custody account at Citibank in New York. *See* Sec.III(B)(3), *infra*.

Third, a broad and independent remedy that allows execution on Iran's equitable interest in the assets directly against Citibank, is authorized by the Common Law Creditor's Bill and this Court's inherent equitable powers. This claim has been added to Plaintiffs' amended turnover complaint.

Fourth, notwithstanding any contrary provision that, *arguendo*, may exist in the U.C.C. or CPLR, the assets at issue may be levied at Citibank pursuant to the provisions of the Terrorism Risk Insurance Act of 2002 ("TRIA"). TRIA provides that when a victim of terrorism secures a judgment against Iran, the "blocked assets" of Iran and its "agencies and instrumentalities" may be attached in satisfaction of that judgment notwithstanding any other law to the contrary. *See* TRIA § 201 (enacted 107 Pub. L. 297, 116 Stat. 2322, 28 U.S.C. § 1610, Note) (emphasis added). New York courts have recognized that TRIA preempts any conflicting provisions concerning collection, attachment and garnishment of "blocked assets." *See* Sec.IV(D)(1), *infra*.

The restrained assets are "blocked assets" because Citibank, and any other person including Clearstream and UBAE, are prohibited by applicable OFAC regulations⁴ from implementing the

³ Discovery from UBAE disclosed that additional bonds with an approximate \$2.5 Billion nominal value denominated in US Dollars were also transferred by Markazi from its account at Clearstream to its new account at UBAE at the same time in Feb. 2008, indicating that Markazi, UBAE and Clearstream were engaged in a scheme to defraud creditors, cause U.S. Persons to violate U.S. Regulations and avoid international sanctions.

⁴ The Iranian Transactions Regulations ("ITR"), 31 C.F.R. Part 560, administered by the U.S. Department of the Treasury, Office of Foreign Assets Control ("OFAC") generally prohibit exporting of any services, directly or indirectly, from the United States or by a U.S. person, wherever located, to Iran or the Government of Iran. *See* 31 C.F.R. Part 560.204.

instructions of Bank Markazi (directly or through intermediaries, *e.g.*, UBAE and Clearstream) to transfer the restrained bonds and proceeds or to provide any other custodial services for the Government of Iran or a person in Iran. Any such transfer or service would constitute a violation of OFAC regulations, and would subject Citibank, Clearstream, and, potentially, UBAE to severe penalties under U.S. law. Even if the restraints are dissolved, the assets at issue can not be transferred back to Bank Markazi.

III. RELEVANT FACTS

A. History of This Action

The Plaintiffs, families of 241 U.S. military servicemen who were killed in the October 23, 1983 terrorist bombing of the United States Marine Barracks in Beirut, Lebanon, hold an unsatisfied judgment against Judgment Debtors, Islamic Republic of Iran and Iranian Ministry of Information and Security, based in part on the Foreign Sovereign Immunity Act (28 U.S.C. §§ 1600 et seq.) (“FSIA”).

On June 11, 2008, Plaintiffs were informed by the Dept. of the Treasury’s Office of Foreign Asset Control (“OFAC”) that Clearstream “has had an Iranian government client that has had a beneficial ownership interest in assets custodized in the United States...held on Clearstream’s books, apparently in the Iranian client’s name, under account number 80726.” OFAC’s letter further stated that the securities that Clearstream held for its unidentified client, were part of Clearstream’s Omnibus account with Citibank. *Id.* See Exh. B to Plaintiffs’ Am. Compl. of Oct. 20, 2010. The assets at issue were restrained pursuant to restraining notices served upon Citibank and Clearstream and executions served on both on June 12 and October 17, 2008, respectively, and by subsequent court Orders extending same. Since the time they were restrained, 14 out of the 20 underlying bonds have matured, and their proceeds are now held by Citibank in a separate interest bearing suspense account in New York (rather than Clearstream’s normal cash account), and have not been paid to Clearstream. *See*

Clearstream 3^d Br.; Exh. 6 to Vogel Decl. (June 27, 2008 Tr.) at pp. 51-55. at 2; *see also* Exh. 1 to Clearstream 3^d Br.

On June 27, 2008, this Court held a hearing (on the Order to Show Cause, filed by Citibank). At this hearing, Clearstream admitted that the restrained bonds had been deposited with it in an account held by Bank Markazi until February 2008. Clearstream also revealed that two of the bonds restrained had previously been transferred by Bank Markazi through UBAE to third parties who held them through custodians outside the Clearstream system.⁵ As a result, the Court issued an Order dated June 27, 2008, vacating the restraint on those two bonds valued at \$250,000,000.00, but restrained the remaining assets. At that hearing, Clearstream falsely led the Court and Plaintiffs to believe that it had no knowledge about the identity of the beneficial owner of the bonds once they were transferred free of payment by Bank Markazi to UBAE's new customer account, because consideration could have been paid by some unknown transferee outside the Clearstream system. It has now come to light that, in fact, Clearstream had direct knowledge (at the latest, as of March 3, 2008, and likely before when the entire scheme was hatched) that Markazi was the beneficial owner, yet deceived the Court and Plaintiffs as an active participant in Iran's continuing scheme to defraud creditors and evade U.S. Regulations. Clearstream's continuing fraud delayed the Plaintiffs for over 2 years at great expense and delay before they were able to discover Iran as the beneficial owner and Clearstream's active participation in the fraud.

B. Correspondence Between UBAE, Clearstream and Bank Markazi

On June 9, 2010, pursuant to this Court's Letters Rogatory under the Hague Convention, Plaintiffs obtained documents from UBAE, including the following correspondence. *See* Exh. (A-J) to Vogel Decl. (Selected correspondence between Clearstream, UBAE and Bank Markazi).

⁵ Documents from UBAE now reveal that proceeds from the sale to third parties was paid by UBAE to Bank Markazi. *See* Exhs. 16 and 17 to Vogel Decl.

1. Clearstream Had Full Knowledge of the Identity of the True Beneficial Owner—the Central Bank of Iran (Bank Markazi)

The following e-mail correspondence between Bank Markazi, UBAE **and three people with Clearstream e-mail addresses** confirms that Clearstream was aware as early as March 3, 2008 (only a few days after the transfers), that a total of \$4.627 Billion of Bank Markazi's bonds/notes (including the restrained assets at Citibank) were transferred by Bank Markazi from its Clearstream account to UBAE's customer account for the benefit of Bank Markazi:

Good afternoon [REDACTED] [a UBAE Officer]. . . . According to a statement we have **received from Clearstream Banking Dubai**, we expect the **balance of our Custody Account No. [REDACTED] with you to be the nominal amount of USD 4,627,000,000.00** as of today 03.03.2008 the list of issues you have sent us is missing 3 issues . . .

[Lists 3 of the 20 bonds that are today restrained at Citibank]

Please investigate and let us have your **confirmation on their credit entries to our Custody Account with you** so that we make the necessary arrangements.

Exh. 1(B) to Vogel Decl. (March 3, 2008 Correspondence from Bank Markazi to Clearstream and UBAE) (emphasis added).⁶

In correspondence dated October 26, 2009, UBAE management confirmed that Clearstream was well aware that Bank Markazi was the beneficial owner:

The securities that are now under OFAC's scrutiny were originally received on February 22 and 28, 2008, into UBAE's customer account free of payment as they were transferred from account no. 80726 [Markazi's account], which was **registered in your books in the name of the current beneficial owner of the assets.**⁷ **Those same securities were administered by Clearstream for the**

⁶ This e-mail was sent in response to an e-mail from UBAE to Bank Markazi, also dated March 3, 2008, confirming receipt of bonds valued at \$4.327 Billion as of the previous Friday and attaching a scanned image of a detailed list of securities received. On that list are 17 of the 20 bonds restrained at Citibank by the Plaintiffs. See Exh. 1(A) to Vogel Decl.

⁷ The securities consisted of Bonds with a nominal value of \$4.6 Billion, all denominated in U.S. Dollars. They included the bonds restrained at Citibank by this Court as well as other bonds custodized at financial institutions in various countries outside the United States. After the Plaintiffs restrained the assets at Citibank, Clearstream itself blocked the account of UBAE with respect to all U.S. Dollar denominated

same beneficial owner in the period preceding above mentioned transfer of those assets to UBAE.

It is evident that Clearstream, as it was and it is obligated to under existing banking regulations, has always known the identity of the beneficial owner of the assets. [Emphasis in the original]....

The relevant securities were already custodized at U.S. institutions, at the time that they were transferred from the account no. 80726 at Clearstream to UBAE's customer account at Clearstream....

As indicated above, Clearstream knew who the beneficial owner of the securities held by UBAE in account 13061 [UBAE's customer account] at Clearstream was and by maintaining those assets in custodial accounts in the United States where they are apparently subject to OFAC and other restrictions, Clearstream failed to take the appropriate steps to protect UBAE...

Exh. 1(I) to Vogel Decl. (October 26, 2009 Letter from UBAE to Clearstream) (emphasis added).

On June 27, 2008 and repeatedly thereafter, Clearstream nonetheless led this Court and the Plaintiffs to believe it had no knowledge about "Iranian beneficial ownership" of the assets at issue.⁸ Clearstream had carefully planned this deception in advance of its June 27, 2008

securities because continuing to provide custodial services on the bonds necessarily would involve the service of U.S. Persons including foreign affiliates of U.S. Financial Institutions acting as sub-custodians and paying agents, and U.S. financial institutions acting as correspondent banks through which all U.S. Dollar transactions must be made. See, Appendix D – Fundamentals of the Funds Transfer Process prepared by U.S. Dep't of Treasury Financial Crimes Enforcement Network as part of report dated October 2006 on Feasibility of a Cross-Border Electronic Funds Transfer Reporting System under the Bank Secrecy Act Exhibit [REDACTED] to Vogel Decl. Such services by U. S. Persons would violate the Iranian Transaction Regulations promulgated by OFAC. See letter from [REDACTED], Executive.V.P. of Clearstream, to UBAE dated June 5, 2009, annexed as Exh. 1(H) to Vogel Decl.

⁸ See e.g., Nov. 25, 2008 Tr. at p. 19, lines 2-19; p. 31, lines 4-7; and p. 35, lines 11-19; July 27, 2008 Tr. at p. 14, line 15 – 17, line 4, and p. 62, lines 13 – 22 (summary of testimony); see also Clearstream's August 14, 2008 Letter Br. to Judge Crotty, at 3 ("What is maintained at Clearstream with respect to these 19 securities is the account of another intermediary bank.... Clearstream does not even know who that bank's customers are, let alone who holds the underlying interests in the securities maintained at that bank"); Dec. 23, 2008 Clearstream's Resp. to Plaintiff's Supp. Mem. Regarding Discovery, at 6 ("Clearstream already testified that as a securities intermediary, it does not have any information on the underlying beneficial ownership of the securities entitlements held by B in its custodial account."). Annexed as Exhibit [REDACTED] to Vogel Decl. are; Clearstream's 1st Br. at pp. 5 and 10. Referenced excerpts from hearing transcripts and briefs submitted to the Court by Clearstream with repeated misrepresentations. are attached and highlighted in Exh. [REDACTED] to Vogel Decl. (For example, in its Aug. 14, 2008 Letter Br. to Judge Crotty, Clearstream wrote with respect to the identity of beneficial owner of the

appearance before this Court. Clearstream described its intended deception of this Court and the Plaintiffs in anticipation of the June 27, 2008 Hearing, as follows:

At a hearing to be held before US District Court for the Southern District of New York to be held this Friday at 10 am in the procedure relating to the restraining notice served to Citibank (case No. 18 Misc. 8302), Clearstream Banking SA has been ordered by US Judge Koeltl to testify in order to disclose the identity of account holders impacted by the restraining notice in order to determine which funds should be released. **Clearstream's position is that we have no written evidence that there is an Iranian beneficial ownership** on the above mentioned assets in relation to your account 13061.

