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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

KIRSCHENBAUM, *et al.*,

Plaintiffs-Appellees,

—against—

650 FIFTH AVENUE COMPANY, *et al.*,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS ALAVI FOUNDATION AND 650 FIFTH AVENUE COMPANY

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CORPORATE DISCLOSURE STATEMENT

The Alavi Foundation is a not-for-profit corporation organized under the laws of New York. The Alavi Foundation has no parent corporation, and no publicly-held corporation owns 10% or more of its stock.

The 650 Fifth Avenue Company is a partnership organized under the laws of New York. The 650 Fifth Avenue Company has no parent corporation, and no publicly-held corporation owns 10% or more of its stock.

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PRELIMINARY STATEMENT

By way of these consolidated actions, ten groups of plaintiffs holding terrorism-related judgments against Iran (the "Iran Creditors") seek to enforce their judgments against two U.S. entities that undisputedly have nothing to do with terrorism and had no involvement in the terrorist acts for which the judgments were entered. Specifically, the Iran Creditors seek to execute on the properties of Defendants-Appellants Alavi Foundation ("Alavi" or the "Foundation"), a New York not-for-profit corporation, and the 650 Fifth Avenue Company (the "Fifth Avenue Company" or the "Partnership") (together, "Defendants"), a New York real estate partnership, thereby divesting them of hundreds of millions of dollars of assets, based on their historical relationship with Iran. After a bench trial, in which these judgment enforcement actions were partially consolidated with a civil forfeiture action brought by the U.S. Government, the District Court for the Southern District of New York (Forrest, J.) found that these two U.S. entities are agencies or instrumentalities of Iran for purposes of the Foreign Sovereign Immunities Act ("FSIA") and the Terrorism Risk Insurance Act ("TRIA") and, therefore, are liable for the Iran Creditors' outstanding judgments against Iran. The District Court's findings and conclusions constitute error, and the judgments below should be reversed.

This is not the first time the Iran Creditors' claims have been considered by this Court. In 2014, Defendants appealed summary judgment decisions by the same District Court finding that they "are" the "foreign state" of Iran, "agencies or instrumentalities" of Iran, and "alter egos" of Iran for FSIA and TRIA purposes. This Court vacated the District Court's judgments, holding that Defendants do not constitute the foreign state of Iran under the FSIA "as a

matter of law" and are "statutorily disqualified" from being considered agencies or instrumentalities of Iran within the meaning of the statute. *Kirschenbaum v. 650 Fifth Ave.*, 830 F.3d 107, 124, 128 (2d Cir. 2016). The Court also held that Defendants are not Iran's alter egos because there was "no record evidence" that Defendants were "extensively controlled" by Iran. *Id.* at 129. Accordingly, the Court held that the Iran Creditors' FSIA claims failed as a matter of law. *Id.* at 141-42.

The Court also vacated the District Court's judgment in favor of the Iran Creditors with respect to their TRIA claims. Applying the FSIA's definition of a "foreign state" to the claims under the TRIA, which is codified as a note to the FSIA, the Court held that Defendants do not qualify as Iran as a matter of law. *Id.* at 131-32. The Court vacated the District Court's judgment that Defendants were liable as "agencies or instrumentalities" of Iran under the TRIA, but found that issues of material fact existed as to whether Defendants constitute agencies or instrumentalities under a definition that differed from that set forth in the FSIA. *Id.* at 131. The Court announced guidelines of what constitutes an agency or instrumentality under the TRIA, explaining that an entity could qualify if it serves as a means through which a material function of a terrorist party is accomplished; provides material services to the terrorist party; or is owned, controlled, or directed by the terrorist party. *Id.* at 135. The Court made clear that the determination of agency or instrumentality status must be made as of the time the TRIA complaint is filed, but did not elaborate on how its standard should be applied. *Id.* at 131. The Court remanded the case for further proceedings on two narrow issues: first, whether Defendants qualified as agencies or instrumentalities of Iran for purposes of the TRIA, and second, whether their properties were "blocked" within the meaning of the TRIA.

Disregarding the limited mandate, the District Court agreed on remand to consider claims against the Fifth Avenue Company under the FSIA, finding that they had been "reserved" by the Iran Creditors and were not subject to this Court's holdings. The District Court also considered the TRIA issues that were actually remanded: whether Defendants qualified as agencies or instrumentalities of Iran under the TRIA (and therefore could have their properties executed upon), and whether their properties were blocked. After a five-week trial that focused overwhelmingly on acts from the late 1970s through early 1990s, and involved minimal evidence from the period at the time of or shortly before the Iran Creditors' complaints were filed between 2009 and 2013, the District Court again found that Alavi is an agency or instrumentality of Iran under the TRIA and that the Partnership is an agency or instrumentality of Iran under the TRIA and the FSIA. The District Court effectively ignored this Court's instruction that the issues must be decided "at the time Plaintiffs' complaints were filed," *id.* at 136, conducting instead what it described as a "historical analysis" of evidence going back forty years. (SPA-435 n.63.)[1]

The District Court's judgments should be reversed. The District Court erroneously considered the Iran Creditors' FSIA claims even though this Court's mandate made clear that those claims had been definitively resolved and were not sent back for further consideration. Contrary to this Court's holding that the Partnership was not an agency or instrumentality of Iran under the FSIA, the District Court found otherwise. It did so only after misapplying the statute's definition of the term and ignoring the relevant time frame. Though the pertinent section of the FSIA allows

[1] All cites to "SPA" are to the Special Appendix, which is filed herewith.

recovery only where the underlying judgment is against an agency or instrumentality of a foreign state, the District Court granted relief in favor of the Iran Creditors based on their judgments against the foreign state *itself*. The District Court's judgments on the FSIA claims should be reversed.

The District Court's judgments with respect to the TRIA claims were equally flawed. The District Court erroneously denied Defendants a jury trial on the TRIA claims after the case was remanded and the Iran Creditors materially changed their theories of jurisdiction and liability. The Seventh Amendment guarantees the right to a trial by jury where a plaintiff seeks to impose liability for money damages against a new party—as the Iran Creditors do here. Defendants promptly demanded a jury trial, but the District Court erroneously found that the right had been waived. Accordingly, the judgments should be vacated and the cases should, at a minimum, be remanded for trial by jury.

The TRIA judgments also should be reversed because the District Court applied the statute's definition of an agency or instrumentality of a foreign state sponsor of terrorism in a manner that conflicts with the definitions applied by other courts and with the statute's legislative history, and violates due process requirements. In the previous appeal, this Court offered guidelines as to what constitutes an agency or instrumentality under the TRIA, but did not explain how the standard should be applied. The District Court adopted a novel interpretation that would allow a service provider of a terrorist party to be held liable for unbounded terrorism-related judgments so long as its services could be considered "important." The case on which this Court relied in establishing its TRIA standard actually imposed a much more limited definition, reserving the agency or instrumentality designation for those entities that were involved in or contributed to terrorism-related activity. The

District Court's disregard of this limitation contradicts congressional intent and violates the Fifth Amendment Due Process Clause's requirement that civil liability be proportionate to a defendant's conduct.

Compounding the error in its TRIA analysis, the District Court did not consider Defendants' status at the time the Iran Creditors' complaints were filed, but instead performed a "historical analysis" of their purported connections to Iran since 1973. This historical analysis constituted the vast majority of the District Court's factual analysis and overwhelmed its scant consideration of the evidence from the time of filing. A review of the evidence from the relevant time period requires a different outcome or, at a minimum, a new trial.

Further, the TRIA allows execution only on the "blocked assets" of a terrorist party. Defendants' properties do not fall within the ambit of the blocking order relied upon by the Iran Creditors, Executive Order 13,599, because that Order only blocked the assets of the Government of Iran. In addition, to the extent the Government has viable forfeiture claims concerning Defendants' assets, they cannot be considered blocked as a matter of law.

Finally, the Court should vacate the FSIA and the TRIA judgments because of the District Court's serious evidentiary errors. The District Court prevented Defendants from introducing critical evidence by excluding more than a dozen witnesses the Defendants intended to call at trial and improperly limiting Defendants' examinations of the witnesses who did testify. Because these evidentiary errors substantially prejudiced Defendants' ability to present their case, the case must be retried in the event that the claims are not dismissed entirely. Given the District Judge's firmly-expressed beliefs on this case, the case should be assigned to

a different district judge on remand to ensure impartiality and the appearance of impartiality.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Defendants appeal from a judgment entered by the Honorable Katherine B. Forrest of the United States District Court for the Southern District of New York on October 4, 2017, granting execution against certain of their properties in partial satisfaction of the Iran Creditors' pre-existing judgments against Iran. (SDNY 13-cv-1825, Dkt. 524.)

Defendants filed a timely notice of appeal on October 11, 2017. (SDNY 13-cv-1825, Dkt. 527.) Because these judgment enforcement actions were brought against entities purported to be agencies or instrumentalities of a foreign state pursuant to the FSIA, 28 U.S.C. § 1602 *et seq.*, and the TRIA, *codified at id.* § 1610 note, the District Court properly exercised subject matter jurisdiction under those statutes. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

1. Did the District Court err by permitting the Iran Creditors to pursue claims against the Fifth Avenue Company under the FSIA, and by ordering execution on its properties on the basis of those claims, after this Court held that claims against Defendants under the FSIA failed as a matter of law?

2. Did the District Court erroneously deny Defendants their constitutional right to a jury trial on the Iran Creditors' TRIA claims and improperly order execution on Defendants' properties based on its flawed interpretation of the TRIA?

3. Do the District Court's critical evidentiary errors require this Court to vacate and remand these judgment enforcement actions?

4. Should this case be reassigned to a different district judge on remand to ensure impartiality?

STATEMENT OF THE CASE

A. The Parties

1. The Alavi Foundation

Alavi is a New York not-for-profit corporation that was organized forty-five years ago with a charitable mission of supporting Islamic culture and promoting the study of Persian language, literature, and civilization in the United States. (EX-1623.)[2] Its Certificate of Incorporation states that the purpose of the Foundation is to "render support and assistance for the study and promotion of the arts and sciences," to "contribute to religious instructions regardless of creed for the purpose of promoting understanding and harmony among persons of all faiths," and to support "established charitable, philanthropic, educational and civic endeavors." (EX-13.) The Foundation was established in 1973 by the Shah of Iran. (*Id.*; EX-1623.) After the Shah was deposed during the 1979 Iranian Revolution, the Foundation was renamed the Mostazafan Foundation of New York in 1980, and then the Alavi Foundation in 1992. (EX-1623.)

As a matter of New York not-for-profit law, Alavi cannot be owned by any individual or entity, including the Iranian

[2] All cites to "EX" are to the Exhibit Volume of the Joint Appendix, which is filed herewith.

government. (*Id.*; A-3509.)[3] The Foundation is run by its Board of Directors, its president, and its employees. (EX-260; A-3509.) As a charitable organization, Alavi is also overseen by the New York Attorney General's Office ("NYAG"). (A-3511.) The NYAG has never taken any action against Alavi or its employees (*id.*), and the Foundation remains a not-for-profit corporation in good standing. (EX-260.) Alavi is also recognized as a charitable organization under § 501(c)(3) of the Internal Revenue Code. (EX-1623.)

Alavi fulfills its charitable mission by financially supporting educational, religious, and cultural programs. (A-3510.) These activities include making grants to colleges and universities; donations to Persian schools and Islamic organizations; and grants to Persian art and literature programs. (*E.g.*, EX-372-732; A-3512; A-3514-16.) The Foundation's grants and loans are directed to charitable entities in the United States or Canada. (EX-1623.) Alavi also owns several real properties throughout the United States that it provides on a rent-free basis to community organizations to use for religious, educational, and health care purposes. It owns five real properties that house four community centers located in Queens, New York; Rockville, Maryland; Carmichael, California; and Houston, Texas. (EX-1635; A-3512.)[4] The Queens property houses the Islamic Institute of New York, an institution where community members come to practice their religion and congregate, and the Razi School, a not-for-profit school that educates children in an Islamic environment. (A-3512-13.)

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[3] All cites to "A" are to the Joint Appendix, which is filed herewith.

[4] Alavi also owns property in Catharpin, Virginia. (EX-1635.)

Similarly, the Houston property houses the Islamic Education Center of Houston, which holds religious gatherings, has a full-time accredited school, and provides free services to the Houston community, such as medical care and assistance for the homeless. (A3514; A-3551.)

The vast majority of Alavi's charitable activities are funded by distributions from the Fifth Avenue Company, in which the Foundation holds a majority partnership interest. (EX-1.) Alavi receives no funding from the Government of Iran. (A-3755; EX-2529-30.)

2. The Fifth Avenue Company

In 1974, Alavi purchased property located at 650 Fifth Avenue in Manhattan. (EX-1628.) The following year, the Foundation borrowed $42 million from Bank Melli, which is owned by the Government of Iran. (*Id.*) Alavi used the Bank Melli loan to retire its existing mortgage and to construct a thirty-six-story office tower on the property (the "Building"). (*Id.*) At the time that Alavi borrowed from Bank Melli, the arrangement was completely legal; the relevant sanctions against Iran were not imposed until 1995. *See infra* at 12.

In 1989, Alavi and Bank Melli entered into a transaction which effectively converted Bank Melli's mortgage into an equity interest in the Building. Alavi transferred its interest in the Building to a newly-created real estate partnership, the Fifth Avenue Company, in exchange for a 65% interest in the Partnership. (EX-1628.) Bank Melli created a New York corporation, Assa Corporation ("Assa"), which contributed $44.8 million to the Partnership in exchange for a 35% interest in the Partnership. (*Id.*) The funds contributed by Assa were used to satisfy the Bank Melli mortgage. (*Id.*) Alavi later transferred a 5% interest in the

Partnership to Assa, resulting in Alavi holding 60% of the Partnership and Assa holding a 40% interest. (*Id.*)

Assa's ownership structure changed in the years following 1989, though it is undisputed that Bank Melli retained beneficial ownership of Assa. (EX-1632.) Assa is wholly owned by Assa Ltd., a corporation domiciled in the Channel Islands in the United Kingdom. (*Id.*) From 1989 to 1993, Assa Ltd. was indirectly owned by two Bank Melli officials through another entity. (*Id.*) In 1993, these officials' indirect interests in Assa Ltd. were transferred to Bank Melli. (*Id.*) In 1995, Bank Melli's indirect interest in Assa Ltd. was transferred to two individuals, Davood Shakeri and Fatemeh Aghamiri, who have been the indirect nominal owners of Assa since that time. (*Id.*)[5]

The Partnership leases the Building to commercial tenants and distributes profits to the partners on a pro rata basis. (EX-23; A-3522.) The Building has always been under the management of a professional real estate management company, which collects rent from the tenants and oversees the daily operations of the Building. (A-3432.) Alavi serves as the managing partner of the Partnership. (EX-1628.) Assa does not play any role in managing the Partnership or the Building; rather, it acts as a silent partner which passively receives partnership distributions. (A-3522; EX-2617.) The Partnership made its last distribution to Assa in 2007. (EX-1501.) As of 2008, the Building was

[5] In the prior appeal in the Forfeiture Action, this Court determined that there was a genuine dispute of fact as to whether Alavi knew that Shakeri and Aghameri were straw owners and that Bank Melli continued to own Assa after 1995. *In re 650 Fifth Ave. & Related Props.*, 830 F.3d 66, 93 (2d Cir. 2016).

estimated to have a value of at least $600 million. (A1758-59.)

3. The Iran Creditors

The Iran Creditors are ten groups of private individuals who hold unsatisfied money judgments against the Government of Iran. (SPA-471-72.) The Iran Creditors obtained their judgments against Iran pursuant to the terrorism exceptions to a foreign state's sovereign immunity from the jurisdiction of U.S. courts, FSIA § 1605A and former § 1605(a)(7). *See* 28 U.S.C. § 1605A; *id.* § 1605(a)(7) (repealed). In the underlying actions, Iran was found to have provided assistance to terrorist groups, such as Hamas and Hezbollah, which committed the terrorist acts that harmed the Iran Creditors or their family members. (EX-1482; EX-2893; EX-2916; EX-2939; EX-3065; EX-3095; EX-3123; EX-3141; EX-3169; EX-3190; EX-3200.) None of the Iran Creditors' judgments is against Alavi or the Partnership (EX-2887; EX-2912; EX-2933; EX-3064; EX-3093; EX-3162; EX-3163; EX-3193; EX-3194; EX-3253; EX-3284; EX-2780; EX-2781), and it is undisputed that neither Alavi nor the Partnership had any involvement in the terrorist activity underlying each judgment.[6] The unsatisfied

[6] The Greenbaum, Acosta, Beer, Kirschenbaum, Miller, and Rubin Creditors stipulated that their judgments "resulted from events in which they have no evidence that Alavi Foundation or the 650 Fifth Avenue Company was involved or played any part," and that "they are not aware of any evidence that either the Alavi Foundation or the 650 Fifth Avenue Company was ever involved in any form of terrorism or sponsored any terrorist act." (EX-1349-50; EX-1353-54; EX-1358-60.) The Havlish Creditors stipulated to the latter fact. (EX-1345-46.) Further, the District Court acknowledged that "there is no evidence and no allegation in

portions of the Iran Creditors' judgments total billions of dollars. (Dkt.[7] 1122.)

B. The Initial Litigation and the Prior Appeal

1. The Government's Forfeiture Action

In 1995, the United States imposed broad financial sanctions on Iran pursuant to the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701 *et seq.*, including a prohibition on "the exportation from the United States to Iran, the Government of Iran, or to any entity owned or controlled by the Government of Iran, or the financing of such exportation, of any goods, technology, . . . or services." Exec. Order No. 12,959, 60 Fed. Reg. 24,757 (May 6, 1995). In addition, the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC") promulgated regulations which prohibited U.S. entities from providing services to Iran, *see* 31 C.F.R. Part 560, which went into effect on August 20, 1997. *Id.* § 560.301.

In December 2008, the U.S. Government brought a civil forfeiture action against properties owned by Assa and Bank Melli, including Assa's interest in the Fifth Avenue Company and the Building (the "Forfeiture Action"). (A-311-31.) The Government alleged that Assa had violated the 1995 sanctions and the IEEPA by providing services to Bank Melli, including the transfer of Partnership distributions to Bank Melli, and that Assa violated the federal money laundering statutes, 18 U.S.C. §§ 1956, 1957. (*Id.*)

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this case that the Alavi Foundation is involved in supporting or financing terrorism, weapons of mass destruction, or anything of that nature." (A-2971.)

[7] All cites to "Dkt." are to filings in SDNY 08-cv-10934, unless otherwise specified.

