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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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SHIRIN EBADI and THE STROTHMAN :
AGENCY, LLC, :
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 : Plaintiffs, :
 :
 : -- against -- :
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OFFICE OF FOREIGN ASSETS CONTROL :
OF THE DEPARTMENT OF THE TREASURY; :
JOHN W. SNOW, SECRETARY OF THE TREASURY, :
in his official capacity; and ROBERT WERNER, :
DIRECTOR, OFFICE OF FOREIGN :
ASSETS CONTROL, in his official capacity, :
 :
 : Defendants. :
-----X

Civ. No. _____

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR
PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF**

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PRELIMINARY STATEMENT

In a misguided effort to implement national security legislation, the Office of Foreign Assets Control (“OFAC”) of the United States Department of the Treasury has promulgated regulations, the Iranian Transactions Regulations (“ITR”), that effectively bar plaintiff Shirin Ebadi, an Iranian national, a human rights lawyer and activist and the recipient of the Nobel Peace Prize in 2003, from publishing her memoirs in the United States.

The ITR transform ordinary publishing activities in the United States into prohibited transactions if they involve authors in countries subject to certain U.S. trade restrictions, including Iran. Thus, the ITR preclude Ms. Ebadi from securing assistance from U.S. persons like plaintiff The Strothman Agency, LLC (“Strothman”), a literary agency. The ITR also restrict Strothman’s freedom to work with authors in sanctioned countries. Publishing a book in the United States can be a complicated process and may involve numerous players, including literary agents, editors, publishers, translators and co-authors. In Ms. Ebadi’s case, the difficulties are amplified by her lack of fluency in English and her basic unfamiliarity with American culture. Unless Ms. Ebadi secures the necessary assistance from Strothman, among others in the United States, she will not be able to publish her memoirs in this country. That would be a senseless outcome, because the United States certainly has no national security interest in stifling the free speech of someone like Ms. Ebadi, who has dedicated her life to fighting for the rights of women, children and minorities and promoting justice, equality and peace in Iran.

Ms. Ebadi and Strothman are in this dilemma because OFAC overstepped its authority when it promulgated the OFAC Information Regulations (defined below). The OFAC Information Regulations are totally inconsistent with the legislation that they were intended to implement. Indeed, Congress has twice declared that trade embargoes may *not* be allowed to

restrict the international flow of information and ideas that is vital to our understanding of the world. Additionally, the OFAC Information Regulations, on their face and as applied, violate Ms. Ebadi's constitutional rights, as well as the constitutional rights of all U.S. citizens, including Strothman. Finally, the ITR and the OFAC Information Regulations also impose an unconstitutional prior restraint of speech.

By preventing Iranian nationals like Ms. Ebadi from communicating with U.S. persons through the medium of published manuscripts in the United States, the ITR and the OFAC Information Regulations as interpreted by OFAC are threatening the free exchange of ideas and knowledge that forms the very foundation of American society. The OFAC Information Regulations should therefore be struck down in their entirety, and Ms. Ebadi should be permitted to obtain the necessary assistance of U.S. persons, including Strothman, to the publish her memoirs in the United States.

STATEMENT OF FACTS

I. The Legal Framework

U.S. economic sanctions are governed principally by two federal statutes, the Trading With the Enemy Act (“TWEA”), 50 U.S.C. App. §§ 1-40, and the International Emergency Economic Powers Act (“IEEPA”), 50 U.S.C. §§ 1701-06. OFAC promulgates and enforces U.S. economic sanctions against various embargoed countries, including Iran, pursuant to TWEA and IEEPA on behalf of the President and Secretary of the Treasury. Separate regulations set out the terms of the embargoes for each embargoed country. The regulations for Iran prohibit most forms of trade to and from the United States. *See* Iranian Transactions Regulations, 31 C.F.R. § 560 (2004).

A. The Berman Amendment

In 1988, in response to several seizures of shipments of magazines and books from embargoed countries at the U.S. border, Congress added an exemption to IEEPA and TWEA to ensure that “informational materials” would not be excluded from the United States. The “Berman Amendment” provided that:

[t]he authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly, the importation ... or the exportation ..., whether commercial or otherwise, of publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, or other informational materials.

Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988), 50 U.S.C. App. § 5(b)(4)(1988). The legislative history of the Berman Amendment confirms the importance to Congress of ensuring that trade sanctions do not interfere with the international exchange of ideas and information. The conference report declares that the Amendment “clarifies that the Trading With the Enemy Act and the International Emergency Economic

Powers Act do not authorize regulations on the export or import of informational material not otherwise controlled under the Export Administration Act.” H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. (1988), *reprinted* in 1988 U.S. Code Cong. & Admin. News 1547, 1872. The relevant House Foreign Affairs Committee’s report emphasized that ideas and information should flow freely into the United States and from the United States to the rest of the world, in light of the fundamental First Amendment interests at stake. *See* H.R. Rep. No. 4, 100th Cong., 1st Sess., pt. 3, at 113 (1987).