Exh. 1(E) to Vogel Decl. (June 27, 2008 SWIFT from [REDACTED], Clearstream's Executive Board to UBAE) (emphasis added). Clearstream continued to hide its knowledge and the identity of Bank Markazi as the beneficial owner warning UBAE as follows:

Finally, you should be aware that the Plaintiffs in the *Peterson* litigation seek to discover all of the communications between us, which, due to the continuing character of the discovery, would include your letter of October 26, 2009. We have objected to such discovery requests and the federal district court in New York currently is considering whether to grant the Plaintiff's requests.

See Nov. 16, 2009 Letter from Clearstream (signed by [REDACTED], who testified misleadingly before Judge Koeltl on June 27, 2008) to UBAE, attached as part of Exh. 1(J) to Vogel Decl. (emphasis added).

2. *Iran, Through Bank Markazi, Is the Beneficial Owner*

UBAE's correspondence with Bank Markazi confirms that Bank Markazi (Iran) is the beneficial owner of all assets at issue in these proceedings, as well as other assets valued in excess of \$2.5 billion

19 restrained securities at issue that "Clearstream does not even know who that bank's customers are, let alone who holds the underlying interests in the securities maintained at that bank")

that Clearstream appears to have blocked after Plaintiffs served the restraints.⁹ The following communications from UBAE to Bank Markazi state:

We follow up on our previous communications and we are pleased to provide you with an update on the restraining of securities of which you are the beneficial owner.

Clearstream has specified that the frozen assets do not concern position at UBAE only. We therefore believe that other securities held by other banks on your behalf have been affected as well.

Exh. 1(F) to Vogel Decl. (July 3, 2008 SWIFT from UBAE to Bank Markazi) (emphasis added).

[F]ollowing on the meeting we had in Teheran, please note that Clearstream informed us having opened two new sub-accounts where cash blocked relating to your securities has been lodged.

As for this block we have opened two new positions for your credit [;] the first is related to cash (coupons and matured securities) deposited with US depositories and US affiliates with the balance of \$316,125,000.00 and the second to cash (coupons and matured securities) in US dollars deposited in Europe with the balance of \$545,289,404.19....

Exh. 1(G) to Vogel Decl. (July 23, 2008 Letter from UBAE to Bank Markazi) (emphasis added).

Many thanks for your dispatch of the list of the bond issues we have transferred to our A/C with your good selves for the total Nominal Amount of USD 4,627,000,000.00.

Exh.1(C) to Vogel Decl. (March 5, 2008 Correspondence from Bank Markazi to UBAE) (emphasis added).

3. Bank Markazi placed its bonds with Clearstream for safekeeping knowing that they were to be, Sub-Custodized at Citibank in New York

Clearstream clarified that Bank Markazi placed the bonds with Clearstream “for safekeeping” with knowledge they would be kept in New York.

* * *

⁹ See also documents showing payment of interest on some of the now restrained bonds, from UBAE to Markazi between Feb. 22, 2008 and June 13, 2008 produced by UBAE annexed as Exh. [REDACTED] to Vogel Decl.

Second, the choice of sub-custodians by Clearstream Banking is neither made randomly nor on the basis of the particular circumstances of a given customer. Specific sub-custodians are used per type of securities. **For each type of security, the identity of such sub-custodian is known by each customer of Clearstream Banking since such sub-custodians are identified by name and location in our Governing Documents and are available at all times on our website.** If one of our customers thus wishes to hold a given security in its account with us, it knows in advance which sub-custodian we will use. If a customer is not content with the sub-custodian set out in our list of the sub-custodians, it is free to use a principal custodian other than Clearstream Banking. **This notwithstanding, the securities in questions are all issued in dematerialized form in the United States of America and consequently the ultimate place of safekeeping, irrespective of the choice of principal and intermediate custodians, is necessarily the United States.** It is a necessary consequence of this fact that the securities in question cannot be held in safe custody without procuring services from US-based persons.

See Exh. 1(J) to Vogel Decl., at 1 (November 11, 2009 Letter to UBAE from Mark Gem, Executive V.P., and Christian Heyne, Director of Legal, at Clearstream) (emphasis added).

For each security eligible for safekeeping services at Clearstream, Clearstream lists on its website a description including its place of safekeeping. Each designates "Citibank NA (US)" with a depository address at 333 West 34th Street, New York, as both the "Depository" and "Safekeeper"¹⁰ It is evident from Clearstream's invoices to UBAE covering the assets held for Markazi's benefit that safekeeping services are the essence of the account agreement. The invoice line item designated as "Safekeeping Services" constitutes essentially the entire monthly fee charged by Clearstream.¹¹ In the Terms and Conditions of Clearstream's customer agreement, the parties agree that Clearstream need not hold securities deposited by Bank Markazi at the place where the deposit is made, but instead may hold them through sub-

¹⁰ The address of Citibank is referenced in a separate webpage on Clearstream's website entitled "Depository Details." See copies of webpages in Exh. 1 to Vogel Decl.

¹¹ In UBAE's invoices to Bank Markazi, UBAE copied the Clearstream invoices verbatim, and added a 10% "handling fee" on top of Clearstream's fee. See invoices attached as Exh. 14 to Vogel Decl.

custodians outside Luxembourg, such as Citibank in New York. The Terms and Conditions state in relevant part as follows:

CBL [Clearstream] shall not be under any obligation to keep the securities deposited with it at the place where the deposit is made. Accordingly, **CBL may hold the securities at any other place or deposit them with other depositories, in Luxembourg or abroad**, including banks, custodians and sub-custodians, or other clearing systems.... CBL may permit any such entity, in turn, to redeposit or hold securities with one or more other entities used by it without the prior approval by CBL. **The names and addresses of the depositories used by CBL will be furnished to the Customer upon request.**

See Exh. 3 to Vogel Decl. (Article 15 of Customer Agreement) (emphasis added). The names of the sub-custodians, and specifically Citibank, New York were expressly identified and listed on Clearstream's website. See Exh. 4 to Vogel Decl. (Clearstream website).

Every instruction or confirmation of instruction given or received by Clearstream, UBAE and Markazi concerning the bonds at issue indicates that Citibank in New York is Clearstream's Depository and that either DTC or the Federal Reserve in New York is the place of safekeeping. See, e.g. Exhs. 15, 16, 17, 18 to Vogel Decl.¹² Clearstream directed Citibank and JP Morgan Chase to effect electronic fund transfers to HSBC as correspondent bank for UBAE for the benefit of, and ultimate payment to, Bank Markazi for interest and sale proceeds from the bonds. See Exhs. 15, 16 and 17 to Vogel Decl.

4. Clearstream Acknowledged That Its Actions Were a Potential Violation of OFAC's Iranian Transaction Regulations

Both UBAE and Clearstream recognized that a transfer of assets at issue is a violation of the Iranian Transaction Regulations ("ITR") 31 C.F.R. Part 560 and other OFAC regulations

¹² Clearstream produced Creation Online reports reflecting instructions received from Bank Markazi to transfer bonds to UBAE and instructions from UBAE to transfer bonds to its proprietary account and to third parties. The actual underlying communications were conducted by fax and SWIFT messages (See Exh. ■ to Vogel Decl. (June 27, 2008 Tr.) at p. 33, lines 19-24), but Clearstream refused to produce copies of same notwithstanding Plaintiffs' subpoena dated June 20, 2008 and July 30, 2008, (relevant parts attached as Exh. ■ to Vogel Decl.). Discovery thereof is necessary.

involving transactions with the Islamic Republic of Iran. Bank Markazi.

We refer to the income payments in ISIN code [REDACTED] and [REDACTED] respectively dated the 27th of May and 02nd of June, for which you hold a position...

Cash transfers involving institutions that qualify as "U.S. Persons" risk violations by Clearstream of the U.S. Iranian Transactions Regulations ["IRT"], 31 C.F.R. pt. 560, if the beneficial owner of the transferred assets is the Government of Iran or otherwise a person of Iran...

The payments of the 27th of May and of the 2nd of June involve one or more of the following entities deemed to be U.S. persons or affiliates of US persons presumed to involve US persons in the performance of their functions: Citibank Europe Plc [affiliate of a U.S. entity], as depository for the underlying securities; JP Morgan Chase Bank N.A. [an entity located in the United States], as Cash Correspondent Bank; and JP Morgan [London] [a branch of a U.S. entity] as paying agent. The relevant prohibitions are found at ITR Sections 204, 410 and 516.

* * *

If Clearstream processes transfers of cash and U.S. Persons are involved in such transactions, and if the transfer is for the beneficial ownership of an Iranian party, then Clearstream runs the risk of engaging in the prohibited exportation of services from the United States, or procuring such exportation by a U.S. Person in violation of the above-referenced ITR sections...

Accordingly, pending information on beneficial ownership, the income payments of the 27th of May and of the 2nd of June cannot be transferred to your cash account with Clearstream, as doing so could come within the scope of the transactions prohibited by ITR sections 204, 410 and 516.

See Exh. 1(H) to Vogel Decl. (June 5, 2009 Letter to UBAE from Mark Gem, Executive Vice President, and Christian Heyne, Director of Legal, at Clearstream) (emphasis added). UBAE replied as follows:

Only on August 1st, 2008, after your communication of June 20, 2008 and following various requests from UBAE, we were made aware that OFAC had informed you that "transfer of assets sub-deposited at institutions that qualify as U.S. Persons can involve violations by Clearstream of the ITR 31 C.F.R. pt. 560, if the beneficial owner of transferred assets is the Government of Iran or otherwise Iranian," because such transfers could constitute a prohibited exportation of services.

Therefore, we have been made aware of the legal basis of OFAC's investigation of Clearstream only on August 1st, 2008. However, your first communication to us (when our instructions to you were refused not only in relation to the securities

seized within the Peterson case, but also in relation to all other securities held by us with Clearstream in accounts n. 13061 and n. 14826) was made in June 2008.

* * *

We have reason to believe that the above-mentioned investigation of UBAE by OFAC derives from Clearstream's management of the relevant assets, including Clearstream's decision to place the assets in custodial account at U.S. institutions. This placement appears to have been made by Clearstream **before** the transfer of the assets to UBAE. [emphasis in the original].

Exh.1(I) to Vogel Decl. (October 26, 2009 Letter from UBAE to Clearstream) (emphasis added).

C. Clearstream's Agreement With Bank Markazi

1. Clearstream Has No Indemnity Liability Toward Its Entitlement Holders

Clearstream has no indemnity obligations towards any of its customers for any acts that it must take in compliance with applicable law, court order or regulations. *See* Exh.3 to Vogel Decl., Article 48. In fact, the Articles 51 and 52 require each customer **to indemnify Clearstream** for expenses that it must incur in order to comply with an applicable court order. *See* Exh. 3 to Vogel Decl., Articles 51 and 52.

IV. ARGUMENT

A. CPLR and U.C.C. Article 8 Permit This Court to Restrain and Issue a Turnover Order Against Bank Markazi's Immediate Intermediary-Clearstream

1. Clearstream is the Proper Garnishee

Clearstream incorrectly argues that the U.C.C. forbids enforcement of Plaintiffs' judgment against the judgment debtor's interest held by Clearstream in New York. New York CPLR § 5201(c) defines the proper garnishee for an intangible debt and/or property and refers to UCC § 8-112 to describe "the extent to which and the means by which any interest in a ...

security entitlement¹³ ... may be reached by garnishment, attachment or other legal process.” *See* NY CPLR § 5201(c)(4). Clearstream concedes (assuming that Plaintiffs can establish fraudulent transfer) that it holds bonds in its New York account at Citibank “for the benefit” of its customers/entitlement holder(s), including Bank Markazi. *See* Clearstream 2^d Br. at 3 (“Clearstream is in the next tier of financial intermediaries via its Omnibus Account with Citibank. Clearstream customers like Bank Markazi are in the next tier down via their securities accounts with Clearstream”); *see also* Exh. 2 to Clearstream 2^d Br. (illustrating “Custody Structure for US Securities in Clearstream Banking S.A.”). Clearstream’s argument that Bank Markazi does not have a property interest in the restrained assets has no basis in the U.C.C.:

Relevant parts of U.C.C. § 8-112 describe “Creditor’s Legal Process” as follows:

* * *

(c) The interest of a debtor in a security entitlement may be reached by a creditor only by legal process upon the securities intermediary with whom the debtor's securities account is maintained, except as otherwise provided in subsection (d)...

