

## August Term 2017

No. 17-759-cv

John Doe,  
*Plaintiff-Appellant,*

*v.*

JPMorgan Chase Bank, N.A.,  
Respondent-Third-Party-Petitioner-Counter-Claimant-Appellee,

Deutsche Bank Trust Company Americas, Commerzbank AG, New York Branch,  
*Respondents-Appellees.*<sup>1</sup>

Appeal from the United States District Court  
for the Southern District of New York

Laura T. Swain, District Judge, Presiding.

(Argued: December 15, 2017; Decided: August 9, 2018)

Before: Parker, Wesley, and Chin, *Circuit Judges*.

Judgment creditor of sanctioned foreign entities sought attachment and turnover of blocked electronic funds transfers (“EFTs”) under Section 201(a) of

<sup>1</sup> The Clerk of Court is respectfully directed to amend the caption as above.

1 the Terrorism Risk Insurance Act, Pub. L. No. 107–297, § 201, 116 Stat. 2322, 2337  
2 (2002) (codified at 28 U.S.C. § 1610 note). The District Court (Swain, J.) denied  
3 the request on the grounds that a blocked EFT held at an intermediary bank is  
4 subject to execution only if the judgment debtor or its agent transmitted the EFT  
5 directly to the bank where the EFT is blocked. The judgment of the District Court  
6 is **AFFIRMED**.

7  
8 Judge Chin dissents in a separate opinion.

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10  
11 ORLANDO DO CAMPO, Do Campo & Thorton, P.A., Miami, FL,  
12 and BRETT E. VON BORKE, Buckner + Miles, Miami, FL, *for John*  
13 *Doe*

14  
15 STEVEN B. FEIGENBAUM AND GREGORY P. FEIT, Levi Lubarsky  
16 Feigenbaum & Weiss LLP, New York, NY, *for JPMorgan Chase*  
17 *Bank, N.A.*

18  
19 MARK P. GIMBEL, Covington & Burling LLP, New York, NY, *for*  
20 *Deutsche Bank Trust Company Americas*

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22 TERRY MYERS AND PAUL A. SASO, Gibbons P.C., New York, NY,  
23 *for Commerzbank AG, New York Branch*

24  
25 CHAD D. READLER, Acting Assistant Attorney General;  
26 SHARON SWINGLE AND BENJAMIN M. SHULTZ, Department of  
27 Justice; and PETER ARONOFF AND CHRISTOPHER CONNOLLY,  
28 Assistant U.S. Attorneys, for Geoffrey S. Berman, U.S.  
29 Attorney for the Southern District of New York, *for Amicus*  
30 *Curiae United States of America*

1 BARRINGTON D. PARKER, *Circuit Judge*:

2 John Doe is a judgment creditor who seeks attachment and turnover of  
3 electronic fund transfers (“EFTs”) initiated by sanctioned foreign terrorist  
4 organizations which, after passing through foreign intermediary banks, were  
5 blocked and held by domestic banking institutions. See Section 201(a) of the  
6 Terrorism Risk Insurance Act (“TRIA”), Pub. L. No. 107–297, § 201, 116 Stat. 2322,  
7 2337 (2002) (codified at 28 U.S.C. § 1610 note). Specifically, Doe applied below  
8 for turnover orders against JPMorgan Chase Bank, N.A. (“JPMorgan”), Deutsche  
9 Bank Trust Company Americas (“Deutsche Bank”), and Commerzbank AG, New  
10 York Branch (“Commerzbank”), the institutions which blocked and held the  
11 EFTs.

12 The United States District Court for the Southern District of New York  
13 (Swain, *J.*), denied the applications on the grounds that the EFTs were not the  
14 property of the originators—the terrorist organizations—but instead were the  
15 property of the intermediaries that transferred the funds to the U.S. institutions.  
16 See *Doe v. Ejercito De Liberacion Nacional*, No. 15-cv-8652, 2017 WL 591193  
17 (S.D.N.Y. Feb. 14, 2017). In reaching that conclusion, the District Court relied on

1 *Calderon-Cardona v. Bank of N.Y. Mellon*, 770 F.3d 993 (2d Cir. 2014) and *Hausler v.*  
2 *JP Morgan Chase Bank, N.A.*, 770 F.3d 207 (2d Cir. 2014) (per curiam), in which we  
3 held that blocked wire transfers held at an intermediary bank are subject to  
4 execution under Section 201(a) only if the judgment debtor or an agency or  
5 instrumentality of the judgment debtor “transmitted the EFT directly to the bank  
6 where the EFT is held pursuant to the block.” *Calderon-Cardona*, 770 F.3d at 1002;  
7 *see also Hausler*, 770 F.3d at 212. Because the record reflects that the judgment  
8 debtors did not do so, we **AFFIRM**.