OFAC amended its regulations purportedly to comply with the Berman Amendment in 1989. The amended regulations expanded the general licensing provisions to authorize all transactions relating to “informational materials” (54 Fed. Reg. 5229, 5231-34 (1989); 31 C.F.R. §§ 500.206, 500.550, 515.206, 515.545 (1990, 2004)), but narrowly defined “informational materials” to include only “information recorded in tangible form,” excluding “intangible items, such as telecommunications transmissions.” 54 Fed. Reg. 5229, 5231, 5233; 31 C.F.R. §§ 500.332, 515.332 (1990). The exemption for transactions relating to “informational materials” also contained the following unexplained carve-out:

This section does not authorize transactions related to informational materials not fully created and in existence at the date of the transaction, or to the substantive or artistic alteration or enhancement of informational materials, or to the provision of marketing and business consulting services by a person subject to the jurisdiction of the United States. Such prohibited transactions include, without limitation, payment [of] advances for informational materials not yet created and completed, provision of services to market, produce or co-produce, create or assist in the creation of informational materials, and payment of royalties to a designated national with respect to income received for enhancements or alterations made by persons subject to the jurisdiction of the United States to informational materials imported from a designated national.

54 Fed. Reg. 5229, 5231, 5233; 31 C.F.R. §§ 500.206(c) (1990) & 515.206(a)(2) (1990) (the “OFAC Information Regulations”). The new regulations went into effect on February 2, 1989.

Within a year, OFAC’s restriction of the scope of “informational materials” exempted from regulation by the Berman Amendment faced two legal challenges. In the first case, the court ruled that artworks qualified as “informational materials” exempt from regulation pursuant to the Berman Amendment. In the second, *Capital Cities/ABC, Inc. v. Brady*, 740 F. Supp. 1007 (S.D.N.Y. 1990), the court accepted OFAC’s argument that the exemption did not apply to information not yet physically in being or otherwise in intangible form, such as broadcast communications.

B. The Free Trade in Ideas Amendment

Distressed by OFAC’s unauthorized narrowing of the Berman Amendment and the outcome in the *Capital Cities* case, Congressman Berman proposed new legislation in 1992, then known as the Free Trade in Ideas Act, to clarify Congress’s original intent to allow the import and export of all materials protected by the First Amendment. A summary of the bill reiterated that the legislation was “necessary to clarify the intent of Congress in adopting the Berman amendment,” because the Executive Branch had interpreted it “narrowly, to exclude many informational and artistic materials.” The new law “makes clear and explicit that *all First Amendment protected materials and activities*, including paintings, telecommunications, and travel necessary for trade in information, are within the ambit of the statute’s protection.” 138 Cong. Rec. E1856-04, E1857 (emphasis added).

The Free Trade in Ideas Amendment added the words “information and” to the phrase “informational materials” in TWEA and IEEPA to make it clear that the exemption applies to information, even if it has not yet been given tangible form as a “fully created” work at the time

of the transaction. Congress also added four new examples of informational materials that would be covered by the exemption and expressly stated that the exemption applies regardless of format or medium of expression. The statutory language now reads:

The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly, the importation from any country, or the exportation to any country, whether commercial or otherwise, *regardless of format or medium of transmission, of any information or informational materials, including but not limited to, publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds.*

P.L. 103-236, Sec. 525(b), (c) (1994); *codified in* 50 U.S.C. § 1702(b)(3); 50 U.S.C. App. § 5(b)(4) (2001). (The words in italics were added by the Free Trade in Ideas Amendment to the original text of the Berman Amendment.)

The conference committee's report on the Free Trade in Ideas Amendment specified that the Berman Amendment had been intended, "by including the words 'directly or indirectly,' to have a broad scope," and to cover all information protected by the First Amendment. It explained that the new law was designed to correct the Treasury Department's "restrictive interpretations, for example limits on the type of information that is protected or on the medium or methods of transmitting the information." H.R. Conf. Rep. No. 482, 103rd Cong., 2d Sess. (1994), *reprinted* in 1994 U.S.C.C.A.N. 398, 483. It further clarified that Congress intended "informational materials" to include both tangible and intangible informational materials; "without regard to the type of information, its format, or means of transmission, and electronically transmitted information, *transactions for which must normally be entered into in advance of the information's creation.*" *Id.* (emphasis added).

In spite of that clarification of the statutory language and Congress's explicit articulation of the legislation's purpose, OFAC has continued to misinterpret and misapply the sanctions

statutes, in defiance of Congress's manifest intent. OFAC revised its regulations in response to the Free Trade in Ideas Amendment. The term "information" was added, and the definition of informational materials was revised to encompass "compact disks, CD ROMS, artworks and news wire feeds." 60 Fed. Reg. 8933, 8934 (1995). However, OFAC made no changes to the provisions of the regulations that forbid Americans from entering into transactions related to information "not fully created and in existence at the date of the transactions" – such as publishing agreements for new or to-be-revised books or articles. See 31 C.F.R. §§ 500.206(c), 515.206(a) (2004); 538.211(3); 560.210(3). Nor did OFAC retract the prohibitions on "substantive or artistic alteration or enhancement of informational materials" and "the provision of marketing and consulting services" in connection with either existing or not-yet-fully-created works, despite Congress's second declaration that no direct or indirect regulation or prohibition is permitted. *Id.*

