23-1158

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOHN DOE #1, JOHN DOE #2, JOHN DOE #3, JOHN DOE #4,
JOHN DOE #5, JOHN DOE #6, JOHN DOE #7,

Plaintiffs-Appellants,

—against—

THE DEPOSIT GUARANTEE FUND,

Intervenor-Defendant-Appellee,

THE TALIBAN, AL-QAEDA, THE HAQQANI NETWORK,

Defendants,

THE BANK OF NEW YORK MELLON,

Garnishee.

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

BRIEF FOR INTERVENOR-DEFENDANT-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Intervenor-Defendant-Appellee Deposit Guarantee Fund is a governmental entity in Ukraine and thus exempt from Federal Rule of Appellate Procedure 26.1.

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Cases

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(2002).....*passim*

Other Authorities

Statement of Interest of the United States of America, *Caballero v. Fuerzas Armadas Revolucionarieas de Colombia, et al.*, No. 20-cv-07602, Dkt. 125 (W.D.N.Y. Sept. 20, 2022).....33

Statement of Interest of the United States of America, *In re Terrorist Attacks on Sept. 11, 2001*, No. 1:03-md-1570, Dkt. 7661 (S.D.N.Y. Feb. 11, 2022) 33

Ukraine: Fact Sheet, U.S. Dept. of State (Dec. 27, 2023), available at
https://www.state.gov/u-s-security-cooperation-with-ukraine/.....20

PRELIMINARY STATEMENT

This proceeding involves the disposition of PJSC "Joint Stock Commercial Industrial and Investment Bank" (a/k/a Prominvestbank, "PIB") assets formerly indirectly owned by the Russian Federation, which were seized in 2022 by Ukraine as part of a government-mandated policy to nationalize Russian assets in support of Ukraine's resistance to Russian aggression. Under Ukraine law, Intervenor-Defendant-Appellee Deposit Guarantee Fund ("DGF") has been tasked with liquidating PIB and acting on PIB's behalf.

Plaintiffs-Appellants John Does 1-7 ("Appellants") are individuals who were injured in a 2016 Taliban terrorist attack, received a judgment for their injuries in the Northern District of Texas, and then sought a Writ of Execution in the United States District Court for the Northern District of New York, seeking to levy their default judgment against certain blocked assets of PIB ("Blocked Assets") held by Bank of New York Mellon ("BNY Mellon"). Appellants alleged that PIB was an instrumentality of terrorists pursuant to the Terrorism Risk Insurance Act, Pub. L. No. 107-297, 116 Stat. 2322 (2002) ("TRIA"), because Russia should be deemed an instrumentality of the Taliban and Russia indirectly owned PIB through the State Development Corporation in VEB.RF ("VEB").

The district court initially granted Appellants' *ex parte* motion for a Writ of Execution in November 2022, finding that PIB was an agency or instrumentality of

the Taliban, that the Blocked Assets are held at BNY Mellon, and that the Blocked Assets are subject to attachment to satisfy Appellants' judgment pursuant to the TRIA and 18 U.S.C. § 2333(e). However, Appellants had never served PIB.

In December 2022, shortly after Plaintiffs moved to extend the Writ of Execution based on their failure so far to effectuate service on PIB, DGF appeared in this matter and moved to intervene to request the court vacate the Writ of Execution. DGF argued, among other things, that the seizure and later nationalization of PIB by Ukraine prior to Appellants' filing for a Writ of Execution meant that PIB was no longer an instrumentality of the Taliban, to the extent that it ever was,[1] that the district court lacked subject matter jurisdiction, and that PIB enjoys sovereign immunity.

The district court agreed with DGF and vacated the Writ of Execution. While noting that there was "some force" to DGF's other arguments, the district court found that it was proper to vacate the Writ of Execution because PIB had been seized and later nationalized by Ukraine and was therefore no longer controlled indirectly by Russia. Since the district court had previously relied on a finding that Russia was an instrumentality of the Taliban to conclude that PIB was as well, the fact that PIB was no longer indirectly owned by Russia meant the Blocked Assets could not

[1] DGF has not taken a position on whether Russia was an instrumentality of the Taliban as such an analysis is irrelevant, since Russia did not indirectly control PIB by the time Appellants filed their petition for a Writ of Execution.

possibly have been subject to attachment under the TRIA when Appellants filed their action.

Appellants now bring this appeal of the district court's order vacating the Writ of Execution. They allege three primary errors: (1) the district court should not have set aside its original finding that PIB is an instrumentality of the Taliban; (2) the district court erred in recognizing PIB's nationalization by Ukraine because (a) U.S. law allegedly forbids recognizing *any* nationalization of foreign assets in the U.S. by *any* foreign government and (b) the nationalization of PIB was allegedly not formally completed until after Appellants filed for the Writ of Execution; and (3) the district court erred in determining that DGF did not need to show standing to intervene merely to block the relief Appellants sought.

However, the district court got it right. Whether Russia generally or PIB specifically was an instrumentality of the Taliban or not when Russia controlled PIB is entirely irrelevant to whether PIB was an instrumentality of the Taliban when Appellants filed their application for a Writ of Execution. Plainly, the district court was correct to find that the seizure and later nationalization of PIB by Ukraine means that any PIB assets are no longer assets owned or controlled indirectly by Russia and that Plaintiffs' application for a Writ of Execution thus fails as a matter of law.

The district court also correctly concluded that it should recognize the nationalization of PIB by Ukraine. Appellants' assertion that the law clearly holds

that courts will not recognize nationalization "except in extreme circumstances," Br. at 19, is wrong—as this Court has held on several occasions, the test is whether recognition is in line with U.S. foreign policy. The U.S. has expressed unwavering support for Ukraine in its war against Russian aggression—this is not a case involving the Sandinistas in Nicaragua, Iranian revolutionaries, or communist Cuba, like the cases Appellants cite, where U.S. foreign policy was opposed to actions of those governments. Moreover, the district court was correct to reject out of hand Appellants' argument regarding when the final step in nationalization occurred. Appellants' position would elevate form over substance—regardless of when the shares were finally transferred, control of PIB by Russia had been eliminated by the time Appellants filed their motion for a Writ of Execution.