#### 9 **BACKGROUND**

10 The International Emergency Economic Powers Act, 50 U.S.C. §§  
11 1701–1706, empowers the President to impose economic sanctions to respond to  
12 unusual and extraordinary international threats to the United States. 50 U.S.C. §§  
13 1701, 1702(a). In 2001, the President invoked that authority to authorize the  
14 Treasury Department to designate a persons as a Specifically Designated Global  
15 Terrorist (“SDGT”) if the Treasury finds that the person is “owned or controlled  
16 by” a designed terrorist group; assists in, sponsors, or provides material or  
17 financial support to a terrorist group; or is “otherwise associated with” a terrorist

1 group. *See* Executive Order 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001) § 1(c)–(d).  
2 Executive Order 13,224 also authorizes the Treasury to “take such actions,  
3 including the promulgation of rules and regulations . . . as may be necessary to  
4 carry out the purpose of this order.” *Id.* § 7. Pursuant to this authority, the  
5 Department of the Treasury’ Office of Foreign Asset Control (“OFAC”)  
6 promulgated Global Terrorism Sanction Regulations that, among other things,  
7 require United States banks to block transactions involving SDGTs that are  
8 subject to sanctions. *See* 31 C.F.R. Part 594. These regulations provide that  
9 “property and interests in property” of SDGTs are “blocked” and “may not be  
10 transferred, paid, exported, withdrawn or otherwise dealt in” if the property or  
11 interest is either in the United States or comes within the possession or control of  
12 a U.S. person. *Id.* § 594.201(a).

13 Doe’s motion seeking a turnover order and his brief on appeal alleged the  
14 following facts. In December 2010, OFAC identified Tajco Ltd. (“Tajco”) as a  
15 SDGT. Joint App’x A-370. A few days later, Tajco originated an EFT from Arab  
16 Gambian Islamic Bank Ltd. in the amount of \$120,416 for the benefit of an  
17 account holder at the Lebanese Canadian Bank. *Id.* A-371. From the originating

1 bank, the funds flowed to AHLI United Bank UK PLC ("AHLI"), an intermediary  
2 bank, which then transmitted the funds to JPMorgan, as the beneficiary bank. *Id.*  
3 at A-371–72. JPMorgan blocked and held the transfer because Tajco was referred  
4 to in the payment instructions of the EFT and appeared on the OFAC’s list of  
5 terrorist organizations. *Id.* at A-371.

6 In April 2012, OFAC identified Grand Stores Ltd.’ ("Grand Stores")  
7 Gambian location as an alias of Tajco and as a SDGT. *Id.* at A-370. In May 2012,  
8 Grand Stores, from its Gambian operation, originated an EFT in the amount of  
9 \$400,951.41 from Trust Bank Ltd. *Id.* at A-371–72. Trust Bank then wired the  
10 funds to its correspondent bank Credit Suisse AG ("Credit Suisse"), which then  
11 wired the funds to JPMorgan, as the beneficiary bank. *Id.* at A-371. JPMorgan  
12 blocked the transfer and held the funds because at the time of the wire transfer,  
13 Grand Stores was on the OFAC’s list of SDGTs. *Id.* Credit Suisse and AHLI then  
14 disclaimed any interest in the blocked accounts and all remaining possible  
15 claimants other than Doe have either defaulted, or have dismissed or withdrawn  
16 any claims to the funds which have remained in the blocked accounts. *Id.* at A-  
17 372.