C. The OFAC Licensing Scheme and Enforcement Proceedings

OFAC's regulations provide for both general licenses, which permit entire classes or categories of transactions, and specific licenses, which require case-by-case determinations and approval by OFAC. See Reporting, Procedures and Penalties Regulations, 31 C.F.R. § 501.801 (2004). OFAC's license determinations are not subject to any stated criteria. OFAC has stated only that "many" of them are "guided by U.S. foreign policy and national security concerns." OFAC website, Frequently Asked Questions, *available at* <http://www.ustreas.gov/offices/enforcement/ofac/faq/#license>. OFAC's regulations permit OFAC to amend or rescind existing licenses at any time or to exclude any person or transaction from the benefit of any general or specific license. See 31 C.F.R. §§ 501.803, 560.502 (2004). There is no limit to how long OFAC may take to respond to a license application. One letter ruling on publishing and the

OFAC Information Regulations was issued almost a year and a half after the inquiry was made. Nor is there any formal process for appealing the denial of a license. *See* Reporting, Procedures and Penalties Regulations, 31 C.F.R. § 501.801 (2004). A person participating in activities covered by the Regulations without a license faces stiff sanctions.¹

OFAC's enforcement division vigorously investigates violations of its regulations and the statutes it administers. According to congressional testimony of former OFAC Director R. Richard Newcomb given on June 16, 2004, since 1993, OFAC has imposed penalties in more than 8,000 matters, generating fines of nearly \$30 million. Beginning late last year, however, OFAC issued a series of interpretive rulings that created increasing concern for authors in foreign countries wishing to publish in the United States and U.S. persons, such as Strothman, who seek to assist foreign authors in publishing their works in the United States. Many of these rulings unambiguously prohibit transactions that are necessary incidents to the publishing process.

D. Recent OFAC Interpretive Rulings

In September 2003, responding to inquiries from U.S. entities interested in publishing books by Iranian authors in the United States and working with Iranian publishers to publish U.S. works there, OFAC ruled that several routine publishing activities are barred by the current Regulations. In two letters, OFAC stated:

- U.S. persons may not engage Iranian authors to create new works;

¹ The penalties for violations of OFAC's regulations include prison terms of up to ten years and fines totaling up to \$250,000 for individuals, and \$1,000,000 for corporations. OFAC may, in addition, impose civil penalties of up to \$65,000 under TWEA and up to \$11,000 under IEEPA through administrative proceedings. Reporting, Procedures, and Penalties Regulations, 31 C.F.R. § 501.701 (2004); 50 U.S.C. App. § 16 (2004); 50 U.S.C. § 1705 (2004); 18 U.S.C. § 3571 (2004).

- U.S. persons are not authorized to assist Iranian authors by editing and otherwise preparing their manuscripts for publication, including the reordering of paragraphs or sentences, correction of syntax and grammar, and replacement of inappropriate words, since such activities “would result in a substantively altered or enhanced product”; and
- U.S. persons may not create illustrations for Iranian-authored works because that would constitute “a prohibited exportation of services.”

9/15/03 OFAC Ruling, 9/26/03 OFAC Ruling (Diana Decl. Exs. D, E).

OFAC also explicitly ruled that the publication of books in the U.S. on behalf of persons in Iran or the publication of books in Iran on behalf of U.S. persons is prohibited. As OFAC wrote, “[i]nherent in the publication of a book are marketing, distribution, artistic, advertising and other services not exempt from [OFAC’s regulations]. Thus, you may not publish books in the United States on behalf of a person in Iran, nor may a person in Iran publish books on your behalf.” 9/26/03 OFAC Ruling, *see also* 9/15/03 OFAC Ruling (Diana Decl. Exs. D, E).

Further, in September 2003, OFAC issued an interpretive ruling to the Institute of Electrical and Electronics Engineers (“IEEE”), which publishes scientific and technical journals, that certain ordinary activities undertaken by IEEE in the publication of works by Iranian authors fell outside the “information and informational materials exemption” and therefore were barred. These activities included “the reordering of paragraphs or sentences, correction of syntax, grammar, and replacement of inappropriate words by U.S. persons,” because they “may result in a substantively altered or enhanced product, and [are] therefore prohibited under [OFAC’s regulations] unless specifically licensed.” 9/30/03 OFAC Ruling (Diana Decl. Ex. F). OFAC indicated that a U.S. publisher could accept “camera-ready copy” from Iran and distribute it here. In addition, OFAC stated that the marketing of a periodical with articles by many authors would be permissible, although marketing a particular work by an author in a country under embargo,

would not, because “the provision of marketing or business consulting services is generally not permitted as incidental to the importation or exportation of informational materials.” *Id.* OFAC also ruled that IEEE’s facilitation of a peer review process, including the selection of reviewers to collaborate with Iranian authors and transmitting the reviewers’ comments to the authors, would also violate the regulations because it would substantively enhance the articles. *Id.*

Other OFAC rulings are inconsistent, if not contradictory. On April 2, 2004, OFAC ruled that IEEE could, without a license, engage in the limited peer review process it had described, but only so long as the process begins with completed manuscripts—not new or commissioned material – and provides only “general guidance and suggestions” from reviewers and editors that does not result in the “substantive[] re-writ[ing] or revis[ing of] the manuscript” or “a collaborative interaction ... resulting in co-authorship or the equivalent thereof.” 4/2/04 OFAC Ruling (Diana Decl. Ex. G). This time, OFAC stated that routine copy editing, such as changing font sizes, correcting linguistic errors and repositioning illustrations, would be exempt because such acts would not amount to substantive alteration or enhancement of the work. *Id.*

