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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Second Circuit err in denying mandamus on the ground that the district court did not clearly abuse its discretion by applying the *Restatement (Third) of the Foreign Relations Law of the United States* §442 ("*Restatement*") and ordering discovery sanctions to address the evidentiary imbalance caused by Petitioner's refusal to produce records that were essential to the proof of Respondents' Anti-Terrorism Act (ATA) claims?

2. Did the Second Circuit err in determining that the permissive adverse inference and evidentiary preclusion sanctions contemplated by the district court's order did not foreclose Petitioner from presenting a defense and did not violate due process?

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STATEMENT

A. Plaintiffs' Claims.

Six American families filed the first of these actions in July 2004 asserting claims under the ATA's civil remedy provision. 18 U.S.C. §2333(a). Each Plaintiff is an American national who was the victim of a terror attack in Israel, or an heir or survivor of a victim. Plaintiffs allege that Arab Bank, a Jordanian bank with branches in the Palestinian Territories and (during the relevant time period) in New York City, knowingly provided direct material support in the form of tens of millions of dollars and other financial services (frequently routed through its then-operating New York branch) to U.S.-designated Foreign Terrorist Organizations (FTOs) and their agents, including Specially Designated Global Terrorists (SDGTs).[1] Plaintiffs further alleged that the amount and timing of that material support made terror attacks that injured American nationals reasonably foreseeable.

Subsequently, additional suits were brought against Arab Bank under the ATA and by foreign nationals under the Alien Tort Statute (ATS). 28 U.S.C. §1350. Although the district court initially denied Petitioner's motion to dismiss the ATS claims (*Almog v. Arab Bank plc*, 471 F. Supp. 2d 257, 269-94 (E.D.N.Y. 2007)), prior to filing the Petition, Arab Bank renewed its motion to dismiss

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[1] The designation process for FTOs and SDGTs is discussed in *Holy Land Found. v. Ashcroft*, 333 F.3d 156, 162-165 (D.C. Cir. 2003).

in light of *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *aff'd on other grounds, Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). Petitioner then requested that this Court grant certiorari to dismiss the ATS claims (Brief at 33-35) without disclosing that its renewed motion to dismiss was *sub judice* before the district court. On August 23, 2013 the district court granted Petitioner's motion, and dismissed all of the pending ATS claims. Resp. App. 1a-2a. Thus, the ATS issues presented to this Court are moot.

After the action had been pending for six years, the district court exercised its discretion under Fed. R. Civ. P. 42(b) to order a first trial of liability limited to claims of ATA plaintiffs allegedly injured in terrorist attacks perpetrated by Hamas, a U.S.-designated Foreign Terrorist Organization since 1997. In that first liability trial, the jury will be asked to decide four questions, common to all Hamas attacks. First, did Petitioner knowingly provide material support to Hamas by maintaining bank accounts for Hamas's leaders and paying cash over the counter to non-customers who included Hamas operatives or their next of kin?[2] Second, did Petitioner knowingly maintain

[2] Most of this evidence was produced by Arab Bank in the form of wire transfers that were processed by its former New York branch. Over Petitioner's strenuous objections, Plaintiffs eventually obtained records Petitioner produced to the U.S. Office of the Comptroller of the Currency (OCC) during the OCC's 2004 investigation of Petitioner following the filing of the *Linde* lawsuit. In issuing the sanction, the district court observed that Petitioner deserved "little credit for its

accounts and transfer tens of millions of dollars to Hamas's network of "political and charitable organizations," which facilitates terrorism according to the findings of both the executive and legislative branches? *See Holder v. Humanitarian Law Project*, 130 S. Ct 2705, 2725 (2010) (deferring to congressional and executive branch findings that material support even for a Foreign Terrorist Organization's nominally non-violent activities facilitates terrorism).[3] Third, did Petitioner knowingly provide financial services and logistical support to help administer financial aid programs funded by the Saudi Committee for the Support of the Intifada Al Quds (the "Saudi Committee") and by a Specially Designated Global Terrorist controlled by Hezbollah (a Lebanese-based Foreign Terrorist Organization)? That financial aid was paid directly to families of Hamas terrorists identified as "martyrs" in documentation utilized by Petitioner – including "martyrs" who died in "martyrdom operations" (i.e. suicide bombings) and other specifically identified terrorist attacks – that killed hundreds and injured thousands of civilians. Fourth, was Hamas responsible for each of the

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grudging production of the [New York branch] documents, which were produced only after this court rejected Petitioner's attempt to obfuscate the production obligations of its local branch…." Pet. App. 73a.

[3] *See, generally, U.S. v. El-Mezain*, 664 F.3d 467, 531-35 (5th Cir. 2011), for a discussion of several of Petitioner's customers found to be part of Hamas's network of organizations in the Palestinian Territories.

attacks that took place between 2001-2004 that are at issue?

B. Procedural History

1. Production Orders

Discovery in this action proceeded in phases. At the Magistrate Judge's direction, Plaintiffs' first operative discovery requests only requested responsive materials for: (1) a bank account in Beirut, Lebanon[4] later identified as belonging to Osama Hamdan, a Specially Designated Global Terrorist and senior Hamas leader and (2) accounts for relatives of nine suicide bombers and deceased terrorists. Resp. App. 3a-12a. Thereafter, in 2005, the Magistrate Judge issued a series of focused production orders that required Petitioner to produce specific banking information concerning known or suspected terrorists. Pet. App. 8a.

Petitioner objected to the production orders on grounds that it was prohibited from complying by foreign bank secrecy laws, and it therefore refused to produce responsive records as ordered, or to provide related testimony. Arab Bank did, however, disclose approximately 200,000 Saudi Committee-related documents, but "neither

[4] Petitioner initially opposed production on relevance grounds but later produced account documents for the Hamdan account claiming that it had received permission to do so from the Lebanese government when, in fact, the records were already physically resident in New York because the Bank had already disclosed them to U.S. authorities without the Lebanese government's consent. Pet. App. 72a.

produced a privilege log-like accounting of its withholding nor indicated how many pages of documents responsive to plaintiffs' requests [were] withheld." Pet. App. 74a. The production also lacked "account statements; unredacted Know Your Customer material that the Bank is required to collect ... [or] internal correspondence regarding Bank work for the Saudi Committee" – precisely the evidence most essential to proof of Plaintiffs' claims. *Id.*[5]

The Magistrate Judge overruled Petitioner's foreign bank secrecy objections. *See* Resp. App. 13a-25a. Recognizing that *Restatement* §442 provided the relevant framework, the Magistrate Judge evaluated that provision's multiple factors:

> a. the importance to the investigation or litigation of the documents or other information requested;
>
> b. the degree of specificity of the request(s);
>
> c. whether the information originated in the United States;
>
> d. the availability of alternative means of securing the information; and

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[5] The Second Circuit found that the withheld "documents related to the Saudi Committee are directly relevant to whether Arab Bank knowingly provided banking services in support of terrorist operations and are thus essential to plaintiffs' case. Arab Bank has unique access to the records and only Arab Bank can make a complete production." Pet. App. 43a.

> e. the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

Id. at 19a-20a.[6]

He concluded that the only factor favoring the Petitioner was the fact that the requested information largely originated outside of the United States. *Id.* at 20a. In accord with the remaining *Restatement* factors, the Magistrate Judge concluded that foreign states' (and non-state Palestinian Authority's) interests in enforcing their laws and the potential hardship faced by Petitioner were outweighed by the U.S. interests in deploying effective statutory weapons against terrorism, including civil actions under §2333(a). *Id.* at 22a-23a n.6. The Magistrate Judge specifically found that the discovery was "*essential* to the proof of the plaintiffs' case," without which "the plaintiffs *cannot prove* the defendant's involvement in and knowledge of the financial transactions that are the basis of the plaintiffs' theory of liability," and without which "the interests expressed in the [ATA] will be *difficult, if not impossible* to vindicate in this action." *Id.* at 20a-21a (emphasis added).

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[6] *See also id.* at 20a n.4. (observing that at production and remedy phases, federal courts consider foreign states' competing interests, importance of requested discovery, hardship of compliance, and resisting party's good faith).

The district court affirmed the Magistrate Judge's ruling. Resp. App. 26a-28a. Petitioner never requested interlocutory review of the district court's production rulings. Nor does it now expressly challenge the rulings' correctness, instead devoting its arguments entirely to the remedies imposed for Petitioner's refusal to comply with court-ordered discovery.

2. Rule 37 Sanctions

At the Magistrate Judge's direction, the parties stipulated to a narrower consolidated production order. *See Linde et al. v. Arab Bank plc*, 2007 WL 4373252 (E.D.N.Y. Dec. 10, 2007). When Petitioner failed to comply with that order,[7] Plaintiffs filed a motion for sanctions in accordance with the *Restatement* standard and Fed. R. Civ. P. 37(b)(2)(A).

Plaintiffs sought an order deeming certain facts established, precluding Petitioner from denying the authenticity of bank documents whose authenticity it had refused to admit on grounds of bank secrecy, and precluding it from offering evidence that Plaintiffs would be unable to test because of Petitioner's withholding. In accordance with *Kronisch v. United States*, 150 F.3d 112, 128 (2d Cir. 1998), which requires movants seeking such relief to provide "some evidence suggesting that a document or documents relevant to substantiating [their] claim[s]" would have been

[7] Petitioner's failure to provide discovery was not limited to documents, but also included deposition testimony.

among the documents that a party has failed to produce, Plaintiffs made a voluminous and detailed proffer to the Magistrate Judge showing the required "specific relevance" of the withheld documents. *See* Pet. App. 75a, 78a-79a.

In June 2009, the Magistrate Judge issued a Report & Recommendation recommending remedial sanctions. Pet. App. 107a-132a. Reiterating that the withheld evidence was "essential" to the Plaintiffs' proof, he also recognized, in light of Plaintiffs' evidentiary proffer, that "the fact that the withheld records may disclose a large volume of payments and other transactions made to or for the benefit of terrorists, as well as other information linking the defendant's accountholders to terrorist organizations, furnishes a powerful incentive to withhold them." Pet. App. 111a.

The Magistrate Judge concluded that "some sanction must be imposed if for no other reason than to restore the 'evidentiary balance' that has been disturbed by the non-production of important evidence." Pet. App. 109a (citation omitted). But he also recognized that before issuing a severe sanction like default, a "court must consider whether *lesser sanctions* will provide an effective remedy," such as a deeming order, preclusion, or adverse inference instruction. Pet. App. 110a (emphasis added). Although the Magistrate Judge initially recommended that the district court issue deemed findings concerning Petitioner's provision of "financial services on behalf of the Saudi Committee" to various terrorists and terrorist organizations, Pet. App. 131a, at Petitioner's request, he later reduced this recommendation to

the lesser sanction of a permissive adverse inference instruction concerning financial services rendered on behalf of the Saudi Committee and to Foreign Terrorist Organizations. *See* Pet App. 133a-137a.

The Magistrate Judge also concluded that some preclusion sanction "should be imposed to prevent the defendant from gaining an unfair advantage from their [sic] failure to produce documents," but that the scope of preclusion was "best left to trial," where the district court could weigh Petitioner's specific proffers against the prejudice to Plaintiffs from "the absence of records in countering that testimony." Pet. App. 130a.

Although Petitioner filed objections to the Magistrate Judge's Report, it raised no comity objections and cited no comity cases. Plaintiffs objected, in part, as well, asking the District Judge to reinstate the deemed finding as to financial services that the Magistrate Judge originally entered and to order the lesser sanction of a permissive adverse inference instruction as to Petitioner's state of mind.

After reviewing the Magistrate Judge's analysis of the relevant *Restatement* §442 and Rule 37 factors at both the production and sanctions phases, Pet. App. 66a-70a, the district court rejected Plaintiffs' request for a deemed finding but agreed to the lesser sanction of permissive adverse inference instructions regarding both Petitioner's provision of financial services to Foreign Terrorist Organizations and its state of mind. The district court also precluded Petitioner from making arguments or offering evidence at trial that "would

find proof or refutation in the withheld documents." Pet. App. 88a. But, like the Magistrate Judge, the District Judge found that it was not yet possible to identify all of those arguments or such evidence before trial. *Id*. at 88a.