1           **A.     Proceedings Below**

2           This action began in June 2015 when Doe registered in the Southern  
3     District of New York a \$36.8 million judgment he had obtained in the Southern  
4     District of Florida against Ejercito de Liberacion Nacional (the “ELN”) and  
5     Fuerzas Armadas Revolucionarios de Colombia (the “FARC”) terrorist  
6     organizations that he alleges kidnaped and tortured him in Venezuela and  
7     Colombia. In an attempt to collect on the judgment, Doe initiated a turnover  
8     proceeding and named JPMorgan as a respondent. The petition sought the  
9     turnover of funds blocked and held by JPMorgan and alleged to belong to Grand  
10    Stores and Tajco, both of which Doe alleged to be agents of the FARC. In  
11    response, JPMorgan brought an interpleader action in which it named Credit  
12    Suisse and AHLI respondents. Credit Suisse and AHLI then reached settlements  
13    with JPMorgan in which they agreed to relinquish any claims to the blocked  
14    Tajco and Grand Stores accounts and also to release JPMorgan from any liability  
15    with respect to the accounts. Doe later joined Deutsche Bank and Commerzbank  
16    in the turnover proceedings, also alleging that the blocked funds they held  
17    belonged to agents of the ELN and the FARC.

The District Court denied Doe's turnover application directed at JPMorgan. Because the parties agree that the issues raised in the JPMorgan petition were similar to those raised in the petitions against Deutsche Bank and Commerzbank, Doe requested, and the District Court agreed, to enter an order denying the petitions directed at Commerzbank and Deutsche Bank for substantially the reasons that it denied the one directed at JPMorgan. Doe appeals the denial of the three petitions.

We review *de novo* the threshold issue of whether EFTs are property of a particular party. *Hausler*, 770 F.3d at 211 (quoting *Calderon-Cardona*, 770 F.3d at 1000).

## DISCUSSION<sup>2</sup>

Unless a judgment creditor acquires a license from the OFAC, the creditor is typically barred from attaching blocked assets. *See, e.g.*, 31 C.F.R. §§ 594.201(a), 594.202(e) (providing that attachment and other similar judicial process related to property blocked pursuant to the Global Terrorism Sanctions Regulations are

<sup>2</sup> As noted, this appeal principally concerns Doe’s turnover petitions directed at JPMorgan, Deutsche Bank, and Commerzbank. While this opinion recounts facts and engages in analysis solely with respect to the JPMorgan petition, it disposes of the appeals of the Deutsche Bank and Commerzbank turnover petitions, as all parties agree that they involve the same issues.



1 null and void). However, to assist victims of terrorism in satisfying their  
2 judgments, Congress enacted TRIA in 2002. *Calderon-Cardona*, 770 F.3d at 998.  
3 Section 201(a) of TRIA allows a plaintiff to execute a judgment on blocked assets  
4 of a terrorist party, or its agency or instrumentality, to satisfy a judgment against  
5 the terrorist party, where:

6 (1) a person has obtained a judgment against a terrorist party;

7 (2) the judgment is either

8 (a) for a claim based on an act of terrorism, or

9 (b) for a claim for which a terrorist party is not immune under §

10 1605(a)(7);

11 (3) the assets are “blocked assets” within the meaning of TRIA; and

12 (4) execution is sought only to the extent of any compensatory damages.<sup>3</sup>

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<sup>3</sup> Section 201(a) of TRIA provides:

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

1 Courts applying TRIA in the EFT context look to state law to define the  
2 rights a judgment debtor has in the property a creditor seeks to reach. *See*  
3 *Calderon-Cardona*, 770 F.3d at 1001. In *Hausler*, after analyzing what property  
4 interests are attachable under New York law, we held that under Article 4A of  
5 the New York Uniform Commercial Code, EFTs are neither the property of the  
6 originator nor the beneficiary while briefly in the possession of an intermediary  
7 bank. 770 F.3d at 212. We held that “the *only* entity with a property interest in  
8 the stopped EFT is the entity that passed the EFT on to the bank where it  
9 presently rests.” *Id.* (quoting *Calderon-Cardona*, 770 F.3d at 1002) (emphasis  
10 added). This is so because “wire transfers, which include EFTs, are a unique type  
11 of transaction to which ordinary rules do not necessarily apply.” *Calderon-*  
12 *Cardona*, 770 F.3d at 1001 (quoting *Export-Import Bank of U.S. v. Asia Pulp & Paper*  
13 *Co.*, 609 F.3d 111, 118 (2d Cir. 2010)). EFTs function “as a chained series of debits  
14 and credits between the originator, the originator’s bank, any intermediary  
15 banks, the beneficiary’s bank, and the beneficiary[;] ‘the only party with a claim  
16 against an intermediary bank is the sender to that bank.’” *Id.* (quoting *Asia Pulp*,  
17 609 F.3d at 119–20). In other words, under the N.Y. UCC’s statutory scheme, “the

