No. _____

In The

Supreme Court of the United States

JOSE RICUARTE DIAZ HERRERA,

Petitioner,

v.

KEITH STANSELL, MARC GONSALVES, THOMAS HOWES, JUDITH G. JANIS, CHRISTOPHER T. JANIS, GREER C. JANIS, MICHAEL I. JANIS AND JONATHAN N. JANIS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Court should resolve the circuit split created by the Eleventh Circuit's holding that a motion under Fed. R. Civ. P. 60(b)(4) to vacate a default judgment as "void" must be filed within a "reasonable time" after the existence of the default judgment is discovered or is barred by the doctrine of laches.

II.

Whether a garnishment action that is "void" and a "nullity" under the express terms of a federal statute and implementing regulation is also "void" for purposes of relieving a party from a default judgment under Fed. R. Civ. P. 60(b)(4) and whether the Eleventh Circuit's opinion refusing to so hold conflicts with *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Jose Ricuarte Diaz Herrera was an intervenor in the district court and an appellant in the Eleventh Circuit. Mr. Herrera is an individual. Thus, there are no disclosures to be made by him pursuant to Supreme Court Rule 29.6.

Respondents were the individual plaintiffs in the district court and appellees in the Eleventh Circuit.

The Revolutionary Armed Forces of Colombia ("FARC") and numerous individual members of the FARC were defendants in the district court but did not participate in the district court or Eleventh Circuit proceedings.

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PETITION FOR WRIT OF CERTIORARI

Jose Ricuarte Diaz Herrera respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The Eleventh Circuit's opinion, App. 1-70, is reported at 771 F.3d 713. The relevant orders of the District Court, App. 71-100, are unreported.

STATEMENT OF JURISDICTION

The Eleventh Circuit issued its decision on October 16, 2014, and denied rehearing on January 5, 2015. App. 101-02. This Court has jurisdiction to review the Eleventh Circuit's decision under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be . . . deprived of . . . property, without due process of law. . . ." U.S. Const. amend. V.

Federal Rule of Civil Procedure 60(b)(4) provides, in pertinent part:

> **(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> . . .
>
> (4) the judgment is void. . . .
>
> **(c) Timing and Effect of the Motion.**
>
> **(1)** ***Timing*****.** A motion under Rule 60(b) must be made within a reasonable time – and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

21 U.S.C. § 1901 provides in pertinent part:

> **(a) Findings.** Congress makes the following findings:
>
> . . .
>
> (4) There is a national emergency resulting from the activities of international narcotics traffickers and their organizations that threatens the national security, foreign policy, and economy of the United States.
>
> **(b) Policy.** It shall be the policy of the United States to apply economic and other financial sanctions to significant foreign narcotics

traffickers and their organizations worldwide to protect the national security, foreign policy, and economy of the United States from the threat described in subsection (a)(4).

21 U.S.C. § 1904 provides in pertinent part:

(c) Prohibited transactions. Except to the extent provided in regulations,. . . . [or] licenses . . . issued pursuant to this title . . . the following transactions are prohibited:

> **(1)** Any transaction or dealing by a United States person, or within the United States, in property . . . of any significant foreign narcotics trafficker so. . . . designated by the Secretary of the Treasury. . . .

21 U.S.C. § 1905 provides, in pertinent part:

(a) In general. To carry out the purposes of this title [the Kingpin Act, 21 U.S.C. §§ 1901 *et seq.*], the Secretary of the Treasury may, under such regulations as he may prescribe, by means of . . . licenses, or otherwise –

> . . .
>
> **(2)** . . . nullify, void . . . any acquisition, . . . or transactions involving, any property in which any foreign country or national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States.
>
> . . .

> **(d) Rulemaking.** The Secretary of the Treasury may issue such other regulations . . . including regulations prescribing . . . licenses . . . as may be necessary for the exercise of the authorities granted by this title.

31 C.F.R. § 598.205 [governing the Kingpin Act], entitled "Effect of transfers violating the provisions of this part," provides in pertinent part:

> **(a)** Any transfer . . . that is in violation of any provision of this part or of any regulation, . . . or license issued pursuant to this part, and that involves any property . . . of a specially designated narcotics trafficker *is* null and void and shall not be the basis for the assertion or recognition of any interest in or right, remedy, power, or privilege with respect to such property or property interests.
>
> . . .
>
> **(e)** Unless licensed or authorized pursuant to this part, any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which . . . there existed an interest of a specially designated narcotics trafficker.

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STATEMENT OF THE CASE

A. Introduction

In a decision that diverges sharply from the established law in every other circuit, the Eleventh Circuit has granted district courts the discretion under Fed. R. Civ. P. Rule 60(b)(4) to refuse to vacate default judgments that are void – (1) for having been brought under inapplicable statutes, (2) without licenses required by law and (3) without giving the property owners notice or an opportunity to contest the confiscation of their assets – all because an innocent property owner delayed nine months after learning about a default judgment to file his Rule 60(b)(4) motion to vacate it. The Court should grant this Petition to answer the question created by the circuit conflict: Can an otherwise unenforceable order become enforceable against a party whose rights the order purports to extinguish because the party did not affirmatively move to enforce his rights within what a court views as a "reasonable time."

The Court should also grant the Petition because the Eleventh Circuit's holding – that garnishment actions that are statutorily rendered "void" and "nullities" by Executive Orders of the President of the United States and acts of Congress cannot be voided under Rule 60(b)(4) – undermines Presidential authority to address national emergencies and "touch[es] fundamentally upon the manner in which our Republic is to be governed." *Dames & Moore v. Regan*, 453 U.S. 654, 659 (1981).

B. The *Ex Parte*, Unlicensed Confiscation of Herrera's $2 Million

In 2009 the Stansell plaintiffs obtained a $318 million default judgment against the Revolutionary Armed Forces of Colombia ("FARC") under the Anti-Terrorism Act, 18 U.S.C. §§ 2333(a) and 2238. Thereafter, they invoked § 201(a) of the Terrorism Risk Insurance Act of 2002 ("TRIA"), codified as a "Note" to a provision in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1610, to garnish the assets of property owners who had had their assets temporarily "blocked" by the Office of Foreign Assets Control ("OFAC"), United States Department of the Treasury, as allegedly having some connection to the FARC. TRIA allows the victims of terrorist activities to satisfy judgments against "the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)." TRIA's definitional sections, however, limit its reach to assets blocked under two and only two statutes, the Trading With the Enemy Act ("TWEA"), 50 U.S.C. App. § 5(b), and the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701, *et seq*. Under its "plain" and "unambiguous" language, TRIA does not authorize the execution of judgments against assets blocked under the Kingpin Act, 21 U.S.C. §§ 1901-09. *Stansell v. FARC*, 740 F.3d 914, 915-16 (11th Cir. 2013) (per curiam) (hereinafter "*Stansell I*"). Moreover, the "text [of the Kingpin Act] and accompanying regulations . . . requires the procurement of a government-issued license before

private individuals may execute against assets frozen under the Act," *id.* at 916, and any unlicensed actions are expressly rendered "void" under both 21 U.S.C. § 1905(a)(2)(1999) and 31 C.F.R. § 598.205(a) and (e). *See* pp. 3-4 *supra*.[1]

On December 15, 2010, the Stansell plaintiffs commenced a TRIA-based garnishment proceeding against over $2 million owned by Petitioner Herrera, a prominent Colombian businessman. OFAC had placed Petitioner on its Special Designated National and Blocked Person List ("SDN List") solely under the Kingpin Act and his funds had been temporarily blocked by OFAC at a Wells Fargo bank in Tampa, Florida.[2] At no time did the Stansell plaintiffs or their counsel ever request, much less obtain, licenses from OFAC to do so. Nor did they ever serve Herrera with the garnishment pleadings or notify him in any way that the proceeding was taking place.[3] Indeed, the

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[1] The Kingpin Act was preceded in 1995 by Executive Order 12978, issued by President William J. Clinton, in part, under the authority of the IEEPA. *See* 60 Fed. Reg. 54579 (Oct. 24, 1995).

[2] When Petitioner learned that he had been placed on the SDN List, he immediately began contesting the designation under OFAC's administrative procedures (*see* 31 C.F.R. § 501.807) through properly licensed counsel in Bogota. R478:17; 478-1:12. He eventually prevailed but was not removed from the SDN List until 2013, long after his funds had been confiscated and turned over to the plaintiffs. *See* 78 Fed. Reg. 28700-01 (May 15, 2013).

[3] Petitioner's downtown Bogota, Colombia business address was listed by OFAC in its blocking designation. *See* 75 Fed. Reg. 27118 (May 13, 2010); 75 Fed. Reg. 38212, 38253 (July 10, 2010).

(Continued on following page)

Stansell plaintiffs convinced the district court to sign a proposed order, adopting verbatim all of their arguments and factual misrepresentations [4] and to hold that Petitioner was not "entitled to notice . . . or any other right to be heard." R255:9; 257, App. 90.

C. Herrera's Post-Judgment Motions

The Stansell plaintiffs obtained their *ex parte* default garnishment judgment against Petitioner's $2 million on January 18, 2011. R257, App. 89-91. No attempt was made to serve Petitioner, either by the plaintiffs or the district court. However, on January 26, 2011, a New York lawyer (who was only licensed to represent Petitioner to contest the OFAC designation), discovered the existence of the Tampa judgment from a lawyer for Wells Fargo bank. R513:4. Petitioner attempted to retain Florida counsel to represent him but they could not do so (or accept fees) until

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His address and his telephone number were also readily available from the City of Bogota telephone directory and from his internet web site. R478:3; 448-1: 10; 478-3.

[4] Among other things, the plaintiffs falsely stated that OFAC had "determined" that Petitioner was a "member" of the FARC and "an agency or instrumentality of the FARC." R251:3-4, 6, 10, 12. The proposed order later signed by the district court elevated these non-existent "determinations" into findings by the court. *See* App. 76, 81. The plaintiffs also falsely claimed that Petitioner had not challenged OFAC's designation (*see* R255:4-5.) when, in fact, he had been doing so for months. *See* n. 2 *supra*.

they obtained licenses from OFAC.[5] It took OFAC four months (until May 12, 2011) to issue the licenses. R478:17; 525-6. Approximately five months later, on October 31, 2011, Petitioner filed a motion to vacate the judgment under Rule 60(b)(4), arguing that it should be deemed "void" because it was deliberately and unconstitutionally obtained without notice or service of process, because TRIA did not apply to the Kingpin Act, and because neither plaintiffs nor their counsel were ever licensed by OFAC to garnish his assets. R478:11; 479:13.

In their response, the Stansell plaintiffs argued among other things that *Stansell I* could not be applied "retroactively" for some reason and that Petitioner's motions were untimely because he waited a total of nine months to file them after learning about the judgment from a third party. R493. The district court stayed the matter pending the outcome in *Stansell I*, where the applicability of TRIA to assets blocked under the Kingpin Act was already at issue.

After *Stansell I* held that TRIA could not be used to garnish assets blocked under the Kingpin Act and

[5] In a parallel TRIA confiscation action filed by the same plaintiffs against another innocent property owner who, unlike Petitioner, discovered the existence of the proceeding in time to participate in it, the district court adopted the plaintiffs' argument that the property owner was "not even permitted to engage in this proceeding related to these funds without obtaining a specific license from OFAC authorizing such legal representation in an otherwise prohibited transaction with blocked funds." R271:3 (citing 31 C.F.R. §§ 598.203(a) and (e)).

that, in any event, licenses were required, *see* p. 4 *supra*, Petitioner renewed his motion (R573:4-5) and the plaintiffs renewed their laches defense. R579. On February 26, 2013, the district court denied Petitioner any relief, adopting the plaintiffs' laches argument, finding that Herrera had "waived his right to challenge" the judgment because he "sat on his rights" for nine months after being tipped off about the existence of the proceedings shortly after the judgment was entered. R614, App. 94. The district court ignored the fact that much of the delay was due to counsels' need to obtain proper licenses from OFAC as well as the deliberate nature of plaintiffs' scheme to conceal the existence of the proceedings from Petitioner. Nor did the court remotely hint that if Petitioner had acted any sooner, it would have made any difference, since the court did not budge from its earlier holding that he was not "entitled to notice . . . or any other right to be heard." R257, App. 90. The district court also adopted plaintiffs' retroactivity theory, holding that they could not have foreseen that the Eleventh Circuit would construe TRIA according to its plain meaning. *Id.*

D. The Eleventh Circuit's Opinion

On appeal, the Eleventh Circuit agreed with Petitioner that he had a due process right to notice, service of process and an opportunity to be heard "before execution." App. 25. The court also found that "Plaintiffs initiated their collection efforts in each instance *ex parte*, without any direct notice" to Petitioner. App.

12. The court nonetheless refused to vacate the judgment as "void" under Rule 60(b)(4), holding that Petitioner had "waived his right to object to any defects in the service of process or to any denial of his right to be heard" by "knowingly [sitting] on his right for nine months before filing anything at all with the district court." App. 42-43.[6] With respect to the failure of the Stansell plaintiffs to obtain a license, the court held *ipse dixit* that "[i]t is not sufficient to cite a regulation that makes use of the word 'void,'" and that, in any event, the voidness penalty for violating the Kingpin Act's licensing requirement was not a "'fundamental infirmity'" under Rule 60(b)(4). App. 44, quoting *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010).

REASONS FOR GRANTING THE PETITION

Rule 60(b)(4) permits a party to challenge a default judgment if that judgment is "void." *Klapprott v. United States*, 335 U.S. 601, 609 (1949). As this Court most recently acknowledged, while relief under Rule 60(b)(4) is "rare," relief is required where a judgment

[6] At one point, the Eleventh Circuit "[a]ssume[d]" that the first four months of delay were excusable due to OFAC's licensing requirement but then continued to define the delay as the full nine months, speculating that Petitioner could have found an attorney who would have been willing to (unlawfully) seek relief for him immediately without a license or being paid to do so. App. 43 & n. 17.

is void either because it "is premised . . . on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010). A judgment must also be considered void where a court entered "a decree which is not within the powers granted to it by the law," *United States v. Walker*, 109 U.S. 258, 265-67 (1883), or where a federal statute and implementing regulation explicitly render unlicensed proceedings involving blocked property "void." *See Dames & Moore v. Regan*, 453 U.S. 654 (1981) (nullifying attachments of Iranian assets based on an executive order entered pursuant to the IEEPA). The judgment confiscating Petitioner's property was void for all four reasons.

First, the district court lacked in *personam jurisdiction* by deliberately never notifying Petitioner about the existence of the garnishment proceeding.[7]

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[7] *See Omni Capital Int'l Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) ("Before a federal court may exercise personal jurisdiction over a defendant the procedural requirement of service of summons must be satisfied."); *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84 (1988) (judgment obtained without any service of process is "constitutionally infirm"); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799-800 (1983) ("Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding. . . ."); *Ins. Corp. of Ir., Ltd. v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("The requirement that a court have personal jurisdiction flows . . . from the Due Process Clause. . . . It represents a restriction on judicial power . . . as a matter of

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Second, Petitioner's right to due process was unquestionably violated by garnishing his property without affording him notice or an opportunity to be heard at any point in the process.[8]

Third, since "the law" at issue, TRIA, did not authorize its use against funds blocked under the Kingpin Act, the district court's rulings were "not within the powers granted to it by the law." *Walker*, 109 U.S. at 265-67.

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individual liberty.") (footnote omitted); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest").

[8] The Court's garnishment and attachment cases require, as the "general rule," that due process requires "predeprivation notice and hearing" except in "extraordinary situations." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993). Even then, however, due process requires at least *post*-deprivation notice and an opportunity to be heard prior to final judgment when the property is finally awarded to a creditor. *See, e.g., Mitchell v. W.T. Grant Co.,* 416 U.S. 600, 606, 610 (1974); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606-07 (1975). An even stronger rule applies when there is no underlying lawsuit establishing the debt, *i.e.*, a pre-judgment attachment. *See Connecticut v. Doehr,* 501 U.S. 1, 19, 20 (1991) (holding that Connecticut statute violated due process even though it provided for an expeditious post-attachment adversary hearing and double damages for actions started without probable cause because unlike *Mitchell* the plaintiff "had no existing interest in Doehr's real estate when he sought the attachment"). *See also Fuentes v. Shevin*, 407 U.S. 67 (1972) (before pre-judgment replevin of goods); *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337, 342 (1969) (before pre-judgment garnishment of wages).

Fourth, both the Kingpin Act itself and OFAC's Kingpin Act regulations expressly render unlicensed attempts to garnish Kingpin Act-blocked assets "void." *See* p. 4 *supra*.

Creating a conflict with every other circuit, the Eleventh Circuit's ruling abandoned the well-established principle that a judgment that is void *ab initio* due to lack of constitutionally required notice and an opportunity to be heard is a nullity that can *never* be enforced against a party who did not receive notice. Under this principle, a void judgment cannot acquire validity because of laches on the part of the affected party. But that is exactly the consequence of the Eleventh Circuit's ruling below. This case thus presents a fundamental and critically important question about the consequences of failing to provide – deliberately in this case – the most basic requirements of due process: Can an otherwise unenforceable default judgment become enforceable against a party whose property rights the order purports to extinguish because the party did not affirmatively seek relief fast enough after accidentally discovering the existence of the judgment.

The Court should also grant the Petition to prevent the evisceration of the President's authority through executive orders and Congress's authority through the enactment of statutes to "void" unauthorized transactions and lawsuits involving "blocked" assets. The Eleventh Circuit's denigration of the "use of the word 'void'" in OFAC's Kingpin Act regulations ignored both its foundation in an act of Congress,

§ 1905(a)(2) of the Kingpin Act, and the identical language in both the TWEA and the IEEPA. The Eleventh Circuit's reasoning would effectively gut the licensing enforcement mechanism from all three statutes.

I. THE ELEVENTH CIRCUIT'S REQUIREMENT THAT A PARTY MUST MOVE TO VACATE A "VOID" DEFAULT JUDGMENT UNDER FED. R. CIV. P. 60(b)(4) WITHIN A "REASONABLE TIME" CONFLICTS WITH DECADES OF UNIFORM CIRCUIT PRECEDENT

A. Rule 60(b)(4) Motions Are Not Subject to Time Limitations

Although Rule 60(c)(1) requires that a motion seeking relief from judgment under Rule 60(b) must be brought "within a reasonable time," before the Eleventh Circuit's ruling herein, every federal circuit, every state court with rules modeled on Rule 60(b) and the most respected treatises were in lockstep agreement: A judgment that is void *ab initio* due to the lack of service of process, personal jurisdiction and/or constitutionality required for due process is a "legal nullity," *Espinosa*, 559 U.S. at 269 (citation omitted), and cannot be revived through the passage of time. *See, e.g., Klapprott*, 335 U.S. at 609 (a court may "set aside a 'void judgment' without regard to the limitation of a year applicable to motions to set aside on some other grounds"); *"R" Best Produce, Inc. v. DiSapio*, 540 F.3d 115, 123-24 (2d Cir. 2008) ("In fact,

it has been oft-stated that, for all intents and purposes, a motion to vacate a default judgment as void 'may be made at any time.'") (citation omitted); *Philos Techs., Inc. v. Philos & D, Inc.*, 645 F.3d 851, 857 (7th Cir. 2011) (defendant who has not personally appeared may bring collateral challenge under Rule 60(b)(4) at any time); *Robinson Eng'g Co. Ltd. Pension Plan & Trust v. George*, 223 F.3d 445, 453-54 (7th Cir. 2000) (reversing the district court's denial of a Rule 60(b)(4) motion as untimely, holding that a litigant's delay in moving to vacate a default judgment was irrelevant); *United States v. One Toshiba Color TV*, 213 F.3d 147, 157 (3d Cir. 2000) ("[N]o passage of time can transmute a nullity into a binding judgment."); *Carter v. Fenner*, 136 F.3d 1000, 1006 (5th Cir. 1998) (holding that the "'reasonable time' limit of Rule 60(b) cannot be enforced with regard to this class of motion"); *Bludworth Bond Shipyard, Inc. v. M/V Caribbean Wind,* 841 F.2d 646, 649 n. 6 (5th Cir. 1988) (observing that "no court has denied relief under Rule 60(b)(4) because of delay"); *Rodd v. Region Constr. Co.,* 783 F.2d 89, 91 (7th Cir. 1986) ("The reasonable time criterion of Rule 60(b) as it relates to void judgments means no time limit because a void judgment is no judgment at all."); *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 224 n. 9 (10th Cir. 1979) ("[I]f judgment is void, it is a nullity from the outset."); *Williams v. Capital Transit Co.,* 215 F.2d 487, 490 (D.C. Cir. 1954) ("The lack of jurisdiction of the court cannot be cured by the running of months or even years where the court had no jurisdiction to proceed against [defendant] in the first place."). *Accord* 11 C.