Moreover, in July 2004, OFAC issued an interpretive ruling stating that it would be permissible for a U.S. person to fund the translation of already-published literary works by Iranian writers, evidently on the theory that reproducing, dubbing or translating existing works would not substantively alter or enhance them, which OFAC reiterated would not be allowed. 7/6/04 OFAC Ruling (Diana Decl. Ex. H). But on July 19, 2004, in response to a query from the American Society of Newspaper Editors, OFAC issued another contradictory interpretation of the exemption for “information and informational materials.” OFAC ruled that a U.S. newspaper could translate a completed article or op-ed commentary by a writer in a sanctioned country into English; edit such a work for space reasons by deleting superfluous text; edit it to correct

grammar, syntax or spelling errors; and substantively edit it to make it more cohesive, efficient, argumentative or effective, in the same manner that it would for one of its own writers. 7/19/04 OFAC Rulings (Diana Decl. Ex. I). OFAC did not explain the departure from its previous rulings or how to square its ruling with the regulations, which bar substantive alteration. OFAC merely stated that “offering substantive edits to the work’s content ... would not constitute substantive or artistic alteration or enhancement of the article or commentary.” OFAC did not explain why “substantive edit[ing]” would not constitute “substantive alteration or enhancement.” *Id.* None of these recent rulings, however, have rescinded the ban on substantive alteration or enhancement of works by authors in sanctioned countries by literary agencies or U.S. publishers.

Faced with such inconsistency in the interpretation of “substantive...alteration or enhancement,” Ms. Ebadi, as well as U.S. publishers, editors, translators and literary agents like Strothman are left to wonder which rulings to follow and which transactions remain prohibited by that phrase in the regulations. Because all of the activities ostensibly prohibited by the regulations are integral to the publishing process, the regulations effectively make it illegal for Americans to publish any books by Iranian authors such as Ms. Ebadi. Thus, the OFAC Information Regulations and related interpretive rulings have impeded the free flow of ideas and information into the United States.

II. The Negative Impact Of The OFAC Information Regulations On Ms. Ebadi And Strothman

The OFAC Information Regulations effectively deny Ms. Ebadi the right to publish her memoirs in the United States by prohibiting literary agents like Strothman, book publishers, editors, translators and co-authors in the United States from engaging in those activities necessary to publish her manuscript.

To even commence the process of publishing her memoirs in the United States, Strothman and book publishers would have to engage in “transactions relating to information or informational materials not yet fully created,” which the regulations prohibit. *See Generally* Strothman Decl. For example, to publish her memoirs in the United States, Ms. Ebadi will need to retain a literary agent. *See id.* ¶ 19. Generally speaking, a literary agent is an author’s liaison to the publishing world in the United States. *See id.* ¶ 14. Indeed, most publishers have stated in their publishing guidelines that they will not accept a proposal for publication unless it is submitted by a literary agent. *See id.* at ¶ 12 (“Publishers in the Time Warner Book Group... are not able to consider unsolicited manuscript submissions and unsolicited queries. Many major publishers have a similar policy... If you are interested in having a manuscript considered for publication, we recommend that you first enlist the services of an established literary agent.”)

In order for Ms. Ebadi to publish her memoirs in the United States, some, if not all, of the following services would need to be performed by Ms. Ebadi’s proposed literary agency Strothman:

- (i) assist in the writing of a proposal for Ms. Ebadi’s memoirs to submit to potential publishers, editors, translators, and/or co-authors;
- (ii) identify publishers, editors, translators, and/or co-authors interested in Ms. Ebadi’s proposed memoirs, and submit the proposal and/or manuscript to editors and publishers; in anticipation of contacting publishers and editors, we may also promote Ms. Ebadi and her work to media outlets;
- (iii) advise Ms. Ebadi on the value of different offers to enable her to make the most informed decision of editors and publishers with whom to work; we negotiate the terms of agreements with publishers, translators and/or co-authors; we represent Ms. Ebadi’s business and legal interests throughout the publishing process, overseeing and reviewing payments from publishers for accuracy and timeliness, examining sales data to ensure that royalties match sales, and providing oversight regarding in-print status of the works;

(iv) edit for substance and style the preliminary manuscript, and subsequent revisions, to communicate effectively Ms. Ebadi's memoirs to an American audience;

(v) provide general advice to publishers on the best ways to promote the author's work and general advice on press relations and publicity for the book, including the negotiation of the terms of any requested interviews or personal appearances to promote the book, as well as monitoring and helping to develop any publicity or advertising for the book; and

(vi) negotiate the terms of the sales of rights subsidiary to any possible book publication, including, but not limited to, magazine or article republication rights, sales of book rights to non-U.S. publishers and/or distributors and sales of audio rights and/or dramatic rights.²

Strothman Decl. ¶¶ 15, 28-30. These are all routine activities performed by literary agents in the publishing process in the United States. *See id.* The ITR and the OFAC Information Regulations, as interpreted by OFAC, however, prohibit most, if not all, of these necessary editing, marketing and business consulting activities.