1 only entity with a property interest in an EFT while it is midstream is the entity  
2 immediately preceding the bank ‘holding’ the EFT in the transaction chain.” *Id.*  
3 at 1002.<sup>4</sup> “It is beyond cavil that attachment will only lie against the property of  
4 the debtor, and that the right to attach the property ‘is only the same as the  
5 defendant’s own interest in it.’” *Bank of N.Y. v. Nickel*, 14 A.D.3d 140, 145 (N.Y.  
6 App. Div. 1st Dep’t 2004) (quoting *Sidwell & Co. v. Kamchatimpex*, 166 Misc. 2d  
7 639, 644 (N.Y. Sup. Ct. Co. 1995)).

8 Doe contends that Grand Stores or Tajco are agencies or instrumentalities  
9 of the FARC and that turnover of the FARC’s assets to satisfy his judgment is

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<sup>4</sup> The dissent takes issue with, among other things, this recitation of the N.Y. UCC statutory scheme, as embraced by our decisions in *Calderon-Cardona* and *Hausler*. In so doing, the dissent sees a tension between a SDGT’s interest in funds being, “in effect, entirely extinguished while temporarily midstream,” on the one hand, and OFAC’s authority to block “property [or] interests in property” of a SDGT, on the other. *See* Dissent, op. at 7-9. We, however, see no such tension. The terms “interest” and “title” are “clearly not synonymous.” *Asia Pulp*, 609 F.3d at 120 (quoting *Bank of N.Y. v. Nickel*, 14 A.D.3d 140, 145–47 (N.Y. App. Div. 1st Dep’t 2004)). “[A]lthough Article 4-A establishes that neither an originator nor a beneficiary owns or has title to a midstream EFT, Article 4-A does *not* address the separate issue of who has an ‘interest’ in an EFT.” *Id.* (emphasis in original). By contrast, the Global Terrorism Sanctions Regulations define “property” and “property interest” very expansively to include, among other things, “any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future or contingent.” 31 C.F.R. § 594.309. Similarly, the Regulations further define “interest” when used with respect to property very broadly to mean “an interest of any nature whatsoever, direct or indirect.” *Id.* § 594.306. As such, our holding here that the SDGTs at issue did not hold title to the blocked assets—such that attachment under Section 201(a) is unavailable—does not preclude the blocking of such assets under the Global Terrorism Sanctions Regulations. As the propriety of the blocking of the assets is not properly before us, we need not reach that issue.

1 authorized by Section 201(a). All parties agree that Doe obtained a judgment  
2 against a terrorist party, based upon an act of terrorism, and seeks execution only  
3 to the extent of compensatory damages. Consequently, the only disputed issue  
4 before us is whether the assets in the blocked accounts are property of SDGTs.

5 Here, as in *Hausler*, it is undisputed that no SDGT transmitted any of the  
6 blocked EFTs directly to a blocking bank. See 770 F.3d at 212. Credit Suisse and  
7 AHLI transmitted the funds held in the Grand Stores and Tajco blocked accounts  
8 to JPMorgan, and neither Credit Suisse nor AHLI are SDGTs. See *Ejercito*, 2017  
9 WL 591193, at \*2. Consequently, our decisions in *Calderon-Cardona* and *Hausler*  
10 compel the conclusion that neither Grand Stores nor Tajco has any attachable  
11 property interest in the blocked funds at JPMorgan since they were not the  
12 entities that directly passed the EFTs to JPMorgan. As such, as the District Court  
13 correctly concluded, the blocked funds are not attachable under Section 201(a).

14 Doe invites us to depart from *Calderon-Cardona* and *Hausler* on the theory  
15 that where, as here, the intermediary banks, which passed the EFTs on to  
16 blocking banks, disclaim any interest in the blocked accounts and the originating  
17 banks fail to appear or participate in the turnover proceedings, the funds

1 “move[] back up the chain or upstream” to the “sender[s] to that bank,” which  
2 would be Grand Stores and Tajco (the two SDGTs). In other words, the  
3 transaction, Doe contends, should be recast as though the funds moved directly  
4 from the SDGTs to JPMorgan.

