UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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THOMAS BURNETT, SR., *et al*. Civil Action No. 02-1616 (JR)

Plaintiffs

- against –

AL BARAKA INVESTMENT & DEVELOPMENT CORP., *et al.*,

Defendants.

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PLAINTIFFS' SUR-REPLY MEMORANDUM OF LAW IN FURTHER OPPOSITION TO MOTION OF SULTAN BIN ABDULAZIZ AL-SAUD TO DISMISS THE CLAIMS AGAINST HIM

September 2, 2003

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INTRODUCTION

Prince Sultan's reply brief on his motion to dismiss raises several new arguments not presented in his moving papers. Plaintiffs respectfully submit this sur-reply memorandum to address those issues.[1]

Chief among the issues on which Sultan submits new material is the justiciability of this case. Abandoning the effort to make a legal argument, Sultan has submitted a declaration from Chas. W. Freeman, who purports to be an "expert," to support his contention that this case presents a non-justiciable political question. This declaration does not respond to arguments made by plaintiffs in their opposition. It represents a new argument, not properly asserted on reply. Nor is Mr. Freeman in any sense an "expert" with respect to these matters. As detailed below, he is, rather, a self-described "longstanding friend" of the Saudi royal family, who is president of (and receives a salary from) an organization funded in part by at least one of Sultan's co-defendants in this lawsuit. His declaration, setting forth a biased and outdated point of view, sheds no light on the justiciability of this case under the political question, or any other, doctrine. Rather, it consists primarily of a recitation of Mr. Freeman's views about the dependence of the United States on the Kingdom of Saudi Arabia, along with threats of retaliation by the Kingdom should this Court have the audacity to entertain plaintiffs' claims. But Sultan (and Mr. Freeman) give insufficient weight to the separation of powers and misapprehend the nature of the political question doctrine, which has never been understood to preclude courts from adjudicating cases simply because they may have political impact. The issue for this Court

[1] In an effort to limit the length of this sur-reply, plaintiffs respond only to those points in Sultan's reply that are new or particularly egregious misstatements or misrepresentations of plaintiffs' positions. That a particular point in Sultan's reply is not addressed here should not be construed in any way as an abandonment of any point in plaintiffs' initial opposition brief or a concession to any of defendant's arguments.

is not whether defendant, or his government, would prefer to deal with the Executive Branch or even whether the United States is dependent on the good will of the King of Saudi Arabia, but rather whether this case calls for the Court to tread into areas constitutionally committed to the Executive Branch. As set forth in plaintiffs' initial opposition brief ("Plaintiffs' Opp.") and below, it does not. And while Mr. Freeman fears that the government of Saudi Arabia will be "insulted" by this case, the true insult lies in the suggestion that this Court can be intimidated out of performing its constitutionally-committed function to hear and decide cases by threats from a foreign prince.

Sultan also makes new arguments with respect to the Foreign Sovereign Immunities Act ("FSIA") and the personal jurisdiction of this Court over him. Because of the importance of these issues, and because Sultan has addressed them more fully in his Reply than in his opening brief, plaintiffs respond here to those arguments, to demonstrate that Sultan has no immunity and that this Court has jurisdiction over him.

ARGUMENT

I. THE POLITICAL QUESTION DOCTRINE IS INAPPLICABLE AND PROVIDES NO BASIS FOR THIS COURT TO REFUSE TO HEAR PLAINTIFFS' CLAIMS[2]

As discussed in plaintiffs' initial opposition brief, the Supreme Court decision in *Japan Whaling Assn. v. American Cetacean Society*, 478 U.S. 221 (1978), sets forth the standard for application of the political question doctrine. Under *Japan Whaling*, it is clear that this case does not present a non-justiciable political question. Sultan attempts to distinguish this controlling

[2] In its Order of July 9, 2003, concerning plaintiffs' motion to take discovery in connection with Sultan's motion to dismiss, this Court held that it would address "political question nonjusticiability" prior to reaching Sultan's arguments concerning the FSIA and personal jurisdiction. In accordance with the Court's Order, plaintiffs address justiciability first.

precedent largely by trying to suggest that a direct challenge to a decision of the Executive Branch concerning economic sanctions against an important ally poses less of a political question than does an action that raises no challenge to any decision of the Executive Branch. In doing so, Sultan completely misapprehends the nature of the political question doctrine. As the Supreme Court has explained, "The nonjusticiability of a political question is primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962). The issue is whether this case intrudes on a function committed solely to the Executive Branch. *Japan Whaling*, 478 U.S. at 230; *Baker*, 369 U.S. at 211. It is clear that, whatever the role of the Executive Branch in conducting foreign relations, determination of the liability of foreigners, even foreign government officials, for torts committed in the United States has not been committed to the Executive Branch. Rather, Congress has specifically conferred jurisdiction on the federal courts to determine the liability for foreign government officials for torts committed here. *See* 28 U.S.C. § 1605(a)(5).[3] Under *Baker* and *Japan Whaling*, it is clear that this case

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[3] Commitment of an issue to the Executive Branch is one of the six factors set forth in *Baker* for identifying non-jusiticable political questions. *See Baker*, 369 U.S. at 217. These factors include:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. None of these factors are applicable here. As noted in the text, far from being committed to another branch of government, this question is specifically committed to the courts for resolution. *See* 28 U.S.C. §§ 1602, 1605; 18 U.S.C. § 2333; 28 U.S.C. § 1350. As discussed in plaintiffs' initial opposition, the standards for resolving the case are judicial in nature and manageable, *see* Plaintiffs' Opp. at 40-41. Moreover, because the Anti-Terrorism Act prescribes the standard for this case, the kinds of policy decisions that call for nonjudicial discretion have already been made by Congress. The remaining factors are similarly inapplicable. The (*footnote continued on next page*)

presents no political question.

Unable to fit this case into the controlling Supreme Court precedents demonstrating the justiciability of this case and the responsibility of this Court to adjudicate it, Sultan attempts to change the subject. He does so by the submission of a 15-page declaration from a former ambassador, Chas. W. Freeman, predicting dire consequences from the prosecution of this lawsuit. Through this declaration, Sultan suggests: (a) that the U.S. is dependent on Saudi Arabia in numerous ways, *see* Freeman Dec. at 3-14; (b) that the Saudi government would be "insulted" by the prosecution of this case, *see id.* at 11; and (c) that the Executive Branch cannot credibly conduct foreign affairs if it cannot control what cases are pursued against foreign officials in the courts of the United States. *See id.* at 14. None of these propositions can withstand examination.

