UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 10-22095-CIV-MORENO/TORRES

ANA MARGARITA MARTINEZ,

Plaintiff,

vs.

THE REPUBLIC OF CUBA,

Defendant.

vs.

ABC CHARTERS, INC.,
AIRLINE BROKERS COMPANY, INC.,
C&T CHARTERS, INC.,
CUBA TRAVEL SERVICES, INC.,
GULFSTREAM AIR CHARTER, INC.,
MARAZUL CHARTERS, INC.,
WILSON INTERNATIONAL SERVICES, INC., and
XAEL CHARTERS, INC.'S,

Garnishees,

vs.

UNITED STATES OF AMERICA,

Intervenor.
_____/

REPORT AND RECOMMENDATION ON
MOTIONS FOR SUMMARY JUDGMENT[1]

[1] The Honorable Federico A. Moreno referred all matters relating to this garnishment action to the undersigned Magistrate Judge. [D.E. 35].

This matter is before the Court on Intervenor United States of America's Motion for Summary Judgment and to Quash Plaintiff's Writs of Garnishment [**D.E. 26**] and Garnishees ABC Charters, Inc., Airline Brokers Company, Inc., C&T Charters, Inc., Cuba Travel Services, Inc., Gulfstream Air Charter, Inc., Marazul Charters, Inc., Wilson International Services, Inc., and Xael Charters, Inc.'s (collectively, "Garnishees") Motion for Summary Judgment, Dissolution of Writs, and Attorneys' Fees [**D.E. 29**]. After considering the motions and related filings, and the record in this case, and for the reasons discussed below, we recommend that Garnishees' motion for summary judgment be granted in part and denied in part, and that the writs of garnishment be dissolved. We further recommend that the government's motion for summary judgment be denied as moot.

I. BACKGROUND

Plaintiff Ana Margarita Martinez ("Plaintiff") is the ex-wife of Pablo Roque, a Cuban spy. Plaintiff claimed that Roque married and used her as a cover for his espionage activities on behalf of the Cuban government. She sued the Republic of Cuba for damages in the Eleventh Judicial Circuit Court in and for Miami-Dade County.

In March 2011, Plaintiff obtained a default judgment against the Cuban government. The judgment was entered in accordance with section 1605(a)(7) of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602, *et seq.*, which created an exception to the sovereign immunity of foreign states in suits where money damages are sought for injury caused by acts of torture committed by a foreign state that the United States has designated as a state sponsor of terrorism. *See* 28 U.S.C. §

1605(a)(7).[2] Plaintiff was awarded $7.2 million in compensatory damages and $20 million in punitive damages based on the state court's determination that she had been subject to torture and sexual battery. [D.E. 1-4]. Plaintiff has collected approximately $200,000 of that judgment.[3]

With the bulk of her default judgment unsatisfied, in February 2010 Plaintiff obtained writs of garnishment from the clerk of the state court directed to payments owed by eight United States air charter companies (Garnishees) to entities in Cuba in connection with flight services authorized by the United States.

Garnishees removed the case to this Court but it was subsequently remanded to state court. *See Martinez v. Republic of Cuba*, No. 10-20611-CIV-MORENO, D.E. 52 (S.D. Fla. April 28, 2010). The United States was granted leave to intervene in the state court proceeding and thereafter removed the case to this Court. On November 22, 2010, Judge Moreno denied Plaintiff's attempt to return the case to state court. [D.E. 25].

The United States then moved for summary judgment to quash the writs of garnishment "in order to protect its statutory and regulatory authority over the assets at issue and its significant foreign policy interests." [D.E. 27 at 4]. The United States argues that the writs of garnishment are presumptively null and void because the

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[2] Section 1605(a)(7) was repealed in 2008 and replaced by 28 U.S.C. § 1605(A), which is not applicable here.