5 We decline this invitation because the Global Terrorism Sanctions  
6 Regulations broadly prevent the unlicensed transfer of blocked assets and any  
7 transfer in violation of the Regulations is “null and void.” See 31 C.F.R. §  
8 594.202(a). The Regulations, section 594.312, go on define “transfer” in  
9 exceptionally expansive language as “any actual or purported act or transaction .  
10 . . the purpose, intent, or effect of which is to create, surrender, release, convey,  
11 transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or  
12 interest with respect to any property.” These Regulations mean that any  
13 disclaimer by the transmitting banks (Credit Suisse and AHLI) to an interest in  
14 the blocked funds is incapable of effecting an unlicensed transfer to anyone and  
15 certainly not a transfer “back up the chain” to an originating SDGT.  
16 Consequently, disclaimers by intermediary banks can not serve to vest (or re-

1 vest) title to the transferred funds with the originators which were the initial  
2 targets of the sanctions.

3 Moreover, we are not persuaded to depart from *Calderon-Cardona* and  
4 *Hausler* by two unpublished district court decisions in which correspondent  
5 banks waived their interests in blocked EFTs, *Vera v. Republic of Cuba*, No. 12-cv-  
6 01596, 2015 WL 13657629 (S.D.N.Y. May 8, 2015)<sup>5</sup> and *Gates v. Syrian Arab*  
7 *Republic*, Nos. 11-cv-8715, 14-cv-6161, 2014 WL 5784859 (N.D. Ill. Nov. 6, 2014).  
8 Doe notes that both of these decisions post-date *Calderon-Cardona* and *Hausler*  
9 and analyze the disclaimer distinction in light of those opinions. We, however,  
10 note that both *Vera* and *Gates* involved unique situations and, most importantly,  
11 neither of them accounts for the applicable OFAC regulations which  
12 unambiguously prohibit unlicensed transfers of blocked assets.<sup>6</sup> Consequently,  
13 we do not find them persuasive.

## 14 CONCLUSION

15 For the foregoing reasons, we **AFFIRM** the judgment of the District Court.

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<sup>5</sup> See also *Vera v. Republic of Cuba*, No. 12-cv-01596, ECF No. 814 (S.D.N.Y. Sept. 24, 2015).

<sup>6</sup> The dissent declines to conclude that the OFAC license requirement is clearly applicable in these circumstances. See Dissent, op. at 11. We respectfully see no authority for this view.

DENNY CHIN, *Circuit Judge*:

I respectfully dissent.

It is undisputed that Doe satisfies the first three requirements of the Terrorism Risk Insurance Act ("TRIA"), Pub. L. No. 107-297, § 291, 116 Stat. 2322, 2337 (2002) (codified at 28 U.S.C. § 1610 note): (1) he obtained a judgment against a terrorist party, (2) based upon an act of terrorism, and (3) execution is sought only to the extent of compensatory damages. The only question is whether the funds are "blocked assets" of Specially Designated Global Terrorists ("SDGTs"), subject to attachment under Section 201(a) of the TRIA. The majority concludes they are not, relying on this Court's decisions in *Hausler v. JP Morgan Chase Bank*, 770 F.3d 207 (2d Cir. 2014) (per curiam), and *Calderon-Cardona v. Bank of N.Y. Mellon*, 770 F.3d 993 (2d Cir. 2014). I believe the cases are distinguishable, however, and for the reasons set forth below, I disagree.

It is undisputed that the funds at issue originated with Grand Stores Ltd. ("Grand Stores") and Tajco Ltd. ("Tajco"), as they initiated the electronic fund transfers ("EFTs") that have been blocked by JPMorgan Chase Bank, N.A. ("JPMorgan"). It is also undisputed that Grand Stores and Tajco are agents and instrumentalities of the Fuerzas Armadas Revolucion de Colombia ("FARC"), a

designated SDGT, and Doe holds judgments against the Ejército De Liberación Nacional ("ELN") and against FARC for his kidnapping and torture by them. Doe argues that because, under the New York Uniform Commercial Code ("N.Y. U.C.C."), the originators of an EFT retain an interest in interrupted fund transfers, and here, the originators are SDGTs, the funds in the blocked accounts are attachable "blocked assets" under the TRIA for purposes of satisfying Doe's judgment. *See Heiser v. Islamic Republic of Iran*, 735 F.3d 934, 941 (D.C. Cir. 2013) (explaining that under U.C.C. § 4A-402(d)-(e), "claims on an interrupted funds transfer ultimately belong to the originator");<sup>1</sup> *Bank of N.Y. v. Nickel*, 14 A.D.3d 140, 145 (N.Y. App. Div. 1st Dep't 2004) ("[T]he right to attach the property is only the same as the defendant's own interest in it.") (internal quotation marks omitted)).<sup>2</sup>

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<sup>1</sup> This provision has been adopted by the N.Y. U.C.C. *See* N.Y. U.C.C. § 4-A-402.