Finally, the district court emphasized that the:

> *Defendant is entitled to rely on the documents it did produce to make its case that it did not have the required state of mind*. In addition, defendant can argue to the jury that it had no knowledge that certain accountholders, *whose records have been produced*, were terrorists. But it cannot argue that it had no knowledge a certain Bank customer was a terrorist if it did not produce that person's complete account records. To permit the Bank to make such an argument would allow it to profit from evidentiary gaps that it chose to create.

Id. at 88a (emphasis added). As an example, it pointed to Petitioner's proffer that it had closed ten accounts that it admitted were held by Specially Designated Global Terrorists (in addition to the account held by SDGT Hamdan – *see* p. 4, *supra*), when it simultaneously refused on bank secrecy grounds to provide "information regarding what it did with the funds contained in those accounts when they were closed, and [provided] no documentation of the account closings." *Id.* at 72a, 93a. As the district court explained:

> The Bank argues that it bears no responsibility because it closed the terrorists'

> accounts as soon as the accountholders were so designated. Plaintiffs cannot refute or challenge the Bank's argument because the Bank itself possesses the documents that would prove or undercut its argument and refuses to produce them.

Id. at 93a.

Petitioner subsequently filed a motion for reconsideration raising, *inter alia*, comity objections that, as the district court noted, it had "not voice[d] ... in its Rule 72 Objections," in violation of the standards for reconsideration. *Id.* at 95a. "Arab Bank, at the time that sanctions were under consideration, did not suggest that any new or different analysis of comity would be appropriate," the Court noted. *Id.* at 98a. "And it seems clear that the Bank is simply attempting to avoid meaningful sanctions altogether, despite this court's decision to give greater weight to the United States' interest in preventing the financing of terrorism than to other jurisdictions' enforcement of their bank secrecy laws." *Id.* at 99a. Nevertheless, the district court discussed the foreign state interests again, observing that the Magistrate Judge and District Judge had considered them "at numerous junctures" in connection both with the production and sanction orders. *Id.* at 95a.

C. The Second Circuit Dismisses and Denies Petitioner's Appeals

After the district court denied its motions for reconsideration and leave to pursue an interlocutory appeal, Petitioner filed a collateral

order appeal and a mandamus petition with the Second Circuit. On appeal, Petitioner did not challenge the production orders, or argue that the district court had applied the wrong legal standard or failed to apply any factor under the *Restatement* standard or Fed. R. Civ. P. 37. Instead, Petitioner argued only that in applying the *correct* standard, the district court reached the *wrong* result by failing to give sufficient weight to foreign states' interests.

The Second Circuit found that Petitioner failed to meet the standards for collateral order review set out in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), "because the sanctions order is both intertwined with the merits of this case and is effectively reviewable after final judgment." Pet. App. 23a. It also held that Petitioner failed to satisfy *any* of the three requirements for issuance of a writ of mandamus set forth in *Cheney v. United States*, 542 U.S. 367, 380-81 (2004), and it squarely rejected Petitioner's strained effort to raise due process claims by depicting the sanction as a de facto default judgment. Observing that "Rule 37(b) permits sanctions *even harsher* than those imposed by the District Court here, including, for example, an order directing that 'designated facts be taken as established,'" Pet. App. 45a (emphasis added), the Court found that "Arab Bank will still be entitled to emphasize its substantial Saudi Committee disclosures, including the Bank's own internal documentation, to persuade a jury that it was not aware that the beneficiaries of its financial services

were terrorists." *Id.* at 45a-46a.[8]

Finally, the Second Circuit held that "[t]he combination of the Bank's long delay in the District Court, partial production in the U.S. government investigations (in contrast), and apparent unwillingness to pursue permission to produce materials covered by the narrowly-tailored discovery orders further support the District Court's sanctions order, which, unlike the default judgment at issue in *Rogers*, allows the Bank to mount a defense at trial." *Id.* at 47a.

Petitioner's subsequent application for rehearing *en banc* was denied. Its instant Petition followed.[9]

ARGUMENT

The Second Circuit's decision does not warrant further review. Heeding this Court's admonition in *Cheney* that mandamus is a "drastic and extraordinary remedy," and that mandamus

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[8] *See also* Pet. App. 48a ("a jury instruction involving permissive adverse inferences is not a default judgment; instead, it is a calibrated device imposed by district courts to address specific discovery violations after considering the seriousness of the violations, the course of the litigation, and the legal issues at stake in the case.").

[9] Since filing this petition, Petitioner has filed a *second* petition for mandamus with the Second Circuit (again joined by amicus Union of Arab Banks), claiming that the district court erred in denying its motion for summary judgment and excluding the testimony of certain expert and fact witnesses on relevance grounds and arguing that these evidentiary rulings violate its due process rights. *See* Resp. App. 38a.

should issue only under "circumstances amounting to a judicial usurpation of power or a clear abuse of discretion," 542 U.S. at 380 (citations omitted), the Second Circuit thoroughly addressed Petitioner's arguments for issuance of the writ and found that they fell short of that demanding standard. In doing so, the Second Circuit considered in detail each of *Cheney*'s three factors, 542 U.S. at 380-81, explaining why petitioner had failed to show that it had a "clear and indisputable" right to the writ, that it had no other "adequate means" to obtain relief, and that the writ was "appropriate under the circumstances." Petitioner does not take issue with the *Cheney* factors – it does not even refer to them at all – challenging only the Second Circuit's conclusions. This kind of case-specific grievance "hardly ever" justifies this Court's review. *See Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980).

In any event, the Second Circuit correctly held that the district court's discovery sanction was not a "clear abuse of discretion." The Second Circuit recognized that properly analyzing the issue required "a careful balancing of the interests involved and a precise understanding of the facts and circumstances of the particular case." Pet. App. 30a (citations omitted). Although Petitioner argued below, as it does here, that principles of international comity require issuance of the writ, the Second Circuit looked to the factors set out in *Restatement* §442 – an approach expressly endorsed by this Court (*Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 544 n.28 (1987) (citing the draft which

became *Restatement* §442)) – and determined that, on balance, those factors militated against granting mandamus here. Again, Petitioner does not claim that §442's factors were the wrong ones to consider, just that the Second Circuit misapplied them.

Furthermore, the Second Circuit's application of the *Restatement*'s factors was wholly unexceptional. It expressly acknowledged that principles of international comity should guide courts "towards interpretations of domestic law that avoid conflict with foreign law." Pet. App. 35a. At the same time, however, the Second Circuit balanced that interest against "the United States' interests in the effective prosecution of civil claims under the ATA," *id.* at 37a, pointing out that the withheld records and testimony in this case were "directly relevant to whether Arab Bank knowingly provided banking services in support of terrorist operations and are thus essential to plaintiffs' case." *Id*. at 43a. Petitioner simply ignores the latter concern, taking the view that, regardless of the need for requested records and testimony, federal courts must give principles of international comity conclusive effect. No court has taken that extreme view – indeed, this Court has twice said just the opposite (*Aérospatiale*, 482 U.S. 544 n.29; *Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 213 (1958)) – and such a view would ignore the strong U.S. interests explicitly reflected in the Anti-Terrorism Act.

Finally, Petitioner argues that the Second Circuit should have granted mandamus because the district's court's order deprives it of due

process. This argument, however, depends upon Petitioner's overblown characterization of the order as the equivalent of a default judgment. The Second Circuit, after looking ahead to possible trial developments, concluded that Petitioner could still mount a defense and that the jury retained considerable latitude to decide the case on its merits. Pet. App. 45a-47a. In short, the Second Circuit carefully and correctly applied well-established principles to this case.

I. THE SECOND CIRCUIT DID NOT ERR IN FINDING THAT PETITIONER FAILED TO SATISFY THE STANDARDS FOR ISSUANCE OF THE WRIT OF MANDAMUS.

The Second Circuit correctly held that Petitioner failed to meet *any* of the three "demanding" requirements for mandamus.[10] Pet.

[10] Only in one sentence in its main brief and in the last paragraph of its Supplemental Brief does Petitioner mention collateral order doctrine review, without citing or discussing any legal authority. This Court has long recognized that "a Rule 37(a) sanctions order often will be inextricably intertwined with the merits of the action" because "evaluation of the appropriateness of sanctions may require the reviewing court to inquire into the importance of the information sought or the adequacy or truthfulness of a response." *Cunningham v. Hamilton Cnty., Ohio*, 527 U.S. 198, 205 (1999). The Second Circuit correctly concluded that precisely such an inquiry would be required for review of the sanctions order, and that the order "is intertwined with the merits of the litigation to an even greater degree than the sanctions order in *Cunningham*." Pet. App. 24a.

App. 28a-29a. The Second Circuit applied a tri-partite standard articulated in *Cheney*:

> First, the party seeking issuance of the writ must have no other adequate means to attain the relief he desires—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process. Second, the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

Cheney, 542 U.S. at 380-81. (alterations, internal quotations, and citations omitted).

In *Cheney*, this Court stressed that mandamus relief is appropriate in "only exceptional circumstances," when, for example, a district court's order "amounts to a judicial usurpation of power or a clear abuse of discretion." 542 U.S. at 380 (citations omitted). *Accord, Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009). The Second Circuit's denial of the writ under these standards was correct. First, Petitioner failed to demonstrate a clear abuse of discretion by the

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The Circuit also correctly found that the Bank failed to satisfy the irreparable harm prong for collateral order review, *id.* at 25a, for the reasons Plaintiffs discuss in connection with the standard for interlocutory review by mandamus.

district court, which applied the correct legal standard, carefully considered each of the *Restatement's* factors, and weighed *all* of the state interests implicated by the need to remedy the highly prejudicial evidentiary imbalance created by Petitioner's withholding of essential evidence. Second, Petitioner failed to show that it had no adequate alternative to mandamus, as it confused the harm of the sanctions order – the effects of which cannot be determined until it is applied at trial – with the speculative harm of an adverse judgment that Petitioner may never suffer. Finally, Petitioner did not show that mandamus was appropriate under the circumstances, as its petition identified no novel question of law, no case conflict requiring interlocutory supervisory intervention, and no flagrant error in application of the well-established *Restatement* standard.

A. The Second Circuit Did Not Err in Finding That the District Court Committed No Clear Abuse of Discretion in Applying the *Restatement* Standard.

1. It is Undisputed That the District Court Applied the Correct Legal Standard and Considered All of the Relevant Factors.

In *Aérospatiale*, this Court recognized that the operation of foreign law "do[es] not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that

[law]." 482 U.S. at 544 n.29 (citing *Rogers*). In *Rogers*, this Court made clear that even a litigant who in good faith fails to comply with a production order on grounds of foreign law should not be allowed to profit from its non-disclosure, and that a trial court therefore enjoys "wide discretion" to adopt adverse inferences or other measures to deal with the "handicap" caused by the non-disclosure. 357 U.S. at 213.

Consistent with *Rogers'* teaching, *Restatement* §442[11] also provides that in appropriate cases, a court may "make findings of fact adverse to a party that has failed to comply with the order for production, even if that party has made a good faith effort to secure permission from the foreign authorities to make the information available and that effort has been unsuccessful." *Id.*, §442(2)(c).

The district court faithfully applied the *Restatement* standard in ordering production. Petitioner did not appeal the production order and does not challenge the correctness of that order. The district court thereafter applied the *Restatement* standard in fashioning a discovery sanction and considered the potential hardship to Petitioner, examined whether Petitioner demonstrated good faith in its discovery conduct, and calibrated the sanction to "restor[e] the

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[11] *See also* American Bar Association, Resolution and Report No. 103 (Feb. 6, 2012) at 1 ("Properly applied, U.S. law already provides a clear and workable standard ...," citing the same draft and *Aérospatiale*).

evidentiary balance" upset by Petitioner's withholding. *See Residential Funding Corp. v. deGeorge Finance Corp.*, 306 F.3d 99, 108 (2d Cir. 2002) (internal citation omitted). *See also* Pet. App. 33a (citing, *e.g.*, *Minpeco, S.A. v. Conticommodity Servs., Inc.*¸116 F.R.D. 517, 523 (S.D.N.Y. 1987)). In doing so, the court expressly found – and Petitioner has not challenged – that:

- Plaintiffs' discovery requests were narrow and highly specific;
- the discovery sought was not just relevant, but "essential to proof of the plaintiffs' [sic] case";
- without the discovery, Plaintiffs will be "highly prejudiced" and face a "difficult, perhaps insurmountable, hurdle" to proving their claims;
- "reasonable alternative means for obtaining the discovery sought ... are not available"; and
- Petitioner was afforded ample opportunity to contest the production order and warned of the consequences of noncompliance.