Wright, *et al.*, Federal Practice and Procedure § 2862, p. 331 (4th ed. 2009); 12-60 Moore's Federal Practice – Civil § 60.44[5][c] (Matthew Bender 3d ed. 2003).[9] Indeed, courts have vacated void judgments up to 30 years old. *See Crosby v. Bradstreet Co.*, 312 F.2d 483 (2d Cir.), *cert. denied,* 373 U.S. 911 (1963); *see also Battle v. Liberty Nat'l Life Ins. Co.,* 974 F.2d 1279 (11th Cir. 1992) (per curiam), *cert. denied,* 509 U.S. 906 (1993) (affirming vacatur 13 years after the judgment); *Taft v. Donellan Jerome, Inc.,* 407 F.2d 807, 808 (7th Cir. 1969) (same).

B. The Limited Effects of "Actual Notice" of Legal Proceedings Acquired *Prior* to the Entry of a Default Judgment

Where service of process is materially defective, a party's "actual knowledge" of the lawsuit is irrelevant. Prior to the instant case, that hornbook principle was likewise uniformly accepted, even within the Eleventh Circuit.[10] The long-standing rule is that a

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[9] *See also Precision Etchings & Findings, Inc. v. LGP Gem, Ltd.,* 953 F.2d 21, 23 (1st Cir. 1992); *Briley v. Hidalgo*, 981 F.2d 246, 249 (5th Cir. 1993); *In re Center Wholesale*, 759 F.2d 1440, 1447 (9th Cir. 1985); *Misco Leasing, Inc. v. Vaughn*, 450 F.2d 257 (10th Cir. 1971); *Austin v. Smith*, 312 F.2d 337, 343 (D.C. Cir. 1962).

[10] *See, e.g., Albra v. Advan, Inc.*, 490 F.3d 826, 829 (11th Cir. 2007) (affirming dismissal of complaint where plaintiff only mailed a copy of the summons without attaching the complaint, reiterating that "[a] defendant's actual notice is not sufficient to cure defectively executed service"); *LSJ Inv. Co. v. O.L.D., Inc.*, 167 F.3d 320, 322 (6th Cir. 1998) (service insufficient under Rule

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party "who knows of an action" *prior* to the entry of a default judgment but believes service was defective "generally has an election." *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1547 (D.C. Cir. 1987). The party may either appear in the trial court and move to dismiss under Rule 12(b)(2) or may decline to appear, allow the entry of a default judgment, and later move under Rule 60(b)(4) for relief from the judgment as void for lack of jurisdiction. *Id.* The Federal Rules express no preference between the two. This Court has unambiguously held that "[a] defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." *Ins. Corp. of Ir., Ltd. v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 706 (1982); *see also Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931) ("[defendant] had the election not to appear at all. If, in the absence of appearance, the court had proceeded to judgment . . . [defendant] could have raised and tried out the issue in the present action, because it would never have had its

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4(d) despite execution of return receipt for certified mail by person employed at address listed for corporation and one of its defendant officers); *Mid-Continent Wood Prods., Inc. v. Harris*, 936 F.2d 297, 301 (7th Cir. 1991) ("it is well recognized that a 'defendant's actual notice of the litigation . . . is insufficient to satisfy Rule 4's requirements") (citation omitted); *Schnabel v. Wells*, 922 F.2d 726, 727-28 (11th Cir. 1991) (Wells' "actual notice of the lawsuit" through the mail does not cure lack of personal service requirement).

day in court with respect to jurisdiction"). *See, e.g., Norex Petroleum, Ltd. v. Access Indus.*, 416 F.3d 146, 161 (2d Cir. 2005) ("even if Norex was aware of the Know-How litigation in Russia, it was 'free to ignore' those proceedings if not properly served, . . . and could not be faulted by an American court for doing so."), *cert. denied*, 547 U.S. 1175 (2006). *See generally National Dev. Co. v. Triad Holding Corp.*, 930 F.2d 253, 256 (2d Cir. 1991) ("we reject the notion that 'actual notice' suffices to cure a void service . . . ").

When a party with actual notice of a proceeding opts to accept the default and challenge the judgment after-the-fact, there are only two possible ramifications. First, the defaulting party may be required to bear the burden of proving that the notice received was legally defective.[11] Second, the defaulting party may also need to prove that the notice received, while technically defective, was not in "substantial compliance" with Rule 4. But where the "actual

[11] *See, e.g., Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175 (D.C. Cir. 2013); *DiSapio*, 540 F.3d at 126; *SEC v. Internet Solutions for Bus., Inc.*, 509 F.3d 1161, 1163 (9th Cir. 2007); *Philos Techs., Inc. v. Philos & D, Inc.*, 645 F.3d 851, 857 (7th Cir. 2011); *Be2 LLC v. Ivanov*, 642 F.3d 555, 557 (7th Cir. 2011); *Burda Media, Inv. v. Viertel*, 417 F.3d 292, 299 (2d Cir. 2005); *Bally Export Corp. v. Balicar, Ltd.*, 804 F.2d 398, 401 (7th Cir. 1986); *see generally* Comment: *Allocating the Burden of Proof in Rule 60(b)(4) Motions to Vacate a Default Judgment For Lack of Jurisdiction*, 68 U. CHI. L. REV. 521 (Spring 2001).

notice" did not at least "substantially comply" with Rule 4, actual notice is irrelevant.[12]

This Court's decision in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367 (2010), is consistent with these principles. In that case, a creditor, United Student Aid Funds, Inc., received proper service of a complaint and summons under the applicable Bankruptcy Rules. 559 U.S. at 265. With full notice through service of process, United "did not object to the plan's proposed discharge" of the student "without a determination of undue hardship" and likewise did not object to the student's "failure to initiate an adversary proceeding." *Id.* The only "process" that United did not receive was an adversary

[12] *See, e.g., Sanderford v. Prudential Ins. Co.*, 902 F.2d 897, 900 (11th Cir. 1990) ("if a summons is in substantial compliance with Rule 4(b), F.R.Civ.P., and a defendant has not been prejudiced by the defect in the summons, the defendant must raise his or her Rule 12(b)(4), F.R.Civ.P., defense by motion or in a responsive pleading, or risk having waived that defense if he or she waits until final default judgment has been entered"); *Precision Etchings & Findings, Inc. v. LGP Gem, Ltd.*, 953 F.2d 21 (1st Cir. 1992) ("'minor' formal defects are excusable provided actual notice has been accomplished"); *Daly-Murphy v. Winston*, 837 F.2d 348, 355 (9th Cir. 1987) (requiring "substantial compliance" with Rule 4); *Khaldei v. Kaspiev*, No. 10 Civ. 8328 (JFK), 2014 U.S. Dist. LEXIS 78676, at *17, 2014 WL 2575774 (S.D.N.Y. June 9, 2014) (a defect "will not destroy otherwise-valid service where the serving party has substantially complied with the rule. . . ."); *Klein v. United States*, 278 F.R.D. 94 (W.D.N.Y. 2011) (vacating judgment, despite party's knowledge that government had been trying to serve him, where attempts did not substantially comply with Rule 4); *Zuckerman v. McCulley*, 7 F.R.D. 739, 741 (E.D. Mo. 1947) (same).

hearing that it had knowingly waived three years earlier, *i.e.*, while the proceedings were still in progress. *Id.* at 274. In refusing to vacate the judgment under Rule 60(b)(4), the Court reasoned that United plainly received due process, because it had "actual notice" of the proceedings by having been served with the student's original court filings, had even filed a claim, and later also received the Bankruptcy Court's order affirming the discharge.

The type of notice Herrera received here was neither prior to the entry of the default judgment nor in "substantial compliance" with Rule 4. Indeed, the plaintiffs and the district court tried to keep Herrera in the dark deliberately and he only got wind of the litigation through sheer happenstance.

C. If "Actual Notice" of a Legal Proceeding Is Not Acquired Until *After* the Entry of a Default Judgment, Laches Does Not Apply and a Rule 60(b)(4) Motion May Be Brought at Any Time

Where, as here, the defaulting party does not discover the existence of the proceeding until *after* the judgment has been entered, the default "any time" rule applies. No court, other than the Eleventh Circuit below, has applied laches to bar relief. The circuit conflict created by the Eleventh Circuit's opinion could not be more stark.

For example, in *Bludworth Bond Shipyard, Inc. v. M/V Caribbean Wind*, 841 F.2d 646 (5th Cir. 1988)

(per curiam), defendant Rolf Westerstrom sought relief from a default judgment entered in favor of plaintiff Bludworth Bond Shipyard. Bludworth sued Westerstrom and others to recover an unpaid balance for repairs on a vessel docked in its Houston, Texas shipyard. Bludworth attempted to serve Westerstrom in Florida by certified mail under the Texas long-arm statute. When the envelopes were returned "Moved, Left No Address" in September 1984, the district court entered a default judgment in Bludworth's favor. Ten months later, in July 1985, Bludworth served Westerstrom with a notice for his deposition in aid of execution of the judgment. Westerstrom acknowledged having been served with the notice but did not move to set aside the default judgment (arguing that the attempted mail service was defective) until April 29, 1986, some *nine months* later. The district court denied the motion and on appeal Bludworth argued that Westerstrom's motion was untimely. However, the Fifth Circuit disagreed and reversed, observing that "there seems to be universal agreement that laches cannot cure a void judgment, and no court has denied relief under Rule 60(b)(4) because of delay. . . ." 841 F.2d at 649, n. 6. *See also Briley v. Hidalgo*, 981 F.2d 246-49 (5th Cir. 1993) ("A void judgment cannot acquire validity because of *laches* on the part of the debtor.").

The en banc Third Circuit reached the same conclusion in *United States v. One Toshiba Color TV*, 213 F.3d 147, 157-58 (3d Cir. 2000) (en banc). In that case, the Third Circuit consolidated two forfeiture appeals

brought by a prisoner, Reginald McGlory. Only the second appeal, involving the government's effort to forfeit McGlory's Toshiba television and other electronic equipment, is relevant here. It was undisputed that the government made no attempt to serve McGlory in prison with the forfeiture complaint. A default judgment was entered and over four years went by before McGlory filed a motion to vacate it under Rule 60(b)(4) and *four months* after McGlory conceded that he learned about the proceeding. The government admitted the due process violation but convinced the district court to deny relief on the basis of laches. The en banc Third Circuit unanimously "disagree[d]" and reversed. 213 F.3d at 156.[13] In so ruling, the Third Circuit agreed with the "nearly overwhelming authority . . . that there are no time limits with regards to a challenge to a void judgment because of its status as a nullity; thus laches is no bar to recourse to Rule 60(b)(4)." *Id.* at 157. Any prejudice to the government from the delay, the Third Circuit believed, was "best dealt with outside of the Rule 60(b) context." *Id.* at 157. The delay, the court posited, might be relevant after the judgment is vacated when McGlory would then have to file a motion for return of the property. "McGlory would have to act within the confines of whatever legal framework surrounds

[13] Judge, now Justice, Alito filed a dissent from the Third Circuit's ruling in the first appeal (concerning the propriety of service by mail to prisoners) but expressly "joined" the portion of the opinion discussed in the text above. *Id.* at 159.

the legal or equitable remedy he will elect to pursue." *Id.* at 158. Conversely, the Third Circuit noted that if McGlory sought relief through "doctrines of equity, the District Court will also have to consider whether the party asserting the defense of laches has clean hands." *Id.* at 159 (citation omitted). The Third Circuit concluded by reiterating that "as we have held, laches analysis does not apply" to a motion brought under Rule 60(b)(4). *Id.*

Later that same year, the Seventh Circuit agreed. In *Robinson Eng'g Co. Ltd. Pension Plan & Trust v. George*, 223 F.3d 445 (7th Cir. 2000), plaintiff Robinson filed a complaint in February 1988, alleging that Mark George, Timothy McDonald and Canam Financial Group, Ltd. had defrauded Robinson of nearly $1 million through violations of the RICO statute, 18 U.S.C. §§ 1961-68, and the federal securities laws. The court issued a summons for George and a process server allegedly left the summons and the complaint with an individual residing at George's apartment building in Calgary, Canada. When George did not defend the suit, the court entered a default judgment against him. Some 10 years later, on March 18, 1998, George moved to vacate the judgment under Rule 60(b)(4), claiming that he was never served but conceding that he became aware of the judgment in November 1997. 223 F.3d at 448. He also submitted an affidavit disputing the accuracy of the process server's account.

The district court denied the motion and George appealed. The Seventh Circuit reversed and

remanded for the district court to resolved the factual dispute about the manner of service, despite the fact that George "waited five months" – precisely the same unexcused time period herein[14] – "after allegedly learning about the default judgment [in 1997] before filing his motion. . . ." *Id.* at 453. The Seventh Circuit correctly reasoned that since George was proceeding under Rule 60(b)(4), "the fact that George found out about the judgment in November 1997 but did not file his motion to vacate until March 1998 is irrelevant." *Id. See also Pacurar v. Hernly*, 611 F.2d 179, 180-81 (7th Cir. 1979) (permitting a challenge by a defendant 15 months after he became aware of a default judgment entered against him).

The Eleventh Circuit's opinion below is also in conflict with its own prior precedents. In *Hertz Corp. v. Alamo Rent-A-Car*, 16 F.3d 1126 (11th Cir. 1994), Hertz sued its competitor rent-a-car companies under the Lanham Act, 15 U.S.C. § 1125(a), and the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201, *et seq.*, claiming that the companies were not complying with a Miami Dade County ordinance. The district court dismissed the complaint with leave to amend but Hertz failed to do so in time and in March 1991 the court dismissed the complaint with prejudice. In April 1991, Alamo sought attorney's fees, a motion Hertz contested, thereby implicitly

[14] As previously discussed, the Eleventh Circuit "assumed" that the initial four months of Herrera's delay was excusable due to OFAC's licensing requirement. *See* p. 11, n. 6 *supra*.

acknowledging that it was aware of the default but did not file a Rule 60(b) motion for relief until December 1991, approximately eight months after being served with Alamo's attorney's fees motion. The district court denied the motion and, on appeal, Alamo argued that Hertz's Rule 60(b) motion was untimely. However, the Eleventh Circuit disagreed, holding that "the principle of laches does not operate as a bar to a Rule 60(b)(4) motion," citing Wright & Miller, Moore's Federal Practice and cases from the First, Fifth, Seventh, Tenth and D.C. Circuits. 16 F.3d at 1129-30 (citations omitted). The *Hertz* court too found "no case law to the contrary." *Id.* at 1130.[15] Nor has counsel – in either the federal courts or state courts with rules modeled after Rule 60(b)(4).[16]

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[15] Although Herrera sought rehearing en banc, expressly pointing out the conflict between the opinion below and *Hertz*, his motion garnered no votes.

[16] Federal cases include: *Orner v. Shalala*, 30 F.3d 1307, 1310 (10th Cir. 1994) (six month delay in party's moving to vacate judgment after learning about it no bar to Rule 60(b)(4) relief because a " 'void judgment[ ] is not subject to any time limitation' ") (citation omitted); *Owens-Corning Fiberglas Corp. v. Ctr. Wholesale, Inc.* (*In re Ctr. Wholesale, Inc.*), 759 F.2d 1440, 1448 (9th Cir. 1985) ("a void judgment cannot acquire validity because of laches on the part of the judgment debtor. . . . Therefore, [the debtor's] delay in bringing its Rule 60(b)(4) motion is irrelevant. . . ."); *Misco Leasing, Inc. v. Vaughn*, 450 F.2d 257, 260 (10th Cir. 1971) ("a void judgment acquires no validity as the result of laches on the part of the adverse party") (citations omitted); *Austin v. Smith*, 312 F.2d 337, 343 (D.C. Cir. 1962) (vacating four-year-old default judgment against garnishee for lack of proper service, despite the fact that garnishee first

(Continued on following page)

learned about the default judgment in 1960 but did not file his Rule 60(b)(4) motion until March 1961, holding that "the Rule places no time limit on an attack upon a void judgment, nor can such a judgment acquire validity because of laches on the part of him who applies for relief from it"); *Klein v. United States*, 278 F.R.D. 94, 96-97 (W.D.N.Y. 2011) (two-year delay in filing motion to vacate after party "became aware of the Government's attempt to serve him" irrelevant); *Orix Fin. Servs. v. Phipps*, No. 91 Cv. 2523 (RPP), 2009 U.S. Dist. LEXIS 71771, at *10, 2009 WL 2486012 (S.D.N.Y. Aug. 14, 2009) (rejecting argument that the defendant was "equitably estopped from raising a Rule 60(b)(4) motion because seventeen years elapsed between the time of the default judgment and the time of his motion, during which time Defendant knew about both the Summons and Complaint . . ." because " 'actual notice' is insufficient to cure improper service") (citations omitted); *Kao Hwa Shipping Co. v. China Steel Corp.*, 816 F. Supp. 910, 913 (S.D.N.Y. 1993) (doctrine of laches, i.e., "that the opposing party has slept on its rights, is not a valid defense to a motion made under Rule 60(b)(4)"); *Triad Energy Corp. v. McNell*, 110 F.R.D. 382, 385 (S.D.N.Y. 1986) (same).

State cases include: *Jones v. Hersh*, 845 A.2d 541, 545-46 (D.C. App. 2004) (holding that a default judgment is void " 'even though the defendant has actual notice of the action' " and that a void judgment cannot "acquire validity because of laches on the part of him who applies for relief from it") (citations omitted); *Inman v. Inman*, 67 P.3d 655, 659 (Alaska 2003) (vacating 17-year-old judgment for lack of personal jurisdiction and rejecting laches defense); *Estate of Hutchins v. Fargo*, 188 Or. App. 462, 468, 72 P.3d 638, 641 (2003) (seven year delay in moving to vacate default judgment for lack of personal jurisdiction irrelevant; no requirement that Mills file his motion "within a reasonable time after learning of the judgment"); *McBrayer v. Hokes Bluff Auto Parts*, 685 So.2d 763, 766-67 (Ala. Civ. App. 1996) (although McBrayer became aware of default judgment in December 1993 but did not file his Rule 60(b)(4) motion until May 1995, motion was "within a reasonable time," holding that "the doctrine of laches will not operate to deny McBrayer relief from the default judgment"); *Barkley v. Toland*, 7 Kan. App. 2d 625,

(Continued on following page)

In short, the Eleventh Circuit's opinion is not only fundamentally at odds with this Court's due process-based service-of-process cases (flowing from *Mullane*) and garnishment/attachment cases (flowing from *Sniadach*) but it also directly conflicts with decades of jurisprudence nationwide that has heretofore universally rejected both a timeliness requirement and a laches defense in Rule 60(b)(4) litigation over void judgments. The net result is that a property owner's mere nine (or five) month delay between the entry and discovery of a patently unconstitutional default judgment and the filing of a Rule 60(b)(4) motion to vacate it has allowed the Stansell plaintiffs to retain the fruits of what appears to have been nothing short of a $2 million fraud – the deliberate concealment of a garnishment proceeding brought without the requisite licenses from OFAC and absent any statutory authority. This Court's review is needed to ensure the continued availability of relief from such frauds through Rule 60(b)(4).

628-29, 646 P.2d 1124, 1127-28 (1982) (vacating default judgment, despite delay of two months since judgment was entered and three months since party learned about the lawsuit, and rejecting argument that a void judgment could be sustained because of laches).

II. THE ELEVENTH CIRCUIT HAS EVISCERATED THE AUTHORITY OF THE PRESIDENT AND CONGRESS TO "VOID" TRANSACTIONS WITH FOREIGN COUNTRIES, CRIMINAL GANGS AND TERRORIST ORGANIZATIONS THROUGH LICENSING REQUIREMENTS

The Eleventh Circuit has held that a judgment that is "void" by operation of a duly promulgated administrative regulation cannot be vacated as "void" under Rule 60(b)(4), because that type of "voidness" is not a "'fundamental infirmity'" as that term was allegedly used by this Court in *Espinosa*. In so ruling, the Eleventh Circuit inexplicably ignored the explicit *statutory* basis for "nullify[ing]" and "void[ing]" transactions and proceedings conducted in violation of the licensing requirement – 21 U.S.C. § 1905(a)(2). *See* p. 3 *supra*. That provision was derived from virtually identical language in both the TWEA, 50 U.S.C. App. § 5(b)(1),[17] and the IEEPA, 50 U.S.C.

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[17] The TWEA provides in pertinent part:

> [T]he President may, through any agency that he may designate . . . by means of . . . licenses, or otherwise –
>
> . . .
>
> (B) investigate, . . . *nullify, void*, . . . any acquisition, . . . transfer, . . . or dealing in, or exercising any right, power or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States.

(Emphasis added).

