IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	3:04-CR-240-P
	§	
	§	
HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT, et al.	§	
	§	

PETITION OF THE ESTATE OF UNGAR ET AL TO ADJUDICATE INTEREST IN PROPERTY PURSUANT TO 21 U.S.C. § 853(n)

Introduction

This is a petition pursuant to 21 U.S.C. § 853(n) to adjudicate the validity of petitioners' interest in funds belonging to defendant Holy Land Foundation for Relief and Development ("HLF") which are subject to the Preliminary Order of Forfeiture issued by this Court on February 5, 2009.

Petitioners are the orphaned sons, parents, siblings and estate of a Yaron Ungar, an American citizen murdered in a terrorist attack carried out by the Hamas terrorist organization. In March 2000, petitioners brought suit against Hamas under the civil provisions of the Antiterrorism Act, 18 U.S.C. § 2333, in federal court in Rhode Island. In February 2004, the Rhode Island court issued a decision directing entry of final judgment for the petitioners against Hamas in the amount of $116,409,123, and holding that pursuant to the statutory veil-piercing provisions of the Terrorism Risk Insurance Act ("TRIA") petitioners' judgment is enforceable against the HLF.

After obtaining from the Treasury (by order of the federal district court in the District of Columbia) a list of HLF's funds, which are located in financial institutions in seven different federal districts, petitioners registered their judgment in the federal courts in those respective districts and commenced execution proceedings against the HLF funds pursuant to TRIA.

Federal courts in New York, South Carolina and Washington issued writs of execution on petitioners' judgment against the HLF funds in those districts.

In the meanwhile, the government filed an indictment against HLF in this Court, which demanded forfeiture of $12,400,000 that HLF had illegally transferred abroad to Hamas.

On September 24, 2004, the government filed an *ex parte* application in this Court for a restraining order pursuant to 21 U.S.C. §853(e)(1)(A), on the explicit and primary ground that such an order was needed in order to block the petitioners' enforcement proceedings. Dkt. # 84.

This Court issued the requested restraining order *ex parte* the same day. Dkt. # 85. The restraining order was intended to remain in force indefinitely, and no notice or hearing regarding the order, which specifically targeted the petitioners, was provided at any time.

The petitioners appealed the restraining order on both merits and procedural grounds, and on April 4, 2006, the Court of Appeals vacated the restraining order on the ground that it was entered without providing petitioners adequate notice and a fair opportunity to be heard, as required by Rule 65 of the Federal Rule of Civil Procedure. *U.S. v. Holy Land Foundation for Relief and Development*, 445 F.3d 771 (5th Cir. 2006).

The government then sought and obtained rehearing *en banc*. Upon *en banc* reconsideration, the Court of Appeals ruled that the petitioners were not entitled to challenge the restraining order at that time, but could assert their merits claims to the HLF funds at the conclusion of trial, in a proceeding under § 853(n). *See U.S. v. Holy Land Foundation for Relief and Development*, 493 F.3d 469 (5th Cir. 2007).

On February 5, 2009, this Court entered a Preliminary Order of Forfeiture, directing that "subject to the provisions of 21 U.S.C. § 853(n)" the HLF's bank accounts listed in Attachment A to the Preliminary Order shall be "forfeited to the Government as specific property involved in or traceable to property involved in the commission of the offenses described in Count 22 of the Superseding Indictment." Dkt. # 1264 at 3.

On February 19, 2009, petitioners received notice of the Preliminary Order of Forfeiture from the office of the U.S. Attorney, advising that the petitioners are required to file a § 853(n) petition within thirty days. Exhibit A. Accordingly, the petitioners are filing the instant petition.

As shown below, the petitioners are entitled to enforce their judgment against HLF's bank accounts, notwithstanding the government's forfeiture proceedings.

BACKGROUND

I. The Underlying Judgment

Petitioners (David Strachman, as Administrator of the Estate of Yaron Ungar, Yishai Ungar, Dvir Ungar, Meir Ungar, Judith Ungar, Amichai Ungar, Dafna Ungar and Michal Cohen) (hereinafter: "Ungars") are the orphaned children, parents, siblings and administrator of the estate of U.S. citizen Yaron Ungar, who was murdered along with his

pregnant wife Efrat in a terrorist machine-gun attack carried out by the Hamas terrorist organization on June 9, 1996, in Israel.

A 25 year-old New York native, Yaron was a schoolteacher studying for rabbinical ordination when he was murdered. The Ungars were ambushed while returning from a wedding. Efrat shielded their ten month-old son Yishai from the bullets and he survived the attack. The Ungars' other son Dvir, then two years old, was not in the vehicle.

In March 2000, the Ungars filed suit against Hamas and other defendants in the U.S. District Court for the District of Rhode Island under the Antiterrorism Act ("ATA") 18 U.S.C. §2333. Section 2333(a) of the ATA creates a cause of action for a U.S. national, or his estate, survivors and heirs, injured by reason of an act of "*international terrorism"* as defined in § 2331.

Hamas defaulted the action, but the Rhode Island federal court did not proceed immediately to default judgment. Instead, the court required the Ungars to submit evidence that Hamas has contacts with the United States sufficient under the 5th Amendment to permit the exercise of *in personam* jurisdiction, and instructed the Ungars to extensively brief the yet-unexamined question of the scope of damages allowed under the ATA.