(e) A creditor whose debtor is the owner of a ... security entitlement is entitled to aid from a court of competent jurisdiction, by injunction or otherwise, in reaching the ... security entitlement or in satisfying the claim by means allowed at law or in equity in regard to property that cannot readily be reached by other legal process.

N.Y.U.C.C. § 8-112 (emphasis added). Clearstream is the securities intermediary that has at all times relevant to this litigation maintained a securities account for Bank Markazi. Acquisition of the “Security Entitlement” by the “Entitlement Holder” from the “Securities Intermediary” is described in § 8-501(b) as follows:

¹³ “**Security entitlement**” means “the rights and property interest of an entitlement holder with respect to a financial asset specified in Part 5.” *See* N.Y.U.C.C. § 8-102(17). “**Entitlement holder**” means a person identified in the records of a securities intermediary as the person having a security entitlement against the securities intermediary. If a person acquires a security entitlement by virtue of Section 8-501(b)(2) or (3), that person is the entitlement holder. *Id.* § 8-102(7). “**Securities intermediary**” means: 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. *Id.* § 8-102(14).

(b) ~~Except as otherwise provided in subsections (d) and (e), a person acquires a security entitlement~~ if a securities intermediary:

(1) indicates by book entry that a financial asset¹⁴ has been credited to the person's securities account;

(2) receives a financial asset from the person or acquires a financial asset for the person and, in either case, accepts it for credit to the person's securities account; or

(3) becomes obligated under other law, regulation, or rule to credit a financial asset to the person's securities account.

(c) If a condition of subsection (b) has been met, a person has a security entitlement even though the securities intermediary does not itself hold the financial asset.

N.Y.U.C.C. § 8-102 (emphasis added).

2. Bank Markazi has a Property Interest in the Assets Restrained at Citibank

Clearstream attempts to distort the intent of CPLR § 5201(c) and Article 8 of the U.C.C. by conflating the concepts of “proper garnishee” with “situs” of an intangible interest in a global bond certificate. CPLR § 5201(c) is concerned only with identifying the proper garnishee. It makes no reference whatsoever to the *situs* of the asset that is being garnished. *See Hotel 71 Mezz Lender LLC v. Falor* 14 N.Y.3d 303, 314 (2010) (“the CPLR contains no provision as to the situs of intangible property for attachment purposes”) *quoting ABKO Inds. v. Apple Films, Inc.*, 39 N.Y.2d 670, 675 (NY 1976). Article 8 of the U.C.C., and specifically U.C.C. § 8-112, which is incorporated by reference into CPLR § 5201(c), similarly makes no reference to the *situs* of the securities described therein. Indeed, Article 8 of the U.C.C. does not deal at all with the *situs* of an asset. While these sources of law do not address the *situs* of an intangible interest,

¹⁴ The term “**Financial asset**,” is defined in U.C.C. § 8-102(9), which includes, in relevant parts, (i) a security, (ii) “an obligation of a person or a share, participation, or other interest in a person or in property or an enterprise of a person..., dealt in or traded on financial markets,” or recognized as a “medium for investment,” or (iii) “any property that is held by a securities intermediary for another person in a securities account,” if expressly agreed to be treated as a financial asset under this Article. *See, e.g.,* N.Y.U.C.C. § 8-102(9).

they do confirm Plaintiffs' right to proceed against Clearstream, which is the immediate securities intermediary for Bank Markazi and therefore the proper garnishee. Article 8 of the U.C.C., contrary to Clearstream's argument, clearly recognizes that Bank Markazi, as beneficial owner, has a property interest in the financial asset held by the upper-tier intermediary, at Citibank. Furthermore, this property interest supports Plaintiffs' common law analysis finding the *situs* of the property in New York.

The U.C.C. itself belies Clearstream's argument that under 8-112(c) only Clearstream has a securities entitlement to bonds deposited in Citibank's Omnibus Account. U.C.C. § 8-503 (a) specifically states that "[t]o the extent necessary for a securities intermediary to satisfy all security entitlements with respect to a particular financial asset, all interests in that financial asset held by the securities intermediary are **held by the securities intermediary for the entitlement holders, are not property of the securities intermediary**, and are not subject to claims of creditors of the securities intermediary, except¹⁵ as otherwise provided in Section 8-511." (Emphasis added.) It further clarifies that an entitlement holder, like Bank Markazi in this case, has "a **pro rata property interest** in all interests in that financial asset held by the securities intermediary." See N.Y.U.C.C. § 8-503(b) (emphasis added). By operation of § 8-503, if no security intermediary in the chain, has any property interest in the financial asset, then Clearstream's argument that Citibank holds Clearstream's property interest in the restrained assets is plainly wrong. Financial intermediaries hold interests in the financial asset solely for the benefit of the ultimate beneficial owner—the investor or Bank Markazi in this case. Thus,

¹⁵ The exceptions referenced in U.C.C. § 8-511 are not at issue in this case. See, e.g., N.Y.U.C.C. § 8-511(b) (authorizing priority claims of the secured creditors of the security intermediary, ahead of the entitlement beneficiary, only in the circumstances when the secured creditor "has a security interest in the financial asset," and "has control over the financial asset"); see also U.C.C. § 8-511(c) (dealing with insolvency and creditors of a clearing corporation holding the entitlement beneficiary's assets).

the UCC recognizes the investor's property interest in the financial asset at every level in the chain of intermediaries through which it holds the interest. *See* Opinion Letter of Professor Charles W. Mooney, together with his curriculum vitae annexed as Exh. 20 to Vogel Decl.¹⁶

Article 8 of the U.C.C. merely provides a mechanism for smooth transactions among intermediaries by limiting the beneficial owner's ability to exercise its rights in the financial asset via its immediate intermediary. But, each upstream intermediary is in turn required to exercise the instructions and rights of the beneficial owner until the final safekeeping intermediary (here Citibank) is reached. In the absence of such serial obligations upstream, the beneficial owner/investor would be unable to enjoy the monetary value of its investment.¹⁷ The prospectus filed by each issuer of the restrained bonds is designed to inform potential investors of how they will receive the financial benefit of their investment through the chain of intermediaries in the indirect holding system. The prospectuses clearly recognize that the

¹⁶ The law of New York applies, as discussed above, but were Luxembourg Law to apply, the result would be the same. Luxembourg recognizes that an investor's interest in dematerialized securities deposited with a custodian in a securities account, is a right in rem of an intangible nature. The law provides that the investor remains the legal owner of the securities; that intermediaries must hold the investor's securities segregated from their own assets; and only the investor is entitled to exercise or benefit from, the rights attaching to securities. Moreover, the investor can assert the rights attached to the securities (economical and non-economical rights) against the issuer by means of the production of a certificate issued by the depository (Clearstream) certifying the number of securities booked to the securities account. (See European Commission, EU Clearing and Settlement Legal Certainty Group Questionnaire dated April 24, 2006, at Sections 7.14, 12.14 and 36.14, copies annexed as Exh. [REDACTED] to Vogel Decl. Markazi, and thus judgment creditors standing in its shoes, could obtain such a certificate from Clearstream to enforce rights in the securities against upstream intermediaries. In the event of insolvency of Clearstream, an investor under Luxembourg Law may enforce its rights *in rem* against Citibank as sub-custodian. Exh. [REDACTED] at Sec. 15.14.

¹⁷ Indeed "[a] securities intermediary must take action to obtain a payment or distribution made by the issuer of a financial asset ... [and is then] obligated to its entitlement holder for a payment or distribution made by the issuer of a financial asset if the payment or distribution is received by the securities intermediary." N.Y.U.C.C. § 8-505. The "pay when paid" obligation of each intermediary is an almost absolute obligation to the entitlement holder. The obligation to pass through the economic benefits of the financial asset is the only obligation of a securities intermediary not subject to limitation by agreement or a commercial reasonableness standard (*see* U.C.C. § 8-505; and *see also* Federal Reserve Bank of New York response to the E.U. Clearing and Settlement Legal Certainty Group Questionnaire, Ex. 4 to Clearstream Compendium of Exhs. dated Sep. 3, 2008, also attached as Exhibit [REDACTED] to Vogel Decl.)

investor is the intended beneficial owner of the bond and not the intermediary banks.¹⁸

Clearstream's own submissions to this Court concede this point. *See*, EU Clearing and Settlement Legal Certainty Group Questionnaire responses from the Federal Reserve Bank of New York. Exh. 4 to Clearstream 1st Br. (also attached as Exh. 2 to Vogel Decl.) The Federal Reserve Bank of New York confirms that under applicable provisions of the U.C.C., Clearstream "does not own" the property at issue and "exercises ownership rights with respect to financial assets on behalf of the entitlement holder," including rights to "make demand for payment of an instrument which is a financial asset, and rights to enforce legal obligations." *Id.* at (Exh. 4 to Clearstream 1st Br., attached also as Exh. 2 to Vogel Decl., at p. 7 (*citing* U.C.C. 8-506) (emphasis added). It further clarifies that beneficial ownership does not vary even though the books of an upper-tier intermediary may list the lower-tier intermediary as the owner:

(8): What is the legal position of the intermediary in respect to of the securities credited to an investor's securities account?

[Answer:] As stated above, to the extent necessary to satisfy securities entitlement with respect to a financial asset, the interest held in that financial asset by the intermediary are held for entitlement holders and are not property of the securities intermediary. Thus, the securities intermediary, does not "own" the financial assets credited to the securities accounts maintained on its books, although it may be reflected in the books of the issuer or its transfer agent as the registered holder or have a security entitlement (or be an investor/account holder) in respect of an upper-tier intermediary....

See Exh. 4 to Clearstream 1st Br. (attached also as Exh. 2 to Vogel Decl.), at 8.

This is precisely the situation here. The fact that Clearstream is listed as a securities entitlement holder in respect to its upper-tier intermediary (Citibank) does not mean that it has any property ownership interest in the assets at issue. On the contrary, the facts and law all

¹⁸ All legal obligations to be enforced under the bonds, including payment, are by the terms of each bond enforceable pursuant to New York Law, and most bonds at issue expressly elect New York courts as the appropriate forum. *See* Exh. B to Plaintiffs' Oct. 17, 2008 Br. in opposition to motion to vacate restraints. (Prospectuses for most global securities at issue and brief synopsis prepared by Plaintiff.)

indicate that Clearstream's interest in the bonds is only custodial in nature and that it exercises Bank Markazi's ownership rights purely "on behalf of" and "for the benefit of" the actual entitlement holder, Bank Markazi, which controls and directs distribution of these assets through UBAE. If UBAE is found to be the transferee of a fraudulent conveyance, then the immediate intermediary—Clearstream—is the proper garnishee and Plaintiffs may "stand in the shoes" of Bank Markazi, to enforce its rights in the financial assets through Clearstream, who in turn is required by statute and contract to enforce such rights, as directed by Plaintiffs and this Court, against Citibank. The continued restraint of the assets at Citibank ensures that Iran does not transfer them out of New York and that Clearstream honors its obligations and the Court's restraint as against Clearstream. Given the recent discovery of Clearstream's history of defrauding the Court and the Plaintiffs, the continuing restraint at Citibank is imperative.

3. Discovery From UBAE Confirms That Markazi Owns the Restrained Assets

The correspondence between UBAE, Clearstream and Bank Markazi, as well as other documents produced by UBAE¹⁹ to Plaintiffs in Italy, leaves no doubt that Iran, through its agent—Bank Markazi—is the beneficial and property interest owner of the approximately \$2 Billion of assets at issue. *See* Sec III(B)(2), *supra*.; *see also* Exhs. 1(A-J) to Vogel Decl. This information was obtained after two years of diligent effort and at great expense, which would have been unnecessary if Clearstream had disclosed this knowledge and information rather than defrauding the Court and the Plaintiffs by maintaining that Clearstream was ignorant of the facts.