In November 2009, the Government filed an amended forfeiture complaint which added properties belonging to Alavi and the Partnership as additional defendants-*in-rem*. (A-332-428.) The Government alleged that Defendants had violated the IEEPA since 1995 by providing services to Assa—and, thus, Bank Melli—and to Iran generally. (*Id.*) Defendants' alleged services to Iran included their management of the Partnership and the Building and running a charity focused on Iranian culture. (*Id.*) The Government further alleged that Defendants' properties were involved in money laundering transactions. (*Id.*)

2. The Iran Creditors' Actions

From 2009 to 2013, the Iran Creditors instituted these actions seeking to execute on Defendants' properties in partial satisfaction of their outstanding judgments against Iran. (EX-1488.)[8] They alleged that Defendants constitute the foreign state of Iran, its alter egos, and its agencies or instrumentalities, such that Defendants should be held liable for the Iran Creditors' judgments against Iran under the FSIA

[8] The Iran Creditors' actions were initiated on the following dates: the Rubin Creditors filed in federal court on January 8, 2009; the Miller Creditors filed in federal court on January 8, 2009; the Greenbaum Creditors filed in New York State Supreme Court on December 24, 2008, and the action was removed to federal court on January 21, 2009; the Hegna Creditors filed in federal court on March 27, 2009; the Peterson Creditors filed in federal court on March 1, 2010; the Acosta Creditors filed in federal court on March 18, 2010; the Heiser Creditors filed in federal court on February 27, 2013; the Kirschenbaum Creditors filed in federal court on March 19, 2013; the Beer Creditors filed in federal court on March 20, 2013; and the Havlish Creditors filed in federal court on May 23, 2013. (EX-1488.)

and the TRIA, even though Defendants had no involvement in the terrorist acts underlying those judgments. The Iran Creditors also alleged that Defendants are controlled by Iran and provided services to Iran, including charitable and real estate management services. (SDNY 09-cv-553, Dkt. 1-1; SDNY 09-cv-165, Dkt. 1; SDNY 09-cv-166, Dkt. 1; SDNY 10-cv-1627, Dkt. 1; SDNY 10-cv-2464, Dkt. 1; SDNY 13-mc-71, Dkt. 1; SDNY 13-cv-1825, Dkt. 1; SDNY 13-cv-1848, Dkt. 1; SDNY 08-cv-10934, Dkt. 501; SDNY 11-cv-3761, Dkt. 38-1.) The Iran Creditors asserted claims under FSIA §§ 1610(a)(7), 1610(b)(3),[9] and 1610(g), which permit the enforcement of terrorism-related judgments against the assets of a "foreign state" or an "agency or instrumentality of a foreign state" under certain circumstances. 28 U.S.C. §§ 1610(a)(7), (b)(3), (g).[10] They also asserted claims pursuant to TRIA § 201, which permits a plaintiff with a terrorism-related judgment against a "terrorist party" to execute against the "blocked assets" of that terrorist party or those of its "agencies or instrumentalities." *Id.* § 1610 note. The TRIA defines a terrorist party as including a "foreign state designated as a state sponsor of terrorism," such as Iran. *Id.*; Determination Pursuant to Section 6(i) of the Export Administration Act of 1979—Iran, 49 Fed. Reg. 2836-02 (Jan. 23, 1984). The District Court consolidated the Iran Creditors' judgment enforcement actions with the Forfeiture Action for pre-trial purposes and partially consolidated the cases for trial. (Dkt. 108.)

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[9] The Greenbaum and Peterson Creditors did not assert § 1610(b)(3) claims. (SPA-325.)

[10] The term "foreign state" is defined in FSIA § 1603(a), and "agency or instrumentality of a foreign state" is defined in § 1603(b). 28 U.S.C. §§ 1603(a), (b).

3. The 2013 Summary Judgment Motions and the Prior Appeal

In 2013, both the Iran Creditors and Defendants moved for summary judgment. (Dkts. 682, 869, 950, 954-55.) The Iran Creditors moved for summary judgment on their claims under FSIA §§ 1610(a)(7) and 1610(g) and TRIA § 201, but "reserved" their FSIA § 1610(b)(3) claims against Defendants. (Dkt. 871 at 13 n.13.) Defendants moved for summary judgment on *all* of the Iran Creditors' claims. (Dkt. 684 at 1.) The District Court granted summary judgment to the Iran Creditors on their claims under FSIA §§ 1610(a)(7) and 1610(g) and the TRIA, and denied Defendants' motion. (Dkts. 851, 1125.) It held that Defendants constitute the "foreign state" of Iran, "alter egos" of Iran, and "agencies or instrumentalities" of Iran under both statutes. (Dkt. 1125 at 19-29.) The District Court also found that Defendants' assets are "blocked" within the meaning of the TRIA. (*Id.* at 31-32.) Accordingly, it ordered execution on Defendants' assets in partial satisfaction of the Iran Creditors' judgments pursuant to both the FSIA and the TRIA.

After entry of partial judgment, Defendants appealed the District Court's grant of the Iran Creditors' motion for summary judgment *and* its denial of Defendants' motion. (Dkt. 1159.)[11] On July 20, 2016, this Court vacated the District Court's judgment in its entirety. *Kirschenbaum*, 830 F.3d at 142. As to the Iran Creditors' FSIA claims, the Court ruled *as a matter of law* that Defendants do not constitute the foreign state of Iran or its agencies or instrumentalities under the FSIA § 1603 definitions. *Id.* at 123-30. It held that

[11] Defendants simultaneously appealed the District Court's grant of summary judgment in favor of the Government in the Forfeiture Action. (Dkt. 1158.)

Defendants are not the "foreign state" of Iran under § 1603(a) because they "bear none of the attributes of statehood," and that "Defendants are statutorily disqualified as agencies or instrumentalities" of Iran within the meaning of § 1603(b). *Id.* at 124, 128. The Court also held that Defendants are not Iran's "alter egos" because "there is no record evidence that Alavi and, therefore, 650 Fifth Ave. Co., of which Alavi owns 60%, is so extensively controlled by [Iran] that a relationship of principal and agent is created." *Id.* at 129 (internal quotation marks omitted). Accordingly, the Court held that the FSIA claims failed as a matter of law. *Id.* at 141-42.

This Court also vacated the District Court's judgment as to the Iran Creditors' TRIA claims. It held, as a matter of law, that Defendants do not qualify as Iran—a "foreign state designated as a state sponsor of terrorism" and, therefore, a "terrorist party" under the TRIA—for the same reasons that they do not qualify under the FSIA. *Id.* at 131-32. The Court also held that factual issues precluded summary judgment as to whether Defendants constituted agencies or instrumentalities of Iran under the TRIA. *Id.* at 131. Although the Court recognized that the term "agency or instrumentality" is used in both the FSIA and the TRIA, it determined that the FSIA's definition does not control in the TRIA context, even where the relevant terrorist party is a foreign state sponsor of terrorism. *Id.* at 131. Rather, the Court outlined a new, three-part standard for an "agency or instrumentality of [a] terrorist party": an entity that "(1) was a means through which a material function of the terrorist party is accomplished, (2) provided material services to, on behalf of, or in support of the terrorist party, *or* (3) was owned, controlled, or directed by the terrorist party." *Id.* at 135 (emphasis in original). The Court did not, however, define the terms "material function" or "material services," or describe the level of control needed for an entity to be

deemed an agency or instrumentality under the TRIA. In addition, the Court held that factual issues remained as to whether Defendants' assets are "blocked" within the meaning of the TRIA, such that they are available for execution under that statute. *Id.* at 141.

The Court remanded these actions, stating that "the *only* issues returning to the District Court for further proceedings are (1) Defendants' status as agencies or instrumentalities under the TRIA, and (2) whether their asserts [*sic*] are 'blocked' under that statute." *Id.* at 142 (emphasis added). The Iran Creditors' FSIA claims were not remanded for further proceedings.[12]

C. The Proceedings on Remand

1. The Proceedings in Advance of Trial

On March 21, 2017, the day this Court remanded these actions to the District Court, the Iran Creditors moved to consolidate them for trial with the Forfeiture Action, which was already scheduled for trial on May 30, 2017. (Dkt. 1499.) The District Court granted this motion over Defendants' objection. (SPA-59-61.) Accordingly, the pre-trial proceedings in the Iran Creditors' actions were compressed into the two months leading up to trial. (Dkt. 1506.) During this brief pre-trial period, a number of key issues were addressed. First, the Iran Creditors argued that they still had a viable claim under the FSIA—namely, a claim to execute on property of the Fifth Avenue Company as an agency or instrumentality of Iran, pursuant to

[12] This Court simultaneously vacated the District Court's grant of summary judgment in the Forfeiture Action and remanded for further proceedings. *In re 650*, 830 F.3d at 76.

§ 1610(b)(3).[13] (Dkt. 1536.) Defendants argued that the § 1610(b)(3) claims were barred by this Court's mandate, but the District Court permitted the Iran Creditors to proceed to trial on those claims. (SPA-62-68.) Second, Defendants contended that they were entitled to a jury trial on the TRIA claims. (Dkt. 1511 at 3-5.) Defendants pointed out that, although they did not oppose a bench trial in 2013, the Iran Creditors had materially changed their theory of jurisdiction and liability on remand, and these changes renewed Defendants' right to a jury trial. The District Court disagreed, finding that Defendants had waived their right to a jury trial, regardless of the Iran Creditors' new TRIA theory. (SPA-46-58.)

2. The Consolidated Trial

From May 30, 2017 to June 29, 2017, the District Court conducted simultaneous trials in these judgment enforcement actions and the Forfeiture Action. The Forfeiture Action was tried to a jury during the day, and evidence adduced in that case was deemed part of the record in these actions. (SPA-59-61.) Supplemental evidence was presented in the bench trial of these actions during the evenings after the Forfeiture Action adjourned. (*Id.*)

a. The Iran Creditors' Case

In these actions, the critical issues were whether Defendants constituted agencies or instrumentalities of Iran at the time of filing of the Iran Creditors' complaints between 2009 and 2013 and whether Defendants' assets were blocked. The Iran Creditors contended that Defendants could be deemed agencies or instrumentalities because they

[13] The Iran Creditors acknowledged that they had no viable FSIA claim against Alavi. (Dkt. 1536 at 2 n.1.)

were controlled by Iran, were "organs" of Iran, and performed material services and functions for Iran during the relevant period. (A-3772; A-3789-93; A-3795-96; Dkt. 1749 at 3-4, 7.) The Iran Creditors' case consisted of testimony by nineteen witnesses and related documents, with the majority of the questioning conducted by the Government. Their case lasted approximately three and a half weeks of the four-week evidentiary portion of the trial.

The Iran Creditors primarily sought to prove their claims through the testimony of former Alavi Board members, former Bank Melli officials, and Government agents with no personal knowledge of the events at issue. Manoucher Shafie, who served as Alavi's president from 1979 to 1983, testified that several officials from an Iranian agency, the Bonyad Mostazafan, were appointed to Alavi's Board in the 1980s. (A-2983; A-3004-06.) But Shafie testified that he operated the Foundation independently from the Government of Iran and the Bonyad Mostazafan. (A-3006-07; A-3026; A-3027; A-3038; A-3039; A-3049.) After his resignation in 1983, Shafie had very limited involvement with the Foundation, though he opined that Mohammad Geramian, who served as Alavi's president from 1991 to 2007, was a "puppet" of Iran's ambassador to the United Nations, Kamal Kharazi.[14] (A-3024.) Shafie admitted, however, that Kharazi refused to interfere with Alavi's operations when Shafie sought his assistance to do work for Alavi in 1994. (A-3023.)

[14] Iran's ambassador to the United Nations changed over the years: Kharazi served from 1989 to 1997, Seyyed Mohammad Hadi Nejad-Hosseinian served from 1998 to 2002, Javad Zarif served from 2002 to 2007, and Mohammad Khazaee served from 2007 to 2014. (EX-1488.)

The Iran Creditors' case also included testimony by Seyed Mojtaba Hesami-Kiche, a Government informant who was paid nearly $800,000 for his cooperation in the Forfeiture Action. (EX-1638.) Hesami-Kiche testified that, while he served on Alavi's Board from 1983 to 1991, he monitored the Foundation on behalf of the Bonyad Mostazafan. (A-3227.) He discussed numerous documents from the 1970s, 1980s, and early 1990s, including those reflecting the 1989 transaction during which Alavi and Bank Melli worked together to convert Bank Melli's mortgage into an equity interest in the Partnership. (A-3258-59.) He also testified that Ambassador Kharazi assumed responsibility for Alavi in 1991, displacing the Bonyad Mostazafan's influence over the Foundation. (A-3317.) Hesami-Kiche testified that he resigned from Alavi's Board in 1991 at the behest of the Supreme Leader of Iran, Ayatollah Khamenei. (A-3307.) He had little contact with the Foundation's leadership for many years thereafter. (A-3320-21.) However, in 2007, Hesami-Kiche became a paid informant of the Federal Bureau of Investigation ("FBI"). (A-3344-45.) In this role, Hesami-Kiche made several covert tape recordings of conversations with Alavi's officers and directors in 2008. (A-3262.) On those tapes, Alavi officials made unguarded statements demonstrating that they did not know that Assa was still owned by Bank Melli and genuinely believed that Assa was "independent." (EX-2772; EX-2776.) In one such recording, former Alavi president Geramian and Board member Hassan Hassani stated in reference to Assa that they "did not know who they were," "don't know who they are," and that Assa "ha[s] not responded" to Alavi's letters asking "who are the members of [its] Board of Trustees." (EX-2774.)

Unlike Hesami-Kiche, who left before 1995, Abbas Mirakhor, an economist at the International Monetary Fund, testified that during his tenure on the Board from 1991 to

2005, Alavi operated independently from the Government of Iran and was not subject to Iran's control. (EX-2514-15; EX-2534-35.) He stated that Ambassador Kharazi asked him to join the Foundation's Board in 1991 in order to help stabilize its finances (EX-2512-17; EX-2538; EX-2632-33), and that the Board made decisions about financial issues and charitable donations without direction, interference, or funding from Iran. (EX-2523-30; EX-2545-46; EX-2556-57.) Mirakhor testified that he witnessed the Iranian ambassador attending two or three Board meetings during his fourteen-year tenure to discuss cultural activities in which the Foundation and the ambassador had a common interest, but the ambassador did not give any instructions to the Board. (EX-2550-55; EX-2558-59.) In the mid- to late-1990s, Mirakhor learned about Assa, Alavi's "silent" partner. (EX-2560-61; EX-2617.) He testified that Alavi made good faith inquiries to learn more about Assa's ownership in the late 1990s and early 2000s. (EX-2606-08; EX-2618.)

The Iran Creditors also relied on testimony by two former Bank Melli officials, Mohammad Karjooravary and Gholamreza Rahi. They testified that, in the 1980s, Alavi had difficulty paying off its loans from Bank Melli. (A-3082; A-3097-98.) These difficulties and related tax problems led the parties to form the Partnership in 1989. (A-3107-08.) The Bank Melli witnesses testified about documents demonstrating that Mohammad Badr-Taleh, who served as Alavi's president from 1988 to 1991, communicated extensively with Bank Melli concerning the decision to form the Partnership. (A-3059-60; A-3099-3100; A-3103-06.) However, Karjooravary testified that Bank Melli's investment in the Partnership was intended to be "short term" because the Bank understood that it was not permitted to hold real estate for more than five years under U.S. law. (A-3210; A-3213.) Rahi described a meeting he

had with Ambassador Kharazi and another Bank Melli official in 1996 or 1997, during which they discussed the Bank's frustration that it was unable to control the Partnership. (A-3068; A-3079-80.) He was not aware of Bank Melli or the Iranian government ever providing directions to Alavi. (A-3077.)

In addition, the Iran Creditors relied upon testimony by agents from the FBI and the Internal Revenue Service ("IRS") who were involved in the investigation into Defendants' alleged violations of the 1995 sanctions. These agents discussed their investigation and relayed a number of hearsay statements allegedly made by former Alavi and Assa officials during interviews in 2008 and 2009. Over Defendants' objection, FBI Agent George Ennis testified about statements allegedly made by Badr-Taleh concerning the 1989 partnership transaction (A-2882-94); statements allegedly made by Geramian concerning Bank Melli's ownership of Assa and Ambassador Zarif's instruction to the Foundation to settle a 2004 lawsuit (A-3724; A-3725; A-3727-28); statements allegedly made by former Board member Alireza Ebrahimi that the Iranian ambassador directed certain activities of the Foundation (A-3728-29); and statements allegedly made by Mohammad Deghani Tafti, Assa's U.S. representative, opining that Alavi knew that Bank Melli owned Assa. (A-2925-26.) Ennis also testified about a 2008 interview with Houshang Ahmadi, who served on Alavi's Board from 1979 to 2013. (EX-1488.) According to Ennis, Ahmadi acknowledged that Ambassador Zarif sought to influence the Foundation by relaying instructions through Geramian. (A-2921; A-2924.) But Ahmadi maintained that Alavi had operated independently from the Government of Iran since 1992, that Alavi's Board and program coordinator selected the recipients of its charitable donations, and that the Board—not the Iranian ambassador—selected the Foundation's

president. (A-2921; A-2935-36.) Ahmadi also told Ennis that Alavi's Board decided to settle the 2004 lawsuit based on the advice of its attorney. (A-2921; A-2935-36.) Ahmadi further stated that the Foundation wanted to know more about Assa's board members and made a number of unsuccessful attempts to set up a meeting with them. (A-2936.)

The Iran Creditors also relied upon the testimony of IRS Agent Dan McWilliams, who described Ebrahimi's personal journals. (A-3123; A-3125-33.) These journals contained thousands of pages of seemingly random and mostly inscrutable entries, discussing topics like his bathroom usage and grades for former students. (A-3124; EX-1764-1808.) The Iran Creditors presented snippets from these journals as purported evidence of Alavi's knowledge that Bank Melli continued to own Assa after 1995. (A-3125-33.) Over Defendants' objection, McWilliams read excerpted phrases from the journals into the record and provided his own interpretation of their significance. He acknowledged, however, that he never spoke to Ebrahimi about the meaning of the journal entries. (A-3125-33; A-3148.)

In addition, the Iran Creditors relied on testimony by several agents who described a 2008 incident during which Alavi's then-president, Farshid Jahedi,[15] destroyed documents that were responsive to a grand jury subpoena. (A-2825-29; A-2832-33; A-2836-38.) Jahedi later pled guilty to obstruction of justice in connection with that incident. (A-2874.) The Iran Creditors relied upon the testimony concerning this incident primarily to prove the fact that the documents were destroyed, as opposed to the actual

[15] Jahedi served as Alavi's president from May 2007 to January 2009. (EX-1488.)

content of those documents, which were only minimally discussed.

Despite the Iran Creditors' heavy reliance on the FBI and IRS agents' testimony, Defendants were severely limited in cross-examining the agents. The District Court prohibited Defendants from questioning the agents about their bias against Muslims and Iranians, even though the agents' own emails clearly demonstrated such bias. (SPA-190-91.) For example, a co-case agent leading the investigation made a joke to the investigative team about Ebrahimi reading a fictitious magazine named "Hizbollah Illustrated" with "burqa-wearing centerfolds" and masturbating to his grandmother's ankle while "chanting verses from the Koran." (A-2547.1.) The District Court did not permit Defendants to question the agents about anti-Muslim bias and the effect it had on their investigation. (SPA-190-91.) It found this issue to be irrelevant, reasoning that the Government's investigation was not on trial. (*Id.*) Further, the District Court severely curtailed cross-examination regarding the agents' aggressive investigative techniques—demonstrated in emails by arguments with the prosecutors about appropriate methods of questioning of witnesses and threats to "lock up" uncooperative witnesses (A-2534.1; A-2542.1)—which contributed to a number of Alavi witnesses' deciding to invoke their Fifth Amendment rights and not testify at trial. (SPA-241-43; SPA-263-65; A-2797-2800.) The District Court went so far as to require Defendants to produce outlines of their cross-examinations of agents for the District Court to screen and remove any portions found to be objectionable. (SPA-264; A-2853; A-2912; A-2916-2916.13; A-3730; A-4013.)