Taking the last proposition first, it should be evident that Executive Branch control of the Judiciary is antithetical to the very separation of powers that the political question doctrine is designed to protect. Sultan's argument, apparently, is not that this case intrudes on the domain of the Executive, but rather that the Executive could more easily and more freely carry out its role if other branches of government did not insist on acting independently. That this may be so makes it no less dangerous a proposition. The independence of the judiciary is fundamental to the American system of government and to the freedoms that Americans cherish. A one-branch government would, no doubt, be more efficient and would permit the United States always to

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Executive Branch has never taken a position on the culpability of individual Saudis, even members of the Saudi royal family, and nothing in this lawsuit requires the Court to contradict or embarrass any decisions of the Executive with respect to our relations with the Saudi government. Indeed, as the Second Circuit has pointed out, the fact that "cases present issues that arise in a politically charged context . . . does not transform them into cases involving nonjusticiable political questions." *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995).

speak with one voice, but would not, in the judgment of the framers, ensure the rule of law and protect the liberties that are at the heart of our democracy. As Justice Jackson wrote:

> The example of. . . unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).[4]

Moreover, some overlap in the work of the other branches with affairs conducted by the Executive is intrinsic to the system of checks and balances embodied in our Constitution. As Justice Brandies explained nearly 80 years ago:

> The separation of the powers of government did not make each branch completely autonomous. . . .The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

Myers v. United States, 272 U.S. 52, 292-93 (1926) (Brandeis, J., dissenting). This is true not only with respect to the Executive and the Judiciary, but also with the Legislative branch as well. The recent Congressional hearings into the September 11 attacks are a timely reminder that each branch of our government has a role to play, even in matters that touch on foreign affairs. Mr. Freeman's vision of the Executive Branch conducting foreign policy unfettered by Congress or

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[4] Separation of powers has been viewed as so fundamental to the American system of government that even the expediencies of war-time have not been found to provide sufficient basis to disregard it. *Youngstown Sheet & Tube* concerns the seizure, in 1952, of the nation's steel industry by President Truman to ensure the continued supply of steel necessary to support the then-ongoing Korean War. In the face of the Executive's claim of war-time necessity, the Supreme Court upheld an order from a judge of this court enjoining the seizure as beyond the authority of the Executive. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). This case does not ask this Court to enjoin or even question any action of the Executive Branch. But *Youngstown Sheet & Tube* makes clear that even the desire of the Executive Branch for a free (*footnote continued on next page*)

by a court's adjudication of specific cases with international connections does not correspond to the tripartite government created by our Constitution.

Indeed, plaintiffs note that *any* assertion of jurisdiction over a foreign sovereign in a U.S. court must, of necessity, affect the foreign relations that the Executive Branch must conduct with that sovereign. *See Leutwyler v. Office of her Majesty Queen Rania Al-Abdullah*, 184 F.Supp.2d 277, 303 (S.D.N.Y. 2001) ("Considering that the defendant in an FSIA action necessarily must be a political subdivision or an agency or instrumentality of the foreign state to fall within the jurisdictional scope of that statute, any court that exercises subject matter jurisdiction over such an action will be required to adjudicate issues relating to conduct of a foreign sovereign."). But Congress has determined that the decision as to when a case may proceed against a foreign sovereign is to be made by the Judicial, not the Executive, Branch:

> The Congress finds that the determination by the United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. . . . Claims of foreign states to immunity should henceforth be decided by the courts of the United States . . . .

28 U.S.C. § 1602.[5] Sultan's argument that, independent of the standards set forth in the FSIA, this Court should decline to hear a case against a foreign sovereign because of a potential impact

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hand in conducting foreign affairs must give way to the separate functions of each branch of government.

[5] In hearings concerning a proposed amendment to the Foreign Sovereign Immunities Act, Congress heard testimony about the inadequacies of relying on the Executive Branch to determine when Americans can seek redress against foreign states. H.R. Report 103-702, *3 (August 16, 1994). And the FSIA itself reflects Congress's determination that the courts are best suited to "protect the rights of *both* foreign states *and litigants* . . . ." 28 U.S.C. § 1602 (emphasis added). The Executive Branch, by contrast, has been viewed as suffering from a tendency to be too deferential to foreign governments, at the expense of the rights of American litigants. *See* H.R. Report 103-702, *3. The Freeman declaration illustrates precisely this tendency and underscores why Congress legislated standards for balancing the interests of (*footnote continued on next page*)

on foreign relations asks this Court not only to surrender its independence, but to disregard the considered judgment (and enactments) of Congress, as well.[6] *See* Declaration of Jeane J. Kirkpatrick, ¶¶ 9-10, Exhibit 1; *see also* Declaration of W. Michael Reisman, ¶ 3, Exhibit 2.

In sum, Sultan offers a novel approach to the "political question" doctrine unsupported by any case law. What the "political question" doctrine addresses is the incursion of the courts into the province of the Executive; it provides no basis to expand the powers of the Executive so as to invade the province of the courts.

Sultan also suggests, through Mr. Freeman, that the Kingdom of Saudi Arabia would be "deeply insulted" if this lawsuit is allowed to proceed. *See* Freeman Dec. at 11. He details numerous ways that he believes the U.S. is dependent on Saudi Arabia and "predicts" (or more accurately, threatens) that the Kingdom may retaliate by withdrawal of its favor if this case is not dismissed. One can only surmise that what insults the Kingdom is the independence of a judiciary that makes its own findings on matters before it, even when those matters affect friends of the Executive. One may surmise, as well, that the Kingdom is "insulted" by the rule of law, under which wealth, connections, special pleading and favors count for little and the law is applied equally to all. The image of "blind justice" famously represents our system of law and

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foreign sovereigns and litigants and delegated to the courts the task of applying the statutory standards.

[6] That the FSIA, and not the "political question" doctrine, is the appropriate mechanism for addressing the concerns raised by Sultan is apparent from the origins of sovereign immunity itself. *See First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972) (sovereign immunity doctrine "judicially created to effectuate general notions of comity among nations and among the respective branches of the Federal Government"). The replacement of the judge-made doctrine, which relied on deference to the Executive Branch, with the FSIA thus represents a clear choice by Congress that the standards set forth in the statute would be used to address the issues of international comity and coordination among the branches of government that inevitably arise from the assertion of jurisdiction over a foreign sovereign. The commitment (*footnote continued on next page*)

the American court system is reknowned the world over as one in which legal rights are respected and can be vindicated. It may be that in Saudi Arabia a complainant must seek the favor of a prince for his case to succeed, but in the United States, a just cause under the law has always been sufficient, regardless of the identity or connections of the defendant.

Plaintiffs recognize that it may be difficult for Prince Sultan and his government to appreciate the independent judiciary and the rule of law that are so fundamental to our system, because neither of these institutions exists in the Kingdom of Saudi Arabia. But the possibility that those who live under vastly different systems may be insulted by the workings of our most cherished institutions provides no justification for abandonment of those institutions at the behest of a foreign prince. A nation that would not, as Sultan's nephew and co-defendant Turki al-Faisal bin Abdulaziz al-Saud has pointed out, pay even one cent for tribute, *see* Turki Reply at 9 n.5, surely cannot and will not compromise its fundamental values to avoid displeasing another country.

On the other hand, it may be that Sultan's government appreciates these values more than Mr. Freeman gives it credit for. In an interview broadcast by the BBC on August 15, 2003, Adel Al-Jubeir, foreign policy advisor to Crown Prince Abdullah of Saudi Arabia, was asked about the allegations of this lawsuit and whether the Saudi government disputes them. He responded:

> Of course they do, I mean of course we dispute it which is a legal case that is now in the courts, it is up to the courts to decide what to do with the case. We in the government are not party to this lawsuit and so we in general don't comment on it. Let the, let the, let justice take its course, so to speak. If the charges are true, somebody will have to pay the price. If the charges are nonsense, then the courts will decide that.[7]

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of these questions to the courts precludes the application of the "political question" doctrine, which applies only when an issue has been committed to another branch of government.

[7] The interview is available on the internet at: news.bbc.co.uk/2/hi/programmes/hardtalk/3153801.stm.

Apparently, the Saudi government is content to let this issue be decided in court, even if Sultan is not.