<sup>2</sup> The TRIA defines a "blocked asset" as "any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)) or under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701, 1702)." TRIA § 201(d)(2)(A). As discussed in the majority opinion, the Department of the Treasury Office of Foreign Assets Control ("OFAC") regulations that blocked the EFTs at issue were promulgated pursuant to Executive Order 13224, 66 Fed. Reg. 49079 (Sept. 23, 2001) § 7, which executive authority was invoked under the IEEPA, 50 U.S.C. §§ 1701 *et seq.* The regulations block any "property and interests in property" of SDGTs. 31 C.F.R. § 594.201(a); *see also id.* § 594.310 (defining SDGT as "any person whose property and interests in property are blocked pursuant to § 594.201(a)").



I agree. First, attachment is consistent with the plain language and purpose of the TRIA. The TRIA was enacted to "aid victims of terrorism to satisfy their judgments" by authorizing judgment holders to attach the blocked assets of liable terrorist parties. *Calderon-Cardona*, 770 F.3d at 998; *see also Weininger v. Castro*, 462 F. Supp. 2d 457, 483 (S.D.N.Y. 2006) (explaining that the purpose of TRIA § 201 "is to 'deal comprehensively with the problem of enforcement of judgments rendered on behalf of victims of terrorism in any court of competent jurisdiction by enabling them to satisfy such judgments through the attachment of blocked assets of terrorist parties.'" (quoting H.R. Conf. Rep. No. 107-779, at 27 (2002))).

In relevant part, section 201 of the TRIA, provides that:

Notwithstanding any other provision of law, and except as provided in subsection (b), in every case in which a person has obtained a judgment against a terrorist party on a claim based on an act of terrorism, or for which a terrorist party is not immune under [28 U.S.C. § 1605(a)(7)], 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 the aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

TRIA § 201(a). As Doe is a victim of terrorism and holds a judgment against a terrorist party, and the EFTs were blocked pursuant to OFAC regulations as "property or [an] interest[] in property" of that terrorist party's agents or instrumentalities, this case seems precisely to fall within the situation contemplated by the TRIA. 31 C.F.R. § 594.201(a).

Second, *Hausler* and *Calderon-Cardona* are not factually analogous, and, in my view, do not preclude attachment under these circumstances. *Hausler* involved non-terrorist entities who had attempted to transfer funds *to* a terrorist party, but the funds were blocked and never became the property of the terrorist party. There, we held that the funds were not subject to execution under the TRIA because they were not the "assets of" a terrorist party. *Hausler*, 770 F.3d at 211 (citing TRIA § 201).

*Calderon-Cardona*, on the other hand, involved blocked EFTs that allegedly contained funds belonging to North Korea or an agency or instrumentality of North Korea. In that case, we held that TRIA § 201(a) did not apply because North Korea was not designated as a "terrorist party" at the time the judgment was issued. *See Calderon-Cardona*, 770 F.3d at 999. We considered, however, whether victims could instead recover under the Foreign Sovereign

Immunities Act, 28 U.S.C. § 1602 *et seq.*, which also utilizes New York law governing EFTs. Nevertheless, we held that there were factual issues surrounding whether the entities that transmitted the EFTs to the blocking banks were agencies or instrumentalities of North Korea and remanded the case to develop that information. *See id.* at 1002.

Unlike in *Hausler* and *Calderon-Cardona*, there is no dispute in this case that the originating parties are designated terrorist parties. *See, e.g., Martinez v. Republic of Cuba*, 149 F. Supp. 3d 469, 479 (S.D.N.Y. 2016) (explaining that *Vera v. Republic of Cuba*, No. 12 Civ. 1596 (AKH) (S.D.N.Y. Sept. 24, 2015), was distinguishable from *Calderon-Cardona* and *Hausler* because it involved a transaction that undisputedly originated with a terrorist party). Moreover, unlike in *Hausler* and *Calderon-Cardona*, the upstream banks in this case have disclaimed any interest they might have in the funds.