The Iran Creditors also relied on videotaped "depositions" in which five former Alavi officers and directors were recorded in 2013 invoking their Fifth

Amendment privilege against self-incrimination in response to a lengthy list of questions regarding the Foundation's relationship with Iran. (A-3788-89.) These individuals included Geramian, Ahmadi, Ebrahimi, Jahedi, and Hassani. At least two of Alavi's former directors who invoked the Fifth Amendment in 2013 expressed a willingness to testify at trial after remand of the previous appeal, but the District Court precluded their testimony at trial. (SPA-177-81; A-3371; A-3695.) The District Court held that allowing these witnesses to testify would unfairly "surprise" the Iran Creditors—despite the fact that these individuals were willing to be deposed months before trial began—and that "reopening" discovery would unfairly prejudice the Iran Creditors, who "had the right to rely on the record that they had developed during the discovery period." (SPA-177-81.) Thus, the only Alavi Board members permitted to testify were those called in the Iran Creditors' case; critical witnesses who served on the Foundation's Board from 2009 to 2013 and had firsthand knowledge of relevant events were excluded on timeliness grounds. In contrast, the District Court found that no prejudice resulted from the Government's production of more than a thousand pages of new evidence to Defendants on the eve of and *during* trial, some of which was helpful to Defendants' case. (SPA-299-305.)

None of the individual Iran Creditors testified at trial. They did not offer testimony that either Defendant had any involvement in the underlying terrorist acts that caused them harm; rather, they stipulated that Defendants were *not* involved in those acts. (EX-1345-46; EX-1349-50; EX-1353-54; EX-1358-60; *see also* A-2791.)

The Iran Creditors also relied on a number of documents submitted into evidence, including notes from an October 2007 meeting between Jahedi and Ambassador Khazaee, in

which Khazaee stated his request (which was shown to have been at least partially rejected) that Alavi should donate only to Shia Muslim organizations, that the Board should meet with him every three to six months, and that he should be given an opportunity to offer his opinion regarding Alavi's activities. (EX-1731.) The Iran Creditors also offered evidence regarding testimony given by Ahmadi and Geramian in two lawsuits filed in the 1990s that Alavi did not conduct business with the Iranian government and was not an agency or instrumentality of Iran. (EX-2307-09; EX-2319; EX-2214.) These lawsuits were ultimately dismissed.

b. The Defendants' Case

The District Court severely restricted Defendants' ability to present their defense. It precluded fourteen of Defendants' witnesses from testifying, including two of Alavi's Board members, an OFAC representative, attorneys who represented Board members who were threatened with potential prosecution if they testified on Defendants' behalf, and representatives of organizations that received charitable donations from Alavi. (SPA-177-81; SPA-183 n.13; SPA-209-12; SPA-228; SPA-241-43; SPA-279-82; SPA-287-89; A-3571.) Defendants ultimately called five witnesses and their case was limited to approximately two days of the trial.

By prohibiting testimony by certain Alavi directors who had invoked their Fifth Amendment privileges in 2013 (but were willing to be deposed in 2017), the District Court prevented Defendants from calling critical witnesses who were prepared to testify about the lack of Iranian control over the Foundation and the absence of knowing services for Iran during their tenure on the Board, which lasted from 2005 through 2013. (SPA-177-81.) The District Court also severely limited Defendants' evidence concerning Alavi's charitable activities, finding that such evidence was unfairly

prejudicial, even as part of the bench trial. (SPA-203-06; SPA-226-31; SPA-261-63; A-2842-43; A-3539.) Defendants sought to offer this evidence to rebut the Iran Creditors' allegations that Alavi's charitable activities were controlled by the Iranian government and were services to Iran. While Defendants were prepared to offer testimony from five recipients of Alavi's charitable donations, the District Court precluded all but two of those witnesses of its own choosing. (SPA-227.) It further restricted the testimony to twenty minutes each and outlined permissible lines of questioning. (SPA-260-62.) The District Court again screened Defendants' direct examination outlines and struck certain questions. (A-3545; A-4011-12.)

Defendants called two Alavi employees who worked at the Foundation during the relevant period from 2009 to 2013. Hanieh Safakamal, who served as Alavi's program coordinator from 2000 to 2005 and as financial manager from 2005 to 2014, testified that the Foundation operated independently from the Iranian government. (A-3507-09; A-3519; A-3754.) She said that she never interacted with any Iranian official in connection with her position at Alavi, that Iran played no role in her hiring, and that Alavi's employees did not carry out any functions of the Iranian government. (A-3753-56.) Safakamal testified that she occasionally participated in Alavi's Board meetings and never witnessed any Iranian government official at those meetings or at the Foundation's offices. (A-3509; A-3519.) She stated that there were no external influences from Iran or anyone else over the Foundation's charitable grant-making process. (A-3511; A-3519.) Safakamal testified that Alavi supports organizations such as Islamic centers, Persian schools, universities, interfaith programs, and disaster relief organizations. (A-3511-18; EX-1121.) She explained that, although Alavi focused on the Muslim and Iranian communities, its support was by no means limited to those

communities. (A-3512; A-3514; A-3515.) Alavi also donated to non-Muslim and non-religious organizations such as Catholic University, Harvard Law School, Sacred Heart University, Doctors Without Borders, and Women for Women International. (EX-461; EX-529; EX-603; EX-668; EX-731; A-3518-20.)

Safakamal testified that Alavi's main source of funding was the Building's rental income, and that the Foundation did not receive any funding from Iran. (A-3510; A-3755.) She explained that Alavi managed the Partnership's affairs and that the Partnership itself did not have its own employees. (A-3520; A-3522.) The daily operation of the Building was handled by Cushman & Wakefield, a professional real estate management company. (A-3520-21.) Alavi's employees interacted with the management company's personnel on a regular basis to deal with issues such as leasing and capital improvements. (A-3521-22.) Safakamal also testified that Assa played no role in managing the Partnership or the Building; Assa was merely a "silent partner." (A-3522; A-3524; A-3534.) It is undisputed that the Partnership ceased providing distributions to Assa by 2007, long before the Iran Creditors' actions were filed. (A-3767; EX-1501.)

Safakamal also testified about correspondence reflecting inquiries by Alavi and its Board concerning Assa's owners and directors between 1995 and 2007. (A-3525-29; EX-1111-13; EX-1120; EX-1166; EX-1168; EX-1286.) In November 1995, an Assa representative informed the Foundation that ownership of Assa's parent company, Assa Ltd., had been transferred to Shakeri and Aghameri. (A-3525; EX-1109.) Safakamal testified that the Foundation repeatedly requested meetings with Shakeri and Aghameri, but it was only able to obtain meetings with Tafti, Assa's U.S. representative. (A-3527-29.) Safakamal believed that

Assa was owned by two wealthy individuals based in England. (A-3524-25; A-3527.) She did not know that it had any ties to Bank Melli. (A-3525.)

Defendants also called Misriya Chatoo, who has served as Alavi's secretary since 1983. (A-3534.) She testified that Alavi had no known connection to the Iranian government and that the Foundation's president decided which organizations received its charitable donations. (A-3535; A-3537.) Chatoo testified that Tafti was the only Assa representative that she ever met. (A-3546.)

In addition, representatives of two organizations that received charitable grants from Alavi during the relevant period from 2009 to 2013 testified at trial. Fahim Kazimi, a representative of the Islamic Education Center of Houston, testified that his organization provides religious, educational, charitable, and medical services to the broader Houston community. (A-3551.) Alison Van Dyk testified on behalf of the Temple of Understanding, an organization that received support from the Foundation between 2009 and 2011. (A-3454; A-3456-57; EX-603; EX-729.) Her organization educates people about different religions and promotes interfaith and cross-cultural understanding. (A-3454.) Both Kazimi and Van Dyk testified that their organizations are not focused solely on Shia Muslims or Iranians, and that Alavi did not limit the use of its charitable grants to any particular denomination or nationality. (A-3457; A-3552-53.) Neither organization has any connection to Iran or any relationship with the Iranian government. (A-3456; A-3553.)

The District Court denied Defendants' request to submit post-trial briefing with proposed findings of fact and conclusions of law, stating that a decision would be issued

"virtually simultaneous[ly] with the jury verdict." (A-3820; *see also* SPA-331.)

3. The District Court's Decision

Approximately eighteen hours after closing arguments were completed, the District Court issued a 155-page decision, holding that Defendants' properties were subject to turnover under both FSIA § 1610(b)(3) and TRIA § 201. (SPA-469.)[16] In its lengthy and document-intensive findings of fact, the District Court determined that "the Government of Iran exercised extensive control over" Defendants "at all relevant times." (SPA-336.) Rather than limiting its focus to the dates on which the Iran Creditors' complaints were filed, however, the District Court analyzed whether Defendants could be held liable for judgments against Iran "based to some degree on a historical analysis leading up to the date on which the complaints were filed." (SPA-435 n.63; SPA-437.) Indeed, the District Court's opinion spent dozens of pages describing events from the 1970s, 1980s, and 1990s in painstaking detail. (SPA-340-91.) It made limited findings concerning events that occurred in the late 2000s, within a few years of the relevant period from 2009 to 2013. (SPA-402-10.) The District Court concluded that the Partnership constituted an agency or instrumentality of Iran under the FSIA, that both Defendants constituted agencies or instrumentalities of Iran under the TRIA, and that

[16] The District Court explained its ability to issue such a prompt decision without "pre-determin[ing] the issues before trial" as follows: "[T]he Court took notes on the computer at the bench as the evidence began to come in. These were later converted into findings. The Court also drafted portions of this Opinion at night, early in the morning, and on all intervening weekends during this five-week trial." (SPA-332-33 n.15.)

Defendants' assets were blocked. (SPA-427-28; SPA-439; SPA-466.) Thus, it ordered execution on Defendants' properties to the Iran Creditors pursuant to those statutes. (SPA-469.)

SUMMARY OF ARGUMENT

The District Court's judgments turning over Defendants' assets to the Iran Creditors pursuant to the FSIA and the TRIA should be reversed. *First*, the District Court erred by considering the Iran Creditors' FSIA § 1610(b)(3) claims against the Fifth Avenue Company, in violation of this Court's mandate, and by ordering turnover of the Partnership's properties pursuant to that section. In its prior decision, this Court clearly stated that the "only" issues returning to the District Court on remand were (1) whether Defendants qualify as "agencies or instrumentalities" of Iran under the TRIA, and (2) whether Defendants' assets are "blocked" under that statute. *Kirschenbaum*, 830 F.3d at 142. This Court expressly rejected *all* the Iran Creditors' FSIA claims because Defendants do not satisfy the strict statutory definitions of a "foreign state" or its "agency or instrumentality." *Id.* at 125, 128. Yet the District Court permitted the Iran Creditors to proceed to trial on their § 1610(b)(3) claims and to relitigate the Partnership's status as an agency or instrumentality of Iran. This was error.

Even if the Iran Creditors' § 1610(b)(3) claims had not been foreclosed by this Court's mandate, those claims fail on the merits. By its plain text, § 1610(b)(3) does not permit judgment creditors of a *foreign state*—like the Iran Creditors here—to execute their judgments against the assets of the state's *agency or instrumentality*. Rather, this subsection permits a judgment creditor to execute against the assets of an agency or instrumentality only where the underlying judgment is against that *same* agency or instrumentality.

Thus, even if the Partnership did constitute an agency or instrumentality of Iran, as the Iran Creditors claim, they could not execute their judgments against the Partnership's assets pursuant to § 1610(b)(3). While a different subsection of the FSIA, § 1610(a)(7), permits a creditor to satisfy a judgment against a foreign state by executing against the assets of an agency or instrumentality, the Iran Creditors concede that this Court already rejected their § 1610(a)(7) claims in the prior appeal. The District Court erroneously conflated the statutory requirements of § 1610(b)(3) and § 1610(a)(7) and permitted the Iran Creditors to shoehorn their failed § 1610(a)(7) theory into their supposedly "reserved" § 1610(b)(3) claims.

The Iran Creditors' § 1610(b)(3) claims fail for the additional reason that the Partnership does not qualify as an agency or instrumentality of Iran that may be subjected to liability under the FSIA, as this Court already held. The District Court disregarded this Court's binding determination, however, and incorrectly determined that the evidence at trial proved that the Partnership constitutes an agency or instrumentality of Iran under the FSIA's definition. For all these reasons, the judgment on the Iran Creditors' § 1610(b)(3) claims must be reversed and remanded with instructions to dismiss.

Second, the District Court erred by ordering the turnover of Defendants' properties to the Iran Creditors pursuant to TRIA § 201. At the outset, the District Court denied Defendants their constitutional right to a jury trial on the TRIA claims. As this Court has recognized, the Seventh Amendment entitles the parties to a jury trial where the plaintiff seeks to enforce a money judgment against a third party that is not otherwise liable for that judgment, as the Iran Creditors do here. The District Court determined that Defendants waived their right to a jury trial in 2013, but it

ignored the fact that the Iran Creditors asserted a materially different theory of recovery and jurisdiction at that time, which directly implicated Defendants' jury trial right. In 2013, the Iran Creditors alleged that Defendants constituted agencies or instrumentalities of Iran within the meaning of the FSIA and that the District Court had subject matter jurisdiction over *all* their claims pursuant to that statute, including the TRIA claims. Under this theory, the FSIA's bench trial requirement precluded Defendants from seeking a jury trial. But after this Court held that Defendants do not qualify as agencies or instrumentalities of Iran under the FSIA definition, and clarified that the FSIA and TRIA definitions of "agency or instrumentality" are not coextensive, the Iran Creditors materially changed their TRIA theory. They contended that Defendants constitute agencies or instrumentalities of Iran under the TRIA, even if they do not qualify under the FSIA. The Iran Creditors' assertion of this new theory revived Defendants right to a jury trial on the TRIA claims, and Defendants renewed the jury demand in a timely manner. Thus, the judgment on the TRIA claims must be vacated and remanded for a jury trial if the claims survive this appeal.

On the merits, the District Court erred in holding that Defendants' properties must be turned over to the Iran Creditors pursuant to the TRIA. Under a proper interpretation of the statute, Defendants do not qualify as "agencies or instrumentalities" of Iran that may be subjected to liability for unsatisfied terrorism judgments. While this Court provided some guidance for interpreting this term of art in the prior appeal, it did not elaborate on how its three-part TRIA standard should be applied. In particular, the Court did not specify what constitutes a "material" service or function that renders the provider of that service or function an agency or instrumentality that is subject to unlimited liability for terrorism judgments. The District Court applied

an overbroad interpretation of the TRIA standard, permitting an entity to be deemed a terrorist party's agency or instrumentality merely for providing a service or function that could be considered "important," even if the entity did so unwittingly. (SPA-432.) The District Court found that Defendants constituted agencies or instrumentalities of Iran because they supposedly enabled Iran to maintain ownership of real properties, managed the real estate partnership, provided Iran with access to U.S. currency, and performed charitable works for Iran. (SPA-432-36.) None of these alleged services or functions has any nexus to the terrorist activity that harmed the Iran Creditors or to terrorism generally, and it is undisputed that Defendants had no involvement in any such activity.

The District Court's overly broad interpretation of the TRIA standard runs afoul of the statute's precedent, legislative intent, and constitutional constraints. The authority on which this Court relied in establishing its three-part TRIA standard applied a much stricter standard than the one employed by the District Court; it required the agency or instrumentality to be involved in the terrorist party's terrorism-related activity before liability for its acts may be shifted onto that entity. In addition, the legislative history of the TRIA demonstrates that Congress intended the term "agency or instrumentality" to encompass only entities that assist in committing terrorist acts or are closely related to terrorist parties. Moreover, the Due Process Clause prohibits an interpretation of the TRIA which would allow a plaintiff to shift ruinous terrorism-based liability onto a third party that played no role in terrorism or the terrorist activity that harmed the plaintiff and is not closely identified with the wrongdoer. Under a proper interpretation of the TRIA, Defendants cannot be considered agencies or instrumentalities of Iran.

In addition to applying an incorrect interpretation of the TRIA standard, the District Court failed to analyze Defendants' status as of the proper time period. Although this Court instructed the District Court to analyze Defendants' status "at the time Plaintiffs' complaints were filed," *Kirschenbaum*, 830 F.3d at 136, the District Court undertook a decades-long "historical analysis" that overwhelmed its minimal consideration of the evidence at the time of filing. (SPA-435 n.63.) Because the Iran Creditors presented insufficient evidence to prove that Defendants constituted agencies or instrumentalities of Iran between 2009 and 2013, their TRIA claims must be dismissed or, at the very least, retried under a proper time-of-filing analysis.

The District Court also erroneously held that Defendants' properties are "blocked" within the meaning of the TRIA under Executive Order 13,599, which only blocked the assets of the Government of Iran. Moreover, assets cannot be considered blocked where the Government has asserted or obtained an ownership interest in those assets, as it did in the related Forfeiture Action.

Third, in the event that this Court does not dismiss the Iran Creditors' claims as a matter of law, these actions must be remanded for retrial because the District Court's extensive evidentiary errors substantially prejudiced Defendants' ability to present their defense. The District Court improperly excluded the vast majority of Defendants' witnesses and severely restricted their ability to prove that Alavi is a legitimate charity which operates independently from the Government of Iran. Further, the District Court prohibited Defendants from cross-examining federal agents concerning their coercive investigation tactics and anti-Muslim bias, which would have raised questions about the validity of their testimony and explained Defendants'

witnesses' decisions to invoke their Fifth Amendment privilege. The collective effect of these rulings and others was to deprive Defendants of their right to a fair trial. Thus, Defendants are entitled to a new trial on the Iran Creditors' TRIA claims before a jury. Given the District Judge's firmly-expressed views about the merits of this case, these actions should be assigned to a new district judge in order to ensure impartiality and the appearance of impartiality.

ARGUMENT

I. The District Court Erred by Ordering Execution against the Fifth Avenue Company's Properties Pursuant to the Foreign Sovereign Immunities Act in Disregard of This Court's Mandate

The District Court erred by considering the Iran Creditors' FSIA § 1610(b)(3) claims and by ordering execution of the Iran Creditors' judgments on the Fifth Avenue Company's properties pursuant to that section. This Court should reverse the District Court's turnover of the Partnership's properties pursuant to § 1610(b)(3), as a violation of the mandate rule and on the merits.

A. The Mandate Rule Prohibited the District Court from Reopening the FSIA § 1610(b)(3) Claims on Remand

The District Court was precluded from reconsidering the Iran Creditors' § 1610(b)(3) claims against the Partnership because this Court rejected them in the prior appeal and remanded solely for resolution of the TRIA claims.[17]

[17] This Court reviews *de novo* whether the District Court has complied with the mandate. *See Puricelli v. Republic of Argentina*, 797 F.3d 213, 218 (2d Cir. 2015).

Kirschenbaum, 830 F.3d at 123-30, 141-42. Under the "mandate rule," a district court "must carry out its duty to give the mandate 'full effect.'" *Statek Corp. v. Dev. Specialists, Inc.*, 809 F.3d 94, 98 (2d Cir. 2015). The mandate rule, which is a subsidiary rule of the law-of-the-case doctrine, "compels compliance on remand with the dictates of the superior court and forecloses relitigation of issues expressly or *impliedly* decided by the appellate court." *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001) (emphasis in original). The lower court has "no discretion in carrying out the mandate" and "cannot vary it, or examine it for any other purpose than execution; or give any other or further relief." *Statek*, 809 F.3d at 98. Where the appellate court's mandate is "unambiguously limited in scope," it cannot be "construed to authorize consideration by the district judge of" other issues. *Ben Zvi*, 242 F.3d at 95.

The District Court disregarded the plain terms of this Court's mandate. It permitted the Iran Creditors to relitigate their § 1610(b)(3) claims, despite the fact that this Court had already rejected those claims as a matter of law and remanded for the sole purpose of resolving the TRIA claims. In doing so, the District Court relied on an incomplete recitation of the procedural history of the case. It found that the § 1610(b)(3) claims were "not foreclosed by the mandate" because they were not at issue in the prior appeal. (SPA-63-64; SPA-67.) This ruling was incorrect as a matter of both fact and law.