[3] Plaintiff states that she received $7,000 in 2003 after attaching a couple of small Cuban planes that had been flown to the United States in 2003 and $199,659.59 that was allocated to her by the United States in 2005 from Cuban assets previously seized by the government. [D.E. 53 at 2].

assets that Plaintiff seeks to attach are regulated by the U.S. Department of Treasury, Office of Foreign Assets Control ("OFAC"), pursuant to the Cuban Assets Control Regulations ("CACR"), 31 C.F.R. 515; the issuance of the writs constitutes a transfer of those assets for which a license from OFAC is required; and Plaintiff did not seek or obtain a license from OFAC to garnish the assets at issue.

Moreover, the government maintains, neither FSIA nor the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, Title II, 116 Stat. 2322 (Nov. 26, 2002) (codified at 28 U.S.C. § 1610 Note), supercedes the requirements of the CACR to permit Plaintiff to attach the assets at issue as they are not "blocked assets" subject to attachment under TRIA and OFAC has specifically authorized the transfer of those assets for travel-related services to Cuba. Finally, the United States contends that maintenance of the writs interferes with its foreign policy determination that certain flight services to Cuba should be permitted. Unless quashed, the government asserts, the writs threaten to further disrupt the United States' significant policy interests including fostering democratic change in Cuba.

Garnishees in their summary judgment motion also seek to dissolve the writs of garnishment on the ground that Plaintiff failed to obtain a license from OFAC authorizing garnishment of these non-blocked assets as required by the CACR. Garnishees raise additional arguments in support of dissolution of the writs: Plaintiff obtained the writs from the clerk of the state court rather than by court order in violation of 28 U.S.C. § 1610(c) of the FSIA; Plaintiff failed to establish prior to issuance of the writs that Garnishees were indebted to Cuba or any agent, instrumentality, or alter ego of that country; the state court lacked *quasi in rem*

jurisdiction over Garnishee Cuba Travel Services, Inc., a California corporation; and the writs were issued in violation of the Garnishees' due process rights. Garnishees also request attorneys' fees in connection with litigating these issues.

In response, Plaintiff counters that both the United States and Garnishees lack standing to move to dissolve the writs, that she does not need a license from OFAC to pursue this garnishment proceeding, and that the funds she seeks to attach are "blocked assets" under the TRIA and thus available for garnishment. With respect to the additional issues raised by the Garnishees, Plaintiff contends that there are disputed issues of material fact as to whether the Garnishees owe a debt to Cuba or its agencies or instrumentalities; 28 U.S.C. § 1610(c) does not require that the writs be issued by court order; this Court does have personal jurisdiction over Garnishee Cuba Travel Services; and the writs do not violate any due process rights.

II. LEGAL STANDARD

A motion for summary judgment should be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party asserting that a fact cannot be or is genuinely disputed must support the assertion by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers or other materials; or showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986).

"Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal citation omitted). The court must "view all the evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party," *see Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285 (11th Cir. 1997), and "resolve all reasonable doubts about the facts in favor of the nonmovant." *United of Omaha Life Ins. Co. v. Sun Life Ins. Co. of America*, 894 F.2d 1555, 1558 (11th Cir. 1990).

III. ANALYSIS

A. Standing

We quickly dispose of Plaintiff's standing argument. Pursuant to Florida Statute § 77.07(2), "[t]he defendant and any other person having an ownership interest in the property, as disclosed by the garnishee's answer," may move to dissolve a writ of garnishment. Plaintiff claims that the Garnishees do not have standing to maintain this action because they did not claim in their answers to the writs of garnishment that they have an ownership interest in the property described in the writs.

There is no doubt that the Garnishees have an ownership interest in that property. The Garnishees provide Cuba-related travel services and incur obligations in connection with the provision of those services. The writs of garnishment are directed at the payments the Garnishees make to satisfy those obligations. The Garnishees have the legal right of control over the funds at issue, and the writs affect

their business interests. As such, the Garnishees have standing to maintain this suit and seek dissolution of the writs.[4]

B. Statutory and Regulatory Framework

We summarize below the sources of statutory and regulatory authority that are relevant to our determination regarding the validity of the writs of garnishment.