In addition, in order to get her memoirs published in the United States, Ms. Ebadi, with her literary agency, will also have to engage in "transactions relating to information or informational materials not yet fully created" with U.S. publishers, editors, translators and perhaps even a co-author. *See id.* ¶ 29. Before entering into any transactions with a book publisher, editor, translator or co-author, there likely would be extensive negotiations over the terms of any agreement. *See id.* ¶ 30. However, U.S. publishers, editors, translators, and co-authors would be hesitant to engage in such negotiations without assurance that such activities do not run afoul of the OFAC Information Regulations. *See id.* ¶ 30. Also, the additional

² For such professional services, literary agents like Strothman typically receive a percentage of any revenues received in connection with the publication of the author's work. *See Strothman Decl.* ¶ 18.

transaction costs associated with the OFAC licensing process also deters many U.S. persons from entering into negotiations with authors in sanctioned countries. *See id.* ¶ 31.

For example, a publisher in the United States customarily would offer to pay Ms. Ebadi an advance on future royalties if not for the prohibition contained in the OFAC Information Regulations. *See id.* ¶ 28. Publishers often pay authors advances on royalties for new works or for rights to works previously published abroad. *See id.* Compensation is often a significant inducement for authors, as well as for all professionals, including literary agents like Strothman, as individuals and entities often cannot afford to spend the time necessary to write and market publications without compensation. *See id.* ¶ 17; Ebadi Decl. ¶ 26. This is especially the case for Ms. Ebadi. Due to her unpopularity with certain political and religious factions in Iran, Ms. Ebadi assumes great personal and professional risk any time that she speaks out, a risk that might prevent her from ensuring the future financial security of her family. *See* Ebadi Decl. ¶ 26. Ms. Ebadi's ability to receive compensation before her memoirs are complete provides some security for her and her family, without which she might not be able to complete her work.

The prohibition against the substantive alteration or enhancement of a work would also greatly impede the publication of Ms. Ebadi's work. Substantive editing by literary agents like Strothman and publishers is an integral part of the publication process in the United States for almost all authors, but these activities will be particularly important for Ms. Ebadi. *See* Strothman Decl. ¶ 24; Ebadi Decl. ¶ 22. Ms. Ebadi will require substantial outside input and assistance in order to publish her memoirs in a form that is suitable for an American audience. *See id.* ¶ 21.

As an initial matter, Ms. Ebadi will need help overcoming significant language and cultural barriers to communicate effectively with an American audience. *See id.* ¶ 23; Ebadi

Decl. ¶ 19. Ms. Ebadi speaks and reads very limited English, and, therefore, she would not be able write her memoirs in English. *See id.* ¶ 21; Ebadi Decl. ¶ 19. A word-for-word English translation of Ms. Ebadi's memoirs written in her native tongue, Farsi, would not be appropriate for an English-speaking, American audience because of the structure of the Farsi language. *See id.* ¶ 22; Ebadi Decl. ¶ 19. Additionally, Ms. Ebadi is not familiar with the style of writing suitable for an American audience, which is much different from the style of writing of Iranian authors. *See id.* ¶ 22; Ebadi Decl. ¶ 19. She also requires advice concerning the amount of detail that she must provide to American readers about the history and culture of Iran and the history and principles of Islam. *See id.* ¶ 23; Ebadi Decl. ¶ 19. The social and historical context of many events of Ms. Ebadi's life (and even passing references to Iranian events, people, places and customs) would have to be explained at some length to American readers. *See id.* ¶ 23; Ebadi Decl. ¶ 19. Further, the history and principles of Islam are not as familiar to many American readers as they are to Iranians, but they are central to Ms. Ebadi's life and work and must be understood, and thus explained, to communicate effectively Ms. Ebadi's intended message. *See id.* ¶ 23; Ebadi Decl. ¶ 20. Accordingly, Ms. Ebadi's writing may have to be reconstructed, with substantive editing and artistic enhancements from her literary agent, editors, translators and possibly a co-author in the United States, both to answer questions Americans would expect to be addressed, and to sound comfortable to American ears. *See id.* ¶ 24; Ebadi Decl. ¶ 19. Again, the OFAC Information Regulations preclude Ms. Ebadi from obtaining this necessary assistance.

Finally, the OFAC Information Regulations preclude Strothman, as well as U.S. publishers, from marketing Ms. Ebadi's manuscript in the United States. As set forth in the Declaration of Wendy J. Strothman, the OFAC Regulations bar the marketing of books to

appropriate media outlets and the promotion of Ms. Ebadi's persona and work to the American public. Without marketing Ms. Ebadi's work in some manner, there is no way for Strothman to secure a publisher for Ms. Ebadi. *See* Strothman Decl. Para. 28, 32.

Simply stated, the OFAC Information Regulations impede Ms. Ebadi and Strothman from engaging in nearly every aspect of the publishing process.

