17-3342

IN THE

United States District Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Counter-Defendant-Appellee,

(See Inside Cover for Continuation of Caption)

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

REPLY BRIEF FOR PETITIONERS-APPELLANTS JEREMY LEVIN AND DR. LUCILLE LEVIN

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Jeremy Levin and Dr. Lucille Levin

Fiona Havlish, individually and on behalf of the Estate of Donald G. Havlish, Jr., et al.,

Plaintiff,

Steven M. Greenbaum, Alan D. Hayman, Shirlee Hayman, Renay Frym, Stuart E. Hersh, Abraham Mendelson, Daniel Miller, Elena Rozenman, Noam Rozenman, Tzvi Rozenman, Deborah Rubin, Jenny Rubin, Daniel Miller, Carlos Acosta, Maria Acosta, Irving Franklin, Libby Kahane, Norman Kahane, Ethel J. Griffin, Ciporah Kaplan, Baruch Kahane, Tova Ettinger,

Consolidated - Plaintiffs,

v.

Jeremy Levin, Lucille Levin,

Petitioner - Appellants,

v.

650 Fifth Avenue Company, Alavi Foundation,

Defendants-Appellees,

ASSA Co., Ltd., Bank Melli Iran in 650 Fifth Avenue Company, including but not limited to the Real Estate Property and Appurtenances located at 650 Fifth Avenue, New York, New York, with all improvements and attachments thereon, All funds formerly on deposit at Citibank, N.A., New York, New York, in Account Number 78429712, in the name of ASSA Corporation and all funds traceable thereto, All funds formerly on deposit at Citibank, N.A., 888165552, in the name of ASSA Corporation and all funds traceable thereto, All funds formerly on deposit at JPMorgan Chase Bank, N.A., Baton Rouge, Louisiana, in Account Number 2724409590, in the name of ASSA Corporation, and all funds traceable thereto, All funds formerly on deposit at JPMorgan Chase Bank, N.A., Baton Rouge, Louisiana, in Account Number 725700280, in the name of ASSA Corporation, and all funds traceable thereto, ASSA Corporation, Alavi Foundation of New York, All Right, Title, and Interest of ASSA Corporation, All Right Title And Interest Of Assa Corporation, All right title and interest of Assa Corporation, Assa Company Limited, Bank Melli Iran, and the Alavi Foundation in 650 Fifth Avenue

Company, including but not limited to the real property and appurtenances located at 650 Fifth Avenue, New York, New York, All Right Title And Interest In 650 Fifth Avenue, All right title and interest in the real property and appurtenances located at 650 Fifth Avenue, New York, New York with all improvements and attachments thereon, All Right Title And Interest In 2313 South Voss Road, All right, title and interest in the real property and appurtenances located at 2313 South Voss Road, Houston, Texas 77057, with all improvements and attachments thereon, All Right Title And Interest In 55-11 Queens Boulevard, All right, title and interest in the real property and appurtenances located at 55-11 Queens Boulevard, Queens, New York 11377, Block 1325 Lots 1,6,7 and 8 with all improvements and attachments thereon, All Right, Title And Interest In 4836 Marconi Avenue, All right, title and interest in the real property and appurtenances located at 4836 Marconi Avenue, Carmichael, California 95608, with all improvements and attachments thereon, All Right, Title And Interest In 4204 Aldie Road, All right, title and interest in the real property and appurtenances located at 4204 Aldie Road, Catharpin, Virginia 20143-1133 with all improvements and attachments thereon, All Right, Title, And Interest In 4300 Aldie Road, All right, title, and interest in the real property and appurtenances located at 4300 Aldie Road, Catharpin, Virginia 20143-1133, All Funds On Deposit At JPMorgan Chase Bank, N.A., All funds on deposit at JPMorgan Chase Bank, N.A., in account number 230484468, held in the name of 650 Fifth Avenue Company, and all funds traceable thereto, All Funds On Deposit At JPMorgan Chase Bank, N.A. in account number 230484476 held in the name of 650 Fifth Avenue Company and all funds traceable thereto, All funds on deposit at JPMorgan Chase B, All Funds On Deposit At Sterling National Bank, All funds on deposit at Sterling National Bank in account number 3852524414 held in the name of Alavi Foundation and all funds traceable thereto, All Funds On Deposit At Sterling National Bank, All funds on deposit at Sterling National Bank in account number 3802032201 held in the name of Alavi Foundation and all funds traceable thereto, All Funds On Deposit At Sterling National Bank, All funds on deposit at Sterling National Bank in account number 3802032216 held in the name of Alavi Foundation and all funds traceable thereto, All Right, Title And Interest In 7917 Montrose Road, All right, title and interest in the real property and appurtenances located at 7917 Montrose Road, Rockville, Maryland 20854, with all improvements and attachments thereon, All Right, Title And Interest In 8100 Jeb Stuart Road, All right, title and interest in the real property and appurtenances located at 8100 Jeb Stuart Road, Rockville Maryland 20854, with all improvements and attachments thereon,

Defendants.