Before turning to Sultan's argument that continuation of this case will injure U.S.-Saudi relations to the detriment of the United States, plaintiffs cannot let pass without comment the submission of the Freeman declaration as a purported "expert" opinion on U.S.-Saudi relations. Mr. Freeman is no neutral "expert." He is President of (and receives compensation from) the Middle East Policy Council ("MEPC"), which is funded in part by the Saudi Binladen Group – one of the defendants in this lawsuit.[8] Indeed, one of Mr. Freeman's fellow board members at MEPC is Dr. Fuad A. Rihani, is the Director of "Research and Development" at the Saudi Binladen Group. (Although Mr. Freeman's declaration discloses his connection with MEPC, it omits to mention the funding MEPC receives from the Saudi Binladen Group that gives him a substantial conflict of interest in presenting himself as an "expert.")

Freeman is, moreover, a partisan and apologist for the Saudi government. In an article published on the MEPC website dated September, 2002, Freeman described himself as "a longstanding friend of Saudi Arabia and its ruling family."[9] Not only is Mr. Freeman a "friend" of the Saudi royal family, his ties to Prince Sultan himself are sufficiently strong that he was chosen by a prominent Saudi businessman as one of the best people to lobby Sultan in connection with a commission dispute. Given these ties, it is hardly surprising that Mr. Freeman concludes, in his "expert" opinion, that prosecution of this lawsuit would be ill-advised, but Mr. Freeman is no disinterested expert and, as explained above, his views have little to do with the

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[8] The Saudi Binladen Group's funding of MEPC was reported in the *Wall Street Journal*, *see* "Bin Laden Family Could Profit From a Jump In Defense Spending Due to Ties to U.S. Bank," *Wall Street Journal*, September 27, 2001, Exhibit 3.

[9] http://www.mepc.org/public_asp/whats/sacomments.asp.

issues that this Court must consider.

But beyond Freeman's partisanship and bias, Freeman's views should not be accepted because they are nothing but an attempt to predict the future and are based on an outdated viewpoint that others in the field of diplomacy reject. Freeman has been out of government for nearly a decade, during which time the Khobar Towers bombing, the African embassy bombings, the bombing of the *Cole* in Yemen, the September 11 attacks, the routing of the Taliban from Afghanistan, the Bali bombing, the withdrawal of U.S. forces from Saudi Arabia, the second Iraq war, and the recent Riyadh bombings have dramatically altered the context for U.S.-Saudi relations. As William Wechsler, former Director for Global Issues and Multilateral Affairs at the National Security Council, former chair of an interagency group tasked with disrupting al-Qaeda's financial network, and current Co-Director of the Council on Foreign Relations Independent Task Force on Terrorist Financing, explains, Freeman's views on the relations between the United States and Saudi Arabia are "generally outdated" and are products of the "previous and simpler era in which he served in government . . . ." Declaration of William Wechsler ("Wechsler Dec.") at p.4, Exhibit 4.

In the current climate, Wechsler believes, "U.S.-Saudi relations will come to resemble more closely normal U.S. bilateral relations with other large, important regional powers with which the U.S. has a complex pattern of bilateral relations . . . ." Wechsler Dec. at 6-7. In that context, Wechsler believes, "any likely negative ramifications of such private litigation will be manageable in the context of evolving U.S.-Saudi diplomatic relations." *Id.* at 8. Former U.S. Permanent Representative to the United Nations, Jeane Kirkpatrick agrees that many aspects of Freeman's predictions about the effect of this lawsuit "are not an accurate assessment of the prevailing political facts and relevant policy considerations." Declaration of Jeane J. Kirkpatrick

("Kirkpatrick Dec."), ¶ 6, Exhibit 1.

This Court is not called upon to decide whether Mr. Freeman or Mr. Wechsler is a better prognosticator of the future of U.S.-Saudi relations. It is sufficient to note that Mr. Freeman's is not the only, nor the most current, view of the matter. But the long-term impact of this case (or of any other development) on U.S.-Saudi relations, and how that impact should be managed, is beyond the purview of this Court. As Ambassador Kirkpatrick makes clear in her affidavit, no doctrine or principle of law permits this Court to decline to adjudicate a case out of fear that the defendant may be in a position to retaliate against the United States. *See* Kirkpatrick Dec., ¶ 8. The overall relations between the United States and Saudi Arabia are indeed committed to the Executive Branch and to Congress. Plaintiffs are confident that our government and Sultan's can continue to cooperate in areas of mutual interest and that the Executive Branch, coordinating with Congress, can address the precise contours of that relationship in response to developments in this Court, in Congress, and around the world. [10]

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[10] Sultan asserts that the U.S. traditionally expresses its views on such issues only upon invitation from the court and submits samples of such requests. *See* Sultan Reply at 23 & n.6. To the extent that these assertions may be read as a suggestion that this Court solicit an opinion from the Executive Branch, that suggestion should be rejected. To begin with, Sultan has had many months to ask the State Department to intervene on his behalf. There is no reason to delay these motions, which are ready for argument, at this late juncture. Moreover, under 28 U.S.C. § 517, the United States does not need the invitation of this Court to express its views. The existence of this litigation has been widely covered in the press. If the United States believed it was important to express its views, it could have done so already.

There is certainly no law, rule or practice which requires this Court to seek the views of the United States. *See First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972) (Powell, J., concurring) ("I would be uncomfortable with a doctrine that would require the judiciary to receive the Executive's permission before invoking its jurisdiction. Such a notion, in the name of the doctrine of separation of powers seems to me to conflict with that very doctrine."). And, as the Second Circuit has noted, it is up to the Executive Branch to take the initiative to make its views known to the judiciary when private litigation implicates its interests. If the Executive Branch remains silent, "it would not be wise for the courts unnecessarily to force the Government's hand." *Calderon v. Naviera Vacuba S/A*, 325 F.2d 76, 66 (2d Cir. (*footnote continued on next page*)

The remainder of Sultan's arguments similarly provides no basis for this Court to decline to hear this case. For example, Sultan's reply brief mischaracterizes the opinion of the D.C. Circuit in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), falsely claiming that two of the three justices in that case affirmed dismissal of plaintiffs' ATCA claims "on grounds that it was barred by the political question doctrine." Sultan Br. at 19. Judge Robb indeed opined that plaintiffs' claims – arising from a terrorist attack in Israel – could not be adjudicated under the political question doctrine. But, as this Court recognized in its opinion of July 25, 2003, neither Judge Bork nor Judge Edwards agreed with that reasoning. *See Burnett v. Al-Baraka Investment and Devel. Corp.*, 2003 WL 21730530, *8 (D.D.C. July 25, 2003) [hereinafter "July 25 Opinion"]. Rather, Judge Bork based his opinion on his view that the ATCA did not create a cause of action. 726 F.2d at 799-819. Indeed, Judge Bork specifically noted that he did *not* base his decision on the political question doctrine and further noted that, even if he were inclined to do so, Supreme Court precedent would not support that approach, *see* 726 F.2d at 803, 822. Judge Edwards, by contrast, accepted that ATCA created a cause of action and that the case was justiciable, but found that the particular acts alleged by plaintiffs did not violate the "law of nations" when committed by individuals. 726 F.2d at 775-798. Judge Robb's decision, then, is more in the way of a dissent and it is clear that Judge Robb so understood it. S*ee* 726 F.2d at 823 (noting that neither Judge Edwards nor Judge Bork had reflected on what Judge Robb viewed to be the "the inherent inability of federal courts to deal with cases such as

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1963), *mod. on other grounds* 328 F.2d 578 (2d Cir. 1964) (*per curiam*). *See also In re Tobacco/Governmental Health Care Costs Litig.*, 100 F.Supp.2d 31, 38 (D.D.C. 2000) ("to the extent that the United States Government is concerned about the potential adverse foreign relations consequences from the resolution of these lawsuits, the Executive Branch possesses the competence, capacity, and incentive to make its views known . . . to this Court . . ."). It seems (*footnote continued on next page*)

this one"). Certainly, Judge Robb's opinion does not override the later decisions of the Supreme Court, in *Japan Whaling*, and the D.C. Circuit, in *South African Airways v. Dole*, 817 F.2d 119 (D.C. Cir. 1987), which make clear the more limited scope of the "political question" doctrine. [11]

II. PRINCE SULTAN HAS NO IMMUNITY WITH RESPECT TO THE CLAIMS IN THIS LAWSUIT

A. The "State-Sponsored Terrorism" Exception to the FSIA Does Not Preclude Application of the "Tortious Act" and "Commercial Activity" Exceptions

Sultan claims that the existence of the "state-sponsored terrorism" exception to the FSIA, 28 U.S.C. § 1605(a)(7) (which all parties agree is inapplicable to the claims against this defendant), precludes reliance on any other FSIA exception. *See* Sultan Reply at 7-8. This argument is nonsense. Neither the language nor the history of § 1605(a)(7) supports such an interpretation.