These findings fully support the sanctions the district court issued in order to correct the material imbalances wrought by Petitioner's withholding of evidence concededly essential to proof of the Plaintiffs' claims.

2. The Second Circuit Did Not Err in Finding That the District Court Properly Weighed the State Interests.

Petitioner asserts that the district court "violate[d] international comity" by disregarding the foreign bank secrecy interests implicated by the production order. As the Second Circuit correctly found, however, comity interests are expressly built into a *Restatement* §442 analysis. Pet. App. 35a ("careful application of Restatement §442 will faithfully adhere to the principles of international comity."). Here the district court took international comity into account at both the production and sanction stages, and again on reconsideration, acknowledging the submissions by foreign jurisdictions, but correctly noting that they simply repeated support for foreign bank secrecy laws and their (theoretical) enforceability, and thus raised no issues the Court had not previously considered. Pet. App. 98a.

Although Petitioner seems to believe otherwise, the *Restatement* standard does not mandate one-sided deference to the imperatives of foreign laws. Instead, it directs courts to consider "the extent to which noncompliance with the request would undermine *important interests of the United States*." *Restatement* §442(1)(c) (emphasis added). *See also Rogers*, 357 U.S. at 204 (asserting that discovery issue required consideration of U.S. statute's underlying claims). Plaintiffs assert express statutory claims for injuries from "act[s] of international terrorism," 18 U.S.C. §2333(a), not just ordinary breach of

contract claims. *Compare M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). "By its provisions for compensatory damages, treble damages, and the imposition of liability at any point along the causal chain of terrorism," the Senate Report on the ATA explained, the §2333(a) civil remedy "would interrupt, or at least imperil, the flow of money [to terrorists]." Resp. App. 29a-30a. The Executive Branch has agreed. Specifically, in *Boim v. Holy Land Foundation for Relief & Develop.*, the U.S. Department of Justice advised the Seventh Circuit Court of Appeals that "[t]he provision at issue -- 18 U.S.C. § 2333(a) -- was supported by the Executive Branch as an effective weapon in the battle against international terrorism; when correctly applied, it discourages those who would provide financing that is later used for terrorist attacks." Brief for the United States As Amicus Curiae at *1, *Boim v. Holy Land Foundation*, 2008 WL 3993242, (7th Cir. Aug. 21, 2008).

Furthermore, the ATA's civil remedy plainly contemplates extraterritorial application. Acts of "international terrorism" are defined by the ATA in relevant part as acts that "occur primarily outside the territorial jurisdiction of the United States," 18 U.S.C. §2331(1)(C). The predicate material support statutes for Plaintiffs' claims are also expressly extraterritorial. 18 U.S.C. §§2339B(d)(1)(E) & (d)(2); 2339C(b)(2)(C)(iii). Thus Congress left no room here for courts to "construe U.S. ... laws to have no extraterritorial application to prevent even *potential* conflict with foreign law," as Petitioner apparently urges. Brief at 17 (citing *Morrison v. Nat'l Austl. Bank*, 130 S. Ct. 2869 (2010). *See also,*

Goldberg v. UBS AG, 690 F. Supp. 2d 92, 109 (E.D.N.Y. 2010) (addressing statute's extraterritorial reach).

Nor is the ATA or its legislative history silent about the discovery essential to §2333(a) claims. Senator Grassley, who sponsored the original ATA act, explained that it "empowers victims with *all the weapons available in civil litigation, including: Subpoenas for financial records, banking information*, and shipping receipts – this bill provides victims with the tools necessary to find terrorists' assets and seize them." Resp. App. 32a. (emphasis added). Congress also took note of possible limitations on discovery. Section 2336(2) (entitled "Limitations on discovery") authorizes a court to stay a §2333(a) party's discovery request for the Department of Justice's investigative files if the court finds that it will interfere with a criminal investigation, after taking into account the likelihood of prosecution and other factors. Even then, however, the statute contemplates only a stay, not a bar, and the legislative history cautions that this provision is "*not, however, intended to prevent victims and their survivors from conducting civil litigation*." Resp. App. 31a (emphasis added). Thus, Petitioner's argument would require courts to give *greater* weight to foreign bank secrecy than the ATA explicitly gives to the United States government's investigative files privilege. *Compare FG Hemisphere Assocs., LLC v. Democratic Rep. of Congo*, 637 F.3d 373, 380 (D.C. Cir. 2011) (refusing to reverse discovery sanctions against a foreign

state even where the U.S. Executive Branch urged such dismissal).

It is notable that while Petitioner invoked foreign laws requiring "*absolute* secrecy in favor of the bank's clients" and prohibiting disclosure to "*anyone whatsoever*" Resp. App. 17a (emphasis added); Union of Arab Bankers ("UAB") amicus at 11-12 (citing foreign laws); it is also undisputed that Arab Bank did disclose secret customer information to U.S. authorities without even notifying, let alone seeking authorization from, the relevant foreign states. Arab Bank was never prosecuted for those disclosures. Pet. App. 41a. Respect for foreign states does not require U.S. courts to ignore the undisputed fact of non-prosecution for these violations of the foreign laws on which Petitioner relies, as well as Petitioner's confessed willingness to risk prosecution that those disclosures reflect.[12]

Finally, in the balancing of interests that is one part of the *Restatement*'s multi-factor analysis, it is relevant that Petitioner and amicus invoke bank secrecy to protect the privacy interests of ten customers Petitioner *admits* are Specially Designated Global Terrorists, Pet. App. 75a, as well as dozens of customers identifiable as the senior leadership of a Foreign Terrorist Organization, Hamas, and its military brigades, persons wounded or imprisoned in terrorist operations, and families

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[12] The Kingdom of Jordan's amicus brief wholly ignores the Petitioner's undisputed and repeated violations of Jordan's bank secrecy laws.

of "martyrs" killed in "martyrdom operations" (including specifically identified terror attacks such as the "French Hill operation," a machine gun attack on a public bus in the French Hill section of Jerusalem, that killed two and wounding forty-five civilians, including an American national whose survivors are plaintiffs in this action). Pet. App. 79a, 81a. Talismanic invocations of "comity" do not compel granting mandamus review to rebalance alleged foreign interests in protecting the privacy of admitted terrorist customers against the U.S. interests embodied in the ATA.

B. The Court of Appeals Did Not Err in Determining That Petitioner Failed To Show Irreparable Harm From the Sanctions Order.

At pages 21-22, and 30-32, Petitioner's Brief touches upon the mandamus requirement that Petitioner have no adequate alternative to issuance of the writ, conjecturing a highly unfavorable outcome to the litigation that may never come to pass. Thus, Petitioner claims that "[a] *liability verdict* tarring the Bank as an accomplice of terrorists ... would 'cause great reputational harm' and 'stigmatize the Bank....'" Brief at 31 (emphasis added). Similarly, amicus UAB emphasizes "[t]he threat posed by damage awards" and the legal repercussions "*once a bank has been adjudicated* a supporter of terrorism," and asserts that "the prospect of *such a judgment* is far more than an annoyance that can be addressed and remedied on appeal." UAB Br. at 4-5 (emphasis added).

This kind of "worst case" speculation does not justify the extraordinary remedy of mandamus. On the contrary, it is precisely because any litigant can invoke the "potential consequences" of an "anticipated" adverse judgment from a trial that has not yet begun that appellate review must await the actual and final judgment. As shown below, the sanctions order *may* make an adverse judgment more likely, but it neither deems essential facts established, requires the jury to draw adverse inferences, prevents Petitioner from rebutting or explaining evidence it has produced, nor eliminates Plaintiffs' burden to prove attribution of the terror attacks to Hamas or their reasonable foreseeability. In fact, even subsequent to this Petition, Arab Bank's counsel described Plaintiffs' burden of proving Hamas's responsibility for the attacks as an "uphill climb." Resp. App. 36a. The Second Circuit did not err in finding that Petitioner's irreparable harm argument rests primarily on "avoiding the harm from a possible adverse judgment" that may never be entered and that "[t]he sanctions order notwithstanding, it is at this point hardly certain that, after trial, the jury will find against Arab Bank." Pet. App. 48a, 51a. As Judge Chin observed during oral argument in this case, Petitioner's assertion that the sanction might contribute eventually to an adverse judgment is an "argument [that] could be made in any important case in which a party disagrees with a jury instruction to be given by the Court." Resp. App. 37a.

In addition, Petitioner speculates that it will suffer customer flight and reputational

consequences from the discovery sanction itself, but it furnishes no evidence to support its speculation. *See Parker v. Time Warner Ent. Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003) (cautioning against accepting speculative and hypothetical claims of financial demise without "any actual evidence"). In fact, it never explains why it did not suffer such consequences from issuance of the original production order, or why its defiance of that order has not, contrary to its speculation, *helped* its reputation with customers. The Second Circuit committed no error in reasoning that, "[i]f anything, Arab Bank's decision not to disclose the relevant materials may signal to bank customers that banks will *not* disclose private information despite discovery orders issued by U.S. courts." Pet. App. 49a-50a (emphasis in original).

C. The Second Circuit Did Not Err in Finding That the Sanction Order Presented No Novel Issue, Circuit Conflict, or Confusion Warranting Issuance of the Writ.

Petitioner also argues that issuance of the writ is nevertheless appropriate because the case law is in conflict, necessitating supervisory intervention. Brief at 6, 11, 14. However, the *Restatement* standard is routinely applied by numerous federal courts at both the production and sanction stages, as the *Restatement*'s extensive reporter's note and case notes attest. These courts have consistently applied the standard to craft discovery orders depending on the "particularized analysis" required by the standard and this Court

in *Aérospatiale*. *See* 482 U.S. at 543-4 n.28. The diverse fact patterns that underscore §442's balancing test predictably yield disparate results, leading courts to grant some discovery orders[13] and deny others[14] – depending on the variable facts of

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[13] *See In re Oil Spill by Amoco Cadiz off Coast of France on March 16, 1978*, 93 F.R.D. 840, 844 (N.D. Ill. 1982) (ordering "less drastic" sanctions of admission into evidence of certain findings by French party and a preclusion of documents or testimony withheld from discovery); *Lyondell-Citgo Refining, LP v. Petroleos de Venezuela, S.A.*, No. 02 Civ. 0795 (CBM), 2005 WL 1026461 (S.D.N.Y. May 2, 2005) (ordering adverse inference for failure to produce information subject to foreign law where defendant could not make a showing of good faith and withheld information was relevant to central issue in the case); *Remington Products, Inc. v. North American Philips Corp.*, 107 F.R.D. 642 (D. Conn. 1985) (entering a default judgment for failure to provide information subject to foreign law where the information was "crucial" to the claims, the withholding "greatly prejudice[d]" the claimant, and the withholding party's misleading applications to foreign authorities for waivers and its selective disclosure refuted its claim of good faith); *cf. General Atomic Co. v. Exxon Nuclear Co., Inc.*, 90 F.R.D. 290 (S.D. Cal. 1981) (deeming certain facts established and precluding certain defenses where failure to disclose information protected by foreign law "seriously impair[s]" claimant's ability to prove its claim and withholding party's claims of good faith were rejected).

[14] *See, e.g., Payment Card Interchange Fee and Merchant Discount Antitrust Litig.,* No. 05-MD-1720 (JG)(JO), 2010 WL 3420517 (E.D.N.Y. Aug. 27, 2010) (denying production order for information protected by foreign law where information was "secondary" to the conduct that was the subject of the claims and could be obtained by alternative means); *In re Vitamins Antitrust Litig.*, No. 99-197TFH, 2001 WL 1049433,

the cases. Their different outcomes reflect the fact-sensitivity of the standard, not inconsistency.

