18-1031

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

RHONDA KEMPER,

Plaintiff-Appellant,

—v.—

DEUTSCHE BANK AG,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
CIVIL DIVISION
NO. 3:16-CV-00497-MJR-SCW
HONORABLE MICHAEL J. REAGAN

BRIEF OF *AMICUS CURIAE* THE AMERICAN COALITION AGAINST A NUCLEAR IRAN, INC. D/B/A UNITED AGAINST A NUCLEAR IRAN IN SUPPORT OF PLAINTIFF-APPELLANT AND URGING REVERSAL OF THE DISTRICT COURT

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-1031

Short Caption: Kemper v. Deutsche Bank AG

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

The American Coalition Against A Nuclear Iran, Inc. d/b/a United Against A Nuclear Iran

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Yankwitt LLP

Stack Fernandez & Harris, P.A.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: s/ Sarah A. Sulkowski Date: March 28, 2018

Attorney's Printed Name: Sarah A. Sulkowski

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes X No ____

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None

Attorney's Signature: s/ Brian J. Stack Date: March 28, 2018

Attorney's Printed Name: Brian J. Stack

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None

Attorney's Signature: s/ Denise B. Crockett Date: March 28, 2018

Attorney's Printed Name: Denise B. Crockett

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The American Coalition Against a Nuclear Iran, Inc. d/b/a United Against A Nuclear Iran ("UANI") is a not-for-profit, bipartisan organization, founded and led by former U.S. Ambassadors and by prominent Mideast policy experts. UANI works to ensure the economic and diplomatic isolation of the Iranian regime in order to compel Iran to abandon its illegal nuclear weapons program, support for terrorism, and human rights violations. UANI's Advisory Board includes former U.S. Ambassadors, former Senators, former Cabinet officials, and former Governors, as well as former high-ranking government officials of U.S.-allied countries including Australia, Canada, Italy, Poland, Spain, and the United Kingdom. UANI's coalition of members includes human-rights and humanitarian groups, the labor movement, political advocacy and grassroots organizations, and representatives of diverse ethnicities, faith communities, and political and social affiliations – all united in a commitment to neutralize the threat posed by the rogue Iranian state.

UANI has a longstanding and specific interest in combating Iran's abuse of the global wire-transfer system. The District Court's decision, and that of this Court, could significantly lessen the impact of U.S. economic sanctions designed to dissuade Iran from supporting terrorism in the Mideast, including funding, training, and providing guidance to militants targeting U.S. and allied forces in the region. In short, the outcome of this case could seriously undermine U.S. efforts to

[1] No party or counsel for a party authored or paid for this brief in whole or in part, or made a monetary contribution to fund the brief's preparation or submission. No one other than amicus or its counsel made a monetary contribution to the brief.

prevent Iran from continuing to finance terrorist activities, a central concern and founding purpose of UANI.

This brief addresses the purposes of the U.S. government sanctions at issue in this case and the foreseeable consequences of conspiring with Iran and its banks to evade those sanctions. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The District Court erred in finding a separation between the alleged conspiracy to violate U.S. sanctions specifically designed to prevent Iran's financial support of terrorist groups, on the one hand, and Iran's material support for terrorism, on the other. To the contrary, the Complaint more than adequately alleges (1) that the U.S. sanctions regime was precisely engineered to prevent Iran from continuing its longstanding sponsorship of terrorism, and (2) that Deutsche Bank conspired to help Iran evade those sanctions with full knowledge that Iran would use the resulting funds to finance terrorist groups in the Mideast, including those responsible for the attack that killed the Plaintiff-Appellant's son. In short, the Complaint credibly and sufficiently alleges that, by knowingly enabling Iran and its state-owned banks to transfer dollar-denominated assets in violation of U.S. anti-terrorism sanctions, Deutsche Bank conspired to provide material support to terrorism.

As explained below, it is a matter of public record that Iran is actively engaged in a longstanding conspiracy to direct U.S. dollar-denominated assets to organizations designated by the U.S. Government as terrorist entities, including

Hizballah and Iran's own Islamic Revolutionary Guard Corps (the "IRGC") and its subsidiary, the Qods Force (the "IRGC-QF"), which in turn provide training, arms, and other support to militant groups in, among other places, Iraq. It is likewise indisputable that the participants in that conspiracy, which the Complaint alleges included Deutsche Bank, had ample notice that funds provided to Iran in violation of the U.S. sanctions regime would be directed to precisely those nefarious purposes.