ARGUMENT

I. The OFAC Information Regulations Violate The TWEA And The IEEPA As Amended By The Berman And Free Trade In Ideas Amendments

As explained above and in detail in the September 27, 2004 Plaintiffs' Memorandum of Law in Support Their Motion for Preliminary and Permanent Injunctions, filed in the related action captioned *The Ass'n of Am. Univ. Presses, et al. v. Office of Foreign Assets Control of the Dep't of the Treasury, et al.*, Civ. No. 04-7604 (S.D.N.Y. filed 9/27/04) (the "PEN Memorandum"), the OFAC Information Regulations are wholly inconsistent with the legislation that they were intended to implement.³ *See* Diana Decl. Ex. C, at 27-35. The law is clear that where a statute's legislative purpose is plainly at odds with an agency's interpretation, as expressed in its regulatory regime, Congress' intent must be enforced. *See New York City Health and Hosps. Corp. v. Perales*, 954 F.2d 854, 862-63 (2d Cir. 1992). The OFAC Information Regulations must therefore be stricken in their entirety.

II. The OFAC Information Regulations Are Unconstitutional

A. The OFAC Information Regulations Are Unconstitutional On Their Face

The prohibitions imposed by the OFAC Information Regulations constitute an unconstitutional burden on core First Amendments rights. The First Amendment provides that:

³ The arguments set forth in the PEN Memorandum, which is attached as Exhibit C to the Declaration of Anthony Diana, dated October 22, 2004, are incorporated by reference herein.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech, or of the press*; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I (emphasis added). On its face, the ITR, and the OFAC Information Regulations in particular, implement Congressional legislation in a manner that “abridg[es] freedom of speech, or of the press” and improperly tramples upon the constitutional rights of foreign authors like Ms. Ebadi who wish to publish their books in the United States, as well as the First Amendment rights of American publishers, editors, literary agencies like Strothman, and translators. The ITR and OFAC Information Regulations also infringe upon the First Amendment rights of persons in the United States who wish to read works from authors in sanctioned countries, like Ms. Ebadi. *See Kliendienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (“It is now well established that the Constitution protects the right to receive information and ideas”). Accordingly, and as discussed in detail in the PEN Memorandum, the OFAC Information Regulations cannot stand. *See Diana Decl. Ex. C*, at 36-38.

B. The OFAC Information Regulations Are Unconstitutional As Applied To Ms. Ebadi And Strothman

Because Ms. Ebadi is a citizen and resident of Iran, the publication of her book in the United States by an American publisher, and even her representation by an American literary agency like Strothman, would be barred by the ITR and the OFAC Information Regulations, for the following reasons: (i) the literary agency and publisher would necessarily provide business and marketing advice to Ms. Ebadi throughout the publishing process; (ii) Ms. Ebadi would be paid an advance and, eventually, royalties despite the fact that, as of now, she has not yet completed the work; and (iii) throughout the process of writing, editing and publication, the

publisher, the literary agency and possibly another writer would provide substantive alterations and artistic enhancements.

1. The OFAC Information Regulations Prevent Strothman And Others From Marketing And Providing Business Advice To Ms. Ebadi In Connection With The Publication Of Her Memoirs In The United States

To help Ms. Ebadi publish her memoirs, literary agencies like Strothman and book publishers necessarily must engage in “transactions relating to information or informational materials not yet fully created,” which the OFAC Information Regulations prohibit. None of the marketing and business consulting activities necessary in the publishing process in the United States, as described above, are permitted under the OFAC Information Regulations, but they are all vital to Ms. Ebadi being able to exercise her First Amendment right to publish her memoirs in the United States. Such restrictions are thus unconstitutional. *See City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 768 (1988) (“[L]iberty of circulating is as essential to [freedom of expression] as liberty of publishing; indeed, without the circulation, the publication would be of little value”) (alteration in original) (citations omitted); *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996) (“The sale of protected materials is also protected [by the First Amendment]”).

2. The OFAC Information Regulations Also Prohibit U.S. Publishers From Paying Ms. Ebadi Royalties, Including Advances, For Her Memoirs

As explained above, publishers customarily pay advances on expected royalties for new works from authors or for rights to works published abroad. Compensation is a significant inducement for authors like Ms. Ebadi, as for all professionals, including literary agencies like Strothman, as individuals and companies often cannot afford to spend the time necessary to write and market publications without compensation. Thus Ms. Ebadi’s ability to receive

compensation for her work is essential to her freedom of expression, and to the extent the OFAC Information Regulations prohibit Ms. Ebadi from receiving just compensation for her memoirs, such regulations must be stricken as unconstitutional. *See United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 468-69 (1995) (stating that “prohibition [of] compensation unquestionably imposes a significant burden of expressive activity”); *see also Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (where “law establishes a financial disincentive to create or publish works... ‘the state must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end’”) (alterations in original) (citations omitted).⁴

3. The Publication Of Ms. Ebadi’s Memoirs In English In The United States Would Require Substantive Alteration Or Artistic Enhancements, Which Is Prohibited By The OFAC Information Regulations

The prohibition against the substantive alteration or artistic enhancement of a work would also greatly impede the publication of Ms. Ebadi’s memoirs in the United States. *See Machleder v. Diaz*, 801 F.2d 46, 54-55 (2d Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987) (editing process protected by First Amendment); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (First Amendment protects “function of editors”). Substantive editing by literary agencies like Strothman and also by book publishers is integral to the publication process for almost all