There is thus no "conflict" among the Circuits, as Petitioner tries to suggest. Indeed, in the cases Petitioner relies upon, the courts of appeals expressly recognized that federal courts could order discovery sanctions in appropriate cases, regardless of whether the disclosure in question was prohibited by foreign secrecy laws. In *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F. 2d 992, 997 (10th Cir. 1977), the Tenth Circuit declared that "foreign illegality does not necessarily prevent a local court from imposing sanctions when, due to the threat of prosecution in a foreign country, a party fails to comply with a valid discovery order." Likewise, in *United States v. First Nat'l Bank of Chicago*, 699 F.2d 341, 345 (7th Cir. 1983), the Seventh Circuit warned "the fact that foreign law may subject a person to criminal sanctions in the foreign country if he produces certain information does not automatically bar a domestic court from compelling

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at *9 (D.D.C. June 20, 2001) (deferring production order until plaintiffs could show that the requested information is "absolutely essential to their case"); *Madanes v. Madanes*, 186 F.R.D. 279 (S.D.N.Y. 1999) (denying motion to compel where discovery request was general, U.S. interest was attenuated, and alternative means of obtaining the information were available); *Minpeco, S.A. v. Conticommodity Services, Inc.*, 118 F.R.D. 331 (S.D.N.Y. 1988) (denying motion to compel information subject to foreign bank secrecy laws where information was not "highly relevant" and was sought from a nonparty).

production," and remanded for further inquiry into whether an order should issue.[15]

Petitioner's assertion that no identical discovery sanctions have ever been sustained in the precise circumstances of this case (Brief at 24) misses the critical point: the *Restatement* standard appropriately fits a sanction to the particular and variable facts of each case, as the range of similar sanctions cases shows. The Second Circuit did not err in finding that "[t]hese cases illustrate the multitude of considerations facing courts deciding whether to compel discovery and impose sanctions in the face of competing legal dictates of foreign nations." Pet. App. 43a. The district court's ruling was squarely "in line with this precedent," *id.*, and the precedent, in turn, adheres to the *Restatement* and the particularized analysis counseled by this Court in *Aérospatiale* and *Rogers*.

Thus, Petitioner turns the law on its head in claiming that "[t]he question here – whether severe sanctions are warranted for inability to produce documents due to the mandates of foreign penal law – is a straightforward one of general applicability for which mandamus and collateral order review are well-suited." Brief at 32. In fact, under the *Restatement* and *Aérospatiale,* the

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[15] In *Cochran Consulting, Inc. v. Uwatec USA, Inc.*, 102 F.3d 1224 (Fed. Cir. 1996), the Federal Circuit, reviewing the lower court's issuance of an injunction as a discovery sanction, found that the requested discovery was unnecessary to proving the patent infringement dispute at issue – in sharp contrast to the uncontested finding here that the withheld evidence was "essential."

question of production and remedial discovery sanctions against litigants who invoke foreign laws is one of *particularized*, not "*general*" applicability. Precisely because of the particularized considerations of how "essential" to Plaintiffs' ATA claims the discovery withheld by Petitioner was, the unique importance of the interests articulated by the ATA (as contrasted with interests under other statutes), and the findings that Petitioner was "hardly faultless" (in part because of its confessed selective disclosures in violation of the laws it invokes), this case would be a poor vehicle for guidance of "general applicability," if any such guidance were even possible.

Moreover, Petitioner has also not shown any conflict in the circuits about interlocutory review of such particularized analyses. In *Credit Suisse v. U.S. Dist. Ct.*, 130 F.3d 1342 (9th Cir. 1997), the Ninth Circuit issued the writ of mandamus to review the *purely legal question* whether injunctive and declaratory relief with attendant discovery violated the act of state doctrine, not to review a discretionary application of a fact-sensitive discretionary standard. *See DeGeorge v. U.S. Dist. Ct.*, 219 F.3d 930, 935 (9th Cir. 2000) (observing that *Credit Suisse* was the "exception, not the rule"). In *In re Papandreou*, 139 F.3d 247 (D.C. Cir. 1986), the D.C. Circuit granted interlocutory review to review a jurisdictional discovery order against foreign governmental entities and officials who claimed sovereign immunity. Acknowledging that interlocutory discovery orders were not normally appealable, the court stressed that the petitioners' immunity claims were significantly

different from claims of ordinary privilege because immunity confers a protection from burdens of litigation, not just from liability on the merits, justifying immediate review under *Cohen* to guard against such burdens. Arab Bank invokes no comparable defense. *Id*. at 251.

Finally, Petitioner's reliance on *In re Bieter Co.*, 16 F.3d 929 (8th Cir. 1994) frames precisely why the petition should be denied. In *Bieter,* the Eighth Circuit concluded that the district court failed to apply the correct legal standard, a challenge the Bank does not make here. It then added that had the court simply committed error in applying the standard, "*such error would probably not constitute a clear abuse of discretion." Id.* at 940 (emphasis added). Petitioner's argument here is, at best, that the district court reached a wrong conclusion applying the correct legal standard.

II. THE SECOND CIRCUIT DID NOT ERR IN FAILING TO FIND THE DISCOVERY SANCTION "TANTAMOUNT TO DEFAULT" OR VIOLATIVE OF DUE PROCESS.

In a strained effort to bring the sanction within *Rogers*' stricture on default judgments against litigants who, in good faith, do not comply with discovery orders due to competing imperatives of foreign law, Petitioner argues that the discovery sanction here is tantamount to a default judgment. The Second Circuit, however, did not err in rejecting this argument and finding that the sanctions do not require the jury to find any facts

or preclude Petitioner from defending itself with respect to evidence it did provide.

First, the adverse inferences are not mandatory: the jury is free to reject them. "Whether a reasonable trier of fact actually will draw such an inference is a matter left to trial." *Byrnie v. Town of Cromwell, Bd. Of Educ.*, 243 F.3d 93, 110 (2d Cir. 2001). In deciding whether it will draw that inference, the jury will consider whether the evidence that Plaintiffs proffer supports the inference, as well as Petitioner's rebuttal evidence.

Second, Plaintiffs supported the inferences with evidence "suggesting that a document or documents relevant to substantiating [their] claims" would have been among the withheld documents in order to establish the specific relationship between the inference and the discovery, as required by this Court in *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982). *See also Kronisch*, 150 F.3d at 125-30 (describing this showing). Petitioner's insistence that "the materials produced by the Bank and other evidence offer no indication that it knowingly or intentionally facilitated terrorism and no reason to think that producing the records subject to financial privacy laws would turn up anything inculpatory," Brief at 28, is simply contrary to the record. Plaintiffs provided evidence of substantial material support by Petitioner to Hamas leaders, operatives and organizations, Pet. App. 78a-79a, and Petitioner made no showing to contradict the Magistrate Judge's conclusion that "[i]t would require a suspension of disbelief to conclude that the only financial services the Bank

ever provided to those alleged by the plaintiffs to be terrorists or their affiliates are reflected in the documents that have been produced." Pet. App. 120a. Moreover, Plaintiffs offered evidence from an account at one of Petitioner's branches in Beirut that was "held in the name of an individual who has been identified as a high-ranking member of Hamas," *id.* at 114a, and of three transfers credited into that account that *expressly* identified "Hamas" as the beneficiary customer. Pet. App. 85a. Plaintiffs also offered concrete evidence that Petitioner maintained accounts for numerous senior Hamas leaders and terror cell commanders, *id.* at 79a, 83a, and proffered evidence that Petitioner consulted lists provided by the Saudi Committee of family members of so-called "martyrs" and others injured or imprisoned during the Second Intifada, several of which identified the cause of death giving rise to the payments as "martyrdom operations" (suicide bombings). Pet. App. 81a. Finally, Plaintiffs included payments to the father of Izz al-Din al-Masri, who bombed the Sbarro restaurant in central Jerusalem in which several plaintiffs or their relatives were killed or injured, and other relatives of prominent terrorists. *Id.* at 81a-82a.

The District Judge correctly found that such evidence was as direct as a plaintiff could reasonably obtain and was certainly strong *circumstantial* evidence of knowledge. *Id.* at 86a-87a. Moreover, the district court also recognized that in proving knowledge, the quantity of transactions for the benefit of Hamas and its agents mattered (*id.* at 86a), and the Second Circuit

agreed. *See* Pet. App. 46a ("[A] significant volume of documents showing that Arab Bank provided banking services to terrorist groups could constitute strong circumstantial evidence that it did so knowingly and purposefully."). Plaintiffs thus met their burden justifying permissive adverse inferences. *Kronisch*, 150 F.3d at 128.[16]

Moreover, unlike *United States v. Sumitomo Marine & Fire Ins.*, 617 F.2d 1365 (9th Cir. 1980), cited by Petitioner (Brief at 26), in which the Ninth Circuit precluded all evidence of damages by the plaintiff, the order here did not require the exclusion of *all* evidence on an essential element of the case. "Arab Bank will still be entitled to emphasize its substantial Saudi Committee disclosures, including the Bank's own internal documentation" to rebut Plaintiffs' evidence and to "urge the jury to extrapolate from this evidence that Arab Bank had lacked a culpable state of mind...." Pet. App. 45a-46a. The district court, in fact, has not, to date, stricken any Bank employee's testimony and is permitting Petitioner to present

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[16] Petitioner cites *Gill v. Arab Bank plc,* 893 F. Supp. 2d 542, 547 (E.D.N.Y. 2012), Brief at 29, incorrectly implying that a difference between that district court's assessment of the evidence for an attack that took place in 2008 and the Second Circuit's assessment in this case would necessarily make the latter clearly erroneous. However, *Gill* actually stated: "Viewed most favorably to plaintiff, a reasonable jury might conclude that the Bank violated one of the material support of terrorism statutes *in 2005 or before.*" *Id.* at 562 (emphasis in original). Here, all of the attacks at issue took place between 2001 and 2004.

six case-in-chief and rebuttal experts at trial, opining on matters ranging from global banking standards to the nature of certain Palestinian non-governmental organizations. What Petitioner is not being permitted to do is profit from its withholding by offering evidence that its non-compliance prevents Plaintiffs from cross-examining or otherwise testing effectively.

The Petition itself provides a perfect example of the discovery sanctions' necessity. Petitioner questions the basis for the adverse inference by insisting that its "careful screening of transactions and customers ... and prompt closing of every account upon learning that the holder was designated, make an adverse inference patently inappropriate." Brief at 28-29 n. 6. But it has withheld all evidence of how its Palestinian branches actually screened its customers or what those branches knew about its actual customers, including designated terrorists; and it has refused to produce *any* evidence establishing that it, in fact, closed the accounts of the ten Specially Designated Global Terrorists, when or why it did so, what it did with the money in those accounts, and whether it transferred the money to account signatories who were themselves Hamas leaders. Without this evidence, it is impossible to test Petitioner's claim of alleged "prompt closings" of the accounts described or for the jury to evaluate it. The district court thus committed no error in precluding Petitioner from claiming it had "promptly closed" accounts of Foreign Terrorist Organizations and Specially Designated Global Terrorists, because allowing it to make such unverifiable assertions to

the jury would allow Petitioner to profit from its non-disclosures.

Furthermore, both the Magistrate Judge and the District Judge recognized that the application of the preclusion sanction would depend on specific proffers at trial. In its Supplemental Brief, Petitioner now cites evidentiary rulings by Judge Cogan (many of them based solely on applications of Fed. R. Evid. 401 and 403 rather than the preclusion remedy) to bolster its due process claim. Supp. Brief at 2-3. But Judge Cogan also noted that any preclusion would depend on specific evidence at trial: "This is another [motion *in limine*] I'm going to have to take a step at a time. I will say, because the plaintiffs are going first, I will be in a position to make a judgment by the time the defendant's case comes along as to how much ... of this I will allow the defendant to do." Resp. App. 35a. In *Hagans v. Henry Weber Aircraft Dist., Inc*, 852 F.2d 60 (3d Cir. 1988), the plaintiffs claimed – like Petitioner here – that a proposed preclusion was "tantamount to dismissal." The Third Circuit rejected that claim as "too speculative," because assessing it "would require predicting first what evidence the defendants would present to support their defense," and then predicting "what evidence plaintiffs could introduce to sufficiently rebut that defense notwithstanding the evidence." *Id*. at 65. Petitioner's entire due process argument is similarly defective.