Sultan relies on that portion of the terrorism exception that directs that a court "shall decline to hear *a claim under this paragraph* . . . if the foreign state was not designated as a state sponsor of terrorism," § 1605(a)(7)(emphasis added), to suggest that this Court should decline to hear plaintiffs' claims because Saudi Arabia has not been so designated. But Sultan ignores the highlighted words -- "a claim under this paragraph." Plaintiffs have not brought a claim under

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most appropriate for this Court to defer to the Executive Branch's decision *not* to express its views here.

[11] Nor does *Sarei v. Rio Tinto PLC*, 221 F.Supp.2d 1116 (C.D.Cal. 2002) compel a different result. To begin with, to the extent that *Sarei*, a district court case from California, is inconsistent with Supreme Court precedents, including *Japan Whaling*, it is not good law and should not be followed. Moreover, the plaintiffs in *Sarei* alleged human rights violations over the course of a civil war in Papua New Guinea during which one region of the country sought to secede. The adjudication of that case would have required the court to involve itself in the internal affairs of Papua New Guinea. By contrast, this case does not involve the Court at all in the internal affairs of Saudi Arabia. Plaintiffs seek redress not for injuries that occurred over there, pursuant to complex policies that it may be difficult for a court to judge, but for injuries (*footnote continued on next page*)

§ 1605(a)(7) against this defendant. Nothing in the language of § 1605(a)(7) precludes the Court from hearing a claim against a foreign sovereign for an act of terrorism under any of the other exceptions to the FSIA set forth in other paragraphs of § 1605, so long as the requirements of that other exception are met.

Nor does plaintiffs' reliance on the "tortious act" and/or "commercial activity" exceptions represent some kind of "end-run" around the limitations of § 1605(a)(7). Each of the exceptions to sovereign immunity in § 1605 provides a separate and independent basis of jurisdiction over a foreign sovereign. Use of the "tortious act" exception here in no way undermines the policies of the "state sponsored terrorism" exception.

In particular, § 1605(a)(5) provides jurisdiction over torts, including acts of terrorism, that take place in the United States, while § 1605(a)(7) provides jurisdiction more broadly for acts of terrorism that take place abroad. This was the precise holding of the court in *Flatow v. Islamic Republic of Iran*, 999 F.Supp. 1 (D.D.C. 1998). In that case, the court considered the extraterritorial application of § 1605(a)(7) to determine whether the then-recently enacted state-sponsored terrorism exception extended to acts of terrorism that occurred outside the United States. Citing *Letelier v. Republic of Chile*, 488 F.Supp. 665 (D.DC. 1980) and *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989), the court reasoned: "*As 28 U.S.C. § 1605(a)(5) already provides jurisdiction over state-sponsored terrorist acts in the United States*, the state sponsored terrorism exception would be redundant if it were held to apply only within the United States." *Flatow*, 999 F.Supp. at 15 (emphasis added; citations omitted).

The history of the "state-sponsored terrorism" exception confirms that it was not added to

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that occurred in the United States as a result of terrorist attacks that clearly violated U.S. and international law.

limit jurisdiction where a terrorist act is carried out or assisted by a foreign sovereign in the United States, but rather to authorize jurisdiction where the terrorist act took place outside the United States. A predecessor to the bill that ultimately enacted § 1607(a)(7), entitled the Foreign Sovereign Immunities Amendments, H.R. 934, was proposed in 1994. The House Report on that bill discussed the current state of the law under the FSIA and focused on the need for legislation to provide a cause of action for Americans injured by foreign states. *See* House Report No. 103-702 (August 16, 1994). The section entitled "Need for Legislation" begins "H.R. 934 is necessary to clarify and expand the circumstances in which an American who is grievously mistreated *abroad* by a foreign government can bring suit in U.S. courts against the foreign government under the FSIA." House Report No. 103-702, *3 (emphasis added).[12] The report continues:

> The FSIA. . .allows U.S. citizens to sue foreign sovereigns for gross abuses of human rights that the foreign sovereign commits in the United States. *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980). However, the FSIA does not currently allow U.S. citizens to sue for gross human rights violations committed by a foreign sovereign on its own soil.

House Report 103-702 at *4. *See also Price v. Socialist People's Libyan Arab Jamahiriaya*, 294 F.3d 82, 88 (D.C. Cir. 2002) ("Under the original FSIA, therefore, terrorism, torture, and hostage taking *committed abroad* were immunized forms of state activity.") (emphasis added)[13]; *Flatow*, 999 F.Supp. at 12 (terrorism exception enacted because court decisions construing the other

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[12] If there were any doubt about the gap in the law that § 1605(a)(7) was designed to fill, the House Report on the earlier proposal further eliminates it by emphasizing that the bill "stands for the principle that U.S. citizens who are grievously mistreated *abroad* should have an effective remedy for damages in some tribunal . . . ." House Report 103-702, *4.

[13] This portion of the *Price* opinion, along with the House Report cited above, should put to rest entirely the false notion that the "tortious act" exception to the FSIA is limited to innocuous torts like automobile accidents.

exceptions "permitted foreign states to use the FSIA as a shield against civil liability for violations of the law of nations committed against United States nationals *overseas*") (emphasis added). Thus, the House Report shows that Congress understood that suits for abuses that might qualify as acts of terrorism could be brought under the "tortious act" exception, 28 U.S.C. § 1605(a)(5), when the injury occurred in the United States. A subsequent House Report on the next iteration of the measure that became § 1605(a)(7) confirms that the focus of this exception was on acts of terrorism that take place abroad. *See* House Report No. 104-383 (December 5, 1995). As set forth in this Report, the state-sponsored terrorism exception was, at least in part, a response to the Libyan bombing of Pan Am flight 103 over Lockerbie, Scotland. House Report No. 104-383, *62.

Because the terrorism exception in § 1605(a)(7) sweeps so much more broadly than does the "tortious act" exception, encompassing conduct that takes place entirely outside the United States, it is understandable that Congress limited the circumstances in which this exception applies to suits involving designated state sponsors of terrorism. But there is no reason similarly to limit the liability of a foreign sovereign when the bomb explodes in the United States, rather than overseas, and nothing in the FSIA suggests that any such limitation was intended. Moreover, the considerations of foreign relations and diplomatic policy that may be implicated when Americans are injured in terrorist conflicts abroad have much less place, if any, in the context of terrorist attacks at home. The structure of the FSIA recognizes this distinction by lifting the immunity of a foreign sovereign more freely when Americans are injured at home than when they are injured abroad. *Compare* 28 U.S.C. § 1605(a)(5), 28 U.S.C. § 1605(a)(7). Indeed, it is notable that, in striking the balance of lifting immunity for acts that take place entirely outside the United States, but only for states that have been designated as sponsors of

terrorism, Congress did not at the same time limit the existing "tortious act" exception, even though it clearly understood that that exception would apply to acts of terrorism committed in the U.S. *See* House Report 103-702 at *4.