Third, the district court correctly followed well-established case law that an intervenor need not demonstrate Article III standing when it merely intends to oppose the relief that a plaintiff requests. But even if the district court got it wrong, DGF has Article III standing to pursue its claims.

Finally, even if Appellants were correct on all counts, this Court should still affirm the decision below because the district court lacked subject-matter jurisdiction to issue the Writ of Execution. Making a determination about whether a foreign state is an instrumentality of non-state terrorist groups when that state has

never been so designated by the Executive Branch implicates the separation of powers and is not the proper province of the courts.

In short, the supposed errors Appellants identified are not errors at all—the district court properly determined that Appellants were not entitled to levy against assets which now belong to Ukraine.

ISSUES PRESENTED

1. Whether the district court correctly recognized the nationalization of PIB by Ukraine prior to Appellants filing their motion for a Writ of Execution in light of the U.S.'s unwavering support for Ukraine in its war against Russian aggression.

2. Whether the district court correctly found that nationalization warranted vacating its previous findings that PIB is an instrumentality of the Taliban.

3. Whether the district court correctly applied existing law that a proposed intervenor does not need to show Article III standing when it merely seeks to oppose the relief a plaintiff seeks.

4. Whether the district court lacked subject-matter jurisdiction to usurp the role of the Executive Branch and find that foreign sovereigns are state sponsors of the Taliban in light of the separation of powers in the Constitution.

STATEMENT OF THE CASE

A. Ukraine's Seizure and Later Nationalization of PIB

PIB is a bank based in Ukraine. *See* Dkt. 35-4.[2] In May 2022, news agencies reported that Ukraine had nationalized PIB. Dkt. 35-11. Several months prior to the nationalization, on February 25, 2022, the Board of the National Bank of Ukraine issued a decision revoking PIB's banking license and directing its liquidation (the "February 25 Decision"). Dkts. 35-4, 35-5. The February 25 Decision also stated that, as of January 1, 2022, the owner of 99.772644% of the shares of PIB was VEB. Dkts. 35-4, 35-5. It further stated that the shareholder and owner of 100% of the authorized capital of VEB is the Russian Federation, and that VEB was created by Russia. Dkts. 35-4, 35-5. Thus, as of January 1, 2022, PIB was indirectly owned and controlled through VEB by Russia. Dkt. 35-4.

The same day as the February 25 Decision, and pursuant to it, DGF issued a decision commencing PIB's liquidation. Dkts. 35-4, 35-6. Once DGF began the liquidation process, the Ukrainian laws regarding DGF operated to strip VEB and/or Russia of any authority or control they might have had over PIB, including by: (1) terminating all powers previously belonging to PIB's management and control bodies; and (2) giving DGF authority to act on behalf of PIB, including by exercising

[2] "Dkt." refers to a docket entry in the underlying district court proceeding. A certified copy of the docket was filed in lieu of a record in this matter pursuant to Local Rule 11.1(a).

the powers of the bank governing bodies, taking possession of the bank's property (including funds), controlling the disposition of the bank's assets and liabilities, and exercising all other powers necessary to effectuate the liquidation. Dkts. 35-4, 35-8. As a result, since February 25, 2022, DGF has exercised the management and control of PIB, and VEB has had no control over PIB. Dkt 35-4.

The laws of Ukraine also establish DGF's interest in the assets of PIB. Specifically, Article 52 of the DGF Law states that "[f]unds obtained as a result of the liquidation and sale of the bank's property(s), investment of the bank's temporarily free funds in state securities shall be directed by the DGF to satisfy the creditors' requirements" in the priority set forth in Article 52. Dkt. 35-8.

On March 3, 2022, Ukrainian President Volodymyr Zelenskyy signed a law requiring that any Russian assets seized in connection with Ukraine's nationalization effort be "transferred to the State Budget of Ukraine and directed to fund for the elimination of the consequences of armed aggression" by Russia against Ukraine. Dkts. 53, 53-1.

On May 11, 2022, the National Security and Defense Council of Ukraine issued a decision (the "May 11 Decision") compelling the seizure of certain "objects of property of the Russian Federation and its residents," including VEB's 99.77% ownership interest in PIB. Dkts. 35-4, 35-9. The May 11 Decision was enacted by President Zelenskyy the same day. Dkts. 35-4, 35-9. It tasked "[t]he Cabinet of

Ministers of Ukraine, the [DGF] with the participation of the National Bank of Ukraine to ensure the enforcement seizure of the property rights specified in this decision of the Russian Federation and its residents within ten days from the date of publication of the Decree of the President of Ukraine on the implementation of this decision." Dkt. 35-9.

Although the asset seizure was supposed to be effectuated within ten days of the May 11 Decision, administrative and logistical issues in the middle of a war delayed the actual transfer of assets for several months. Dkt. 35-4. On September 13, 2022, the Cabinet of Ministers of Ukraine directed the seizure of PIB's stock by means of transferring VEB's 99.77% ownership interest to the National Investment Fund of Ukraine, a Ukrainian state enterprise (the "September 13 Order"). Dkts. 35-4, 35-10. The September 13 Order provided, among other things, that the Ukrainian National Bank take all necessary actions to credit securities and domestic government bonds forcibly seized and withdrawn pursuant to the May 11 Decision to the relevant accounts of Ukraine's Ministry of Finance. Dkts. 35-4, 35-10.

A Statement of Securities Account Status as of December 15, 2022 provides official confirmation from the Head of the Depository Department of the Treasury and Investment Services Department of Ukraine that the National Investment Fund of Ukraine now owns 99.77% of the ownership interests in PIB. Dkts. 35-4, 35-12. Similarly, an extract from the Unified State Register of Legal Entities, Individual

Entrepreneurs, and Public Organizations regarding PIB as of December 20, 2022 provides official confirmation from a Ukrainian government-operated registry that Ukraine now owns PIB. Dkts. 35-4, 35-13. The extract states, among other things, that there is no ultimate beneficial owner of PIB because "99.7726 percent of the shares of [PIB] belong to the State of Ukraine." Dkt. 35-13.