1. Cuban Assets Control Regulations

Since 1962, the United States has imposed a comprehensive embargo on trade with Cuba. *See Alejandre v. Republic of Cuba*, 42 F. Supp. 2d 1317, 1324 (S.D. Fla. 1999). In 1963, the OFAC promulgated the CACR to implement the embargo with Cuba pursuant to the Trading with the Enemy Act of 1917 ("TWEA"), 50 U.S.C. App. § 1, *et seq.*[5] *Id.*

The CACR prohibits all dealings in, or transfers of, any property or evidences of indebtedness, in which Cuba or a Cuban national has an interest by any person subject to the jurisdiction of the United States, unless licensed by OFAC. *See* 31 C.F.R. §§ 515.201(b)(1), 515.802. The "transfer" of property is defined to include

> any actual or purported act or transaction . . . the purpose, intent, or effect of which is to . . . transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property . . . including the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment[.]

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[4] In light of our determination that the Garnishees have standing to seek dissolution of the writs, we need not reach the issue of the United States' standing.

[5] Section 5(b) of the TWEA authorizes the President of the United States to regulate and prohibit a wide range of transactions or dealings in any property in which a foreign country or a national thereof has any interest. *See* 50 U.S.C. App. § 5(b)(1)(B); *De Cuellar v. Brady*, 881 F.2d 1561, 1562-63 (11th Cir. 1989).

Id. § 515.310. Unless licensed, "any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property" subject to the CACR. *Id.* § 515.203(e).

In addition, pursuant to the CACR, all travel transactions to, from, and within Cuba are transactions in which Cuba or a Cuban national has an interest. *See generally id.* §§ 515.311-.312. Accordingly, Cuba-related travel transactions by persons subject to U.S. jurisdiction are prohibited unless authorized by OFAC. *Id.* §§ 515.201(b)(1), 515.802.

Each of the Garnishees is licensed by OFAC to provide Cuba-related travel services, incur obligations that arise in connection with such services, and make payments to Cuba to satisfy those obligations (such as payments for landing fees). The payments Plaintiff seeks to garnish came into existence after OFAC authorized the Garnishees to provide services and transfer payments to an entity in Cuba.

The foreign policy of the United States government is to "support the desire of the Cuban people to freely determine their future" and "promote democracy and human rights" in Cuba. [D.E. 27-2 (Decl. of Peter M. Brennan, Coordinator, Office of the Coordinator for Cuban Affairs, U.S. Dep't of State) ¶¶ 2-3]. The CACR travel restrictions were amended in 2009 to implement President Obama's announced policy of permitting unrestricted family visits to close relatives who are nationals of Cuba. *See* 31 C.F.R. § 515.561; *see also* D.E. 27-2 ¶ 4. Facilitating greater contact between separated family members in the United States and Cuba furthers the United States' policy goal of encouraging positive change in Cuba by decreasing the Cuban people's

dependency on the Cuban government, promoting democratic values, and increasing Cubans' access to information. [D.E. 27-2 ¶ 4].

All direct travel between the United States and Cuba takes place through the air charter services provided by the Garnishees. [*Id.* ¶ 6]. The United States asserts that the direct flights the Garnishees provide "are vital for maintaining contacts that are in the national interest." [*Id.*]. Garnishing the payments made by the Garnishees "could result in the termination of direct flight services between the two countries [and] disruption in licensed air charter service would cause serious harm to U.S. foreign policy toward Cuba[.]" [*Id.*].

2. Foreign Sovereign Immunities Act

The FSIA provides that foreign states are generally immune from suit in state and federal courts unless one of the exceptions in 28 U.S.C. §§ 1605 - 1607 applies. *See* 28 U.S.C. § 1330(a). Plaintiff's default judgment was obtained under then-section 1605(a)(7)[6] which created an exception to immunity for suits against foreign states designated as state sponsors of terrorism.