Finally, in *Rogers*, this Court emphasized that the non-complying party had shown good faith. 357 U.S. at 1090. Here *both* the Magistrate Judge and the District Judge expressly rejected

Petitioner's claim of good faith, the former observing that he was "unable to determine precisely where on that continuum [of fault] the defendant's refusal to produce discovery lies," Pet. App. 117a, and the latter placing the defendant's overall discovery conduct "at a location approaching willfulness...." Pet. App. 78a. The District Judge found not just that Petitioner had made selective disclosures in violation of the laws it invoked, which "highlight[] the limits of its supposed good faith," but had caused years of delay. *Id*. Declaring that "we can hardly conclude that Arab Bank was faultless," the Second Circuit found that the district court did not clearly err in rejecting Arab Bank's claims of good faith, citing Petitioner's long delays and selective disclosures. Pet. App. 47a.

III. THE ISSUES RAISED BY PETITIONER CONCERNING THE ALIEN TORT STATUTE ARE MOOT

As noted at pages 1-2 *supra*, the ATS claims in this case have been dismissed. The ATS issues raised by Petitioner are thus moot and do not call for further review by this Court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

DISTRICT COURT ORDER DISMISSING THE ALIEN TORT STATUTE CLAIMS

U.S. District Court

Eastern District of New York

Notice of Electronic Filing

The following transaction was entered on 8/23/2013 at 2:45 PM EDT and filed on 8/23/2013

Case Name: Linde et al v. Arab Bank, PLC

Case Number: 1:04-cv-02799-BMC-VVP

Filer:

Document Number: No document attached

Docket Text:

Order granting defendant's motion to dismiss plaintiffs' ATS claims. The law of this Circuit is that plaintiffs cannot bring claims against corporations under the ATS. See Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), aff'd, Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013). A decision by a panel of the Second Circuit "is binding unless and until it is overruled by the Court en banc or by the Supreme Court." Baraket v. Holder, 632 F.3d 56, 59 (2d Cir.

2011). Because the Supreme Court affirmed Kiobel I on other grounds, the Second Circuit's holding on corporate liability under the ATS remains intact. Nothing in the Supreme Court's affirmance undercuts the authority of the Second Circuit's decision. Plaintiffs' request to reinstate their federal common law claims or, in the alternative, assert non-federal common law claims is denied. The federal common law claims were dismissed not only as redundant, but also because Plaintiffs offered "no sound basis" for them. Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257 (E.D.N.Y. 2007). Plaintiffs also offer no sound basis for repackaging these claims under unidentified "non-federal common law" theories. The clerk is directed to enter judgment for defendant in Joseph Jesner, et al. v. Arab Bank, PLC, 06-CV-3869; Yaffa Lev, et al. v. Arab Bank, PLC, 08-CV-3251; and Viktoria Agurenko, et al. v. Arab Bank, PLC, 10-CV-626. Associated Cases: 1:04-cv-02799-BMC-VVP et al. Ordered by Judge Brian M. Cogan on 8/23/2013. (Weisberg, Peggy)

APPENDIX B

PLAINTIFFS' JOINT MODIFIED PHASE I REQUEST FOR THE PRODUCTION OF DOCUMENTS TO DEFENDANT ARAB BANK, PLC

[caption and instructions omitted in printing]

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Request Number 1: Lebanese Bank Account

Account Number: 3-810-622473-0330

Branch: Al-Mazra Branch, Beirut

Relevance: Beginning with the Linde complaint, plaintiffs have all alleged that through this account "Arab Bank knowingly provides banking services to HAMAS" and that "Arab Bank affirmatively assists in distributing funds to support the terror campaign." Linde Complaint ¶ 345. The defendant proffered a sworn declaration by its Chief Banking Officer, Shukry Bishara, dated November 11, 2004. Paragraphs 41-43 state that the account has allegedly been "dormant for the past three years". Mr. Bishara further stated that: "Upon confirming that this account was at some time available on a website alleged to belong to HAMAS … the Bank closed this account, froze the balance of its funds and reported it to the appropriate authorites."

Scope of Request: Plaintiffs seek complete transactional records, including the date the account was opened, any documentation related to the identity of the account holder(s), including the account opening application, and the transactional history of the account, including copies of all

deposits and withdrawals, copies of all and wire transfers into or out of the account, as well as all correspondence the bank has in its possession with, or from, the account holder(s) or any other correspondence the bank has received, written or otherwise generated concerning this account, particularly concerning the closure of the account, the freezing of its funds and the reporting on it "to the appropriate authorites."

Request Number 2: Jordanian Bank Account

Account Holder: Hassan Hussien Hassan Houtari

Account Number: 600/21697-6

Branch: Al-Raseifa Branch -Jordan

Relevance: Mr. Houtari is the father of Said Hassan Houtari who murdered 20 people, mostly teenagers and injured 100 more in a suicide bombing attack on June 1, 2001 at the Dolphinarium dance club in Tel Aviv.

Plaintiffs Killed or Injured in Attack: Liana Saakian – murdered (Almog), Jan Blum – murdered (almog), Aleksei Lupalo – murdered (Almog), Marina Berkovsky – murdered (Almog), Ryisa Nemirovsky – murdered (Almog), Maria Taglitsev – murdered (Almog), Uri Shahar – murdered (Almog), Elena Nalimova – murdered (Almog), Yulia Nalimova – murdered (Almog), Yulia Sklianik – murdered (Almog), Jenya Dorfman – murdered (Almog), Mariana Medvedenko – murdered (Almog), Anya Kazachkov – murdered (Almog), Simona Rudin – murdered (Almog), Irina Nepomnyashchy – murdered (Almog), Ilia Gutman – murdered (Almog), Katrin Talker – murdered (Almog), Sergei Panchenko – murdered (Almog), Lior Sklianik – injured (Almog), Maria Kavosnidova – injured (Almog), Tamara

Fubrickunt – injured (Almog), Margarita Sherman – injured (Almog), Polina Valis – injured (Almog), Anna Pistunov – injured (Almog), Ivgeni Moldavski – injured (Almog), Oksana Datlov – injured (Almog), Tanya Weiz – injured (Almog), Irina Lipkin – injured (Almog), Ziva Mevzos – injured (Almog), Alexander Plotkin – injured (Almog).

Scope of Request: The plaintiffs request confirmation of the name on the account, any information concerning the identity of the account holder(s) including the account opening application, and any and all records relating to wire transfers or other deposits made into the account from January 1, 2001 to the date of this letter. The plaintiffs also request all correspondence between the defendant and the account holder or any other third party concerning this account from January 1, 2001 to the date of this letter.

Request Number 3: Bank Account Located in Palestinian-Controlled Territory

Account Holder: Shuail Ahmad Al-Masri

Account Number: 579796/6

Branch: Jenin Branch

Relevance: Mr. Al-Masri is the father of Iz Al-Din Shuail Al-Masri who murdered 15 people, including young children and injured 130 more in a suicide bombing attack on August 9, 2001 at the Sbarro pizzeria in Jerusalem.

Plaintiffs Killed or Injured in Attack: The victims include Judith Greenbaum, age 31, who was murdered (Coulter), Chana Nachenberg (34), who was placed in a coma (Coulter), Howard and Dora Green -injured (Coulter), David Danzig –injured (Coulter), Clara Ben-Zaken – injured (Linde),

Yocheved Shushan –murdered (Almog), Frieda Mendelsohn – murdered (Almog), Tehilla Maoz – murdered (Almog), Kerovah Shushan - injured (Almog), Orna Amit – injured (Almog), Chava Malgrud – injured (Almog), Miryam Sara Shushan – injured (Almog)

Scope of Request: The plaintiffs request confirmation of the name on the account, any information concerning the identity of the account holder(s) including the account opening application, and any and all records relating to wire transfers or other deposits made into the account from January 1, 2001 to the date of this letter. The plaintiffs also request all correspondence between the defendant and the account holder or any other third party concerning this account from January 1, 2001 to the date of this letter.

Request Number 4: Bank Account Located in Palestinian-Controlled Territory

Account Holder: Muhammad Ahmad Hussein al-Shouli

Account Number: 444228-8, including, but not limited to sub-account 600

Branch: Nablus Branch

Relevance: Mr. al-Shouli is the father of Mahmoud Muhammad Ahmad Abu Hanoud al-Shouli, one of the most famous and prolific of HAMAS's terrorists, credited by the organization for organizing both the Dolphinarium and Sbarro bombings. He was killed by Israeli Security Services on November 23, 2001 and remains one of the most revered 'martyrs' of HAMAS. His image appears on posters, billboards, and many other forms of 'advertizing' produced by HAMAS.

Plaintiffs Killed or Injured in Attack: **Dolphinarium**: Liana Saakian – murdered (Almog), Jan Blum – murdered (Almog), Aleksei Lupalo – murdered (Almog), Marina Berkovsky – murdered (Almog), Ryisa Nemirovsky – murdered (Almog), Maria Taglitsev – murdered (Almog), Uri Shahar – murdered (Almog), Elena Nalimova – murdered (Almog), Yulia Nalimova – murdered (Almog), Yulia Sklianik – murdered (Almog), Jenya Dorfman – murdered (Almog), Mariana Medvedenko – murdered (Almog), Anya Kazachkov – murdered (Almog), Simona Rudin – murdered (Almog), Irina Nepomnyashchy – murdered (Almog), Ilia Gutman – murdered (Almog), Katrin Talker – murdered (Almog), Sergei Panchenko – murdered (Almog), Lior Sklianik – injured (Almog), Maria Kavosnidova – injured (Almog), Tamara Fubrickunt – injured (Almog), Margarita Sherman – injured (Almog), Polina Valis – injured (Almog), Anna Pistunov – injured (Almog), Ivgeni Moldavski – injured (Almog), Oksana Diatlov – injured (Almog), Tanya Weiz – injured (Almog), Alexander Plotkin – injured (Almog).

Sbarro: Judith Greenbaum – murdered (Coulter), Chana Nachenberg – placed in a coma (Coulter), Howard and Dora Green – injured (Coulter), David Danzig –injured (Coulter), Clara Ben-Zaken – injured (Linde), Yocheved Shushan – murdered (Almog), Frieda Mendelsohn – murdered (Almog), Tehilla Maoz – murdered (Almog), Kerovah Shusan - injured (Almog), Orna Amit – injured (Almog), Chava Malgrud – injured (Almog), Miryam Sara Shushan – injured (Almog).

Scope of Request: The plaintiffs request confirmation of the name on the account, any information concerning the identity of the account holder(s) including the account opening application, and any and all records relating to wire transfers or

other deposits made into the account from January 1, 2001 to the date of this letter. The plaintiffs also request all correspondence between the defendant and the account holder or any other third party concerning this account from January 1, 2001 to the date of this letter.

Request Number 5: Bank Account Located in Palestinian-Controlled Territory

Account Holder: Wasifa Mabrouk Saleh Idris

Account Numbers: 9030/627878/7 including, but not limited to sub-accounts 600, 610 and 670

Branch: Rammallah (Al-Bireh)

Relevance: Mrs. Idris's daughter, Wafa Idris, was the first female Palestinian suicide bomber. Ms. Idris blew herself up on January 27, 2002 in downtown Jeruslaem.

Plaintiffs Killed or Injured in Attack: Pinhas Tokatly – murdered (Almog), Ludmila Gershikov – injured (Almog), Mark I. Sokolow, Rena M. Sokolow, Jamie A. Sokolow, Lauren M. Sokolow – injured. (Coulter).

Scope of Request: The plaintiffs request confirmation of the name on the account, any information concerning the identity of the account holder(s) including the account opening application, and any and all records relating to wire transfers or other deposits made into the account from December 1, 2001 to the date of this letter. The plaintiffs also request all correspondence between the defendant and the account holder or any other third party concerning this account from December 1, 2001 to the date of this letter.