B. Procedural History

Appellants initiated this action on September 20, 2022 by registering with the district court a November 5, 2020 default judgment entered in Appellants' favor in the United States District court for the Northern District of Texas in the amount of $138,418,741.00 (the "Default Judgment"). Dkt. 1. The Default Judgment was entered against the three defendants in the underlying proceeding: the Taliban, Al-Qaeda, and the Haqqani Network. Dkt. 1.

On the same date, Appellants filed an *ex parte* emergency motion for writ of execution or, in the alternative, for writ of attachment. Dkt. 2. The motion sought to execute the Default Judgment against PIB's Blocked Assets under the TRIA. Dkts. 2. The Blocked Assets, which exceed $40 million, are held at a BNY Mellon location is Oriskany, New York and have been blocked since March 22, 2022 in accordance with certain sanctions regulations administered by the United States Treasury Department's Office of Foreign Assets Control ("OFAC"). A-19. In support of their motion, Appellants provided an affidavit from an alleged expert

opining that Russia actively supports the Taliban and that PIB is a subsidiary of the Russian government. A-19.

On November 2, 2022, the district court issued an order granting the Writ of Execution. Dkt. 17. Based entirely on Appellants' *ex parte* submissions, the district court found that it had subject matter jurisdiction to conduct post-judgment execution proceedings, granted Appellants' motion, and found that PIB "is an agency or instrumentality of the Taliban," that the Blocked Assets were held by BNY Mellon in Oriskany, New York, and that the Blocked Assets are subject to attachment and execution to satisfy the Default Judgment pursuant to the TRIA and 18 U.S.C. § 2333(e). Dkt. 17.

On December 15, 2022, Appellants moved for an extension of the Writ of Execution due to issues with serving the Writ of Execution on the judgment debtors. *See* Dkts. 32-33. On December 30, 2022, DGF appeared in the action and moved to intervene for the purposes of vacating the Writ of Execution. Dkt. 34.

On July 12, 2023, the district court entered an order granting intervention by DGF and vacating the Writ of Execution. *See* A-14. As to DGF's motion to intervene, the district court found that DGF had shown entitlement to intervene as of right and, in the alternative, permissive intervention. A-22. The district court held that DGF moved timely to intervene after first learning of the Writ of Execution following unsealing in mid-November 2022. A-22. It also found that Appellants

would not be prejudiced by intervention because the Blocked Assets are blocked so there is "no risk" that the Blocked Assets will be dissipated while DGF intervenes; conversely, DGF and PIB would be prejudiced if DGF were not permitted to intervene to object to an order finding PIB to be an instrumentality of the Taliban and to oppose the Writ of Execution. A-23. The district court noted that DGF is the "designated liquidator" of PIB under Ukrainian law and that courts routinely find liquidators have a "direct, substantial, and legally protectable" interest in cases involving assets subject to liquidation. A-23. The district court also found that no existing party could equally assert DGF's legal arguments on DGF's behalf (noting that BNY Mellon explicitly acknowledged this in other motion papers). A-24-25. For similar reasons, the district court found that permissive intervention would also be warranted. A-25.

Next the district court addressed Appellants' arguments that DGF lacked Article III standing to intervene. A-26. The court noted that the arguments were easily disposed of based on the first argument Appellants raised—whether DGF needed to show Article III standing at all. A-26. The court found, in line with other cases in this Circuit, that when a proposed intervenor merely intends to oppose the relief that plaintiff requests, a proposed intervenor does not need to independently establish Article III standing. A-27.

Turning to the motion to vacate, the district court held that the Writ of Execution should be vacated because PIB was not an instrumentality of the Taliban at the time Appellants filed their motion for a Writ of Execution. A-28-29. The court found that in spring 2022, following the Russian invasion, the Ukrainian government revoked PIB's banking license, directed its liquidation, and ultimately nationalized the bank. A-29. Around the same time, Ukraine adopted laws restricting Russian creditors from executing against PIB's assets. A-29. The court held that, as a result of these actions, by the time Appellants filed their motion for a Writ of Execution, VEB and, by extension, Russia had "no control over or access to" PIB's assets and Ukrainian law no longer recognized VEB as having any ownership interests in PIB. A-29-30. Instead, Ukrainian law recognized PIB as owned by the National Investment Fund of Ukraine due to Ukraine's seizure of Russian assets as part of Ukraine's broader campaign of resistance to Russian aggression. A-30. Indeed, government records show that VEB's 99.77% ownership interest in PIB now belongs to the National Investment Fund of Ukraine. A-30.

The district court rejected Appellants' argument that courts in the United States are never empowered to recognize nationalizations of assets, finding that this Court permits recognition of nationalization "only if [the acts nationalizing the assets] are consistent with the policy and law of the United States." A-30 (quoting *Republic of Iraq v. First Nat. city Bank*, 353 F.2d 47, 50-51 (2d Cir. 1965). Given

the United States' "clearly articulated and broad support for Ukraine's sovereignty in the face of Russia's invasion" and the fact that recognizing PIB's nationalization "aligns with the United States' interests in supporting Ukrainian war efforts," the district court found that recognizing PIB's nationalization was proper. A-30.

The court also rebuffed Appellants' attacks on the record evidence. A-31 The district court found that although the "final administrative step" of transferring VEB's shares to the National Investment Fund of Ukraine did not occur until December 15, 2022, Appellants failed to explain why that fact should compel a court to ignore the bevy of Ukrainian-passed laws that stripped VEB and, thus, Russia of control over PIB before Appellants filed their motion or a Writ of Execution. A-31.

Appellants brought this appeal challenging the district court's findings.

SUMMARY OF ARGUMENT

The district court correctly vacated the Writ of Execution on the ground that PIB is not an instrumentality of the Taliban.