The FSIA prescribes the circumstances under which attachment and execution may be obtained against the property of a foreign state to satisfy a judgment. Generally, the property of a foreign state "shall be immune from attachment arrest and

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[6] Then-section 1605(a)(7) permitted suits by United States citizens "for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, [or] hostage taking" committed by an official, employee, or agent of a foreign state designated as a state sponsor of terrorism at the time the act occurred or as a result of the act that caused the injury or death. Cuba was designated as a state sponsor of terrorism in 1982. *See* 50 U.S.C. App. § 2405(j).

execution" except as provided in 28 U.S.C. §§ 1610 and 1611. *See* 28 U.S.C. § 1609. The exception relevant in this case is for property belonging to designated state sponsors of terrorism. Section 1610(f)(1)(A), which is applicable to terrorism-related judgments obtained under § 1605(a)(7), provides in pertinent part that,

> [n]otwthstanding any other provision of law, . . . any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the [TWEA] . . . or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

28 U.S.C. § 1610(f)(1)(A).

The President has express authority under the FSIA to waive any provision of § 1610(f)(1) in the interest of national security. *See* 28 U.S.C. § 1610(f)(3); *Bennett v. Islamic Republic of Iran*, 604 F. Supp. 2d 152, 161 (D.D.C. 2009). The President has previously exercised this waiver authority. *See* Presidential Determination No. 99-1, 63 Fed. Reg. 59,201 (Oct. 21, 1998); Presidential Determination 2001-03, 65 Fed. Reg. 66,483 (Oct. 28, 2000); *Bennett*, 604 F. Supp. 2d at 161.

3. Terrorism Risk Insurance Act

The TRIA authorizes persons holding judgments obtained under § 1605(a)(7) of the FSIA to execute upon certain assets of foreign states that are terrorist parties. Section 201 of the TRIA reads as follows:

> 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 [28 U.S.C. § 1605(a)(7)], the blocked assets of that terrorist party (including the blocked assets of any

> agency or instrumentality of that terrorist party) shall be subject to execution or attachment in 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).[7]

> The TRIA defines the term "blocked asset" in pertinent part as:
>
> (A) any asset seized or frozen by the United States under section 5(b) of the [TWEA] . . .; and
>
> (B) does not include property that–
>
> > (i) is subject to a license issued by the United States Government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for which the issuance of such license has been specifically required by statute other than the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) or the United Nations Participation Act of 1945 (22 U.S.C. 287 et seq.)[.]

TRIA §§ 201(d)(2)(A), (B)(i). Thus, under the TRIA, the holder of a terrorism-related judgment may execute upon assets that have been "seized or frozen" by the government under the TWEA but not upon property that is subject to a license for final payment in connection with a transaction for which a license is specifically required by the TWEA.

The TRIA does not further define the terms "seized" and "frozen." However, OFAC, the agency with delegated authority to carry out the TWEA, defines "blocking"

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[7] Subsection (b)(1) provides that, " . . . upon determining on an asset-by-asset basis that a waiver is necessary in the national security interest, the President may waive the requirements of subsection (a) in connection with (and prior to the enforcement of) any judicial order directing attachment in aid of execution or execution against any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations." TRIA § 201(b)(1).

or "freezing" as a "form of controlling assets under U.S. jurisdiction" that "immediately imposes an across-the-board prohibition against transfers or transactions of any kind with regard to the property." [D.E. 27-1 (Decl. of Adam J. Szubin, Dir., OFAC) ¶ 14]; *see also* U.S. Treasury Dep't, *OFAC Regulations for the Financial Community*, at 4 (May 6, 2011) at http://www.treasury.gov/resource-center/sanctions/Documents/facbk.pdf (last visited June 23, 2011). The Second Circuit in construing the TRIA observed that "[t]o seize or freeze assets transfers *possessory* interest in the property." *Smith v. Federal Reserve Bank of New York*, 346 F.3d 264, 272 (2d Cir. 2003) (emphasis in original). Similarly, the word "seize" as used in the relevant legal context means "to forcibly take possession of . . . property." Black's Law Dictionary 1480 (9th ed. 2009).