§ 1702(a)(1)(B).[18] The Eleventh Circuit has thus not only undermined Congress's authority to protect assets blocked under the *Kingpin Act* from unauthorized appropriation by private litigants but has similarly jeopardized Congress's authority to protect assets blocked under the TWEA and IEEPA. And, OFAC's Kingpin Act regulations that the Eleventh Circuit dismissed as insignificant are virtually identical to OFAC's licensing regulations governing all foreign embargoes and sanction regimes, including those directed against the *foreign governments*, such as Iran (31 C.F.R. §§ 535.203(e) and 560.212(e)), Cuba (31 C.F.R. § 515.203(e)), Syria (31 C.F.R. § 542.202(e)), Ukraine (31 C.F.R. § 589.202(e)), and North Korea (31 C.F.R. § 510.202(e)),[19] *foreign criminal organizations*,

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[18] The IEEPA provides in pertinent part:

> **(a)** In general.
>
> (1) . . . [T]he President may, under such regulations as he may prescribe, by means of . . . licenses, or otherwise –
>
> . . .
>
> **(B)** investigate . . . *nullify, void*, . . . any acquisition, . . . transfer . . . or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States; . . . .

(Emphasis added.)

[19] A non-exhaustive list of similar regulations includes: Somalia (31 C.F.R. § 551.202(e)), Yemen (31 C.F.R. § 552.202(e)), Burma (31 C.F.R. § 537.207(e)), Zimbabwe (31 C.F.R. § 541.202(e)), Darfur (31 C.F.R. § 546.202(e)), Congo (31 C.F.R. § 547.202(e)), and Belarus (31 C.F.R. § 548.202(e)).

including Narcotics Traffickers (31 C.F.R. § 536.202(e)) and Transnational Criminal Organizations (31 C.F.R. § 590.202(e)), *foreign terrorist organizations*, including Global Terrorists (31 C.F.R. § 594.202(e)), Terrorism (31 C.F.R. § 595.202(e)), and Foreign Terrorist Organizations (31 C.F.R. § 597.202(e)), and transactions involving Highly Enriched Uranium (31 C.F.R. § 540.202(a)).

In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), this Court enforced President Carter's use of the IEEPA and the OFAC's licensing regulations governing sanctions against Iran to void attachments and liens that private parties had secured against Iranian assets. In that case, President Carter negotiated the release of the Iranian hostages and, in return, agreed to return certain assets that had been blocked by OFAC under the authority of the IEEPA and which had been attached by private parties to execute their judgments against Iran. The "null and void" clause of 31 C.F.R. § 535.203(e) – identical to the Kingpin Act regulation demeaned by the Eleventh Circuit – was used to revoke prior licenses and "'nullify all attachments and judgments obtained'" prior to the agreement. 453 U.S. at 665. The district court in *Dames* therefore "vacated . . . all prejudgment attachments obtained against the Iranian defendants." *Id.* at 666. This Court affirmed, explaining the importance of this authority:

> This Court has previously recognized that the congressional purpose in authorizing blocking orders is "to put control of foreign

> assets in the hands of the President. . . ." *Propper v. Clark*, 337 U.S. 472, 493 (1949). Such orders permit the President to maintain the foreign assets at his disposal for use in negotiating the resolution of a declared national emergency. The frozen assets serve as a "bargaining chip" to be used by the President when dealing with a hostile country. Accordingly, it is difficult to accept petitioner's argument because the practical effect of it is to allow individual claimants throughout the country to minimize or wholly eliminate this "bargaining chip" through attachments, garnishments, or similar encumbrances on property. Neither the purpose the [IEEPA] was enacted to serve nor its plain language supports such a result.

Id. at 673-74.

In Executive Order 12978, President Clinton declared that foreign narcotics traffickers "constitute[d] an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States" and on that basis – also invoking his authority under the IEEPA – authorized the Secretary of the Treasury to block and issue licenses regarding their assets. *See* 60 Fed. Reg. 54579 (Oct. 24, 1995). Four years later, Congress made similar findings in enacting the Kingpin Act. *See* 21 U.S.C. § 1901. Congress then included a provision in the Act, § 1905(a)(2), authorizing the nullification and voiding of transactions which was modeled on the same provision of the IEEPA (§ 1702) cited by this Court in *Dames* as

authority for voiding attachments and garnishments. In disregarding *Dames*, the Eleventh Circuit has "allow[ed] individual claimants . . . to minimize or wholly eliminate" Congressional authority to address a national emergency "through attachments, garnishments, or similar encumbrances on property" accomplished without licenses. Nothing in the dicta from *Espinosa* cited by the Eleventh Circuit remotely suggested that this Court was retreating from its views in *Dames*. To the contrary, the Court has voided even state statutes that conflict with federal sanction regimes. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374 (2000) (holding Massachusetts statute preempted by a "federal act" that provided the President "with flexible and effective authority over economic sanctions against Burma").

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-11339

D.C. Docket No. 8:09-cv-02308-RAL-MAP

KEITH STANSELL,
MARC GONSALVES,
THOMAS HOWES,
JUDITH G. JANIS,
CHRISTOPHER T. JANIS,
GREER C. JANIS,
MICHAEL I. JANIS,
JONATHAN N. JANIS,

Plaintiffs-Appellees,

versus

REVOLUTIONARY ARMED
FORCES OF COLUMBIA [sic], (FARC), et al.,

Defendants,

JOSE RICUARTE DIAZ HERRERA,

Claimant-Appellant,

WACHOVIA BANK,
a Division of Wells Fargo Bank, N.A., et al.,

Garnishees,

MERCURIO INTERNATIONAL S.A., et al.,

Claimants.

No. 13-11959

D.C. Docket No. 8:09-cv-02308-RAL-MAP

KEITH STANSELL,
MARC GONSALVES,
THOMAS HOWES,
JUDITH G. JANIS,
CHRISTOPHER T. JANIS,
MICHAEL I. JANIS,
GREER C. JANIS,
JONATHAN N. JANIS,

Plaintiffs-Appellees,

versus

REVOLUTIONARY ARMED
FORCES OF COLUMBIA [sic] (FARC), et al.,

Defendants,

CARMEN SIMAN,
ARMANDO JAAR,
RICARDO JAAR,
MOISES SAIEH,
CARLOS SAIEH,
ABDALA SAIEH,
JAQUELINE SAIEH,
U.S. Citizen Beneficial Owner of Brunello Ltd. Trust,
C. W. SALMAN PARTNERS,
SALMAN CORAL WAY PARTNERS,
CONFECCIONES LORD S.A.,
ALM INVESTMENT FLORIDA, INC.,
VILLAROSA INVESTMENTS FLORIDA, INC.,
KAREN OVERSEAS, INC.,

MLA INVESTMENTS, INC.,
JACARIA FLORIDA, INC.,
SUNSET & 97TH HOLDINGS, LLC,
MARIAM SUTHERLIN,
JAMCE INVESTMENTS, LTD.,
AMELIA SAIEH,

Claimants-Appellants,

KATHY A SAIEH,
JAIME SAIEH,
LAURA SAIEH,
SANDRA SAIEH,
KAREN SAIEH,
GRANADA ASSOCIATES, INC.,

Defendants-Appellants.

No. 13-12019

D.C. Docket No. 8:09-cv-02308-RAL-MAP

KEITH STANSELL,
MARC GONSALVES,
THOMAS HOWES,
JUDITH G. JANIS,
CHRISTOPHER T. JANIS, et al.,

Plaintiffs-Appellees,

versus

REVOLUTIONARY ARMED
FORCES OF COLOMBIA (FARC), et al.,

Defendants,

PLAINVIEW FLORIDA II, INC.,
C.W. SALMAN PARTNERS,
SALMAN CORAL WAY PARTNERS,

Claimants-Appellants.

No. 13-12116

D.C. Docket No. 8:09-cv-02308-RAL-MAP

KEITH STANSELL,
MARC GONSALVES,
THOMAS HOWES,
JUDITH G. JANIS,
CHRISTOPHER T. JANIS, et al.,

Plaintiffs-Appellees,

versus

REVOLUTIONARY ARMED
FORCES OF COLOMBIA, (FARC), et al.,

Defendants,

CARMEN SIMAN,
ARMANDO JAAR,
MOISES SAIEH,
CARLOS SAIEH,

Claimants-Appellants.

No. 13-12171

D.C. Docket No. 8:09-cv-02308-RAL-MAP

KEITH STANSELL,
MARC GONSALVES,
THOMAS HOWES,
JUDITH G. JANIS,
CHRISTOPHER T. JANIS,
GREER C. JANIS,
MICHAEL I. JANIS,
JONATHAN JANIS,

Plaintiffs-Appellees,

versus

REVOLUTIONARY ARMED
FORCES OF COLUMBIA [sic] (FARC), et al.,

Defendants,

KATHY A SAIEH,
LAURA SAIEH,
SANDRA SAIEH,
KAREN SAIEH,

Defendants-Appellants,

CARLOS SAIEH,
BRUNELLO, LTD.,
JACQUELINE SAIEH,
U.S. Citizen Beneficial Owner of Brunello Ltd. Trust,

Claimants-Appellants.

No. 13-12337

D.C. Docket No. 8:09-cv-02308-RAL-MAP

KEITH STANSELL,
MARC GONSALVES,
THOMAS HOWES,
JUDITH G. JANIS,
CHRISTOPHER T. JANIS,
GREER C. JANIS,
MICHAEL I. JANIS,
JONATHAN N. JANIS,

Plaintiffs-Appellees,

versus

REVOLUTIONARY ARMED
FORCES OF COLOMBIA (FARC), et al.,

Defendants,

LUIS SUTHERLIN,

Claimant-Appellant.

Appeals from the United States District Court
for the Middle District of Florida

(October 16, 2014)

Before WILSON, JORDAN and BLACK, Circuit Judges.

WILSON, Circuit Judge:

These appeals arise from the collection efforts of victims of a terrorist kidnapping in Colombia. After obtaining a nine-figure default judgment against their captor, they attempted to collect through a series of ex parte garnishments and executions against third parties with purported illicit ties to the captor. The third-party claimants challenge the judgments against their property on both substantive and procedural grounds, including alleged due process violations arising from the ex parte manner in which the district court initially handled the proceedings. We affirm the district court as to all appeals but one: No. 13-12171, concerning Brunello Ltd.

I. Global Discussion

Because common themes run through all appeals, we initially discuss the underlying facts and common issues globally. Later, we will apply our conclusions to the particular circumstances of each appeal and analyze the unique issues in a more individualized manner for each third-party claimant.

A. Underlying Procedural and Factual Background

On February 13, 2003, Keith Stansell, Marc Gonsalves, Thomas Howes, and Thomas Janis were flying over Colombia while performing counter-narcotics reconnaissance. Members of the Revolutionary Armed Forces of Colombia (FARC) shot their plane down and, after the plane's crash landing,

captured the group. FARC immediately executed Janis and took the survivors hostage, holding them for over five years. After they were rescued and returned to the United States, Stansell, Gonsalves, and Howes – along with Janis's wife, Judith G. Janis, as personal representative of his estate, and his surviving children, Christopher T. Janis, Greer C. Janis, Michael I. Janis, and Jonathan N. Janis – (collectively, Plaintiffs) filed a complaint against FARC in the United States District Court for the Middle District of Florida under the Antiterrorism Act, 18 U.S.C. § 2333, naming FARC and a number of associated individuals as defendants. After court-directed service of summons by publication, FARC failed to appear, and the district court entered a default judgment in favor of Plaintiffs in the amount of $318,030,000 on June 15, 2010.

Because of the difficulty inherent in the direct execution of a judgment against a terrorist organization, Plaintiffs sought to satisfy their award by seizing the assets of "agenc[ies] or instrumentalit[ies]" of FARC pursuant to Section 201(a) of the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201(a), 116 Stat. 2322, 2337 (TRIA),[1] which reads:

> Notwithstanding any other provision of law, and except as provided in subsection (b), in every case in which a person has obtained a

[1] This provision is codified as a note to 28 U.S.C. § 1610. For ease of reference and familiarity, we will cite to TRIA § 201, with accompanying subsections where appropriate.

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

TRIA § 201(a). The elements a party is required to establish before executing under TRIA § 201 are therefore quite straightforward. The party must first establish that she has obtained a judgment against a terrorist party that is either for a claim based on an act of terrorism or for a claim for which a terrorist party is not immune. *Weininger v. Castro,* 462 F. Supp. 2d 457, 479 (S.D.N.Y. 2006). The party must then show that the assets are blocked as that term is defined in TRIA. *Id.* Finally, the total amount of the execution cannot exceed the amount of compensatory damages. *Id.* If the party wishes to execute against the assets of a terrorist party's agency or instrumentality, the party must further establish that the purported agency or instrumentality is actually an agency or instrumentality. Of the preceding elements, only the blocked asset and agency or instrumentality determinations are at issue in any of the appeals here.

TRIA defines "blocked assets" as "any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act [(TWEA)] or under sections 202 and 203 of the International Emergency Economic Powers Act [(IEEPA)]." TRIA § 201(d)(2)(A) (citation omitted). Assets are blocked when the United States Department of the Treasury Office of Foreign Assets Control (OFAC) designates the owner of the assets as a Specially Designated Narcotics Trafficker (SDNT). *See* 31 C.F.R. §§ 594.201, 594.301, 597.201, 597.303. OFAC's blocking power is authorized by TWEA, 12 U.S.C. § 95a, 50 App. U.S.C. §§ 1-14, 16-39, 40-44, and the IEEPA, 50 U.S.C. §§ 1701-1706, the blocking authority of which TRIA § 201 includes in its definition of blocked assets.[2] OFAC also has blocking authority under other legislation not mentioned in TRIA § 201, including the Foreign Narcotics Kingpin Designation Act, 21 U.S.C. §§ 1901-08 (Kingpin Act). OFAC specifies the jurisdictional basis for any designation it makes, i.e. the statute under which an individual or entity is designated. Thus, the blocking of assets by OFAC does not

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[2] Designees under the IEEPA include those found by OFAC

> [t]o play a significant role in international narcotics trafficking centered in Colombia; . . . [m]aterially to assist in, or provide financial or technological support for or goods or services in support of, the narcotics trafficking activities of [SDNTs]; [or] to be owned or controlled by, or to act for or on behalf of, any other [SDNT].

31 C.F.R. § 536.312(b) and (c).

necessarily bring those assets within the ambit of TRIA execution. *See Stansell v. Revolutionary Armed Forces of Colom. (Mercurio),* 704 F.3d 910, 915-17 (11th Cir. 2013) (per curiam) (reversing an order permitting TRIA execution of assets that OFAC had blocked pursuant to the Kingpin Act).[3] All the individuals and entities party to these appeals (Claimants)[4] whose property is in jeopardy due to Plaintiffs' TRIA execution had been designated SDNTs by OFAC, rendering their assets blocked. Other than Herrera, no party disputes that the assets in question were blocked at some point for purposes of TRIA execution, though some argue that their eventual delisting during the pendency of the proceedings should have been given effect.

TRIA itself does not define the term "agency or instrumentality." However, § 201 is codified as a note to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-11 (FSIA). *See* 28 U.S.C. § 1610 (note). The FSIA defines the term:

> An "agency or instrumentality of a foreign state" means any entity –
>
> (1) which is a separate legal person, corporate or otherwise, and

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[3] For the sake of clarity, we will cite this opinion hereinafter as *Mercurio,* 704 F.3d 910.

[4] As an additional tool for clarity, we will use "Claimants" when referring to all claimant-appellants collectively and "appellant(s)" when referring to a subset of them.

> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title,[5] nor created under the laws of any third country.

Id. § 1603(b). Claimants here disagree with the district court's standard as well as its factual determinations regarding the agency or instrumentality status of each.

Plaintiffs initiated their collection efforts in each instance ex parte, without any direct notice to Claimants. The district court found that, for purposes of TRIA execution, each Claimant was an agency or instrumentality[6] of FARC and that each asset was

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[5] Those subsections define the citizenship of corporations and legal representatives of estates, infants, or incompetents.

[6] The district court defined an agency or instrumentality as

> Any SDNT . . . , including all of its individual members, divisions and networks, that is or was ever involved in the cultivation, manufacture, processing, purchase, sale, trafficking, security, storage, shipment or transportation, distribution of FARC coca paste or cocaine, or that assisted the FARC's financial or money laundering network, . . . because it was either:
>
> (1) materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of . . . [FARC]; and/or

(Continued on following page)

blocked. Importantly, each Claimant eventually discovered the proceedings against their property. In each case, the district court sided with Plaintiffs and allowed the collection efforts to proceed (or, where such efforts had been completed, to lie).

Claimants appealed the various orders granting Plaintiffs' motions seeking to collect on their judgment using Claimants' assets and denying the motions filed by Claimants seeking relief. They argue separately a number of issues on appeal, including many that Claimants share in common with one another: (1) that they were denied constitutional and statutory rights to notice and a hearing because they were not served with the writs of garnishment and execution or the motions requesting them; (2) that they were erroneously designated agencies or instrumentalities of FARC by the district court; (3) that their assets were not reachable under TRIA § 201 because they have been removed from OFAC's list of SDNTs; (4) that Plaintiffs did not obtain the licenses required to execute against OFAC-blocked assets; (5) that the judgments must be set aside for fraud; and (6) that on remand, we should assign a different judge to the proceedings.

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(2) owned, controlled, or directed by, or acting for or on behalf of, . . . [FARC]; and/or

(3) playing a significant role in international narcotics trafficking [related to coca paste or cocaine manufactured or supplied by the FARC].

B. Analysis of the Issues

We now turn to an analysis of the common issues argued on appeal.

1. Constitutional and Statutory Due Process

Claimants contend that they were denied their rights to notice of the execution proceedings and an opportunity to be heard in violation of the Fifth Amendment, Florida law, and the FSIA. Whether a due process violation occurred is reviewed de novo. *Ali v. U.S. Att'y Gen.,* 443 F.3d 804, 808 (11th Cir. 2006) (per curiam). The de novo standard also applies when determining whether constitutional protections extend to foreign nationals. *United States v. Emmanuel,* 565 F.3d 1324, 1330-32 (11th Cir. 2009) (reviewing de novo whether the Fourth Amendment applied to a foreign search of a foreign national).

Florida law has specific requirements for notice and an opportunity to be heard. *See* Fla. Stat. § 56.21 ("When levying upon real property, notice of such levy and execution sale and affidavit . . . shall be made to the property owner of record in the same manner as notice is made to any judgment debtor pursuant to this section. . . ."); Fla. Stat. § 56.16 (outlining procedure for third-party claimants to halt an execution sale); Fla. Stat. § 77.055 (requiring service of garnishee's answer to the writ on "any . . . person disclosed in the garnishee's answer to have any ownership interest in the" asset); Fla. Stat. § 77.07(2)

(permitting "any other person having an ownership interest in [garnished] property" to move to dissolve the writ with a motion "stating that any allegation in plaintiff's motion for writ is untrue"). In a nutshell, Florida law provides certain protections to third parties claiming an interest in property subject to garnishment or execution. Such law is effective in proceedings in federal court, unless, as the district court held here, it is preempted by federal statute. Fed. R. Civ. P. 69(a)(1). We review de novo a district court's determination that federal law preempts state law. *Pace v. CSX Transp., Inc.,* 613 F.3d 1066, 1068 (11th Cir. 2010).

The FSIA also contains a notice requirement. 28 U.S.C. § 1610(c) (requiring notice required under § 1608(e) be provided where property is attached under § 1610(a) or (b)). Whether this notice requirement applies to TRIA execution is a question of law we review de novo. *Mercurio,* 704 F.3d at 914.

a. Constitutional Due Process

Preliminarily, we address whether, under the Fifth Amendment, Claimants were entitled to due process. The district court and Plaintiffs have at some points maintained that some were not so entitled due to their status as foreign nationals. Where a district court exercises its jurisdiction over property within the United States, however, the owners of that property have due process rights regardless of their location or nationality. *See Russian Volunteer Fleet v.*

United States, 282 U.S. 481, 491-92, 51 S. Ct. 229, 232 (1931) (applying the Takings Clause to confiscation of foreign-owned property located within the United States); *Helicopteros Nacionales de Colom., S.A. v. Hall,* 466 U.S. 408, 413-19, 104 S. Ct. 1868, 1872-74 (1984) (applying due process protection to a Colombian corporation);[7] *Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. De Navegacion,* 732 F.2d 1543, 1545-49 (11th Cir. 1984) (analyzing due process protections vis-à-vis a foreign entity whose property came under the court's jurisdiction); *Nat'l Council of Resistance of Iran v. Dep't of State,* 251 F.3d 192, 204 (D.C. Cir. 2001) ("*Russian Volunteer Fleet* makes clear that a foreign organization that acquires or holds property in this country may invoke the protections of the Constitution when that property is placed in jeopardy by government intervention." (citation omitted)). Therefore, Claimants were entitled to the Fifth Amendment's guarantee of due process.