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INTRODUCTION

The District Court erred in granting the Government's Motion to Dismiss Appellants, TRIA judgment creditors of the Islamic Republic of Iran ("Iran"), and victims of terrorism Mr. Jeremy Levin and Dr. Lucille Levin's (the "Levins"), claim in the action underlying this appeal (the "Forfeiture Action"). The Levins, despite being in their late-eighties and in poor health, acted expeditiously upon receiving notice of the Forfeiture Action and have acted in good faith in the litigation of their action. They should not be the only Judgment Creditors barred from a less than one percent *pro rata* share of hundreds of millions of dollars in terrorist assets because of their good faith reliance on statements of the Government, technical non-compliance with procedural rules that other Judgment Creditors have not had to comply with fully and which the Terrorism Risk Insurance Act of 2002 ("TRIA") excuses.

First, the District Court ignored the facts of the Levins' claim, which must be taken as true, and ignored the rule that TRIA relieves a Judgment Creditor from any technical requirements under the Civil Asset Forfeiture Reform Act ("CAFRA")[1] or the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Action ("Supplemental Rules"). By its own language, TRIA

[1] In failing to address it in their Responsive Brief, the Government acknowledges that CAFRA does not apply here. *See* Dkt. 61.

preempts any other law which would prohibit the satisfaction of a judgment from blocked assets. *See* Terrorism Risk Insurance Act of 2002 § 201(a), Pub. L. 107-297, 116 Stat. 2322 (Nov. 26, 2002) (codified at 28 U.S.C. § 1610 note) ("TRIA § 201"); Dkt. 2030 at 7; *United States v. All Funds on Deposit with R.J. O'Brien & Assocs.,* 783 F.3d 607, 621 (7th Cir. 2015) (hereinafter "*R.J. O'Brien & Assocs.*") ("[T]he district court correctly relied on TRIA in finding that Appellees could proceed with their claims notwithstanding the conflicting provisions of civil forfeiture. Forfeiture's standing requirements cannot overcome TRIA's sweeping mechanism for recovery."). The funds at issue in the forfeiture action are Blocked Assets of agencies and instrumentalities of Iran. Dkt. 1895. Therefore, the Government may not use claims proceedings to take for itself Blocked Assets, thwarting a TRIA Judgment holder from collecting against those funds. TRIA § 201; *see also R.J. O'Brien & Assocs*, 783 F.3d at 619-21. Second, the District Court ignored the fact that equitable estoppel prevents the Government from asserting any such affirmative defenses based on technical non-compliance with the procedural rules against the Levins taking a *pro rata* share in any distribution of the blocked properties ("Blocked Assets"), and not against other similarly positioned Judgment Creditors. *See Nassau Trust Co. v. Montrose Concrete Prods. Corp.,* 56 N.Y.2d 175, 184 (1982). As TRIA Judgment holders, the Levins have standing to seek a *pro rata* distribution from the collection of any forfeiture

blocked assets as well as, in the alternative, to file a separate complaint for a priority distribution to satisfy the remaining amount of their uncollected Judgment against Iran and its agencies and instrumentalities. *See* Dkt. 39 at 24-25. The Levins are prepared to give up on their individual claims to priority of the Blocked Assets and share *pro rata* in the funds along with all the other Judgment Creditors in this case and will only pursue their priority in a separate suit if the District Court's dismissal is affirmed, or if the Government's judgment against the Blocked Assets is reversed on appeal. Dkt. 2030 at 4 n.3.

The Levins received actual notice of the Forfeiture Action in late 2013 and have expended significant time, effort, and resources in the litigation of their claim to these assets. (AA 219-221); Dkt. 39 at 49-52. They relied on statements made by the Government and the U.S. Marshal that a *pro rata* distribution would occur when there was collection by the Government between all Judgment Creditors of Iran. (AA 219-221); Dkt. 39 at 49-52; *see also* Victims Asset Recovery Program, 28 C.F.R. § 9.8. They relied on the Government's handling of prior claims filed by other Judgment Creditors in allowing such claims, despite procedural deficiencies on the part of those Judgment Creditors such as untimely filing, failure to file a claim, and failure to file an answer. (AA 419-424); Dkt. 39 at 46 n.11. By the Government's own published rules, until it has possession of the Blocked Assets, which it does not as of the time of this Appeal, it should not foreclose claimants