The court also conducted a damages hearing over several days in July 2002, at which the Ungars and several expert witnesses testified about the details of the murder, Yaron's conscious suffering before death (Efrat was killed instantly), and the emotional and psychological impact that the murder has had on Dvir and Yishai and the other

immediate members of the Ungar family. *See Ungar v. The Palestinian Authority*, 304 F. Supp.2d 232, 243-279 (D.R.I. 2004).

On July 3, 2003, Magistrate Judge David L. Martin issued a treatise-like Report and Recommendation ("Report"), stretching to nearly forty pages, detailing the basis for the court's exercise of personal jurisdiction over Hamas, analyzing the scope of damages permitted under the ATA and recommending entry of default judgment against Hamas in the amount of $116,409,123 in damages, plus pre-judgment interest. *See* Report and Recommendation attached to *Ungar*, 304 F. Supp.2d at 243-279 (D.R.I. 2004).

The Report specifically noted the great effort invested by the Ungars and their counsel in briefing the numerous issues of first impression raised by the suit. *Id*. at 278 ("[T]his litigation presented special challenges. There was little precedent to follow. Plaintiffs' counsel had to travel to Israel to gather evidence to support the claims being made.")

The district judge did not immediately adopt the Report, but instead instructed the Ungars to brief the question of whether pre-judgment interest was available under the ATA. *Id*. at 236.

On January 27, 2004, Senior U.S. District Judge Ronald R. Lagueux issued a Memorandum and Order adopting the magistrate's Report (except regarding pre-judgment interest) and entering final judgment for the plaintiffs against Hamas for $116,409,123.00 in damages, plus attorney's fees and costs. *Id*. at 242-243.

Thus, the Ungars received a judgment against Hamas nearly ***four years*** after filing suit, and only after investing very considerable financial and emotional resources

and reliving through testimony the excruciating details of the terrorist murder and its aftermath.

II. The Blocking of Assets Belonging to Hamas and Hamas' Agencies and Instrumentalities in the United States

The International Emergency Economic Powers Act, 50 U.S.C. §1701 *et seq*. ("IEEPA") authorizes the President, upon declaration of a national emergency, to block any property subject to the jurisdiction of the United States. 50 U.S.C. §1702.

On January 23, 1995, the President issued Executive Order 12947 (60 Fed. Reg. 5079) pursuant to IEEPA. Executive Order 12947 designated Hamas as a "Specially Designated Terrorist" or SDT, and blocked its assets. Executive Order 12947 also provides for other persons or organizations to be designated as SDTs and thereby have their assets blocked, if found to be "***owned or controlled by, or to act for or on behalf of***" Hamas. *Id*.

On September 23, 2001, the President issued Executive Order 13224 pursuant to IEEPA. (66 Fed. Reg. 49079). Executive Order 13224 designated Hamas as a "Specially Designated Global Terrorist," or SDGT, and blocked its assets under this designation as well. Executive Order 13224 also provides for other persons or organizations to be designated as SDGTs and thereby have their assets blocked, if found to "***act for or on behalf of***" Hamas or to be "***owned or controlled by***" Hamas. *Id*.

On December 4, 2001, the Secretary of the Treasury determined that the HLF "***acts for or on behalf of***" Hamas, and designated the HLF as an SDT under Executive Order 12947 and as an SDGT under Executive Order 13224. *See Holy Land Foundation v. Ashcroft*, 219 F. Supp.2d 57, 64 (D.D.C. 2002). Specifically, the Treasury found strong evidence that HLF functions as the fund-raising arm of Hamas in the United

States. *Id.* at 69-74. Pursuant to these designations, the Office of Foreign Assets Control ("OFAC") in the Treasury issued a "Blocking Notice" freezing all of HLF's funds, accounts and other property. *Id*. at 64. *See also* Blocking Notice, Exhibit B.

The District Court and Court of Appeals for the District of Columbia upheld the designation of the HLF as an SDT and SDGT on the basis of its activities for and on behalf of Hamas. *Holy Land Foundation v. Ashcroft,* 219 F. Supp.2d 57 (D.D.C. 2002), 333 F.3d 156 (D.C. Cir. 2003) cert. denied 124 S. Ct. 1506 (2004). Indeed, that Court of Appeals held that "HLF's role in the funding of Hamas and of its terrorist activities is incontrovertible." *Id*. at 165.

III. Effect of Blocking Under IEEPA

Executive Orders 12947 and 13224 both prohibit "any transaction or dealing by United States persons or within the United States in property or interests in property" of SDTs and SDGTs without legal authorization from OFAC. Executive Order 12947 §1(b); Executive Order 13224 §2(a) (emphasis added). This sweeping language is echoed in the Blocking Notice as well. Exhibit B, at 1 ("Blocked property may not be transferred . . . or otherwise dealt in without prior authorization from OFAC.").

Likewise, the OFAC regulations implementing the blocking orders provide that all property of SDTs and SDGTs are blocked and may not be "transferred, paid, exported, withdrawn or otherwise dealt in." 31 CFR §§594.201 and 595.201.