Now, we consider what due process requires. As Plaintiffs point out in their briefs, post judgment motions and writs typically need not be served on defendants, including when collection is pursued

[7] *Helicopteros* dealt with due process protections afforded by the Fourteenth Amendment. 466 U.S. at 413, 104 S. Ct. at 1872. However, Fourteenth Amendment due process cases are informative for Fifth Amendment due process inquiries. *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.,* 119 F.3d 935, 944 (11th Cir. 1997).

under the FSIA. *See Peterson v. Islamic Republic of Iran,* 627 F.3d 1117, 1130 (9th Cir. 2010). Courts have held that this principle extends to agencies or instrumentalities of terrorist judgment debtors under the FSIA. *See, e.g., Estate of Heiser v. Islamic Republic of Iran,* 807 F. Supp. 2d 9, 23 (D.D.C. 2011) ("Congress did not intent [sic] to require service of garnishment writs on agencies or instrumentalities of foreign states responsible for acts of state-sponsored terrorism. . . ."). To the extent *Estate of Heiser* holds that alleged agencies or instrumentalities which dispute that classification are not entitled to notice of execution or garnishment proceedings against their assets, we disagree.

TRIA execution requires two separate determinations regarding the property being executed: (i) that the asset is blocked, and (ii) that the owner of the asset is an agency or instrumentality of the judgment debtor. TRIA § 201(a). While the first can be definitively established by the fact that OFAC has taken action against the alleged agency or instrumentality under TWEA or the IEEPA, the second is a separate determination in addition to blockage not dispositively decided by OFAC designation. Furthermore, because an agency or instrumentality determination carries drastic results – the attachment and execution of property – it undeniably implicates due process concerns. *United States v. Bissell,* 866 F.2d 1343, 1352 (11th Cir. 1989) ("[Due process] is implicated when, as here, persons are deprived of their possessory interests in property."). It follows that

parties whose assets are under threat of execution pursuant to TRIA § 201 are entitled to notice and an opportunity to be heard in order to rebut the allegations and preserve their possessory interest in blocked assets. *See Dusenbery v. United States,* 534 U.S. 161, 167, 122 S. Ct. 694, 699 (2002) ("[I]ndividuals whose property interests are at stake are entitled to notice and an opportunity to be heard." (internal quotation marks omitted)).

Plaintiffs respond by emphasizing that this court and others have repeatedly held that due process does not require service of post judgment motions. Typically, however, such motions are directed at the judgment debtor, *see Brown v. Liberty Loan Corp. of Duval,* 539 F.2d 1355, 1357 (5th Cir. 1976),[8] not at third parties such as Claimants. The difference – one that the district court did not appropriately consider – is crucial. Where the owner of the asset being garnished is the judgment debtor, "notice upon commencement of a suit is adequate to give a judgment debtor advance warning of later proceedings undertaken to satisfy a judgment." *Id.* at 1364. That same type of notice is not sufficient where the claimant is a third party, who cannot be expected to be on notice of the judgment.

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[8] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), we adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

It may be argued that agencies or instrumentalities are on constructive notice because, as agencies or instrumentalities of the judgment debtor – in this case, FARC – they share a legal identity with the judgment debtor. *Cf.* 28 U.S.C. § 1603(a) (defining "foreign state" for FSIA purposes to include an agency or instrumentality of a foreign state). While that reasoning seems rational in a vacuum, when considered in context, it is circular and illogical. That is, a third party can only be deemed to be on notice if it is associated with the judgment debtor, so it cannot be considered to have such notice until the district court makes the agency or instrumentality determination. Without notice and a fair hearing where both sides are permitted to present evidence, the third party never has an opportunity to dispute its classification as an agency or instrumentality. *Cf. Alejandre v. Telefonica Larga Distancia De P.R., Inc.,* 183 F.3d 1277, 1284 (11th Cir. 1999) (applying the presumption of separate juridicial [sic] status of a state and its alleged instrumentality under the FSIA). In short, it puts the cart before the horse to hold that Claimants had notice of the agency or instrumentality proceedings because they were agencies or instrumentalities of FARC, and such a finding would thus never be tested in an adversarial process. Any party could be deemed an agency or instrumentality and thus be deemed to be on constructive notice, allowing seizure of its assets on a potentially erroneous designation about which it never even knew and never had the opportunity to challenge. Therefore, due process entitled Claimants to actual notice of the postjudgment

proceedings against them. We will analyze the adequacy of the notice provided to each Claimant in Part II.

Further, because Claimants were entitled to the basic constitutional protection of due process, they were entitled to be heard on their challenge to the agency or instrumentality issue. The district court eventually held generally that "some form" of process was due and that Claimants were afforded an adequate opportunity to be heard by (i) the requirement that Plaintiffs file motions in the district court and seek entry of a court order, (ii) the opportunity to challenge their respective designations both administratively and judicially, and (iii) the stay pending the outcome of *Mercurio*. The first of these cannot constitute the requisite opportunity to be heard. Requiring evidence from a party seeking to execute against a third party's assets does nothing to give the third party an opportunity to be heard. Due process contemplates offering a party an opportunity to rebut charges leveled against it, not allowing that party's opponent to present evidence supporting that charge.

The second manner in which Claimants were, according to the district court, given an opportunity to be heard is also constitutionally deficient. Again, the agency or instrumentality determination is separate from the determination that an asset is blocked and carries more immediate and substantial consequences than does the SDNT designation. Moreover, designation is a unilateral move that takes place and blocks a SDNT's assets before the SDNT has an

opportunity to challenge the designation.[9] An administrative challenge to OFAC designation affords a party an opportunity to challenge the decision to block its assets, not to challenge its status as an agency or instrumentality.

Finally, the third example of Claimants' opportunity to be heard – the stay – standing alone, is not sufficient to provide Claimants with due process. However, in conjunction with an actual opportunity for Claimants to be heard, it may satisfy due process. We will examine the circumstances of each appeal below to determine the extent to which each Claimant had a sufficient opportunity to be heard.

In addition, due process must not only be adequate; it must be timely. *Goldberg v. Kelly,* 397 U.S. 254, 267-68, 90 S. Ct. 1011, 1020 (1970). Here, Claimants argue that they were denied due process because they were not granted pre-deprivation hearings –

[9] We disagree with the conclusion that the right to challenge the OFAC designation provided a sufficient safeguard for Claimants and their property. Some Claimants had commenced proceedings seeking de-listing when turnover judgments were entered against them. For those Claimants who eventually succeeded in their challenges, the district court correctly ruled that de-listing did not apply retroactively, and the de-listed Claimants were unable to attain relief with respect to those assets already executed. It cannot be that available de-listing procedures were effective due process bulwarks where a party can be listed, its assets blocked, and TRIA execution procedures begun – thus rendering future de-listing ineffective – before the party receives notice of the designation or blockage.

that is, prior to attachment under TRIA. On this point, we disagree.

We assess whether the procedure afforded to a party is timely considering the three factors set forth in *Mathews v. Eldridge,* 424 U.S. 319, 334-35, 96 S. Ct. 893, 903 (1976), as refined by *Connecticut v. Doehr*[10]:

> [F]irst, . . . the private interest that will be affected by the prejudgment measure; second, . . . the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, [we pay] principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless,

[10] In *Doehr,* the Supreme Court applied the *Mathews* analysis to a deprivation initiated by a private party. *See* 501 U.S. at 11-16, 111 S. Ct. at 2112-15. Under such circumstances, when assessing the third prong of the *Mathews* test, courts must give "principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections." *Id.* at 11, 111 S. Ct. at 2112. Therefore, we consider the private party's interests in the specific attachment as well as the government's interests affected by "financial or administrative burdens involving predeprivation hearings." *See id.* at 16, 111 S. Ct. at 2115. We also assess the government's "substantive interest *in protecting any rights of the plaintiff* [, which] cannot be any more weighty than those rights themselves." *Id.* (emphasis added). Because we consider the government's interest "in providing the procedure," we properly consider TRIA judgment creditors' ability to collect generally, not just that of Plaintiffs here.

> due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.

501 U.S. 1, 11, 111 S. Ct. 2105, 2112 (1991). The first factor weighs in Claimants' favor. *See id.* at 11, 111 S. Ct. at 2112-13 (listing the "significant" consequences of attachment). Although Plaintiffs point out that SDNTs have a diminished interest in their blocked assets because their ability to alienate that property is already restricted, SDNTs do retain some interest, especially because the possibility of unblocking remains, as occurred with a number of Claimants here. *Cf. Bissell,* 866 F.2d at 1352-54 (recognizing the continued interest of a criminal defendant in frozen property prior to forfeiture). As discussed below, de-listing does not operate retroactively, so attachment creates an independent restraint on property that may be effective even where de-listing occurs during the pendency of garnishment or execution proceedings.[11]

However, the second and third factors weigh substantially in favor of immediate attachment. Before a writ of garnishment or execution pursuant to TRIA § 201 issues, a district court must determine

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[11] At the same time, it is relevant that the burden accompanying attachment under TRIA is no more substantial than the already-existing burden of blockage. In other words, attachment under TRIA is less burdensome than, for example, pre-hearing seizure of an asset.

that the property owner is a SDNT designated under TWEA or the IEEPA and is an agency or instrumentality of the judgment debtor terrorist party. The district court did that here, after Plaintiffs made factual proffers on those issues. The risk of erroneous deprivation is therefore diminished. The third factor weighs heavily in favor of a later hearing: ensuring adequate satisfaction of judgments against terrorist parties. During the pendency of execution proceedings, a number of events may occur which make satisfaction using a particular asset impossible. Other judgment creditors may seek to execute against the asset. The government may take action that makes the asset unreachable, including seizure or de-listing of the alleged agency or instrumentality (which may or may not be the result of a finding that the SDNT designation was incorrectly reached), the latter of which would enable the asset owner to move the asset (or proceeds from its sale) outside the reach of any United States district court. *Cf. Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 679, 94 S. Ct. 2080, 2090 (1974) ("[P]reseizure notice and hearing might frustrate the interests served by the statutes . . . if advance warning of confiscation were given."); *Mitchell v. W.T. Grant Co.,* 416 U.S. 600, 610, 94 S. Ct. 1895, 1901 (1974) (noting "the risk of destruction or alienation if notice and a prior hearing are supplied, and the low risk of a wrongful determination of possession" as considerations supporting the constitutionality of pre-notice seizure of household goods). Mere attachment is a minimally intrusive manner of reducing these risks, especially because

blocked assets, by definition, already have more substantial restraints on their alienation. Because the factors weigh in favor of immediate attachment, Claimants were not constitutionally entitled to a hearing before the writ issued. In sum, Claimants were entitled to notice and to be heard before execution, though not necessarily before attachment.

b. Statutory Entitlements to Notice and Hearing

Now we consider whether Florida procedure governs TRIA execution. Plaintiffs contend, and the district court held, that TRIA § 201 partially conflicts with Florida garnishment and execution statutes and that their notice and hearing provisions therefore do not govern garnishment and execution procedure under TRIA § 201. Essentially, the district court held that, because TRIA § 201's purpose is to facilitate collecting on judgments against terrorist parties, any state legislation that might hinder collection efforts in any manner – even if their purpose was to give potentially innocent, third-party claimants the opportunity to contest execution efforts – conflicted with TRIA § 201. We disagree. Nothing about the language or purpose of TRIA § 201 indicates that it conflicts with Florida's requirements that owners of property being garnished or executed against are entitled to notice, notwithstanding TRIA's use of the word "notwithstanding." *United States v. Holy Land Found. for Relief & Dev.,* 722 F.3d 677, 687-89 (5th Cir. 2013) (refusing to give effect to an interpretation of TRIA

§ 201 that would read "notwithstanding" to "operate[ ] to override all statutes that, *by their purpose or effect,* shield assets from attachment or execution"); *see Altria Grp., Inc. v. Good,* 555 U.S. 70, 77, 129 S. Ct. 538, 543 (2008) (noting that courts presume that preemption does not apply).

We cannot say that the state garnishment law in this case is preempted. Contrary to the district court's conclusion, Florida law does not shield terrorist assets from execution. Instead, Florida's notice requirements simply provide the procedure for executing against the full range of assets that fall within the ambit of TRIA § 201. Florida's statutory notice scheme for garnishment proceedings does not conflict with TRIA's "notwithstanding" provision because the assets TRIA subjects to execution are still subject to execution. Therefore, TRIA § 201 does not preempt Florida law, and judgment creditors seeking to satisfy judgments under it must follow the notice requirements of Florida law. *See* Fed. R. Civ. P. 69(a)(1).

Claimants also assert that, pursuant to the FSIA, specifically 28 U.S.C. § 1610(c), Plaintiffs should have served a copy of the default judgment required by 28 U.S.C. § 1608(e) on Claimants. Here, Claimants are wrong for a number of reasons. First, § 1610(c) governs "attachment[s] or execution[s] referred to in subsections (a) and (b) of this section." The attachments and executions here were obtained pursuant to TRIA § 201, not 28 U.S.C. § 1610(a) or (b). Second, § 1608(e) deals with default judgments obtained against foreign states and their political subdivisions

and agencies or instrumentalities. FARC is not a foreign state, and Claimants are not political subdivisions or agencies or instrumentalities of one. Therefore, § 1608(e) notice is, by its very plain terms, not required in this context.

In sum, the district court erred when it held that Florida law did not govern the garnishment and execution procedures and that the alleged agencies or instrumentalities were not entitled to due process. Whether and how this affects the disposition of each appeal is contingent on their respective facts, and we thus reserve the more particularized analyses for the discussions of each appeal below.

2. Agency or Instrumentality

Claimants' second primary argument on appeal is that they were erroneously found to be agencies or instrumentalities of FARC. They object both to the district court's chosen standard for identifying agencies or instrumentalities and to the district court's ultimate determinations. Turning to the preliminary question, whether the district court applied the correct standard in reaching the agency or instrumentality determination is a legal question we review de novo. *Mercurio,* 704 F.3d at 914.

Claimants argue that, because TRIA does not have its own definition of "agency or instrumentality" and is codified as a note to 28 U.S.C. § 1610, the district court should have applied the FSIA definition, 28 U.S.C. § 1603(b), which applies to § 1610. To apply

that definition here, we would have to tweak § 1603(b)'s definition because it requires that a purported agency or instrumentality be an organ of, or majority-owned by, "a foreign state or political subdivision thereof," 28 U.S.C. § 1603(b)(2), and Claimants are alleged to be agencies or instrumentalities of a non-state terrorist organization. By suggesting that agencies or instrumentalities of parties other than foreign states or their political subdivisions may be subject to TRIA execution, Claimants seem to imply that, where the statute contains standards that are inapplicable to non-state terrorist parties, we should simply relax the foreign state requirement. Assuming that such a re-reading of the statute is appropriate, applying the § 1603(b) standard to TRIA § 201 would permit TRIA execution against terrorist parties or parties that are organs of or majority-owned by a terrorist party, regardless of whether the terrorist party is a state or non-state actor. *See* 28 U.S.C. § 1603(b)(2).

We cannot adopt this flexible application of § 1603(b) because it would create an absurd result and leave TRIA § 201 nearly meaningless. First, because this would only permit execution against organs, political subdivisions, and majority-owned organizations, individuals are affirmatively excluded from execution. *Samantar v. Yousuf,* 560 U.S. 305, 314-16, 130 S. Ct. 2278, 2286-87 (2010). Section 1603(b)(3) further limits agency or instrumentality findings to parties "which [are] neither . . . citizen[s] of a State of the United States . . . , nor created under

the laws of any third country." 28 U.S.C. § 1603(b)(3). Because any organization with legal personhood would necessarily be either "a citizen of a State of the United States . . . [or] created under the laws of any third country," none could be an agency or instrumentality under this definition.[12] Therefore, applying the FSIA's definition of agencies or instrumentalities to TRIA would leave only terrorist states as potential sponsors of agencies or instrumentalities under TRIA § 201, eviscerating TRIA's effectiveness vis-à-vis non-state terrorist organizations. This cannot stand, as TRIA's definition clearly contemplates non-state

[12] And this is a generous interpretation of the final clause of § 1603(b)(3). The "third country" element uses as a reference the "foreign state or political subdivision thereof" of which the party is purported to be an organ or by which it is purported to be owned. Where the agency or instrumentality's parent is not a foreign state or its subdivision, the mention of a third country would be illogical or inapplicable. At best, it could be explained as effectively making every country a "third country." Under such an interpretation, all organizations created under the laws of any country are created under the laws of a third country and thus excluded from the definition of an agency or instrumentality.

Moreover, the rationale of the third country exception "is that if a foreign state acquires or establishes a company or other legal entity in a foreign country, such entity is presumptively engaging in activities that are either commercial or private in nature," rendering that entity unprotected by the principle of sovereign immunity for purposes of the FSIA. H.R. Rep. No. 94-1487, at 15 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6614. The flipside is that, when a foreign state establishes a legal entity under its own laws, it seeks to engage in the "public, noncommercial activity" which the FSIA protects. This rationale is inapplicable to TRIA § 201, providing further support for the inapplicability of § 1603(b) to TRIA § 201.

judgment debtors being subjected to TRIA execution. *See* TRIA § 201(d)(4) (defining "terrorist party" to include both state actors and non-state terrorist organizations). Accordingly, the district court was correct to apply a different standard so that Congress's intent could be carried out.[13] *See Hausler v. JP Morgan Chase Bank, N.A.,* 740 F. Supp. 2d 525, 531 (S.D.N.Y. 2010) (recognizing that Congress's purpose in enacting TRIA § 201 was to "'deal comprehensively with the problem of enforcement of judgments rendered on behalf of victims of terrorism'" (quoting H.R. Rep. No. 107-779, at 27 (2002) (Conf. Rep.), *reprinted in* 2002 U.S.C.C.A.N. 1430, 1434)).

Making the FSIA's standard more flexible does not help, either. If either the *Samantar* non-individual requirement or the majority-ownership requirement is applied, TRIA § 201 would still be toothless. Sovereign countries – the parties the FSIA contemplates – operate with more transparency, and their agencies or instrumentalities are likelier to be diplomatic organs or state-owned enterprises with clear ownership structures that makes application of § 1603(b) feasible. *See, e.g., Filler v. Hanvit Bank,* 378

[13] At the same time, it is not proper for the district court to rely solely on OFAC designation as creating an irrebuttable presumption of agency or instrumentality status. The agency or instrumentality determination is separate from the blocked asset determination. The district court must therefore provide alleged agencies or instrumentalities an opportunity to challenge allegations of agency or instrumentality status with their own evidence.

F.3d 213, 217 (2d Cir. 2004) (holding that the Korean Deposit Insurance Corporation was "an organ of a foreign state because [it] was formed by statute . . . and presidential decree"); *S & S Mach. Co. v. Masinexportimport,* 706 F.2d 411, 414 (2d Cir. 1983) (identifying "state central banks and export associations" as the "paradigm of a state agency or instrumentality"). On the other hand, terrorist organizations such as FARC operate in the shadows out of necessity. For example, a corporation organized under Florida law will almost certainly not list FARC as a shareholder of record. Instead, it will operate through layers of affiliated individuals and front companies.

Indeed, the agencies or instrumentalities here were, according to OFAC, part of FARC's money laundering operations. These operations result from a need for clandestine operation, the type § 1603(b) cannot possibly address. Applying § 1603(b) to TRIA § 201 would put the victims of terrorist organizations in the same place they were prior to TRIA's enactment: proud owners of multi-million-dollar judgments with no means of enforcing those judgments. This would counteract Congress's purpose in enacting TRIA. *See Hausler,* 740 F. Supp. 2d at 531.

Because the realities of terrorism make it unrealistic to apply the FSIA standard to TRIA execution, we think that the district court developed a proper standard. As the district court noted in its orders finding agency or instrumentality status, its standard "us[ed] the plain and ordinary meaning of those

terms." Claimants here give us no reason to believe that any other standard is preferable or proper.

In addition to attacking the standard applied by the district court, Claimants challenge the district court's factual determinations regarding agency or instrumentality status. Because these challenges present fact-specific questions, we leave this discussion to the individualized analyses, where we will review the district court's determinations for clear error. *United States v. Perkins,* 348 F.3d 965, 969 (11th Cir. 2003) ("We assess the district court's findings of fact under the clearly erroneous standard. . . .").

3. Effect of OFAC De-listing.

Claimants argue that their OFAC de-listing should operate retroactively to put their assets out of Plaintiffs' reach because they are no longer blocked for purposes of TRIA § 201. Plaintiffs respond that, once the writ of garnishment is served on the garnishee and their lien attaches, subsequent de-listing has no effect. OFAC's regulations clearly set out the result in such a situation:

> Any amendment, modification, or revocation . . . of any order, regulation, ruling, instruction, or license issued by . . . [OFAC] shall not, unless otherwise specifically provided, be deemed to affect . . . any civil or criminal suit or proceeding *commenced or pending prior to such amendment, modification, or revocation.* All penalties, forfeitures, and

> liabilities under any such order, regulation, ruling, instruction, or license *shall continue and may be enforced as if such amendment, modification, or revocation had not been made.*

31 C.F.R. § 536.402 (emphasis added). Claimants contend that the district court incorrectly interpreted this regulation to prevent giving retroactive effect to OFAC de-listing. We review a district court's interpretation of a regulation de novo. *Owner-Operator Indep. Drivers Ass'n v. Landstar Sys., Inc.,* 622 F.3d 1307, 1320 (11th Cir. 2010).