4. Any Property Right Acquired by Clearstream in Bond Proceeds Is Inferior to Plaintiffs' Judgment Lien

¹⁹ Plaintiffs had no opportunity to obtain any discovery from Clearstream, who refused to recognize this Court's jurisdiction and refused to provide any discovery in this action. *See* Clearstream 8/14/08 Letter to Court; Clearstream 12/23/08 Response Br. and Clearstream 8/14/09 Letter to Court.

Clearstream claims that the restrained bonds, to the extent they have matured or paid interest, are no longer assets in which Iran/Markazi has an interest that can be assigned or transferred because, in the “normal course of events,” the money would have been paid into Clearstream’s associated cash account at Citibank at which time, under Luxembourg Law, Clearstream would have become the owner of the cash. Clearstream 3^d Br. at p.3-5. This is incorrect for several reasons.

First, CPLR § 5202 provides as follows:

[w]here a judgment creditor has delivered an execution to a sheriff, the judgment creditor’s rights in a debt owed to the judgment debtor or in an interest of the judgment debtor in personal property, against which debt or property the judgment may be enforced, are superior to the extent of the amount of the execution to the rights of any transferee of the debt or property, except: 1. a transferee who acquired the debtor property for fair consideration before it was levied upon; or 2. A transferee who acquired a debt or personal property not capable of delivery for fair consideration after it was levied upon without knowledge of the levy.

(emphasis added).

Assuming Clearstream is correct that under Luxembourg Law it would become the owner of cash proceeds had they been deposited into the cash account at Citibank, nevertheless, under CPLR § 5202 which governs enforcement of judgments by this Court, any property interest that Clearstream would have acquired by such transfer would be ineffective as against the judgment creditor, Plaintiffs. Neither exception in C.P.L.R. § 5202 applies because no interest or principal payments that are restrained occurred before the June 13, 2008 levy or after the levy without Clearstream’s knowledge of such levy.²⁰ (See McKinney’s N.Y. CPLR, vol. 7B, § 5202 Practice Comm. by David D. Siegel, C 52022).

²⁰ Clearstream knew of the levy before June 16, 2008 (sometime over the weekend of June 14 and 15) and, therefore, reversed a credit pre-advanced to UBAE before the maturity of 2 securities on June 16, 2008. See Exh. █ to Vogel Decl. (June 27, 2008 Tr.) at pp. 57-58.

Second, Clearstream itself argued to this Court that, “[a]s long as the proceeds of the bonds remain with Clearstream (or Citibank) in the indirect holding system, they are subject to the limitations of UCC § 8-112 (c) - whether they are segregated or not.” Clearstream Nov. 14, 2008 Br., at p.12. Clearstream has conceded that the proceeds retain their character as a part of the property right of the entitlement holder, making them reachable by legal process upon Clearstream under U.C.C. § 8-112(c).

Third, Clearstream cannot benefit from the delay of enforcement of the judgment caused by its own fraudulent conduct by now arguing that Clearstream-constructed-delay transformed Iran’s property right into Clearstream’s property right by operation of Luxembourg Law. This is not only chutzpah,²¹ but the transaction itself is a further fraudulent conveyance under New York Debtor Law §§ 273-a and 276, entitling Plaintiffs to receive the cash under Debtor and Creditor Law § 278(1)(b).

Fourth, the “normal course of events” did not occur here. Instead, since the execution was served on June 13, 2008, the cash proceeds of the bonds have been blocked by Citibank, placed in a segregated suspense account, and not paid to Clearstream. See Exh. 6 to Vogel Decl. (June 27, 2008 Tr.), at pp. 51-55.²² Therefore, Clearstream’s hypothetical argument is not supported by the facts.

²¹ “The classic definition of “chutzpah” is that quality enshrined in a man, who having killed his mother and father, throws himself upon the mercy of the court because he is an orphan.” *Williams v. State*, 126 Ga. App. 350, 190 S.E.2d 785, 785, n.1 (Ga. 1972).

²² Indeed the opinion of Clearstream’s Luxembourg counsel (Ex. 3 to Clearstream 3^d Br.) is suspiciously vague; referring to a generic “cash deposit with a credit institution,” rather than the transfer of cash proceeds from securities into a cash account associated with the securities account of a depository. Until discovery is had concerning the nature and terms of the account at Citibank, no conclusion can be reached as to Markazi’s hypothetical rights in such an account had the funds in fact been deposited therein.

5. UCC § 8-112 Expressly Authorizes This Court to Order Clearstream, as an Immediate Securities Intermediary, to Turn Over Debt Owed to and/or Property Interest of the Entitlement Holder, Bank Markazi

U.C.C. § 8-112(c) expressly permits creditors to reach the entitlement of the Judgment Debtor by serving legal process upon the immediate securities intermediary. As Plaintiffs demonstrate in Section IV.A.1., *infra.* at IV(A)(1). Clearstream is Bank Markazi's immediate securities intermediary. Thus, this Court has express statutory power pursuant to § 8-112(c) to order Clearstream to turn over to Plaintiffs the debt and/or property that Clearstream owes to, or holds for, the benefit of the Judgment Debtor²³ in its Omnibus Account at Citibank, New York. *See* N.Y. CPLR §§ 5225 and 5227.

6. U.C.C. § 8-112(e) Authorizes This Court to Restrain the Omnibus Account at Citibank in Aid of the Levy Against the Garnishee—Clearstream

Assuming, *arguendo*, that Citibank is not the proper garnishee under CPLR § 5201(c) and U.C.C. § 8-112(c), nevertheless § 8-112(e) expressly provides that the Court may aid creditors to reach security entitlements of the Judgment Debtor "... by injunction or otherwise [and]... by means allowed at law or equity in regard to property that cannot readily be reached by other legal process" (emphasis added). This provision expressly authorizes the Court to exercise its equitable power to safeguard assets that Clearstream maintains for the benefit of Markazi in the Citibank account in New York.

The Court has previously examined U.C.C. § 8-112(e) and applied it to restrain funds held at Citibank. *See* Court Order entered on May 10, 2010 and extended on June 11, 2010. This is a logical interpretation of the statute. Clearstream's interpretation renders subsection (e)

²³ For purposes of this argument, both Clearstream and Plaintiffs assume that the transfer of securities from Bank Markazi to UBAE was a fraudulent conveyance and it may be set aside as of the date of the restraint and execution. Bank Markazi continues to hold one of the 20 restrained securities in its direct account with Clearstream, known as ISIN [REDACTED], the restraint of which Clearstream did not oppose. *See* Exh. [REDACTED] to Vogel Decl. (June 27, 2008 Tr.) at pp. 60 and 62.

of U.C.C. § 8-112 a nullity, and such interpretations are disfavored. *See, e.g., Corley v. United States*, __U.S.__, 129 S. Ct. 1558, 1566 (2009) (“a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant”); *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)) (same); *see also Weinstein v. Islamic Republic of Iran*, 609 F.3d 43, 49 (2d Cir. 2010) (rejecting an interpretation of TRIA that would render the express parenthetical statement in the statute a nullity).

To the extent that there is any ambiguity in U.C.C. § 8-112, the courts are directed to resolve ambiguity “in favor of the interpretation which affords a full opportunity for courts to act in accordance with their traditional practices.” *See Armstrong v. Guccione*, 470 F.3d 89, 102 (2d Cir. 2006) (citing *Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991) and other Supreme Court cases).²⁴ Accordingly, the Court should maintain the restraints at Citibank and Clearstream, particularly in light of Clearstream’s apparent propensity to violate U.S. laws.

B. The Situs of the Restrained Bank Markazi Assets Is in New York

²⁴ The Commentary to U.C.C. § 8-112 supports the conclusion that Article 8 is to be construed consistently with traditional powers of the Court (*see* Sec. [REDACTED]):

Article 8 of the uniform commercial code as revised is not intended to constitute a comprehensive body of law governing the relationship between brokers and their customers nor to be a body of regulatory law to police against improper conduct by brokers or other intermediaries. Many, if not most, aspects of the relationship between brokers and customers are governed by the common law of contract and agency, supplemented or supplanted by federal and state regulatory law. Article 8 of the uniform commercial code **does not** take the place of this body of common and regulatory law. It simply deals with the mechanisms by which interests in securities are transferred and the rights and duties of those who are involved in the transfer process.

The General Provisions section of the New York version of the U.C.C. also expressly state that the U.C.C. does not—nor was intended—to preempt other bodies of law, particularly concerning issues of principal and agent relationship and fraud. *See* N.Y. U.C.C. § 1-103.

1. Common Law Holds That the Situs of the Restrained Assets is In New York Because Clearstream is Present In New York

Neither U.C.C. Article 8 nor the CPLR contains any provision as to the *situs* of an intangible asset such as the security entitlements of the judgment debtor in the bonds restrained at Citibank.²⁵ N.Y. CPLR § 5201(c) incorporates U.C.C. § 8-112 for the sole purpose of identifying the proper garnishee. As set forth above in Sec. IV(A)(1), Clearstream is the proper garnishee which has been served with a restraining notice and execution and is subject to a turnover order under CPLR §§ 5225 and/or 5227. The *situs* of property, including Iran's property interest in the bonds, is determined by common law in New York. Pursuant to well settled law, the *situs* of intangible property, is generally where the garnishee is found to be present and subject to suit on the claim.²⁶

This Court has both general and specific personal jurisdiction over Clearstream. The controlling cases in New York find that the presence of the garnishee in New York establishes *situs* of intangible assets and/or debt in New York. *See Harris v. Balk*, 198 U.S. 215 (1905) ("Power over the person of the garnishee confers jurisdiction on the court of the State where the writ issues"). This continues to be the controlling precedent in New York. In *Hotel 71 Mezz Lender LLC*, the New York Court of Appeals examined applicability of *Harris v. Balk* and held that it remains the controlling legal precedent in New York on the issue of *situs* of a debt. *See Hotel 71 Mezz Lender.*, 14 N.Y.3d at 314.

The Court of Appeals in *Hotel 71 Mezz Lender* further held that the principles applied to ascertain the *situs* of a debt are equally applicable to an intangible property interest; holding that the uncertificated ownership interest in limited liability companies in possession of the proper

²⁵ *See Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y. 3d 303, 314 (2010).

²⁶ Clearstream's General Terms and Conditions do not contain a forum selection clause. (See Exh. █ to Vogel Decl.

garnishee is attachable based on that garnishee's presence in New York. *Id.* It held on the issue of the *situs* of an intangible uncertificated ownership interest that “[j]ust as a debt clings to the debtor when he enters a state other than the state where the debt was incurred, it follows that defendants’ uncertificated ownership interests, which [garnishee] possesses or has custody over, travel with him and, were attachable in New York based on his presence [in] this state.” *Hotel 71 Mezz Lender*, 14 N.Y.3d at 316; *see also* Siegel, New York Practice § 491 (4th ed.) at 835. In reaching this conclusion, the Court of Appeals reasoned as follows:

[A]lmost any kind of assignable interest is leviable today if a New York situs can be found for it. **Finding the garnishee is just another way of finding the asset's situs: if the garnishee has a New York presence, the debtor's asset in the garnishee's hands will usually be found to have a New York situs, too. Where, for example, the garnishee owes the judgment debtor a debt, not represented by a negotiable instrument, the garnishee's physical presence in New York fixes New York as the situs of the debt.** Where the asset being pursued is a claim that the judgment debtor has against the garnishee, the garnishee's New York presence enables suit on the claim to be brought in New York and thus, again, gives the claim a New York situs.”