4. Determination by the Office of Foreign Assets Control

In response to the issuance of Plaintiff's writs of garnishment, the director of OFAC who is responsible for administering the CACR made the following determinations concerning the payments that Plaintiff seeks to garnish: these assets are regulated by the CACR; Plaintiff has not applied for or obtained a license from OFAC to garnish the assets; the assets are not "seized or frozen" under section 5(b) of the TWEA and have been specifically authorized for transfer to a Cuban entity in payment for flight services that OFAC has authorized; because the assets are not "blocked" and not subject to attachment under the TRIA, Plaintiff is required under the CACR to obtain a license from the OFAC in order to garnish the assets; and absent a license from OFAC, which has not been granted here, the writs of garnishment are null and void under the CACR. [D.E. 27-1 ¶¶ 13-15].

C. This Applicable Framework Requires Dissolution of the Writs

There is no dispute that the payments owed by the Garnishees to an entity in Cuba constitute property in which Cuba or a Cuban national has an interest and are subject to the CACR. Nor is there any dispute that the CACR requires a license to garnish such assets. Absent a license from OFAC or some other statutory basis for attachment of the Garnishees' assets that supplants the CACR license requirement, Plaintiff's writs of garnishment are null and void and must be dissolved.

1. Presidential Waiver of FSIA Section 1610(f)(1)(A)

Plaintiff contends that § 1610(f)(1)(A) of the FSIA, which authorizes attachment of property of a terrorist-sponsoring state by the holder of a § 1605(a)(7) terrorism-related judgment, permits garnishment in this case. She argues that past Presidential waivers of § 1610(f)(1) are invalid and have been specifically disapproved by Congress.

We disagree. As Plaintiff acknowledges, when Congress enacted § 1610(f), it also enacted a non-code provision allowing the President to waive it in the interest of national security. *See* Publ. L. No. 105-277, § 117, 112 Stat. 2681 § 117(d) (Oct. 21, 1998). The President promptly executed the waiver upon signing the legislation into law. *See* Presidential Determination No. 99-1, 63 Fed. Reg. 59,201 (Oct. 21, 1998).

The scope of the President's waiver became the subject of debate, and thereafter Congress amended the FSIA to include language clearly providing that the President "may waive any provision of paragraph (1) [of § 1610(f)] in the interest of national security." *See* Publ. L. No. 106-386, 114 Stat. 1464 (Oct. 28, 2000) (waiver provision codified at 28 U.S.C. § 1610(f)(3)). The President again waived § 1610(f)(1) upon

signing the new legislation into law. *See* Presidential Determination 2001-03, 65 Fed. Reg. 66,483 (Oct. 28, 2000).[8]

Citing language in a committee report to the FSIA amendments that articulated the committee's view that the waiver authority should not be exercised in a blanket fashion, Plaintiff contends that the President, in doing just that, contravened clear legislative intent that waivers be issued on a case-by-case basis.

Notwithstanding the congressional debate or the sentiments expressed in a committee report regarding the President's exercise of the waiver authority, Congress ultimately passed legislation expressly authorizing the President to waive § 1610(f)(1), without limitation. "Where the language of a statute is unambiguous, as it is here, we need not, and ought not, consider legislative history." *Harry v. Marchant*, 291 F.3d 767, 772 (11th Cir. 2002); *see also Young v. West Pub'g Corp.*, 724 F. Supp. 2d 1268, 1278 (S.D. Fla. 2010) ("In our circuit, '[w]hen the import of the words Congress has used is clear . . . we need not resort to legislative history, and we certainly should not do so to undermine the plain meaning of the statutory language.'" (internal citations omitted)). The plain language of the statute controls.

Plaintiff nevertheless argues that, after the second waiver of § 1610(f)(1), Congress again expressed its goal of eliminating blanket waivers by enacting the TRIA with a provision that allows a Presidential waiver only on an asset-by-asset basis. *See* TRIA § 201(b)(1). However, Congress did not also amend the waiver provision of the FSIA or otherwise restrict the President's ability to waive § 1610(f)(1). Consequently,

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[8] The United States relies on the second Presidential waiver.

the TRIA establishes a distinct waiver authority applicable only to attachments under the TRIA; it does not somehow reinstate § 1610(f)(1)(A)'s authorization to attach certain assets of terrorist states under the FSIA.

