No. 12-1485

In the Supreme Court of the United States

ARAB BANK, PLC,

Petitioner,

v.

COURTNEY LINDE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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Pursuant to Supreme Court Rule 15.8, petitioner Arab Bank submits this supplemental memorandum to draw this Court's attention to a new and intervening matter not available at the time the Bank filed its petition for certiorari. New developments in the district court—evidentiary rulings implementing the sanctions order, which disable the Bank from defending itself as to the critical issues of its knowledge and state of mind, and an imminent trial date in this massive case—are highly material to the Court's consideration of the pending petition.

The "direct affront to Jordan's sovereignty" and "contempt for a foreign sovereign's law" that led the Kingdom to "tak[e] the unprecedented step of filing a brief in this Court" as amicus urging that certiorari be granted (at 14) is clearer than ever now that the district court has implemented the sanctions order. The court's evidentiary rulings under the sanctions order "punis[h] Jordan's largest financial institution for its decision not to violate Jordanian law" and thereby face "criminal prosecution by Jordanian authorities." *Id.* at 9. The "dizzying magnitude" of the "acute" "collateral consequences" that would flow from a judgment adverse to the Bank because it has been disabled from explaining its conduct, detailed by amicus Union of Arab Banks (at 19-21), likewise demonstrates the need for this Court's immediate review. Respondents have waived their right to respond to the Bank's petition.

1. After the Bank filed its certiorari petition, this case was reassigned from the Honorable Nina Gershon to the Honorable Brian M. Cogan. On July 30, the district court announced that it would not reconsider any of Judge Gershon's prior rulings, including the sanctions order challenged in the

petition. July 30 Hearing Transcript 4-5 (hereafter cited as "Tr."). The district court set a trial date, with jury selection to begin on January 13, 2014 and trial "to begin immediately thereafter." Tr. 148-149; July 31, 2013 Minute Entry; see Tr. 51 (warning of "the speed with which we are going to trial").

2. At the hearing, the district court also granted a series of plaintiffs' motions in limine, holding that these were "easily resolvable based upon Judge Gershon's prior rulings." Tr. 6. Specifically, the district court excluded, as barred by the sanctions order:

- all evidence of the Bank's adherence to foreign banking or criminal laws, including reference to foreign bank secrecy laws (Tr. 7; First Supplement to the Joint Pre-Trial Order p. 2, ¶ 1 (July 12, 2013), Dkt. 970 (hereinafter "First Supplement"));
- all evidence of the Bank's adherence to both international counter-terrorism-financing standards and its own internal counter-terrorism-financing policies and procedures (Tr. 17, 28-29, 36-37; First Supplement p. 2, ¶ 2 & p. 3, ¶ 7);
- all evidence that the Bank closed accounts of eleven designated terrorists after they were designated (Tr. 22-28; First Supplement p. 4, ¶ 11);
- all evidence concerning the monitoring and compliance procedures of Israeli banks, or any other bank (Tr. 30, 35; First Supplement p.2, ¶ 4); and

- all evidence that respected aid organizations, including the United States Agency for International Development, vetted Palestinian organizations that plaintiffs allege were "fronts" for Hamas and received financial services from the Bank, and provided substantial grants to those organizations to fund activities that plaintiffs allege supported terror (Tr. 50-51; First Supplement p. 3, ¶ 6).

3. The district court recognized the practical impossibility of the Bank's making "any argument or offering any evidence regarding its state of mind" without violating the very foreign privacy laws that prevent it from disclosing protected account records to begin with. The court explained that for the Bank to make the showing necessary to escape the scope of the sanction "*is very difficult to do*, because the bank isn't producing its files, and * * * *I can't think of any other way to prove it, other than to produce the files.*" Tr. 21.

The district court further recognized that "*there are very severe consequences*" as a result of the sanctions order, but stated that it would not "revisit" that order because "that's what the bank has brought upon itself by not complying with Judge Gershon's discovery orders"—observing nevertheless that this Court may do so. Tr. 21-22. The court's understanding that the sanctions order "*makes it very difficult to defend the case*" (*id.* at 37) is borne out by its rulings that numerous categories of evidence that would show the Bank's lack of knowledge and intent "run directly into Judge Gershon's preclusion order." *Ibid.* Any evidence that "shows what the bank does and

why it does it," that "makes it less likely that [the Bank was] giving money to people [it] shouldn't have been giving money to," and any and all "circumstantial evidence of the intent of the bank" is precluded. Tr. 35, 37, 53. These rulings gut the Bank's defenses regarding "the central issue" in a case that the district court acknowledged is "quasi-criminal" because of "the nature of the acts alleged." Tr. 74, 104.

4. The Second Circuit denied mandamus and collateral order relief because it believed that the consequences of the sanctions order were "overly speculative." Pet. App. 48a-49a. But the district court's evidentiary rulings show that there is nothing at all speculative about the impact of the sanctions on trial of these cases, which is concrete and crippling to the Bank's ability to mount a defense.

The district court's rulings on evidentiary issues tie the Bank's hands at trial. In combination with the instruction that the jury may infer that the Bank "knowingly and purposefully" aided terrorists and other sanctions described in our petition (at 3-4), they deny Arab Bank a fair hearing and effectively direct a verdict for plaintiffs in suits where 6500 plaintiffs seek to label Jordan's most important bank a knowing supporter of terrorists and to extract from it hundreds of millions of dollars in damages. And the order has this result even though the magistrate judge in this case held that plaintiffs have made "no showing that the withheld evidence would be likely to provide direct evidence of [illicit] knowledge and intent" (Pet. App. 123a), and even though Judge Weinstein found much of the evidence that has now been excluded by the district court to be "probative" of "the Bank's state of mind." *Gill*, 893 F. Supp. 2d at

539; see Pet. 28-29. As we explained in our petition, these evidence preclusions, as punishment for the Bank's refusal to violate the criminal laws of Jordan and other Middle Eastern nations in which it operates, violate due process and are fundamentally unjust. Pet. 24-29.

5. The district court's evidentiary rulings implementing the sanctions order show clearly why this case is subject to collateral order review as well as mandamus.

Those rulings excluding key evidence of the Bank's knowledge and intent are final; they are entirely "separate from the merits"; they give rise to "important questions" critical to the Nation's foreign relations; and they are "effectively unreviewable on appeal from the final judgment" because by then irremediable damage will have been done to the reputation and operations of the Bank (see Pet. 31-33; UAB Am. Br. 19-21; Jordan Am. Br. 18-19), as well as to principles of comity, U.S.-Jordan relations, and Middle-Eastern stability (see Pet. 16-22; Jordan Am. Br. 14-15, 17-19). *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 106 (2009). The sheer magnitude of harm that would be caused by delayed appellate review—to the United States' foreign relations and the comity principles that promote them, and to a critical Middle East ally's most important bank—makes this case vastly different from those in which collateral order review has been held inappropriate. See *Mohawk Indus.*, *supra*, (whether attorney-client privilege had been waived in particular case); *Cunningham* v. *Hamilton County*, 527 U.S. 198, 201 (1999) ($1,500 monetary sanction on attorney). The threat here is to "substan-

tial public interest[s]" and values "of a high order," which this Court has held to warrant immediate review. *Will* v. *Hallock*, 546 U.S. 345, 352-353 (2006). Whether by collateral order review or mandamus, this case cries out for this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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