Id. at 316 *citing* Siegel, N.Y. Prac. 491 at 835 (4th ed.) *emphasis added*; *see also* *ABKO Inds. v. Apple Films, Inc.*, 39 N.Y.2d 670 (N.Y. 1976) (holding that location of the party “of whom performance is required by the terms of the contract” with judgment debtor, established *situs* of the intangible property rights in New York, and permitted creditors to attach this property right pursuant to New York CPLR); *Em Ltd. v. The Republic of Argentina*, CA09-3908, 2010 U.S. App. LEXIS 17732 at *12-13 (2d Cir. Aug. 3, 2010) (affirming restraint and attachment of debtor’s assets held in trust because the garnishee—trustee bank—was located in New York) (attached as Exh. 9 to Vogel Decl.).

Other courts also reached the same conclusion regarding the *situs* of intangible property. For instance, the Fifth Circuit concluded as follows in a FSIA case:

We think a 'common sense appraisal of the requirements of justice and convenience' in this particular context yields the conclusion that the situs of these royalty obligations is the United States -- the situs of the Garnishees.... This same rule is also applied in other states.... Furthermore, this rule's general operation has been recognized by the Supreme Court. *See, e.g., Harris v. Balk*, 198 U.S. 215, 221-22, 49 L. Ed. 1023, 25 S. Ct. 625 (1905).

AF-Cap Inc. v. The Republic of Congo, 383 F.3d 361, 371-72 (5th Cir. 2004) (internal citations omitted) (emphasis added).

The cases cited by Clearstream are inapposite. Among other distinguishing factors, none of Clearstream's cases involves (a) an immediate garnishee-intermediary, with continuous and extensive New York presence, which holds assets of the judgment debtor as part of a garnishee's account in a New York bank; and (b) a garnishee which knowingly sub-cutodized Iranian assets in a New York bank and fraudulently induced U.S. Persons to violate OFAC regulations, and which purposefully availed itself of the Courts in New York to perpetuate an ongoing fraudulent scheme of the judgment debtor to delay and defraud creditors; and (c) assets with value dependent upon obligations that are required to be performed in New York; and (d) an intermediary/garnishee who contracted with the judgment debtor to place the assets for "safekeeping" with New York banks and depositories.

Clearstream relies heavily on *Fidelity Partners v. First Trust Company of New York*, 58 F. Supp. 2d 52 (S.D.N.Y. 1997). But, the assets in *Fidelity Partners* were held through numerous foreign intermediary banks (ING Bank of Manila, Euroclear, Morgan Guarantee Brussels and Morgan Guarantee London) with no presence in New York. Moreover, the physical global bond certificate was held in London. The only connection to New York was the paying agent. "Given these facts," the Court found that because the proper garnishee on whose books the judgment debtor's interest appeared was in the Philippines and because the debtor resided in the Philippines, the *situs* of the asset was in the Philippines. *See Fidelity Partners*, 58

F. Supp.2d at 54. Moreover, the Court noted that “the agreements governing the issuance of the FLIRB’s [bonds] requires that the FLIRB’s be offered only outside of the United States....” *Id.* at 54, n. 4. By contrast, the facts in the instant case decidedly establish the *situs* of Iran’s interest in the bonds in New York. Here, both the physical global bond certificates and the proper garnishee, Clearstream, are located in New York. Moreover, Bank Markazi deposited the bonds with Clearstream knowing that Citibank in New York was to be the place of safekeeping of its interest in the bonds.²⁷ All payment obligations under the bonds must occur in New York including payments to the DTC or Federal Reserve Bank, to Citibank, to J.P. Morgan Chase (Clearstream’s correspondent bank²⁸) and to HSBC (UBAE’s correspondent bank²⁹), before any economic benefit can be realized by UBAE and Bank Markazi.

Thus, New York law establishes *situs* of the intangible assets at issue based on the presence of the garnishee, Clearstream, and all the performing parties under the notes at issue, in New York, and therefore allows this Court to restrain and order turnover of assets that garnishee-Clearstream holds for the benefit of the Judgment Debtor.

a. Clearstream is Present in New York and This Court Can Exercise Personal Jurisdiction Over Clearstream

Despite Clearstream’s refusal³⁰ to provide any discovery to Plaintiff, there is uncontroverted evidence that Clearstream conducts extensive and systematic business operations in the State of New York. The factors that establish general personal jurisdiction over

²⁷ See Exh. 3, 4 and 1 (J) to Vogel Decl. [Contract, letters, website screen shots]

²⁸ See Exh. █ to Vogel Decl.

²⁹ See Exh. █ to Vogel Decl.

³⁰ Clearstream refused to provide any discovery in this action, claiming that providing requested documents and information would violate laws of Luxembourg. See Clearstream Dec. 23, 2008 Response Br. Despite this refusal, Clearstream is affirmatively using and putting into evidence the affidavits of its employees in this litigation and the hearsay statements of Clearstream’s attorneys in various briefs and letters to the Court. See Declaration of Michael Barrett, the Director of Clearstream’s New York Office, submitted in support of Clearstream’s Sep. 18, 2009 Letter Brief to Court.

Clearstream are discussed in detail in Plaintiffs' Aug. 14, 2009 Letter Br. ~~Exhibit~~

In addition to those factors (which include physical presence of an office and employees upon whom legal process had been served multiple times³¹), Clearstream maintains a correspondent bank account in New York with JP Morgan Chase, and conducts transactions in securities and notes (immobilized in New York) involving payments in U.S. currency through Clearstream's custodial, cash and correspondent bank accounts with New York banks.³² See Exh. 4 to Vogel Decl. Clearstream maintains custodial accounts for the benefit of Clearstream's customers (including Bank Markazi) at Citibank in the City of New York and conducts transactions in billions of dollars (like the transactions at issue) through its custodial bank account at Citibank and correspondent bank account at JP Morgan Chase. See Exh. 4 to Vogel Decl. The disclosure made by the Department of Justice Office of Foreign Asset Control dated June 12, 2008, indicates that Clearstream maintains a cash account in addition to its custodial accounts at Citibank in New York. See Exh. B to Plaintiffs' Complaint of June 8, 2010.

The letter from Mark Gem, the Executive V.P. of Business Management, and Christian Heyne, Director of Legal at Clearstream, unequivocally confirms that Bank Markazi placed its bonds with Clearstream with knowledge and agreement that they would be sub-custodized at Citibank in New York.

Second, the choice of sub-custodians by Clearstream Banking is neither made randomly nor on the basis of the particular circumstances of a given customer.

³¹ Clearstream's employees were served with a restraining notice, amended restraining notice, two executions, three subpoenas, and a summons with turnover complaint. See affidavits of service, annexed as Exhibit ■ to Vogel Decl.

³² This factor alone is sufficient to find personal jurisdiction over Clearstream. See *Banco Ambrosiano v. Arto Bank & Trust Ltd.*, 62 N.Y.2d 65, 69-74 (N.Y. 1984) (affirming personal jurisdiction over a Bahamas-based bank in view of its extensive transactions through the correspondent bank in New York, including the transaction at issue in the litigation); see also *Indosuez Intern'l Finance v. National Reserve Bank*, 98 N.Y.2d 238, 246-47 (N.Y. 2002) (affirming exercise of personal jurisdiction over Russian bank that "maintained a New York account" and made five prior payments through that account).

Specific sub-custodians are used per type of securities. For each type of security, the identity of such sub-custodian is known by each customer of Clearstream Banking since such sub-custodians are identified by name and location in our Governing Documents and are available at all times on our website. If one of our customers thus wishes to hold a given security in its account with us, it knows in advance which sub-custodian we will use. If a customer is not content with the sub-custodian set out in our list of the sub-custodians, it is free to use a principal custodian other than Clearstream Banking. This notwithstanding, the securities in question are all issued in dematerialized form in the United States of America and consequently the ultimate place of safekeeping, irrespective of the choice of principal and intermediate custodians, is necessarily the United States. It is a necessary consequence of this fact that the securities in questions cannot be held in safe custody without procuring services from US-based persons.

See Exh. Exh. 1(J) to Vogel Decl., at 1 (Nov. 11, 2009 Letter from Clearstream to UBAE) (emphasis added). On its website, Clearstream indicated that the bonds at issue herein would be placed by Clearstream for safekeeping with Citibank, in New York. See Exh. 4 to Vogel Decl. (Clearstream website). Thus, UBAE and Bank Markazi knowingly and intentionally agreed to have Clearstream place Markazi's assets at Citibank in New York when they utilized Clearstream's safekeeping services.

Clearstream acted through its agents (Citibank and JP Morgan Chase) to assist Bank Markazi with its fraudulent conveyance scheme, designed to maintain securities in New York and avail itself of benefits of conducting business in New York, and at the same time hide the identity of the beneficial owner from judgment creditors. In furtherance of that scheme and in an effort to hide such activity and Clearstream's inducement of Citibank and other U.S. Persons to violate OFAC Regulations, Clearstream repeatedly misrepresented to the Court and Plaintiffs that it had no knowledge about the identity of the beneficial owner of the restrained assets. These acts were also designed to defraud and delay judgment creditors of Bank Markazi such as Plaintiffs.

Under the "totality of the circumstances" jurisdictional analysis, the above-mentioned

business activities in New York, including the intentional placement of Bank Markazi's securities in the custody of Clearstream's sub-custodian bank in New York and Clearstream's service of those accounts, support not only general personal jurisdiction, but also specific "long arm"³³ jurisdiction over Clearstream, based on CPLR § 302(a)(1). *See Newbro v. Freed*, CA06-1722, 2007 U.S. App. LEXIS 4769, at *2-4 (2d Cir. Feb. 27, 2007) (affirming district court's exercise of personal jurisdiction under CPLR § 302(a)(1) over an out-of-state defendant who maintained a bank account with a financial consultant in New York, and received funds fraudulently transferred by the consultant from his other clients) (attached as Exh. 10 to Vogel Decl.); *see also Atwal v. Atwal*, 807 N.Y.S.2d 776, 777 (4th Dep't 2005) (finding that personal jurisdiction existed under both CPLR §§ 302(a)(1) and (a)(2) over the transferee trust that accepted fraudulently transferred interest and participated in the fraudulent conveyance).

The same jurisdictional factors that are discussed above in this section also satisfy the federal "due process" requirement for the exercise of personal jurisdiction under the New York "long arm" statute. The "due process" test for personal jurisdiction has two related components: the "minimum contacts"³⁴ inquiry and the "reasonableness" inquiry. *Bank Brussels Lambert v.*

³³ CPLR § 302(a)(1) provides for personal jurisdiction based on the acts of non-domiciliaries as follows:

(a) *Acts which are the basis of jurisdiction.* As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, **who in person or through an agent:**

1. transacts any business within the state or contracts anywhere to supply goods or services in the state;

* * *

N.Y. CPLR § 302(a)(1) (emphasis added).

³⁴ "Minimum contacts" prong of this analysis is fulfilled if the defendant "purposefully availed" itself of the privilege of doing business in the forum and could foresee being haled into court there." *See Bank Brussels*, 305 F.3d at 127. Typically, if the requirements of the New York long-arm statute are satisfied, the courts also hold that the constitutional requirement of "minimal contacts" is also met. *See, e.g., Banco Ambrosiano, v. Artoc Bank & Trust, Ltd.*, 62 N.Y.2d 65, 71 (N.Y. 1984). When a plaintiff makes the threshold showing of the "minimum contacts" part of the inquiry, the burden shifts and the defendant must present "a compelling case that the presence of some other considerations would render

Fiddler Gonzalez & Rodriguez, 305 F.3d 120, 127 (2d Cir. 2002). Clearstream's activities in the forum satisfy both of these components.