As Defendants explained to the District Court, *all* of the Iran Creditors' FSIA claims were at issue in the prior appeal, including the § 1610(b)(3) claims. (Dkt. 1581.) In 2013, the Iran Creditors moved for summary judgment on their claims under §§ 1610(a)(7) and 1610(g) and TRIA § 201, purporting to "reserve" their § 1610(b)(3) claims against Defendants. (Dkts. 869, 950, 954, 955.) But at the same

time, Defendants moved for summary judgment "on all affirmative claims brought by the private plaintiff judgment creditors against Defendants." (Dkt. 684 at 1.) Defendants argued that the FSIA claims failed as a matter of law because Defendants are not proper defendants under that statute: they do not qualify as the "foreign state" of Iran, its alter egos, or its "agencies or instrumentalities" under the FSIA definitions. (*Id.* at 12-36.) The District Court denied Defendants' motion for summary judgment and granted the Iran Creditors' motion. (Dkts. 851, 1125.) It held that Defendants "are" Iran, its alter egos, and its agencies or instrumentalities under the FSIA. (Dkt. 1125 at 17-29.)

Defendants appealed the District Court's summary judgment decisions on *both* motions to this Court. They described the parties' respective summary judgment motions and requested that this Court reverse "[t]he Opinions and Orders *denying Defendants' motion for summary judgment* and granting [Plaintiffs'] motions for summary judgment . . . [and] remand[] to the District Court with instructions to dismiss." *Kirschenbaum v. 650 Fifth Avenue and Related Props.*, No. 14-1963-cv(L), Dkt. 144, at 6-8, 86 (2d Cir.) (emphasis added). Thus, Defendants specifically raised the District Court's rejection of their motion for summary judgment on the FSIA claims—including the § 1610(b)(3) claims—before this Court. Because *Defendants* sought review of the District Court's denial of their motion for summary judgment on the § 1610(b)(3) claims, it is irrelevant that the Iran Creditors "reserved" those claims in their motion.

This Court's ruling on the FSIA claims was clear and comprehensive:

> As to summary judgment ordering turnover of Defendants' property under the FSIA,

> (a) Defendants do not qualify, as a matter of law, as the foreign state of Iran such that Defendants' properties may be turned over to help satisfy Plaintiffs' judgments under the FSIA, *see* 28 U.S.C. § 1603(a);
>
> (b) Defendants do not qualify, as a matter of law, as the agencies or instrumentalities of the foreign state of Iran such that Defendants' properties may be turned over to help satisfy Plaintiffs' judgments under the FSIA, *see* 28 U.S.C. § 1603(b);
>
> (c) Defendants do not quali[f]y as the alter egos of Iran under *Bancec*, 462 U.S. at 627, such that Defendants' properties may be turned over to help satisfy Plaintiffs' judgments under the FSIA.

Kirschenbaum, 830 F.3d at 141-42. In other words, this Court rejected the FSIA claims across the board because Defendants did not qualify as any of the types of entities to which the FSIA applies. Absent such a showing, the Iran Creditors could not, as a matter of law, succeed under *any* of the exceptions to sovereign immunity contained in the FSIA, including the exceptions to immunity from execution on property set forth in § 1610. This Court remanded these actions to the District Court with the following instructions: "[T]he *only* issues returning to the District Court for further proceedings are (1) Defendants' status as agencies or instrumentalities under the TRIA, and (2) whether their asserts [*sic*] are 'blocked' under that statute." *Id.* at 142 (emphasis added). The Court's mandate did not permit the District Court to consider the Iran Creditors' § 1610(b)(3) claims on remand.

The Iran Creditors petitioned for rehearing, arguing that the District Court should be permitted to consider their § 1610(b)(3) claims on remand. *See Kirschenbaum v. 650 Fifth Avenue and Related Props.*, No. 14-1963-cv(L), Dkt. 350-1 (2d Cir.). But this Court denied the Iran Creditors' petition. *See Kirschenbaum v. 650 Fifth Avenue and Related Props.*, No. 14-1963-cv(L), Dkt. 371 (2d Cir. Sept. 13, 2016).

Despite this Court's clear instructions, the District Court permitted the Iran Creditors to relitigate their § 1610(b)(3) claims (SPA-63), and ultimately granted turnover of the Partnership's properties pursuant to those claims. (SPA-469.) These rulings violated the mandate rule because the § 1610(b)(3) claims were both expressly and impliedly "decided by the appellate court." *Ben Zvi*, 242 F.3d at 95. As demonstrated by the above-quoted excerpt from this Court's decision, it expressly held that *all* the Iran Creditors' FSIA claims failed as a matter of law. *Kirschenbaum*, 830 F.3d at 141-42. Moreover, the Court expressly ruled against the Iran Creditors on critical elements of their § 1610(b)(3) claims: it held that the Partnership "do[es] not qualify, as a matter of law, as the agenc[y] or instrumentalit[y] of the foreign state of Iran such that [its] properties may be turned over to help satisfy Plaintiffs' judgments under the FSIA." *Id.* at 142. The mandate was "unambiguously limited in scope" and did not "authorize consideration by the district judge of" the § 1610(b)(3) claims. *Ben Zvi*, 242 F.3d at 95.

The District Court's consideration of the Iran Creditors' § 1610(b)(3) claims was in violation of this Court's mandate, and its judgment with respect to these claims should be reversed.

B. FSIA § 1610(b)(3) Does Not Permit Execution on the Property of an Agency or Instrumentality in Satisfaction of a Judgment against a Foreign State

Had the Court returned the § 1610(b)(3) claims to the District Court for further proceedings, the claims would still fail on the merits because the Iran Creditors' judgments are against Iran, not the Fifth Avenue Company. The text of § 1610(b)(3) creates an exception to the jurisdictional bar of sovereign immunity for a party seeking to execute against property of an agency or instrumentality of a foreign state, but only to enforce an underlying judgment against that same agency or instrumentality. Because the Iran Creditors' judgments are against Iran itself, those judgments cannot be enforced through § 1610(b)(3).[18]

The FSIA's statutory scheme "comprehensively regulat[es] the amenability of foreign nations to suit in the United States." *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014). In an action against a foreign state, the FSIA "must be applied . . . since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983). The FSIA provides that a "foreign state," including an "agency or instrumentality of a foreign state,"[19] is immune from the jurisdiction of U.S. courts and

[18] This Court reviews a district court's legal conclusions under the FSIA *de novo*, including whether a foreign state's property is protected by immunity. *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 286 (2d Cir. 2011).

[19] FSIA § 1603(a) defines the term "foreign state" as including "an agency or instrumentality of a foreign state" as defined in § 1603(b). 28 U.S.C. § 1603(a).

from execution against its assets, unless the plaintiff can demonstrate that an exception set forth in the statute applies. *See* 28 U.S.C. §§ 1604, 1609. The exceptions to foreign state jurisdictional immunity are set forth in §§ 1605-1607, and the exceptions to the execution immunity of foreign state assets are set forth in § 1610 (including TRIA § 201, which is codified as a note to § 1610), *see id.* § 1610 & note.

The Iran Creditors invoked the FSIA's terrorism exception to foreign state jurisdictional immunity, § 1605A,[20] in obtaining their underlying judgments against Iran for its support of terrorist activity. Through these actions, they sought to satisfy their judgments by executing on properties belonging to Defendants pursuant to §§ 1610(a)(7), 1610(b)(3), and 1610(g). The subsection relevant to this appeal, § 1610(b)(3), permits a judgment creditor to execute on property of an agency or instrumentality of a foreign state only if the underlying "judgment relates to a claim for which the *agency or instrumentality* is not immune by virtue of section 1605A." 28 U.S.C. § 1610(b)(3) (emphasis added). In other words, § 1610(b)(3) does not provide a mechanism for the judgment creditor of a foreign state to "pierce the corporate veil" and execute against the assets of a separate entity. The underlying terrorism judgment must be entered against the agency or instrumentality *itself*. *See Rubin v. Islamic Republic of Iran*, 830 F.3d 470, 478 (7th Cir. 2016)

[20] FSIA § 1605A (which replaced former § 1605(a)(7)) permits certain terrorism-related actions against "foreign states" and their "agencies or instrumentalities." 28 U.S.C. § 1605A; *see also id.* § 1605(a)(7) (repealed by Pub. L. 110-181, § 1083 (2008)). Each of the Iran Creditors obtained a judgment against Iran pursuant to one or both of these sections. For ease of reference, Defendants will refer to these sections by the current provision, § 1605A.

("§ 1610(b) establishes rules for executing a judgment *against a foreign state's instrumentality* on the instrumentality's property"), *aff'd*, 138 S. Ct. 816 (2018) (emphasis added). While the exception to execution immunity set forth in § 1610(a)(7) permits a plaintiff with a terrorism judgment against a foreign state to execute against property of that state's agency or instrumentality,[21] the Iran Creditors concede that this Court already rejected the § 1610(a)(7) claims in the prior appeal. (Dkt. 1536 at 4-5.) Because the Iran Creditors are not seeking to enforce an underlying judgment that was entered against the Partnership, the District Court lacked subject matter jurisdiction over the § 1610(b)(3) claims.

This Court rejected a similar attempt to circumvent the requirements of § 1610(b) in *Walters v. Industrial & Commercial Bank of China, Ltd.*, 651 F.3d 280 (2d Cir. 2011). In that case, the plaintiffs obtained a default judgment against the People's Republic of China pursuant to the "commercial activity" and "tortious act" exceptions to jurisdictional immunity, §§ 1605(a)(2) and 1605(a)(5). *Id.* at 287. The plaintiffs then sought to execute their judgment against the assets of three banks alleged to be agencies or instrumentalities of China pursuant to § 1610(b)(2), the exception to execution immunity for property of an agency or instrumentality that applies where the underlying "judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), . . . or (5)." 28 U.S.C. § 1610(b)(2). This Court declined to turn over the banks' assets pursuant to § 1610(b)(2), reasoning: "[B]ecause petitioners' default

[21] Section 1610(a)(7) permits a creditor to enforce a "judgment [that] relates to a claim for which the *foreign state* is not immune under section 1605A." 28 U.S.C. § 1610(a)(7) (emphasis added).

judgment is against China itself, rather than an agency or instrumentality, the judgment does not relate to a claim 'for which the agency or instrumentality is not immune' from jurisdiction." *Walters*, 651 F.3d at 298. Accordingly, the plaintiffs' § 1610(b)(2) claim failed as a matter of law. *See id.*

Walters is controlling here. While the *Walters* plaintiffs sought turnover of the defendants' assets pursuant to § 1610(b)(2), as opposed to § 1610(b)(3), the relevant language in these two subsections is identical: they require the underlying judgment to "relate[] to a claim for which the *agency or instrumentality* is not immune by virtue of" a specified exception to jurisdictional immunity. 28 U.S.C. §§ 1610(b)(2), (b)(3) (emphasis added). Like the *Walters* plaintiffs, the Iran Creditors cannot satisfy this requirement. In their underlying actions, the Iran Creditors obtained judgments against *Iran* and proved that *Iran* is "not immune" from jurisdiction "by virtue of" the § 1605A exception to jurisdictional immunity. But critically, the Iran Creditors did not bring § 1605A actions against Iran's alleged agency or instrumentality—the Partnership—or prove that the Partnership was "not immune" from jurisdiction pursuant to the terrorism exception. Indeed, the Iran Creditors stipulated that the Partnership did *not* have any involvement in terrorist activity. (EX-1345-46; EX-1349-50; EX-1353-54; EX-1358-60.) Thus, even if the Partnership could be deemed an agency or instrumentality of Iran—and it cannot, *see infra* at 45-56—the Partnership still could not be held responsible for the judgments against Iran pursuant to § 1610(b)(3). *Walters*, 651 F.3d at 298.

C. The Fifth Avenue Company Does Not Constitute an Agency or Instrumentality of Iran under the FSIA

The Iran Creditors' § 1610(b)(3) claims fail for the additional reason that the Partnership does not qualify as an agency or instrumentality of Iran under the FSIA definition of this term of art.[22] Under the FSIA, an entity must fulfill three requirements in order to qualify as an "agency or instrumentality of a foreign state." 28 U.S.C. § 1603(b). That term is defined as an entity:

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

Id. A defendant's agency or instrumentality status must be determined based on the facts "at the time of the filing of the [plaintiff's] complaint." *Kirschenbaum*, 830 F.3d at 126 (quoting *Dole Food Co. v. Patrickson*, 538 U.S. 468, 480 (2003)). This rule is consistent with the FSIA's jurisdictional nature and with "the longstanding principle

[22] The District Court's ruling regarding the Partnership's agency or instrumentality status is reviewed *de novo*. *See Walters*, 651 F.3d at 286.

that the jurisdiction of the Court depends upon the state of things at the time of the action brought." *Dole*, 538 U.S. at 478.[23] As this Court already held, the Partnership does not constitute an agency or instrumentality of Iran.

1. The District Court Disregarded This Court's Binding Determination That the Partnership Does Not Qualify as an Agency or Instrumentality of Iran under the FSIA

At the outset, the District Court erred by reopening the question of the Partnership's agency or instrumentality status under the FSIA on remand. In the prior appeal, this Court plainly held that Defendants "do not qualify, as a matter of law, as the agencies or instrumentalities of the foreign state of Iran." *Kirschenbaum*, 830 F.3d at 142. That decision was binding, and the District Court erred by permitting the Iran Creditors to relitigate this issue. *See Ben Zvi*, 242 F.3d at 95.

The District Court improperly cabined this Court's agency or instrumentality ruling to the Iran Creditors' §§ 1610(a)(7) and 1610(g) claims and held that it did not control with respect to the § 1610(b)(3) claims that were supposedly "reserved." (SPA-65-66.) This ruling was erroneous. This Court's holding on the agency or instrumentality issue was binding as to the § 1610(b)(3) claims because those claims were properly raised in the prior appeal. *See supra* at 36-40. Moreover, the § 1603(b) agency or instrumentality test is the same for all FSIA claims; it is

[23] Where a plaintiff initiates an FSIA action in state court, the defendant's "agency or instrumentality" status must be evaluated as of the date of removal to federal court, in accordance with the general practice of federal courts in assessing their jurisdiction. *See F5 Capital v. Pappas*, 856 F.3d 61, 77 (2d Cir. 2017).

set forth in the "Definitions" provision that applies to the entire FSIA "chapter" of the U.S. Code. 28 U.S.C. § 1603. Thus, even if the § 1610(b)(3) claims had not been at issue in the prior appeal, this Court's agency or instrumentality determination under § 1603(b) *still* would have bound the lower court because that "issue" was already decided and was "foreclose[d]" on remand. *Ben Zvi*, 242 F.3d at 95.

The District Court's claim-specific approach to the resolution of legal issues that apply to *multiple* claims—like the FSIA agency or instrumentality issue—would create perverse incentives for litigants to litigate issues on a piecemeal basis. The law-of-the-case doctrine and the mandate rule do not permit a party to re-litigate issues previously resolved by an appellate court, expressly or impliedly. *Ben Zvi*, 242 F.3d at 95. While litigants are free to move for summary judgment only with respect to particular *claims*, any legal *issues* decided on appeal are binding as to all the plaintiffs' claims. Accordingly, this Court's holding that the Partnership is "statutorily disqualified" from being deemed an agency or instrumentality of Iran under the FSIA was binding on remand. *Kirschenbaum*, 830 F.3d at 128.

2. The District Court Erred in Determining That the Partnership Is an Agency or Instrumentality of Iran under the FSIA

Even if the Iran Creditors could properly relitigate the agency or instrumentality issue, the Fifth Avenue Company did not satisfy the § 1603(b) definition at the time the Iran Creditors filed their complaints from 2009 to 2013. The Partnership does not meet the § 1603(b)(3) requirement concerning citizenship, and it is neither majority-owned by Iran nor an "organ" of Iran under § 1603(b)(2). 28 U.S.C. §§ 1603(b)(2), (b)(3).

a. The Partnership Is a Citizen of New York

In the prior appeal, the Iran Creditors conceded that the Partnership constituted a citizen of New York for § 1603(b)(3) purposes, but argued that its citizenship should be ignored based on equitable principles. *Kirschenbaum*, 830 F.3d at 126-27. This Court rejected that reasoning, concluding that equitable principles were not a proper basis for "questioning corporate citizenship in the context of determining agency or instrumentality status." *Id.* at 127-28. In a footnote, the *Kirschenbaum* Court questioned the parties' understanding that the Partnership would otherwise constitute a citizen of New York under § 1603(b)(3). It noted that this subsection "excludes from the definition of 'agency or instrumentality' an entity that is 'a citizen of a State of the United States as defined in section 1332(c) and (e) of this title.'" *Id.* at 127 n.10 (quoting 28 U.S.C. § 1603(b)(3)). The Court observed that "Section 1332(c) defines the citizenship of corporations" but "makes no mention of partnerships." *Id.* (citing 28 U.S.C. § 1332(c)). The Court then stated in dicta: "[W]e construe § 1603(b)(3) to incorporate only the § 1332(c) definition of corporations, and not to extend to partnerships." *Id.* It reiterated, however, that "this argument was not pursued on appeal." *Id.*

On remand, the Iran Creditors argued for the first time that the Partnership is not a citizen of New York under § 1603(b)(3) because that provision only incorporates the § 1332(c) definition of the citizenship of corporations. (Dkt. 1749 at 8; Dkt. 1536 at 3-4, 6.) The District Court adopted this reasoning (SPA-457), erroneously disregarding the fact that the Iran Creditors had already waived the argument. *See United States v. Stanley*, 54 F.3d 103, 107 (2d Cir. 1995) ("Because [defendant] decided on his first appeal to forego any argument concerning [the issue he challenged on

remand], the mandate rule prohibited the district court from reopening the issue."). This waiver alone is reason enough to reject the Iran Creditors' argument that the Partnership satisfies the § 1603(b)(3) requirement.

Even if the Iran Creditors had been permitted to challenge the Partnership's New York citizenship on this basis, that argument should have failed. The District Court's holding that § 1603(b)(3) excludes U.S. corporations from the definition of "agency or instrumentality of a foreign state" but does not exclude U.S. partnerships is a novel interpretation which draws an untenable distinction between incorporated and unincorporated U.S. entities. Because the FSIA grants sovereign immunity to an agency or instrumentality of a foreign state, *see* 28 U.S.C. §§ 1604, 1609, the District Court's interpretation of § 1603(b)(3) would render U.S. corporations ineligible for sovereign immunity, but permit U.S. partnerships to be eligible for such immunity. This anomalous result would directly contravene Congress's intent in establishing the § 1603(b)(3) requirement concerning citizenship.