from making claims on that property. 28 C.F.R. § 9.4; 28 C.F.R. § 9.8; United States Attorneys' Bulletin, Vol. 61, No. 5, September 2013 ("Bulletin") at 49. Thus, the Government should be equitably estopped from singling out the Levins as the only Judgment Creditors of Iran who are being denied restitution, applying an inequitable and discriminatory rule to the Levins' claim, and asserting that the Levins' claim is insufficient in its Letter Motion to Dismiss. *See Nassau Trust Co.*, 56 N.Y.2d at 184; *Griffith v. Staten Island Rapid Transp. Operating Auth.*, 703 N.Y.S.2d 270, 272 (2000) (citing *Bender v. New York City Health & Hosps. Corp.*, 38 N.Y.2d 662, 668 (1976)) ("[A] municipality may be estopped from asserting that a claim was untimely filed when its improper conduct induces reliance by a party who changes his or her position to his or her detriment or prejudice."). This is simple fairness. Such fairness will not prejudice the Government, which will cover its costs, nor other similarly situated victims in any significant way, as the Levins' share is tiny. *United States v. One Urban Lot Located at 1 Street A–1*, 885 F.2d 994, 1001 (1st Cir. 1989) (when the government will suffer no prejudice, equity and fairness may require the district court to exercise its discretion in the claimant's favor).

Finally, even if the procedural requirements applied to the Levins, which they do not because the Levins are TRIA Judgment holders and TRIA preempts the procedural rules, those procedural requirements should be waived with respect to

the Levins due to equitable considerations, as they have been for other Judgment Creditors. *See* Dkt. 1895 at 7 (District Court recognizing, as to other Judgment Creditors, that procedural deficiencies should be ignored when it is "manifestly unjust."). Despite its contentions otherwise, the Government fails to show how it would be prejudiced in allowing a valid claim by the Levins. *See* Dkt 61. Indeed, the Government, which allegedly represents all victims in the forfeiture, should want to treat the Levins in the same way as the other similarly situated victims were treated, if for no other reason, to appear just. The Government has already committed to a *pro rata* distribution of the Blocked Assets to the Judgment Creditors in a settlement of April 16, 2014 (those Judgment Creditors who settled hereinafter referred to as the "Settling Creditors"). Indeed, since the Levins have already committed to seek no more than their *pro rata* share, including them in this vast recovery will not result in any delay of the distribution. *See* Dkt. 39 at 53-54. Indeed, as the Levins have a separate case filed against the same Blocked Assets, which has been stayed, if the Government does distribute the Iranian assets despite the Levins' claims, it will be subject to the Levins' claim that it knowingly distributed assets against which they have a priority. *See id.* The Levins believe there are no pending claims, and are aware of none, other than their own, against these Blocked Assets which are not being covered by the Government's settlement agreement. This Court should reverse the District Court's Order granting the

Government's Motion to Dismiss the Levins' Notice of Claim Against the Defendant Properties in the Forfeiture Action, and the Levins should be permitted to make a claim and petition for a *pro rata* share of any proceeds from the Blocked Assets, along with the other similarly situated Settling Creditors, ending this litigation completely.

ARGUMENT

I. Standard of Review

The District Court's grant of the Government's Motion to Dismiss must be reviewed *de novo*. *Pacheco v. Serendensky*, 393 F.3d 348, 352 (2d Cir. 2004) (motion to dismiss third-party petitions asserting an interest in property subject to forfeiture should be treated like a motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b)); *Jaghory v. New York State Dep't of Educ.*, 131 F.3d 326, 329 (2d Cir. 1997) (grant of a motion to dismiss under Rule 12(b)(1) or 12(b)(6) reviewed *de novo*). To survive a motion to dismiss, the Levins must set forth enough facts in their Notice of Claim to "state a claim to relief that is plausible on its face." *Willis Mgmt., Ltd. v. U.S.*, 652 F.3d 236, 242 (2d Cir. 2011) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court must assume the facts set forth in the Levins' Notice of Claim to be true for purposes of the motion, and must "draw[] all reasonable inferences in the plaintiff's favor." *Brown Media Corp. v. K&L Gates, LLP*, 854 F.3d 150, 156-57 (2d Cir. 2017). The

Levins' claim should be dismissed "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 507 (2002).

In their Notice of Claim, the Levins set out facts which, if true, entitle them to enforce their unsatisfied judgment on all of the Blocked Assets and prevent any dismissal on the basis of an affirmative defense that the claim was untimely, not verified, or that the Levins lack standing to make a valid claim. (AA 243-250). It sets forth facts which must be taken as true and which would: (1) either entitle the Levins to make a claim for a share of the assets at such time as the Government might collect them, with their consent, if the Government distributes them *pro rata* under 28 C.F.R. §§ 9.4 and 9.8 and Bulletin at 49, or (2) except them from any technical requirements under CAFRA and the Supplemental Rules, because of the preemptive provisions of TRIA and equitable estoppel based on the Government's conduct, so that they are in a position to contest the Government's action in purporting to distribute the Blocked Assets unlawfully. *Id.* Therefore, the District Court's grant of the Government's Motion to Dismiss their Notice of Claim should be reversed.