2. *Clearstream's Restrictive Interpretation of Creditors' Rights Under CPLR and U.C.C. Does Not Make Sense In View of the New York Court of Appeal's Recent Decision in Koehler v. Bank of Bermuda*

In a recent decision in *Koehler v. Bank of Bermuda Ltd.*, 12 N.Y.3d 533, 883 N.Y.S.2d 763 (N.Y. 2009), the New York Court of Appeals examined the reach of New York's CPLR Article 52 with respect to the intangible property held by a garnishee. It affirmed the appellate court position that "New York courts have the power to command a garnishee present in the state to bring out-of-state assets under the garnishee's control into the state." *Id.* at 540. The judgment debtor in *Koehler* maintained stock of a Bermuda corporation with the Bank of Bermuda Ltd. in Bermuda. The judgment creditor brought a turnover proceeding against the New York branch of the Bank of Bermuda, seeking turnover of the stock held by the main bank in Bermuda. The New York Court of Appeals in *Koehler* further concluded "that a court sitting in New York that has personal jurisdiction over a garnishee bank can order the bank to produce stock certificates outside New York." *Id.* at 541.

Just as the Bank of Bermuda in *Koehler*, Clearstream maintains an office in New York. To accept Clearstream's restrictive interpretation of Article 52, would mean that a New York court with jurisdiction over a New York office of a foreign bank, as in *Koehler*, has the power to direct the bank to turn over property located outside of the United States, but a New York Court (as in this case) does not have the power to order a garnishee over which it has jurisdiction (Clearstream) to turn over property of the debtor that the garnishee holds within the State of New

jurisdiction unreasonable." *Bank Brussels*, 305 F.3d at 129. No such "compelling case" was presented here by Clearstream.

York in a custody account at a New York bank (Citibank). Clearstream's argument conflicts with *Koehler* and its interpretation of the reach of CPLR Article 52 where it concerns assets held by the garnishee.

3. "Situs" of the Assets Is in New York Because the Parties Upon Whom Rest the Obligation of Performance Under the Bonds Are in New York

Another approach taken by the Courts to determine the *situs* of intangible property is to consider the location of the parties upon whom rest obligations of performance that result in generating the value of the intangible property. Determining *situs* of intangible property varies with the context. *See AF-Cap*, 383 F.3d 361 (ruling that "the *situs* of intangible property is about as intangible a concept as is known in law...we affirm that the *situs* of intangible property will vary depending on the context") (emphasis added); *Hotel 71 Mezz Lender*, 14 N.Y.3d at 314 ("We have therefore commented that the situs of intangibles is in truth a legal fiction.") Some New York courts have examined intangible property and contractual obligations and found that *situs* existed where the "party upon whom rested the obligation of performance" was present. *See ABKCO*, 39 N.Y.2d at 657.

Here, it is Citibank, DTCC, Federal Reserve Bank, JP Morgan Chase and HSBC,³⁵ all located in New York, that is each a "party upon whom rest[s] the obligation of performance" under the terms of the global bonds held in New York, in order for the Islamic Republic of Iran to reap the profits and financial benefits of beneficial ownership. The following facts support this conclusion:

³⁵ JP Morgan Chase is Clearstream's correspondent bank according to its website, *See* Exh. [redacted] to Vogel Decl. HSBC is UBAE's correspondent bank according to UBAE's website at www.bancaubae.it, printed on 6/30/2008, a copy of which is annexed as Exh. [redacted] to Vogel Decl.

- The actual bonds are physically located in New York, held at The Federal Reserve Bank and/or DTCC. *See* Clearstream 2^d Br. at 3; *see also* Exh. 2 to Clearstream 2^d Br.)
- Bank Markazi agreed that its interest in the bonds was to be located, for safekeeping services, at Citibank in New York. *See* Sec. III(B)(3), *supra*. The essence of the service provided by Clearstream to UBAE for the benefit of Markazi is “safekeeping services” as reflected in its invoices. *See* Exh. 14 to Vogel Decl. The place of safekeeping is key to the services provided and its importance is reflected by references to New York as the place of safekeeping in every written instruction and transfer confirmation provided by Clearstream and UBAE. *See* Exhs. 15-18 to Vogel Decl.
- Most of the bonds/notes designate a New York bank, as the fiscal agent and/or paying agent. *See* fn. 19, *supra*.
- The bond prospectuses provide that payment of proceeds from the issuer is made to the depository which is either DTCC or its nominee or the Federal Reserve. The depository or its nominee, upon receipt of any payment of principal or interest, then pays its participants (in this case, Citibank in New York) in amounts proportionate to the interests such participants hold for themselves and/or their customers.
- The prospectuses of the bonds at issue indicate that the performance under these bonds is governed by New York law, and many of the bonds at issue expressly reserve forum in New York courts for litigation of disputes pertaining to these bonds. [*See* fn. 19, *supra*.]
- Upon maturation of the bonds, per its Agreement with its customers and pursuant to applicable U.C.C. provisions, Clearstream has an obligation to transfer the securities or cash proceeds from its New York account to the beneficiaries, assignees or transferees of each entitlement holder, according to the entitlement holder’s instructions given to Clearstream. *See* Sec. IV (A)(1) & (2), *supra*; *see* Exh. 3 to Vogel Decl., Articles 11 and 20 (Customer Agreement); *see also* N.Y. U.C.C. § 8-505(b). Clearstream holds proceeds from the bonds in its cash account at Citibank in New York pending instructions from its customers (Bank Markazi and UBAE) to withdraw the funds. When a withdrawal is instructed by its customer (UBAE on behalf of Markazi in this case) Clearstream instructs Citibank to make an electronic funds transfer through Clearstream’s correspondent bank, JP Morgan Chase in New York, to UBAE’s correspondent bank, HSBC in New York. The funds are not transferred to Luxembourg and therefore the situs cannot be in Luxembourg as claimed by Clearstream. This was made clear by [REDACTED] who testified that only a credit is received in UBAE’s account at Clearstream upon payment of bond proceeds received at Citibank. (*See* Exh. 6 to Vogel Decl., (June 27, 2008 Tr.) at pp. 18 and 58). The realization of the cash payment in U.S. Dollars can only be accomplished by active participation of each of these New York banks. *See* copies of documents reflecting cash withdrawals produced by UBAE attached as Exhs. 15-17 to Vogel Decl.; *see, e.g.*, Sec. III(B)(4) (referring to HSBC and JP Morgan Chase Bank); *see*

also Exh. 4 to Vogel Decl. (Clearstream website). The choice of investments made by Bank Markazi was solely its own. No advice was given by Clearstream such that one could argue the situs is where such investment advice was given. *See* letter from UBAE to Clearstream dated October 26, 2009 and responding letter from Clearstream to UBAE dated November 11, 2009 annexed as Exh. 1(J) to Vogel Decl. Moreover, Markazi was receiving statements on its account from Clearstream's Dubai representative office, not Luxembourg. *See* letter from Markazi to Clearstream dated March 3, 2008, annexed as Exh. 1(B) to Vogel Decl.

- Clearstream admitted as follows: “the securities in question are all issued in dematerialized form in the United States of America and consequently the ultimate place of safekeeping, irrespective of the choice of principal and intermediate custodians, is necessarily the United States. It is a necessary consequence of this fact that the securities in question cannot be in safe custody without procuring services from US-based persons.” (Letter from Clearstream to UBAE dated Nov. 11, 2009, Exh. 1(J) to Vogel Decl.)

All these factors support the conclusion that the *situs* of the debt or property of the entitlement holder—the Judgment Debtor Bank Markazi—is in New York. *See Em Ltd. v. Republic of Argentina*, CA09-3908, 2010 U.S. App. LEXIS 17732, at *12 (2d Cir. August 3, 2010) (Exh. 9 to Vogel Decl.) (affirming attachment of intangible securities held by a New York garnishee—U.S. Trust Bank because the garnishee had the responsibility to transfer and dispose of the assets).

C. Common Law Creditor's Bill Authorizes This Court to Restrain Clearstream's Citibank Account and to Direct Citibank to Turn Over Assets to the Plaintiffs

The Creditor's Bill³⁶ is a common law equitable remedy, which permits judgment creditors to reach and attach equitable interests of a judgment creditor “not subject to execution at law,” and to set aside fraudulent conveyances. *See, e.g., Koehler v. Bank of Bermuda*, 544 F.3d 78, 87 (2d Cir. 2008). Where CPLR Article 52 cannot assist in the collection of a federal money judgment, a creditor's bill is an equitable action available to a judgment creditor to

³⁶ The Plaintiffs included a claim based upon a Creditor's Bill in their amended complaint in the turnover action now pending before this Court.

attempt to reach a judgment debtor's equitable interest not subject to execution at law. *See, e.g., Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999).

Specifically, a creditor's bill is available "to permit a judgment creditor to discover the debtor's assets, to reach equitable interests not subject to execution at law, and to set aside fraudulent conveyances." *Koehler*, 544 F.3d at 87, citing *Grupo Mexicano de Desarrollo*, *supra* at 319. "It is well established, however, that, as a general rule, a creditor's bill could be brought only by a creditor who had already obtained a judgment establishing the debt." *Id.* The term "not subject to execution at law" means that the judgment creditor is "not in a position to avail himself of all the ordinary remedies which courts of law [give] for enforcement of judgments." *See Importers' & Traders' Nat'l Bank v. Quackenbush*, 143 N.Y. 567 (N.Y. 1844).

The Common Law Creditor's Bill also finds support in the lower federal courts' "inherent equitable power," which was vested from the inception of the federal court system. *See, e.g., Armstrong*, 470 F.3d at 103-04 ("When Congress established the lower federal courts and vested them with the judicial power of the United States ... the judicial power consisted of all the inherent powers of the courts of justice necessary to their functioning"). Moreover, the federal courts' inherent equitable power to enforce its judgments was affirmed in *Peacock v. Thomas*, 516 U.S. 349 (1996). In particular, the Supreme Court in *Peacock* stated as follows:

[w]e have reserved the use of ancillary jurisdiction in subsequent proceedings for the exercise of a federal court's inherent power to enforce its judgments. **Without jurisdiction to enforce a judgment entered in federal court, the judicial power would be incomplete and entirely inadequate** to the purposes for which it was conferred by the Constitution. In defining that power, we have approved the exercise of ancillary jurisdiction over a broad range of supplementary proceedings involving third parties to assist in the protection and enforcement of federal judgments....

Id. at 356 quoting *Riggs v. Johnson County*, 73 U.S. 166 (1868).

Clearstream's flawed reading of the U.C.C. provisions would nullify the Common Law

Creditor's Bill remedy and this Court's inherent equitable power when dealing with assets held through financial intermediaries. The legislature did not enact U.C.C. Article 8 to provide a "safe haven" to allow state sponsors of terrorism to hide their assets and defraud judgment creditors through the use of the indirect holding system. This is particularly true where, as in this case, the securities and account numbers at issue were described with specificity in the execution and the restraining notices served by the Plaintiffs; and where Clearstream was easily able to trace the transfer of Markazi's interest in the bonds to others including UBAE, resulting in the immediate release of 2 securities that Clearstream asserted were no longer owned by Iran. The specificity of the information concerning the identification number of the security (ISIN), the nominal value of each security in US Dollars, and the account numbers at Clearstream, enabled both Citibank and Clearstream to restrain the assets quickly without undue effort. Mr. Gem, Executive Vice President of Clearstream, confirmed that the restraint occurred quickly enabling Clearstream to reverse a credit it had given to UBAE for an interest payment coming due. *See* Exh. 6 to Vogel Decl. (June 27, 2008) at pp. 57-59. Moreover, Plaintiffs' decision to restrain the assets at Citibank minimized the intrusion in the chain of custodians while ensuring the prevention of the removal of the assets from the reach of the judgment creditors. The granting of relief of a Creditor's Bill in these circumstances will not materially impact the indirect holding system

Accordingly, the traditional remedies under a Common Law Creditor's Bill and this Court's inherent equitable powers, give this Court additional authority to restrain all securities and payments that Clearstream holds at Citibank, New York, for the benefit of and as payment due to the Judgment Debtor, and to direct Citibank to turn over assets to the Plaintiffs.