OFAC regulations define a "transfer" as including every imaginable disposition or modification of rights or interests in the property, and any type of encumbrance. 31 CFR §§594.312 and 595.313. Moreover, the regulations also provide that any putative unlicensed "transfer" made in respect to blocked property "is null and void and shall not

be the basis for the assertion or recognition of any interest in or right, remedy, power or privilege with respect to such property." 31 CFR §§594.202 and 595.202.

IV. The Terrorism Risk Insurance Act of 2002 Subjects the Blocked Assets of the HLF to Execution in Satisfaction of Plaintiffs' Judgment Against Hamas

On November 26, 2002, the President signed into law the Terrorism Risk Insurance Act of 2002 (Public Law 107-297; 116 Stat. 2322) ("TRIA"). Section 201 of Title II of the TRIA provides in relevant part that:

> Notwithstanding any other provision of law . . . in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to, execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

TRIA §201(a).

The remedial legislative purpose of the TRIA was described in a decision of the U.S. District Court for the District of Columbia:

> The TRIA was . . . specifically intended "to deal comprehensively with the problem of enforcement of judgments rendered on behalf of victims of terrorism in any court of competent jurisdiction by enabling them to satisfy such judgments through the attachment of blocked assets of terrorist parties." 148 Cong. Rec. H8728 (Nov. 13, 2002).

Hill v. Republic of Iraq, 2003 WL 21057173 (D.D.C. 2003), at 2. Another federal court described TRIA's purpose similarly:

> TRIA § 201 was passed in order to "deal comprehensively with the problem of enforcement of judgments rendered on behalf of victims of terrorism in any court of competent

> jurisdiction by enabling them to satisfy such judgments through the attachment of blocked assets of terrorist parties. It is the intent of the Conferees that Section 201 establish that such judgments are to be enforced." H.R. Conf. Rep. 107-779, at 27 (2002), reprinted in 2002 U.S.C.C.A.N. 1430, at 1434-35; *see Hill v. Republic of Iraq*, No. 99 Civ. 03346, 2003 WL 21057173, at *2 (D.D.C. Mar. 11, 2003) (discussing enactment of TRIA). As noted by the Second Circuit, the plain meaning of the phrase that blocked assets "shall be subject to execution or attachment in aid of execution" "is to give terrorist victims who actually receive favorable judgments a right to execute against assets that would otherwise be blocked." *Smith ex rel. Estate of Smith v. Fed. Reserve Bank of New York*, 346 F.3d 264, 271 (2d Cir. 2003).

Weininger v. Castro, 462 F.Supp.2d 457, 483 (S.D.N.Y. 2006).

A "*terrorist party*" as defined by TRIA includes both terrorist organizations and designated foreign state sponsors of terrorism. TRIA §201(d)(4).

True to its remedial purpose, TRIA is revolutionary in two respects:

(i) Section 201 permits attachment and execution proceedings against terrorist parties "*Notwithstanding any other provision of law,*" and thereby expressly overrides any and all legal obstacles to enforcement. *See e.g. Hill*, *supra*, 2003 WL 21057173 at 2 (holding that TRIA's "notwithstanding" language overrides the IEEPA blocking regime, the Foreign Sovereign Immunities Act, and the Vienna Convention on Diplomatic Relations).

(ii) Section 201 also functions as a statutory veil-piercing provision, by allowing American victims of terrorism holding a judgment against a "terrorist party" to also enforce that judgment against the assets of "*any agency or instrumentality of that terrorist party.*" § 201. *See e.g. Weininger*, 462 F.Supp.2d at 485 ("TRIA … explicitly provides that where a judgment against a terrorist party exists, not only its blocked assets,

but the assets of its agencies and instrumentalities can be used to satisfy the judgment. The language of TRIA itself thus indicates that Congress intended to make the agencies or instrumentalities of statutorily defined terrorist parties liable for qualifying judgments rendered against the terrorist party in question.")

The machine-gun murder of the Ungars by Hamas was an "act of terrorism" as defined by TRIA[1] and Hamas clearly meets the definition of a "terrorist party" under TRIA.[2] Therefore, §201(a) renders all "blocked assets" of Hamas, as well as all "blocked assets" of any agency or instrumentality of Hamas subject to execution and attachment in aid of execution, in order to satisfy the Ungars' judgment against Hamas. The assets of the HLF were blocked pursuant to Executive Orders 12947 and 13224 specifically because the HLF "***acts for or on behalf of***" Hamas, and thus these assets are "blocked assets" of an agency and instrumentality of Hamas subject to execution by plaintiffs under TRIA.[3]

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[1] Section 201(d)(1) of TRIA provides that the term "act of terrorism" includes any terrorist activity as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act (8 U.S.C. § 1182(a)(3)(B)(iii))). The latter provision defines terrorist activity as "any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following . . . The use of any . . . explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property [or] A threat, attempt, or conspiracy to do any of the foregoing."

[2] Section 201(d)(4) of TRIA provides that the term "terrorist party" includes a "terrorist organization" as defined in section 212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. § 1182(a)(3)(B)(vi). The latter provision defines a terrorist organization as including "an organization . . . that is a group of two or more individuals, whether organized or not, which engages in" terrorist activity."

[3] Section 201(d)(2) of TRIA provides that the term "blocked asset" includes any asset blocked pursuant to IEEPA. As noted, the Executive Orders blocking HLF's assets were issued pursuant to IEEPA.