Request Number 6: Bank Account Located in Palestinian-Controlled Territory

Account Holder: Hussien Mohammad Farah Tawil

Account Number: 626831/5 including but not limited to sub-accounts 670 and 610

Branch: Rammallah (Al-Bireh)

Relevance: Mr. Tawil is the father of Dia Tawil who blew up a bus stop in the French Hill section of Jerusalem on March 27, 2001 injuring 21 civilians.

Plaintiffs Killed or Injured in Attack: Danielle Fine-Cohen – injured (Almog), Shmuel Shfaim – injured (Almog)

Scope of Request: The plaintiffs request confirmation of the name on the account, any information concerning the identity of the account holder(s) including the account opening application, and any and all records relating to wire transfers or other deposits made into the account from January 1, 2001 to the date of this letter. The plaintiffs also request all correspondence between the defendant and the account holder or any other third party concerning this account from January 1, 2001 to the date of this letter.

Request Number 7: Bank Account Located in Palestinian-Controlled Territory

Account Holder: Muhyi al-Din Kamil Salah Hubayshah

Account Number: 444136/2 including but not limited to sub-accounts 500, 510, and 570

Branch: Nablus

Relevance: Mr. Al-Din Kamil's son, Maher Muhyi al-Din Kamil, was a suicide bomber responsible for the murder of 15 commuters on the No. 16 bus in Haifa on December 2, 2001.

Plaintiffs Killed or Injured in Attack: Michael Zarayski – murdered (Almog), Rassime Safiullin – murdered (Almog), Riki Hadad – murdered (Almog), Inna Frenkel – murdered (Almog), Yitzak Ringal – murdered (Almog), Ronen Kachlon – murdered (Almog), Mara Fishman – murdered (Almog), Zizilia Kuzmin – murdered (Almog), Tatiana Borovik – murdered (Almog), Shimon Kabesa – injured (Almog), Ronen Avrahami – injured (Almog).

Scope of Request: The plaintiffs request confirmation of the name on the account, any information concerning the identity of the account holder(s) including the account opening application, and any and all records relating to wire transfers or other deposits made into the account from June 1, 2001 to the date of this letter. The plaintiffs also request all correspondence between the defendant and the account holder or any other third party concerning this account from June 1, 2001 to the date of this letter.

Request Number 8: Bank Account Located in Palestinian-Controlled Territory

Account Holder: Muhammad Jamil Mutlaq Ghanim (a/k/a Ghanem)

Account Number: 521586-2

Branch: Tulkarem

Relevance: Mr. Ghanim's son, Rami Muhammad Jamil Mulaq Ghanim, blew up the London Café in Netanya on March 30, 2003, injuring four people.

Plaintiffs Killed or Injured in Attack: Lidia Samouel – injured (Almog), Joseph Samouel – injured (Almog), Shlomo Menashe – injured (Almog), Lili David – injured (Almog).

Scope of Request: The plaintiffs request confirmation of the name on the account, any information concerning the identity of the account holder(s) including the account opening application, and any and all records relating to wire transfers or other deposits made into the account from January 1, 2003 to the date of this letter. The plaintiffs also request all correspondence between the defendant and the account holder or any other third party concerning this account from January 1, 2003 to the date of this letter.

Request Number 9: Bank Account Located in Palestinian-Controlled Territory

Account Holder: First Name Unknown (Aliyan)

Account Number: 519610/8

Branch: Tulkarem

Relevance: The son of the account holder, Ahmad Omar Aliyan, blew himself up in a shopping mall in Netanya on March 4, 2001, killing 3 people and wounding 65 others.

Plaintiffs Killed or Injured in Attack: Bosmat Glam – injured (Almog), Ariel Mahfud – injured (Almog), Mazal Alevi – injured (Almog).

Scope of Request: The plaintiffs request confirmation of the name on the account, any information concerning the identity of the account holder(s) including the account opening application, and any and all records relating to wire transfers or

other deposits made into the account from January 1, 2001 to the date of this letter. The plaintiffs also request all correspondence between the defendant and the account holder or any other third party concerning this account from January 1, 2001 to the date of this letter.

Request Number 10: Bank Account Located in Palestinian-Controlled Territory

Account Holder: Kamil Sa'id 'Abdallah al-Zubeidi

Account Number: 414648/4 including but not limited to sub-accounts 570 and 500

Branch: Nablus

Relevance: Mr. al-Zubeidi's son, 'Imad Kamil Sa'id al-Zubeidi, blew himself up in Kfar Saba on April 22, 2001, killing one person and wounding 38 others.

Plaintiffs Killed or Injured in Attack: Dr. Mario Goldin was murdered (Almog), Michael Milman was injured (Almog).

Scope of Request: The plaintiffs request confirmation of the name on the account, any information concerning the identity of the account holder(s) including the account opening application, and any and all records relating to wire transfers or other deposits made into the account from January 1, 2001 to the date of this letter. The plaintiffs also request all correspondence between the defendant and the account holder or any other third party concerning this account from January 1, 2001 to the date of this letter.

APPENDIX C

NOVEMBER 25, 2006 MAGISTRATE JUDGE'S ORDER OVERRULING PETITIONER'S FOREIGN BANK SECRECY OBJECTIONS

[caption omitted in printing]

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DECISION AND ORDER

POHORELSKY, Magistrate Judge.

The plaintiffs have moved for an order (1) overruling all objections made by the defendant Arab Bank, Plc to the Plaintiffs' First Set of Requests for Admissions and Related Interrogatories based on the application of the secrecy provisions of foreign banking laws and (2) imposing sanctions for the defendant's refusal to comply with discovery obligations. Although the motion attacks the defendant's responses to a limited number of discovery requests, its purpose is to remove the defendant's assertion of foreign bank secrecy laws as a bar to disclosure of numerous documents and other important information that has been requested by the plaintiffs and which the court has found relevant to the issues to be decided here. The court's decision on the bank secrecy matters presented is therefore crucial to the prosecution of the plaintiffs' claims.

BACKGROUND

These related actions involve tort claims arising from injuries and deaths caused by suicide bombings and other attacks in Israel, the West

Bank, and Gaza since the onset of the second intifada in late 2000. The plaintiffs allege that the defendant knowingly encouraged and promoted these violent acts by providing a financial system for the collection and payment of funds in compensation and reward to the families of those who carried out the attacks. Proof concerning the flow of money, if any, from those allegedly funding the payments through the bank to the families of known participants in the attacks is essential to the plaintiffs' case. Furthermore, because the defendant denies knowing involvement in any such compensation scheme, proof concerning the arrangements for making such payments and the breadth of the payment scheme is also crucial.

The plaintiffs' First Set of Requests for Admissions and Related Interrogatories ("Requests for Admissions"), served on September 16, 2005, sought information concerning a limited number of documents that were in the possession of the plaintiffs and which either appeared to be bank records of the defendant or contained information about accounts and customers of the bank. In the defendant's responses to the Requests for Admissions, the defendant declined to provide information on the grounds that doing so would violate the bank secrecy provisions of the Palestinian territories and perhaps other jurisdictions.

Although the defendant's responses to the Requests for Admissions are the nominal object of the plaintiffs' motion, the plaintiffs have made other discovery requests which have implicated foreign bank secrecy laws and the plaintiffs seek rulings here "to overrule all of the Defendant's objections to discovery based on foreign bank secrecy laws and to compel the discovery of all information that the Defendant has withheld on that basis." Plaintiffs' Memorandum of Law in Support of Their Motion

for an Order Overruling Objections, Deeming Certain Facts as Admitted, and Compelling Further Responses to Plaintiffs' First Set of Requests for Admissions and Related Interrogatories ("Pl.Mem.") at 10. Thus, for example, in June 2005, for the purpose of raising bank secrecy issues and at the court's suggestion, the plaintiffs made a modified document request seeking information about specific bank accounts located in Jordan, Lebanon and the Palestinian territories. When the defendant raised the bank secrecy laws of those jurisdictions as a bar to disclosure, the court entered an order on July 27, 2005 (the "First Production Order") directing the parties to seek to obtain permission to disclose the information from appropriate foreign regulatory authorities. The defendant successfully obtained such permission relating to a single account located in Lebanon, but was ultimately denied permission with respect to an account located in Jordan and accounts in the Palestinian territories.[1]

The plaintiffs have also served a First Request for the Production of Documents seeking a wide range of documents concerning accounts, account holders and transactions deemed likely to be involved in the scheme alleged. In an order dated March 3, 2006 (the "Second Production Order"), the court ruled on disputes concerning the scope of the document requests, and identified documents and other information the defendant was required to disclose. The Second Production Order also required the defendant to identify, by category, the documents covered by the Order whose disclosure

[1] The defendant initially obtained a ruling from a court in Jordan that this court's order requiring production of the information sought fell within the exception in that nation's bank secrecy law which permits disclosure if ordered by a court. The ruling was overturned upon an appeal filed by the account holder.

would violate any foreign bank secrecy laws. The Order expressly reserved, however, any ruling concerning the issues now before the court.

The defendant complied with that portion of the Second Production Order concerning identification of documents prohibited from disclosure by foreign bank secrecy laws. In addition, the defendant obtained the permission of the Saudi Committee, the account holder alleged to be at the center of the compensation scheme at issue here, to disclose documents covered by the Order subject to the Saudi Committee's prior review. As a result of the Saudi Committee's waiver and its review, which was continuing at the time of the last conference in this matter in September, the defendant has now produced some 170,000 transaction records relating to that account holder. Other documents covered by the Second Production Order, however, continue to be withheld on the basis of bank secrecy laws.

DISCUSSION

The documents and other information sought by the plaintiffs are primarily located in the bank's branches in Jordan, Lebanon, the West Bank and Gaza.[2] Jordan and Lebanon, as well as the Palestinian Monetary Authority, an entity recognized by the United States and other countries to have jurisdiction over the financial system in the West Bank and Gaza, have all promulgated bank secrecy laws which prevent the disclosure of certain types of information about business conducted by the bank, including the identities of accountholders and the transactions occurring in their accounts, without the consent of

[2] The bank has also apparently cited bank secrecy laws of Morocco, Great Britain, France, Austria and Switzerland as bars to some of the discovery sought by the plaintiffs.

the affected customers.[3] Violations of the laws carry criminal penalties, including fines and incarceration. Although the plaintiffs vigorously dispute that the defendant is entitled to withhold any information on the basis of those laws, they apparently do not dispute that disclosure of at least some of the information they seek would constitute a violation of those laws.

The bank secrecy laws cited above are broadly phrased and prohibit not only the bank, but also bank employees, from disclosing information. The court therefore rejects the plaintiffs' argument that the laws do not prohibit the defendant from authenticating and otherwise providing information about documents that the plaintiffs have already obtained from various sources other than the bank. The court also rejects the plaintiffs' argument that the defendant's disclosure of some documents to regulatory and investigative authorities in the United States waives bank secrecy. The bank secrecy laws do not establish a

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[3] For example, Jordan's bank secrecy statute provides that "A bank shall observe full confidentiality regarding all accounts, deposits. of its customers" and that "All present and former administrators of the bank shall be prohibited from providing any information or data on the clients or the accounts ... or any of their transactions, or disclosing or enabling others to have access to such information and data in situations other than those permitted under this law." See Decl. of Aiman Odeh, ¶¶ 12-13. The law applicable in the Palestinian territories provides, "All present and former directors and employees of the banks shall keep confidential all information and documents regarding their customers."Decl. of Maher Masri, ¶ 5. Lebanon's bank secrecy law provides, "Managers and employees of the banking establishments referred to in article 1 ... are bound to absolute secrecy in favor of the bank's clients and may not disclose to anyone whatsoever ... the names of clients, their assets and facts of which they are aware ..." Decl. of Chakib Cortbaoui, ¶ 4.

waivable privilege held by the bank, they establish confidentiality rights held by the customers of the bank, rights waivable only by the customers, not the bank.