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II. Supplemental Rule G Does Not Control the Levins' Claim

A. Supplemental Rule G Does Not Apply to the Levins' Claims

The Government claims that "Title 18, United States Code, Section 983, [CAFRA] and Rule G provide the exclusive means for obtaining statutory standing to contest a forfeiture," and further, that the "Levin Creditors do not put forth any authority for alternate means of contesting a forfeiture, nor could they," and therefore, "the District Court correctly dismissed their forfeiture claim." Dkt. 61 at 340, 342. First, unless there is no alternative, the Levins are not presently contesting the forfeiture, as the Government is well aware. The Levins did not file a Claim "contesting" the Government's action under CAFRA and Supplemental Rule G, but rather filed a Notice of Claim as Judgment Creditors of Iran, as did many other victims the Government intends to pay from the funds. This is permitted under the law. *See* 28 C.F.R. § 9.8 ("Persons seeking remission as victims shall file petitions for remission with the appropriate deciding official as described in § . . . 9.4(e) (judicial forfeiture)."); 28 C.F.R. § 9.4 ("Petitions shall be considered any time after notice until such time as the forfeited property is placed in official use, sold, or otherwise disposed of according to law, except in cases involving petitions to restore property."); *see also* Bulletin at 49 ("Following the seizure or forfeiture of property, the U.S. Attorney's office . . . makes an effort to

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identify all potential victims and provides them with notice of the opportunity to file a petition for remission.").

Under these rules, until the Government has the Defendant Properties in its possession from a Forfeiture Action, it should not foreclose claimants from making claims to that property. The Government claims that these authorities do not apply because they "relate to petitions for remission and mitigation" which are "processes for distributing forfeited assets by the Government pursuant to its broad authority to dispose of forfeited assets under law. *See* 18 U.S.C. § 981(e)." Dkt. 61 at 348. The Government further states: "Those processes, however, have no bearing on contesting a forfeiture or filing an innocent owner claim . . . ." Dkt. 61 at 348. As the Levins have stated, and continue to state, their Notice of Claim was not contesting any forfeiture. *See, e.g.*, (AA 246); Dkt. 39 at 15, 21, 22-23 n.5, 30. They are seeking a *pro rata* distribution of the Blocked Assets, which falls under the Government's "broad authority to dispose of forfeited assets under law" pursuant to 18 U.S.C. § 981. Furthermore, even if the Government's rules make some general distinction between remission and mitigation in contesting a forfeiture (which the Levins are not doing), TRIA preempts any such maneuvers by the Government, the end result of which is to deny a TRIA judgment holder collection of assets of Iran or its agencies and instrumentalities. TRIA § 201; *see also R.J. O'Brien & Assocs.*, 783 F.3d at 619-21.

Therefore, the Supplemental Rules and CAFRA do not apply to their claims and failure to comply with those inapplicable procedures should not preclude the Levins from taking part in collecting their *pro rata* distribution, as the Government did not enforce those procedures in other victim cases. *See* Section (II)(C), *infra*.

B. Even If Supplemental Rule G Applied, It Would Be Preempted by TRIA, Which Governs Here

Citing 18 U.S.C. § 981, the Government argues that "[o]nce the assets are forfeited to the Government . . . those assets [are] no longer assets 'of' of [sic] a terrorist organization, and subject to the TRIA." Dkt. 61 at 342. First, procedurally, the assets have not been forfeited to the Government yet. The issue of who has priority to the Blocked Assets has not been decided, and the underlying case is on appeal. *See* Dkt. 61. Second, the Blocked Assets are subject to a civil forfeiture action under the International Emergency Economic Powers Act (IEEPA), which transfers only a possessory interest to the Goverment. *See* Dkt. 1895 at 10, 104-05 (civil forfeiture pursuant to the IEEPA Presidential blocking powers and federal money-laundering statutes). Under the IEEPA, the President may block or confiscate assets. *See* International Emergency Economic Powers Act § 203(a)(1)(B)(c), Pub. L. No. 95-223, 91 Stat. 1626 (1977) (codified at 50 U.S.C. § 1702) ("IEEPA § 203"); *see also Kirschenbaum v. 650 Fifth Ave.*, 257 F. Supp. 3d 463, 497 (S.D.N.Y. 2017) ("'In addition to conferring authority on the