The district court did not err when it vacated its previous finding that PIB is an instrumentality of the Taliban. DGF has never taken a position regarding whether Russia, as a factual matter, supported the Taliban financially through VEB, PIB, or otherwise. However, there are two issues with finding that PIB was an instrumentality of the Taliban <u>at the time the application for a writ of execution was filed</u> (which is the relevant time period). First, and as will be explained in more

detail below, PIB had been seized, set for liquidation, and nationalized by the Government of Ukraine prior to Appellants' filing of their application for a writ of execution. Whether or not PIB may have been an instrumentality of the Taliban while it was allegedly controlled by Russia is thus beside the point—as a factual matter (and as the district court found), PIB was not a subsidiary of VEB or controlled by Russia by the time Appellants filed their application.

Second, the district court did not err in recognizing the nationalization of PIB by Ukraine. Appellants misread the case law in this area. It is not true that this Circuit has routinely held that foreign expropriations are invalid unless in "extreme circumstances," Br. at 19, such as when a treaty or other Executive Branch proclamation supports the nationalization. In fact, the proper test is exactly the one applied by the district court here—whether the public policy of the United States is served by recognizing the expropriation. All of the cases Appellants cite involve expropriations by revolutionary Iran, Cuba, or the Sandinistas in Nicaragua—all of which were governments and countries that the United States levied sanctions against and opposed. By contrast and as the district court found, current U.S. policy is fully supportive of Ukraine in its war against Russia. Moreover, the acts of state doctrine require this Court to refrain from invalidating Ukraine's decision to set for liquidation, seize, and later nationalize a bank operating under its own laws.

As to Appellants' renewed attack on the record, it was not clear error for the district court to find, as a factual matter, that PIB was controlled by Ukraine at the time Appellants filed their motion for a Writ of Execution. The Court should reject Appellants invitation to overturn this Circuit's existing case law on when the proper time is to evaluate whether an entity is an instrumentality of terrorists. As a factual matter, Russia no longer controls PIB and did not at the time of the application for a Writ of Execution. Even if Russia were deemed an instrumentality of terrorists (hardly a sure conclusion and one which DGF takes no position on as it is irrelevant to resolving this case), Russia no longer has control over PIB and thus PIB could not possibly be an instrumentality of terrorists anymore.

Appellants' "what if" speculation about what could happen in the future is no reason to find that PIB is no longer controlled by Russia *now*. Moreover, Appellants ignore Ukrainian law regarding liquidation in their rush to focus solely on nationalization. Ukrainian law holds that a bank that has been declared insolvent or sent for liquidation cannot be returned to the control of the previous owner—any claim arising from liquidation of a bank would be for monetary compensation—not return of the bank.

Moreover, Appellants' argument that the final administrative step of transferring PIB to Ukrainian control did not occur until after they filed their motion for Writ of Execution improperly elevates form over substance. Under Ukrainian

law, neither VEB nor Russia had control over PIB following Ukraine's decision to place PIB in liquidation. Ukraine controlled PIB for months before Appellants filed their application. Focusing only on the stock transfer date would elevate the form of the transaction over its substance and would ignore the fact that VEB had been stripped of control over PIB for months before the attachment application was filed. In other contexts, this Circuit and district courts in this circuit have rejected such an approach. Thus, the district court was correct to dismiss Appellants' arguments regarding when the final administrative step of nationalization occurred as providing no reason to "to disregard Ukrainian-passed laws nationalizing [PIB] prior to September 20, 2022." A-31.

Moreover, the district court was correct that an intervenor who seeks only to block a plaintiff's requested relief does not need to demonstrate Article III standing. It is well established that Article III standing is not required to intervene when the proposed intervenor does not seek relief beyond denying a plaintiff's application. That should end the inquiry. But even if Article III standing were required, DGF has standing. Appellants' arguments rest on a misinterpretation of case law. Appellants cite a case about *statutory* standing in a civil forfeiture action not *constitutional* standing to block a writ of execution in support of their position. It is well established that a party may claim an interest in property, even if it is subject to OFAC blocking sanctions and cannot be transferred or possessed by the alleged

owning entity. Moreover, the court may not question the appointment of DGF as the liquidator of PIB under the act of state doctrine. Since DGF is, under Ukrainian law, responsible for PIB's assets, any action that would diminish PIB's assets creates a sufficient injury to confer standing to DGF.

Finally, even if all of Appellants' alleged errors were correct (they are not), it would still be proper to affirm the district court's ruling on the alternative ground that the district court lacked subject-matter jurisdiction to enter the Writ of Execution. In cases similar to this one, the United States has filed notices of interest in which it has stated that permitting judgment creditors to execute on sovereign assets based on judgments against non-state actors presents serious foreign policy and national security issues and usurps the role Congress gave to the Executive Branch to determine what sovereigns are state sponsors of terrorism. Similar reasoning has led district courts in this Circuit to find a lack of subject matter jurisdiction. The cases Appellants rely on to establish that a court may find indirect participants to be instrumentalities of terrorists do not address the situation here—judgment creditors attempting to execute a judgment against non-state actors against sovereign assets of a state that has not been designated a state sponsor of terrorism. The same policy concerns that led the United States to file statements of interest apply equally in this case where Plaintiffs allege that PIB was an instrumentality of the Taliban—a non-state actor—because PIB was allegedly

controlled by Russia, which has not been designated as a state sponsor of terrorism by the Executive Branch. This Court should decline Appellants' invitation to usurp the role of the Executive Branch in determining who is a state sponsor of terrorism.

For all these reasons, this Court should affirm the district court's ruling that Appellants are not entitled to a Writ of Execution against the Blocked Assets.

STANDARD OF REVIEW

This Court "review[s] a denial of a writ of execution and turnover order for abuse of discretion." *Mohammad Ladjevardian, Laina Corp. v. Republic of Argentina*, 663 F. App'x 77, 79 (2d Cir. 2016) (summary order). "The district court abuses its discretion if it applies legal standards incorrectly, relies on clearly erroneous findings of fact, or proceeds on the basis of an erroneous view of the applicable law." *Aurelius Cap. Partners, LP v. Republic of Argentina*, 584 F.3d 120, 129 (2d Cir. 2009). This Court will not upset a factual finding "unless [it is] left with the definite and firm conviction that a mistake has been committed." *Republic of Turkey v. Christie's Inc.*, 62 F.4th 64, 70 (2d Cir. 2023).