Finally, plaintiffs cannot help but note that Sultan's interpretation of the FSIA leads to a fundamental absurdity whereby a foreign sovereign may be sued if one of its employees accidentally runs down a pedestrian in the District of Columbia with his car, but has immunity if that employee blows up the pedestrian in a deliberate act of violence instead. The FSIA does not countenance such absurdities. Rather, it presents a coherent scheme in which injuries negligently or deliberately inflicted in the United States are actionable under § 1605(a)(5), while injuries inflicted abroad are actionable only in the more limited circumstances set forth in § 1605(a)(7).

B. The "Tortious Act" Exception to the FSIA, 28 U.S.C. § 1605(a)(5), Abrogates Any Immunity that Prince Sultan Might Otherwise Claim

Sultan also claims that the "tortious act" exception to the FSIA does not apply because (a) even though the September 11 attacks took place in the United States, his role in those attacks occurred abroad and (b) his actions fall within the "discretionary function" exclusion to the "tortious act" exception. Plaintiffs addressed both these issues in their initial opposition brief and will not repeat the arguments set out in full there. But some of the new assertions in Sultan's reply warrant response and plaintiffs address them here. Plaintiffs note that if this Court determines that the "tortious act" exception does apply, as plaintiffs believe it should, then the Court may deny Sultan's motion to dismiss for lack of FSIA jurisdiction without reaching the disputed factual question of whether any Sultan's contributions to charities that funneled money to al Qaeda were made in his personal capacity.

1. Because the September 11 Attacks Occurred in the United States, the "Tortious Act" Exception Applies

Sultan contends that *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 842 (D.C. Cir. 1984), is controlling on the question of where the tort in question took place. But Sultan ignores that *Persinger* dealt with a hostage-taking that occurred abroad, in Iran. Neither *Persinger* nor any other case cited by Sultan addresses a situation remotely like this one, where a foreign official assisted a murder (or in this case, 3,000 murders) on American soil. The *only* cases of which plaintiffs are aware (and Sultan cites no others) that deal with anything remotely akin to this situation are *Letelier v. Republic of Chile*, 488 F.Supp. 665 (D.DC. 1980) and *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989) – and in both cases, the court found the "tortious act" exception applicable.

Unable to point to any authority to counter these precedents, Sultan attempts, unsuccessfully, to distinguish them. He contends that in both *Letelier* and *Liu,* agents of the foreign sovereigns carried out the torts entirely in the United States and the foreign sovereigns were held liable under principles of agency law, not for any actions they took in their own countries. But this distinction fails on several levels.

First, even if the direct perpetrators of the assassinations in those cases are viewed as "agents" of the foreign sovereign, there is no doubt that the murders were planned and organized abroad. The "agents" were hired and instructed abroad. (This is especially true in the *Liu* case, where the meetings in Taiwan at which the assassination was planned are described in detail in the court's opinion, *see* 892 F.2d at 1422.) The foreign sovereigns were not alleged merely to be passive principals. The literal, crabbed meaning of the "entire tort" that Sultan urges this Court to adopt could no more be applied to those cases than to this one, since it is clear that some of the acts necessary for those torts to occur took place in Chile and in Taiwan. But the D.C. District

Court and the Ninth Circuit nonetheless found the "tortious act" exception applicable, no doubt because the murders themselves took place on American soil.

Nor are *Letelier* and *Liu* best understood as agency cases. The real force of the agency doctrine makes a principal liable for the acts of his agents within the scope of their agency even where the principal had no knowledge of those acts. In both *Letelier* and in *Liu*, the foreign states in question directly ordered the assassinations in question (and did so in their own countries). In that circumstance, the foreign states were liable independently of any agency theory. The basis of their liability is set forth in § 877 of the Restatement (Second) of Torts (1979), which provides for liability when one persons orders or induces another to act, or otherwise controls the conduct of the direct perpetrator.[14]

Significantly, § 877 and the section setting forth the scope of aiding and abetting liability at issue here, § 876, are adjoining sections within the same chapter of the Restatement, Chapter 44, entitled "Contributing Tortfeasors." *See* Restatement (Second) of Torts (1979) §§ 876, 877.

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[14] Section 877 states:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
> (a) orders or induces the conduct, if he knows or should know of circumstances that would make the conduct tortious if it were his own, or
> (b) conducts an activity with the aid of the other and is negligent in employing him, or
> (c) permits the other to act upon his premises or with his instrumentalities, knowing or having reason to know that the other is acting or will act tortiously, or
> (d) controls, or has a duty to use care to control, the conduct of the other, who is likely to do harm if not controlled, and fails to exercise care in the control, or
> (e) has a duty to provide protection for, or to have care used for the protection of, third persons or their property and confides the performance of the duty to the other, who causes or fails to avert the harm by failing to perform the duty.

Restatement (Second) of Torts, § 877. The comment to Clause(a) of this section points out that "[i]n many of the situations that would come within the rule stated in this Clause, the person giving the order or inducement would be liable on the ground that he was principal or master; the rule, however, is independent of the existence of liability upon this ground." *Id.*
(*footnote continued on next page*)

There can be no reason to treat the two bases of liability differently with respect to the location of the tort committed or the immunity of the sovereign that commits it.

More fundamentally, Sultan's purported distinction between this case and the authorities he seeks to avoid ultimately rests on a false dichotomy. Agency liability is one form of vicarious liability; aiding and abetting is another. In both instances, the foreign nation acts abroad and is held responsible for the actions of others (whether its agents or those it aided and abetted) within the United States. No principled reason justifies a different result under the FSIA for these different scenarios. Indeed, in a case of pure agency liability, where the principal has no knowledge of the agent's act, there arguably would be *less* reason, not more, to lift the immunity of the foreign sovereign and hold it accountable in a U.S. court.

2. The Provision of Material Support to Terrorist for the Purpose of Attacking the United States Does Not Fall Within the "Discretionary Function" Exclusion

Sultan also contends that his acts fall within the "discretionary function" exclusion of § 1605(a)(5)(A). In doing so, he ignores the precedents that plaintiffs rely on and misrepresents their argument. Sultan claims that his actions were "discretionary" if they were not illegal in Saudi Arabia. But the holding in *Letelier* and in *Liu* was that there are some acts of foreign officials that cannot, as a matter of public policy, be recognized as within their "discretionary functions." *See Liu*, 892 F.2d at 1419; *Letelier*, 488 F.Supp. at 673. In *Letelier*, this Court found that assassination of a former diplomat in the United States was such an act. 488 F.Supp. at 673. It based its finding *not* on the illegality of that act in Chile, but rather on "precepts of humanity as recognized in both national and international law." *Id.*; *see also Maalouf v. Swiss Confederation*, 208 F.Supp.2d 31, 35 (D.D.C. 2002) ("immunity exists only if the discretionary

acts of a government employee are of the nature and quality that Congress intended to shield from tort liability").