President to regulate and prohibit transactions to deal with threats to this nation's security, foreign policy, or economy, the IEEPA authorizes the President to block property to address such threats.'"). In the present matter, the Blocked Assets were blocked and not confiscated. Dkt. 1895 at 104-06. Thus, the Government's proposition that it has an ownership interest over the Blocked Assets is contradicted by a case cited in its own brief. *Smith ex rel. Estate of Smith v. Fed. Reserve Bank of N.Y.*, 346 F.3d 264, 271 (2d. Cir. 2003) (distinguishing between "blocked" and "confiscated" assets, stating: "To seize or freeze assets transfers *possessory* interest in the property. . . . But confiscation, pursuant to IEEPA § 203(a)(1)(C), transfers *ownership* of terrorist property by vesting right, title, and interest as the President deems appropriate. . . .") (emphasis in original). Because the Blocked Assets were blocked under IEEPA § 203(a)(1)(B) and not confiscated under § 203(a)(1)(C), the Government has a purely possessory interest.

Further, the Government claims that TRIA and Supplemental Rule G are not "conflicting legal principles" such that TRIA would preempt Rule G and that the Levins' "overbroad reading of the statute should be rejected." Dkt. 61 at 342-43. Presumably, the Government is arguing that it becomes the owner of the Iranian funds after a legitimate forfeiture pursuant to the Presidential authority to block assets, which *Smith* holds it does not. *Smith ex rel. Estate of Smith*, 346 F.3d at 271. However, the Levins are also making an alternative claim as TRIA judgment

holders to a priority over the Government to the Iranian assets. *See Levin v. 650 Fifth Avenue Co., et al.*, No. 1:17-cv-00959, Dkt. 1; Dkt. 39 at 22 n.5. Therefore, even if *Smith* did not settle this question, the Government cannot legitimately take ownership of Iranian funds to thwart collection by a TRIA Judgment holder. *R.J. O'Brien & Assocs.,* 783 F.3d at 619-21. The Court below did not rule that the Government has a priority over the TRIA Judgments. *See* Dkt. 2062. Indeed, this was a factual and legal argument the Court reserved for the next phase of the case until the other Judgment holders and the Government settled and agreed to split the proceeds without a priority fight. *See id.* at 2 n.1. This deal left the TRIA issue unresolved in this case, but the law prevents the Government from taking for itself funds that are subject to collection directly by victims. TRIA § 201. The Levins are pursuing their claims in a separate action because they were forced to this, rather than being allowed the sensible and equitable option of joining the main action and being a part of the distribution as were the others similarly situated. Dkt. 1299.

Immediately following its broad assertion that the Blocked Assets here are not subject to TRIA, the Government seems to abandon this argument by conceding that TRIA would apply "if the Levin Creditor's claims were construed as being made against the Defendant Properties . . . ." Dkt. 61 at 343. The Blocked Assets are subject to TRIA, as the District Court held. *See* Dkt. 1895.

Not only does TRIA apply, but the Levins' claims were made specifically with respect to the Blocked Assets. The Government is engaged in circular, sophistic reasoning. It asks the Court to award it the Blocked Assets because all the other terrorist victims are getting their shares and they no longer care to assert their priority. *See* (AA 119-144; AA 459-468). The Government then claims that if this Court awards it the Blocked Assets, it will own them, and so there are no TRIA assets. Dkt. 61 at 344. But it only gets to this result because it is in fact sharing the Blocked Assets by agreement with all the victims, except the tiny portion that represents the Levins' *pro rata* share. *Id.* This private deal with the other victims and the Government, does not change the fact that these Blocked Assets are owned by Iran now and the Levins, if the Government is allowed to exclude them from this case, have a priority claim in their separate case, *Levin v. 650 Fifth Avenue Co., et al*., No. 1:17-cv-00959, Dkt. 1. Of course, the Government's position that the Blocked Assets are not subject to distribution to TRIA Judgment Holders is inconsistent with its treatment of those assets with respect to the Settling Creditors, who are also TRIA Judgment Holders. *See* Dkt. 61 at 334-35. The Government position is not supportable in light of TRIA, as well as being unfair and, ultimately, grossly inefficient.

Furthermore, the Government's argument that the Supplemental Rules "have some *effect* within the realm of [TRIA]" but that the Supplemental Rules and TRIA