Thus, by asserting that Deutsche Bank entered into an agreement with Iran and its state-controlled banks to clandestinely transfer and disguise payments of U.S. dollar-denominated assets into the Iranian banks in violation of U.S. sanctions specifically designed to prevent Iran from engaging in terrorist financing, the Complaint properly states causes of action for conspiracy to assist terrorism. The District Court's erroneous order of dismissal should therefore be reversed.

ARGUMENT

I. U.S. SANCTIONS WERE ADOPTED IN RESPONSE TO, AND DESIGNED TO PREVENT, IRAN'S LONGSTANDING SPONSORSHIP OF TERRORISM

As detailed below, the United States has been using economic and other sanctions to combat Iran's support of terror groups for nearly 40 years. The express purpose of those sanctions is to prevent and punish the Iranian government's funding, through Hizballah and the IRGC (among others), of militant groups in Iraq, including those responsible for the death of Plaintiff-Appellant's son.

U.S. economic sanctions are particularly effective because – as the Complaint correctly observes – the majority of Iran's export revenues are generated by oil and

gas production, and thus are denominated in U.S. dollars. *See United States v. Atilla*, No. 15 Cr. 867 (RMB), 2018 WL 791348, at *11 (S.D.N.Y. Feb. 7, 2018) (quoting Deutsche Bank official's testimony that "the Iranian economy is primarily petroleum based. The petroleum industry is predominantly U.S. dollar based. In order for the Iranian economy to function, it, therefore, must conduct a lot of its business in U.S. dollars."); *see also* Lan Cao, *Currency Wars and the Erosion of Dollar Hegemony*, 38 Mich. J. Int'l L. 57, 67 (2016) ("Any country that buys Gulf oil must pay in dollars – hence the term petrodollars.").[2]

A significant portion of the oil revenues paid to the Iranian regime are unaccounted for in any public reporting, and are therefore easily used for clandestine purposes such as in support of terrorism and nuclear proliferation. Between 2005 and 2012 alone, tens of billions of dollars in oil revenues collected by or on behalf of the Iranian government went unaccounted-for in its budgets. For example, the National Iranian Oil Company (the "NIOC"), which the U.S. Treasury Department designated as an IRGC agent or affiliate in 2012, is entitled to retain 14.5% of all dollar-denominated revenues it collects – and has not released an annual report or audit revealing the destination of those revenues since 2005. *See* Press Release, U.S. Dep't of the Treasury, Treasury Submits Report to Congress on NIOC and NITC (Sept. 24, 2012), available at https://www.treasury.gov/press-

[2] This Court may take judicial notice of scholarly articles, *see Jogi v. Voges*, 480 F.3d 822, 833 (7th Cir. 2007) (citing Michigan Journal of International Law); news articles, *see Sidney Hillman Health Ctr. of Rochester v. Abbott Labs., Inc.*, 782 F.3d 922, 929 (7th Cir. 2015); agency determinations, *see Opoka v. INS*, 94 F.3d 392, 394-95 (7th Cir. 1996); and executive orders, *see Gallaher & Speck, Inc. v. Ford Motor Co.*, 226 F.2d 728, 731 (7th Cir. 1955).

center/press-releases/Pages/tg1718.aspx (designating the NIOC as an IRGC agent or affiliate); Antoine Heuty, *A Ticking Bomb? Iran's Oil and Gas Management*, Revenue Watch Institute Briefing (Feb. 2012) at 6, available at https://resourcegovernance.org/sites/default/files/documents/rwi_bp_iran21.pdf (noting the NIOC previously released annual reports and audits but has not done so since 2005). In addition, the IRGC itself may have had direct control over as much as one-third of the country's economy, including much of its oil-production revenue, during the period at issue in this case. *See* Mark Gregory, *Expanding Business Empire of Iran's Revolutionary Guards*, BBC News, July 26, 2010, available at http://www.bbc.com/news/world-middle-east-10743580.

Prohibited from holding U.S. dollar accounts in the United States, the government of Iran maintains the bulk of its dollar deposits in so-called "Eurodollar" accounts, which are accounts maintained at banks outside the United States that hold U.S. dollar-denominated assets (*i.e.*, electronic representations of U.S. dollars that can be transmitted between financial institutions without the transfer of physical banknotes). While Eurodollar accounts can be *maintained* at non-U.S. banks, any *transfer* of Eurodollars to or by Iran (in, for example, a sale of oil) must be cleared through the Federal Reserve Bank of New York. Thus, the U.S. government can – and does – effectively freeze all of Iran's dollar-denominated assets simply by blocking the use of the U.S. clearing system, or "cover" accounts, for Eurodollars transferred by or on behalf of targeted entities.