Pursuant to the clear terms of the OFAC regulation, if Plaintiffs commenced their garnishment proceedings prior to revocation of the OFAC order listing them as SDNTs, then the order of revocation "shall not . . . be deemed to affect" the garnishment proceedings. 31 C.F.R. § 536.402. The question is, then, when proceedings commenced relative to Claimants' de-listing. Because Federal Rule of Civil Procedure 69(a)(1) commands that state civil procedure governs execution proceedings, Florida law governs this issue. In Florida, execution and garnishment proceedings are ancillary proceedings. *See Burdine's, Inc. v. Drennon,* 97 So. 2d 259, 260 (Fla. 1957); *Williams Mgmt. Enters., Inc. v. Buonauro,* 489 So. 2d 160, 167-68 (Fla. Dist. Ct. App. 1986). Thus, an execution or garnishment proceeding "commence[s] when the writ is issued or the pleading setting forth the claim of the party initiating the action is filed." Fla. R. Civ. P. 1.050. Therefore, a civil proceeding

commenced no later than service of the writ on the garnishee in each case. Under § 536.402, any OFAC de-listing after that moment was ineffectual for determining whether the asset was blocked for TRIA § 201 purposes.

Precedent cited by Claimants seemingly holding that de-listing operates retroactively does not support that proposition. Claimants' cherry-picked language from *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi* appears to indicate that the assets must be blocked at the time judgment against the asset is finalized. *See* 556 U.S. 366, 369, 377-79, 129 S. Ct. 1732, 1735, 1739-40 (2009) ("We ultimately hold that the Cubic Judgment was not a 'blocked asset' at the time the Court of Appeals handed down its decision. . . ."). The controlling determination in that case, though, was that the asset in question was *never* blocked because Iran's interest in it arose after the Treasury Department unblocked all Iranian assets. *Id.* at 376, 129 S. Ct. at 1739. In *Holy Land Foundation,* the assets were unreachable because they were unblocked during the pendency of the original civil suit, prior to the commencement of any execution proceeding. 722 F.3d at 687 (holding that the government's restraining order against a blocked asset obtained prior to the entry of a civil judgment unblocked it for TRIA purposes).

This rule is not just prescribed by law; it is also good policy. Applying de-listing to the "blocked asset" element of an ongoing TRIA execution proceeding

would undermine the finality of a judgment until direct review of the judgment concludes. Further, such a policy would provide an incentive to SDNTs to draw out and delay execution proceedings while their OFAC administrative challenges were pending. Such a tactic counters the policy of satisfying judgments, especially where OFAC de-listing is not necessarily an exoneration.

4. OFAC Licenses

Claimants also argue that the execution violated OFAC regulations which purportedly require a party executing or attaching blocked assets to obtain a license from OFAC. *See* 31 C.F.R. § 598.205(a) and (e). This section, however, applies only where a party is designated pursuant to the Kingpin Act and the Foreign Narcotics Kingpin Sanctions Regulations, 31 C.F.R. § 598.314(b) (Kingpin Regulations). *See* 31 C.F.R. § 598.205 (listing the Kingpin Act as authority for the regulation requiring licensure). The only party designated under the Kingpin Act and its accompanying regulations was Herrera; therefore, this argument is inapplicable to the other parties.[14]

[14] As discussed below, the licensing requirement does not affect the outcome of Herrera's appeal.

5. Fraud

Claimants argue that the means by which Plaintiffs moved against their assets constituted fraud, creating grounds for setting aside the judgments under Federal Rule of Civil Procedure 60(b)(3). We review a district court's denial of a Rule 60(b)(3) motion for abuse of discretion. *Cox Nuclear Pharmacy, Inc. v. CTI, Inc.,* 478 F.3d 1303, 1314 (11th Cir. 2007). The movant must establish fraud by clear and convincing evidence. *Id.* Claimants here take issue with Plaintiffs' deliberate failure to formally serve them with process, purportedly dubious legal arguments and factual allegations, and failure to disclose adverse law.

However, none of the complained-of acts or omissions provide clear and convincing evidence of fraud. The failure to serve was based on the good-faith but erroneous belief that it was not required, which was based on cases instructing that post-judgment motions need not be served. *See, e.g., Peterson,* 627 F.3d at 1130. Even where Plaintiffs' legal arguments later turned out to be incorrect, we have no reason to doubt that they were made in good faith. That TRIA § 201 did not allow execution against assets blocked under the Kingpin Act was not raised by any party until the Department of Justice intervened as amicus in the *Mercurio* appeal, indicating a lack of bad faith in pursuing Herrera's assets. The allegedly fraudulent factual allegations were not misrepresentations, even if they were based on scant evidence, and the failure to disclose that some parties

had begun the process of challenging their designation was not fraudulent. Finally, Claimants do not identify the adverse law Plaintiffs failed to disclose. Because Claimants do not identify facts amounting to fraud, we affirm the district court's denial of the 60(b)(3) motions.[15]

6. Reassignment

Finally, Claimants request reassignment to a new district court judge on remand. We consider three factors when a party requests reassignment: "(1) whether the original judge would have difficulty putting his previous views and findings aside; (2) whether reassignment is appropriate to preserve the appearance of justice; (3) whether reassignment would entail waste and duplication out of proportion to gains realized from reassignment." *United States v. Torkington,* 874 F.2d 1441, 1447 (11th Cir. 1989) (per curiam). Only Brunello faces a remand, but as we discuss below, our remand includes specific instructions that give the district court little discretion. Moreover, we are confident that Judge Lazzara will

[15] Because Plaintiffs and their counsel acted in good faith throughout the proceedings, the appellant's motion for sanctions pursuant to 28 U.S.C. § 1927 in Appeal No. 13-11339 is denied. *See Amlong & Amlong, P.A. v. Denny's, Inc.,* 500 F.3d 1230, 1239 (11th Cir. 2006) ("We have consistently held that an attorney multiplies proceedings unreasonably and vexatiously within the meaning of the statute only when the attorney's conduct is so egregious that it is tantamount to bad faith." (internal quotation marks omitted)).

be fair and just. Therefore, reassignment is unnecessary.

III. Individualized Discussion

We now turn to a discussion of the facts of the individual appeals and apply our generalized conclusions to the circumstances of each appeal. Where an appeal raises a unique argument, we analyze that argument to decide whether it is grounds for reversing the district court.

A. No. 13-11339 (Herrera)

OFAC designated Jose Ricuarte Diaz Herrera as a SDNT on May 13, 2010, 75 Fed. Reg. 27,118, for allegedly assisting in FARC's financial fronts network, thereby blocking his assets.[16] Herrera attempted to

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[16] Herrera was designated under the Kingpin Act and the Kingpin Regulations. The Kingpin Act permits designation of foreign persons

> materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of a significant foreign narcotics trafficker . . . ; . . . owned, controlled, or directed by, or acting for or on behalf of, a significant foreign narcotics trafficker . . . ; . . . [or] playing a significant role in international narcotics trafficking.

21 U.S.C. § 1904(b)(2)-(4); *see also* 31 C.F.R. § 598.314(b). OFAC did not specify on which of these grounds it based its decision to designate Herrera. Although TRIA § 201(d)(2)(A) does not expressly list assets blocked pursuant to the Kingpin Act among

(Continued on following page)

use an electronic funds transfer (EFT) to transfer some of his own money from a Colombian brokerage firm account into a deposit account in his name at a Colombian bank in June of 2010. Wachovia, N.A., acting as an intermediary in the EFT, halted the transfer no later than September 8, 2010, and notified OFAC, as it must under 31 C.F.R. § 501.603. Herrera subsequently began the process for de-listing as a SDNT by filing a petition with the OFAC office in Bogota, Colombia, as provided in 31 C.F.R. § 501.807. That petition was granted when OFAC removed Herrera's SDNT designation and unblocked his assets effective April 30, 2013. 78 Fed. Reg. 28,700-01 (May 15, 2013).

On December 15, 2010, Plaintiffs moved for a writ of garnishment against the blocked Wachovia funds. The district court granted the motion on December 16, holding that (1) Herrera was an agency or instrumentality of FARC; (2) funds blocked under the Kingpin Act were subject to garnishment under TRIA § 201; (3) Plaintiffs did not need a license from

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those assets subject to execution or attachment pursuant to TRIA § 201, the district court held that those assets were in fact subject to execution or attachment because "[t]he Kingpin Act . . . was enacted pursuant to Congressional findings and authority arising from the [IEEPA]." We later held that execution or attachment under TRIA § 201 does not include those assets blocked under the Kingpin Act and is limited to those assets which were blocked under the acts expressly listed in TRIA § 201(d)(2)(A): TWEA and the IEEPA. *Mercurio,* 704 F.3d at 917. Herrera bases his appeal partly on the district court's erroneous order, which we discuss below.

OFAC to garnish the funds; (4) the blocked funds were property within the United States; and (5) Herrera was not entitled to notice or a hearing. After the writ was served on Wachovia, Wachovia filed an answer to the writ on January 11, 2011, wherein it objected to the writ's issuance based on their assertion that Federal Rule of Civil Procedure 19 may have required the joinder of other parties and other beneficiaries, including Herrera. The district court entered judgment against Wachovia on January 18, 2011, reaffirming that Herrera was not entitled to notice or a hearing. No notice of these proceedings was served on Herrera.

Herrera's attorney in New York learned of the garnishment proceedings no later than January 26, 2011, eight days after the district court's entry of judgment; the attorney was advised by counsel representing Wachovia to "take up his grievances with Judge Lazzara." Herrera and his attorney failed to take any action until Herrera hired a Florida attorney on February 24, 2011. According to Herrera, before the attorney could accept fees for his representation in any matter related to the OFAC designation, he had to apply for and be issued a license from OFAC, which he obtained on May 12, 2011. Herrera still waited to file anything in the district court to address the garnishment proceedings until October 31, 2011, when he filed (1) a motion for relief from the judgment entered on January 18 pursuant to Federal Rules of Civil Procedure 12(b)(5), 55(c), and 60(b), as well as the Fifth Amendment; (2) a motion for relief

from the writ of garnishment pursuant to Federal Rule of Civil Procedure 69(a)(1) and Florida garnishment law as well as the Fifth Amendment; and (3) a motion to disqualify Judge Lazzara pursuant to 28 U.S.C. § 455(a) and (b) as well as the Fifth Amendment. The district court denied the motion to disqualify on December 5, 2011, and stayed the remainder of the motions pending the outcome of *Mercurio.* After we released that opinion, the district denied the remaining motions, holding that laches barred consideration of them and that our opinion in *Mercurio* could not apply retroactively. Herrera appeals from that order.

Typically, a turnover judgment is the final, appealable judgment in garnishment proceedings. Here, the district court entered that turnover judgment on January 18, 2011. Federal Rule of Appellate Procedure 4(a) requires parties to file any notice of appeal within thirty days after judgment is entered. Herrera did not file anything with the district court until October 31, 2011, more than nine months after the entry of judgment, when he filed motions seeking various types of relief. The district court denied the consolidated motion on February 26, 2013. Herrera timely filed a notice of appeal from that order. The order was final and appealable. *See Mirage Resorts, Inc. v. Quiet Nacelle Corp.,* 206 F.3d 1398, 1401 (11th Cir. 2000); *Am. Bankers Ins. Co. of Fla. v. Nw. Nat'l Ins. Co.,* 198 F.3d 1332, 1338 (11th Cir. 1999).

Nonetheless, the orders denied motions to set aside the judgment, so we must consider "only the

propriety of the denial or grant of relief and . . . not . . . issues in the underlying judgment." *Id.* Denials of Rule 60(b) and 55(c) motions are generally subject to an abuse of discretion standard of review. *In re Worldwide Web Sys., Inc.,* 328 F.3d 1291, 1295 (11th Cir. 2003); *EEOC v. Mike Smith Pontiac GMC, Inc.,* 896 F.2d 524, 528 (11th Cir. 1990).

However, motions to set aside for voidness under Rule 60(b)(4) are subject to de novo review. *Burke v. Smith,* 252 F.3d 1260, 1263 (11th Cir. 2001). We hold that the district court did not abuse its discretion or err in denying the motions.

A judgment can be set aside for voidness where the court lacked jurisdiction or where the movant was denied due process. *United Student Aid Funds, Inc. v. Espinosa,* 559 U.S. 260, 271, 130 S. Ct. 1367, 1377 (2010). This includes lack of personal jurisdiction and defective due process for failure to effect proper service. *Worldwide Web,* 328 F.3d at 1299. Herrera is correct to point out that a motion to set aside a judgment for voidness pursuant to Federal Rule of Civil Procedure 60(b)(4) is not subject to a typical laches analysis. *Hertz Corp. v. Alamo Rent-A-Car, Inc.,* 16 F.3d 1126, 1130 (11th Cir. 1994). "However, there are limitations on this doctrine [that jurisdictional defects are grounds for granting a 60(b)(4) motion] . . . [including] that objections to personal jurisdiction (unlike subject matter jurisdiction) are generally waivable." *Worldwide Web,* 328 F.3d at 1299. Because Herrera knowingly sat on his rights for nine months before filing anything at all with the district court, he

waived his right to object to any defects in the service of process or to any denial of his right to be heard. *See Espinosa,* 559 U.S. at 275, 130 S. Ct. at 1380 ("Rule 60(b)(4) does not provide a license for litigants to sleep on their rights.").

Herrera claims that the delay was out of his control because his attorney was required to obtain a license before he could be paid using the blocked funds. Assuming this excuses his delay,[17] Herrera still fails to provide us with grounds for considering the motion because he waited an additional five months after his attorney was licensed to file anything with the district court. Herrera does not give an acceptable reason for this delay. Therefore, the district court did not err in denying the Rule 60(b)(4) motion.

The additional grounds for voidness Herrera argues apply here are meritless. The district court had subject matter jurisdiction. It is well settled that a judgment is not void "simply because it is or may have been erroneous." *Espinosa,* 559 U.S. at 270, 130 S. Ct. at 1377 (internal quotation marks omitted); *see also Oakes v. Horizon Fin., S.A.,* 259 F.3d 1315, 1319

[17] And we merely assume this for purposes of this analysis. It is not difficult to imagine that Herrera would be able to find an attorney who would file a notice of appeal before the deadline, a Federal Rule of Appellate Procedure 4(a)(6) request for reopening the time to file an appeal, or a Rule 60(b) motion immediately upon learning of the judgment against Herrera at least to keep Herrera's opportunity to seek redress from spoiling while the license application was pending.

(11th Cir. 2001) ("[I]t is well-settled that a mere error in the exercise of jurisdiction does not support relief under Rule 60(b)(4).").

Plaintiffs' contention that assets blocked under the Kingpin Act are subject to TRIA execution is not a claim that the district court lacked jurisdiction. The district court had entered judgment on the writ before we issued *Mercurio,* so the mere fact that we *later* decided that TRIA § 201 does not apply to assets blocked under the Kingpin Act means the district court's judgment may have been erroneous, but it does not mean the court lacked subject matter jurisdiction. Therefore, the district court had subject matter jurisdiction, and a motion to set aside the judgment for voidness does not lie based on lack of subject matter jurisdiction.

Herrera's argument that the judgment was void because Plaintiffs failed to obtain licenses from OFAC is likewise unavailing. Voidness for purposes of a 60(b)(4) motion contemplates lack of jurisdiction or defects in due process that deprive a party of notice or an opportunity to be heard. *Espinosa,* 559 U.S. at 271, 130 S. Ct. at 1377. It is not sufficient to cite a regulation that makes use of the word "void," *see* 31 C.F.R. § 598.205(a) and (e), and Herrera does not provide additional argument for why execution of OFAC-blocked assets without a license constitutes a "fundamental infirmity." *See Espinosa,* 559 U.S. at 270, 130 S. Ct. at 1377.

Motions filed pursuant to Rule 60(b)(6) and 60(b)(3) are not subject to the very generous timing considerations that 60(b)(4) motions are because they do not carry the same jurisdictional and due process concerns. *See, e.g., Hertz,* 16 F.3d at 1130 (holding *only* that Rule 60(b)(4) motions are not subject to the "reasonable time" requirement). Thus, they "must be made within a reasonable time." Fed. R. Civ. P. 60(c)(1). Even assuming again that we should not expect Herrera to have filed his motion before his attorney was licensed, the five-month delay that followed his licensure surely was unreasonable. Therefore, we will not consider the 60(b)(6) or 60(b)(3) claims.

Rule 55(c) provides an additional, less "stringent" standard: good cause. *See Jones v. Harrell,* 858 F.2d 667, 669 (11th Cir. 1988). However, that standard applies to setting aside an entry of default and is inapplicable in the instant case because the district court, in fact, entered a default judgment. *See* Fed. R. Civ. P. 55(c) (providing the court may set aside an *entry* of default for good cause and a default *judgment* under Rule 60(b)). Accordingly, our Rule 60(b) analysis governs this issue. *See Harrell,* 858 F.2d at 669 ("Because a judgment had not been entered the trial court had the discretion to set aside the entry of default under Rule 55(c) rather than under the more stringent provisions of Fed. R. Civ. P. 60(b) that would have controlled if judgment had been entered.").

Therefore, we affirm the district court's order denying Herrera's requested relief.

B. No. 13-12019 (The Partnerships and Plainview)

Salman Coral Way Partners and C.W. Salman Partners (collectively, "the Partnerships") are partnerships organized under Florida law. Plainview Florida II, Inc. (Plainview) owns a 50-percent share of each of the Partnerships. The remaining 50 percent is owned by Granada & Associates, Inc. (Granada), which is not a party to this appeal.

OFAC designated the Partnerships as SDNTs under the IEEPA on March 7, 2007, because of alleged ties to the North Valley Cartel (NVC). Specifically, OFAC alleged that the Partnerships were owned by SDNT individuals who themselves had ties to the NVC. The Partnerships argued that those individuals, Carlos Saieh and Moises Saieh, had ownership interests in Granada, not any direct interest in the Partnerships. Additionally, the OFAC press release did not mention FARC. The Partnerships challenged their designation and received licenses from OFAC to continue operations. OFAC de-listed the Partnerships, as well as Granada and the Saiehs, on January 10, 2012.

As in Herrera's case, Plaintiffs sought to execute against the Partnerships' blocked assets under TRIA § 201. On August 31, 2011, Plaintiffs moved, ex parte, for writs of garnishment against deposit accounts held by the Partnerships at Terrabank, N.A. In support of the motion, Plaintiffs submitted the OFAC press release documenting the Partnerships' alleged

ties to the NVC and affidavits from two experts familiar with Colombian narcotrafficking. The affidavits, one from a Senior Analyst in the Office of Naval Intelligence and the other from a Colombian Marine Corps officer, documented FARC's ties to the NVC. Both testified that the NVC, including its "individual members, divisions, and networks," was an agency or instrumentality of FARC based on the district court's standard. The district court granted the writs of garnishment on September 6, 2011.[18] Based on the fact that OFAC had designated the Partnerships as SDNTs because of alleged ties to the NVC, the district court found that they were agencies or instrumentalities of the NVC. Because of the testimony that the NVC, including its members, divisions, and networks, was an agency or instrumentality of FARC, the district court determined that the Partnerships were in turn agencies or instrumentalities of FARC,[19] opening their blocked assets to execution by Plaintiffs under TRIA § 201. The Partnerships had not previously been directly linked to FARC by OFAC or any other executive or judicial authority.

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[18] The writ as to Plainview's account was issued in error because it was never a SDNT. Plaintiffs resolved the matter by returning the amount in Plainview's account to Plainview.

[19] The district court found that the NVC's "OFAC designated member organizations, partners, affiliates, and/or money laundering financial network members, are all agencies or instrumentalities of the FARC, [including] the Terrabank, N.A. SDNT account holders who are all OFAC designated members, affiliates, front persons, or entities within the [NVC]."

The district court further determined that the Partnerships were not entitled to notice or an opportunity to be heard. Specifically, the court held that because TRIA § 201 preempts Florida garnishment law and does not contain any provisions for notice or an opportunity to be heard, the Partnerships would not be afforded those protections. Accordingly, the order granting the writs of garnishment was entered without formal notice to the Partnerships. On September 8, 2011, the district court stayed all garnishment proceedings pending the outcome of the *Mercurio* appeal. The district court later granted a motion for clarification from Plaintiffs, which allowed Plaintiffs to continue the garnishment action during *Mercurio*'s pendency.[20] After service of the writs, Terrabank turned over the contents of the deposit accounts on September 23 without filing an answer.

On October 7, 2011, Plaintiffs moved for a writ of execution against four parcels of real property owned by the Partnerships. The district court granted the writ on October 11. Like the order granting the writ of garnishment, this order held that the Partnerships were not entitled to notice or an opportunity to be heard.

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[20] The *Mercurio* appeal concerned TRIA execution against a SDNT that had been designated by OFAC under the Kingpin Act. Because the Partnerships had been designated under the IEEPA, the district court allowed garnishment against them and other IEEPA-designated SDNTs to continue.