Accordingly, Judge Lagueux in Rhode Island expressly found that the blocked assets of the HLF are subject to execution in satisfaction of the Ungars' judgment:

> On December 4, 2001, the Office of Foreign Asset Control, a division of the Treasury Department, determined that the HLF acts "for or on behalf of" Hamas and was thus a Specially Designated Terrorist under Executive Order 12947 and a Specially Designated Global Terrorist under Executive Order 13224. *Holy Land Found. for Relief and Dev. v. Ashcroft*, 219 F. Supp.2d 57, 64 (D.D.C. 2002). These designations allowed the Treasury Department to block all of the HLF's funds, accounts, and real property. Id.
>
> The Terrorism Risk Insurance Act of 2002, ("TRIA") subjects the blocked assets of a terrorist party, and any agency or instrumentality of that terrorist party, to execution or attachment in order to satisfy a judgment against them on any claim based on an act of terrorism. Pub. L. No. 107-297, 116 §201(a), Stat. 2322 (2002). The HLF is an agency and instrumentality of Hamas because it acts "for or on behalf of" Hamas as Hamas' fund-raising agent in the United States. **Therefore, the HLF's blocked assets are also subject to attachment and execution under the TRIA in order to satisfy the present judgment against Hamas**.

Ungar, 304 F. Supp.2d at 241 (emphasis added). [4]

Thus, the blocked assets of the HLF are subject to execution in satisfaction of the Ungars' judgment, pursuant to §201 of TRIA.

[4] This finding supported the ruling by the Rhode Island district court that final judgment should enter against Hamas pursuant to FRCP 54(b) despite the pendency of the action against other defendants. The court found that HLF's assets "are steadily depleting because the Treasury Department has allowed the HLF to use the assets to pay its attorneys to challenge the blocking order and defend the HLF against a civil action arising from its collection of funds for Hamas," and that this depletion of the limited pool of assets available to satisfy plaintiffs' judgment constituted sufficient grounds for immediate entry of final judgment under Rule 54(b). *Id*. at 241-242.

V. The Ungars' Enforcement Proceedings Under TRIA Against the Blocked HLF Assets

On February 24, 2004, the Ungars registered their judgment in the United States District Court for the District of Columbia, and served the Treasury with a subpoena seeking information regarding the location of all blocked assets of Hamas and Hamas' agencies and instrumentalities.

On May 7, 2004, the U.S. District Court for the District of Columbia issued a protective order authorizing release of the information sought by the Ungars, subject to numerous restrictions governing the use and confidentiality of the information. Exhibit C.

On May 13, 2004, pursuant to the court order of May 7, the Treasury provided the Ungars with a list containing the details of all blocked assets of Hamas and Hamas' agencies and instrumentalities held by financial institutions in the United States including the assets of the HLF. Exhibit D (submitted under seal).

The list provided by the Treasury indicated that blocked HLF funds totaling $5,045,037.80 are held by financial institutions in seven federal districts across the United States.

Acting pursuant to the list provided by the Treasury, the Ungars then registered their judgment in the Southern District of New York, the Southern and Northern Districts of California, the Western District of Washington, the Northern District of Texas, the District of New Jersey, and the Northern District of Illinois, and retained local counsel in each of those districts.

After the Ungars discovered that four of the HLF accounts identified by the Treasury as being in California were actually in South Carolina, they registered their judgment and retained local counsel in the District of South Carolina as well. Exhibit E.

On August 10, 2004, the Ungars filed with the U.S. District Court for the Southern District of New York an application with supporting declaration for issuance of a writ of execution against Hamas and the HLF pursuant to TRIA.

On August 30, 2004, U.S. District Judge Richard C. Casey entered an Order instructing the clerk of the court to issue a writ of execution in the form attached to his Order, and the clerk issued the writ in that form on September 1, 2004. Exhibits F and G.

The writ of execution issued by Judge Casey specifically provided that:

> Pursuant to §201 of the Terrorism Risk Insurance Act of 2002, Public Law 107-297; 116 Stat. 2322, this Writ shall also be effective to execute upon the goods, chattels and other assets of The Holy Land Foundation for Relief and Development a/k/a The Holy Land Foundation ("HLF") in satisfaction of Plaintiffs' judgment against the Defendant, and the phrase "*goods, chattels and other assets of Hamas - Islamic Resistance Movement a/k/a Harakat Al-Muqawama Al-Islamiyya"* appearing herein shall therefore also include goods, chattels and other assets of the HLF.

Exhibit G at 1.

Substantively identical writs of execution (with minor stylistic variations reflecting local practice) were issued by the United States District Court for the Western District of Washington (on September 2, 2004) and by the United States District Court for the District of South Carolina (on September 8, 2004). Exhibits H and I.

The Ungars *did not* require an OFAC license for their execution proceedings because §201 of TRIA, which permits execution against blocked assets "*Notwithstanding any other provision of law,*" overrides the IEEPA blocking regime.

Accordingly, "*No license by the Office of Foreign Assets Control of the U.S. Treasury Department is required as a precondition*" to an execution under TRIA. *Daliberti v. J.P Morgan Chase & Co.*, 2003 WL 340734 at 2 (S.D.N.Y. 2003). The

federal courts have without exception authorized executions under TRIA without any OFAC license. *See e.g. Hill v. Republic of Iraq*, 2003 U.S. Dist. LEXIS 3725 (D.D.C. March 11, 2003); *Weinstein v. Islamic Republic of Iran*, 274 F. Supp.2d 53 (D.D.C. 2003).