The text of § 1603(b) makes clear that the "agency or instrumentality" test is intended to apply equally to incorporated and unincorporated entities. Section 1603(b)(1) requires an agency or instrumentality to be "a separate legal person, *corporate or otherwise*." *Id.* § 1603(b)(1) (emphasis added). Moreover, under the Dictionary Act, the term "person" is presumed to include "partnerships." 1 U.S.C. § 1. The FSIA's legislative history confirms that § 1603(b) is "intended to include a corporation, association, foundation, or any other entity which . . . can sue or be sued in its own name, contract in its own name or hold property in

its own name." H.R. Rep. 94-1487 at 6614 (1976).[24] There is no indication in the legislative history that Congress intended to treat U.S. partnerships differently from U.S. corporations with respect to their eligibility for "agency or instrumentality" status. Rather, Congress intended for all U.S. entities to be excluded by § 1603(b)(3), irrespective of whether they are incorporated. *See id.* ("[I]f a foreign state acquires or establishes a company *or other legal entity* in a foreign country, such entity is presumptively engaging in activities that are either commercial or private in nature.") (emphasis added). The intended distinction in § 1603(b)(3) is between entities created "under the law of the foreign state" at issue and those created under the laws of other countries. *Id.*; *see also Edlow International Co. v. Nuklearna Elektrarna Krsko*, 441 F. Supp. 827, 831 (D.D.C. 1977) (describing § 1603(b)(3) as requirement that entity "cannot be a citizen of the United States or be organized under the laws of any nation *save the foreign state in question*") (emphasis added).

Indeed, the Supreme Court has stressed the need to avoid disparate treatment of different types of U.S. citizens under § 1603(b)(3). In *Samantar v. Yousuf*, 560 U.S. 305 (2010), the petitioner argued that a natural person could qualify as an "agency or instrumentality" under § 1603(b). As to the petitioner's argument that a natural person could satisfy the § 1603(b)(3) requirement, the Court observed:

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[24] The Supreme Court relied on this passage in the FSIA's legislative history in interpreting the § 1603(b) "agency or instrumentality" definition in *Samantar v. Yousuf*, 560 U.S. 305, 316 n.9 (2010), stating: "As for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it."

> [R]eading § 1603(b) as petitioner suggests would leave us with the odd result that a corporation that is the citizen of a state is excluded from the definition under § 1603(b)(3), and thus not immune, whereas a natural person who is the citizen of a state is not excluded, and thus retains his immunity.

Id. at 316 n.8 (citation omitted). The *Samantar* Court rejected the petitioner's proposed interpretation to avoid this "odd result." *Id.*

As in *Samantar*, this Court should interpret § 1603(b)(3) in a manner that avoids absurd results. While unincorporated entities are plainly contemplated by the § 1603(b) "agency or instrumentality" definition, adopting the District Court's interpretation of § 1603(b)(3) would lead to an equally disparate treatment between a corporation that is a citizen of a state and an unincorporated entity which *also* is a citizen of a state This result would also be contrary to Congress's intent to exclude all U.S. entities, incorporated or not, from being considered agencies or instrumentalities of a foreign state. *See* H.R. Rep. 94-1487 at 6614. This Court has recognized that its "function is to give effect to the Legislature's intent, and where a literal reading leads to an illogical result, the tempering influence of reasonable construction must be applied." *United States v. Oates*, 560 F.2d 45, 76 (2d Cir. 1977). Thus, § 1603(b)(3) should be interpreted to exclude a U.S. partnership from the definition of an "agency or instrumentality of a foreign state" in the same manner as a U.S. corporation.

Under well-established rules for determining diversity of citizenship under 28 U.S.C. § 1332, the "citizenship of a partnership is based upon the citizenship of the individual partners." *ConnTech Dev. Co. v. Univ. of Conn. Educ.*

Props., 102 F.3d 677, 681 (2d Cir. 1996). Because the two partners that hold interests in the Partnership are New York corporations, the Partnership is a New York citizen under § 1332. Thus, it does not satisfy § 1603(b)(3).

b. The Partnership Is Neither Majority-Owned by Iran Nor an Organ of Iran

Nor does the Partnership satisfy the § 1603(b)(2) element of the agency or instrumentality test. To qualify under § 1603(b)(2), a defendant must be either "an organ of a foreign state" or an entity "a majority of whose shares or other ownership interest is owned by a foreign state" at the time of filing of the plaintiff's complaint. 28 U.S.C. § 1603(b)(2); *Dole*, 538 U.S. at 480. The District Court erroneously held that the Partnership satisfied both prongs of § 1603(b)(2). (SPA-458-64.)

First, the District Court on its own initiative held that the Partnership is an entity "a majority of whose shares or other ownership interest is owned by a foreign state." The District Court acknowledged that Alavi is the "legal owner of 60% of the shares in the Partnership," but it reasoned that § 1603(b)(2) was satisfied because "these corporate formalities have been used as a vehicle to conceal the fact that, in reality, [Alavi] holds that interest for the benefit of Iran." (SPA-458; SPA-462.) This reasoning disregards the strict requirements of the subsection and this Court's previous ruling. *Kirschenbaum*, 830 F.3d at 127-28 (disallowing equitable principles to substitute for statutory compliance). Under the Supreme Court's decision in *Dole*, § 1603(b)(2) requires "*direct* ownership of a majority of shares by the foreign state;" indirect ownership through multiple tiers of companies or alleged control by a foreign state is insufficient. 538 U.S. at 473, 474, 477 (emphasis

added). Thus, Alavi's direct ownership of 60% of the Partnership is dispositive of the majority ownership issue.

Second, the District Court incorrectly held that the Partnership constitutes an "organ" of Iran under § 1603(b)(2). It analyzed the five factors established by this Court for determining whether a defendant qualifies as an organ:

> (1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the foreign country; and (5) how the entity is treated under foreign state law.

Filler v. Hanvit Bank, 378 F.3d 213, 217 (2d Cir. 2004). The District Court's analysis was not limited to the facts as of time of filing of the complaints but, rather, was "based to some degree on a historical analysis leading up to the date on which the complaints were filed." (SPA-435 n.63.) The District Court's analysis and findings were both erroneous. A proper time-of-filing analysis under the *Filler* factors demonstrates that the Partnership does not constitute an organ of Iran.

National Purpose. An entity serves a "national purpose" when it "performs functions traditionally performed by the government." *Filler*, 378 F.3d at 217. Entities serving national purposes include a national deposit insurance corporation which "ensur[es] the stability of [a nation's] banking system," *id.* at 217, 220; a "financial oversight agency" which "supervis[es], investigat[es], examin[es], and enforc[es] sanctions against financial

institutions," *Peninsula Asset Mgmt. (Cayman) v. Hankook Tire Co.*, 476 F.3d 140, 142 (2d Cir. 2007); and an organization which "establish[es] a common market and a monetary union, and [] coordinat[es] economic activities throughout the community" of member states, *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 145 (2d Cir. 2014). The Partnership does not serve a governmental function. It is a private real estate partnership that was created to own and operate a commercial office building in Manhattan with the goal of generating profits. Thus, this factor weighs against organ status. *See Patrickson v. Dole Food Co.*, 251 F.3d 795, 808 (9th Cir. 2001), *aff'd on other grounds*, 538 U.S. 468 (2003).

Active Supervision. A foreign state actively supervises an entity when it "appoints the [entity's] key officials and regulates some of the activities the [entity] can undertake." *European Cmty*, 764 F.3d at 145. In *Filler*, this Court found that Korea's national deposit insurance corporation was actively supervised by that government because "its directors [we]re appointed by the Ministry of Finance and Economy; its president appointed by the President of the Republic of Korea; and many of its operations overseen by the Ministry of Finance and Economy." 378 F.3d at 217.

Iran did not actively supervise the Partnership during the relevant period from 2009 to 2013. It did not appoint any of the Partnership's officers or employees, *as the Partnership had no officers or employees*. (A-3520.) Nor did the Iran Creditors present any evidence that Iran sought to "regulate" the Partnership's activities or "oversee" its operations. *Filler*, 378 F.3d at 217; *European Cmty*, 764 F.3d at 145. Rather, the Partnership's daily operation of the Building was handled by a professional management company, Cushman & Wakefield. (A-3432; A-3520.) While Assa held a minority share in the Partnership, it played no role in

managing the Partnership or the Building. (A-3522; A-3524.) Nor did the Iran Creditors demonstrate that Iran actively supervised the Partnership through Alavi. Contrary to the District Court's findings (SPA-461), there was no evidence that any Iranian officials made "direct decision[s]" for the Partnership, and there was insufficient evidence that Iran controlled Alavi's Board members and officers between 2009 and 2013. *See infra* at 86-89.

Public Employees. The third *Filler* factor also weighs against a finding that the Partnership constitutes an organ of Iran because Iran does not "require[] the hiring of public employees" or "pay[] their salaries." *Filler*, 378 F.3d at 217. As discussed above, the Partnership did not have any employees during the relevant period. (A-3520; SPA-462.) Moreover, there was no evidence that the Alavi employees who were involved in the management of the Partnership from 2009 to 2013 were "public employees" of Iran or paid by Iran; rather, there was uncontradicted testimony that they were not. (A-3755-56; EX-2529-30.)

Exclusive Rights in Iran. An entity holds an "exclusive right" when it has sole authority to exercise a particular "governmental power," *European Cmty.*, 764 F.3d at 146, such as the right to "authori[z]e the issue of banknotes" and to conclude multilateral trade agreements on behalf of nations, *id.*, or to "receive monthly business reports from the solvent financial institutions it oversees," *Peninsula Asset Mgmt.*, 476 F.3d at 143. The District Court found that it was "unclear" whether the "exclusive rights" factor was satisfied "because the very participation of Iran has been concealed; it is therefore difficult to know what rights the Partnership might have in Iran." (SPA-462-63.) As the District Court effectively acknowledged, the Iran Creditors did not present *any* evidence that the Partnership holds any sort of exclusive rights in Iran. The District Court erred in excusing this lack

of evidence by speculating that the Partnership "might" have held such a right. (*Id.*)

Treatment under Iranian Law. The fifth *Filler* factor is satisfied where an entity is treated as part of the government under the foreign state's laws. Evidence of an entity's governmental status may include the foreign government's express position that the entity is considered a governmental body or the entity's amenability to suit in an administrative court reserved for governmental defendants. *See, e.g.*, *Peninsula Asset Mgmt.*, 476 F.3d at 143; *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 86 (2d Cir. 2008), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305 (2010). Although the Iran Creditors did not present any evidence that the Partnership has special governmental status under Iranian law, the District Court found that this factor weighed in favor of finding that the Partnership is an organ of Iran because "[t]he evidence at trial supports that the Partnership was and is treated as an asset of the [Bonyad Mostazafan] and Bank Melli, and it is reasonable to infer that whatever Iranian laws apply to those entities apply to their progeny (i.e., the Partnership)." (SPA-463.) The District Court again substituted speculation for evidence. There was no evidence that the Partnership was treated as part of the Iranian government *under Iranian law*. Nor was it reasonable for the District Court, in the absence of any evidence, to infer that the New York-based Partnership is afforded the same treatment as Iranian governmental entities under Iranian law.

In sum, a proper assessment of the *Filler* factors from 2009 to 2013 leads to the conclusion that the Partnership is not an organ of Iran under § 1603(b)(2). Thus, the Partnership does not qualify as an agency or instrumentality whose assets are subject to execution under § 1610(b)(3).

II. The District Court Erred by Ordering Execution against Defendants' Properties Pursuant to the Terrorism Risk Insurance Act

The District Court also erred by turning over Defendants' properties to the Iran Creditors pursuant to the TRIA. First, the District Court deprived Defendants of their constitutional right to a jury trial on the TRIA claims. Second, the District Court incorrectly concluded that those claims succeeded on the merits; specifically, it misapplied this Court's standard of what constitutes an agency or instrumentality under the TRIA and erroneously found that Defendants' assets are "blocked" within the meaning of the statute. The TRIA ruling should be reversed or, at the very least, vacated and remanded for retrial.

A. The District Court Improperly Denied Defendants' Seventh Amendment Right to a Jury Trial on the TRIA Claims

The District Court denied Defendants their constitutional right to a jury trial on the Iran Creditors' TRIA claims based on its erroneous finding that Defendants had waived that right by consenting to a bench trial in 2013. At that time, the Iran Creditors premised their TRIA claims on FSIA jurisdiction over claims against a "foreign state." Because the FSIA prohibits jury trials in actions against foreign states, Defendants were precluded from seeking a jury trial under this theory. However, in the prior appeal, this Court held that Defendants do not constitute the foreign state of Iran or its agencies or instrumentalities under the FSIA, and that the TRIA definition of agency or instrumentality is not coextensive with the FSIA definition of that term. Accordingly, on remand, the Iran Creditors materially altered their TRIA theory such that it was no longer subject to the FSIA's bench trial requirement: they asserted that

Defendants constitute agencies or instrumentalities of Iran under the TRIA pursuant to the guidelines established in *Kirschenbaum*. Under this new TRIA theory, Defendants were entitled to a jury trial under the Seventh Amendment. Accordingly, this Court should vacate the District Court's judgment on the TRIA claims and remand for retrial.[25]

1. Defendants Are Constitutionally Entitled to a Jury Trial on the TRIA Claims

The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." U.S. CONST. amend. VII. The right to trial by jury is a "fundamental and sacred" right. *Jacob v. New York City*, 315 U.S. 752, 752 (1942). The Supreme Court has stressed that "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Beacon Theatres v. Westover*, 359 U.S. 500, 501 (1959); *see also Jacob*, 315 U.S. at 752 (right to jury trial "should be jealously guarded by the courts").

The Seventh Amendment provides the right to a jury trial in "suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered." *Curtis v. Loether*, 415 U.S. 189, 193 (1974) (emphasis in original). Thus, while the Amendment "preserves" the right to a jury trial as it existed at common law, U.S. CONST. amend. VII, it also applies to "statutory

[25] The District Court's decision denying Defendants' request for a jury trial is reviewed *de novo*. *See Eberhard v. Marcu*, 530 F.3d 122, 135 n.13 (2d Cir. 2008).

causes of action *analogous* to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty." *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 709-10 (1999) (emphasis added) (citation omitted). Courts apply a two-step analysis in determining whether a particular action is legal or equitable in nature: "The first step focuses on whether the action would have been deemed legal or equitable in 18th century England, while the second, more important step requires a determination as to whether the remedy sought . . . is legal or equitable in nature." *Eberhard*, 530 F.3d at 135 (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989)) (internal quotations omitted). Where ambiguity exists, the federal policy "favoring jury trials . . . should be favored." *Prudential Oil Corp. v. Phillips Petroleum Co.*, 392 F. Supp. 1018, 1022 (S.D.N.Y. 1975) (citing *Beacon Theatres*, 359 U.S. at 500).

Applying the first step of the Seventh Amendment analysis, this Court has recognized that an action seeking to impose one party's legal liability on another party through veil piercing or otherwise has both legal and equitable origins. *See Wm. Passalacqua Builders v. Resnick Developers S., Inc.*, 933 F.2d 131, 135-36 (2d Cir. 1991). In addition, the Supreme Court has held that actions under federal statutes that "sound[] basically in tort" are analogous to actions recognized at common law. *Curtis*, 415 U.S. at 195. The Court has stressed, however, that "characterizing the relief sought is more important than finding a precisely analogous common-law cause of action." *Tull v. United States*, 481 U.S. 412, 421 (1987) (citations omitted).

Under the second step of the analysis, the Supreme Court has repeatedly recognized that money damages were "the traditional form of relief offered in the courts of law."

Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 565, 570 (1990); *see also Pernell v. Southall Realty*, 416 U.S. 363, 370 (1974) ("an action . . . for the recovery of a money judgment . . . is one at law") (quoting *Whitehead v. Shattuck*, 138 U.S. 146, 151 (1891)). The Supreme Court has also taken a broad view of the remedies which equate to legal damages, stating: "Almost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to *pay a sum of money* to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied . . . ." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002) (citation omitted) (emphasis added). A plaintiff cannot change the legal nature of a money damages remedy by couching it in equitable terms. *See Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477-78 (1962).

Applying these principles in the judgment enforcement context, this Court has held that an action seeking to enforce a money judgment against a party other than the judgment debtor is a suit at law. In *Passalacqua*, the plaintiffs sought to enforce a pre-existing money judgment against parties that allegedly constituted the judgment debtor's alter egos or instrumentalities. *See* 933 F.2d at 133. Rejecting the argument that the claims were equitable in nature, the Court analogized the alter ego action to the historical "creditor's bill" procedure, which had both "equitable and legal components." *Id.* at 136. Turning to the nature of the remedy, this Court stated: "Plaintiffs here seek enforcement of a money judgment obtained against [the judgment debtor]. *The fact that plaintiffs seek money indicates a legal action*." *Id.* (citing *Pernell*, 416 U.S. at 370) (emphasis added). The Court explained: "Plaintiffs seek to establish defendants' liability for the judgment already obtained against [the judgment debtor]. This is analogous to the second phase of the old creditors' bill procedure in which the creditors,

having obtained a judgment against the corporation in equity, then enforced that judgment against the individual stockholders at law." *Id.* Because the plaintiffs' alter ego claims had both legal and equitable origins and the plaintiffs sought legal relief under the second, "more important" step of the Seventh Amendment analysis, the *Passalacqua* Court held that the claims were properly tried to a jury. *See id.* at 135, 136.

District courts in this Circuit have followed *Passalacqua*, holding that actions seeking to enforce money judgments against third parties that are not otherwise liable for those judgments are legal actions. *See, e.g.*, *JSC Foreign Econ. Ass'n Technostroyexport v. Int'l Dev. & Trade Servs.*, 295 F. Supp. 2d 366, 388-90 (S.D.N.Y. 2003) (holding that action seeking to enforce money judgment against judgment debtor's alter egos was legal in nature because "collection of a money judgment" is "essentially [a suit] for money damages"). *Passalacqua* and its progeny recognize that, because an action seeking to enforce a money judgment against a new party is "essentially an action for money damages," *Fischer Diamonds, Inc. v. Andrew Meyer Designs, L.L.C.*, No. 06 Civ. 2737, 2006 U.S. Dist. LEXIS 41362, at *6 (E.D.N.Y. June 21, 2006), such actions are suits at law.

Passalacqua controls this case. As to the first step of the Seventh Amendment analysis, these TRIA actions are analogous to the situation in *Passalacqua*, where plaintiffs sought to enforce their judgments against alleged alter egos or instrumentalities in suits at law. *See* 933 F.2d at 136. Indeed, the Iran Creditors "seek to establish defendants' liability for the judgment already obtained against [the judgment debtor]." *Id.* Moreover, these TRIA actions seek to shift liability for underlying tort judgments onto Defendants and, likewise, "sound[] basically in tort." *Curtis*,

415 U.S. at 195. As to the second step of the analysis, the Iran Creditors seek to recover money damages based on the underlying judgments obtained against Iran. The TRIA makes clear that judgment creditors may recover only to the extent of the "compensatory damages" included in their unsatisfied judgments. 28 U.S.C. § 1610 note. Accordingly, the Iran Creditors' complaints sought Defendants' "property with a value of" or orders requiring Defendants to "otherwise *pay a sum of money*" equal to the Iran Creditors' compensatory damages.[26] Thus, the ultimate relief sought by the Iran Creditors was "pay[ment of] a sum of money," from whatever sources were available. The District Court granted the requested relief, requiring that Defendants' non-cash assets be liquidated and the proceeds distributed among the Iran Creditors. (SDNY 13-cv-1825, Dkt. 524 at 9.) Thus, both steps of the Seventh Amendment analysis weigh strongly in favor of a jury trial. *See Passalacqua*, 933 F.2d at 135, 136.