The court is thus left to determine whether the existence of the bank secrecy laws of the above foreign jurisdictions should relieve the defendant from the discovery obligations already imposed on the defendant by the court's prior orders finding discovery sought by the plaintiffs to be appropriate. Fortunately, the Supreme Court has provided substantial guidance for resolving such issues. First, it is beyond dispute that the Federal Rules of Civil Procedure provide the court with authority to issue discovery orders requiring the disclosure of information protected by foreign bank secrecy laws. *See Société Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers,* 357 U.S. 197, 204-06, 78 S.Ct. 1087,1091-92, 2 L.Ed.2d 1255 (1958); *Minpeco, S.A. v. Conticommodity Services, Inc.,* 116 F.R.D. 517, 520 (S.D.N.Y.1987). Exercising that authority is a matter of discretion, however, and in *Société Nationale Industrielle Aérospatiale v. U.S. District Court,* 482 U.S. 522, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987), the Court reviewed at some length the difficulties encountered when discovery requests directed to foreign litigants seek documents and other information located in foreign jurisdictions whose laws prohibit their disclosure. The Court stressed the importance of comity in dealing with such situations, and cited with approval the *Restatement of Foreign Relations Law of the United States. See Aérospatiale,* 482 U.S. at 541-46 & n. 28, 107 S.Ct. 2542. In detailing the concerns that should inform comity analysis, the Court looked to a section of the tentative draft of that Restatement then under review, which has since become section 442 of the *Restatement (Third) of The Foreign Relations Law of the United*

States (1987) (hereinafter *"Restatement"). Id.,* 482 U.S. at 546 n. 28; *British Intern. Ins. Co. Ltd. v. Seguros La Republica, S.A.,* No. 90 Civ. 2370(JFK)(FM), 2000 WL 713057, at *9 (S.D.N.Y. June 2, 2000). Numerous courts in this circuit have subsequently been guided by the principles set forth in that section when deciding issues involving foreign discovery. *See, e.g., Reino De Espana v. American Bureau of Shipping,* No. 03 Civ. 3573, 2005 WL 1813017, at *3 (S.D.N.Y. Aug.1, 2005); *In re Auction Houses Antitrust Litigation,* 196 F.R.D. 444, 446 (S.D.N.Y.2000); *Madanes v. Madanes,* 186 F.R.D. 279, 285-86 (S.D.N.Y.1999); *Hudson v. Hermann Pfauter GmbH & Co.,* 117 F.R.D. 33, 35-37 (N.D.N.Y.1987); *Minpeco, S.A. v. Conticommodity Services, Inc.,* 116 F.R.D. 517, 529-30 (S.D.N.Y.1987).

Section 442 of the *Restatement* articulates a series of factors which courts have considered in deciding whether to exercise their power to compel production of protected documents and information:

> In deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account the importance of the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

Restatement § 442(1)(c); see, e.g., *British Intern. Ins. Co. Ltd.,* 2000 WL 713057, at *8-9; *Madanes v.*

Madanes, 186 F.R.D. at 285-86.[4] Upon consideration of those factors here, the court concludes that the bank secrecy laws cited by the defendant here should not excuse the defendant from being ordered to produce appropriately limited categories of documents and information.

The only one of the factors that arguably favors recognition of the bank secrecy laws as a bar to discovery is the fact that the vast majority of the discovery sought here concerns information that originated outside of the United States. The remaining factors, however, tilt in favor of discovery notwithstanding bank secrecy laws. As noted above, the discovery sought here is essential to the proof of the plaintiffs' case. Without it, the plaintiffs cannot prove the defendant's involvement in and knowledge of the financial transactions that are the basis of the plaintiffs' theory of liability. As to the specificity of the plaintiffs' requests, the plaintiffs' Requests for Admissions are highly specific. The requests that led to the Court's Second Production Order, on the other hand, were decidedly less specific. Nevertheless, the Second Production Order has narrowed the scope of the

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[4] Relying on a prior version of the *Restatement,* courts in the Circuit have also articulated and relied on the following formulation of factors, which overlap with those in the present *Restatement* in some respects but differ in others: (1) the competing interests of the nations whose laws are in conflict, (2) the hardship of compliance on the party or witness from whom discovery is sought, (3) the importance to the litigation of the information and documents requested, and (4) the good faith of the party resisting discovery. *See, e.g., Reino De Espana,* 2005 WL 1813017, at *3 (citing *Minpeco, S.A. v. Conticommodity Services, Inc.,* 116 F.R.D. at 522). In the current *Restatement,* the question of good faith may affect the remedy for non-compliance with a production order instead of the question whether a production order should be issued. *See Restatement* § 442(2).

requests considerably, and with information that has been obtained thus far from the Saudi Committee production, the Order can be further narrowed to achieve greater specificity.

Reasonable alternative means for obtaining the discovery sought from the defendant is not available. The transactional and customer information simply cannot be obtained without disclosure of the defendant's records. The only other sources of most of that information would be customers and other participants in the transactions at issue, and their identities are largely unknown. Even if they were known, it is unlikely that those persons would willingly disclose information to the plaintiffs for fear that any information verifying their connection to the perpetrators of violent acts would expose them to retaliation.

Finally, there is no question that important interests of the United States would be undermined by noncompliance with the discovery orders issued by the court. As the court has already recognized, those interests are articulated in statutes on which some of the claims in this litigation rest: "Congress has expressly made criminal the providing of financial and other services to terrorist organizations and expressly created a civil tort remedy for American victims of international terrorism." *Linde v. Arab Bank, PLC,* 384 F.Supp.2d 571, 584 (E.D.N.Y.2005). The discovery sought here is transactional and other evidence of precisely those financial and other services at which the statutes here are aimed. Without that discovery, the interests expressed in those statutes will be difficult if not impossible to vindicate in this action.

Although maintaining bank secrecy is an important interest of the foreign jurisdictions where the

discovery sought here resides-indeed the United States has enacted similar bank secrecy protections-that interest must yield to the interests of combating terrorism and compensating its victims. Both Jordan and Lebanon, have recognized the supremacy of those interests over bank secrecy. As members of the Middle East and North Africa Financial Action Task Force, they have expressly adopted a policy not to rely on bank secrecy laws as a basis for protecting information relating to money laundering and terrorist financing.[5] Although the Palestinian Monetary Authority has apparently not expressly adopted any policies recognizing the subordination of bank secrecy to the interest of fighting terrorism, it is not a state, *see Estates of Ungar v. Palestinian Authority* 315 F.Supp.2d 164, 177 (D.R.I.2004), and its interests therefore need not be accorded the same level of deference accorded to "states" in considering comity.[6] In any

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[5] Both Jordan and Lebanon have signed a Memorandum of Understanding Between the Governments of the Member States of the Middle East and North Africa Financial Action Task Force Against Money Laundering and Terrorist Financing, November 30, 2004 (the "MOU"). The MOU adopts Forty Recommendations on Money Laundering and the Special Recommendations on Terrorist Financing which were created by the Financial Action Task Force, an intergovernmental body established at the G-7 Summit in 1989. MOU, available at *http:// www. menafatf. org/ images/ uploadfiles/ mou- eng. pdf,* Objective 1.1. Among the Forty Recommendations are provisions which specifically renounce bank secrecy as a basis for refusing requests for mutual legal assistance in money laundering and terrorist financing investigations. *See* The Forty Recommendations, available at *http:// www. fa tf-gafi.org/dataoecd/7/40/34849567.pdf,* Recommendations 36, 40.

[6] The court does not mean to suggest that the enactments of the Palestinian Monetary Authority are entitled to no weight. Rather, since "[c]omity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases

event, as the Palestinian Monetary Authority operates in an area governed at least in part by other authorities that have themselves engaged in terrorist activity, it would be absurd for this court to exalt the bank secrecy interests of those under the jurisdiction of the Palestinian Monetary Authority over the anti-terrorism interests of the United States and other recognized states in the region.

The court thus concludes that a discovery order overruling the defendant's objections to production on the basis of foreign bank secrecy laws is appropriate. Before granting the further relief sought by the plaintiffs on their motion, however, the court believes it is appropriate to follow the guidance of one further provision of the *Restatement.* Specifically, with respect to an order requiring the disclosure of information located outside the United States which is prohibited by the law of a foreign state, "a court or agency in the United States may require the person to whom the order is directed to make a good faith effort to secure permission from the foreign authorities to make the information available." *Restatement* § 422(2)(a). It is appropriate to provide the defendant with that opportunity here. As noted above, the defendant previously unsuccessfully sought to obtain rulings from courts in Jordan and in the territories covered by Palestinian Monetary Authority that this court's orders fell within one of the exceptions to the operation of their bank secrecy laws, and successfully obtained permission from authorities in Lebanon to provide information protected by their bank secrecy laws to the

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touching the laws and interests of *other sovereign states," Aerospatiale,* 482 U.S. at 543 n. 27, 107 S.Ct. 2542 (emphasis added), its lack of status as a "sovereign state" reduces the weight of its enactments as an expression of the interests of those within its limited jurisdiction.

plaintiffs here. Now that this court has ruled that the bank secrecy laws of those jurisdictions will not serve as a bar to discovery ordered here, the defendant may be in a position to pursue avenues for obtaining permission to disclose the information from pertinent governments and authorities through letters rogatory or other devices, and should be given a specified period of time to do so. The defendant has expressed its desire to engage in this effort.[7]

The documents and information for which the defendant is to seek permission for disclosure shall include (i) the documents that were the subject of the First Production Order and (ii) the information sought by the Requests to Admit. As to the documents and information that were the subject of the Second Production Order, in view of the documents that have been disclosed concerning the Saudi Committee, it appears that the order is broader than it needs to be to satisfy interests of comity. The parties shall be prepared to address appropriate limitations on the breadth of the order at the November 30, 2006 conference.

CONCLUSION

For the foregoing reasons, the defendant's objections to providing discovery in this action based on foreign bank secrecy laws are overruled with respect to the documents and information that are the subjects of the First Production Order and the plaintiffs' Requests to Admit. The objections based on foreign bank secrecy laws are also overruled with respect to the Second Production Order, subject, however, to the court's further

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[7] The defendant has already submitted a motion for the issuance of letters rogatory to the governments of Lebanon and Jordan and to the Palestinian Monetary Authority concerning the Second Production Order.

review and narrowing of that order following discussion at the next discovery conference. In all other respects, ruling on the plaintiffs' motion is deferred, pending the outcome of any attempts by the defendant to obtain approvals to disclose the above information notwithstanding applicable bank secrecy laws.

APPENDIX D

MARCH 14, 2007 DISTRICT COURT ORDER UPHOLDING THE MAGISTRATE JUDGE'S ORDER OVERRULING PETITIONER'S FOREIGN BANK SECRECY OBJECTIONS

[caption omitted in printing]

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ORDER

GERSHON, United States District Judge:

Both plaintiffs and defendant have appealed from Magistrate Judge Pohorelsky's Decision and Order of November 25, 2006 which ruled on defendant's assertion of foreign bank secrecy laws as a basis for withholding production of documents and refusing to respond to other discovery requests. Plaintiffs also raise objections to two rulings made by Judge Pohorelsky at a conference on November 30, 2006.

Defendant's appeal of Judge Pohorelsky's overruling of its objections to production of documents or information on the basis of foreign bank secrecy laws is without merit. The ruling is neither clearly erroneous nor contrary to law. On the contrary, it is fully supported by the case law, as thoughtfully analyzed by Judge Pohorelsky.

Plaintiffs appeal from two aspects of the November 25, 2006 Decision and Order. The first ruling challenged is Judge Pohorelsky's conclusion that the Second Production Order "is broader than it needs to be to satisfy interests of comity" and his

consequent direction to plaintiffs to narrow their requests "to achieve greater specificity." That ruling was well within the magistrate judge's discretion.

The second ruling challenged is the ruling that allowed defendant the opportunity to seek approvals to disclose the discovery requested, as follows:

> Now that this court has ruled that the bank secrecy laws of those jurisdictions will not serve as a bar to discovery ordered here, the defendant may be in a position to pursue avenues for obtaining permission to disclose the information from pertinent governments and authorities through letters rogatory or other devices, and should be given a specified period of time to do so. The defendant has expressed its desire to engage in this effort.

(Judge Pohorelsky noted in a footnote that defendant had already begun the process of seeking letters rogatory.) This exercise of discretion by the magistrate judge also was within his powers and will not be overturned.