⁴ In *Teague v. Regional Commissioner of Customs*, 404 F.2d 441 (2d Cir. 1968) the Second Circuit upheld the constitutionality of the TWEA and related regulations. In *Teague* the court acknowledged, however, that the regulations at issue impinged on First Amendment freedoms. *Id.* at 445. In addition, the court specifically held that where it is necessary to protect First Amendment rights, the payment of compensation to a foreign national may be permissible. *Id.* at 445-46. The court also noted that under the regulations at issue, all publications from the affected countries were treated alike. Here, completed works are given special dispensation. Furthermore, *Teague* predates the Supreme Court’s decision in *Nat’l Treasury Employees Union*, 513 U.S. at 468-69, which held that prohibitions from compensation impose a “significant burden on expressive activity.” The *Teague* court did not address whether restrictions on compensation to the author would impinge upon the foreign author’s First Amendment rights. Finally, *Teague* was decided before the passage of the Berman Amendment, which was designed to provide adequate First Amendment protections for all persons involved in the importation of information and information materials.

authors, but this activity will be particularly important for Ms. Ebadi. As discussed above, Ms. Ebadi will require substantial outside input and assistance in order to publish her memoirs in a form that is suitable for an American audience. Ms. Ebadi's writing may have to be reconstructed, with substantive editing and artistic enhancements from her literary agent, publisher, editors, translators and possibly even a co-author in the United States. The OFAC Information Regulations preclude Ms. Ebadi from obtaining this necessary assistance.

4. Recent Interpretive Rulings From OFAC Evidence The Unconstitutional Application Of The OFAC Information Regulations By OFAC

The OFAC Information Regulations impede Ms. Ebadi from engaging in nearly every aspect of the publishing process in the United States and are violating the First Amendment rights of Ms. Ebadi as well as Strothman by erecting illegal barriers to the publication of Ms. Ebadi's memoirs. This *de facto* prohibition on publishing Ms. Ebadi's memoirs in the United States is unconstitutional, as the OFAC Information Regulations, as interpreted and enforced by OFAC, only allow Ms. Ebadi to express certain views in the United States in particular media.

For example, under recent OFAC interpretative rulings, Ms. Ebadi might be able to publish an editorial of her political views in a U.S. newspaper, with the publishers of the U.S. newspaper having the right to substantively edit Ms. Ebadi's editorial to make it more engaging for an American reader, and the publishers might be able to market the newspapers in which the editorial appears. 7/19/04 OFAC Ruling (Diana Decl. Ex. I). Further, Ms. Ebadi would be able to come to the United States and give a speech on whatever topic she chose, and indeed previously has been issued a visa by the U.S. State Department to visit the United States for speaking engagements. *See* Ebadi Decl. ¶ 11. Ms. Ebadi also would be able to give an interview to reporters expressing her views, and those views could be published in the United States or

transmitted by radio, television or internet because the regulatory scheme does not cover such activities.

OFAC cannot credibly argue that its interpretation and enforcement of OFAC Information Regulations has been anything but arbitrary and capricious. The purpose of the underlying legislation would not be furthered by preventing Ms. Ebadi from publishing her memoirs in the United States, as she is able to communicate her views in the United States in so many other different ways without restriction. Therefore, the OFAC Information Regulations are unconstitutional as applied, and they should be invalidated.

C. The OFAC Information Regulations Constitute An Unconstitutional Prior Restraint On Speech

As a threshold matter, any prior restraint on a foreign author's speech, like Ms. Ebadi, or on the efforts of publishers, literary agents, editors, translators and potential co-authors to further such speech, is unjustified. *See New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (“[T]he Government . . . carries a heavy burden of showing justification for the imposition of such a restraint.”). Prior restraints are appropriate only “where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures.” *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (Per J. Blackmun, as Cir. Justice). The OFAC Information Regulations are an inappropriate, intrusive and blunderbuss measure that impose a blanket prior restraint on the speech of participants in the U.S. publishing industry as they are prohibited from assisting authors residing in sanctioned countries publish in the United States. Additionally, as respects the OFAC Information Regulations, OFAC has not identified any “great and certain evil,” such as a threat to national security, to be addressed by the OFAC Information Regulations. Far from narrowly tailoring the restrictions on publishing to further U.S. National Security interests, the OFAC Information Regulations result in a blanket prior

restraint on all speech from authors in sanctioned countries, regardless of whether the author's work may threaten national security interests. In any event, the invocation of national security interests supposedly to trump the First Amendment rights to free speech rings hollow as the Supreme Court has upheld a prior restraint on speech to protect national security interests only where the speaker is a government employee, rather than a member of the general public, or where the restraint applies strictly to military installations. *Compare Snepp v. United States*, 444 U.S. 507 (1980) (enforcing agreement that CIA would submit book manuscript for prior review by CIA) (per curiam), and *Greer v. Spock*, 424 U.S. 828, 837-40 (1976) (upholding regulation prohibiting civilians from engaging in political activities on Army base without approval of base commander), with *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (newspapers permitted to publish stories that potentially threatened war effort).⁵