On November 29, 2011, United States Marshals levied on the real property by posting notice in conspicuous places and providing direct notice to the Partnerships, tenants, and management. They also published notice of the levy in a local newspaper for four weeks. This was the first notice the Partnerships received of the proceedings against their property. The Partnerships moved to vacate the orders granting the writs of garnishment and execution and to quash the resulting writs on February 21, 2012, arguing that they were entitled to notice and an opportunity to be heard prior to issuance of the writs and requesting an evidentiary hearing. They also argued that the district court incorrectly found them to be agencies or instrumentalities of FARC. In support, they attached an affidavit from their accountant outlining their ownership structure: 50 percent owned by Granada and 50 percent owned by Plainview. The affidavit also asserted that Granada's only capital contribution to the partnerships was its 1992 purchase of the 50 percent ownership stake and that Granada did not have access to the Partnerships' bank accounts or control over its operations. The next day, the district court stayed ruling on that motion and reminded Plaintiffs of previous orders staying execution on the real property.

On January 9, 2013, we reversed the district court in *Mercurio*. The district court then lifted the stay and ordered Plaintiffs to respond to the Partnerships' motion to vacate. Plaintiffs' response conceded that the Partnerships were entitled to "some form" of

due process and argued that they had received adequate notice through the OFAC designations and the levy on the real property. Though Plaintiffs had previously argued – and the district court had agreed – that the Partnerships were not entitled to notice, the district court denied the Partnerships' request to reply to this change in Plaintiffs' argument. The district court denied the Partnerships' motion to vacate on April 19, 2013.[21] It held that the Partnerships received due process through (i) the notice of

[21] For an order to be appealable, it must be final. 28 U.S.C. § 1291. Writs of garnishment and orders denying relief from such writs are not appealable; typically, there is no appellate jurisdiction until the district court enters an order directing the disposition of the property. *United States v. Branham,* 690 F.3d 633, 635 (5th Cir. 2012) (per curiam). Because Terrabank turned over the money in the subject accounts as soon as it received the writ, there was no order from the district court directing disposition of the account. In its place, the order denying the motion to vacate functions as a final, appealable order as to the garnishment proceedings because it "end[ed] the litigation on the merits," and there was nothing left for the court to do because the judgment was already executed. *See Green Tree Fin. Corp.-Ala. v. Randolph,* 531 U.S. 79, 86, 121 S. Ct. 513, 519 (2000) (internal quotation marks omitted); *Gillespie v. U.S. Steel Corp.,* 379 U.S. 148, 152, 85 S. Ct. 308, 311 (1964) ("[T]he requirement of finality is to be given a practical rather than a technical construction." (internal quotation marks omitted)). It also functions as a final, appealable order for the execution writs because the only thing left to do there was hold the execution sale. *See In re Martin Bros. Toolmakers, Inc.,* 796 F.2d 1435, 1437 (11th Cir. 1986) (recognizing the "qualification of the [final judgment] rule[ ] allowing review whenever an order directs immediate delivery of physical property and subjects the losing party to irreparable harm" (internal quotation marks omitted)).

their OFAC designations, (ii) the stay of the sale of the real property, (iii) the opportunity to challenge OFAC's designations both administratively and through judicial review, (iv) "the requirement that the Plaintiffs file a motion and seek entry of a court order," and (v) the notice that came with the levy on the real property. The court further held that OFAC's removal of the Partnerships' SDNT status was irrelevant because OFAC's regulations do not permit retroactive effect of de-listing. *See* 31 C.F.R. § 536.402.

The Partnerships timely filed a notice of appeal on April 29, 2013. We granted their motion to stay the sale of the real property on July 9. On appeal, the Partnerships argue that (1) they were denied constitutional due process, (2) they were denied statutory entitlements to notice and a hearing, (3) the agency or instrumentality standard applied by the district court was erroneous, and (4) the evidence did not support the agency or instrumentality finding.

First, contrary to the district court's decision, the notice the Partnerships received of their OFAC designation was not sufficient as to the TRIA execution proceedings. Such a designation provides notice to the designee that its assets have been blocked and of a number of other consequences, including the *potential* for TRIA execution. Having notice of the potential for proceedings without notice of their timing, location, adverse parties, nature, etc., is not sufficient to satisfy due process. The OFAC designation did not give the Partnerships notice that was "reasonably

calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950), because it does not "give a person in jeopardy of serious loss . . . opportunity to meet" that particular proceeding, *Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, 171-72, 71 S. Ct. 624, 649 (1951) (Frankfurter, J., concurring).

The notice conveyed to the Partnerships through the levy on their real property, however, did provide sufficient notice of the execution proceedings. The Supreme Court has specifically stated "that in most cases, the secure posting of a notice on the property of a person is likely to offer that property owner sufficient warning of the pendency of proceedings possibly affecting his interests." *Greene v. Lindsey,* 456 U.S. 444, 452, 102 S. Ct. 1874, 1879 (1982). While a posting may not be sufficient where the notice is not conveyed due to, for example, removal of the posting by children, *see id.* at 453-54, 102 S. Ct. at 1879-80, such argument is not available where there is no evidence that the postings could not be relied upon to convey notice, *see Goldhofer Fahrzeugwerk GmbH & Co. v. United States,* 885 F.2d 858, 862 (Fed. Cir. 1989). In fact, the Partnerships not only fail to provide evidence that the postings were an unreliable means of providing notice under the circumstances; they also received actual notice and appeared. Therefore, notice as to the real property execution was

adequate.[22] *See Espinosa,* 559 U.S. at 275, 130 S. Ct. at 1380.

The Partnerships were also afforded an opportunity to be heard. As discussed *supra,* the Partnerships were not entitled to a pre-writ hearing. Nevertheless, they had the opportunity to present evidence refuting the agency or instrumentality designation. They simply did not present any evidence that changed the district court's position on the agency or instrumentality determination.

Even if constitutional due process standards are met, the Partnerships argue that the writs of garnishment and execution should be quashed for failure to comply with Florida's statutory requirements for garnishment and execution. Despite the fact that the district court erred in holding that Florida law did not apply, the circumstances indicate that the decision was harmless. The Partnerships were not prevented from taking advantage of Florida law specifically providing for third-party challenges to garnishment proceedings. *See* Fla. Stat. § 77.07(2). The third party can move to dissolve the writ of garnishment by "stating that any allegation in plaintiff's motion for writ is untrue." *Id.* If the relevant allegation – here, agency or instrumentality status –

[22] We can also infer that the Partnerships received notice of the garnishment proceedings against their accounts because their motion seeking relief from the real property execution also challenged the writs of garnishment.

is found to be untrue, the court dissolves the writ. *Id.* The Partnerships followed this procedure, and the district court, after due consideration of their argument, concluded that the agency or instrumentality allegation was "proved to be true." *See id.* It therefore properly denied the motion to dissolve the writ. Any failure by the district court to conform to Florida's notice procedures was harmless because the Partnerships received actual notice and were able to contest the allegations as provided in § 77.07; they merely failed to succeed on the merits.

The execution of the real property was likewise proper under Florida law. The Partnerships complain that Plaintiffs did not furnish the required affidavit, rendering the execution invalid. *See* Fla. Stat. § 56.21; *cf. In re King,* 463 B.R. 555, 566 (Bankr. S.D. Fla. 2011) (setting aside an execution sale where judgment creditors failed to comply with the § 56.21 30-day requirement). However, "[w]hen a particular provision of a statute relates to some immaterial matter, where compliance is a matter of convenience rather than substance, or where the directions of a statute are given with a view to the . . . conduct of business merely, the provision may generally be regarded as directory" and not mandatory. *Neal v. Bryant,* 149 So. 2d 529, 532 (Fla. 1962) (internal quotation marks omitted) (noting the exception to the generally mandatory nature of statutory directives introduced by the word "shall"). Here, we know that failure to provide the affidavit was harmless because the Partnerships had actual notice of the execution

proceedings and simply failed to disprove the agency or instrumentality allegations over the months between their receipt of notice and the district court's denial of their motions. Therefore, any failure to comply with statutory notice requirements is not grounds for reversal.

The Partnerships, moreover, were afforded an opportunity to present evidence to the district court rebutting Plaintiffs' allegation that they were agencies or instrumentalities of FARC. In fact, the Partnerships presented evidence of their ownership, presumably under the incorrect understanding that § 1603(b) would control for TRIA § 201. As discussed above regarding the writs of garnishment, the court properly found that evidence immaterial to the agency or instrumentality allegation.

The Partnerships also argue that there was not a sufficient evidentiary basis for the agency or instrumentality determination. This argument is unavailing. The evidence Plaintiffs presented to the district court was sufficient to establish the required relationship between FARC and the Partnerships, even if that relationship was indirect. *Cf. In re Air Crash Disaster Near Roselawn, Ind., on Oct. 31, 1994,* 96 F.3d 932, 940-41 (7th Cir. 1996) (holding that an entity majority-owned by an agency or instrumentality of a foreign state is itself an agency or instrumentality of that foreign state under the FSIA). The district court therefore did not clearly err in reaching the agency or instrumentality determination.

The remaining arguments raised by the Partnerships are meritless for reasons set forth in the global discussion. Therefore, we affirm the district court and lift the stay we imposed by order.

C. No. 13-11959 (Jamce Investments, Ltd., et al.)

The appellants here assert ownership of cash deposits held at various banks. The organizational appellants are the Partnerships, Granada, Confecciones Lord S.A. (Lord), ALM Investment Florida, Inc. (ALM), Villarosa Investments Florida, Inc. (Villarosa), Karen Overseas, Inc. (Overseas), MLA Investments, Inc. (MLA), Jacaria Florida, Inc. (Jacaria), Sunset & 97th Holdings, LLC (Sunset), and Jamce Investments, Ltd. (Jamce) (collectively, the Organizations). The individual appellants are Jacqueline Saieh (Jacqueline), Miriam Sutherlin (Miriam), Sandra Saieh (Sandra), Laura Saieh (Laura), Karen Saieh (Karen), Kathya Saieh (Kathya), Jaime Saieh (Jaime), Amelia Saieh (Amelia), Abdala Saieh (Abdala), Carlos Saieh (Carlos), Carmen Siman de Jaar (Carmen), Armando Jaar (Armando), Ricardo Jaar (Ricardo), and Moises Saieh (Moises) (collectively, "the Individuals").[23]

[23] Some of the Individuals have asserted standing to challenge the writ of garnishment issued to Wells Fargo as to Jamce, claiming that Jamce was a trust and that they were its beneficiaries. The district court rejected that assertion, finding that Jamce was a corporation. *See KMS Rest. Corp. v. Wendy's*

(Continued on following page)

These appellants were all OFAC-designated SDNTs when Plaintiffs filed ex parte motions for writs of garnishment against their blocked assets under TRIA on September 7, 2011. Fifteen of the writs were issued to Terrabank as to accounts held by Ricardo, Armando, Moises, Carlos, Carmen, Abdala, Jacaria, Lord, MLA, Granada, Overseas, Villarosa, the Partnerships, and ALM. Five more were issued to OceanBank, N.A. as to accounts held by Carmen, Abdala, Moises, Carlos, Sunset, and ALM. One was issued to Wells Fargo, N.A. as to an account held by Jamce. After obtaining OFAC's approval, Terrabank turned the contents of the accounts over to Plaintiffs' attorneys without filing an answer to the writs on September 23, 2011. The other banks filed answers, but the court entered turnover judgments against them as to all writs. After judgment was entered, a number of motions were filed seeking relief from the judgments. The final orders on appeal here are an order discharging Terrabank, two turnover judgments, four orders denying Rule 60(b)

Int'l, Inc., 361 F.3d 1321, 1324-25 (11th Cir. 2004) (recognizing that corporations themselves – and not shareholders – are the only parties with standing as to injuries against them). The Individuals give us no reasons to disturb that finding. Accordingly, only Jamce has standing to challenge the issuance of a writ of garnishment against its account. The Individuals with no personal interest in any of the assets garnished pursuant to the orders at issue, Jacqueline, Miriam, Sandra, Laura, Karen, Kathya, Jaime, and Amelia, therefore do not have standing. The other Individuals do not have standing to the extent that they challenge the writ issued as to Jamce.

motions[24], and the denial of Jamce's Rule 59(e) motion. The order discharging Terrabank and the first turnover judgment were not timely appealed, and we therefore do not have jurisdiction to consider them. Fed. R. App. P. 4(a). Thus, only the later-in-time turnover judgment (against Jamce's Wells Fargo account), the denials of the Rule 60(b) motions, and the denial of Jamce's Rule 59(e) motion are at issue here.[25]

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[24] The Rule 60(b) motions were also filed pursuant to Rules 59(e) and 69(a)(1). The district court correctly declined to consider the motions under Rule 59(e) because they were not timely filed. *See* Fed. R. Civ. P. 59(e); *Wright v. Preferred Research, Inc.,* 891 F.2d 886, 890 (11th Cir. 1990) (per curiam) (construing the old Rule 59(e), which included a deadline of 10 days after entry of judgment). Further, failure to comply with statutory law pursuant to Rule 69(a)(1) is not sufficient grounds to set aside a judgment under Rule 60(b)(4); the movant must demonstrate denial of due process or a jurisdictional error. *Espinosa,* 559 U.S. at 271, 130 S. Ct. at 1377; *Am. Bankers Ins.,* 198 F.3d at 1338 ("An appeal of a ruling on a Rule 60(b) motion . . . does not raise issues in the underlying judgment for review."). We note that these appellants do not argue that the district court "lacked even an arguable basis for jurisdiction." *See Espinosa,* 559 U.S. at 271, 130 S. Ct. at 1377 (internal quotation marks omitted). Their Rule 60(b)(4) motions, then, rest on an alleged denial of due process because they make no other argument that would constitute grounds for setting aside the judgment under Rule 60(b)(4).

[25] For an order to be appealable, it must be final. 28 U.S.C. § 1291. With respect to the writs issued to OceanBank and Wells Fargo, finality was accomplished when the district court entered turnover judgments against them after receiving their answers to the writs. Writs of garnishment and orders denying relief from such writs are not appealable; typically, there is no

(Continued on following page)

Jamce appeals a turnover judgment entered against an account it held at Wells Fargo. However, Jamce waived any opposition to Plaintiffs' motion seeking entry of judgment on the writ of garnishment when, after receiving notice of the motion through counsel, it failed to timely respond to the motion. The day after the district court entered the judgment, Jamce filed a Rule 59(e) motion, which the district court denied, specifically noting the electronic notice provided. Jamce appealed the judgment itself on the day it was issued and later amended the notice of appeal to include the Rule 59(e) motion denial. Because Jamce waived opposition to the motion seeking entry of judgment, we affirm the judgment. Further, a Rule 59(e) motion cannot be used simply as a tool to reopen litigation where a party has failed to take advantage of earlier opportunities to make its case. *Michael Linet, Inc. v. Vill. of Wellington,* 408 F.3d 757, 763 (11th Cir. 2005). Therefore, we also affirm the order denying Jamce's Rule 59(e) motion.

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appellate jurisdiction until the district court enters an order directing the disposition of the property. *Branham,* 690 F.3d at 635. Because Terrabank turned over the money in the subject accounts as soon as it received the writ, there was no order from the district court directing disposition of the account. In its place, the order discharging Terrabank functions as a final, appealable order because it "end[ed] the litigation on the merits," and there was nothing left for the court to do because the judgment was already executed. *See Randolph,* 531 U.S. at 86, 121 S. Ct. at 519 (internal quotation marks omitted); *Gillespie,* 379 U.S. at 152, 85 S. Ct. at 311. Additionally, the denials of the Rule 60(b) motions are appealable. *Am. Bankers Ins.,* 198 F.3d at 1338. Rule 59(e) motion denials are likewise appealable.

A number of the Individuals and Granada appeal the order denying their Rule 60(b) motion to set aside the execution of the real property owned by the Partnerships. In the denial, the district court held that they did not have standing because they did not own the real property under Florida law. The appellants do not challenge that determination here, and they have thus waived argument on that issue. *Marek v. Singletary,* 62 F.3d 1295, 1298 n.2 (11th Cir. 1995).

On November 2, Carmen, Armando, Ricardo, Carlos, and Moises moved to quash the garnishment, to reconsider the order granting Plaintiffs' motion for an issuance of writs of garnishment, for relief from judgment, to set aside the judgment, to stay the garnishment, and to deposit garnished funds into the court registry. On November 21, they also moved to alter judgment, to amend or correct the order on Plaintiffs' motion for judgment, to stay execution, and to deposit garnished funds into the court registry. After the stay discussed above was lifted, the district court denied the motions on April 9 and 12, 2013, respectively. The Organizations brought a similar motion seeking relief on April 30, 2012, and the district court denied it on April 25, 2013.

The appeal of those remaining orders – all denying Rule 60(b) motions – also fails. Contra the argument of these appellants, TRIA § 201 permits execution against the assets of parties not named in the original lawsuit; that is the purpose of the specific allowance for execution against agencies or instrumentalities provided by that section. *See Mercurio,*

704 F.3d at 913 & n.5 (citing *Weinstein v. Islamic Republic of Iran,* 609 F.3d 43, 50 (2d Cir. 2010)).

The appellants' arguments regarding an alleged denial of due process also lack merit because any such violation was harmless. As we concluded in the global discussion, no pre-deprivation hearing was warranted. Moreover, the appellants here had sufficient opportunities to present their arguments to the district court. Ultimately, the district court gave due consideration to these arguments.

The district court made the factual determination that each of the appellants in this appeal was an agency or instrumentality of FARC. Even if the appellants had given us reason to believe that that determination was clear error (they have not), they certainly do not give us reason to believe that such error is grounds for setting aside a judgment. The remaining grounds advanced by the appellants for reversing the district court are meritless, as detailed in the global discussion.

The turnover judgment as to Jamce's property was properly entered after Jamce defaulted. The Rule 60(b) motions do not establish any grounds on which we may grant such extraordinary relief. We therefore affirm the orders from which this appeal is brought.

D. No. 13-12337 (Sutherlin)

Luis Sutherlin claims that Jamce is a trust, that he is its beneficiary, and that he is thus entitled to

challenge the execution of assets owned by Jamce. However, the district court found that Jamce is a corporation. Sutherlin does not give us reason to disturb that finding. Therefore, only Jamce has standing to challenge the execution of its assets. *See KMS Rest. Corp.,* 361 F.3d at 1324-25 (recognizing that corporations themselves – and not shareholders – are the only parties with standing to contest injuries to the corporation). Consequently, this appeal is dismissed.

E. No. 13-12116 (Individual Claimants)

The appellants here appeal a series of turnover judgments for accounts in the names of Carmen, Carlos, Armando, and Moises at UBS AG, Bank of America (BOA), and HSBC Bank USA, N.A. (HSBC), as well as an order denying a Rule 59(e) motion.[26] All the appellants party to this appeal were SDNTs when Plaintiffs initiated garnishment proceedings against them. Significantly, the appellants made appearances in the district court after receiving notice of the garnishment proceedings and well before judgment was entered against them. First, they filed a motion to quash the writs of garnishment issued to UBS and BOA on November 2, 2011. Then, on February 12, 2013, they filed a brief opposing a lift of the stay.

[26] They also appeal an order denying relief from a writ of garnishment issued to BOA as to an account held by Brunello. We address that writ and the associated turnover judgment below.

Finally, they filed multiple motions opposing entry of judgment.

As an initial matter, the district court's denial of the Rule 59(e) motion on jurisdictional grounds was not proper. The district court based that decision on *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 58, 103 S. Ct. 400, 402 (1982) (per curiam). The district court quoted that opinion's language for the proposition that the filing of a notice of appeal divested it of jurisdiction to consider the Rule 59 motion. *Id.* ("The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."). However, *Griggs* was based on the language of an old version of Federal Rule of Appellate Procedure 4, which provided that a notice of appeal filed during the pendency of a Rule 59 motion would have no effect. In 1993, Rule 4(a) was specifically amended in response to *Griggs* and now provides that a notice of appeal filed during the pendency of a Rule 59 motion is simply suspended. *See Katerinos v. U.S. Dep't of Treasury,* 368 F.3d 733, 737-38 (7th Cir. 2004) ("The rule therefore was amended in 1993 to provide that a premature notice of appeal is no longer void, but merely suspended; it becomes effective . . . when the order disposing of the last such remaining motion is entered." (internal quotation marks omitted)); *see also* Fed. R. App. P. 4(a)(4)(B)(i). The district court retained jurisdiction to consider the Rule 59 motion, and we have jurisdiction because the notice of appeal

became effective following the district court's denial of that motion. In addition, the appellants here filed amended notices of appeal after the district court disposed of the Rule 59(e) motion giving us jurisdiction to consider the appeal of the denial. *See Stallworth v. Shuler,* 758 F.2d 1409, 1410 (11th Cir. 1985) (per curiam).