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[26] (SDNY 09-cv-165, Dkt. 65 at 2, 13-14; SDNY 09-cv-166, Dkt. 66 at 2, 13-14; SDNY 09-cv-553, Dkt. 73 at 1, 53-54; SDNY 10-cv-1627, Dkt. 31 at 1-2, 12; SDNY 10-cv-2464, Dkt. 35 at 2, 53-54; SDNY 13-mc-71, Dkt. 1 at 3-4, 15-16; SDNY 13-cv-1825, Dkt. 1 at 1-2, 54; SDNY 13-cv-1848, Dkt. 1 at 1-2, 53-54 (emphasis added).) The Havlish Creditors sought an order turning over "*all property* of all Defendants . . . in satisfaction of the Havlish Plaintiffs' judgment as to *compensatory damages*." (SDNY 13-cv-1825, Dkt. 235 at 39 (emphasis added).) The Hegna Creditors sought an order "directing that [the Building] be condemned and sold at public auction with the *proceeds net of expenses* turned over to the Hegna judgment creditors in satisfaction of their judgments against Iran." (SDNY 11-cv-3761, Dkt. 38-1 at 2 (emphasis added).)

2. Defendants Did Not Waive Their Right to a Jury Trial

Though the TRIA claims would otherwise have entitled Defendants to a jury trial, in 2013, the Iran Creditors asserted that Defendants constituted the foreign state of Iran under the FSIA and that all their claims had to be tried to the bench pursuant to FSIA § 1330(a). (A-881.)[27] Based on the underlying premise of the Iran Creditors' claims—*i.e.*, that Defendants were liable for judgments against Iran because they "are" Iran and that the District Court had jurisdiction under the FSIA—Defendants did not dispute that a non-jury trial was required. (A-880.) On remand from this Court, however, the Iran Creditors fundamentally changed their TRIA theory and thereby revived Defendants' right to a jury trial. The District Court's rejection of Defendants' timely demand for a jury trial on the TRIA claims was error and should be reversed.

a. Defendants Did Not Knowingly Waive Their Right to a Jury Trial in 2013

The "fundamental" right to a jury trial, *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937), "occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right . . . should be scrutinized with the utmost care." *Dimick v. Scheidt*, 293 U.S. 474, 486 (1935). Courts therefore "indulge every reasonable presumption against waiver." *Aetna*, 301 U.S. at 393. Conduct forming the basis of a waiver must be "clear and unequivocal," *Tray-Wrap, Inc. v. Six L's Packing Co.*, 984 F.2d 65, 68 (2d Cir. 1993), and any waiver of the constitutional right to a jury trial must be "voluntary and intelligent." *McMahon v.*

[27] It is undisputed that valid jury demands were made in each of the Iran Creditors' actions. (SPA-47.)

Hodges, 382 F.3d 284, 290 (2d Cir. 2004). A valid waiver requires an "intentional relinquishment or abandonment of a *known* right or privilege." *Id.* (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)) (emphasis added); *see also Jennings v. McCormick*, 154 F.3d 542, 545 (5th Cir. 1998) (right to jury trial preserved unless "knowingly" waived).

This Court has recognized that a defendant cannot "knowingly" waive a constitutional right during a period in which the defendant reasonably believes that it is not entitled to assert that right. In *Garcia v. State University of New York Health Sciences Ctr.*, 280 F.3d 98 (2d Cir. 2001), the Court analyzed whether the State of New York had waived its Eleventh Amendment right to sovereign immunity against claims under the Rehabilitation Act by accepting federal funds conditioned on such a waiver. This Court stressed that the "waiver of any constitutional right . . . requires an 'intentional relinquishment or abandonment of a *known* right or privilege.'" *Id.* at 114 (quoting *Johnson*, 304 U.S. at 464) (emphasis in original). The Court noted that "[a]t the time that New York accepted the conditioned funds, [the Americans with Disabilities Act] was reasonably understood to abrogate New York's sovereign immunity," and that the Rehabilitation Act's abrogation provision was "virtually identical." *Id.* After the Supreme Court held that the ADA provision purporting to abrogate sovereign immunity was unconstitutional, the *Garcia* Court held that "a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits, since by all reasonable appearances state sovereign immunity had *already been lost*." *Id.* (citations omitted) (emphasis added). In other words, New York could not "knowingly" waive its sovereign immunity when it reasonably believed, based on prevailing law, that it had already been stripped of that immunity by statute. *Id.* at 115; *see also Warren v. Goord*,

No. 06-3349, 2008 U.S. App. LEXIS 24272, at *4 (2d Cir. Nov. 26, 2008) (holding that state's acceptance of federal funds "cannot be understood to have constituted a waiver" of its sovereign immunity because "at the time in question, Congress had abrogated the state's sovereign immunity and it was *not known* that the abrogation was ineffective") (emphasis added).

The same logic applies here. Defendants could not knowingly waive their Seventh Amendment right to a jury trial when they reasonably believed that they were not entitled to assert it, given prevailing law and the Iran Creditors' express legal theory. At the time of Defendants' alleged waiver in 2013, courts had uniformly applied the FSIA's definition of "agency or instrumentality" to TRIA claims brought against alleged agencies or instrumentalities of foreign states. *See, e.g.*, *Levin v. Bank of New York*, No. 09 Civ. 5900, 2011 U.S. Dist. LEXIS 23779, at *75 (S.D.N.Y. Mar. 4, 2011); *Hausler v. JP Morgan Chase Bank, N.A.*, 845 F. Supp. 2d 553, 572 (S.D.N.Y. 2012), *rev'd on other grounds*, 770 F.3d 207 (2d Cir. 2014); *Weininger v. Castro*, 462 F. Supp. 2d 457, 494-98 (S.D.N.Y. 2006). It was not until this Court's decision in the prior appeal that any court had applied a definition of an "agency or instrumentality" of a foreign state terrorist party under the TRIA which departed from the FSIA definition. *See Kirschenbaum*, 830 F.3d at 135. In light of the consensus among courts in 2013 that the FSIA definition and the TRIA definition of "agency or instrumentality" were coextensive as applied to foreign states, Defendants reasonably understood that the FSIA stripped them of their right to a jury trial on the Iran Creditors' TRIA claims. *Cf. Garcia*, 280 F.3d at 114-15.

Moreover, in 2013, the Iran Creditors' TRIA claims were *expressly premised* on the theory that Defendants constituted

the foreign state of Iran or its agencies or instrumentalities under the FSIA definitions. The Iran Creditors argued that their claims must be tried to the bench because "the Court has subject matter jurisdiction over Plaintiffs' Private Actions under the [FSIA]," which "explicitly prohibits jury trials in actions 'against a foreign state.'" (A-881 (quoting 28 U.S.C. § 1330(a)).) FSIA § 1330(a) prohibits jury trials in actions against entities that qualify as foreign states or their agencies or instrumentalities under the definitions set forth in § 1603. *See* 28 U.S.C. § 1330(a). This exception "displaces certain rights which otherwise inhere in a plaintiff's statutory or common law cause of action" where those claims are asserted "against foreign states." *Bailey v. Grand Trunk Lines New England*, 805 F.2d 1097, 1101 (2d Cir. 1986). The Iran Creditors contended that, "[b]ecause Plaintiffs have successfully pled that [Defendants] are foreign states for purposes of the FSIA, the FSIA's bench trial requirement mandates that Plaintiffs' Private Actions be tried to the Court without a jury." (A-881 (internal citations omitted).) Notably, this assertion was not limited to the Iran Creditors' FSIA claims, but encompassed their TRIA claims as well. (*Id.*) Given that all the Iran Creditors' claims were premised on FSIA jurisdiction over actions against a foreign state, Defendants reasonably believed that they were not entitled to demand a jury trial in 2013 and could not knowingly waive that right. *Cf. Garcia*, 280 F.3d at 114-15. However, after this Court held that Defendants do not constitute a foreign state under the FSIA, the Iran Creditors altered their TRIA theory so that it was decoupled from their FSIA theory. On remand, the Iran Creditors argued that Defendants are agencies or instrumentalities of Iran under the TRIA, even if they do *not* qualify as agencies or instrumentalities under the FSIA. (Dkt. 1749 at 5; A-3795; A-3820.) Under this revised TRIA theory, the FSIA no longer precluded Defendants from demanding a jury trial.

Given the Iran Creditors' TRIA theory and the prevailing law in 2013, Defendants did not knowingly waive their right to a jury trial.

b. The Iran Creditors' Material Change in Their TRIA Theory on Remand Revived Defendants' Right to a Jury Trial

Even if Defendants had waived their right to a jury trial in 2013, that right was revived when new issues were introduced upon remand from this Court. Under Federal Rule of Civil Procedure 38(b), a party may demand a jury trial on an issue "no later than 14 days after the last pleading directed to the issue is served." Fed. R. Civ. P. 38(b). Thus, a party that initially waived its right to a jury trial has a second opportunity to demand a jury when new issues are introduced into the case through amended pleadings. *See Lanza v. Drexel & Co.*, 479 F.2d 1277, 1310 (2d Cir. 1973) (en banc) (holding that "the right to demand a jury trial is revived" when an amended pleading "changes the issues"). The injection of new issues into an action after an appeal likewise renews the Rule 38(b) period. Where an action is "remanded for a new trial and an issue not raised in the original action is newly introduced," courts treat the appellate court's mandate as "ha[ving] the effect of amending the pleadings, thereby providing the parties with an opportunity to demand a jury trial on the newly introduced issue." 8-38 Moore's Federal Practice § 38.52 (2018); *see also In re Zweibon*, 565 F.2d 742, 747 n.20 (D.C. Cir. 1977) ("Where the issue . . . is not reached by the District Court but is passed on by the appellate court, the pleadings should be treated as effectively amended by the judgment on appeal.").

For example, in *Zweibon*, a new affirmative defense was introduced during the parties' first appeal to the D.C. Circuit.

See 565 F.2d at 747. On remand, the plaintiff demanded a jury trial on the new defense, but the district court struck that demand as untimely. *See id.* at 745. During the second appeal, the court determined that the Rule 38(b) period should be measured from the date of remand. The court explained that "the pleadings are properly treated as amended pursuant to this court's opinion and judgment of reversal to include this [affirmative defense] issue," and that "[s]uch an amendment of the pleadings . . . triggers the [] period for demand of trial by jury of that issue." *Id.* at 747-48. Because the plaintiff demanded a jury trial within nine days of the issuance of the mandate, the plaintiff was entitled to a jury trial on the new defense. *See id.* at 748.

As in *Zweibon*, this Court's decision in the prior appeal introduced a new issue into the case: whether Defendants qualify as agencies or instrumentalities of Iran under the TRIA standard established in *Kirschenbaum*. *See* 830 F.3d at 135. This new issue revived the Rule 38(b) period because it demanded a fundamentally different analysis than the Iran Creditors' initial TRIA theory, which relied on the FSIA as the basis for jurisdiction and liability. *See Zweibon*, 565 F.2d at 747 (right to jury trial revived where issue on remand "differs conceptually" from issues raised by the initial pleadings); *In re N-500L Cases*, 691 F.2d 15, 22-23 (1st Cir. 1982) (issue is new for purposes of renewing a jury trial right where "[t]he analysis required of the jury [is] different"). This distinction is highlighted by the Court's holding that "Defendants cannot be agents or instrumentalities of the 'foreign state' of Iran for the purposes of FSIA jurisdiction [but that] does not foreclose Defendants being agencies or instrumentalities of Iran as a designated terrorist party under the TRIA." *Kirschenbaum*, 830 F.3d at 134-35. Because this Court's 2017 mandate introduced a new issue, it revived Defendants' right to demand a jury trial on the TRIA claims.

Defendants demanded a jury trial on the TRIA claims within the requisite fourteen days following issuance of this Court's mandate. *See* Fed. R. Civ. P. 38(b)(1); Dkt. 1511. Therefore, Defendants' demand for a jury trial was timely, and the District Court erred in depriving them of that right. This Court should vacate the District Court's judgment on the TRIA claims and remand for retrial.

B. The District Court Incorrectly Determined That Defendants Constitute Agencies or Instrumentalities of Iran under the TRIA

Beyond the jury trial issue, the District Court made critical errors in considering the Iran Creditors' TRIA claims at trial. Most fundamentally, the District Court applied an overly broad standard in determining what constitutes an "agency or instrumentality of [a] terrorist party" under the TRIA when the alleged terrorist party is a foreign state.[28] While the District Court purported to follow the parameters established by this Court in *Kirschenbaum*, it applied them in a manner that would render any entity that provided an "important" service or function to a terrorist party—directly or indirectly and knowingly or unknowingly—fully liable for any terrorism judgment against that terrorist party. Such a standard, yielding unlimited liability without regard to the defendant's involvement in terrorist activity or its relationship with the terrorist party, fails to comport with TRIA precedent, legislative history, or due process requirements. Further, despite this Court's clear instruction to evaluate Defendants' status as of the time of filing of the

[28] Whether the District Court applied the correct standard in evaluating Defendants' status as agencies or instrumentalities is a legal question subject to *de novo* review. *Stansell v. Revolutionary Armed Forces of Colombia*, 771 F.3d 713, 730 (11th Cir. 2014).

Iran Creditors' complaints, the District Court improperly employed a "historical analysis" in finding Defendants to be agencies or instrumentalities of Iran. The District Court's judgment on the TRIA claims should be reversed.

1. The District Court's Overbroad TRIA Standard Is Not Supported by Precedent or Legislative Intent

TRIA § 201, which is codified as a note to FSIA § 1610, permits a judgment creditor of a "terrorist party" that holds a terrorism judgment under § 1605A to execute against the "blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) . . . in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable." 28 U.S.C. § 1610 note. The TRIA defines a "terrorist party" as: "a terrorist, a terrorist organization . . . or a foreign state designated as a state sponsor of terrorism . . . ." *Id.* Because Iran has been designated as a state sponsor of terrorism, it qualifies as a terrorist party under the TRIA. *See* 49 Fed. Reg. 2836-02.

The TRIA does not define the term "agency or instrumentality of [a] terrorist party." 28 U.S.C. § 1610 note. In other TRIA cases where the terrorist party is a foreign state, courts have uniformly applied the FSIA's definition of an "agency or instrumentality of a foreign state" set forth in § 1603(b). *See, e.g.*, *Levin*, 2011 U.S. Dist. LEXIS 23779, at *75; *Hausler*, 845 F. Supp. 2d at 572; *Weininger*, 462 F. Supp. 2d at 494-98; *Gates v. Syrian Arab Republic*, No. 11 Civ. 8715, 2013 U.S. Dist. LEXIS 45327, at *11-18 (N.D. Ill. Mar. 29, 2013). In the prior appeal of this action, this Court acknowledged that "where, as here, the alleged terrorist party *is a foreign state* designated as a state sponsor of terrorism, as opposed to an individual terrorist or non-

state terrorist organization, applying the FSIA's definition of 'agency or instrumentality' to the TRIA might appear less problematic." *Kirschenbaum*, 830 F.3d at 134 (emphasis in original). However, this Court noted that the TRIA reaches more broadly than the FSIA to permit attachment of property belonging to agencies or instrumentalities of non-state terrorist parties and, therefore, concluded that § 1603(b)'s definition does not apply to the TRIA. *Id.* at 133-34. The Court outlined general parameters of what constitutes an agency or instrumentality under the TRIA that differ from the FSIA definition: an entity that "(1) was a means through which a material function of the terrorist party is accomplished, (2) provided material services to, on behalf of, or in support of the terrorist party, *or* (3) was owned, controlled, or directed by the terrorist party." *Id.* at 135 (citing *Stansell*, 771 F.3d at 723) (emphasis in original).

Since the date of the Court's decision, the Supreme Court has had occasion to consider claims for execution against the foreign state of Iran under FSIA § 1610 and reaffirmed that TRIA § 201 should be construed along with other provisions of the FSIA. *See Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018). Accordingly, Defendants respectfully ask the Court to reconsider its previous conclusion that the FSIA definition of an "agency or instrumentality of a foreign state" does not apply to alleged agencies or instrumentalities of a foreign state sponsor of terrorism under the TRIA.[29] But

[29] The TRIA should be read within the FSIA's "statutory context," and the FSIA should be read "as a symmetrical and coherent regulatory scheme" for addressing actions against a foreign state. *Calderon-Cardona v. Bank of New York Mellon*, 770 F.3d 993, 1000 (2d Cir. 2014). "[D]iscordant" interpretations of the TRIA and the FSIA must be avoided. *Id.* Section 1603(b) provides a strict definition of an "agency or instrumentality of a foreign state" which applies "[f]or

even without reconsideration, the District Court misapplied the TRIA standard established by the Court.

The District Court construed this Court's TRIA standard extremely broadly, further than the statute allows. It ignored the fundamental interpretive principle that the words of a statute should not be read in isolation; rather, a phrase must be construed within its statutory context. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 570, 574 (1995); *see also United States v. Costello*, 666 F.3d 1040, 1044 (7th Cir. 2012) ("Dictionary definitions are acontextual, whereas the meaning of sentences depends critically on context . . . ."). Moreover, the District Court disregarded that "agency or instrumentality," when used together, is a legal term of art. It is a "cardinal rule of statutory construction" that when Congress uses a term of art, "it presumably knows and adopts the cluster of ideas that were attached to each borrowed word." *Molzof v. United States*, 502 U.S. 301, 307 (1992). Congress has used the terms "agency" and "instrumentality" together in a variety of statutory contexts, including the FSIA, and they have consistently been interpreted to mean that the principal owns a majority interest in or has close supervisory control over its agency or instrumentality. *See* 28 U.S.C. § 1603(b) (requiring "agency or instrumentality of a foreign state" to be either majority-owned by foreign state or its organ); *Logue v. United States*, 412 U.S. 521, 527-28 (1973) (holding that "critical factor" in determining whether a contractor is an "instrumentalit[y] or

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purposes of this chapter"—the U.S. Code chapter that includes the TRIA. 28 U.S.C. § 1603. Thus, this Court should reconsider *Kirschenbaum* and hold that the FSIA's definition of "agency or instrumentality of a foreign state" is determinative of whether an entity is an "agency or instrumentality of [a foreign state designated as a state sponsor of terrorism]" under the TRIA.

agenc[y]" of government under the Federal Tort Claims Act is "the authority of the principal to control the detailed physical performance of the contractor"); *United States v. Esquenazi*, 752 F.3d 912, 925 (11th Cir. 2014) (holding that "agency" or "instrumentality" of government under the Foreign Corrupt Practices Act means "an entity controlled by the government of a foreign country," such as an entity in which the government has a "majority interest"); *Schaefer v. Transp. Media, Inc.*, 859 F.2d 1251, 1255 (7th Cir. 1988) (holding that entity must be subject to "supervisory control" in order to be considered city's "agency or instrumentality" under the Age Discrimination in Employment Act); *Rose v. Long Island R.R. Pension Plan*, 828 F.2d 910, 918 (2d Cir. 1987) (holding that factors determinative of whether entity is "agency or instrumentality" of government under the Employee Retirement Income Security Act include "whether control and supervision of the organization is vested in public authority" and whether the government has "the powers and interests of an owner"). The same holds true under the common law. *See, e.g., Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 394-400 (1995).

Rather than taking guidance from the TRIA's statutory context and uses of "agency or instrumentality" as a term of art, the District Court limited its analysis to the dictionary definitions of isolated words. (SPA-429-30.) The District Court noted that the first two factors in this Court's TRIA standard have a materiality component. But according to the District Court, a "material" function or service is just "an important one," which may include "an array of different functions and services." (SPA-432.)