Even if the facts did justify a prior restraint on Ms. Ebadi's speech, the licensing scheme embodied in the OFAC regulations, 31 C.F.R. § 501.80 (2004), lacks constitutionally required procedural safeguards and is therefore facially invalid. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988); *City of Lovell v. City of Griffin*, 303 U.S. 444 (1938). "[P]rior restraints involve either an administrative rule requiring some form of license or permit before one may engage in expression, or a judicial order directing an individual not to engage in expression, on pain of contempt." RODNEY A. SMOLLA, *SMOLLA AND NIMMER ON FREEDOM OF SPEECH*, §15.1 at pp. 15-4 – 15-5 (2004). The OFAC Information Regulations impose exactly such an administrative rule, requiring U.S. publishers and literary agencies like Strothman to

⁵ The Second Circuit in *Teague* held that national security interests can be invoked to justify encroachments on First Amendment rights. *Teague*, 404 F.2d at 445-46. However, *Teague* predates the Supreme Court cases cited above, which limit the national security interests as a justification for such encroachments. Moreover, the Second Circuit found that the infringement on First Amendment freedoms was "incidental" to the purpose of the statute, while here, the regulations are specifically prohibiting speech. *Id.*

obtain a “special license” before entering into any transactions with, or providing any services for, foreign authors in connection with the publication of a previously uncompleted work. *See* Reporting, Procedures and Penalties Regulations, 31 C.F.R. § 501.801 (2004).

The OFAC Information Regulations are an impermissible unconstitutional prior restraint on publishing in the United States because they do not include the necessary safeguards to protect foreign authors and those in the United States who are involved with the publication of a foreign author’s work. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 560 (1975)

As the Supreme Court in *Southeastern Promotions Ltd.* held:

A system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured.

Id. at 560.

There is nothing in the OFAC Information Regulations that provide such safeguards because: (i) OFAC can deny an application of the license without explanation; and (ii) there is no specified time period for OFAC to make a determination of whether an application will be issued or denied. Indeed, the OFAC Informational Regulations erect an additional obstacle on foreign authors like Ms. Ebadi, as such regulations, on their face, and contrary to the authorizing statute, do not permit foreign authors to apply for these “special licenses” on their own behalf—they must rely upon U.S. literary agents and publishers to do so. Thus, Ms. Ebadi’s rights, and those of other foreign authors, are dependent upon the expeditious actions of U.S. persons.

Additionally, the licensing process is completely arbitrary. As the Supreme Court has held “[s]tandards provide the guideposts that check the licensor and allow courts quickly and

easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 758 (1988) (holding that the “Constitution requires that the city establish neutral criteria to insure that the . . . licensing decision is not based on the content or viewpoint of the speech being considered”). The ITR and the OFAC Information Regulations offer no standards governing issuance of a license. To make matters worse, such special licenses may be amended or revoked at any time. *See* 31 C.F.R. §501.803. Further, OFAC has the right to exclude any particular person or transaction from operation of any general or specific license. *See* Iranian Transactions Regulations, 31 C.F.R. § 560.502 (2004). Essentially, OFAC can withhold or award a license at its whim. Indeed, as described above on pp. 7-12, OFAC historically has done just that, issuing a series of rulings that lack any consistency and that leave observers confused as to what the licensing standards actually require. Simply put, the licensing process lacks coherence. The ITR and the OFAC Information Regulations are therefore an impermissible prior restraint on speech.

III. A Preliminary Injunction Is Warranted And Necessary To Lift OFAC's Restrictions On Free Speech

Plaintiffs seek to engage in speech protected by the First Amendment and by the Berman and Free Trade in Ideas Amendments. As demonstrated above, the ITR and OFAC Information Regulations illegally preclude Plaintiffs from engaging in that speech. It is well-established that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 374 (1976) (citations omitted). “Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the

irreparable nature of the harm may be presumed.” *Bronx Household of Faith v. Board of Education of New York*, 331 F.3d 342, 349 (2d Cir. 2003). The ITR and OFAC Information Regulations directly limit speech, so irreparable injury may be presumed. Under these facts, however, such a presumption is not even necessary because the irreparable harm is so clear.⁶ Unless the ITR and OFAC Information Regulations are enjoined, Ms. Ebadi will never be able to publish her memoirs in the United States.

Accordingly, because plaintiffs have established (i) the clear likelihood of their success on the merits and (ii) the clear risk of irreparable harm, a preliminary injunction is warranted. *See Bronx Household of Faith*, 331 F.3d at 350; *see also McClellan v. Cablevision of Conn., Inc.*, 149 F.3d 161 (2d Cir. 1998).

⁶ The very existence of a licensing scheme that burdens or restricts First Amendment activity causes irreparable harm. *See Tunick v. Safir*, 209 F.3d 67, 70 (2d Cir. 2000), (requiring an artist to apply for a city permit to conduct a photography session in public caused irreparable harm); *Bery v. City of New York*, 97 F.3d 689, 693-94 (2d Cir. 1996) (ordinance requiring visual artists to apply for vendor’s licenses to sell their work in public places caused irreparable harm).

CONCLUSION

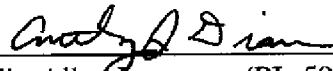
For the reasons set forth above and in the accompanying papers, plaintiffs request that the OFAC Information Regulations be held invalid.

Dated: New York, New York

October 22, 2004

Respectfully submitted,

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