There appear to have only been two other cases involving blocked fund transfers that were originated by terrorist parties and where the upstream banks had waived or disclaimed any interest in the funds. In both cases, the district courts concluded that our decisions in *Hausler* and *Calderon-Cardona* did not prevent turnover.

In *Vera v. Republic of Cuba*, No. 12 Civ. 1596 (AKH) (S.D.N.Y. Sept. 24, 2015), a Cuban bank, as originator, was attempting to move money between two of its accounts at other banks. The money was blocked midstream pursuant to U.S. banking regulations. The correspondent bank in that case argued that it was merely acting as an agent for the originator's bank, which was acting as an agent for the originator that was subject to sanctions. The court held that because the funds could not be returned to the Cuban bank, petitioners were entitled to them under U.S. law.

In *Gates v. Syrian Arab Republic*, 2014 WL 5784859 (N.D. Ill. Nov. 6, 2014), the originator and beneficiary of a blocked funds transfer was an instrumentality of Syria, and Syria was subject to U.S. sanctions. As in this case, the intermediary bank disclaimed any interest it had in the blocked EFT. The defendant in *Gates* also argued that, under *Hausler* and *Calderon-Cardona*, the blocked funds could not be attached because they were solely the property of the intermediary bank. *See id.*, at \*2. The district court, however, rejected the argument, and concluded that the funds were attachable because: (1) when the "transferor immediately preceding [the beneficiary bank] disclaim[s] any interest in the funds" then, "[u]nder the U.C.C., the only party to whom those funds

would belong would be [the originator]," *id.* at \*2; and (2) allowing attachment was consistent with the "broad purpose of [the TRIA]," which "is to compensate victims of state sponsored terrorism at the expense of state sponsors of terror," *id.* at \*3. The court specifically noted that when the upstream bank disclaims any interest in the blocked accounts, any risk of impact to innocent parties is obviated and the "EFTs are attachable." *Id.* at \*3.

Here, because Grand Stores and Tajco retained an interest in the funds as the originators of the EFTs, and all parties with superior claims have disclaimed any interest they might have, I would conclude that the blocked funds are "blocked assets" subject to attachment under § 201(a) of the TRIA. Under the majority's opinion, the funds remain frozen indefinitely in a blocked account at JPMorgan, which does nothing to further the purpose of the TRIA.<sup>3</sup>

Finally, I have some technical concerns with the majority's analysis. Its conclusion is as follows: The funds are not the "blocked assets" of the SDGTs

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<sup>3</sup> Defendants-appellees contend that because, under *Hausler* and *Calderon-Cardona*, the banks were the rightful owners of the EFTs, their disclaimers have likely rendered the funds "abandoned property under New York's Abandoned Property Law and therefore subject to turnover to the State of New York upon the lifting of sanctions or the receipt of a license from OFAC." Def.-Appellee Deutsche Bank Br. at 5 n.2. Giving the funds to New York State, rather than to Doe, certainly would not further the purpose of the TRIA.

because (a) under New York law, EFTs are "neither the property of the originator nor the beneficiary while briefly in the possession of an intermediary bank"; (b) here, Credit Suisse AG and AHLI United Bank UK PLC, the intermediary banks, "immediately preced[ed]" the holding bank and thus are the "only entit[ies] with [] property interest[s]" in the EFTs; and (c) Credit Suisse and AHLI are not SDGTs so the funds do not constitute the "blocked assets" of a designated terrorist party. *See* Maj. Op. at 10-12.

This conclusion is inherently at odds with OFAC regulations that require the "property and interests in property" of SDGTs to be blocked in the first place. *See* 31 C.F.R. § 594.201(a). If an SDGT's interest in funds is, in effect, entirely extinguished while temporarily midstream, there would be no authorization to block those midstream funds as "property [or] interests in property" of a designated terrorist party because that property would belong *solely* to the intermediary bank, not a designated terrorist party. *See* Maj. Op. at 10 ("[T]he *only* entity with a property interest in an EFT while it is midstream is the entity immediately preceding the bank 'holding' the EFT in the transaction chain." (emphasis in original)). That result is inconsistent with our understanding of how the economic sanctions regime works. *See* Maj. Op. at 5

(explaining that the relevant economic sanctions require U.S. banks to block "property and interests in property" of designated entities, *see* 31 C.F.R. § 594.201(a), which includes transactions to and from SDGTs); *see also* *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must . . . interpret [a] statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole." (internal citation and quotation marks omitted)). Under that theory, JPMorgan should not have blocked the funds at all, as the funds would not then be assets of an SDGT.