Indeed, the Justice Department agrees that assets subject to TRIA do not require an OFAC license. Exhibit J (Letter from the Department of Justice, January 6, 2006, attached as Exhibit O to Declaration of James W. Perkins submitted in *Weininger v. Castro*, Civ. No. 05-7214 (S.D.N.Y.), dkt. #131.)

VI. The Government's Criminal and Forfeiture Proceedings Against HLF

Following the HLF's designation as a terrorist group and the blocking of its assets, the government pursued a criminal investigation of HLF.

In early April, 2002, this Court issued four search warrants permitting federal agents to examine documents and moveable property of the HLF seized by OFAC from HLF's offices and held in storage facilities in Dallas, San Diego, Newark and Mundelein, Illinois. *See* Docket nos. 1-5 in *USA v. 11025 Switzer Ave, et al.*, 3:02-MJ-119; Docket no. 94 in *USA v. Holy Land Foundation*, 04-cr-00240.

However, because the HLF's property is blocked under IEEPA, the warrants issued by the Dallas federal court were ineffective to permit the FBI to conduct the searches. The Justice Department was therefore required to seek a license from OFAC, permitting execution of the search warrants issued by the federal court. `Accordingly, on April 9, 2002, OFAC issued a "Directive License" permitting the FBI (which OFAC defines therein as a "licensee") to access, examine, copy and remove HLF's property "in furtherance of a criminal search warrant." Directive License, No. SDGT-53, Exhibit K.

On July 26, 2004, the United States filed a forty-two count indictment against the HLF and its principals in this Court. *USA v. Holy Land Foundation*, 04-cr-00240.

The indictment included a demand for forfeiture of $12,400,000 in tainted assets transferred abroad, as well as a demand for forfeiture of substitute assets.

However, the filing of the indictment and forfeiture demand could not purport to, and did not, have any legal effect on the blocked HLF funds, because (as noted) the executive blocking orders and regulations prohibit and nullify *ab initio* any and all unlicensed dispositions in blocked property. 31 CFR §§594.202 and 595.202.

Accordingly, on September 23, 2004, OFAC issued a License authorizing the Department of Justice "to pursue criminal forfeiture of the assets of the Holy Land Foundation for Relief and Development ("HLF") blocked pursuant to" Executive Orders 12947 and 13224. License No. SDGT-382, Exhibit L ("Forfeiture License").

Thus, the first date on which the forfeiture demand contained in the indictment could possibly have become legally effective in respect to the blocked HLF assets was September 23, 2004, when OFAC authorized the forfeiture proceedings.

The Forfeiture License further provided that, "This authorization includes the pursuit of restraining orders necessary to preserve the status of the Blocked Assets prior to their forfeiture or other final disposition." *Id*.

And indeed, the next day, September 24, 2004, the government filed in this Court an "*Ex Parte* Application For Post-Indictment Restraining Order" accompanied by a proposed order. Dkt. # 84. That application sought a restraining order, pursuant to 21 U.S.C. §853(e)(1)(A), "to preserve the availability of certain property that is subject to forfeiture" in the criminal action and identifies the "certain property" whose restraint is

sought as blocked HLF funds held by "various financial institutions" listed in a document labeled "Attachment A" and appended to the *Ex Parte* Application. Id. at pages 1-2.

Significantly, the *Ex Parte* Application dedicates a full page to the Ungars' enforcement proceedings under TRIA, and specifically argues that a restraining order is necessary to prevent the Ungars from reaching the blocked HLF funds. *Id*. at p. 3.

Indeed, the Ungars' enforcement proceedings are cited by the government as the first and main ground for granting its Application, and halting the Ungars' proceedings is presented as the very raison d'être of the requested restraining order.

That day, September 24, 2004, this Court granted the *Ex Parte* Application and issued a Post-Indictment Restraining Order in the form proposed and submitted by the U.S. attorney.

ARGUMENT

I. Section 201 of TRIA Permits Execution Against the Blocked HLF Funds Notwithstanding the Government's Forfeiture Proceedings

As noted, §201 of TRIA permits attachments and executions "Notwithstanding any other provision of law," and its clear remedial purpose is to assist American victims of terrorism to enforce judgments against terrorist parties:

> TRIA § 201 was passed in order to "deal comprehensively with the problem of enforcement of judgments rendered on behalf of victims of terrorism in any court of competent jurisdiction by enabling them to satisfy such judgments through the attachment of blocked assets of terrorist parties. It is the intent of the Conferees that Section 201 establish that such judgments are to be enforced." H.R. Conf. Rep. 107-779, at 27 (2002), reprinted in 2002 U.S.C.C.A.N. 1430, at 1434-35; *see Hill v. Republic of Iraq*, No. 99 Civ. 03346, 2003 WL 21057173, at *2 (D.D.C. Mar. 11, 2003) (discussing enactment of TRIA). As noted by the Second Circuit, the plain meaning of the phrase that blocked assets "shall be subject to execution or attachment in aid of

> execution" "is to give terrorist victims who actually receive favorable judgments a right to execute against assets that would otherwise be blocked." *Smith ex rel. Estate of Smith v. Fed. Reserve Bank of New York*, 346 F.3d 264, 271 (2d Cir. 2003).