Applying this interpretation, the District Court held Defendants liable for billions of dollars' worth of terrorism judgments against Iran, even though it was undisputed that Defendants were not involved in the terrorist activity that

caused Iran to be designated as a terrorist party or the conduct that resulted in the underlying judgments. (SPA-428-49.) First, it found that Defendants were a "[m]eans through which a material function of Iran was accomplished" because they enabled Iran to "maintain and protect its ownership interests in [a] portfolio of real estate assets" and provided "charitable works focuse[d] on Iranian heritage and culture." (SPA-432-35.) As to the second factor, the District Court found that Defendants "[p]rovided material services" in the form of "real-estate management services" and by "provid[ing] currency" up until 2007. (SPA-435-36.) Finally, the District Court found that Defendants were "always controlled and directed by Iran." (SPA-436-37.) Though the District Court found that Defendants knew of their status as agencies or instrumentalities of Iran, it held that the TRIA contains no knowledge requirement. (SPA-442.) Because it determined that Defendants qualified as agencies or instrumentalities of Iran, the District Court ordered execution on Defendants' assets under the TRIA.

The District Court's interpretation of the TRIA agency or instrumentality test constituted error. In the prior appeal, when this Court offered guidelines as to what qualifies as an agency or instrumentality under the TRIA, it cited favorably to the Eleventh Circuit's decision in *Stansell v. Revolutionary Armed Forces of Colombia*, 771 F.3d 713 (11th Cir. 2014). *See Kirschenbaum*, 830 F.3d at 133-36 & n.19. But rather than take guidance from *Stansell*, which requires an agency or instrumentality to be *involved in* or to *assist* the terrorist party's criminal wrongdoing, the District Court adopted a much broader standard. In *Stansell*, the plaintiffs were judgment creditors of the terrorist narco-trafficking organization Revolutionary Armed Forces of Colombia ("FARC"). They asserted TRIA claims against individuals and entities affiliated with FARC, claiming that they were its agencies or instrumentalities. The district court

held that the defendants could properly be deemed FARC's agencies or instrumentalities, reasoning:

> Any [Specially Designated Narcotics Trafficker or Significant Foreign Narcotics Trafficker] . . . that is or was ever *involved in* the cultivation, manufacture, processing, purchase, sale, trafficking, security, storage, shipment or transportation, distribution of FARC coca paste or cocaine, or that *assisted* the FARC's financial or money laundering network, is an agency or instrumentality of the FARC under the TRIA because it was either:
>
> (1) materially assisting in, or providing financial or technological support for or to, or providing goods or services *in support of, the international narcotics trafficking activities* of . . . [FARC]; and/or
>
> (2) owned, controlled, or directed by, or acting for or on behalf of, . . . [FARC]; and/or
>
> (3) playing a *significant role in international narcotics trafficking* [related to coca paste or cocaine manufactured or supplied by the FARC].

Stansell v. Revolutionary Armed Forces of Colombia, No. 09 Civ. 2308, Dkt. 327, at 4-5 (M.D. Fl. Sept. 6, 2011) (emphasis added). Because each defendant had an integral role in FARC's criminal narco-trafficking activities, the district court held that each qualified as FARC's agency or instrumentality. *Id.* The Eleventh Circuit affirmed this TRIA standard. *See Stansell*, 771 F.3d at 732.

Unlike the District Court's agency or instrumentality interpretation, the *Stansell* court's interpretation has a predicate requirement that the entity must be "involved in" or "assist" the criminal activity that caused the terrorist party to be designated as such. *Id.* at 724 n.6. Further, while the provision of services to a terrorist party can serve as a basis for being deemed its agency or instrumentality under *Stansell*, any such services must be "in support of" the terrorist party's criminal activities. *Id.* The *Stansell* court did not impose liability on independent entities that provided services *unrelated to* FARC's narco-trafficking activities. Nor have other federal courts conferred agency or instrumentality status based on the provision of "important" services. To the contrary, courts have consistently held that merely providing services to an entity is insufficient to render the service provider its agency or instrumentality. *See, e.g.*, *Logue*, 412 U.S. at 525-28 (holding that county jail was not "instrumentalit[y] or agenc[y] of the United States" under FTCA merely by reason of its contract to provide services to the government); *Edison v. Douberly*, 604 F.3d 1307, 1310 (11th Cir. 2010) (holding that private entity is not agency or instrumentality of government under ADA "merely because it contracts with a public entity to provide some service"). Because this Court relied on *Stansell* in establishing its three-part TRIA standard, *Stansell* should have informed the District Court's analysis. At a minimum, this Court should hold that, under the first and second *Kirschenbaum* prongs, a service or function can be "material," and thus render the service provider or functionary liable as an agency or instrumentality of a terrorist party under the TRIA, only if it furthers or is connected to terrorist activity.

The District Court also misapplied the third *Kirschenbaum* prong concerning entities "owned, controlled, or directed by" a terrorist party. In *Kirschenbaum*, this Court

stressed that such an agency or instrumentality is "distinct from" but "a part of" the terrorist party. 830 F.3d at 135. Only closely-related entities can be fairly characterized as "a part of" a terrorist party. At least one court has already interpreted *Kirschenbaum* to require majority ownership by the terrorist party. *See Harrison v. Republic of Sudan*, No. 13 Civ. 3127, 2017 U.S. Dist. LEXIS 25675, at *17 (S.D.N.Y. Feb. 10, 2017) (rejecting claim that bank in which Sudan held 40% interest constituted Sudan's agency or instrumentality under TRIA). As to the "control" and "direction" aspects of the third *Kirschenbaum* prong, the test must be confined to entities over which a terrorist party has a high degree of control, one approximating "alter ego" status. Unless a purported agency or instrumentality is alleged to have been involved in a terrorist party's terrorist activity, a close relationship between the entities akin to alter ego status is required before the terrorist party's wrongful conduct can be fairly attributed to the agency or instrumentality; otherwise, the imposition of massive liability on the agency or instrumentality would be unreasonable and inconsistent with other federal case law applying this term of art. *See, e.g.*, *Logue*, 412 U.S. at 527-28; *Edison*, 604 F.3d at 1310.

Faced with a lack of clarity as to what constitutes an agency or instrumentality under the TRIA, the District Court should have also looked at congressional intent. The TRIA's legislative history makes clear that this provision was only intended to impose liability on parties that either participated in terrorist activity or are owned and controlled by a terrorist party. Senator Harkin, one of the drafters of TRIA § 201, discussed agency or instrumentality liability in his floor statement: "[P]aying American victims of terrorism from the blocked and frozen assets of these rogue governments and their agents will really punish and impose a heavy cost on *those aiding and abetting the terrorists*." 148 Cong. Rec. S11527 (Nov. 19, 2002) (emphasis added). Senator Allen,

who co-drafted TRIA § 201, similarly stated that the TRIA's primary purpose was to impose "financial responsibility for the injuries and damages" on "those who are culpable for the terrorist criminal acts." 148 Cong. Rec. S5510 (June 13, 2002). Representative Fossella, who co-sponsored TRIA § 201, likewise evinced an understanding that this provision would impose liability on those involved in committing terrorist acts or entities owned and controlled by terrorist parties. *See* 148 Cong. Rec. H6134 (Sept. 10, 2002) (characterizing the TRIA as an "effective financial tool . . . against terrorists and *those who help them*" and describing "agencies and instrumentalities" as "wholly owned and controlled" by terrorist states) (emphasis added). There is no suggestion in the TRIA's legislative history that Congress intended to impose liability for terrorism judgments on independent entities that had no involvement in the underlying terrorist acts but simply performed an important service or function for the terrorist party.

Though the District Court found that Defendants knowingly operated as agencies or instrumentalities of Iran, it ruled that knowledge was not required for "instrumentality" status. The District Court explained that, although "agency principles prevent an agent from lacking knowledge as to its princip[al]," an entity may "unwittingly" become a terrorist party's "instrumentality." (SPA-431; SPA-442-43.) But agency principles should have guided the District Court's interpretation of the *entire* phrase "agency or instrumentality" as a term of art. *See Logue*, 412 U.S. at 527 & n.5 (relying on Restatement (Second) of Agency in interpreting "instrumentalit[y] or agenc[y]" under FTCA). Basic agency principles require an agent to "manifest[] assent" to an agency relationship, Restatement (Third) of Agency § 1.01 (3d 2006), which the agent cannot do without knowledge of the agency relationship. These agency principles should have been dispositive of the issue, and the

District Court should have imposed a knowledge requirement under the TRIA.

Given these authorities, the District Court should have interpreted the *Kirschenbaum* standard more narrowly. This Court should clarify that an "agency or instrumentality" under the TRIA includes any entity that knowingly (1) performs a material function of the terrorist party relating to its terrorist operations, (2) provides material services in support of the terrorist party's terrorist activity, or (3) is majority-owned by the terrorist party or subject to its close supervisory control.

2. The District Court's TRIA Standard Violated the Due Process Clause's Prohibition on Disproportionate Civil Liability

The District Court's imposition of liability on Defendants for terror-related judgments based on acts for which they bore no responsibility also violated the Fifth Amendment's Due Process Clause. The TRIA standard outlined in *Kirschenbaum* must be construed narrowly in order to comport with constitutional requirements. *See INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, we are obligated to construe the statute to avoid such problems."). Where, as here, a statute could be interpreted to shift unbounded civil liability from a tortfeasor to another party that has not been proven to have caused any harm to the plaintiff, due process demands strict limitations on the circumstances under which such liability may be imposed.

The Due Process Clause "places outer limits on the size of a civil damages award made pursuant to a statutory scheme." *Browning-Ferris Industries of Vt., Inc. v. Kelco*

Disposal, Inc., 492 U.S. 257, 276 (1989). It prohibits "irrational and arbitrary" deprivations of property, including the imposition of disproportionate liability in tort cases. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 429 (2003) (due process "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor"); *see also Missouri Pac. Ry. Co. v. Tucker*, 230 U.S. 340, 351 (1913) (statutory damages award unconstitutional because "arbitrary and oppressive" and "grossly out of proportion to the possible actual damages"); *Parker v. Time Warner Entm't Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003) ("[A] devastatingly large damages award, out of all reasonable proportion to the actual harm suffered by members of the plaintiff class, may raise due process issues."). Because grossly excessive civil liability violates due process, courts must ensure that the imposition of liability is both "reasonable and proportionate" in relation to the defendant's own conduct and its harm to the plaintiff. *Campbell*, 538 U.S. at 426; *see also Tucker*, 230 U.S. at 351.[30]

In determining whether a punitive damages award transgresses constitutional limits, the Supreme Court has analyzed the "*Gore* guideposts," including: "(1) the degree of the defendant's reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the defendant's actions; and (3) the sanctions imposed in other cases for comparable misconduct." *Cooper Indus. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 435 (2001) (citing *BMW of N. Am. v. Gore*, 517 U.S. 559, 575-85 (1996)); *see also Campbell*, 538 U.S. at 418. Courts have recognized that the principles set forth in *Gore* and *Campbell* likewise apply in evaluating the constitutionality of statutory

[30] This proportionality requirement applies under both the Fifth and Fourteenth Amendment Due Process Clauses. *See Campbell*, 538 U.S. at 416; *Parker*, 331 F.3d at 22.

damages awards, including those that serve a purely compensatory purpose. *See, e.g.*, *Parker*, 331 F.3d at 22; *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 954 (7th Cir. 2006); *Stillmock v. Weis Mkts., Inc.*, 385 Fed. App'x 267, 277-78 (4th Cir. 2010) (Wilkinson, J., concurring); *In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328, 342, 351 (N.D. Ill. 2002).

Under this framework, a court's analysis of the proportionality of a civil damages award must focus on the culpability of the defendant's own conduct and the harm it caused to the plaintiff. *See Campbell*, 538 U.S. at 425. Due process does not permit the imposition of civil liability to punish a defendant for general wrongdoing. *Id.* at 423 ("A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business."); *see also Philip Morris USA v. Williams*, 549 U.S. 346, 356-57 (2007). Where, as here, the defendant has caused *no* harm to the plaintiff, the imposition of devastating civil liability is unconstitutional. *See Tucker*, 230 U.S. at 351.

Given the grave consequences of being deemed an agency or instrumentality of a terrorist party under the TRIA, that term must be construed narrowly to require (1) some meaningful involvement in the terrorist party's criminal activity, such that the entity's own conduct was culpable and had a nexus to the harm suffered by the plaintiff, *see Cooper*, 532 U.S. at 435, or (2) a unity of identity with the terrorist party such that the terrorist party's wrongful conduct can be fairly attributed to the agency or instrumentality (akin to alter ego liability). Otherwise, the TRIA would arbitrarily shift unbounded liability for terrorist acts to third parties having nothing to do with the conduct that harmed the plaintiff.

The TRIA standard applied by the District Court is inconsistent with due process and is unconstitutional as applied to Defendants.[31] This Court should construe the statute narrowly to avoid a constitutional defect. *St. Cyr*, 533 U.S. at 299-300.

3. The District Court Failed to Analyze Defendants' Status as of the Time of Filing of the Complaints

The District Court also erred by failing to follow this Court's instruction to determine whether Defendants satisfied the TRIA agency or instrumentality test "at the time Plaintiffs' complaints were filed." *Kirschenbaum*, 830 F.3d at 136 (citing *Dole*, 538 U.S. at 480). Analyzing the defendant's status as of the commencement of the action is consistent with the TRIA's nature as a jurisdictional statute. *See id.* at 126, 136. In the prior appeal, the Court underscored the importance of the time-of-filing analysis by noting the dearth of "recent record evidence" which might prove that Iran controlled Defendants between 2009 and 2013. *Id.* at 136-37. The District Court acknowledged the time-of-filing rule but nonetheless conducted an analysis of

[31] Even assuming that the District Court applied the correct TRIA standard, that standard is unconstitutional as applied to Defendants in this case. The District Court ordered execution against over $600 million of Defendants' assets in partial satisfaction of judgments resulting from terrorist acts in which Defendants played no part. The imposition of such arbitrary and disproportionate liability violates due process. *See Cooper*, 532 U.S. at 435; *Tucker*, 230 U.S. at 351. At a minimum, the Court should reduce Defendants' TRIA liability to an amount that is "reasonable and proportionate" in relation to Defendants' conduct. *Campbell*, 538 U.S. at 426.

the issue that was "based to some degree on a *historical analysis* leading up to the date on which the complaints were filed." (SPA-435 n.63; SPA-437 (emphasis added).) Indeed, in its bench trial decision, the District Court spent dozens of pages recounting events from the 1970s, 1980s, and 1990s, even though the earliest complaint was filed in *2009*. (SPA-340-91.) The District Court's improper historical analysis overwhelmed its minimal consideration of the facts at or near the time the Iran Creditors' complaints were filed. It should have limited its analysis to the facts as of the time of the filing of each Iran Creditor's complaint.

The District Court attempted to justify its reliance on stale evidence concerning Iran's alleged control over Defendants by stating: "The most recent years of what is portrayed as *seeming independence* of [Alavi] is nothing more than a 'long game,' whereby the Government of Iran fully understands that it must withdraw into the background until a more fortuitous time arises when [Alavi's] assets may again be employed for use by the Government of Iran." (SPA-424-25 (emphasis added).) This statement effectively conceded that there was no actual evidence of Iranian control in "recent years" and that the evidence suggested Alavi's "independence" from Iran. (*Id.*) The District Court impermissibly speculated that Iran intends to resume purported control over Alavi on some future date; there is no evidence in the record that would allow such an inference. In reality, the Iran Creditors failed to present *any* evidence that Iran controlled Defendants from 2009 through 2013; at most, they established that Iran influenced or controlled Defendants during the 1970s, 1980s, and early 1990s. The District Court cannot bridge this gap in the evidence by speculating that any control relationship which might have existed decades earlier persisted until 2009 and beyond—especially when faced with evidence to the contrary.

Thus, the Iran Creditors' TRIA claims fail for lack of sufficient evidence that Defendants constituted agencies or instrumentalities of Iran at the time of filing. In the event that the Court does not reject these claims as a matter of law, these actions should be remanded for retrial under a proper time-of-filing analysis.

4. Defendants Do Not Qualify as Agencies or Instrumentalities of Iran under a Proper TRIA Analysis

Under a proper TRIA analysis, neither Defendant would qualify as an agency or instrumentality of Iran at the time the Iran Creditors' complaints were filed. The District Court's holding that Defendants constitute agencies or instrumentalities of Iran based on an overbroad standard should be reversed.

Defendants did not qualify as agencies or instrumentalities of Iran under the first or second prong of the *Kirschenbaum* standard. As the District Court acknowledged, there is "no evidence" that Alavi was "involved in supporting or financing terrorism, weapons of mass destruction, or anything of that nature." (A-2971.) Indeed, the Iran Creditors *stipulated* that Defendants had no involvement in any terrorist activity, including the acts that harmed the Iran Creditors. (EX-1345-36; EX-1349-50; EX-1353-54; EX-1358-60.) In finding that Defendants carried out a "material function" of Iran under the first prong, the District Court relied on evidence that Defendants "maintain[ed] and protect[ed Iran's] ownership interests in [a] portfolio of real estate assets" and provided "charitable works focuse[d] on Iranian heritage and culture." (SPA-432-34.) As to the second prong of the TRIA standard, the District Court found that Defendants provided "material services" in the form of "real-estate management services"

and "provid[ing] currency." (SPA-435-36.) But these commercial and charitable activities cannot constitute "material" functions or services sufficient to convert two U.S. entities into agencies or instrumentalities of Iran that can be held liable for its terrorism-related debts under the TRIA. Moreover, the evidence at trial demonstrated that the last transfer of currency from the Partnership to Assa occurred in 2007, years before the complaints were filed. (EX-1501.)

Interpreting the TRIA as permitting commercial services to be sufficient to render a service provider an agency or instrumentality of a terrorist party is without precedent and would subject a number of entities to liability for *billions of dollars* in outstanding judgments against Iran for terrorist acts in which the service providers had no involvement. For instance, under the District Court's ruling, the assets of several major financial institutions would be subject to turnover to judgment creditors of Iran, given that these institutions have admitted in public filings to having provided financial services to Iran in violation of OFAC regulations—services which would be deemed "important" by the District Court but have no nexus to terrorist activity.[32]

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[32] *See, e.g.*, U.S. Treasury Department, Settlement Agreement (Dec. 16, 2009), https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/08182010.pdf (settlement between OFAC and Credit Suisse AG); U.S. Treasury Department, Settlement Agreement (Aug. 18, 2010), https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/12162009.pdf (settlement between OFAC and Barclays Bank PLC); U.S. Treasury Department Settlement Agreement (Dec. 11, 2012), https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/121211_HSBC_Settlement.pdf (settlement between OFAC and HSBC Holdings plc).

The District Court's interpretation of the TRIA could also generate a flood of litigation against American companies that provide online communication services to terrorist parties. *Cf. Force v. Facebook, Inc.*, No. 16-cv-5158, Dkt. 1 (E.D.N.Y.) (asserting Antiterrorism Act claims against Facebook for allegedly "provid[ing] material support" to a terrorist organization in the form of social networking services). Holding Defendants or any of these other entities responsible for terrorist acts perpetrated by unrelated third parties is inconsistent with the TRIA and due process.

Defendants likewise do not qualify as agencies or instrumentalities of Iran under a proper reading of the third prong of the *Kirschenbaum* standard. The District Court did not find that Defendants constituted agencies or instrumentalities of Iran based on any alleged ownership by Iran. It is undisputed that neither Alavi nor the Partnership is majority-owned by Iran; Alavi has no owners and the Partnership is majority-owned by Alavi. (EX-1623-25; EX-1628-31.) While Assa owns a *minority* interest in the Partnership (EX-1628-31), this interest is insufficient to render the Partnership an "agency or instrumentality" of Assa under the TRIA, let alone Iran. *See Harrison*, 2017 U.S. Dist. LEXIS 25675, at *17.