Accordingly, because the President has waived § 1610(f)(1)(A), that provision remains a "nullity," *see Bennett*, 604 F. Supp. 2d at 161, and thus the FSIA provides no basis for Plaintiff to attach the Garnishees' assets.

2. "Blocked Assets" under the TRIA

Section 201(a) of the TRIA authorizes a person who obtains a terrorism-related judgment under § 1605(a)(7) of the FSIA to execute upon or attach the "blocked assets" of the terrorist party. Plaintiff contends that the Garnishees' debt obligation is a "blocked asset" subject to attachment under the TRIA.

As previously discussed, the TRIA defines a "blocked asset" as "any asset seized or frozen by the United States under section 5(b) of the [TWEA]." *See* TRIA § 201(d)(2)(A). The OFAC defines "blocking" as a "form of controlling assets under U.S. jurisdiction" that "immediately imposes an across-the-board prohibition against transfers or transactions of any kind with regard to the property." *See* U.S. Treasury Dep't, *OFAC Regulations for the Financial Community*, at 4 (May 6, 2011).

We agree with the government and the Garnishees that the assets at issue here – payments by air charter companies to an entity in Cuba for flight services authorized by the OFAC – are not "blocked" assets under the TRIA. It is undisputed that the OFAC licensed Garnishees to provide travel services to Cuba and make payments associated therewith. The assets that Plaintiff seeks to garnish have thus been authorized for transfer to Cuba and are not subject to an across-the-board prohibition

on transfer. They have not been seized or frozen by the United States for purposes of the TRIA and therefore are not "blocked." *See Weinstein v. Islamic Republic of Iran*, 299 F. Supp. 2d 63, 74-75 (E.D. N.Y. 2004) (assets that could be transferred pursuant to OFAC's licenses were not "blocked assets" under the TRIA); *Bank of New York v. Rubin*, 484 F.3d 149, 150 (2d Cir. 2007) (approving the analysis in *Weinstein* as to the definition of "blocked assets" under the TRIA).

Moreover, Garnishees' assets are specifically excluded from the definition of "blocked asset" by § 201(d)(2)(B)(i) of the TRIA. This provision expressly excludes property that is subject to a license for final payment in connection with a transaction for which a license is specifically required by statute (such as the TWEA). The payments at issue here were authorized by the OFAC pursuant to its authority under the TWEA, and the transfer could not otherwise proceed absent an OFAC license. These assets are therefore not "blocked assets" under TRIA. *See Weinstein*, 299 F. Supp. 2d at 74-75 (assets subject to a license are not "blocked"); *Hausler v. Republic of Cuba*, No. 09-21175-CIV-JORDAN, D.E. 62 at 8; D.E. 77 at 6-7 (S.D. Fla. Oct. 1, 2010; April 26, 2011) (payments made pursuant to a specific OFAC license were not "blocked assets" under the TRIA).

Plaintiff suggests that *all* property interests regulated by the CACR (as implemented pursuant to § 5(b) of the TWEA), even licensed transfers like the Garnishees' here, are subject to an across-the-board prohibition on transfers or transactions and thereby satisfy the definition of "blocked assets" under the TRIA. [D.E. 53 at 11-12]. Plaintiff does not offer any cases or other authority to support this interpretation of "blocked assets" under the TRIA.