Weininger v. Castro, 462 F.Supp.2d at 483.

The case law applying and interpreting §201 of TRIA clearly establishes that the "notwithstanding" provision of §201 operates to *override all statutory limitations* on attachment and execution:

> This matter concerns the efforts of plaintiffs, 180 individuals in whose favor default judgments have been entered against the Republic of Iraq ("Iraq"), to satisfy those judgments [against] accounts . . . that are held by garnishee Riggs Bank NA in the name of the Embassy of Iraq Commercial Office (the "Iraqi Accounts"). **Both of these accounts have been blocked since August 2, 1992 pursuant to Executive Order No. 12722 and the International Emergency Economic Powers Act. 50 U.S.C. §§1701-02**. Plaintiffs have moved this Court for issuance of an order directing execution against those accounts. The Court finds that each of these accounts is subject to execution under the Terrorism Risk Insurance Act ("TRIA") . . .
>
> Section 201 of the TRIA states that "[n]otwithstanding any other provision of law," the blocked assets of a terrorist party "shall be subject to execution or attachment in aid of execution." **As this Court has frequently recognized, "the phrase 'notwithstanding any other provision of law,' or a variation thereof, means exactly that; it is unambiguous and effectively supersedes all previous laws**." *Energy Transp. Group, Inc v. Skinner*, 752 F.Supp. 1, 10 (D.D.C. 1990); *see also Crowley Caribbean Transp., Inc. v. United States*, 865 F.2d 1281, 1283 (D.C.Cir. 1989) ("[a] clearer statement [than 'notwithstanding any other provision of law'] is difficult to imagine"). **Accordingly, by its plain terms, the TRIA overrides any immunity from execution that blocked Iraqi property might otherwise enjoy under the Vienna Convention [on Diplomatic Relations] or the FSIA**.

Hill, 2003 WL 21057173 1-2 (emphasis added).

Similarly, in *Hegna v. Islamic Republic of Iran*, 376 F.3d 485 (5th Cir. 2004), the Fifth Circuit rule that (subject to a narrow exception)[5] TRIA overrides the immunity provisions of the Vienna Convention and permits execution against diplomatic property subject to the Convention.

Thus, TRIA's "notwithstanding" language overrides (1) executive blocking orders issued pursuant to IEEPA (2) the FSIA and (3) the Vienna Conventions. This fact is extremely significant, because the federal courts have consistently held that IEEPA, the FSIA, and the Vienna Convention are themselves all legal regimes of superior and overriding normative force.

For example, in *Charles T. Main Intern., Inc. v. Khuzestan Water & Power Authority*, 651 F.2d 800 (1st Cir. 1981), the First Circuit held that, "**The language of IEEPA is sweeping and unqualified**," and that the IEEPA blocking regime empowers the President to override judicial remedies, such as attachments and injunctions, and to extinguish "interests" in foreign assets held by United States citizens. *Id*. at 807.

In *Dames & Moore v. Regan*, 101 S.Ct. 2972 (1981), the Supreme Court explained the legislative purpose behind the IEEPA blocking regime:

> This Court has previously recognized that the congressional purpose in authorizing blocking orders is "to put control of foreign assets in the hands of the President . . ." *Propper v. Clark*, 337 U.S. 472, 493, 69 S.Ct. 1333, 1345, 93 L.Ed. 1480 (1949). Such orders permit the President to maintain the foreign assets at his disposal for use in negotiating the resolution of a declared national emergency.

Dames, 101 S.Ct. at 2983.

[5] I.e. that the property is being used exclusively for diplomatic or consular purposes. *Hegna*, 376 F.3d at 494.

Quoting with approval the holding in *Charles T. Main* that IEEPA's provisions are "sweeping and unqualified" (*Id.* at 2982), the Supreme Court upheld the validity of orders issued by the President under IEEPA which extinguished third-party rights in Iranian property:

> Because the President's action in nullifying the attachments and ordering the transfer of the assets was taken pursuant to specific congressional authorization, it is supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

Dames, 101 S.Ct. at 2984 (internal quotes omitted).

The overwhelming normative force of IEEPA and blocking orders issued pursuant thereto has been recognized by a long series of cases, including the Fifth Circuit:

> The **IEEPA grants the President sweeping powers** to prohibit "any person['s]" participation in any transaction involving or the exercise of any right, power, or privilege with respect to any "property in which any foreign country . . . has any interest." See 50 U.S.C. §1702(a)(1)(B). Pursuant to this broad authority, President Reagan authorized a freeze on all property and interests in property of the GOL and its agencies, controlled entities and instrumentalities that are in the United States or hereafter come into the possession or control of U.S. persons . . . **In matters like this, which involve foreign policy and national security, we are particularly obliged to defer to the discretion of executive agencies interpreting their governing law and regulations**.

Paradissiotis v. Rubin, 171 F.3d 983, 988 (5th Cir. 1999).