ARGUMENT

I. The District Court Properly Held That PIB's Assets Were Not Subject to Attachment and Execution Under TRIA Because Ukraine Nationalized PIB Before Appellants Filed Their Motion for Writ of Execution.

Under Section 201(a) of TRIA, where a person has obtained a judgment against a terrorist party based on an act of terrorism, "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 . . . ." Thus, based on a straightforward reading of Section 201(a), to attach property pursuant to TRIA, a party must show, among other things, that the property belongs to a "terrorist party" or any "agency or instrumentality of that terrorist party." Under well-settled Second Circuit precedent, whether a person is an agency or instrumentality of a terrorist group is assessed at the time the party commences an enforcement proceeding against the entity. *See Kirschenbaum v. 650 Fifth Ave. & Related Properties*, 830 F.3d 107, 126 (2d Cir. 2016), *abrogated on other grounds by Rubin v. Islamic Republic of Iran*, 583 U.S. 202 (2018).

Here, Appellants filed their enforcement action on September 20, 2022, months after Ukraine revoked PIB's banking license, directed its liquidation, and ultimately nationalized the bank. Thus, as the district court correctly held, when Appellants sought the Writ of Execution, PIB was controlled by the government of Ukraine, not Russia, and thus was not subject to attachment under TRIA. A-29-31. On appeal, Appellants argue that the district court erred because (1) it was not empowered to recognize Ukraine's nationalization of Russian assets, and (2) the record did not establish that PIB had been nationalized by September 20, 2022. For the reasons below, both of these arguments fail.

A. The District Court Was Empowered to Recognize Ukraine's Nationalization of PIB in Light of the United States' Unwavering Support of Ukraine's War Efforts.

The district court did not err when it determined that it should recognize Ukraine's nationalization of PIB, because such recognition comports with U.S. policy. As the district court recognized, this Court "long ago observed [that] courts have 'discretion whether or not to respect a foreign act of state affecting property in the United States,' but will give effect to acts of state 'only if they are consistent with the policy and law of the United States.'" A-30 (quoting *Republic of Iraq*, 353 F.2d at 50-51). Applying this well-settled principle, the district court correctly found that:

> Given the United States' clearly articulated and broad support for Ukraine's sovereignty in the face of Russia's invasion, and given that recognizing Ukraine's nationalization of [PIB] aligns with the United States' interests in supporting Ukrainian war efforts, Ukraine's nationalization of [PIB] is certainly consistent with this country's policy goals.

A-30. Indeed, the U.S. State Department has repeatedly confirmed "its unwavering support for Ukraine's sovereignty and territorial integrity" and strongly denounced "Russia's premediated, unprovoked, and unjustified war against Ukraine."[3]

[3] Bureau of Political Military Affairs, *U.S. Security Cooperation with Ukraine: Fact Sheet*, U.S. Dept. of State (Dec. 27, 2023), available at https://www.state.gov/u-s-security-cooperation-with-ukraine/.

Appellants do not contest that the United States is fully committed to supporting Ukraine in its war efforts (nor could they credibly do so).

Instead, Appellants attempt to twist this Court's words into a new test that essentially holds that all nationalizations are abhorrent and should not be recognized unless they have not been challenged for decades, provide funds to Americans, or are the subject of treaties entered by the Executive Branch and/or ratified by Congress—or, as Appellants put it, "extreme circumstances." Br. at 19-26. For support, Appellants point to a handful of cases from this Circuit and elsewhere that they allege show that nationalizations are generally repugnant to American policy. *Id.* Tellingly, the cases Appellants rely on are not remotely apposite to this case. Most of the cases Appellants cite involved nationalizations by foreign governments to which the U.S. government was openly hostile. *Bandes v. Harlow & Jones, Inc.*, 852 F.2d 661 (2d Cir. 1988) (Sandinistas in Nicaragua); *Banco Nacional de Cuba v. Chem. Bank New York Tr. Co.*, 658 F.2d 903 (2d Cir. 1981) (Castro's Cuba); *F. & H.R. Farman-Farmaian Consulting Engineers Firm v. Harza Eng'g Co.*, 882 F.2d 281 (7th Cir. 1989) (revolutionary Iran). Several of Appellant's cited cases involved attempts to nationalize debts that American companies owed to allies or former allies either directly or through a back door of nationalizing the company that the American company owed. *Bandes*, 852 F.2d 661 (attempt to nationalize company formerly run by American-backed Contras in Nicaragua to get refund owed by

American company); *United Bank Ltd. v. Cosmic Int'l, Inc.*, 542 F.2d 868 (2d Cir. 1976) (attempt to nationalize company formerly run by American-allied Pakistanis in Bangladesh to get debts owed by American company); *F. & H.R. Farman-Farmaian Consulting Engineers Firm*, 882 F.2d 281 (attempt to obtain debts owed by American companies to pre-revolutionary but now nationalized Iranian companies). And in *Republic of Iraq*, the United States Department of State had explicitly "disclaimed any interest of the executive department" in the outcome of the litigation, which had to do with the former king's assets that were held in a New York bank. 353 F.2d at 52.

This case is hardly similar to the fact patterns in the cases Appellants rely on. Ukraine is not a country the United States is hostile to—in fact, the United States is fully supporting Ukraine in its war against Russia, as the district court found. A-30. Nor is this a case where Ukraine is attempting to seek debts owed to an entity within its borders by an American or American company. Rather, it is seeking to protect the assets of a Ukrainian bank held in a correspondent bank in New York, which could be used to fund a war against an aggressor state—assets that are currently under OFAC sanctions because of Russian aggression against Ukraine and Russia's former indirect ownership of PIB. It would be a perverse result in light of U.S. policy to dissipate assets which Ukraine is seeking to release to fund its fight against Russia—a fight fully supported by the United States—to compensate victims of

alleged Russian actions in a completely different geopolitical theater. There is no logical policy that would require injuring one victim of Russia to pay another.