A. Early Sanctions Under the Carter and Reagan Administrations

The U.S. first instituted sanctions against Iran in November 1979, when, in response to Iranian militants' seizure of the American embassy in Tehran, President Jimmy Carter declared a national emergency under the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1702(a)(1); froze all Iranian assets in the United States; and signed two executive orders prohibiting, *inter alia*, any transfer of funds by a U.S. person to any Iranian person or entity. *See* Exec. Order No. 12,205, 45 Fed. Reg. 24,099 (Apr. 7, 1980) ("Prohibiting Certain Transactions with Iran"); *see also* Exec. Order No. 12,211, 45 Fed. Reg. 26,685 (Apr. 17, 1980) ("Further Prohibitions on Transactions with Iran").[3]

Four years later, following Hizballah's 1983 bombing of the U.S. Marines barracks in Beirut, Lebanon, the Reagan Administration designated Iran as a state sponsor of terrorism pursuant to Section 6(j) of the Export Administration Act of 1979, Pub. L. No. 96-72, as amended. That designation triggered restrictions on sales of U.S. goods to Iran and a ban on U.S. government financial assistance and arms sales to Iran pursuant to the Foreign Assistance Act, 22 U.S.C. § 2371 (1961) and the Arms Export Control Act, Pub. L. No. 95-92, as amended.

Three years after that, on October 29, 1987, President Reagan declared that "the Government of Iran is actively supporting terrorism as an instrument of state policy" and ordered that "no goods or services of Iranian origin may be imported into the United States." Exec. Order No. 12,613, Fed. Reg. 41,940 (Oct. 29, 1987). The

[3] Both of these executive orders were rescinded by Executive Order 12,282, 46 Fed. Reg. 7,925 (Jan. 19, 1981).

Commerce Department subsequently issued regulations implementing the ban on Iranian imports. *See* 31 C.F.R. Part 560 (1987).

B. Clinton Administration Sanctions

In March 1995, the Clinton Administration once again declared a "state of emergency" in relations with Iran. Exec. Order No. 12,957, 60 Fed. Reg. 14,615 (Mar. 15, 1995). Two months later, President Clinton signed an executive order further expanding U.S. sanctions against the regime. Exec. Order No. 12,959, 60 Fed. Reg. 24,757 (May 6, 1995). In announcing that May 6, 1995 sanctions order, President Clinton cited Iran's "drive to acquire devastating weapons and its continued support for terrorism," which had "broadened its role as an inspiration and paymaster to terrorists." Todd S. Purdum, *Clinton to Order a Trade Embargo Against Teheran*, N.Y. Times, May 1, 1995, available at http://www.nytimes.com/1995/05/01/world/clinton-to-order-a-trade-embargo-against-teheran.html. Every subsequent administration has renewed the Iran state-of-emergency declaration issued in 1995.

The regulations implementing the U.S. sanctions regime (known as the "Iranian Transactions Regulations") prohibit, *inter alia*, "any transaction . . . that evades or avoids, or has the purpose of evading or avoiding . . . any of the prohibitions" set forth in Part 560 of the C.F.R., or "[a]ny conspiracy formed to violate any of [those] prohibitions." 31 C.F.R. § 560.203(a)-(b).

1. The U-Turn Exemption

In June 1995, one month after expanding U.S. sanctions against Iran, the Clinton Administration created a limited exception to those sanctions, known as the "U-Turn Exemption." The U-Turn Exemption, which remained in effect until November 2008, sought to counterbalance American pressure on Iran to cease its campaign of terror and pursuit of weapons of mass destruction, with a means by which Iran could continue to sell the oil and natural gas that were critical to the Iranian economy. To accomplish that end, the U-Turn Exemption permitted Iran to process legitimate Eurodollar transactions through the United States, *provided that* Iran's state-controlled banks followed certain restrictions and procedures and, most important, that the transactions were conducted transparently.