Thus, §201 of TRIA is truly revolutionary. Until the enactment of TRIA, the normative force of IEEPA reigned supreme over all other legal norms, and permitted the President to utilize his "sweeping powers" to exercise total dominion over foreign assets and override the rights of all third-parties vis-à-vis such assets. Indeed, as noted above,

even the FBI and the U.S. Attorney were unable to execute a search warrant issued by this Court against blocked assets, or to seek judicial forfeiture or restraint of such assets, without first obtaining licenses from OFAC.

No longer: since the enactment of § 201, the Ungars and other victims of terrorism are entitled to override IEEPA blocking orders, and to attach and execute freely against assets blocked pursuant to IEEPA, without any OFAC license.

Since TRIA's "Notwithstanding any other provision of law" proviso overrides even the "sweeping" national security provisions of IEEPA which are "supported by the strongest of presumptions and the widest latitude of judicial interpretation" (*Dames* at 2984) that "notwithstanding" proviso must ***a fortiori*** trump any and every garden-variety "provision of law" governing forfeitures.

Or, stated somewhat differently, as a transitive principle of logic: since TRIA is normatively superior to IEEPA (no OFAC license required for execution), and IEEPA is normatively superior to the provisions governing forfeitures (OFAC license required for forfeiture) then TRIA is *per force* normatively superior to the forfeiture provisions and permits attachment and execution "notwithstanding" those forfeiture provisions.

This interpretation is not only mandated by the peremptory "notwithstanding" language of §201, it is also demanded by TRIA's legislative purpose. Congress did not arm victims of terrorism such as the Ungars with a statute that overrides even the overwhelming – and heretofore insuperable – national security powers of the President under IEEPA, only to leave them vulnerable to common forfeiture proceedings. Indeed, in virtually every imaginable case, the blocked U.S.-based assets of terrorist organizations subject to execution under §201 would also be potentially subject to some

type of forfeiture. Thus, an interpretation that reads into TRIA's "notwithstanding" language an unwritten exception for forfeiture provisions would effectively permit the government to thwart virtually all TRIA enforcements by the simple expedient of initiating forfeiture proceedings.

Such a result would utterly contradict and defeat Congress' express intent in enacting TRIA.

This analysis is also strongly supported by the fact that TRIA overrides the FSIA and the Vienna Conventions:

The FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States." H.R.Rep. No. 94-1487, 94th Cong., 2d Sess. (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6610.

Moreover, exceptions to immunity are construed narrowly. *See e.g. Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1156 (7th Cir. 2001); *Mendenhall v. Saudi Aramco*, 991 F.Supp. 856, 858 (S.D.Tex. 1998) (citing cases).

Section 1609 of the FSIA provides: "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter." 28 U.S.C. §1609.

Yet, as noted, "the TRIA overrides any immunity from execution that blocked [foreign state] property might otherwise enjoy under . . . the FSIA." *Hill* at 2.

Thus, the "notwithstanding" language of § 201 overrides even the provisions of §§ 1610-11 of the FSIA which were – until the enactment of TRIA – "the sole and exclusive standards" governing the immunity of the property of foreign states.

Likewise:

> There is . . . a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action. A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.

Trans World Airlines v. Franklin Mint Corp., 104 S.Ct. 1776, 1782 (1984) (internal quotation marks omitted).

Therefore, only a "clearly expressed" enactment by Congress can overcome the immunity granted to diplomatic property under the Vienna Conventions.

As noted, the Court of Appeals (in *Hegna*) and the *Hill* court both found that §201 of TRIA overrides the Vienna Conventions.

Thus, here too: since TRIA's "notwithstanding" language is effective to override even the presumptions against any derogation from the broadly construed norms contained in the FSIA and the Vienna Conventions, it is perforce effective to defeat any run-of-the-mill provisions of law governing criminal forfeitures.

Therefore, §201 of TRIA overrides any provision of law permitting forfeitures, and the forfeiture proceedings brought by the government against the HLF in this case are ineffective to defeat the Ungars' right to attach and execute under TRIA.

Notably, in its *en banc* decision, the Fifth Circuit termed the Ungars' TRIA argument "an interesting legal question" which should be resolved in the context of this § 853(n) petition. *See U.S. v. Holy Land Foundation*, 493 F.3d at 479.

II. Some of the HLF Funds Are in the Custody of Other Federal Courts and This Court Therefore Lacks Jurisdiction to Forfeit Those Funds

Even assuming, *arguendo*, that TRIA did not trump the criminal forfeiture provisions, it is long settled that:

> [W]here a court of competent jurisdiction has, through its officers, taken property into its possession, the property is thereby withdrawn from the jurisdiction of other courts. Having possession, the court may not only issue all writs necessary to protect its possession from physical interference, but is entitled to determine all questions respecting the same.

Ex parte Baldwin, 54 S.Ct. 551, 553 (1934).

The Fifth Circuit has repeatedly reiterated this rule. *See e.g. Wong Shing v. M/V Mardina Trader*, 564 F.2d 1183, 1188 (5th Cir. 1978) ("When a court of competent jurisdiction takes possession of property through its officers, that property is withdrawn from the jurisdiction of all other courts."); *In re Rehkopf Mattress Sales, Inc.*, 479 F.2d 67, 70 (5th Cir. 1973) (noting the "general rule that when a court of competent jurisdiction takes possession of property through its officers, that property is withdrawn from the jurisdiction of all other courts which, though of concurrent jurisdiction, may not disturb that possession.").