The appellants here first claim that their due process rights were violated by the district court's failure to provide them with notice and an opportunity to be heard. Notwithstanding their complaints about lack of formal service, any failure to provide notice was harmless because the appellants received actual notice and appeared. First, they filed a motion to quash the writs of garnishment issued to UBS and BOA on November 2, 2011. Then, on February 12, 2013, they filed a brief opposing a lift of the stay. Finally, they filed multiple motions opposing entry of judgment. Therefore, because they appeared, the appellants were not prejudiced by the lack of notice because they received actual notice. *Cf. Murphy v. Travelers Ins. Co.,* 534 F.2d 1155, 1159 (5th Cir. 1976) (holding that a party's voluntary appearance "waiv[ed] any potential defects founded on service or venue problems").

The Rule 59(e) motion does not save the appellants, either. We review denials of Rule 59(e) motions for an abuse of discretion. *Thomas v. Farmville Mfg. Co.,* 705 F.2d 1307, 1307 (11th Cir. 1983) (per curiam). The district court's denial of the Rule 59(e) motion based on a miscomprehension of the law was an

abuse of discretion. *United States v. Merrill,* 513 F.3d 1293, 1301 (11th Cir. 2008). However, we affirm the denial on the merits. *See Parks v. City of Warner Robins,* 43 F.3d 609, 613 (11th Cir. 1995) ("[W]e may affirm the district court's decision on any adequate ground, even if it is other than the one on which the court actually relied."). The appellants here simply failed to litigate the agency or instrumentality issue when they had notice of the proceedings. They then attempted to use the Rule 59(e) motion to reopen litigation, an improper basis for moving under Rule 59(e). *Michael Linet, Inc.,* 408 F.3d at 763 (holding that a party "cannot use a Rule 59(e) motion to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment"). We thus affirm the denial of the motion.

The appellants here also contend that they were improperly designated as agencies or instrumentalities. We have already determined that the district court applied the correct standard. Moreover, we cannot say that the district court clearly erred in making the factual determination that they were agencies or instrumentalities of FARC. Plaintiffs proffered evidence of connections to FARC that met the district court's standard, and the appellants here failed to rebut that evidence.

Finally, any other arguments raised do not support reversal. Therefore, we affirm the district court's orders at issue in this appeal.

F. No. 13-12171 (Brunello)

Brunello, Ltd. is a Caymanian corporation that was designated a SDNT on November 8, 2006, for alleged ties to the NVC. It began the de-listing process soon after that. Plaintiffs moved for a writ of garnishment against BOA on September 15, 2011, where they believed Brunello held a blocked asset. The district court issued the writ on September 20, 2011. BOA answered the writ claiming that it was indebted to Brunello. On November 16, it amended the answer, disclaiming any debt owed to Brunello and informing the district court and Plaintiffs that Merrill Lynch, Pierce, Fenner & Smith, Inc., (Merrill Lynch) was indebted to Brunello. BOA had mistakenly reported to OFAC that it held an asset belonging to Brunello; Brunello actually held the account in question with Merrill Lynch. Both BOA and Merrill Lynch are wholly owned subsidiaries of Bank of America Corporation.

Meanwhile, Brunello had successfully challenged its OFAC designation, which was reflected in OFAC's updated SDNT list, published on January 10, 2012. Brunello then moved to dissolve the writ of garnishment on January 23, 2013, asserting that BOA did not possess any of its assets. On January 29, while that motion was pending, Plaintiffs moved to amend the writ of garnishment to add Merrill Lynch as a party indebted to Brunello. Brunello filed its opposition to that motion on January 30, and, the next day, the district court denied Brunello's motion to quash and granted Plaintiffs' motion to amend. The clerk

issued the amended writ on March 13. Merrill Lynch was served on April 8. The district court entered a turnover judgment against Merrill Lynch on May 6, and Brunello timely filed an appeal. While Brunello raises many of the same arguments discussed above, it uniquely asserts that the district court improperly related back, *nunc pro tunc,* the writ of garnishment. Because we agree with Brunello on that point, we reverse the turnover judgment and remand to the district court with instructions to quash the underlying writ of garnishment and return any turned over funds.

The purpose of a *nunc pro tunc* order is not "to revise history, but only to correct inaccurate records." *Justice v. Town of Cicero,* 682 F.3d 662, 664 (7th Cir. 2012) (internal quotation marks omitted).

> A *nunc pro tunc* order merely recites court actions previously taken but not properly or adequately recorded. The failure of a court to act, or its incorrect action, can never authorize a *nunc pro tunc* entry. If a court does not render judgment or renders one which is imperfect or improper, it has no power to remedy any of these errors or omissions by treating them as clerical misprisions.

Cypress Barn, Inc. v. W. Elec. Co., 812 F.2d 1363, 1364 (11th Cir. 1987) (citation and internal quotation marks omitted). In other words, a *nunc pro tunc* order's "purpose . . . is to correct mistakes or omissions in the record so that the record properly reflects the events that *actually took place.*" *Glynne v. Wilmed*

Healthcare, 699 F.3d 380, 383-84 (4th Cir. 2012). It cannot change substantive rights retroactively. *See Transamerica Ins. Co. v. South,* 975 F.2d 321, 325-26 (7th Cir. 1992).

Here, the *nunc pro tunc* order substituted a new party that actually was indebted to Brunello for one that was not. A *nunc pro tunc* order that has the effect of retroactively inserting in a writ a garnishee who was never mentioned in the original writ, was not a party to the proceedings, and was never served with the original writ is perhaps the most obvious violation of the limitations on the doctrine. Such an order does not "merely recite[ ] court actions previously taken but not properly or adequately recorded," *Cypress Barn,* 812 F.2d at 1364, "correct inaccurate records," *Justice,* 682 F.3d at 664 (internal quotation marks omitted), or "reflect[ ] the events that *actually took place,*" *Glynne,* 699 F.3d at 384. Rather, it "revise[s] history," *Justice,* 682 F.3d at 664, "to remedy [an] error" borne of "its incorrect action," *Cypress Barn,* 812 F.2d at 1364 (internal quotation marks omitted). It works an injustice on the parties that were not earlier named in the writ; it does not correct, in Plaintiffs' words, a mere "wrinkle." *See Sage v. Cent. R.R. Co. of Iowa,* 93 U.S. 412, 417 (1876) ("While it is true that the court may enter an order in a cause *nunc pro tunc,* where the action asked for has been delayed by or for the convenience of the court, it is never done where the parties themselves have been at fault, or where it will work injustice." (citations omitted)).

In response to Brunello's argument that the *nunc pro tunc* order was entered improperly, Plaintiffs allege that the garnishee originally named in the writ, BOA, answered the writ in a "misleading" fashion and engaged in "questionable conduct." Assuming that claim is true, it is irrelevant. The proper garnishee was a completely separate entity.[27] It is immaterial that both garnishees were owned by the same entity or that BOA may have misled Plaintiffs.

Thus, the motion for a writ of garnishment against Merrill Lynch was filed on the date it was filed, not the date on which the writ against BOA was filed, which came after Brunello's de-listing. For that reason, TRIA § 201's requirement that the subject asset is "blocked" was not met as a matter of law. *See Holy Land Found.,* 722 F.3d at 687. We reverse the turnover judgment and remand to the district court with instructions to quash the writ of garnishment.

IV. Conclusion

In the proceedings below, it seems no party was free of fault. Plaintiffs should have provided formal notice of the garnishment and execution proceedings to the owners of the property, as Florida law provides. Initially, the district court incorrectly concluded that no process was due to the owners of property here, none of whom could be deemed to be on notice of the

[27] The district court did not determine that BOA and Merrill Lynch were alter egos.

underlying proceedings against FARC. Ultimately, though, Claimants bear their share of the blame for either sitting on their rights to challenge the allegations against them or simply failing to rebut the charges. Therefore, with the exception of the turnover judgment against Brunello's account, we affirm the district court.

AFFIRMED IN PART; DISMISSED IN PART; REVERSED AND REMANDED IN PART.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Tampa Division

KEITH STANSELL,
MARC GONSALVES,
THOMAS HOWES,
JUDITH G. JANIS,
CHRISTOPHER T. JANIS,
GREER C. JANIS,
MICHAEL I. JANIS,
and JONATHAN N. JANIS

Plaintiffs,

vs.

REVOLUTIONARY
ARMED FORCES OF
COLOMBIA (FARC); et al.,

Defendants. /

CIVIL ACTION CASE NO.:
8:09-CV-2308-RAL-MAP

ORDER

THIS CAUSE coming on to be heard upon Plaintiffs' Motion for Issuance of Writ of Execution for Post-Judgment Execution [D.E. 251] filed on December 15, 2010, and the Court having reviewed the motion, memorandum of law, legal authority, and being duly advised in the premises, it is hereby ORDERED AND ADJUDGED:

1. Plaintiffs have obtained a Default Judgment against the narco-terrorist organization Revolutionary Armed Forces of Colombia ("FARC") et al. on June 15, 2010 for an amount totaling Three Hundred

Eighteen Million Thirty Thousand Dollars and zero cents ($318,030,000.00) [DE 233].

2. The Judgment also provides that "[i]nasmuch as the FARC used profits from the manufacture and distribution of cocaine, money laundering, and extortion to support their terrorist acts, Plaintiffs are deemed crime victim judgment creditors with perfected liens on proceeds derived from these related offense criminal activities." [DE 233, ¶ 9].

3. Plaintiffs now seek post-judgment execution/garnishment on blocked assets of a terrorist party under Section 201(a) of the Terrorism Risk Insurance Act of 2002 ("TRIA"):

> SEC. 201. SATISFACTION OF JUDGMENTS FROM BLOCKED ASSETS OF TERRORISTS, TERRORIST ORGANIZATIONS, AND STATE SPONSORS OF TERRORISM.
>
> (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.

Section 201(a) of TRIA, Pub. L. No. 107-297, 116 Stat. 2322

4. This Court has subject matter jurisdiction over Plaintiffs' post-judgment execution proceedings pursuant to 28 U.S.C. § 1331 because it involves a federal question of execution against a blocked account of an agency or instrumentality of a terrorist party under Section 201 of the Terrorism Risk Insurance Act of 2002 ("TRIA") on a federal Anti-Terrorism Act ("ATA") judgment [18 U.S.C. § 2331 et seq.]. The ATA provides for nationwide jurisdiction, venue and service of process. 18 U.S.C. § 2334.

5. The TRIA allows for execution on the blocked assets of a terrorist party, or its agency or instrumentality, to satisfy a judgment against the terrorist party, provided that the following requirements are met:

> (1) a person has obtained a judgment against a terrorist party;
>
> (2) the judgment is either
>
> > (a) for a claim based on an act of terrorism, or
> >
> > (b) for a claim for which a terrorist party is not immune under § 1605(a)(7);
>
> (3) the assets are "blocked assets" within the meaning of TRIA; and

(4) execution is sought only to the extent of any compensatory damages.

Weininger v. Castro et al., 462 F. Supp. 2d. 457, 479 (S.D.N.Y. 2006).

6. The TRIA applies to these post-judgment enforcement proceedings and Plaintiffs' Motion meets all four requirements of the TRIA. Plaintiffs have a federal district court judgment under the Anti-Terrorism Act against the FARC, a "terrorist party", for damages arising from "an act of terrorism" [murder and hostage taking], as defined under Section 201(d) of the TRIA. The Wachovia Wells Fargo intercepted wire transfer is a "blocked asset" under the TRIA. Plaintiffs' Judgment is solely for compensatory damages.

7. On October 8, 1997 the Secretary of State of the United States designated the FARC as a Foreign Terrorist Organization [FTO], pursuant to the Anti-terrorism and Effective Death Penalty Act, 8 U.S.C. § 1189. The FARC was re-designated on September 5, 2001.

8. The FARC was named as a Specially Designated Global Terrorists [SDGT] in October 2001 under President Bush's Executive Order 13224 issued pursuant to authority of the International Economic Emergency Powers Act ("IEEPA") 50 U.S.C. §§ 1701, 1702. The FARC was also designated by President Bush as a Significant Foreign Narcotics Trafficker [SFNT] on May 29, 2003.

9. The TRIA's purpose "is to deal comprehensively with the problem of enforcement of judgments issued to victims of terrorism in any U.S. court by enabling them to satisfy such judgments from the frozen assets of terrorist parties. . . ." *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43, 50 (2d Cir. 2010) (quoting Senator Harkin a sponsor of the TRIA 148 Cong. Rec. S11524, at S11528 (Nov. 19, 2002)).

10. TRIA § 201(a) begins with the phrase "[n]otwithstanding any other provision of law" (the "Notwithstanding Clause"). TRIA § 201(a). The Notwithstanding Clause's plain language is not restricted only to issues of immunity and jurisdiction, and TRIA § 201's legislative history also evinces the broader Congressional purpose to "deal *comprehensively* with the problem of enforcement of judgments rendered on behalf of victims of terrorism in any court of competent jurisdiction." *Jeannette Hausler v. JP Morgan Chase Bank, NA,* ___ F. Supp. 2d. ___, 2010 WL 3817546 (S.D.N.Y. 2010) (citing H.R. Conf. Rep. No. 107-779 at 27). The Court in *Hausler* noted that "Courts have routinely interpreted such "notwithstanding" provisions to supersede all other laws . . . and to indicate preemption, . . . " (citations omitted), therefore the Court held that insofar as New York state law Article 4-A conflicts with TRIA, TRIA's § 201(a)'s opening phrase weighs in favor of preemption. Accordingly, to the extent any state laws on post-judgment enforcement conflict with the TRIA, the TRIA will control and is the legal mechanism for these victims of terrorism to satisfy their United

States District Court Judgment. To the extent any provisions of Florida's garnishment statute conflict with the TRIA – including any right to exemptions from garnishment, to seek dissolution of the writ, or right to jury trial – the TRIA controls and preempts state law. Fed. R. Civ. P. 69(a).

11. The 2nd Circuit Court of Appeals in *Weinstein v. Islamic Republic of Iran,* 609 F.3d 43, 50 (2d Cir. 2010) recently held that: "Accordingly, we find it clear beyond cavil that Section 201(a) of 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 the judgment-debtor, even if the instrumentality is not itself named in the judgment." *Id.* at 50. See also *Weininger v Castro,* 462 F. Supp. 2d. 457, 479 (S.D.N.Y. 2006) ("[B]y its terms § 201 provides that the blocked assets that may be executed upon are those of either the "terrorist party" or "any agency or instrumentality of that terrorist party," even though the judgment itself need be only against the terrorist party.").

12. On May 6, 2010, OFAC determined that Jose Ricaurte Diaz Herrera is a member of the FARC Financial Fronts Money Laundering Networks and he is therefore an agency or instrumentality of the FARC under § 201 of the TRIA. *See Ungar v. The Palestinian Authority,* 304 F. Supp. 2d 232, 241 (D.R.I. 2004) (HLF is an agency or instrumentality of Hamas because it acts "for or on behalf of" Hamas).

13. Jose Ricaurte Diaz Herrera is a Specially Designated Narcotics Trafficker [SDNTK] pursuant to the Kingpin Act and the Foreign Narcotics Kingpin Sanctions Regulations, 31 C.F.R. Part 598.314(b), which provides:

> **§ 598.314 Specially designated narcotics trafficker.**
>
> The term *specially designated narcotics trafficker* means:
>
> (b) Foreign persons designated by the Secretary of the Treasury, in consultation with the Attorney General, the Director of Central Intelligence, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, the Secretary of Defense, and the Secretary of State, because they are found to be:
>
> (1) Materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of a specially designated narcotics trafficker;
>
> (2) Owned, controlled, or directed by, or acting for or on behalf of, a specially designated narcotics trafficker; or
>
> (3) Playing a significant role in international narcotics trafficking.

14. Jose Ricaurte Diaz Herrera's assets in the United States and otherwise under U.S. jurisdiction

have been blocked by his OFAC designation as a FARC SDNTK.

15. The TRIA defines "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), 116 Stat. at 2339. The FARC is a SDGT pursuant to Executive Order 13224 issued under the IEEPA.

16. The TRIA legislative history indicates that the statutory definition of "blocked assets" was included to specifically address the frustrations of terrorism victims unable to enforce judgments against terrorist parties. *See* 148 Cong. Rec. S 11528 (indicating that H.R. 3210, the version of TRIA passed in 2002, amended earlier versions of TRIA legislation to include a definition of "blocked assets"); H.R. Conf. Rep. 107-779 ("In § 201(d), the Conferees . . . defined the term "blocked assets."). In his remarks prior to TRIA's passage, Senator Harkin identified § 201's definition of "blocked asset" as one of three amendments addressing statutory deficiencies that had "vexed" victims of terrorism seeking to satisfy judgments from the frozen assets of terrorist parties. *See* 148 Cong. Rec. S11528.

17. The term 'blocked asset' has been broadly defined to include any asset that has been, as here, seized by the United States in accordance with law . . . includ[ing] any asset with respect to which

financial transactions are prohibited or regulated by the U.S. Treasury under any blocking order under the [TWEA], the [IEEPA], or any proc]amation, order, regulation, or license." *Id.*

18. The Kingpin Act, 21 U.S.C.A. § 1901-1908, was enacted pursuant to Congressional findings and authority arising from the International Emergency Economic Powers Act ("IEEPA") (50 U.S.C. § 1701 et seq.). The Kingpin Act "restates the applicable provisions of the [IEEPA]". H.R. CONF. REP. 106-457, Sec. 806, 810. Congress based the Kingpin Act on the effective sanctions program that the Department of the Treasury's Office of Foreign Assets Control ("OFAC") administers against the Colombian drug cartels pursuant to Executive Order 12978 issued in October 1995 ("Executive Order 12978") under authority of the IEEPA. The FARC was included as a Specially Designated Global Terrorist [SDGT] by Executive Order 13224 under authority of the IEEPA. Executive Order 13224 authorizes blocking of FARC assets, and assets of foreign entities determined to be "to be owned or controlled by, or to act for or on behalf of the FARC, or "to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of" the FARC, or "to be otherwise associated with" the FARC. The Kingpin Act authorizes the Treasury Department to make derivative designations and block the assets of foreign persons or entities that provide support or assistance to designated traffickers, or that are

owned or controlled by such traffickers, or that act on their behalf.

19. OFAC's designation of Jose Ricaurte Diaz Herrera as an SDNTK is a factual determination. *See Weinstein* at 50. OFAC's decisions are entitled to great deference. *See De Cuelar v. Brady,* 881 F.2d 1561, 1565 (11th Cir. 1989) (OFAC decision entitled to great deference, and should be reversed only if arbitrary or capricious); *Paradissiotis v. Rubin,* 171 F.3d 983, 987 (5th Cir. 1999) (OFAC's designation of SDN being "an agency's application of its own regulations, receives an even greater degree of deference than the *Chevron* standard, and must prevail unless plainly inconsistent with the regulation."); *Consarc Corp. v. OFAC,* 71 F.3d 909, 914-15 (D.D.C. 1995); *Zarmach Oil Services, Inc. v. U.S. Dept. of the Treasury,* ___ F.Supp.2d ___, 2010 WL 4627838 (D.D.C. 2010) (OFAC regulations carry the force of law); *see also* 31 C.F.R. § 538.802.

20. OFAC regulation 31 C.F.R. 501.807 sets forth specific procedures for requesting removal from the OFAC list, including the submission of "arguments or evidence that the person believes establishes that insufficient basis exists for the designation" and the proposal of "remedial steps . . . which the person believes would negate the basis for designation". OFAC's Part 501 Regulations also apply to OFAC's Kingpin Act Regulations under Part 598. 31 C.F.R. 598.101(a), 598.801, Jose Ricaurte Diaz Herrera remains OFAC designated as an agency or instrumentality of the FARC.

21. Because OFAC has determined that Jose Ricaurte Diaz Herrera is owned, controlled, or directed by, or acting for or on behalf of, the FARC, or is materially assisting in, or providing financial or technological support for or to the FARC, or providing goods or services in support of the FARC's international narcotics trafficking activities, and because the FARC is a Specially Designated Global Terrorist [SDGT] by Executive Order 13224 under authority of the IEEPA, the blocked account at Wachovia Bank, a division of Wells Fargo Bank, N.A., is a "blocked asset" as defined in Section 201(d) of the TRIA and this account is subject to execution and garnishment under Section 201(a) of the TRIA. Therefore, any of his blocked assets are subject to execution or attachment in aid of execution, pursuant to Section 201(a) of the TRIA enabling terrorism victims to satisfy judgments even though he is not named in the judgment.

22. Therefore, the $2,006,878.84 proceeds remain a blocked asset of a terrorist party available to partially satisfy plaintiffs' ATA judgment. Plaintiffs may now enforce their ATA judgment against the Wells Fargo blocked funds of a Colombian national, Jose Ricaurte Diaz Herrera, who has been designated by OFAC as an SDNTK of the FARC.