Specifically, to ensure that no designated terrorist entities were involved, the U-Turn Exemption required *every* bank (including Deutsche Bank) initiating a U.S. dollar transaction on behalf of Iran to disclose the full details of the transaction. Further, every such U.S. dollar transfer had to be initiated by a non-Iranian foreign bank (such as Deutsche Bank) from its own account in a U.S. bank, and paid into a recipient account held at a U.S. bank by a non-Iranian foreign bank (such as Deutsche Bank). *See* Press Release, U.S. Dep't of the Treasury, Treasury Revokes Iran's U-Turn License (Nov. 6, 2008), available at https://www.treasury.gov/press-center/press-releases/Pages/hp1257.aspx.

In theory, this requirement that every Iranian transaction pass through non-Iranian banks on its way to and from a U.S. clearing bank should have ensured

compliance with all applicable enhanced due-diligence requirements. Specifically, the U-Turn Exemption's safeguards were designed to enable U.S. financial institutions clearing Eurodollar transactions for customers like Deutsche Bank, which were in turn acting on behalf of Iran, to identify the counterparties to each such transaction and check those names against the U.S. Office of Foreign Assets Control's ("OFAC") Specially Designated Nationals List, to ensure no terrorist organizations or terrorism sponsors were involved. The role of the non-Iranian intermediary banks was particularly critical given that Iranian state-owned Banks Saderat, Melli, and Sepah collectively serviced 80 percent of Iran's international trade during the period at issue. Robin Wright, *Stuart Levey's War*, N.Y. Times, Oct. 31, 2008, available at http://www.nytimes.com/2008/11/02/magazine/02IRAN-t.html.

2. The Iran Sanctions Act of 1996

On June 25, 1996, a truck bomb exploded at the Khobar Towers military housing complex in Saudi Arabia, killing 19 Americans and wounding another 372. Steven Erlanger, *Bombing in Saudi Arabia: The Witnesses; Survivors of Saudi Explosion Knew at Once It Was a Bomb*, N.Y. Times, June 27, 1996, available at http://www.nytimes.com/1996/06/27/world/bombing-saudi-arabia-witnesses-survivors-saudi-explosion-knew-once-it-was-bomb.html. Congress responded by enacting the Iran and Libya Sanctions Act of 1996,[4] with a stated purpose of "constrict[ing] Tehran's ability to fund rogue activities." H.R. Rep. No. 104-523(I),

[4] The statute was subsequently retitled the Iran Sanctions Act, codified as amended at 50 U.S.C. § 1701 note, after sanctions against Libya were terminated in 2006.

104th Cong., at 9 (2d Sess. Apr. 17, 1996) (quotation marks omitted); *see also id.* (quoting Under Secretary of State Peter Tarnoff's statement that "a straight line links Iran's oil income and its ability to sponsor terrorism"). The statute was renewed in 2001 and again in 2006. *See* ILSA Extension Act of 2001, Pub. L. No. 107-24 (Aug. 3, 2001); Iran Freedom Support Act, Pub. L. No. 109-293, § 201, 120 Stat. 1344 (Sept. 30, 2006) (codified as amended at 50 U.S.C. § 1701 note).

C. Bush Administration Sanctions

In October 2007, the Bush Administration designated various Iranian entities as sponsors or financiers of terrorism, including the IRGC-QF and the state-owned Bank Saderat and Bank Melli. Regarding the IRGC-QF, the government found, *inter alia*:

> The Qods Force has had a long history of supporting Hizballah's military, paramilitary, and terrorist activities, providing it with guidance, funding, weapons, intelligence, and logistical support. The Qods Force operates training camps for Hizballah in Lebanon's Bekaa Valley and has reportedly trained more than 3,000 Hizballah fighters at IRGC training facilities in Iran. The Qods Force provides roughly $100 to $200 million in funding a year to Hizballah and has assisted Hizballah in rearming in violation of UN Security Council Resolution 1701.
>
> In addition, the Qods Force provides lethal support in the form of weapons, training, funding, and guidance to select groups of Iraqi Shi'a militants who target and kill Coalition and Iraqi forces and innocent Iraqi civilians.

Press Release, U.S. Dep't of the Treasury, Fact Sheet: Designation of Iranian Entities and Individuals for Proliferation Activities and Support for Terrorism (Oct. 25, 2007), available at https://www.treasury.gov/press-center/press-releases/Pages/hp644.aspx.