The allegations against Sultan fall outside the permissible scope of a foreign official's "discretion." What plaintiffs allege is that Sultan knowingly provided funding and support to "charities" and other organizations that funneled donations to al Qaeda and Osama bin Laden for use in their *jihad* against the United States. Sultan attempts to deny this is true and further attempts to deny that this is what plaintiffs have alleged, but the Complaint (and additional evidence that may be considered on this jurisdictional motion) speaks for itself. The Third Amended Complaint alleges:

> In 1994, the Saudi Kingdom issued a royal decree banning the collection of money in Saudi Arabia for charitable causes without official permission. King Fahd set up a Supreme Council of Islamic Affairs, headed by his brother Prince Sultan to centralize, supervise and review aid requests from Islamic groups. This council was established to control the charity financing and look into ways of distributing donations to eligible Muslims.

3AC ¶ 357.[15] Plaintiffs further allege that the specific charities that Sultan chose to fund "sponsor, aid, abet or materially support Osama bin Laden and al Qaeda," *id.* at ¶ 359, and that "Sultan could not have ignored the ultimate destinations of charitable funding and could not have overlooked the role of the Saudi charitable entities identified herein in financing the al Qaeda organization." *Id.* at ¶ 358. Indeed, plaintiffs allege that "Prince Sultan's role in directly

[15] Sultan's contention that the Supreme Council has no oversight role with respect to charities, *see* Sultan Reply at 6, can be tested only at the merits phase of this case; at this juncture, plaintiffs' allegation must be accepted as true. But plaintiffs note that in December, 1994 (the year that plaintiffs allege Saudi Arabia banned the collection of money in the Kingdom without approval from the Supreme Council, *see* 3AC ¶ 357), the *Mideast Mirror* reported on "the recent crackdowns against Islamist dissidents in Saudi Arabia and Oman, and the setting up by Riyadh of a government committee headed by Defense Minister Prince Sultan bin-Abdelaziz to control the activities of religious groups and the expenditure of Islamic charities." "U.S. Pressure Foiled Moroccan-brokered Gulf Reconciliation Bid," *Mideast Mirror*, December 16, 1994, Exhibit 5.

contributing to and in the oversight of IIRO [International Islamic Relief Organization] evidences his material sponsorship, aiding and abetting of international terrorism. Prince Sultan maintains close ties with the IIRO organization headquarters and knew or should have known these assets were being diverted to al Qaeda." *Id.* at ¶ 360. Moreover, as alleged in the Complaint, the target of al Qaeda's *jihad* was clear. In 1998, Osama bin Laden issued a *fatwa*, proclaiming:

> We – with God's help – call on every Muslim who believes in God and wishes to be rewarded to comply with God's order to kill the Americans and plunder their money wherever and whenever they find it. We also call on Muslim ulema, leaders, youths, and soldiers to launch the raid on Satan's U.S. troops and the devil's supporters allying with them . . . .

Id. at p. 213. Thus, bin Laden's goals were well-known in the Arabic world.

Further evidence obtained since the Complaint was drafted supports these allegations and demonstrates that Sultan's contributions to charities and organizations with ties to al Qaeda were not routine, discretionary acts. Sultan repeatedly made contributions to entities that had been identified by the United States and other governments as funneling money to terrorists. For example, on October 2, 1998, the *Washington Times* reported that Kenyan authorities had closed down the offices of IIRO and Al Haramain because of links between these organizations and the terrorist bombings of U.S. embassies in Nairobi and Dar es Salaam. *See* "11 Kenyan Groups Closed for Possible Ties to Bombing," *Washington Times,* October 2, 1998, p. A15, Exhibit 6. On August 10, 2000, the *Financial Times* reported that Filipino intelligence agencies had investigated the activities of IIRO; it noted that intelligence reports alleged that the IIRO was being used by Osama bin Laden and his brother-in-law Mohammad Jamal Khalifa as a conduit of funds for extremist groups. *See* Exhibit 7. Nor could Sultan have been unaware of this information (and much more like it). As Sultan's nephew and co-defendant, Turki al-Faisal, wrote in an article in the *Washington Post*, "in 1997 the Saudi minister of defense, Prince Sultan,

established a joint intelligence committee with the United States to share information on terrorism in general and on bin Laden (and al Qaeda) in particular." Prince Turki al-Faisal, "Allied Against Terrorism," *Washington Post*, September 17, 2002.[16] Nonetheless, Sultan continued to make donations to these very organizations. *See* Plaintiffs' Opp. at 12-13.[17]

In sum, as alleged in the Complaint and as supported by further evidence, Sultan *knew* that al Qaeda sought to commit terrorist acts against America and Americans, *knew* that certain charities were providing funds to support and indeed promote those terrorist acts, and yet he gave substantial amounts of money to those very charities. Plaintiffs assert that under *Letelier* and *Liu*, as well as under "precepts of humanity as recognized in both national and international law," *see Letelier*, 488 F.Supp. at 673, it is outside the discretion of any foreign official knowingly to supply murderers with the wherewithal to commit their crimes. This is especially true because it was the official policy of Saudi Arabia not to support bin Laden and al Qaeda. The "discretionary function" exclusion was not meant to protect this kind of act of deliberate aggression against the United States on the part of a foreign official of a supposedly friendly

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[16] A copy of this article was submitted by Sultan's co-defendant, Turki al-Faisal bin Abdulaziz al-Saud, as Exhibit 3 to his motion to dismiss the complaint against him in this action.

[17] Further evidence of Sultan's knowledge is provided in the excerpt from *The Age of Sacred Terror* annexed to plaintiffs' initial opposition. That book describes a 1999 trip by a U.S. delegation to Saudi Arabia to alert the Saudi government about the role of Saudi banks and charities in funding al Qaeda and to enlist its cooperation in putting an end to this important source of funding for terrorism. Sultan dismisses this evidence by noting that the book makes no specific reference to him. *See* Sultan Reply at 6. Plaintiffs have not yet been called upon to prove their claims by a preponderance of the evidence nor is it appropriate that they be required to do so. But plaintiffs cannot help noting that Sultan himself makes much of his role as the third ranking official in his government. *See, e.g.,* Sultan Reply at 2. As alleged in the Complaint, moreover, Sultan had specific responsibilities for overseeing charities. 3AC ¶ 357. In addition, as noted above and reported by Prince Turki (but unmentioned by Sultan), Sultan had established a joint intelligence committee with the United States for the purpose of sharing information about terrorism. Are we really expected to believe that Sultan was not informed about the (*footnote continued on next page*)

government.[18]

C. Plaintiffs Are Entitled to Discovery on the Issue of Sultan's Personal Donations to Terrorist Charity Fronts

As noted above, if the Court finds that it has jurisdiction under the "tortious act" exception to the FSIA, it can deny defendant's motion to dismiss without resolving the question whether any of Sultan's donations were made in his "personal" capacity. But if this Court believes that its jurisdiction turns on the proper characterization of those donations, then under this Court's Order of July 9, plaintiffs are entitled to discovery on that question.

Sultan attempts to re-argue this issue, which already has been decided by the Court, by suggesting that the Court can decide the issue on the record as it now exists, without giving plaintiffs the opportunity to take discovery. *See* Sultan Reply at 3-7. Indeed, Sultan argues, apparently with a straight face, that "[p]laintiffs do not – and cannot – offer any evidence to counter" the evidence submitted by Sultan with his moving papers. *Id.* at 4. It may be that Sultan hopes the Court will forget that it is precisely to obtain such evidence that plaintiffs seek – and are entitled to – discovery.