23. OFAC does not require a license for Plaintiffs to execute on and take possession of the blocked proceeds under the TRIA and therefore no license is required. *Weininger v Castro*, 462 F. Supp. 2d. 457, 499 (S.D.N.Y. 2006) (U.S. DOJ has indicated that "[i]n

the event the Court determines that the funds are subject to TRIA, the funds may be distributed without a license from the OFAC).

24. The TRIA does not require Plaintiffs to wait for Jose Ricaurte Diaz Herrera to seek removal front OFAC's designated blocking list, or wait for OFAC action on any such petition, or wait for any future court action or ruling challenging the designation or denial of the removal petitions, nor any appeal of same. Had Congress intended to so limit the application of the TRIA post-judgment execution remedy it could and should have done so – it did not. Plaintiffs are legally entitled to execute on the blocked assets of an OFAC designated agency or instrumentality of a terrorist party anywhere within the jurisdiction of the U.S. Creditors need not prove the merits or defend the OFAC designation or the source of any blocked assets.

25. Plaintiffs' motion is hereby granted.

26. The blocked account containing the $2,006,878.84 proceeds at Wachovia Bank, a Wells Fargo Bank, N.A., is subject to execution under the TRIA as a blocked asset of an agency or instrumentality of a terrorist party.

27. The Clerk of Court is directed to issue a Writ of Garnishment against the blocked $2,006,878.84 proceeds being held by Wachovia Bank, a Wells Fargo Bank, N.A. in the form proposed by Plaintiffs as Exhibit 6 to their Motion.

28. Upon delivery of the funds to Plaintiffs' counsel in satisfaction of this Court's Order and Writs under the TRIA, Wachovia Bank, a Wells Fargo Bank, N.A., will be released from any liability and discharged for compliance with Orders from this Court.

DONE and ORDERED in chambers at Hillsborough County, Florida this 16th day of December, 2010.

/s/ Richard A. Lazzara
Honorable Richard A. Lazzara
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Tampa Division

KEITH STANSELL,
MARC GONSALVES,
THOMAS HOWES,
JUDITH G. JANIS,
CHRISTOPHER T. JANIS,
GREER C. JANIS,
MICHAEL I. JANIS,
and JONATHAN N. JANIS

Plaintiffs,

vs.

REVOLUTIONARY
ARMED FORCES OF
COLOMBIA (FARC); et al.,

Defendants. /

CIVIL ACTION CASE NO.:
8:09-CV-2308-RAL-MAP

WRIT OF EXECUTION/GARNISHMENT

(Filed Dec. 16, 2010)

THE STATE OF FLORIDA:
To All and Singular the Sheriffs of the State:
And the U.S. Marshal's Service

YOU ARE COMMANDED TO summon garnishee, **WACHOVIA BANK, A DIVISION OF WELLS FARGO BANK, N.A., c/o Corporation Service Company, 1201 Hays Street, Tallahassee, Florida 32301** to serve an answer to this writ on Plaintiffs' attorney, Tony Korvick, Esq., whose address is PORTER & KORVICK, P.A., 9655 S. Dixie Highway, Suite

208, Miami, Florida 33156 (305) 373-5040, within 20 days after service on the garnishee, exclusive of the day of service, and to file the original with the Clerk of the Court at 801 N. Florida Ave., Tampa, FL 33602 either before service on the attorney or immediately thereafter, stating whether the garnishee is indebted to **JOSE RICAURTE** [sic] **DIAZ HERRERA**

[a Colombian national with date of birth August 16, 1958, Colombian passport CC# 792635443, at the same time of the answer or was indebted at the time of service of this writ, or at any time between such times, and in what sum and what tangible and intangible personal property of **JOSE RICAURTE** [sic] **DIAZ HERRERA** the garnishee has in its possession or control at the time of the answer or had at the time of service of this writ, or at anytime between such times (specifically including OFAC blocked account # 62452, Case No. WACNY1016921608, in which **JOSE RICAURTE** [sic] **DIAZ HERRERA** has an interest as beneficiary of the blocked wire transfer), and whether the garnishee knows of any other person indebted to **JOSE RICAURTE** [sic] **DIAZ HERRERA** or who may have any of his property or property interests in its possession or control. Further the garnishee, **WACHOVIA BANK, A DIVISION OF WELLS FARGO BANK, N.A.** will be released from any liability and discharged upon compliance with Orders from this Court, including delivery to plaintiffs' counsel the OFAC blocked proceeds in the amount of $2,006,878.84. The amount set forth in plaintiffs'

motion is Three Hundred Eighteen Million Thirty Thousand Dollars and zero cents $318,030,000.00.

WITNESS SHERYL L. LOESCH, as Clerk of the Court, and the seal of said Court, at the U.S. District Courthouse at Tampa, Florida, this 16th day of December, 2010.

SHERYL L. LOESCH
Clerk of the Court

By /s/ [Illegible] R. Hamner
As Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

KEITH STANSELL, *et al.*,

Plaintiffs,

v.

REVOLUTIONARY ARMED FORCES OF COLOMBIA, *et al.*,

Defendants. /

Case No.: 09-CV-2308-RAL-MAP

ORDER

Upon due consideration of the pleadings on file in the court file, including Plaintiffs' Motion for Issuance of Writ of Garnishment for Post-Judgment Execution Proceedings and Memorandum of Law filed at docket 251, Answer of Garnishee Wachovia Bank, a Division of Wells Fargo Bank, N.A., filed at docket 254, and Plaintiffs' Motion for Entry of Judgment on Answer of Garnishee Wachovia Bank, a Division of Well [sic] Fargo Bank, N. A, filed at docket 255, it is ordered and adjudged that Plaintiffs' Motion for Entry of Judgment on Answer of Garnishee Wachovia Bank, a Division of Wells Fargo, N.A. (Dkt. 255) is granted. The Clerk is directed to enter the proposed judgment furnished by Plaintiffs as exhibit 3 to the motion.

DONE AND ORDERED at Tampa, Florida, on January 14, 2011.

s/Richard A. Lazzara
RICHARD A. LAZZARA
UNITED STATES
DISTRICT JUDGE

COPIES FURNISHED TO:
Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

KEITH STANSELL,
MARC GONSALVES,
THOMAS HOWES,
JUDITH G. JANIS,
CHRISTOPHER T. JANIS,
GREER C. JANIS,
MICHAEL I. JANIS,
and JONATHAN N. JANIS

Plaintiffs,

-vs-

Case No.:
8:09-cv-2308-T-26MAP

REVOLUTIONARY ARMED FORCES OF COLOMBIA (FARC); et al.,

Defendants. /

JUDGMENT ON ANSWER TO WRIT OF GARNISHMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED, that based upon the Court's review of the pleadings, including D.E. 232, 233, 251, 252, 254, and 255, and applicable legal authority, judgment is hereby entered in favor of Plaintiffs on the Answer to Writ of Garnishment filed by Garnishee, Wachovia Bank, a division of Wells Fargo Bank, N.A., as follows:

1. Garnishee's objection to garnishment of the blocked funds is overruled, the Court finds that:

(i) defaulted defendants have no right to notice;

(ii) no other person or entity is entitled to notice, or has a right to request dissolution of the writ, or any other right to be heard;

(iii) no other person or entity has an ownership or beneficial interest in the blocked proceeds; and

(iv) no other person or entity has rights in the blocked proceeds that are superior to the perfected lien and rights of Plaintiffs, who are terrorism victim judgment creditors, under Section 201(a) of the Terrorism Risk Insurance Act of 2002.

2. Garnishee Wachovia Bank, a division of Wells Fargo Bank, N.A is ordered and directed to deliver to Porter & Korvick, P.A. the $2,006,878.84 blocked proceeds by cashier's check payable to Porter & Korvick, P.A. Trust Account within 2 business days of the date of this Judgment.

3. OFAC does not require any license for Plaintiffs to execute on and take possession of the blocked proceeds under the TRIA. *Weininger v Castro,* 462 F. Supp. 2d. 457, 499 (S.D.N.Y. 2006); [D.E. 251, Exhibit 4].

4. Garnishee is ordered to file its request, including amount, of reasonable attorneys fees and expenses within 2 business days of the date of this Judgment, or Garnishee's right to recover fees and expenses will be waived.

5. Porter & Korvick, P.A. shall hold in trust the amount of garnishee's claimed attorneys fees and expenses pending ruling of this court awarding fees and expenses to Garnishee, and further authorizes Porter & Korvick, P.A. to pay same from the trust proceeds in accordance with the Court's Order on attorneys fees and expenses.

6. Porter & Korvick, P.A. is authorized to immediately disburse the remaining proceeds over and above the total amount claimed by Garnishee for its attorneys fees and expenses incurred,

7. Upon delivering the $2,006,878.84 blocked proceeds cashier's check to Porter & Korvick, P.A., in satisfaction of this Court's Order, Writ, and Judgment under the TRIA, Garnishee Wachovia Bank, a division of Wells Fargo Bank, N.A., will be released from any liability to Plaintiffs or other third parties and discharged from compliance with Orders and Judgments of this Court.

Date: January 18, 2011

SHERYL L. LOESCH, CLERK

By: /s/ M. Hamner
M. Hamner, Deputy Clerk

Copies furnished to:
Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

KEITH STANSELL,
MARC GONSALVES,
THOMAS HOWES,
JUDITH G. JANIS,
CHRISTOPHER T. JANIS,
GREER C. JANIS,
MICHAEL I. JANIS,
and JONATHAN N. JANIS

Plaintiffs,

v.

REVOLUTIONARY ARMED FORCES OF COLOMBIA (FARC), *et al.*,

Defendants. /

CASE NO.:
8:09-cv-2308-T-26MAP

ORDER

THIS CAUSE comes before the Court on Claimant Jose Ricuarte Diaz Herrera's Consolidated Motion to Vacate the "Stay," Summarily Grant His Pending Motions, Order Plaintiffs and Their Counsel to Place $2,006,878.84 Into the Registry of the Court and For Attorney's Fees and Costs (Dkt. 573)[1], Plaintiffs'

[1] The Motion consolidates Claimant Diaz Herrera's earlier Motion for Relief From Judgment (Dkt. 478) and Motion For Dissolution of Writ of Garnishment and Related Relief (Dkt. 479) that were filed on October 31, 2011.

Response in Opposition (Dkt. 579)[2], and Claimant's Reply (Dkt. 606).

Claimant Jose Ricuarte Diaz Herrera ("Diaz Herrera") requests, pursuant to Federal Rules of Civil Procedure 12(b)(5), 55(c), and 60(b)(3)(5), and (6), 28 U.S.C. §§ 455(a) and (b)(1), and the Due Process and Takings Clauses of the Fifth Amendment, an order vacating: (1) the Order (Dkt. 256) granting Plaintiff's Motion for Entry of Judgment on Answer of Garnishee Wachovia Bank (Dkt. 255); (2) the Judgment on Answer to Writ of Garnishment in a Civil Case (Dkt. 257); and (3) the endorsed Order (Dkt. 259) affirming an "agreed" award of attorney's fees to garnishee Wachovia Bank. Diaz Herrera further requests that the Court direct Plaintiffs' counsel to return and deposit into the registry of the Court the $2,006,878.84 pursuant to the aforementioned judgment, plus interest, as well as attorney's fees and costs. Plaintiffs assert that Diaz Herrera's Consolidated Motion is untimely and barred by *res judicata*, whereas Diaz Herrera asserts that the Eleventh Circuit's recent decision in *Stansell v. Revolutionary Armed Forces of Columbia (Mercurio Internacional S.A.),* ___ F.3d ___, 2013 WL 93158 (11th Cir. Jan. 9, 2013) ("Mercurio") supports the request for relief.

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[2] The Response adopts and incorporates by reference Plaintiffs' responses in opposition to Claimant Diaz Herrera's earlier Motions (Dkts. 513-514) filed on November 14, 2011.

As Plaintiffs assert, Diaz Herrera remains to this date an OFAC designated Specially Designated Narcotics Trafficking Kingpin ("SDNTK"). (*See* Dkt. 251, Exs. 1 & 2.) He has admitted that he was represented by counsel in the United States in June of 2010. (Dkt. 478-1, p. 12.) On January 26, 2011, Diaz Herrera's New York counsel spoke to counsel for Garnishee Wells Fargo concerning "various procedural and substantive improprieties in the Tampa litigation" and he was advised at that time to "take up his grievances with Judge Lazzara." (Dkt. 493-1.) Therefore, Diaz Herrera had both actual and constructive knowledge of the subject completed garnishment, including the January 18, 2011 Judgment on [Wells Fargo's] Answer to Writ of Garnishment (Dkt. 257), no later than 8 days after entry of the Judgment. Diaz Herrera waived his right to challenge this Judgment, and the completed garnishment, by failing to timely seek relief from this Court and/or by failing to timely petition for appellate review before the Judgment became non-appealable. Instead, Diaz Herrera sat on his rights and took no action for nine months from discovering the completed TRIA execution and Judgment (ten months from the initial Order commencing the TRIA execution (Dkt. 252)) before filing his motions to disqualify, dissolve and vacate on October 31, 2011.

In addition, the Judgment on Garnishee's [Wells Fargo Bank] Answer (Dkt. 257) became final and non-appealable in February 2011 – prior to the filing of the *Mercurio* appeal, prior to the United States first

raising the Kingpin Act argument for the first time as an amicus on September 2, 2011, and prior to the Eleventh Circuit's ruling in *Mercurio* on January 9, 2013. Therefore, Diaz Herrera's motion seeking retroactive application of the *Mercurio* decision must be denied because of the well settled principles of *res judicata* and finality of judgments. The Supreme Court, in *Harper v. Virginia Dep't of Taxation,* 509 U.S. 86, 87, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993), held that "[w]hen [the] Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect **in all cases still open on direct review** and as to all events, regardless of whether such events predate or postdate [the] announcement of the rule." The Court concluded that a rule of federal law, once announced may apply retroactively, and be extended "to other litigants **whose cases were not final at the time of the [first] decision**." *Id.* (quoting *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529, 544 (1991) (emphasis added). Retroactivity in civil cases must be limited by the need for finality and once suit is barred by *res judicata* or by statutes of limitation or repose, a new rule cannot reopen the door already closed. *James B. Beam,* 501 U.S. at 541; see also *In re Fine Paper Antitrust Litigation,* 840 F.2d 188, 194 (3d Cir. 1988) (holding that a final money judgment may not be reopened after time for appeal has expired because of favorable legal ruling in some other party's appeal).

Unlike Diaz Herrera, Mercurio timely filed Notices of Appeal on March 14, 2011 (Dkt. 276) and April 11, 2011 (Dkt. 284). However, it cannot be disputed that when the *Mercurio* appeal commenced, the Diaz Herrera/Wells Fargo garnishment was not an active, pending matter or otherwise open on direct review before any court, and the January 18, 2011 Judgment (Dkt. 257) had long since become final and non-appealable in February 2011. As Plaintiffs set forth, their original subpoena to the OFAC was served on October 1, 2010, and from that date forward the OFAC received formal notice of each and every motion and order relating to Plaintiffs' discovery and execution on SDNTK blocked assets under TRIA. The United States filed its Agreed Motion for Protective Order (Dkt. 248) on October 8, 2010 (Dkt. 248) and, thereafter, DOJ's Civil Division received ECF service of each and every motion and order relating to Plaintiffs' discovery and execution on SDNTK blocked assets under TRIA. From October 8, 2010, to September 6, 2011 – a period of almost 11 months – additional SDNTK discovery was sought and obtained from the OFAC, and there were many motions, orders, answers and/or judgments for the following banks that were holding blocked SDNTK assets (or both SDNT and SDNTK assets): Wells Fargo Bank (Diaz Herrera), Bank of America (Mercurio), Ocean Bank (multiple SDNTKs), Wells Fargo Bank (multiple SDNTKs), and HSBC (multiple SDNTKs). The OFAC, DOJ, Wells Fargo Bank, Diaz Herrera, Bank of America Corp., and Mercurio asserted that TRIA did not apply to SDNTK blocked

assets until September 6, 2011, when the United States filed its motion with the Eleventh Circuit to file an amicus brief out of time. Mercurio's Reply Brief had already been filed on August 23, 2011. The Diaz Herrera/Wells Fargo garnishment was not an active, pending matter or otherwise open on direct review before any court.

The Fifth Circuit in *Hernandez v. Thaler,* 630 F.3d. 420, 430 (5th Cir. 2011) held that:

> "Well-settled precedent dictates that Hernandez may not use Rule 60(b)(6) to claim the benefit of the Supreme Court's decision in *Jimenez.* We have previously held that **"[a] change in decisional law after entry of judgment does not constitute exceptional circumstances and is not alone grounds for relief from a final judgment" under Rule 60(b)(6).**" (citing *Bailey v. Ryan Stevedoring Co.,* 894 F.2d 157, 160 (5th Cir.1990) (explaining that Rule 60(b)(5) "does not authorize relief from a judgment on the ground that the law applied by the court in making its adjudication has been subsequently overruled or declared erroneous").
>
> * * *
>
> **Hernandez cannot use Rule 60(b)(6) to circumvent the principle that when the Supreme Court announces a new rule of law and applies it to the parties before it, the new rule is given retroactive effect only in cases that are still open on direct review. (citing *Harper, supra*).**

(emphasis added). Here, the Wells Fargo garnishment and judgment of the Diaz Herrera blocked proceeds was completed and the funds turned over and disbursed by the time the *Mercurio* appeal commenced. Diaz Herrera failed to pursue a timely postjudgment challenge or appeal of any kind and, thus, the judgment became non-appealable in February 2011.

Even if Diaz Herrera had an open case on direct review when the *Mercurio* decision was announced, he cannot avail himself retroactively of the limited *Mercurio* decision. The Eleventh Circuit has ruled that in deciding the appropriateness of a purely prospective ruling versus a purely retroactive ruling in civil cases to parties before it and cases still open on direct review, a court must apply the factors set forth in *Chevron Oil v. Huson,* 404 U.S. 97, 92 S.Ct. 349 (1971). These factors include the following:

> (1) "the decision must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed;"
>
> (2) "a court must look to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation;" and
>
> (3) "a court must look to the inequity imposed by retroactive application."

Glazner v. Glazner, 347 F.3d 1212, 1216 (11th Cir. 2003) (citing *Chevron Oil,* 404 U.S. at 106-07).

Diaz Herrera cannot satisfy all of these factors. The lengthy series of reviews by Wells Fargo Bank, N.A., Diaz Herrera's counsel in the United States, the DOJ's Civil Division, the OFAC, and this Court demonstrate that the *Mercurio* decision – that Kingpin blocked accounts are not blocked accounts subject to TRIA execution – was not clearly foreshadowed during the instant TRIA execution and turnover. The United States first raised the Kingpin Act argument for the first time as an amicus on September 2, 2011. In denying Diaz Herrera's motion to disqualify, the Court specifically found that:

> From the outset, OFAC was provided timely notice of all motions and orders by Plaintiffs' counsel pursuant to the litigation reporting requirements of 31 C.F.R. § 501.605. The United States Department of Justice Civil Division received ECF notice of all motions and orders after October 8, 2011. (Dkts. 241-242.) The Government could have stopped the execution on the Wells Fargo blocked EFT funds by filing an objection with the Court, or by instructing Wells Fargo not to transfer the blocked funds, but it did neither. Wells Fargo was served with a writ of garnishment and the motion for entry of judgment and had an opportunity to respond. Wells Fargo conferred with OFAC, in advance, to confirm its authority to transfer the

> funds in satisfaction of the TRIA execution orders.

(Dkt. 538, p. 4.)

ACCORDINGLY, it is **ORDERED AND ADJUDGED**:

Claimant Jose Ricuarte Diaz Herrera's Consolidated Motion to Vacate the "Stay," Summarily Grant His Pending Motions, Order Plaintiffs and Their Counsel to Place $2,006,878.84 Into the Registry of the Court and For Attorney's Fees and Costs (Dkt. 573) is **denied**.

DONE AND ORDERED at Tampa, Florida, on February 26, 2013.

s/Richard A. Lazzara
RICHARD A. LAZZARA
UNITED STATES
DISTRICT JUDGE

COPIES FURNISHED TO:
Counsel of Record

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-11339-AA

KEITH STANSELL,
MARC GONSALVES,
THOMAS HOWES,
JUDITH G. JANIS,
CHRISTOPHER T. JANIS,
GREER C. JANIS,
MICHAEL I. JANIS,
JONATHAN N. JANIS,

Plaintiffs-Appellees,

versus

REVOLUTIONARY ARMED FORCES
OF COLUMBIA [sic], (FARC), et al.,

Defendants,

JOSE RICUARTE DIAZ HERRERA,

Claimant-Appellant,

WACHOVIA BANK,
a Division of Wells Fargo Bank, N.A., et al.,

Garnishees,

MERCURIO INTERNATIONAL S.A., et al.,

Claimants.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed Jan. 5, 2015)

BEFORE: WILSON, JORDAN and BLACK, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES
CIRCUIT JUDGE