Finally, plaintiffs challenge Judge Pohorelsky's rulings, on November 30, 2006, that (1) certification that all documents relating to the Beirut Account have been produced can await defense counsel's visit to Beirut and (2) plaintiffs' deposition of Arab Bank pursuant to Rule 30(b)(6) relating to the Beirut Account shall be conducted in Beirut in accordance with prior rulings governing this action which provided that the Bank's employees would be deposed where they reside. Judge Pohorelsky recognized that there is presently an issue of safety to American lawyers traveling to Beirut and concluded that there was no urgency for counsel on either side to travel to Beirut. He noted that there

is other discovery which can be pursued first. He further ruled that, if the security situation remains unchanged, he can revisit his rulings and another location can be ordered. Status Conference Tr., Nov. 30, 2006 at 114-15. It is hard to imagine rulings more clearly within the discretion of the supervising magistrate judge than these. They are affirmed.

In sum, all of the appeals, by both defendant and plaintiffs, are denied and the magistrate judge's rulings affirmed.

I note that, to date, no "specific period of time" as contemplated by Judge Pohorelsky has been fixed for defendant's effort to obtain permission to turn over the documents and information covered by foreign bank secrecy laws, nor has a date been fixed for the production of the documents and information absent permission. In order to assure that production is not unduly delayed, it is contemplated that Judge Pohorelsky will promptly set an appropriate date by which the Bank will determine whether it can achieve permission to turn over the documents.

SO ORDERED.

APPENDIX E

EXCERPTS FROM SENATE REPORT NO. 102–342, July 27, 1992

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J. TERRORISM CIVIL REMEDY

Title X is known as the Civil Remedies for Victims of Terrorism. This legislation was first introduced in the 101st Congress (as S. 2465) by Senator Charles Grassley. On July 25, 1990, the Senate Judiciary Subcommittee on Courts and Administrative Practice held a hearing on the Bill. It passed the subcommittee on September 25, 1990, and was thereafter incorporated into the fiscal year 1992 Military Construction Appropriations bill. In Conference, the conferees intended to delete the provisions of Civil Remedies for Victims of Terrorism. The enrolling clerk, however, erred and the provisions were included in Public Law 101–519 of November 5, 1990.

The Civil Remedies sections of the Military Construction Appropriations Act were repealed in 1991, and Senator Grassley reintroduced the bill, S. 740, in the 102d Congress. The Senate passed this bill by voice vote on April 16, 1991.

Title X would allow the law to catch up with contemporary reality by providing victims of terrorism with a remedy for a wrong that, by its nature, falls outside the usual jurisdictional categories of wrongs that national legal systems have traditionally addressed. By its provisions for compensatory damages, tremble damages, and the imposition of liability at any point along the causal

chain of terrorism, it would interrupt, or at least imperil, the flow of money.

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Section 2336. Other limitations

This section excludes from the scope of any civil action a claim brought on account of "an act of war." The intention of this provision is to bar actions for injuries that result from military action by recognized governments as opposed to terrorists, even though governments also sometimes target civilian populations. Injuries received by noncombatants as a result of open, armed conflict, including civil war, should not be actionable.

The section also provides that a stay of discovery may be sought by the Department of Justice, in the event of a pending criminal investigation or prosecution of the incident. The Department of Justice may object to the discovery request in certain limited circumstances–if compliance will interfere with a criminal investigation or a national security operation related to the incident. The objection will be heard by the judge, in camera, and it is within the court's discretion as to whether to grant the stay of discovery. In no case shall a stay of discovery be grounds for dismissal of the case.

This section also provides that a stay of the civil action may be sought by the Attorney General of the United States. The court has discretion as to whether to grant the stay and may only grant a stay if the continuation of the civil action will substantially interfere with a criminal prosecution which involves the same subject matter and in which an indictment has been returned, or if it will interfere with national security operations related to the terrorist incident that is the subject of the civil action. A stay may be granted for up to 6

months and may be renewed for additional 6-month periods until the criminal prosecution is completed or dismissed.

Sections (b) and (c) were added to afford the Department of Justice the discretion it needs to conduct criminal investigations and prosecutions. These sections merely set forth well recognized standards for Government intervention in civil actions. The Department of Justice, under rule 26 of the Federal Rules of Civil Procedure, has the authority to assert a privilege against discovery of its investigative files. These provisions do not enhance the rights of the U.S. Government. These sections are not, however, intended to prevent victims and their survivors from conducting civil litigation against terrorists. It is expected the Department of Justice will demonstrate to the court's satisfaction that there is a live investigation and a significant likelihood of prosecution, or conduct of a national security operation, in order to stay the discovery. In instances where the Attorney General seeks to stay a civil action, the Attorney General will have a heavy burden of proof in order to establish that the continuation of the civil action will substantially interfere with a criminal prosecution underway or the conduct of a national security operation related to the terrorist incident which gave rise to the civil action. Moreover, the victims or their survivors are entitled to be heard at the Department of Justice or Attorney General's arguments on behalf of a stay.

APPENDIX F

EXCERPT FROM CONGRESSIONAL RECORD --- SENATE PROCEEDINGS AND DEBATES OF THE 102ND CONGRESS, FIRST SESSION TUESDAY, APRIL 16, 1991

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THE ANTITERRORISM ACT OF 1991

Mr. GRASSLEY.

Mr. President, last April, I, along with Senator HEFLIN, first introduced the Antiterrorism Act of 1990 <ATA> S. 740. It was introduced in the House by Congressman FEIGHAN and HYDE. On October 1, the ATA unanimously passed the Senate as part of the military construction appropriations bill.

This legislation would, for the first time, provide for Federal civil remedies for American victims of international terrorism.

Specifically, the ATA amends title 18 of the United States Code, which extends American criminal jurisdiction over terrorists. S. 740 provides that any national of the United States, injured by an act of international terrorism, his estate, heirs, or survivors, may sue in U.S. district court. The ATA removes the jurisdictional hurdles in the courts confronting victims and it empowers victims with all the weapons available in civil litigation, including: Subpoenas for financial records, banking information, and shipping receipts-this bill provides victims with the tools necessary to find terrorists' assets and seize them. The ATA accords victims of terrorism the remedies of American tort law, including treble damages and attorney's fees.

The ATA garnered strong bipartisan support in both the House and Senate. Ten of the 14 members of the Senate Judiciary Committee cosponsored the measure. Last July 25, the Subcommittee on Courts and Administrative Practice held a hearing where families of victims of terrorism testified along the legal experts, and the administration. The ATA was unanimously polled out of subcommittee.

The families of victims of Pan Am 103 testified in support of the ATA and have worked tirelessly for its enactment. Lisa and Ilsa Klinghoffer, daughters of American Leon Klinghroffer who was murdered by PLO terrorists on the Achille Lauro Cruisliner, also testified in support of Grassley-Heflin.

Last June, a New York Federal District Court ruled in the Klinghoffer versus PLO case (after years of litigation), that the U.S. courts have jurisdiction over the PLO. The New York court set the precedent; S. 740 would codify that ruling and makes the right of American victims definitive.

Due to an enrolling error, the ATA was enacted into law on November 5, 1990 as part of the Military Construction Appropriations Act-Public Law 101-519. The ATA stood as the law of the land for 5 months. It was promulgated and relied upon. In the 5 months that the ATA was law, no problems were found with it or its application.

In fact, in March, the Second Circuit Court of Appeals heard oral arguments in the PLO's appeal of the district court's decision granting finding jurisdiction in the Klinghoffer case. Several parties in the case, including the Klinghoffers-and the Anti-Defamation League in an amicus curiae brief-cited and relied upon the ATA in their appellate briefs.

Unfortunately, this law was repealed just a few weeks after oral argument; albeit, on purely technical grounds. The repeal came despite the strong support in Congress for the law. However, I am pleased that once again the Senate is unanimously supporting the ATA.

This should send a clear signal to the courts that the repeal of the ATA a few weeks ago was a wholly technical matter and did not in any way reflect Congress' intent on the substance of the legislation. Our resolve to fight terrorism and equip victims with civil remedies for terrorists acts is as strong as ever.

I now urge the House to act expeditiously and pass the ATA. The Senate unanimously supports the ATA. President Bush already has signed the ATA into law once, without objection: Now is the time for the House to join us in passage of the ATA.

Thank you, Mr. President, and I thank my colleagues for their support of this important legislation.

APPENDIX G

EXCERPTS FROM JULY 30, 2013 STATUS CONFERENCE BEFORE THE HONORABLE BRIAN M. COGAN, UNITED STATES DISTRICT JUDGE

[caption omitted in printing]

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[Tr. 98:23-99:25] MR. OSEN: I will help with the spelling later. But, your Honor, one of the reasons this motion was put forward is that bank witnesses have testified that they knew or heard of great things in the last couple of years that the Saudi Committee has done. I won't give you a time frame. Let's say 2008 or 2006, they joined with Save the Children, or what have you. And it's that, that's why we note we say, especially things after 2004, because clearly after we sued the defendant and after this became public, what they contributed to or what they said afterwards is self-serving, but irrelevant to the time frame that's at issue in the case.

THE COURT: Okay. This is another one I'm going to have to take a step at a time. I will say, because the plaintiffs are going first, I will be in a position to make a judgment by the time the defendant's case comes along as to how much of it I -- how much of this I will allow the defendant to do. You know, I don't want the plaintiffs to give a distorted view of what the Saudi Committee was. At the same time, I don't want the jury speculating, if the evidence is hard enough that it did this, that the Saudi Committee did what I will call the negative acts, that it should be excused, and the

bank should be excused because there were positive acts. My understanding is that's not how the defendant is framing the issue. The defendant is framing it in terms of, would the bank reasonably have known, based on all of these good things, that the Saudi Committee was doing it? But we'll take it a question at a time and see how it comes out.

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[Tr. 136:21-137:18] MR. WERBNER: Arab Bank has taken the position in the prove every single thing, we are not stipulating, that some of these maybe were street crimes. They were violent criminal acts, but they weren't terrorism.

THE COURT: How could a jury tell from a photograph of scattered arms and legs whether it's a street crime or a terrorist? I guess asking the question kind of answers itself, right?

MR. WERBNER: We are going to call like a police officer who investigated it, and these had the hallmarks of a Hamas, in particular, suicide bombing. I mean, some of them they are not even acknowledging were bombings.

THE COURT: Do you really want to fight them on this issue?

MR. STEPHENS: Your Honor, I believe they have an uphill climb to convince the jury with this giant bite of attacks that they have chosen to all bundle up in one trial. Aha, you see, it's all these attacks, and it's all Hamas, and there's no question about it. I don't believe it's actually that simple. If you take a look at the expert reports, it's not simple at all. And it may be that somebody took credit for something. It may be that they did have something to do with it.

APPENDIX H

EXCERPT FROM MARCH 6, 2012 ORAL ARGUMENT BEFORE THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

[caption omitted in printing]

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[Tr. 3:25-4:17] JUDGE SUSAN CARNEY: Could you explain why this order wouldn't be reviewable at the end after the whole process had been gone through and there was a jury verdict?

STEPHEN M. SHAPIRO: That's a very good question. The answer is this bank could easily be destroyed before appellate review occurs because of a run on the bank. If there was an adjudication under this flawed instruction that it was a terrorist accomplice its correspondent banks would abandon it, its depositors would flee and the bank would not survive long enough to reach this Court on appeal from a final judgment. And that's an irreparable injury.

JUDGE DENNY CHIN: That argument could be made in any important case in which a party disagrees with a jury instruction to be given by the Court.

APPENDIX I

DOCKET ENTRY FOR PETITIONER'S SECOND PETITION FOR A WRIT OF MANDAMUS

Court of Appeals, 2nd Circuit

Notice of Docket Activity

The following transaction was entered on 09/13/2013 at 8:25:15 AM EDT and filed on 08/29/2013

Case Name: In Re: Arab Bank, PLC

Case Number: 13-3253

Document(s): Document(s)

Docket Text:

ORIGINAL PROCEEDINGS, PETITION FOR WRIT OF MANDAMUS, on behalf of Petitioner Arab Bank, PLC, FILED.[1040061] [13-3253]