Appellants also argue that Russia may seek to get PIB back through litigation, as it did in 2014. Br. at 22. However, as explained more fully below, Ukrainian laws have changed since 2014. Since at least 2020, Ukrainian law has mandated that former owners of a Ukrainian bank which is later found to be have been unlawfully liquidated have only one recourse—damages. They do not get the bank back. *See* Dkt. 35-8. Moreover, Ukrainian law provides for a three month statute of limitations to challenge actions or decisions of the Ukrainian government. Dkts. 53, 53-2. More than three months have elapsed since all of the Ukrainian government actions occurred in this case, and no challenge has been filed by any person, including Russia. Dkt. 53. Any claim is thus time-barred under Ukrainian law. Thus, recognizing the nationalization of PIB will not have "serious implications" for U.S. foreign policy. Br. at 25.

In short, the district court did not abuse its discretion when it found as a matter of fact that U.S. policy fully supports Ukraine in its war against Russian aggression and that it should thus recognize Ukraine's nationalization of PIB.

B. The District Court Did Not Err in Finding That Ukraine Controlled PIB Prior to Appellants Filing for a Writ of Execution.

1. An Entity's TRIA Instrumentality Status Is Evaluated at the Time an Action Is Commenced.

Appellants argue that the district court erred in holding that an entity's instrumentality status for TRIA purposes is based on its status at the time the motion for a writ of execution is filed. Br. at 26-29. They argue that this Court should reject its own temporal rule in favor of a different court's "video camera" rule that looks back past the filing of the action. Br. at 27-28. That is not the law that this Court has espoused, nor does it comport with how the district courts in this Circuit have interpreted this Court's cases.

In *Kirschenbaum v. 650 Fifth Ave. & Related Properties*, 830 F.3d 107, 126 (2d Cir. 2016), *abrogated on other grounds by Rubin v. Islamic Republic of Iran*, 583 U.S. 202 (2018), this Court held that for purposes of the Foreign Sovereign Immunities Act, "an entity's agency or instrumentality status under the FSIA 'is determined at the time of the complaint.'" (quoting *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003)). This Court clarified that this means that instrumentality status "depends upon the state of things at the time the action is brought." *Id.* (internal quotations and citations omitted). This Court applied the same reasoning to TRIA instrumentality status, noting that the question was "whether [the entity]

was so owned, controlled, or directed at the time Plaintiffs' complaints were filed." *Id.* at 136 (citing *Dole Food Co.*, 538 U.S. at 480).

Following this Court's pronouncement in *Kirschenbaum*, numerous district courts, including the district court in this case, have followed its mandate that instrumentality status under the TRIA depends on the state of facts at the time the relevant action is filed, which here is an application for a Writ of Execution. *See, e.g., Levin v. 650 Fifth Ave. Co.*, No. 17-cv-959 (LAP), 2023 WL 3818566, at *5-6 (S.D.N.Y. June 5, 2023) (rejecting argument that instrumentality status under the TRIA should look back beyond the current action, such as to the complaint in the underlying action, as "foreclosed by the precedent from the [Second Circuit], the Supreme court, [and] this Court"); *Kirschenbaum v. 650 Fifth Ave.*, 257 F. Supp. 3d 463, 518 n.60 (S.D.N.Y. 2017), *vacated and remanded on other grounds sub nom. In re 650 Fifth Ave. & Related Properties*, 934 F.3d 147 (2d Cir. 2019), *and rev'd and remanded on other grounds sub nom. Havlish v. 650 Fifth Ave. Co.*, 934 F.3d 174 (2d Cir. 2019); *Harrison v. Republic of Sudan*, No. 13-cv-3127, 2017 WL 946422, at *4-6 (S.D.N.Y. Feb. 10, 2017).

Appellants try to criticize this Court's "snapshot" approach as "wrong," Br. at 27, but their position is inconsistent with the "longstanding principle" of federal law of looking to "the state of things at the time of the action brought." *Dole*, 538 U.S. at 478. Appellants argue that a "snapshot" approach makes no sense because it is

akin to saying that a pirate is no longer a pirate because he was captured and cut off from his crew. Br. at 28. But the metaphor is wrong—a pirate is not an instrumentality; a pirate is more akin to the terrorist. Appellants' proposed rule seems to be that if an entity was *ever* an instrumentality of terrorism then it should remain so in perpetuity for TRIA purposes. That is not the law of this Court, nor would such a law make sense. To borrow Appellants' pirate metaphor, Appellants' rule would mean that a pirate ship that has been captured by a country's navy and commandeered for use in that navy should still be treated as a pirate ship—a fiction that would make little sense to the navy crewmembers onboard.

Accordingly, Appellants' attempts to convince this Court to assess PIB's instrumentality status prior to Appellants' seeking the Writ of Execution should be rejected. Appellants devote seven pages of their brief to paraphrasing a report from their purported expert, Brian Fonseca, who opined that Russia supports the Taliban; that Russia uses VEB to help finance destabilization around the world, including the Taliban; that PIB, as predominately owned by VEB, plays a role in funding destabilizing activity around the world; and that PIB was added to a sanctions list by OFAC for its ties to Russia's funding of destabilizing activity in Ukraine and elsewhere on February 22, 2022. Br. 13-19. But regardless of the merits of whether or not PIB was truly ever being used by Russia to fund the Taliban, it overlooks one crucial fact—any such activity could not have been ongoing at the time of the

application for a Writ of Execution due to the seizure, liquidation, and later nationalization of PIB by Ukraine, which all occurred prior to Appellants seeking the Writ of Execution. Whether or not PIB may have been an instrumentality of the Taliban while it was allegedly controlled by Russia is thus beside the point. The key question, as recognized by the district court, is whether VEB (and, thus, indirectly Russia) controlled PIB when appellants applied for the Writ of Execution. The district court correctly answered this question in the negative.