Sultan's argument that the press releases of the official Saudi Press Agency submitted by plaintiffs are "mistranslated" does not begin to resolve the factual issue before this Court and in

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substance of the meetings with the U.S. delegation, if he did not actually attend them? *See also* Plaintiffs' Opp. at 5, citing: www.indianexpress.com/ie/daily/1999/1030/ige30061.html.

[18] Plaintiffs' argument is entirely consistent with the precedents cited by Sultan, *Berkovitz v. U.S.*, 486 U.S. 531 (1988) and *U.S. v. Gaubert*, 499 U.S. 315 (1991). In *Berkovitz*, the Supreme Court emphasized that, in the context of the Federal Tort Claims Act ("FTCA"), the "discretionary function" exception protects only "the permissible exercise of policy judgment." 486 U.S. at 537, 539, 546. *Accord Gaubert*, 499 U.S. at 326. In *Letelier* and *Liu,* the court, adapting principles developed under the FTCA to the situation of claims against foreign governments, held no more than that certain intentional acts of foreign officials could not be recognized as *permissible* exercises of policy judgment because such acts were so contrary to (*footnote continued on next page*)

no way dilutes plaintiffs' right to discovery concerning the nature of the donations. The press releases that plaintiffs submitted were issued by the Saudi Press Agency, a government entity, *in English*. If they are "mistranslations," they are official ones, representing the official government position as it chose to report it to the English-language press. Nor do the translations provided by Sultan resolve the question. To state that the contributions were "effected in accordance with the instructions of the King and Crown Prince," as Sultan asserts, *see* Sultan Reply at 4-5, n.2, does not resolve whether the instructions were given to Sultan in his official capacity as a government minister or in his personal capacity as a member of the King's and Crown Prince's family. This is especially true because every Saudi individual has a religious obligation to make personal, charitable contributions. If, for example, Sultan were instructed by the King or the Crown Prince to comply with his *zakat* obligations, that would not turn his personal contributions into official acts. Nor do repeated assertions that "it is common in Saudi Arabia for official acts of a Minister to be attributed to him, rather than to the government," *see* Sultan Reply at 5, n.3, resolve whether these particular donations, attributed by the Saudi Press Agency to Sultan personally, were made personally or officially.[19] As this Court

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public policy and national and international law that they should not be recognized as permissible. *See Letelier*, 488 F.Supp. at 673; *Liu*, 892 F.2d at 1419.

[19] Even without discovery, however, it is clear that not all of Sultan's charitable contributions are official, governmental donations. On May 3, 2003, *Gulf News* reported that Sultan had received the Sheikh Rashid Humanitarian Personality of the Year Award. *See* "Prince Sultan to be Honoured on May 27," *Gulf News* (online edition), May 3, 2003, Exhibit 8. The article reports that Sultan "is well known for his contributions to charities . . . ." and that he is "a major contributor to many charities . . . around the world." *Id.* Similarly, in connection with a 1999 donation that Sultan made to IIRO, the chairman of IIRO's board thanked Sultan and "ask[ed] that God reward him especially as he had supported the organisation on an ongoing basis since it had first seen the light of day on this good earth." *Ain al-Yaqeen*, January 21, 1999, Exhibit 9. It is unlikely that Sultan would have been presented with a "humanitarian" award or viewed as worthy of special reward for purely official donations.
(*footnote continued on next page*)

has already recognized, if the Court reaches this issue, plaintiffs are entitled to discovery to permit them to obtain evidence to respond to the affidavits and evidence submitted by Sultan asserting that all of his acts alleged in the Complaint were official and not personal.

III. THIS COURT HAS PERSONAL JURISDICTION OVER PRINCE SULTAN

A. This Court Has Jurisdiction Over Sultan in His Official Capacity

Sultan dismisses as irrelevant plaintiffs' argument that the D.C. Circuit's holding in *Price v. Socialist People's Libyan Arab Jamahiriya*, 2294 F.3d 82 (D.C. Cir. 2002), is equally applicable to "agencies and instrumentalities" of a foreign sovereign who invoke the protections of the FSIA.[20] He makes no counter-argument, apparently considering it self-evident that the ruling cannot be so applied because, as he contends, no court has yet done so. *See* Sultan Reply at 27 n.9. But the D.C. Circuit did not find Sultan's position self-evident – it specifically reserved for another day the question of the applicability of its holding to agents and instrumentalities of the sovereign. 294 F.3d at 99-100. Moreover, *Price* was decided only a

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By contrast, when the Kingdom itself made donations, the press reported them that way. For example, in 1998, *Arab News* reported that the Rome office of MWL was "established with a donation *from the Kingdom* . . . ." Saeed Al Khotani, "MWL to open office in Italy," *Arab News*, March 4, 1998 (emphasis added), Exhibit 10. And in 1996, the *Saudi Gazette* reported that "Saudi Arabia has extended a financial donation to the OIC Permanent Committee for Scientific and Technological Cooperation in Islamabad." The report continued: "The donation represents the second instalment of the donation *the Kingdom* pledged during the 19th conference of OIC foreign ministers." "Saudi aid to OIC panel," *Saudi Gazette*, May 20, 1996 (emphasis added), Exhibit 11.

Plaintiffs are aware of numerous other such examples, which can be presented to the Court at the appropriate time. But it is clear that discovery is needed to separate out whether the particular contributions at issue in this case were among those that gave rise to Sultan's reputation for personal generosity and for which he was so lavishly praised.

[20] In *Price*, the D.C. Circuit held that foreign sovereigns are not "persons" within the meaning of the Fifth Amendment and thus that the Constitution places no due process limits on the exercise of personal jurisdiction conferred by Congress. 294 F.3d at 96. Plaintiffs submit that this holding is equally applicable to agencies and instrumentalities of a foreign sovereign (*footnote continued on next page*)

year ago, in June, 2002. In that time, no court has held that the *Price* ruling does *not* apply to agents and instrumentalities of the sovereign.

Moreover, Sultan is quite wrong in asserting that no court has ever held that individual foreign officials are not entitled to due process. In *Flatow v. Islamic Republic of Iran*, 999 F.Supp. 1, 21 n.9 (D.D.C. 1998), the Court held that its conclusion that foreign states have no due process rights "applies not only to the foreign state, but also to the foreign state's agents officials and employees for acts performed in their official capacity." The Court continued: "The argument against Constitutional Due Process protections may in fact be even stronger in the case of foreign state officials; aliens outside the United States are not entitled to Constitutional protection, even in the criminal context." *Id.* Sultan offers no reason why this Court should not follow *Flatow* and apply *Price* to this case.

Sultan also misapprehends the relationship between the FSIA exceptions and the "minimum contacts" test, if minimum contacts must be shown. As plaintiffs noted in their initial opposition brief, Congress specifically intended that the required nexus between the United States and the claim for each exception to the FSIA – at least those initially enacted – would be sufficient to satisfy any "minimum contacts" requirement as well. Sections 1605(a)(2) and 1605(a)(5) each requires substantial contact between plaintiffs' cause of action and the United States. *See* H.R. Report 94-1487 ("The requirements of minimum jurisdictional contacts . . . are embodied in [the FSIA] . . . .each of the immunity provisions in the bill . . . requires some connection between the lawsuit and the United States . . . ."). Nor is *Creighton Ltd. v. Gov't of the State of Qatar*, 181 F.3d 118 (D.C. Cir. 1999) to the contrary. In *Creighton*, the plaintiff

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claiming immunity as such. Plaintiffs do not contend that the holding of *Price* is applicable to Sultan in his personal capacity.

invoked the "arbitration exception" to the FSIA, § 1605(a)(6). As the D.C. Circuit noted, that exception was not part of the original FSIA, but rather was added in 1988 in an amendment. *See* 181 F.3d at 125-26. The Court held that Congress's intention in 1976 to ensure that each exception then enacted comported with the "minimum contacts" test had no bearing on the later-enacted amendment, which did not itself contain any requirement of contact between the defendant and the United States. But the two FSIA exceptions at issue in this lawsuit, §§ 1605(a)(2) and 1605(a)(5), were both part of the FSIA when it was originally enacted and, as noted, each contains specific nexus requirements with the United States.