The Treasury Department found that Bank Saderat

> has been used by the Government of Iran to channel funds to terrorist organizations, including Hizballah and EU-designated terrorist groups Hamas [and others]. For example, from 2001 to 2006, Bank Saderat transferred $50 million from the Central Bank of Iran through its subsidiary in London to its branch in Beirut for the benefit of Hizballah fronts in Lebanon that support acts of violence. Hizballah has used Bank Saderat to send money to other terrorist organizations, including millions of dollars on occasion, to support the activities of Hamas.

Id.

Finally, with regard to Bank Melli, the Administration found:

> Bank Melli . . . provides banking services to the IRGC and the Qods Force. Entities owned or controlled by the IRGC or the Qods Force use Bank Melli for a variety of financial services. From 2002 to 2006, Bank Melli was used to send at least $100 million to the Qods Force. When handling financial transactions on behalf of the IRGC, Bank Melli has employed deceptive banking practices to obscure its involvement from the international banking system. For example, Bank Melli has requested that its name be removed from financial transactions.

Id. The effect of these designations was to freeze all U.S. assets of the IRGC-QF, Bank Saderat, and Bank Melli, and to prohibit U.S. persons from conducting any transactions with them.

In November 2008, the Bush Administration revoked the U-Turn Exemption (as described in greater detail in Part II, *infra*) in a further attempt to counter Iran's increasingly evident campaign to subvert U.S. financial controls on the clearing of U.S. dollars through American domestic banks, which served to "enable[] the Iranian regime to facilitate its support for terrorism and proliferation." Press

Release, U.S. Dep't of the Treasury, Fact Sheet: Treasury Strengthens Preventive Measures Against Iran (Nov. 6, 2008), available at https://www.treasury.gov/press-center/press-releases/Pages/hp1258.aspx. In announcing the revocation of the Exemption, the Treasury Department noted that Iran's techniques for evading U.S. detection of its terrorist-financing transactions included "turning to non-designated Iranian banks to handle illicit transactions." *Id.* The Administration once again cited the IRGC-QF's support of terrorist groups, including Hizballah and "certain Iraqi Shi'a militant groups." *Id.*

D. Obama Administration Sanctions

On June 24, 2010, both houses of Congress resoundingly passed the Comprehensive Iran Sanctions, Accountability, and Divestment Act ("CISADA"), which President Obama signed into law on July 1, 2010. Pub. L. No. 111-195, 111th Cong. (2d Sess. July 1, 2010), § 102, 124 Stat. 1312, 1317-19 (codified as amended at 50 U.S.C. § 1701 note). The first stated finding of the Act was that Iran's "support for international terrorism," *inter alia*, "represent[s] a threat to the security of the United States, its strong ally Israel, and other allies of the United States around the world." *Id.*, Pub. L. No. 111-195, § 2. Congress also noted "Iran's ongoing arms exports to, and support for, terrorists in direct contravention of United Nations Security Council resolutions," *id.* § 2(7)(g); stated that sanctions were further warranted by "the involvement of [the IRGC] in . . . international terrorism," *id.* § 3(4); and urged "the President, in the strongest terms, to consider immediately using the authority of the President to impose sanctions on the Central Bank of

Iran and any other Iranian financial institution engaged in . . . support of terrorist groups," *id.* § 104(b)(2).

Two years later, Congress enacted the Iran Threat Reduction and Syria Human Rights Act of 2012, which broadened the President's sanctioning power even further. Pub. L. No. 112-158, 126 Stat. 1216 (Aug. 10, 2012). Significantly, Section 217 of the statute mandated the continuation of sanctions against the Central Bank of Iran, absent a presidential certification that the Bank is not, *inter alia*, facilitating transactions for the IRGC or Iran's support for international terrorism. *Id.* § 217(d)(1)(B)(i)-(ii).

On January 2, 2013, as part of the National Defense Authorization Act for Fiscal Year 2013, Congress enacted the Iran Freedom and Counter-Proliferation Act of 2012, which, *inter alia*, broadly prohibited transactions with or on behalf of entities controlled by the IRGC. H.R. 4310, 112th Cong. (Jan. 2, 2013), codified at 22 U.S.C. § 8801 *et seq.* A few months later, on June 13, 2013, President Obama issued Executive Order 13,645, which authorized the Treasury Secretary to freeze the assets of any person found to have materially assisted or sponsored "any Iranian person included on the list of Specially Designated Nationals," such as the IRGC. Exec. Order No. 13,645, 78 Fed. Reg. 33,945 (June 3, 2013); *see also* U.S. Dep't of the Treasury, Office of Foreign Assets Control, Specially Designated Nationals and Blocked Persons List (Mar. 15, 2018), available at https://www.treasury.gov/ofac/downloads/sdnlist.pdf (designating the IRGC as a Specially Designated National).