2. PIB Was Controlled by Ukraine Prior to Appellants Filing This Action.

Appellants fall a mile short of establishing that the district court clearly erred in finding that PIB was controlled by Ukraine prior to the time Appellants applied for the Writ of Execution. The record evidence makes it abundantly clear that VEB (and thus Russia) lost all control over PIB on February 25, 2022, the day when the National Bank of Ukraine revoked PIB's bank license and directed its liquidation. Pursuant to the February 25 Decision, DGF commenced the liquidation process, which, according to DGF law, "operated to strip VEB and/or Russia of any authority or control they might have had over [PIB]." A-15. Among other things, the beginning of liquidation proceedings vested DGF, a part of Ukraine's government, with the ability to exercise the powers of the bank governing bodies, including taking possession of the bank's property and controlling the disposition of the bank's assets. A-16; *see also* Dkt. 35-8. What is more, Articles 77 and 79 of the Law of Ukraine

on Banks and Banking[4] provide that the remedy for a liquidation or revocation of a banking license that is eventually found to be illegal is monetary compensation—not return of the bank to its previous owners. The act of state doctrine "bars federal and state courts from declaring invalid, and thus ineffective as a rule of decision for the courts of [the United States], the official act of a foreign sovereign. *Celestin v. Caribbean Air Mail, Inc.,* 30 F.4th 133, 137 (2d Cir. 2022) (quoting *W.S. Kirkpatrick & Co. v. Env't Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990) (internal modifications omitted)). Thus, this Court must recognize Ukrainian laws that specify that once liquidation began, there was no ability for VEB or Russia to regain control of PIB. The district court was correct to find that these actions alone were sufficient to show Russia and VEB no longer controlled PIB.

As the district court correctly noted, whether the final administrative step of transferring shares to the National Investment Fund of Ukraine happened after September 20, 2022 or not is irrelevant. The other Ukrainian-passed laws that declared PIB insolvent, placed PIB into liquidation, and later nationalized PIB prior to September 20, 2022 divested Russia of any control it had over PIB. Appellant's focus on the administrative transfer of the shares elevates form over substance. *See, e.g., Equitable Life Assur. Soc. of U.S. v. Bowers*, 87 F.2d 687, 689 (2d Cir. 1937)

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[4] An official English translation of which can be found here: https://bank.gov.ua/admin_uploads/law/Law_BB_eng.pdf?v=4.

(holding that "no one would say that the company had not been mutualized" if all shares had been transferred to the policyholders "though not yet formally cancelled and retired").

Based on the record evidence, the district court correctly held that by the time Appellants applied for the Writ of Execution on September 20, 2022, "VEB had no control over or access to [PIB's] assets, and Ukrainian law no longer recognized VEB as having any ownership interests in PIB." A-29-30. Appellants fail to offer a single credible reason as to why this holding was clearly erroneous.

II. The District Court Correctly Determined That a Proposed Intervenor Seeking Only to Block a Plaintiff's Requested Relief Does Not Need to Demonstrate Article III Standing.

The district court did not abuse its discretion when it found that DGF did not need to demonstrate standing—a holding Appellants do not challenge and which ends the inquiry. The district court followed established case law in this Circuit holding that an intervenor need not show standing if they "merely intend[] to oppose the relief that plaintiff requests." A-26-27 (quoting *Gerschel v. Bank of Am., N.A.*, No. 20-cv-5217, 2021 WL 1614344, at *3 n.8 (S.D.N.Y. Apr. 26, 2021)); *see also Allstar Mktg. Grp., LLC v. AFACAI*, No. 20-cv-8406, 2021 WL 75138, at *2 (S.D.N.Y. Jan. 8, 2021).

Appellants do not challenge this holding—instead, they allege that the district court erred in finding that a "liquidator has standing to intervene as to assets that

were blocked prior to the litigation." Br. at 1. Appellants spend four pages discussing why a liquidator should not have standing to intervene when the assets the liquidator is appointed to liquidate are blocked by OFAC. Br. at 31-35. But that presupposes that DGF needed to demonstrate standing to intervene. The district court held it did not, and Appellants "waived any challenge to the district court's . . . determination[] as to standing by failing to raise any argument concerning [it] in [their principal] appellate brief." *Bandler v. Town of Woodstock*, 832 F. App'x 733, 735 (2d Cir. 2020) (summary order). Nor may Appellants cure this waiver by raising the argument in reply. *See, e.g., JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005) ("[A]rguments not made in an appellant's opening brief are waived even if the appellant pursued those arguments in the district court or raised them in a reply brief."). The fact that Appellants have waived any argument as to whether DGF needed to demonstrate standing should (again) end the inquiry.

But even if Appellants had challenged the district court's findings and the district court had erred in determining that DGF did not need to show standing (neither of which is true), DGF has demonstrated standing. This Court has "repeatedly described [the standing] requirement as 'a low threshold.'" *John v. Whole Foods Mkt. Grp., Inc.*, 858 F.3d 732, 736 (2d Cir. 2017). "To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected

interest." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (internal quotations and citations omitted). DGF more than meets this standard because this enforcement proceeding against PIB's assets will directly impair DGF's ability to carry out its obligations as PIB's designated liquidator in accordance with Ukraine law. *See In re $6,871,042.36, & Accrued Interest,* 217 F. Supp. 3d 84, 92-94 (D.D.C. 2016) (finding liquidators had Article III standing to seek dissolution of protective order even if they had not yet established their legal right to those funds).

The *only* legal authority Appellants cite for the proposition that a liquidator, like DGF, lacks standing to intervene in cases affecting assets that are blocked by OFAC is *United States v. All Assets Held at Bank Julius Baer & Co., Ltd.,* 959 F. Supp. 2d 81 (D.D.C. 2013) ("*All Assets*").[5] The problem is that *All Assets*, in addition to being from a district court outside this Circuit and thus not binding, is not a case about Article III standing—it is about *statutory* standing in the context of a civil forfeiture claim. *Id.* at 95-96. The present case is not a civil forfeiture case, and case law relating to whether a liquidator has statutory standing for a civil forfeiture action has no bearing on the questions in this case.