D. This Court Can Restrain and Order Citibank to Turn Over Iran's Assets Held in the Omnibus Account at Citibank Under TRIA Notwithstanding Any Contrary Provisions in the U.C.C. and CPLR

In addition to this Court's authority to restrain and order turnover of the assets at issue pursuant to the CPLR and the U.C.C., the Court also has an alternate and independent authority to do so pursuant to provisions of the Terrorism Risk Insurance Act of 2002 ("TRIA").

TRIA provides that when a victim of terrorism secures a judgment against a terrorist party, on a claim based on an act of terrorism, or for which the terrorist party may not claim immunity under 28 U.S.C. § 1605(a)(7) of FSIA, the "blocked assets" of the terrorist party and its agencies and instrumentalities, "shall be subject to execution or attachment in aid of execution" in order to satisfy such judgment. *See* TRIA § 201 (enacted 107 Pub. L. 297, 116 Stat. 2322, 28 U.S.C. § 1610, Note); *see also 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).³⁷

In the amendments to FSIA enacted by the Antiterrorism and Effective Death Penalty Act of 1996, Congress expressly empowered private litigants to sue and collect damages from foreign states and their agencies and instrumentalities³⁸ that sponsor terrorism, for certain acts

³⁷ Plaintiffs are seeking turnover of financial assets held by Citibank and Clearstream for the benefit of Bank Markazi (the "agency and instrumentality" of the Judgment Debtor) pursuant to the Foreign Sovereign Immunity Act ("FSIA"), §§ 1602, *et seq.*, and specifically under §§ 1605 and 1610.

³⁸ Bank Markazi is a state-owned central bank, owned 100% by the Islamic Republic of Iran. *See* Exh. █ to Vogel Decl. (Bank Markazi's application to open account at Clearstream); *see also* Appendix A to 31 C.F.R. Part 560 (expressly listing Central Bank of Iran (Bank Markazi) as an entity owned or controlled by the Islamic Republic of Iran). As such, it falls under the definition of the "agency or instrumentality of a foreign state" under 28 U.S.C. § 1603(b). *See Weininger v. Castro*, 462 F. Supp.2d 457, 498 (S.D.N.Y. 2006) ("The Second Circuit has stated that state owned central banks indisputably are included in the 1603(b) definition of 'agency or instrumentality'"); *see also S&S Mach Co. v. Masinexportimport*, 706 F.2d 411, 414 (2d Cir. 1983) (ruling that state owned central banks are covered under the statutory definition).

that result in death or personal injury to a U. S. citizen. *See* 28 U.S.C. § 1605(a)(7)³⁹; *see also* *Wagner v. Islamic Republic of Iran*, 172 F. Supp. 2d 123, 133 (D.D.C. 2001). A court acquires personal jurisdiction over a foreign state, and its agency or instrumentality under TRIA and FSIA when the Court has subject matter jurisdiction pursuant to the FSIA and where service has been made on the foreign state or its agency or instrumentality as specified by FSIA § 1608. *See* 28 U.S.C. § 1608; *see also* *Weininger v. Castro*, 462 F. Supp. 2d 457, 470 (S.D.N.Y. 2006).

1. TRIA Preempts Conflicting State Law Provisions

Under TRIA, all “blocked assets” are available for satisfaction of judgments obtained by American victims of terrorism, “notwithstanding any other law to the contrary.” *See* TRIA § 201 (28 U.S.C. § 1610, Note⁴⁰). It is recognized by New York courts that TRIA preempts⁴¹ any conflicting provisions concerning collection, attachment and garnishment of the “blocked assets.” *See* *Weininger v. Castro*, 609 F.3d 43, 54 (2d Cir. 2010) (holding that TRIA trumps any conflicting provisions of the Treaty of Amity); *Hausler*, 2010 U.S. Dist. LEXIS 96611, *18-23 (holding that TRIA preempts provisions of Article 4-A of NY Uniform Commercial Code) (attached as Exh. 8 to Vogel Decl.) In reaching its decision concerning pre-emption of New York U.C.C. provisions by TRIA, the court in *Hausler* examined in detail the legislative history

³⁹ In 2008, 28 U.S.C. § 1605 (a)(7) was repealed and replaced with 28 U.S.C. § 1605A.

⁴⁰ The placement of the statute as a Note to Section 1610 is irrelevant, where it clearly establishes subject matter jurisdiction over post-judgment execution and attachment. *See* *Weinstein*, 609 F.3d at 49; *see also* *Padilla v. Rumsfeld*, 352 F.2d 695 (2d Cir. 2003) (“No accepted canon of statutory interpretation permits ‘placement’ to trump over text, especially, as here, the text is clear and our reading of it is fully supported by the legislative history”).

⁴¹ A fundamental principle of the Constitution is that Congress has the power to preempt state law. *See* Art. VI, cl. 2; *Savage v. Jones*, 225 U.S. 501, 533 (1912); *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989). Even without an express provision for preemption, state law must yield to a congressional Act where “under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *See* *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000); *see also* *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

and purpose of TRIA and found that “legislative history ... evidences a broader Congressional purpose to ‘deal comprehensively with the problem of enforcement of judgments rendered on behalf of victims of terrorism in any court of competent jurisdiction.’” *Hausler*, 2010 U.S. Dist LEXIS 96611, at *19 citing H.R. Conf. Rep. No. 107-779 at 27. Similarly, the Second Circuit in *Weinstein* examined the legislative history of TRIA and statements by its sponsor, Senator Harkin, stating that TRIA “establishes once and for all, that such judgments are to be enforced against any assets available in the U.S...” See *Weinstein*, 609 F.3d at 50 quoting 148 Cong. Rec. S11524, at S11528 (Nov. 19, 2002) (statement of Sen. Harkin).

2. *TRIA Preempt Conflicting State Laws That Stand in the Way of Achieving the Statutory Intent and Objectives of TRIA*

Even without an express provision for preemption of the field of law by the federal statute, the courts find that Congressional Acts, like TRIA, preempt conflicting provisions of state law, like New York’s U.C.C. where “under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000); see also *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (emphasis added).

It would be a clear violation of the statutory provisions and the underlying purpose of TRIA if Clearstream were to be permitted to transfer the funds from its Omnibus Account in New York to the third parties designated by the Judgment Debtor, presumably out of reach of this Court and Judgment Creditors and for the benefit of a notorious and continuous state sponsor of terrorism, such as the Islamic Republic of Iran.

3. *The Restrained Assets are Effectively Blocked as Citibank is Prohibited under OFAC’s Regulations from Transferring the Restrained Assets to Clearstream*

Since it is indisputable that the assets at issue belong to and/or are held for the benefit of Bank Markazi (which is defined as the “Islamic Republic of Iran” in the OFAC regulations, *see* 31 C.F.R. Part 560, App. A), the release of funds from Citibank would violate OFAC’s Iranian Transactions Regulations because Citibank, Clearstream and any other party involved in the process,⁴² would be engaging in the prohibited exportation of a service, directly or indirectly, from the United States to Iran or the Government of Iran. *See* 31 C.F.R. § 560.204, 560.206.⁴³

If the judicial restraint on the assets were to be vacated, and Citibank were to transfer funds or bonds to Clearstream or any assignee, Citibank and Clearstream would violate the

⁴² Pursuant to the ITR, 31 C.F.R. 560.204, any person regardless of nationality or location, is prohibited from exporting a service, directly or indirectly, to Iran or the Government of Iran. *See also* the International Emergency Economic Powers Act, 50 U.S.C. 1705 which authorizes the imposition of civil or criminal penalties on any person who violates or conspires to violate of any license, order, regulation, or prohibition issued under this chapter. *See e.g.*, OFAC December 22, 2009 Settlement Agreement with Lloyds TSB Bank, plc., available at http://www.treas.gov/offices/enforcement/ofac/civpen/penalties/lloyds_agreement.pdf. Lloyds TSB Bank, a UK entity, engaged in, *inter alia*, apparent violations of the ITR by exporting services from the United States to Iran or the Government of Iran. The agreement stated that:

Specifically, from on or about June 26, 2003, to and including October 31, 2003, Lloyds routed at least 165 electronic funds transfers totaling USD 13,707,126 to or through banks located in the United States and to the benefit of the Government of Iran and/or persons in Iran, including various Iranian financial institutions, in apparent violation of the prohibition against the “exportation.... directly or indirectly, from the United States... of any... services to Iran of the Government of Iran.” *See* 31 C.F.R. Part 260.204.

See also Settlement Agreement between the Department of the Treasury’s Office of Foreign Assets Control and Barclays Bank, PLC, available at <http://www.treas.gov/offices/enforcement/ofac/civpen/penalties/08182010.pdf>; Settlement Agreement between the Department of the Treasury’s Office of Foreign Assets Control and Credit Suisse A.G, available at <http://www.treas.gov/offices/enforcement/ofac/civpen/penalties/12162009.pdf>; Settlement Agreement between the Department of the Treasury’s Office of Foreign Assets Control and Australia New Zealand Bank, available at http://www.treas.gov/offices/enforcement/ofac/civpen/penalties/anz_08242009.pdf.

⁴³ The prohibition on the export of services arises in relevant part from Executive Order 12959 (May 6, 1995) which states, *inter alia*, that the exportation from the United States to Iran, the Government of Iran, or to any entity owned or controlled by the Government of Iran of any goods, technology or services is prohibited. The ITR provide examples of prohibited services (*e.g.*, section 560.410) but the courts have generally upheld OFAC’s prohibitions on the exportation of all kinds of “services” to prohibited parties. *See e.g.*, *Kindhearts for Charitable Humanitarian Development, Inc. v. Geithner*, 647 F. Supp. 2d 857 (N.D. Ohio 2009).

IEEPA and OFAC's regulations.⁴⁴ Specifically, the ITR, 31 C.F.R. Part 560, implement a series of Executive Orders issued pursuant to IEEPA authorities including, for example, Executive Order 12959, issued on May 6, 1995, in which President Clinton declared a national emergency with respect to the Government of Iran in response to, *inter alia*, its support for international terrorism. *Executive Order 12959 – Prohibiting Certain Transactions with Respect to Iran*, 60 Fed. Reg. 24,755 (May 9, 1995). To deal with that threat, the Executive Order imposed comprehensive trade and financial sanctions on Iran. *Id.* Executive Order 13059, issued on August 19, 1997, consolidated and clarified the previous orders, and specifically prohibited the following:

the exportation... directly or indirectly, from the United States, or by a United States person, wherever located, of any... services to Iran or the Government of Iran, including the exportation... of any... services to a person in a third country undertaken with knowledge or reason to know that... such... services are intended specifically for supply, transshipment, or reexportation, directly or indirectly, to Iran or the Government of Iran.

Executive Order 13059 of August 19, 1997 Prohibiting Certain Transactions With Respect to Iran, 62 Fed. Reg. 44,531 at Sec. 2(a) (August 21, 1997). The Executive Order also prohibits, “any transaction or dealing by a United States person, wherever located, including purchasing, selling, transporting, swapping, brokering, approving, financing, facilitating, or guaranteeing, in or related to ... goods, technology, or services for exportation, reexportation, sale, or supply, directly or indirectly, to Iran or the Government of Iran.” *Id.* at Sec. 2(d).

⁴⁴ In the internal correspondence with UBAE, Clearstream concedes that contemplated transfers would violate OFAC regulations. *See* Sec. [REDACTED] (Clearstream confirms in its correspondence to UBAE that a transfer of assets to UBAE, for the ultimate benefit of Iran and its central bank, violates OFAC regulations). However, Clearstream appears to take a contrary position before this Court.

OFAC's regulations implementing IEEPA and these Executive Orders prohibit U.S. persons from engaging in nearly any transaction involving persons in Iran or the Government of Iran, or engaging in transactions in which those parties have an interest.