Under the "control" aspect of the third *Kirschenbaum* prong, the Iran Creditors presented insufficient evidence that Defendants were subject to close supervisory control by Iran at the time the Iran Creditors' complaints were filed in 2009 and after, and Defendants presented unrebutted evidence that they were *not* subject to such control. Nevertheless, the District Court found that Defendants were "always controlled and directed by Iran," stating that Alavi was "merely a branch of the [Bonyad Mostazafan]" and its "charitable mission was directed by the [Bonyad Mostazafan]," and further that Alavi's "most important

decisions . . . were made by Iranian officials," including "how to manage the Partnership, the composition of the Board of [Alavi], and how to maintain the value of the Building." (SPA-436.) The District Court's examples of Iran's alleged control over Defendants included "board meetings held with individuals from the [Bonyad Mostazafan] and other Iranian officials"; "correspondence using secrecy"; "perjurious denials of connections between [Alavi] and Iran"; and "settlement of litigation . . . to prevent revealing the truth." (SPA-436-37.) However, there is no evidence that any of these alleged forms of control occurred anytime near the time of filing of the Iran Creditors' complaints. The evidence cited by the District Court of meetings with the Bonyad Mostazafan, confidential correspondence, and allegedly perjurious statements concerning Alavi's relationship with Iran was all from the 1980s and 1990s (SPA-347; SPA-355; SPA-356; SPA-359; SPA-361; SPA-374; SPA-379-80; SPA-382; SPA-390), and the legal settlement referenced by the District Court occurred in 2004 (SPA-400). The District Court relied on its "historical analysis" to find purported control because there was simply insufficient evidence of control during the relevant time period.

As support for its conclusion, the District Court also cited notes from an October 2007 meeting between Alavi's president and the Iranian ambassador. (SPA-405.) Even viewed in the light most favorable to the Iran Creditors, however, those notes do not reflect control under any interpretation of the term. The notes reflect the ambassador's statements that Alavi's representatives should meet with him "maybe . . . every three to 6 months," that he should be "kept informed regarding the general on goings and allocations," that he should be "kept informed and [had] to be able to state [his] opinion in order for [Alavi] to reach a decision," that he should "see proposed allocations before a

final decision is reached," that he should influence the "composition of [Alavi's] Board," and that he would "establish a cultural Assembly" which would "not oversee the members of [Alavi's] Board" but "maybe . . . will have dinner" with them. (EX-1731-39.) Although the ambassador's statements may be interpreted as requests for influence over Alavi, they do not evidence—or even suggest—control under any reasonable definition of the term.

Critically, the undisputed evidence also showed that Alavi *did not follow* the instructions of the Iranian ambassador: despite the ambassador's suggestion that Alavi "[s]hould only allocate to Shiites," both the trial testimony and Alavi's tax returns demonstrate that the Foundation made substantial charitable donations to non-Shia organizations before and after the 2007 meeting. (A-3457; A-3512; A-3514; A-3515; A3518-19; A-3552-53; EX-461; EX-529; EX-603; EX-668; EX-731.) Further, Alavi's financial manager testified that the Foundation was not subject to external influence from Iran or anyone else in its donation decision-making processes or its everyday operations during the relevant time frame. (A-3519.) This testimony was unrebutted. And finally, despite the ambassador's request to meet with Alavi's Board every three to six months, there was no evidence that any subsequent meeting ever occurred.[33]

[33] There was also no evidence at trial that Iran controlled the Fifth Avenue Company at the time the Iran Creditors' complaints were filed. Though Assa held a minority share in the Partnership, the testimony at trial established that it played no role in the management of the Partnership or the Building; rather, Assa was a "silent partner." (A3524; A-3552; EX-2617.) It is also undisputed that Partnership

All other evidence within even a few years of the filing of the Iran Creditors' complaints did not support the allegation that Iran controlled Defendants. Evidence relating to the destruction of documents by Alavi's president in 2008, while certainly unhelpful to Defendants, does not indicate that the Iranian government controlled the Foundation. Indeed, the grand jury subpoena on which the obstruction charge was premised demanded the production of records regarding Assa, Bank Melli, and the Partnership. Thus, to the extent a negative inference can be drawn, it should relate to those entities, not Iranian control over Alavi. Moreover, the Iran Creditors relied upon the documents that were discarded primarily for the fact of their destruction rather than their content. Likewise, the Fifth Amendment invocations by several Alavi witnesses could potentially serve as the basis for an adverse inference, but they were insufficient to find Iranian control, especially where the invocations were prompted by the Government's threats to criminally prosecute the witnesses. Finally, the journals maintained by one of Alavi's directors—of which the latest relevant entry was from Fall 2007—demonstrate, at most, that the Iranian ambassador sought to advise Alavi, not that Iran exercised control over the Foundation.

Because the Iran Creditors presented insufficient evidence that at the time of filing Defendants constituted agencies or instrumentalities of Iran under a proper interpretation of the TRIA standard, the TRIA claims fail as a matter of law. However, in the event that this Court does not resolve this issue in Defendants' favor as a matter of law,

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ceased providing distributions to Assa by 2007, and that a protective order obtained by the Government in 2008 directed the Partnership to transfer all distributions owed to Assa to an account controlled by the U.S. Marshals Service. (EX-1501; Dkt. 2.)

the Court should remand the TRIA claims for consideration under the proper standard.

C. The District Court Erred by Ordering Execution against Property That Does Not Constitute "Blocked Assets" under the TRIA

Under the TRIA, a judgment creditor may only execute against the "blocked assets of [a] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)." 28 U.S.C. § 1610 note. The question of whether particular assets are blocked must be assessed as of the date of decision. *See United States v. All Funds on Deposit with R.J. O'Brien & Assocs.*, 783 F.3d 607, 622-23 (7th Cir. 2015). The District Court erroneously held that Defendants' properties were blocked by Executive Order 13,599, which blocked the assets of the Government of Iran.[34]

First, Defendants' assets were not blocked by Executive Order 13,599 because neither Alavi nor the Fifth Avenue Company constituted the Government of Iran when that Order was issued in 2012 or anytime thereafter.[35] The Order

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[34] On appeal, the District Court's interpretation and application of the TRIA is reviewed *de novo*. *United States v. Holy Land Found. for Relief & Dev.*, 722 F.3d 677, 683 (5th Cir. 2013). The District Court's factual findings, including its conclusion that Defendants constituted the "Government of Iran" under Executive Order 13,599, are reviewed for clear error. *FDIC v. Providence College*, 115 F.3d 136, 140 (2d Cir. 1997).

[35] It is undisputed that Defendants were never added to OFAC's list of Specially Designated Nationals or its Executive Order 13,599 list (EX-1493); thus, their assets were never blocked in this manner.

defines the "Government of Iran" as including "the Government of Iran, any political subdivision, agency, or instrumentality thereof, including the Central Bank of Iran, and any person owned or controlled by, or acting for or on behalf of, the Government of Iran." Exec. Order No. 13,599, 77 Fed. Reg. 6659 (Feb. 5, 2012). The District Court concluded that Defendants satisfied this definition based on the "same facts" underlying its TRIA "agency or instrumentality" determination. (SPA-428.) As explained above, however, the District Court improperly assessed Defendants' status as agencies or instrumentalities of Iran based on a "historical analysis." (SPA-435 n.63.) It did not assess whether Defendants constituted the Government of Iran under Executive Order 13,599 as of the date the case was decided. Moreover, the District Court's findings were materially impacted by its erroneous evidentiary rulings. *See infra* at 92-95. Because the District Court's determination that Defendants' properties constitute "blocked assets" was predicated on a flawed factual analysis and erroneous evidentiary rulings, it should be vacated and remanded for retrial.

Second, Defendants' assets cannot be considered blocked because the Government sought and obtained forfeiture of those same assets in the related Forfeiture Action. Under this Court's precedent, assets are not blocked where the Government claims or obtains an ownership interest in those assets. *See Smith v. Federal Reserve Bank of New York*, 346 F.3d 264, 272 (2d Cir. 2003) (holding that assets confiscated by Government were not blocked because "[a]ny assets as to which the United States claims ownership are not included in the definition of 'blocked assets' and are not subject to execution or attachment under [the TRIA]"). Under federal forfeiture law, property ownership retroactively transfers to the Government as of the date of the offense giving rise to forfeiture. *See* 18 U.S.C. § 981(f). On the same day that

judgments were entered in these actions, the District Court entered judgment forfeiting most of Defendants' properties to the Government, thereby transferring ownership to the Government as of the date of the underlying offense, which was alleged to be sometime between 1995 and 2009. To the extent that Defendants' properties are or may be subject to forfeiture, those assets are not blocked under the TRIA. *Smith*, 346 F.3d at 272.

III. The District Court's Judgments Should Be Vacated Because Its Erroneous Evidentiary Rulings Substantially Prejudiced Defendants' Case

In the event that the Court does not resolve the Iran Creditors' claims as a matter of law, the District Court's judgments must be vacated and remanded for a new trial because the cumulative effect of the District Court's evidentiary errors substantially prejudiced Defendants' ability to present their case. *See Malek v. Fed. Ins. Co.*, 994 F.2d 49, 55 (2d Cir. 1993) (finding reversible error from cumulative effect of evidentiary rulings).[36]

The District Court precluded the vast majority of the defense case, including over a dozen witnesses and other evidence. Critically, the District Court prohibited Defendants from calling two witnesses who served on Alavi's Board during the relevant time period from 2009 to 2013, Ali Dabiran and Hassan Hassani, and who had expressed a willingness to testify in deposition and at the 2017 trial. (SPA-177-81.) These Board members—and perhaps others—would have testified that Defendants were

[36] The District Court's evidentiary rulings are reviewed for an abuse of discretion. *United States v. Cadet*, 664 F.3d 27, 32 (2d Cir. 2011). A ruling that rests on an error of law is an abuse of discretion. *See id.*

not controlled by Iran, that the Board made independent decisions concerning its charitable donations, that they did not know that Bank Melli owned Assa after 1995, and that Defendants did not knowingly provide services to Iran. Yet the District Court precluded their testimony due to the supposed unfair surprise to the Iran Creditors (*id.*), who were actually informed that these witnesses intended to testify six months before trial and were available for depositions upon issuance of the mandate. (A-1204.) Compounding this error, the District Court admitted the videotaped depositions of five Alavi officers and directors who asserted the Fifth Amendment in 2013, and drew adverse inferences from those assertions (SPA-410-11; SPA-418-22)—ignoring the fact that some of those individuals were actually *willing* to testify. In addition, the District Court prevented Defendants from presenting evidence that would support alternative inferences from the Fifth Amendment assertions. It severely restricted Defendants' cross-examination of the FBI agents concerning their documented harsh investigative techniques and precluded questioning concerning their anti-Muslim bias, which contributed to the Alavi witnesses' decisions to invoke their Fifth Amendment privileges.[37] The District Court also precluded testimony from the attorneys of these officers and directors (SPA-241-43), who would have testified about the Government's threats of prosecution if their clients testified on Defendants' behalf. This evidence would have undermined the District Court's adverse inferences from the Fifth Amendment assertions and the Iran Creditors' allegations that Defendants constituted agencies or instrumentalities of Iran.

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[37] The District Court further prohibited Defendants from questioning the FBI agents about their decision to rely on their informant despite their misgivings about his veracity, as evidenced by their repeated polygraphing of Hesami-Kiche after his initial failure to pass. (SPA-223-25.)

The District Court precluded testimony from other critical witnesses. For example, although Defendants sought to offer testimony from representatives of several recipients of Alavi's charitable donations, the District Court only permitted Defendants to call two of these witnesses (which the District Court selected) and limited their testimony to twenty minutes each. (SPA-227-31; SPA-260-63.) Like the representatives of the Islamic Education Center of Houston and the Temple of Understanding, who did testify at trial, the precluded witnesses would have testified that their organizations have no ties to Iran, do not promote the policies of the Iranian government, and do not focus exclusively on Shia causes (contrary to the Iranian ambassador's suggestion). This evidence was critical to rebut the Iran Creditors' theory (adopted by the District Court) that Alavi was controlled by Iran and provided important charitable services to Iran. The District Court also erred by precluding Defendants' expert witness, John Steines, who would have testified that the 1989 partnership transaction was legitimate under U.S. tax law, in order to rebut the Iran Creditors' and the Government's suggestion that it constituted a tax crime. (SPA-278-89.) This critical evidence should not have been precluded as irrelevant or unduly prejudicial under Fed. R. Evid. 403, especially in a bench trial where the District Court could have chosen not to rely on that evidence. *See Schultz v. Butcher*, 24 F.3d 626, 631-32 (4th Cir. 1994) ("[I]n the context of a bench trial, evidence should not be excluded under 403 on the ground that it is unfairly prejudicial.").

The District Court also erred by permitting the Iran Creditors to introduce hearsay testimony by FBI agents concerning, *inter alia*, alleged statements by Mohammad Badr-Taleh, Alavi's former president, and Mohammad Deghani Tafti, Assa's U.S. representative. The District Court ruled that these statements were admissible as party

opponent admissions, despite the fact that Badr-Taleh had not been affiliated with Alavi for eighteen years at the time of his statements, and that Tafti was *never* affiliated with either Defendant. (A-2885; A-2937.)

Because the cumulative effect of these rulings substantially prejudiced Defendants, they are entitled to a new trial. *Malek*, 994 F.2d at 55.

IV. The Case Should Be Assigned to a Different District Judge on Remand to Ensure Impartiality

The Court should also reassign the case to a different district judge for any remaining proceedings. Reassignment is appropriate because the District Judge assigned to these actions has repeatedly expressed strongly-held views as to the merits of the cases, and these previous statements would cause an objective observer to question the District Judge's ability to preside over the cases in an impartial manner.

This Court has the statutory authority to assign a case to a different district judge on remand in order to ensure impartiality and the *appearance* of impartiality. *See* 28 U.S.C. § 2106; *Hispanics for Fair & Equitable Reapportionment v. Griffin*, 958 F.2d 24, 26 (2d Cir. 1992). "Reassigning a case to a different district judge, while not an everyday occurrence, is not unusual in this Circuit." *In re Reassignment of Cases*, 736 F.3d 118, 128 (2d Cir. 2013) (collecting cases). To reassign a case on remand, the Court need not find actual bias; rather, it "need only find that the facts might reasonably cause an objective observer to question [the judge's] impartiality." *United States v. Londono*, 100 F.3d 236, 242 (2d Cir. 1996). This Court has recognized that there are circumstances where "both for the judge's sake and the appearance of justice, an assignment to a different judge is salutary and in the public interest, especially as it minimizes even a suspicion of partiality."

United States v. Robin, 553 F.2d 8, 10 (2d Cir. 1977) (en banc) (internal citations and quotation marks omitted). Three considerations guide this Court's analysis in determining whether reassignment is appropriate: "(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." *United States v. Hernandez*, 604 F.3d 48, 55-56 (2d Cir. 2010) (internal quotation marks omitted).

Here, consideration of these three factors requires that the case be reassigned on remand. First, the District Judge has already expressed firmly held views about the merits of this case and made detailed factual findings, both in granting summary judgment in 2013 and at trial four years later. The District Judge expressed the strong belief that Defendants are synonymous with the foreign state of Iran and are agencies or instrumentalities of Iran, without considering all admissible evidence. In granting summary judgment, the District Judge found that Defendants "are" Iran and its agencies or instrumentalities, that "no rational juror could find that Iran does not exercise sufficient control over defendants" to consider them alter egos of Iran, and that "there is no issue of material fact as to whether Alavi performed services . . . on behalf of Iran." (Dkt. 1125 at 17, 20, 25, 28.) This Court disagreed and remanded for further proceedings. *See Kirschenbaum*, 830 F.3d at 141-42.

On remand, the District Judge erroneously precluded a substantial portion of Defendants' case, and adhered to her prior determinations regarding Defendants' relationships

with Iran. (SPA-428-31.) The District Judge stated that she was "*firmly convinced*—and [found] by far more than a preponderance of the evidence—that at all relevant times, the Government of Iran exercised extensive control over" Defendants. (SPA-336 (emphasis added).) She determined that the "overwhelming" evidence demonstrated that Alavi's independence from Iran was a "fiction." (SPA-337.) The District Judge appears to have drafted most of her 155-page decision *during* trial, before Defendants presented their case or their closing argument. (SPA-332 n.15.) It is doubtful that "any person can take an objective second look at [the] evidence after reaching such [] conclusion[s]," *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 142 (2d Cir. 2007), let alone an objective third look. Given the "firmness of the district judge's already expressed views," reassignment is required to preserve "the appearance of justice." *Griffin*, 958 F.2d at 26; *see also Robin*, 553 F.2d at 10 ("Where a judge has made detailed findings based on evidence erroneously admitted . . . the circumstances sometimes are such that upon remand he or she [] cannot reasonably be expected to erase the earlier impressions from his or her mind . . . .").

Second, this Court should reassign this case to "preserve the appearance of justice," *Hernandez*, 604 F.3d at 56, because the facts would "reasonably cause an objective observer to question [the judge's] impartiality." *Londono*, 100 F.3d at 242. As Defendants' counsel attempted to present a defense at trial, the District Judge repeatedly accused them of "gamesmanship" and improper conduct. (*E.g.*, A-2875-77; A-3333; A-3547.) In one particularly heated exchange, the District Judge summarily accused Defendants' counsel of orchestrating a scheme to have approximately fifteen Muslim schoolchildren from the Razi School in Queens, New York attend the trial in an attempt to influence the jury. (A-2875-77.) In addition, the District

Judge chastised Defendants' counsel for supposedly engaging in "scorched earth" tactics when counsel were simply defending their clients in a good faith but vigorous manner. (A-3343.) Where, as here, a district judge has made comments that "could be viewed as rising beyond mere impatience or annoyance" with the parties or their counsel, reassignment is "advisable to preserve the appearance of justice." *United States v. Quattrone*, 441 F.3d 153, 192, 193 (2d Cir. 2006); *see also United States v. Padilla*, 186 F.3d 136, 143 (2d Cir. 1999) (reassigning case where district judge commented that defense counsel's notion of justice "baffle[d] [him] totally and completely" and said: "God knows when I've looked to you [defense counsel] for justice, I've never seen it.").

Finally, reassignment here would not "entail waste and duplication out of proportion to any gain in preserving the appearance of fairness," *Hernandez*, 604 F.3d at 56, given that the case will need to be retried before a jury. *See Scott v. Perkins*, 150 Fed. App'x 30, 34 (2d Cir. 2005); *cf. Hernandez*, 604 F.3d at 56 (reassigning case for resentencing "would not waste substantial judicial resources because . . . the work of updating the record and reweighing the [sentencing] factors has not yet been undertaken"). Moreover, reassignment is necessary to avoid a situation in which the District Judge's firmly-entrenched views preclude, once again, a fair trial of this matter. The case should be reassigned "to avoid 'an exercise in futility [in which] the Court is merely marching up the hill only to march right down again.'" *Robin*, 553 F.2d at 11 (quoting *United States v. Tucker*, 404 U.S. 443, 452 (1972)). In short, this case "deserves a fresh look by a different pair of eyes." *Armstrong v. Guccione*, 470 F.3d 89, 113 (2d Cir. 2006).

CONCLUSION

For the reasons stated above, the District Court's June 29, 2017 Opinion and Order following the bench trial of these judgment enforcement actions should be reversed or, in the alternative, vacated and remanded to a different district judge for retrial before a jury.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as modified by this Court's April 12, 2018 Order, because it contains 27,894 words, calculated by the word processing system used in its preparation, and excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Local Rule 32.1(a)(2), and the type-style requirements of Fed. R. App. 32(a)(6), because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in Times New Roman 12-point font.

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