This rule is commonly known as the *in custodia legis* doctrine. *See e.g. Ciel y Cia S.A. v. Nereide Societa di Navigazione per Azioni*, 28 B.R. 378, 381 (E.D.Va. 1983) (holding that after property "has been seized by the Marshal under *in rem* process" in one court, the *in custodia legis* doctrine trumps even bankruptcy proceedings, and exclusive jurisdiction over the property lies with the first court rather than the bankruptcy court).

The *in custodia legis* doctrine controls the instant case because many of the blocked HLF funds are in the custody of the United States District Courts for the

Southern District of New York and the Western District of Washington, and so not subject to forfeiture by this Court.

New York

On September 2, 2004, the U.S. Marshal for the Southern District of New York levied the writ of execution issued by the district court on Chase Bank of Texas/JP Morgan Chase & Co., Republic Bank of New York/HSBC and Morgan Stanley. Exhibit M.

Under New York law, the levying of a writ of execution places the subject assets within the legal custody of the court. *See e.g. Ruvolo v. Long Island R. Co.*, 45 Misc.2d 136, 144, 256 N.Y.S.2d 279, 287 (1965) ("Actual possession by the Sheriff or removal from the premises of the debtor was in no way required. 'Once levied upon the property is deemed to be *in custodia legis*.' (quoting *Matter of Livingston*, 30 Misc.2d 71, 74, 211 N.Y.S.2d 897, 900, *aff'd*. on other grounds 14 AD2d 264, 220 N.Y.S. 434 (1961)); *Sheridan Farms, Inc. v. Federico*, 48 Misc.2d 599, 265 N.Y.S.2d 922 (App.Term 1st Dep't, 1965) ("The property was inventoried by the marshal and the debtor put on notice that it was being levied upon pursuant to the execution lodged with the marshal, who left with the debtor copies of the execution, inventory and notice of sale and posted a notice of levy. The marshal thereby exercised dominion and took custody of the property pursuant to the levy and it passed from the debtor's custody and was placed in custodia legis.").

Crucially, the April 4, 2006 decision of the Fifth Circuit **agreed with this argument in principle**, and found that the Ungars had indeed perfected a valid execution lien under New York law against the HLF assets in New York, but held that that lien had

expired because the Ungars did not file a turnover proceeding under §§ 5225-5227 of New York's C.P.L.R. within 90 days of service of the execution. *U.S. v. Holy Land Foundation*, 445 F.3d at 783-4.

Because the government itself did not raise this argument about expiry of the lien the Ungars did not address it, and the Fifth Circuit reached its conclusion that no extension of the lien had been obtained without any briefing by the parties, on the basis of a *sua sponte* review of the Pacer docket of the U.S. District Court for the Southern District of New York.

In fact, however, unbeknownst to the Court of Appeals, the Ungars ***did indeed*** extend their levy until April 11, 2005, at which time they filed their turnover petition. *See* Order issued in *Ungar v. Hamas*, Exhibit N. Extension of an execution lien in this manner is fully effective under New York law. *See e.g. Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation*, 605 F.2d 648 (2nd Cir. 1979); *Matter of Kitson & Kitson v. City of Yonkers*, 10 A.D.3d 21, 778 N.Y.S.2d 503 (2004).

The Fifth Circuit did not locate the Order extending the levy on the SDNY Pacer docket simply because that Order was issued under a "Miscellaneous" docket number, and in the SDNY "Miscellaneous" proceedings do not appear on Pacer.

Thus, the HLF assets located in New York are in the exclusive legal custody of the SDNY, and this Court does not have jurisdiction to order the forfeiture of those assets.

Washington

Following the April 4, 2006 decision of the Fifth Circuit vacating this Court's restraining order, Saturna Capital, which was holding HLF assets, deposited those assets

into the Registry of the U.S. District Court for the Western District of Washington. *See* Order denying government request for release of funds in Registry, *Amana Mutual Funds Trust et al. v. Holy Land Foundation for Relief and Development et al.*, Civ. No. 06-518-RSL (W.D.Wa.), Exhibit P.

Thus, those funds are in the custody of the U.S. District Court for the Western District of Washington, and so are not subject to forfeiture by this Court.

***

In sum, therefore, the HLF assets in the Southern District of New York and the Western District of Washington are in the custody of the respective federal courts in those districts, and those funds are thereby "**withdrawn from the jurisdiction of all other courts**." *Wong Shing*, 564 F.2d at 1188.

This Court therefore lacks jurisdiction to issue an order forfeiting those funds.

WHEREFORE, the Preliminary Order of Forfeiture should be vacated, or modified to state that any forfeiture is subject to the Ungars' priority rights to enforce their judgment against the HLF's asset pursuant to § 201 of TRIA.

THE ESTATE OF YARON UNGAR, DVIR UNGAR, YISHAI UNGAR, MEYER UNGAR, JUDITH UNGAR, URI DASBERG, JUDITH DASBERG, AMICHAI UNGAR, DAFNA UNGAR and MICHAL COHEN
by and through their attorneys,

March 23, 2009

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The undersigned hereby state under penalty of perjury that the foregoing petition is true and accurate:

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Judith Ungar, individually and as Co-Guardian of Dvir Ungar and Yishai Ungar

Michal Cohen

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