are not "conflicting legal principles that dictate irreconcilable legal outcomes" is wrong. *See id.* at 343 (emphasis in original). As set forth in the Levins' Opening Brief and incorporated herein, it was the intent of Congress to make collection by victims of terrorism a priority through these special statutes because collection of a judgment against Iran and its agencies and instrumentalities is exceedingly difficult such that victims of terrorist atrocities, for the most part, go uncompensated. *See Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 984 F. Supp. 2d 1070, 1093 (S.D. Cal. 2013) ("The Court concludes that Congress' clear and consistent intent in amending FSIA in recent years, and in particular enacting § 1605A as well as TRIA, has been to assist victims [to] collect compensation from foreign states that sponsored acts of terrorism. *E.g., Estate of Heiser v. Islamic Republic of Iran*, 807 F. Supp. 2d 9, 12-16, 18-19, 25-26 (D.D.C. 2011) (surveying "the latest in series of attempts by Congress to aid these victims" of state-sponsored terrorism to enforce judgments). Thus, Congress enacted special statutes to give TRIA Judgment Creditors extraordinary power relative to non-TRIA Judgment Creditors to satisfy their Judgments. *See Weininger v. Castro*, 462 F. Supp. 2d 457, 483 (S.D.N.Y. 2006) ("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 . . . .'"); *see also Heiser*, 807 F. Supp. 2d at 12 (describing collection process as an

"often-frustrating and always-arduous path shared by countless victims of state-sponsored terrorism . . . ."); *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 125 (D.D.C. 2009) ("The harsh reality is that the promise of relief in these actions—if there ever was one—is more distant and seemingly illusory today than it was when this exercise started more than a decade ago . . . ."); *Hausler v. JPMorgan Chase Bank, N.A.*, 845 F. Supp. 2d 553, 569 (S.D.N.Y. 2012), *rev'd and remanded on other grounds*, *Hausler v. JP Morgan Chase Bank, N.A.*, 770 F.3d 207 (2d Cir. 2014) ("'[T]he plain meaning of' the TRIA 'is to give terrorist victims who actually receive favorable judgments a right to execute against assets that would otherwise be blocked [from collection by the Government].'"). To bar the Levins' claims as untimely, because they did not file a verified claim or because they did not file an answer to the Government's complaint, as a result of the civil forfeiture action procedural rules, while allowing the claims of other Judgment Creditors who also did not comply with the same asserted technical requirements, would not only be unfair, but also directly conflicts with TRIA[2] and impedes the purpose of TRIA which is to "give terrorist victims . . . a right to

[2] "If, however, the standards are different, they will produce different outcomes, which means they conflict." *Intercon Sols., Inc. v. Basel Action Network*, 969 F. Supp. 2d 1026, 1049 (N.D. Ill. 2013), *aff'd*, 791 F.3d 729 (7th Cir. 2015); *see also Margolis v. U-Haul Int'l, Inc.*, 818 F. Supp. 2d 91, 101 (D.D.C. 2011) ("[A] conflict may be found when two jurisdictions have different applicable laws, which would result in different outcomes."); *Old Nat. Bank v. Leasing Innovations, Inc.*, 2013 WL 1339380, at *2 (S.D. Ind. Mar. 30, 2013) ("A conflict of laws exists only 'when a difference in law makes a difference to the outcome.'").

execute against assets that would otherwise be blocked [from collection]." *Hausler*, 845 F. Supp. 2d at 569; *see also Harrison v. Republic of Sudan*, 802 F.3d 399, 406-07 (2d Cir. 2015) (holding that TRIA judgment holders "are exempt from the normal OFAC licensure requirement.")

The "notwithstanding" clause in § 201 of TRIA means that this provision effectively supersedes all other conflicting laws, including any forfeiture action. *See* Dkt. 39 at 37-40. The cases cited by the Government in its Responsive brief do not contradict this legal principle. *See* Dkt. 61 at 343-46. For example, the Government cites to *United States v. Holy Land Found. for Relief & Dev.*, 493 F.3d 469, 478 (5th Cir. 2007) for the proposition that "[t]he TRIA's 'notwithstanding' clause should not work like 'legal kryptonite.'" Dkt. 61 at 343; *see also id.* at 344. Whatever that phrase is supposed to mean, in *Holy Land,* the parties "agree[d] that TRIA trumps previous laws that limit the attachment and execution of blocked assets." 493 F.3d at 478. The *Holy Land* Court did not reach the question of preemption, because the argument was raised for the first time on appeal. *Id.*

Similarly, *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993), cited by the Government, only supports the Levins' argument. The Supreme Court in *Cisneros* stated: "As we have noted previously in construing statutes, the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the

provisions of the 'notwithstanding' section override conflicting provisions of any other section. *See Shomberg v. United States*, 348 U.S. 540, 547–548 . . . (1955). Likewise, the Courts of Appeals generally have 'interpreted similar "notwithstanding" language . . . to supersede all other laws, stating that "'[a] clearer statement is difficult to imagine."'" 508 U.S. at 18. This is exactly what the Levins are arguing with regard to the "notwithstanding" language of TRIA.[3]