B. The Assertion of Jurisdiction Over Sultan Is Consistent with "Due Process"

To the extent that traditional Due Process requirements are applicable to the assertion of jurisdiction over Sultan, they are, in any event, satisfied. Sultan continues to insist that requisite contacts are with the District of Columbia, not with the United States as a whole, but he is wrong. Whether he is sued in his official or his personal capacity (plaintiffs allege both), the relevant contacts are with the United States.

To the extent that Sultan is sued in his official capacity and jurisdiction is obtained under the FSIA, 28 U.S.C. § 1330 acts as a federal "long arm" statute and any "minimum contacts" to be shown would be federal as well. *See Vermeulen v. Renault U.S., Inc.*, 985 F.2d 1534, 1545 (11th Cir. 1993) ("The relevant forum when a case is brought under the FSIA is the United States."); *see also Republic of Argentina v. Weltover*, 504 U.S. 607, 614 (1992) (measuring contacts of FSIA defendant with United States); Plaintiffs' Opp. at 30 n.19. To the extent that Sultan is sued in his personal capacity and the FSIA does not apply, plaintiffs may assert claims against him under the Anti-Terrorism Act, which provides for nationwide service of process and gives rise to a nationwide test for minimum contacts. *See* July 25 Opinion, 2003 WL 21730530, *5; Plaintiffs' Opp. at 32-33.

Nor can there be any doubt that Sultan has had numerous "contacts" with the United States. As noted above, in 1997, he "established a joint intelligence committee with the United States to share information on terrorism in general and on bin Laden (and al Qaeda) in particular." Prince Turki al-Faisal, "Allied Against Terrorism," *Washington Post*, September 17, 2002. He has visited the United States on several occasions, *see*, *e.g.*, "Saudi Businessmen Funding Bin Laden -- US Media Report," October 29, 1999 (a Reuters report available on the internet http://www.indianexpress.com/ie/daily/19991030/ige30061.html); "Saudi Foreign Minister Welcomed By Secretary Of State Christopher," reported by the Saudi Embassy on October 25, 1995, see http://www.saudiembassy.net/press_release/press_release00.htm. Moreover, the Prince Sultan Foundation, under the direction of Sultan himself, has donated millions of dollars to establish the Sultan Bin Abdulaziz Arab and Islamic Studies Program at the University of California, Berkeley, *see* http://www.sultanfoundation.com/english/studies.htm.[21]

These contacts are, of course, in addition to Sultan's contacts with the United States as a result of his provision of financial support to terrorists whose known, avowed target was the United States. As set forth in plaintiffs' initial opposition brief, Sultan purposefully directed his conduct at the United States when he knowingly provided support for Osama bin Laden's *jihad* against the United States. *See* Plaintiffs' Opp. at 32-36. Physical presence (or lack thereof) in the United States when he provided this support is irrelevant; the Supreme Court has specifically held that physical presence is *not* a requirement for the satisfaction of minimum contacts and the exercise of personal jurisdiction. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985).

[21] Sultan's role in funding and directing the foundation is described at: http://www.sultanfoundation.com/english/english-main.htm.

In *Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F.Supp. 325, 330 (E.D.N.Y. 1998), *aff'd in part, dis'd in part*, 162 F.3d 748 (2d Cir. 1998), the court found Libya's "intentional, tortious actions that were expressly aimed at the United States" in connection with the bombing of Pan Am Flight 103 over Lockerbie, Scotland were sufficient to establish the requisite contacts for personal jurisdiction. The attack at issue in *Rein*, it should be noted, did not take place in the United States. Nonetheless, the court found that the targeting of an American-flagged carrier provided a sufficient nexus for the assertion of jurisdiction. The connection in this case is even stronger, because the attacks were perpetrated here.

The remaining question, then, is whether "the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" *See Burger King*, 471 U.S. at 475. Sultan, however, makes no argument that it would not. Plaintiffs respectfully refer the Court to their argument on this point in their initial opposition brief, at 32-36.

C. Plaintiffs Are Entitled to Jurisdictional Discovery Concerning Prince Sultan's Contacts with the United States

If this Court believes that plaintiffs have not established a sufficient nexus for the assertion of personal jurisdiction over Sultan, plaintiffs request the opportunity to take discovery on this issue. The law demonstrating plaintiffs' right to "reasonable discovery" concerning personal jurisdiction is set forth in plaintiffs' initial opposition brief, *see* Plaintiffs' Opp. at 36 n.20. Sultan's sole argument to the contrary is his assertion that plaintiffs have demonstrated no contact of any kind between him and the United States that would justify discovery. As detailed above, however, plaintiffs have demonstrated numerous contacts between Sultan and the U.S. Because plaintiffs have established a sufficient predicate, at a minimum, they should be permitted to take focused discovery on this point.

IV. PLAINTIFFS HAVE SUFFICIENTLY PLEADED CAUSATION

Sultan also contends that plaintiffs have failed to state a claim because they have not sufficiently pleaded causation. Plaintiffs recognize that this issue has been fully briefed in connection with this and other motions in this case and that, in its July 25 Opinion, this Court ruled that plaintiffs sufficiently pleaded causation against certain other defendants under the same standard that plaintiffs urge on this motion. *See* July 25 Opinion, *16. Nonetheless, Sultan's reply requires a brief response.

Sultan contends that plaintiffs have failed to plead that he provided any support to al Qaeda. *See* Sultan Reply at 35. That is plainly not the case. Without belaboring the point, plaintiffs allege that Sultan gave money to Islamic charities and organizations knowing that these groups were providing material support to terrorism. As the Ninth Circuit explained in *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000):

> [A]ll material support given to [terrorist] organizations aids their unlawful goals. Indeed, as the government points out, terrorist organizations do not maintain open books. Therefore, when someone makes a donation to them, there is no way to tell how the donation is used. Further . . . even contributions earmarked for peaceful purposes can be used to give aid to the families of those killed while carrying out terrorist acts, thus making the decision to engage in terrorism more attractive. More fundamentally, money is fungible; giving support intended to aid an organization's peaceful activities frees up resources that can be used for terrorist acts.

Accord Boim v. Quranic Literacy Institute, 127 F.Supp.2d 1002, 1019-20 (N.D. Ill. 2001), *aff'd* 291 F.3d 1000 (7th Cir. 2002). Apparently Crown Prince Abdullah of Saudi Arabia agrees. On August 14, 2003, in an address to Saudi security forces and citizens, Abdullah proclaimed: "[H]e who protects or sympathizes with a terrorist is himself a terrorist, and will receive his just punishment."[22]

[22] *See* http://saudiembassy.net/press_release/statements/03-ST-Abdullah-08-14-courage.htm.

Under *Humanitarian Law Project* as well as the authorities cited in plaintiffs' initial opposition, plaintiffs have adequately alleged a causal link between Sultan and the September 11 attacks to state claims against him.

CONCLUSION

For the foregoing reasons and for the reasons set forth in plaintiffs' initial opposition, this Court should deny Prince Sultan's motion to dismiss in its entirety.

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Respectfully submitted,

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