II. IRAN CONSPIRED WITH GLOBAL FINANCIAL INSTITUTIONS TO USE U.S. DOLLAR-DENOMINATED ASSETS TO SUPPORT TERRORIST GROUPS

As explained above, the U-Turn Exemption in effect from 1995 until 2008 provided a mechanism for Iran to move its dollar-denominated assets by complying with various transparency and accountability requirements. Not content to use its Eurodollars for legitimate purposes, however, Iran entered into a broad-scale conspiracy with numerous global financial institutions to disguise the sources and destinations of Iranian funds as they passed through the U.S. banking system, thereby concealing Iran's terrorism funding activities and procurement of weapons of mass destruction. In the course of that conspiracy, the global banks worked with their Iranian counterparts, including Bank Saderat, Bank Melli, and the Central Bank of Iran, to conceal and disguise clandestine transfers of Eurodollars to (1) the IRGC-QF, an organization that Congress has declared "the primary arm of the Government of Iran for executing its policy of supporting terrorist and insurgent groups," 22 U.S.C. § 9404(a)(2); (2) Hizballah, an Iranian terrorism proxy and U.S.-designated Foreign Terrorist Organization; and (3) other Iranian entities that the U.S. government has likewise designated for their roles in terror financing and/or terrorist activities. In 2012, for example, the U.S. government raised concerns that Lebanese banks were being used as vehicles for the laundering of funds by Iran and Hizballah through the U.S. clearance system. *See* Jay Solomon, *Banks Get Pressed on Beirut*, Wall St. J., July 2, 2012, available at https://www.wsj.com/articles/SB10001424052702303933404577503030357824046.

Arguably the first public suggestion that foreign banks had systematically subverted the U.S. clearing system's counter-terrorism and anti-proliferation controls came in the form of regulatory enforcement actions against ABN Amro Bank N.V. ("ABN") in December 2005. *See In re ABN Amro Bank N.V.*, FRB Docket No. 05-035-CMP-FB, at 5 (Dec. 19, 2005) (Order of Assessment of a Civil Monetary Penalty, Monetary Payment and Order to File Reports Issued Upon Consent), available at http://www.federalreserve.gov/boarddocs/press/enforcement/2005/20051219/. The ABN Penalty Order stated, *inter alia*, that one of ABN's overseas branches had modified payment instructions for wire transfers processed by ABN's New York branch, to remove any reference to Iran's Bank Melli as the originating bank. Shortly after the ABN Penalty Order was issued, the *Wall Street Journal* published a front-page story describing ABN's processing of more than $70 billion in suspicious or illegal transfers through its New York branch. Glenn R. Simpson, *How Top Dutch Bank Plunged Into World of Shadowy Money*, Wall St. J., Dec. 30, 2005, available at https://www.wsj.com/articles/SB113590226646934275.

At the same time, the New York County District Attorney's Office (the "DANY") was investigating suspicious funds transfers to two Iranian-government front companies, when it uncovered evidence that Great Britain-based Lloyds Bank TSB was involved in clandestine funds transfers into the U.S. on behalf of Iranian banks. The resulting joint investigation by the Department of Justice and the

DANY culminated in a deferred prosecution agreement ("DPA") in 2009. DPA, *United States v. Lloyds TSB Bank PLC*, No. 09-CR-007 (D.D.C. Jan. 9, 2009).

More deferred prosecution agreements followed. *See* DPA, *United States v. Credit Suisse AG*, No. 09-CR-241 (D.D.C. Dec. 16, 2009); DPA, *United States v. ABN Amro Bank N.V.*, No. 10-CR-124 (CKK) (D.D.C. May 10, 2010); DPA, *United States v. Barclays Bank PLC*, No. 10-CR-218-EGS (D.D.C. Aug. 16, 2010); DPA, *United States v. ING Bank, N.V.*, No. 12-CR-136 (D.D.C. June 12, 2012); DPA, *United States v. Standard Chartered Bank*, No. 12-CR-262 (D.D.C. Dec. 10, 2012); DPA, *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763 (E.D.N.Y. Dec. 11, 2012); Plea Agreement, *United States v. BNP Paribas S.A.*, No. 14-CR-460-LGS (S.D.N.Y. July 10, 2014).