[3] The Government cites to other cases, *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 556 U.S. 366, 86 (2009) and *Smith ex rel. Estate of Smith*, 346 F.3d at 271, in support of its erroneous argument. However, these cases are inapplicable in the Levins' situation. *Elahi* dealt with the issue of waiver, holding that a victim of terrorism could not attach an asset because he expressly waived his right to do so by accepting *pro rata* compensation under the Victims Protection Act. 556 U.S. at 384-86 ("He thereby received the benefit of immediate, guaranteed partial compensation from the Government—in exchange for a promise not to interfere with property that the United States might need to satisfy potential liability to Iran. Having received $2.3 million in Government funds, there is nothing unfair about holding Elahi to the terms of his bargain. . . . as several Courts of Appeals have apparently assumed, the relinquishment of "all rights" includes the right given by TRIA § 201(a) to attach blocked assets."). Unlike the plaintiff in *Elahi*, the Levins have made no voluntary relinquishment or surrender of their rights by waiver, although they are prepared to do so if the Government will let them in exchange for a *pro rata* share. *Smith* also does not apply here, as the finding of "no conflict" was in relation to the President's executive powers. *See* 346 F.3d at 271-72 ("It imposes no obligation on the President to maintain such funds for future attachment. . . . it cannot reasonably be stretched, as Plaintiffs would have us do, to divest the President of authority to confiscate blocked assets."). No executive powers are implicated in the Levins' situation. Further, the *Smith* Court specifically distinguished between "blocked" and "confiscated" assets, stating: "To seize or freeze assets transfers possessory interest in the property. . . . But confiscation, pursuant to IEEPA § 203(a)(1)(C), transfers ownership of terrorist property by vesting right, title, and interest as the President deems appropriate. . . . '[A]ny assets as to which the United States claims ownership are not included in the definition of "blocked assets" [in TRIA § 201] and are not subject to execution or attachment under this provision.'" *Id.* at 272. At issue in this case are blocked, not confiscated, assets. *Smith* is inapplicable in the present matter.

As TRIA preempts any other law which would prevent a TRIA Judgment holder from collecting on blocked assets of an agency and instrumentality of Iran, the technical requirements of the general forfeiture statute must be trumped by TRIA. *See Cisneros*, 508 U.S. at 18.

TRIA, by its own language, preempts any other law which would prohibit the satisfaction of a judgment from blocked assets. *See* TRIA § 201; *Cisneros*, 508 U.S. at 18. Therefore, the Government may not use CAFRA and Supplemental Rule G to prevent the Levins, who are TRIA Judgment holders, from collecting against the Blocked Assets at issue in this case. TRIA § 201.

C. The Levins Have Constitutional Standing

Respondent asserts that "[e]ven if the Levin Creditor's filing were construed as a claim, it fails to establish constitutional standing" because "[t]here is no allegation of a specific property interest in any specific funds or assets." Dkt. 61 at 340. This is simply incorrect. At the district court level, the Levins have a Complaint filed against the Defendant Properties at issue as well as writs of attachment against these properties. *Levin v. 650 Fifth Avenue Co., et al*., No. 1:17-cv-00959, Dkt. 1. Further, even if the Levins' Notice of Claim simply recounted "the Levin Creditors' judgment against Iran, the Iranian Ministry of Information and Security ('MOIS'), and the Iranian Revolutionary Guard Corps ('IRGC')" as the Government claims, this is sufficient for a showing of

constitutional standing because the Levin's Claim contained the essential facts required in order to make a claim against the Blocked Assets, thus showing that there is immediate and actual threat of injury from the impending forfeiture of those Assets. *R.J. O'Brien & Assocs.*, 783 F.3d at 616 (providing that there is constitutional standing where there is an "immediate and actual threat of injury which is far from frivolous – the impending forfeiture of seized terrorist funds to which they have an arguable claim."); *see also Ford Motor Credit Co. v. New York City Police Dep't*, 394 F Supp. 2d 600, 610-13 (S.D.N.Y. 2005), *aff'd sub nom. Ford Motor Credit Co. v. NYC Police Dep't*, 503 F.3d 186 (2d Cir. 2007) ("The potential extinguishment of Ford Credit's liens renders it an 'interested person' in forfeiture proceedings . . . . Thus Ford Credit is entitled to an opportunity to be heard in those forfeiture proceedings . . . .").