OFAC's prohibition applies regardless of the nature of the interest at issue. Indeed, the IEEPA extend these prohibitions to any transaction in which Bank Markazi has "any interest." See 50 U.S.C. § 1702(a)(1)(B); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 67 (D.D.C. 2002). Further, Congress has authorized the executive branch to define the statutory terms of the IEEPA. 50 U.S.C. Part 1704. Consistent with this authority, OFAC has defined "interest" to include "an interest of any nature whatsoever, direct or indirect." 31 C.F.R. Part 535.312; see also Lebanese Sanctions Regulations, 31 C.F.R. Part 549.305; Cote D'Ivoire Sanctions Regulations, 31 C.F.R. Part 543.305; Foreign Narcotic Kingpin Sanctions Regulations, 31 C.F.R. § 598.307.⁴⁵ Further, "Courts have endorsed broad interpretations of the phrase 'any interest' as used in the IEEPA and TWEA [Trading With the Enemy Act]." *Kindhearts for Charitable Humanitarian Development, Inc. v. Geithner*, 647 F. Supp. 2d 857 (N.D. Oh. 2009), citing *Regan v. Wald*, 468 U.S. 222, 225-226, 233-34 (1984); *Consarc Corp. v. Iraqi Ministry*, 27 F.3d 695, 701-02 (D.C. Cir. 1994).

Accordingly, for a transaction to implicate OFAC's prohibitions, a prohibited entity, such as Bank Markazi, need not have a legally enforceable property interest; rather, a beneficial interest may suffice. See *Kindhearts v. Geithner*, 647 F. Supp. 2d at 887 citing *Global Relief Found. v. O'Neill*, 315 F.3d 748, 753 (7th Cir. 2002). Under the ITR, the concepts of indirect or direct interest are both encompassed in the prohibition on exporting a service, directly or indirectly, to the Government of Iran. A direct export of a service occurs when a U.S. person

⁴⁵ See also Report of the Judicial Review Commission for Foreign Asset Control, App. B at pp. 61-62: Letter to Larry D. Thomson, Esq., (November 13, 2000), available at http://justice.law.stetson.edu/JudicialReviewCommission/frtcappendicesvolume1_B.pdf.

directly services, for example, Bank Markazi's bonds; an indirect export of a service occurs where the same service is provided through non-U.S. person intermediaries, but where the Government of Iran (in this case, in the person of Bank Markazi) receives the ultimate benefit.⁴⁶ In this regard, absent specific authorization from OFAC Citibank and Clearstream are prohibited under the ITR from transferring the funds to Markazi or causing such a transfer to happen, even if the funds are not transferred directly to Bank Markazi.

IEEPA, as amended by the IEEPA Enhancement Act, PL 110-96 50 U.S.C. §1705, 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). In this respect, the prohibitions under IEEPA and accompanying penalties apply not only to U.S. persons who violate OFAC's regulations but to any person that causes such a violation as well. As a result, while it is clear that Citibank would be in violation of OFAC's regulations by transferring the restrained assets, Clearstream and UBAE, as well, would be subject to penalties to the extent that they cause Citibank to violate the ITR.

Penalties for violating OFAC's regulations can be severe. In particular, Citibank would be subject to civil penalties of up to \$250,000 per violation or twice the value of the transaction,

⁴⁶ See Settlement Agreement between the Department of Treasury's Office of Foreign Assets Control and Lloyds tsb Bank plc, available at http://www.treas.gov/offices/enforcement/ofac/civpen/penalties/lloyds_agreement.pdf; Settlement Agreement between the Department of the Treasury's Office of Foreign Assets Control and Barclays Bank, PLC, available at <http://www.treas.gov/offices/enforcement/ofac/civpen/penalties/08182010.pdf>; Settlement Agreement between the Department of the Treasury's Office of Foreign Assets Control and Credit Suisse A.G, available at <http://www.treas.gov/offices/enforcement/ofac/civpen/penalties/12162009.pdf>; Settlement Agreement between the Department of the Treasury's Office of Foreign Assets Control and Australia New Zealand Bank, available at http://www.treas.gov/offices/enforcement/ofac/civpen/penalties/anz_08242009.pdf.

whichever is larger.⁴⁷ Moreover, to the extent that, by remitting the restrained assets to Clearstream, Citibank would be acting with knowledge that the release of such funds would benefit Bank Markazi, any violation of the ITR would be considered willful, and Citibank could face criminal penalties amounting to \$1,000,000 per violation and up to 20 years imprisonment. *See* P.L.110-96; *see also* Economic Sanctions Enforcement Guidelines, 74 Fed. Reg. 57,593, 57,602 (Nov. 9, 2009). As OFAC has stated, “[P]enalties, both civil and criminal, are intended to serve as a deterrent to conduct that undermines the goals of sanctions programs.” *See* 74 Fed. Reg. at 57,594. Subject to severe civil and criminal penalties, Citibank is prohibited from effecting the contemplated transfer and neither Clearstream nor UBAE is permitted to cause Citibank to violate OFAC’s regulations by directing such transfers. The restrained assets are therefore “blocked” for purposes of TRIA.⁴⁸ To hold otherwise would leave the restrained

⁴⁷ *See* P.L. 110-96. OFAC’s regulations are strict liability so Citibank need not have been aware of Markazi’s interest to have violated the ITR.

⁴⁸ Plaintiffs note that, in *Weinstein v. Islamic Republic of Iran*, the Eastern District of New York held that, on the facts of that case, the assets of Bank Melli, an instrumentality of the Government of Iran subject to the ITR, were not blocked for purposes of TRIA. 299 F. Supp.2d at 74-75. The present case is distinguishable in a number of respects, not least of which is that, in *Weinstein*, the assets of Bank Melli were subject to both general and specific licenses. OFAC has not issued any general or specific license applicable to the Restrained Assets.

Further, the Eastern District failed to consider the legislative history of TRIA when it interpreted the term “blocked assets” under TRIA. It is clear that Congress intended for the term “blocked” to be expansive. Specifically, the House Conference Report clearly indicates Congress’ intent for TRIA to build upon and extend the remedial purpose of 28 U.S.C. § 1610(f)(1), which applies to property with respect to which financial transactions are prohibited or regulated pursuant to the IEEPA. House Conference Report 107-779 (Nov. 13, 2002) (“H. Conf. Rep.”) at 27. Indeed, Congress intended, “to deal comprehensively with the problem of enforcement of judgments rendered on behalf of victims of terrorism in any court of competent jurisdiction by enabling them to satisfy such judgments through the attachment of blocked assets of terrorist parties.” *Id.* (emphasis added). Congress further noted that section 201(c) of TRIA is intended to clarify that judgments covered under TRIA “are enforceable against any assets or property under any authorities referenced in Section 1610(f)(1),” including property with respect to which financial transactions are prohibited under the IEEPA. *Id.* (emphasis added). Senator Tom Harkin, a co-author of Title II of the TRIA, confirmed this purpose, stating that the term “blocked asset” is intended to include “any asset of a terrorist party that has been seized or frozen by the United States in accordance with law. This definition includes any asset with respect to which financial transactions are prohibited or regulated by the U.S. Treasury under any blocking order under the Trading With the Enemy Act, the International Emergency Economic Powers Act, or any proclamation, order,

assets in Citibank's possession in perpetuity or until further direction from the federal government. Under similar circumstances, the court in *Hausler v. JP Morgan Chase Bank*, 2010 U.S. Dist. LEXIS 96611 (S.D.N.Y. 2010) aptly noted that it was never the statutory purpose or legislative intent of TRIA to permit banks to keep billions of dollars belonging to the terrorist regimes that deposited the funds, while the families of the victims are left with nothing. *See, Hausler v. JP Morgan Chase Bank*, 2010 U.S. Dist. LEXIS 96611, at *42 (holding that the TRIA regulations did not intend to benefit banks and financial institutions, but were clearly intended to compensate "victims of terrorist states—most fittingly, as in this case, when the crime victim was an American citizen") (attached as Exh. 8 to Vogel Decl.)

4. *Balance of Equities Favors Application of TRIA Over Clearstream's Restrictive and Erroneous Application of U.C.C.*

TRIA and related parts of FSIA were passed as part of the statutory scheme to fight terrorism and compensate American victims of terrorism. If Clearstream's restrictive reading of the New York U.C.C. were followed, it would nullify TRIA. If Clearstream's position were followed, it would mean that a terrorist organization could freely invest in U.S. securities or any notes payable in U.S. dollars and invested in and through U.S. financial institutions (in billions of dollars), derive benefits from these investments, receive payments in U.S. dollars from U.S. financial institutions, banks and depositories, and be totally free from any claims of judgment creditors. The only step it would have to take is to make those investments through an intermediary bank, which in turn conducts business in the United States and invests billions of dollars belonging to terrorist organizations as part of the bank's global portfolio of securities,

regulation, or license." Senate Proceedings and Debates of the 107th Congress, Second Session, 148 Cong. Rec. S11528 (daily ed. Nov. 19, 2002) (statement of Sen. Harkin). In this respect, Congress clearly intended for "blocked assets" (defined to include assets that are "seized" or "frozen") to be an expansive, all-encompassing term reaching assets that, as here, are prohibited from being transferred under the ITR.

held with U.S. banks and depositories. This result would conflict with the legislative purpose of TRIA. This is particularly egregious, where there is no doubt—as here—that a state sponsor of terrorism is the ultimate beneficiary of the funds at issue.

Based on correspondence between Bank Markazi, UBAE and Clearstream, it is clear that Clearstream knew the identity of the beneficiary of these investments and UBAE's correspondence with Bank Markazi also leaves no doubt that the assets at issue are owned by and held "for the benefit" of Bank Markazi.

The general legislative intent and purpose behind U.C.C. Article 8 is to allow for the free flow of commerce between banking institutions, without imposing conflicting legal obligations and potential damages on the financial intermediaries. *See, e.g.*, Cmt. to N.Y.U.C.C. § 112. This legislative goal would not be affected by this Court's attachment and turnover of the assets at issue. Clearstream will not incur indemnity liability or be subject to conflicting obligations to its entitlement holder—Bank Markazi—under the provisions of Clearstream's Customer Agreement. *See* Sec. _III(C)(1)_, *supra*; Exh. 3 to Vogel Decl. (Customer Agreement, Articles 48, 51, 52 and 8(v)). Pursuant to Article 48 of its Customer Agreement, Clearstream **is not** liable for "any action taken, or any failure to take any action required to be taken;...including without limitation...reversal order, law, judicial process, decree, regulation, order or other action of any government, governmental body (including any court or tribunal...)". In fact, Clearstream itself may seek indemnity and compensation from Bank Markazi for its costs associated with these proceedings. For example, under Article 52, each Clearstream customer warrants that it has "full legal capacity to hold or dispose of the assets" it keeps with Clearstream, and the "Customer shall be solely and entirely liable for any consequences resulting from the Customer's failure to fulfill this obligation." *Id.* (Customer Agreement,

Article 52). Article 8(v) requires that the securities deposited by the Customer with Clearstream must be “of good delivery at the time of deposit and thereafter,” and “would not violate any law, regulation or order of any government, governmental agency (including any court or tribunal”). *Id.* (Article 8(v)). Of course, if Clearstream actively participated in fraudulent conduct with Bank Markazi from the inception of the investments, the exculpatory provisions in its agreement might be inapplicable; but Clearstream cannot complain about the injuries caused by its own fraud.

Thus, the explicit language of TRIA as well as the balance of equities favors its application of TRIA to protect the rights of the families and victims of terrorism acts over the restrictive and erroneous application of the U.C.C. advocated by Clearstream.

V. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the motion of Clearstream to vacate the restraints be denied. Alternatively, if the Court finds that insufficient facts are known in order to decide this motion, Plaintiffs request that Clearstream’s motion be denied with leave to renew after the Plaintiffs have had an opportunity to conduct discovery from Clearstream, Citibank, JP Morgan Chase and HSBC regarding the transactions at issue. The Plaintiffs will shortly be submitting a request for such discovery. Plaintiffs further request that the restrained funds in Clearstream’s custodial accounts remain with Citibank, with the Court-imposed restraints on transfer until the judgment is rendered by this Court on Plaintiff’s Complaint Pursuant to N.Y. CPLR §§ 5225 and 5227.

Respectfully submitted,

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