A similar argument was considered and rejected by Judge Jordan in *Hausler*, who noted first that the CACR itself provides that "an appropriate license or other authorization issued by or pursuant to the direction or authorization of the Secretary of the Treasury before, during, or after a transfer shall validate such transfer or render it enforceable to the same extent as it would be valid or enforceable but for the provisions of section 5(b) of the [TWEA.]" *See Hausler*, No. 09-21175, D.E. 62 at 9 (quoting 31 C.F.R. § 515.203(c)). As Judge Jordan observed, this language indicates that a transfer that is executed pursuant to an OFAC license is considered valid and enforceable as if it were not proscribed by the TWEA or the CACR. *Id.*

Moreover, Judge Jordan rejected the *Hausler* plaintiffs' argument that assets regulated by OFAC, with transfers and other dispositions carried out pursuant to an OFAC license, constituted "blocked assets" under the TRIA. *Id.* at 10. He approved the *Weinstein* court's conclusion that the term "blocked assets" should not be construed as an "omnibus" term that extended to all assets regulated or licensed by the OFAC. *Id.* (citing *Weinstein*, 299 F. Supp. 2d at 74-75). Judge Jordan agreed that a more expansive reading of "blocked assets" ignored the limitation imposed by the definition itself: assets that are "seized" or "frozen" under specified statutes. *Id.*

We agree with the rationale expressed in *Hausler* and *Weinstein*. Not every action authorized by the TWEA necessarily involves a seizing or freezing of property. Section 5(b) of the TWEA also authorizes the President to regulate transfers, transactions, or dealings in the property interests in a foreign country. *See* 50 U.S.C. App. § 5(b)(1)(B). Travel and carrier services to Cuba are among the transactions regulated by the CACR. *See* 31 C.F.R. 515.572. The mere restriction through

regulation of such services does not mean the Garnishees' payments to a Cuban entity should be considered "seized" or "frozen" under the TRIA.

Congress has recognized a distinction between the attachment of assets that are "seized" or "frozen" under § 201(d)(2)(A) of the TRIA on the one hand, and the attachment of "property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the [TWEA]" under § 1610(f)(1)(A) of the FSIA on the other. *See Weinstein*, 299 F. Supp. 2d at 75. We conclude that OFAC's regulation and authorization of travel services and related payments to Cuba under the CACR does not render the assets "seized" or "frozen" for purposes of attachment under the TRIA. Consequently, § 201(a) of the TRIA does not provide a basis upon which Plaintiff can attach the Garnishees' assets.

IV. CONCLUSION

There is no issue of material fact in dispute here, and the Garnishees have demonstrated they are entitled to judgment as a matter of law. Plaintiff has not obtained a license from the government to garnish payments owed to entities in Cuba in connection with authorized flight services, as required by the CACR. Absent a license, and because Plaintiff has not identified any other statutory basis for attaching Garnishees' assets, the writs of garnishment are null and void. The writs should therefore be dissolved.[9]

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[9] Given this conclusion, we need not address the other issues raised by the parties.

For the foregoing reasons, this Court recommends that:

1) Garnishees' Motion for Summary Judgment, Dissolution of Writs, and Attorneys' Fees [**D.E. 29**] be **GRANTED in part** as to the writs of garnishment which should be dissolved, and **DENIED** as to the remainder of the motion.

2) Intervenor United States of America's Motion for Summary Judgment and to Quash Plaintiff's Writs of Garnishment [**D.E. 26**] be **DENIED as moot**.

Pursuant to Local Magistrate Rule 4(b), the parties have fourteen (14) days from the date of this Report and Recommendation to serve and file written objections, if any, with the Honorable Federico A. Moreno, United States District Judge. Failure to timely file objections shall bar the parties from a *de novo* determination by the District Judge of an issue covered in the report and bar the parties from attacking on appeal the factual findings contained herein. *R.T.C. v. Hallmark Builders, Inc.,* 996 F.2d 1144, 1149 (11th Cir. 1993); *LoConte v. Dugger*, 847 F.2d 745 (11th Cir. 1988); *Nettles v. Wainwright*, 677 F.2d 404, 410 (5th Cir. Unit B 1982) (en banc); 28 U.S.C. § 636(b)(1).

DONE AND SUBMITTED in Chambers at Miami, Florida, this 27th day of June, 2011.

EDWIN G. TORRES
United States Magistrate Judge