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[5] Appellants also cite *F. & H.R. Farman-Farmaian Consulting Engineers Firm*, 882 F.2d at 286, for the supposed proposition that "a liquidator lacks standing if its standing is based upon an offensive nationalization." Br. at 34. However, the Seventh Circuit's decision does not even mention the word "standing" once and made no ruling on whether a liquidator had standing to intervene to block a writ of execution.

Even if blocked indefinitely, DGF has standing as the liquidator to oppose execution upon those assets.

Because Appellants waived any arguments related to the district court's holding that DGF did not need to show Article III standing, this Court need go no farther—whether a liquidator has Article III standing to challenge blocked assets or not is irrelevant if DGF did not need to demonstrate standing in the first place. But even if DGF needed to do so, it did so. The district court's findings on standing should be affirmed.

III. Regardless of Ukraine's Nationalization of Russian Assets, the Order Vacating the Writ of Execution Should Be Affirmed Because the District Court Lacked Subject-Matter Jurisdiction.

But even if the district court did make all the errors Appellants allege (which it did not), affirmance would still be appropriate on the alternative ground that the district court lacked subject-matter jurisdiction to enter the Writ of Execution. This Court may "affirm . . . on any basis for which there is a record sufficient to permit conclusions of law, including grounds upon which the district court did not rely." *Leon v. Murphy*, 988 F.2d 303, 308 (2d Cir. 1993). This includes for lack of subject-matter jurisdiction. *See Mortimer Off Shore Servs., Ltd. v. Fed. Republic of Germany*, 615 F.3d 97, 113 (2d Cir. 2010) (affirming dismissal on alternative ground that court lacked subject-matter jurisdiction to consider plaintiff's claim).

When judgment creditors have sought to enforce a judgment obtained against non-state terrorist groups by executing against the assets of a foreign state or its agency or instrumentality where the foreign state has not been designated a state sponsor of terrorism by the U.S. government, the U.S. government has often intervened, filing a statement of interest to oppose the application of the TRIA, arguing that Congress delegated the power to determine whether a foreign state sponsors terrorism to the Executive Branch and that the judiciary determining that a foreign state (or its agencies or instrumentalities) supports terrorists for TRIA purposes usurps the Executive Branch's role. *See, e.g.,* Statement of Interest of the United States, *In re Terrorist Attacks on Sept. 11, 2001,* No. 1:03-md-1570, Dkt. 7661 at 27 n.9 (S.D.N.Y. Feb. 11, 2022); Statement of Interest of the United States of America, *Caballero v. Fuerzas Armadas Revolucionarieas de Colombia, et al.*, No. 20-cv-07602, Dkt. 125 at 20-23, (W.D.N.Y. Sept. 20, 2022). This very reasoning led the Southern District of New York to find that the Constitution forbade it from determining that the central bank of Afghanistan was an instrumentality of a non-state actor, the Taliban. *In re Terrorist Attacks on Sept. 11, 2001*, 657 F. Supp. 3d 311, 332-36 (S.D.N.Y. 2023). It was the role of the Executive Branch—not the court—to determine whether the government of Afghanistan was an agent or instrumentality of the non-state Taliban, noting that the Executive Branch had not designated the government of Afghanistan as a state sponsor of terrorism. *Id.* Those

same constitutional constraints apply here and should have stripped the district court of subject-matter jurisdiction to consider Appellants' application for a Writ of Execution.

Appellants argue that the district court was correct when it determined that "it appears well settled that the federal courts have subject matter jurisdiction over post-judgment execution and attachment proceedings." Br. 19 (citing A-15). The district court noted that DGF's arguments regarding subject matter jurisdiction "have some force," but ultimately cited this Court's holding in *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43, 50 (2d. Cir. 2010) for the proposition that the TRIA provides courts with subject-matter jurisdiction over post-judgment execution and attachment proceedings against property held in the hands of an instrumentality of a terrorist judgment debtor even if the instrumentality is not itself named in the judgment. A-15.

However, *Weinstein* is not apposite to the situation in this case. *Weinstein* dealt with an instrumentality—the Bank Melli Iran—that was part of the Iranian government—the terrorist party that had a judgment against it. *Weinstein*, 609 F.3d at 50. That is true for many other cases around the country—the instrumentality in question is almost always an instrumentality or agent of the sovereign state that has a judgment against it. *See, e.g., Estate of Heiser,* 885 F. Supp. 2d 429, 449-50 (D.D.C. 2012), *aff'd sub nom, Heiser v. Islamic Republic of Iran,* 735 F.3d 934 (D.C.

Cir. 2013) (awarding turnover of blocked assets of agency of Iran under TRIA where plaintiffs had obtained a default judgment against Iran pursuant to § 1605A); *Bennett v. Franklin Res., Inc.,* 360 F. Supp. 3d 972, 982-83 (N.D. Cal. 2018), *aff'd sub nom, Bennet v. Islamic Republic of Iran,* 778 F. App'x 541 (9th Cir. 2019) (same); *Weininger v. Castro,* 462 F. Supp. 2d 457, 463 (S.D.N.Y. 2006) (same, where judgment was against Cuba pursuant to 28 U.S.C. § 1605(a)(7)).

Here, Appellants seek a Writ of Execution based on allegations that PIB was controlled by Russia indirectly. The Default Judgment was not against Russia or Ukraine—it was against a non-state terrorist group, the Taliban. Neither Russia nor Ukraine is not listed as a state sponsor of terrorism by the U.S. government. The Constitution vests the Executive Branch—not the courts—with the authority to recognize whether a foreign sovereign sponsors the Taliban. The Executive Branch has not found that Russia or Ukraine are state sponsors of terrorism. Both this Court and the district court lack subject-matter jurisdiction to make a determination that is quintessentially one reserved for the Executive Branch.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the type-volume limit of Federal Rules of Appellate Procedures 28(a)(10) and 32(g)(1), along with Local Appellate Rule 32.1(a)(4)(A), because, excluding the parts of the document exempted by Rule 32(f), this document contains 8,584 words as counted by the word-processing software used to create the brief.

I further certify that this document complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Times New Roman 14-point font.

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