In an attempt to avert the escalating crisis, in January 2006 the Treasury Department's then-Under Secretary for Terrorism and Financial Intelligence, Stuart Levey, began holding a series of informal meetings with banks around the world. In those meetings, which ultimately involved more than 80 foreign trips and more than 60 international financial institutions, Levey warned of the dangers of continuing to do business with Iran and its state-owned banks – including the risk of terrorism financing. *See* Robin Wright, *Stuart Levey's War*, N.Y. Times, Oct. 31, 2008, available at http://www.nytimes.com/2008/11/02/magazine/02IRAN-t.html; Mark Gregory, *America's Financial War on Iran*, BBC News, June 13, 2007, available at http://news.bbc.co.uk/2/hi/business/6730681.stm ("Since September 2006, US officials have been travelling the world talking to banks and company

bosses. They aim to persuade business to voluntarily abandon or scale back all dealings with Iran."); Steven R. Weisman, *Pressed by U.S., European Banks Limit Iran Deal*, N.Y. Times, May 22, 2006, available at https://query.nytimes.com/gst/fullpage.html?res=9B07EEDF103EF931A15756C0A9609C8B63&pagewanted=all ("We are seeing banks and other institutions reassessing their ties to Iran. They are asking themselves if they really want to be handling business for entities owned by a government engaged in the proliferation of weapons of mass destruction and support for terrorism.").

Meanwhile, the Treasury Department took a series of formal steps to restrict the availability of the U-Turn Exemption to various Iranian government-owned banks. On September 8, 2006, OFAC amended Section 560.516 of the Iranian Transactions Regulations to exclude Bank Saderat from the U-Turn Exemption, announcing that "Bank Saderat has been a significant facilitator of Hizballah's financial activities and has served as a conduit between the Government of Iran and Hizballah." *See* 71 Fed. Reg. 53,569 (Sept. 12, 2006); Resource Center, U.S. Dep't of the Treasury, Recent OFAC Actions (Sept. 8, 2007), available at https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20060908a.aspx.

The following year, the Treasury Department accelerated its efforts by designating a succession of Iranian government-owned banks as Specially Designated Nationals, thereby blocking any transaction in which they had an interest and denying them the benefit of the U-Turn Exemption. *See, e.g.*, Press

Release, U.S. Dep't of the Treasury, Iran's Bank Sepah Designated by Treasury Sepah Facilitating Iran's Weapons Program (Jan. 9, 2007), available at https://www.treasury.gov/press-center/press-releases/Pages/hp219.aspx (announcing designation of Bank Sepah, Bank Sepah International Plc, and Bank Sepah's Chairman and Director, Ahmad Derakhshandeh). In March 2007, Under Secretary Levey gave public testimony regarding Iran's deceptive practices in support of terrorism, specifically noting that Iranian banks had asked other financial institutions to remove their names from U.S. dollar-denominated transactions in order to evade U.S. clearing controls. Press Release, U.S. Dep't of the Treasury, Testimony of Stuart Levey, Under Secretary for Terrorism and Financial Intelligence, Before the Senate Committee on Banking, Housing and Urban Affairs, available at https://www.treasury.gov/press-center/press-releases/Pages/hp325.aspx. A few months later, the *Financial Times* reported that U.S. regulators' investigation of ABN Amro had sent "seismic waves through the international banking system." Stephanie Kirchgaessner, *Banks Braced for Fines*, Fin. Times, Aug. 29, 2007, available at http://www.ft.com/intl/cms/s/0/0527e010-5672-11dc-ab9c-0000779fd2ac.html#axzz37fWbpnQO.

In October 2007, the U.S. designated Bank Saderat as a Specially Designated Global Terrorist, stating that the bank had "been used by the Government of Iran to channel funds to terrorist organizations, including Hizballah . . . . For example, from 2001 to 2006, Bank Saderat transferred $50 million from the Central Bank of Iran through its subsidiary in London to its branch in Beirut for the benefit of

Hizballah fronts in Lebanon that support acts of violence." Press Release, U.S. Dep't of the Treasury, Fact Sheet: Designation of Iranian Entities and Individuals for Proliferation Activities and Support for Terrorism (Oct. 25, 2007), available at https://www.treasury.gov/press-center/press-releases/Pages/hp644.aspx. At the same time, the Treasury Department also excluded Bank Melli from the U-Turn Exemption, finding that Bank Melli provided banking services to the IRGC and IRGC-QF and had employed deceptive banking practices to conceal its involvement in international banking transfers on behalf of the IRGC. *See id.*