III. The Government is Equitably Estopped from Moving to Dismiss The Levins' Claims Based On Technical Non-Compliance With the Procedural Rules and Any Procedural Requirements Should Be Waived With Respect To The Levins Due To Equitable Considerations

The Government concedes, in its Responsive Brief, that "[p]rocedural rules may also, at times, be excused under the doctrine of equitable estoppel." Dkt. 61 at 337. However, it claims that the "Levin Creditors have failed to demonstrate any equitable principle that entitles them to take priority over the Government in the forfeited property." *Id.* at 346. Further, the Government asserts that "the Levin

Creditors are differently situated from the settling creditors [because they filed their claim post-settlement] and their belated claim does prejudice the Government." *Id.* at 347. Respondent fails to explain how the Government is prejudiced by the Levins' claims. Initially when opposing the Levins' intervention, the Government claimed that it would be prejudiced because allowing the Levins to join the action would retard the forward progress. *See* Dkt. 39 at 19. However, the summary judgments in the case were reversed by this Court, and there has been no activity which would be undone or threatened by allowing the Levins to share in the *pro rata* distribution. The Government cannot distinguish the Levins from the Settling Creditors in any way except that the Levins were not party to the settlement, which they have been precluded from joining. *Id.*

The Government claims that the Levins are differently situated from the Settling Creditors because they, "unlike the other judgment creditors, were not involved in carefully negotiating a settlement agreement and distribution terms among 20 groups of parties consisting of hundreds of individual claimants." Dkt. 61 at 347. However, this is simply not true. The Hegna Judgment Creditors were also not involved in negotiating that settlement agreement, and the Settlement was amended after the fact to give the Hegna Creditors *pro rata* shares, at a conference that the Levins were not permitted to attend. (AA 459-468); *see also* Dkt. 2053. The Levins were also not alone in failing to file a claim prior to settlement, which

the Government claims sets them apart from the other Judgment Creditors. *See* Dkt. 61 at 347. There is no record of the Rubin Judgment Creditors filing any Notice of Claim, yet the Government is prepared to make payments pursuant to the Settlement to satisfy their claims. *See* (AA 125; AA 420). However, the Government objects to and is moving as to the Levins' Claim even though, unlike the Rubin Creditors, they did file a Notice of Claim. The Government has no rational, much less humane, basis for treating some late claimants with defects in their claims (some of whom are distant relatives to actual direct victims) favorably, while shutting out the relatively small claim of the Levins. It is arbitrary and should not be allowed by this Court.

As set forth in the Levins' Opening Brief, equitable estoppel "is imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought." *Nassau Trust Co.*, 56 N.Y.2d at 184. Many of the Settling Creditors did not file timely, were not verified, and did not file answers to the Government's complaint. *See*, *e.g.*, (AA 419-424); *see also* Dkt. 2089. However, these Creditors' claims were allowed, and the Government did not move to dismiss them. *Id.* On the other hand, the Levins were specifically told that the Government was representing their

interest as American citizens in a forfeiture action, and that other Judgment Creditors' claims were allowed despite not meeting the technical requirements that the Government now asserts apply to the Levins' Claim. *See* (AA 419-424). Many of the Settling Creditors used the same basic form of Notice of Claim as submitted by the Levins, yet the Government did not move as to those Notices alleging an improper format but instead agreed to pay those Creditors their *pro rata* distribution. (AA 119-144); *see also* Dkts. 98, 99, 100, 101, 138. The Government also does not recite that any Settling Creditors filed answers to the Government's Complaint and the majority of the Settling Creditors did not file answers. *See* Dkt. 39 at 46 n.11. Finally, almost all of the Settling Creditors filed claims after the deadline. *Id.*

The Levins relied on this behavior on the part of the Government in accepting the same basic Notice of Claim form from other Judgment Creditors, in accepting untimely and unverified claims, and in declining to move as to Judgment Creditors who did not file answers to the Government's complaint. The Levins also relied on the statements of the U.S. Marshal that the Levins would not have to file until the Blocked Assets were obtained. (AA 243-250; AA 220).

Therefore, the Government should be equitably estopped from arguing that the Levins' claim should be dismissed due to a failure to file an answer to the Government's compliant, filing late, or not filing a verified claim. *Nassau Trust*

Co., 56 N.Y.2d at 184. In the alternative, any non-compliance with the Supplemental Rules should be excused for excusable neglect. *United States v. Borromeo*, 945 F.2d 750, 753 (4th Cir. 1991); *see* Dkt. 39 at 42-44, incorporated fully herein. The Levins further incorporate by reference the full equitable argument from their Opening Brief herein, which the Government failed to address in its Responsive Brief. *See id.* at 42-54; Dkt. 61 at 346-48.

CONCLUSION

For the foregoing reasons, the District Court's Order granting the Government's Motion to Dismiss the Levins' Claims Against the Defendant Properties in the Forfeiture Action must be reversed. If for any reason the Court believes that the Notice of Claim is deficient, the Levins should be allowed to amend to add additional facts consistent with the history of these cases and proceedings. *See, e.g.*, Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires."); *see also* Committee Note to Supplemental Rule G ("As with other pleadings, the court should strike a claim or answer only if satisfied that an opportunity should not be afforded to cure the defects under Rule 15.").

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32.1(a)(4)(B), the undersigned certifies that the foregoing Brief contains 6,010 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced, roman typeface 14-point using Microsoft Word.