Hence, if we are to read *Hausler* and *Calderon-Cardona* to compel such a result, it is not clear what funds transfer could ever be blocked while midstream. *See* 31 C.F.R. § 594.201(a) (blocking the "property and interests in property" of SDGTs). A vast amount of everyday banking occurs through EFTs. It is difficult to imagine a scenario where a terrorist party would directly pass funds to a blocking bank without using its own bank or an intermediary bank to execute that transaction on its behalf.<sup>4</sup> If we are to adhere to the majority's

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<sup>4</sup> This scenario would only seem to occur where the terrorist party is designated as a state sponsor of terrorism and utilizes its state-owned financial institutions to conduct its banking. *See, e.g., Calderon-Cardona*, 770 F.3d at 1002 (explaining, in the context of EFTs involving North Korea, that EFTs are attachable only where "either the state itself or an agency or instrumentality thereof (such as a state-owned financial institution) transmitted the EFT directly to the bank where the EFT is held pursuant to the block").

reasoning, a significantly high-risk area of terror financing would, in effect, be read entirely out of reach of the sanctions.

...

In this case, the United States also filed an *amicus* brief in which it argued that, even assuming the SDGTs had an interest in the funds, the banks' purported disclaimers were without effect because OFAC regulations prohibit entities from transferring interests in blocked property without receiving an OFAC license.<sup>5</sup> The majority agrees with the Government that "any disclaimer . . . is incapable of effecting an unlicensed transfer to anyone and certainly not a transfer 'back up the chain' to an originating SDGT." Maj. Op. at 13.

In *Harrison v. Republic of Sudan*, however, we held that TRIA judgment holders "are exempt from the normal OFAC licensure requirement." 802 F.3d 399, 406-07 (2d Cir. 2015), *cert. granted on other grounds*, -- S. Ct. ----, 2018

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This is, however, only one of many areas of terror financing that OFAC sanctions target. The sanctions also encompass lists of designated terrorist parties, which include transnational terrorist organizations and individuals. See Executive Order 13224, 66 Fed. Reg. 49079 (Sept. 23, 2001) § 1(c)-(d).

<sup>5</sup> A "transfer" is defined as including "any actual or purported act or transaction" to "surrender" or "release" an interest "with respect to any [blocked] property." 31 C.F.R. § 594.312. Any transfer in violation of this restriction "is null and void and shall not be the basis for the assertion or recognition of any interest in or right, right, power, or privilege with respect to" the blocked property. *Id.* § 594.202(a).



WL 3096369 (Mem) (June 25, 2018) (relying on a number of Statements of Interest from the Government that stated that TRIA judgment holders were exempt from OFAC licensure requirements). Although we did not face the question of whether an OFAC license was required prior to a bank's *disclaimer* of its property interests in blocked assets, I disagree with the majority that the OFAC license requirement is clearly applicable in these circumstances.<sup>6</sup>

For the reasons set forth above, in my view, the funds are attachable as consistent with the TRIA's broad purpose of allowing victims of terrorism to use blocked assets of liable terrorist parties to satisfy judgments. *See Gates*, 2014 WL 5784859, at \*2.

Accordingly, I dissent.

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<sup>6</sup> The district court in *Vera* relied on our decision in *Harrison* and allowed attachment without an OFAC license. *See Vera*, No. 12 Civ. 1596 (AKH), ECF No. 814 at 6 n.2. In a later case, *Martinez v. Republic of Cuba*, 149 F. Supp. 3d 469 (S.D.N.Y. 2016), the Government filed a Statement of Interest and raised the same arguments as it does here with respect to the OFAC license requirement. It argued that a bank cannot disclaim its interest without an OFAC license, but that, "setting aside [this] error . . . [the court's] reasoning in [*Vera*] is inapplicable here for the additional reason that there is no indication" that the terrorist party was the "originator" of the funds in *Martinez* unlike in *Vera*. *See Martinez*, No. 07 Civ. 6607 (VM), ECF No. 97, at 6.