In sum, by 2008, two critical facts were clear. First, Iran was employing deceptive methods to transfer funds through the international banking system in order to finance terrorism. Second, the U-Turn Exemption, which allowed Iran to transfer its Eurodollar reserves through U.S. banks, was a primary vulnerability exploited by Iran in making such clandestine transfers. As the New York Department of Financial Services later observed:

> By 2008 it was clear that this system of wire transfer checks had been abused, and that U.S. foreign policy and national security could be compromised by permitting U-Turns to continue. In November 2008, the U.S. Treasury Department revoked authorization for "U-Turn" transactions because it suspected Iran of using its banks – including the [Central Bank of Iran], Bank Saderat and Bank Melli – to finance . . . terrorist groups, including Hizballah, Hamas and the Palestinian Islamic Jihad, and engaging in deceptive conduct to hide its involvement in various other prohibited transactions, such as assisting OFAC-sanctioned weapons dealers.

In re Standard Chartered Bank, New York Branch, Order Pursuant to Banking Law § 39, at 8 (Aug. 6, 2012), available at http://www.dfs.ny.gov/about/ea/ea120806.pdf.

In the ensuing years, a third fact emerged: a significant number of Western financial institutions had actively collaborated with Iran to abuse and exploit the U-Turn Exemption. In a recent criminal prosecution for similar violations, the U.S. government described the consequences of enabling Iran's evasion of the sanctions regime:

> [T]he Government points out that the Defendant has aided sanctioned Iranian financial institutions . . . by giving them access to the very financial markets that the sanctions scheme was designed to cut them off from. He has helped the IRGC earn millions of dollars that could be used to finance its weapons proliferation and support for terrorism . . . In doing so, the Defendant eased the pressure on Iran and the IRGC created by the sanctions, and worked to diminish their deterrent effect. [The Defendant's] actions, in a very real sense, compromised the well-being and security of the United States.

United States v. Zarrab, No. 15 Cr 867 (RMB), 2016 WL 3681423, at *8 (S.D.N.Y. June 16, 2016).

The defendant in the *Zarrab* case was charged with having "facilitated millions of dollars worth of transactions on behalf of Iran and sanctioned entities that were designed to evade the U.S. sanctions. . . . includ[ing] entities that, at the time, were arms of the IRGC, which is notorious for its facilitation of terrorism." 2016 WL 3681423, at *3 (quotation marks, citation, and alteration omitted). If the well-pleaded allegations set forth in the Complaint in this case are proven at trial, Deutsche Bank's alleged participation in a conspiracy to facilitate *hundreds of millions* of dollars' worth of evasive transactions by Iran would, if anything,

constitute a greater breach of the security of the United States than that of the *Zarrab* defendant. (*See* Compl. ¶ 141, JA 27-28.)[5]

It is thus clear that the District Court erred in ruling that the detailed allegations set forth in the Complaint failed to sufficiently allege material support for terrorism. The Complaint is correct in pleading that, without the assistance of foreign financial institutions such as Deutsche Bank, Iran could not have transferred the U.S. dollars it did, through the international financial system, for the benefit of Hizballah and the IRGC. (*See* Compl. ¶ 135.) The legislative record and the Executive Branch's litany of findings and orders further illustrate that Deutsche Bank's alleged laundering of Eurodollars through the United States on behalf of Iran's state-owned banks had the effect of concealing Iran's material support of terrorism. Put simply, in the case of Iran, *all* efforts to circumvent the safe harbor provisions of the U-Turn Exemption did foreseeably support acts of terrorism, such as the one that allegedly caused the death of Plaintiff-Appellant's son.

CONCLUSION

For the reasons set forth above, the District Court's order should be reversed.

[5] "JA" refers to the Joint Appendix filed by the parties in this matter.

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Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

I hereby certify that:

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DATE: March 28, 2018

s/ Sarah A. Sulkowski
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CERTIFICATE OF SERVICE

I hereby certify that, on March 28, 2018, an electronic copy of the foregoing Brief for *Amicus Curiae* The American Coalition Against A Nuclear Iran, Inc. d/b/a United Against A Nuclear Iran was filed with the Clerk of Court by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service upon all counsel appearing in the case will be accomplished by the CM/ECF system.

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