IN RE: TERRORIST ATTACK ON SEPTEMBER 11, 2001

January 18, 2008 Oral Argument Before The Second Circuit Court Of Appeals

Judge Jacobs	Now we'll hear argument in In Re: Terror Attacks. Good Morning.
Stephen A. Cozen	Good morning Judge Jacobs. If the court pleases, Steve Cozen, of Cozen O'Connor on behalf of *Federal* and other commercial claimants as well as claimants for wrongful death in those cases asserting claims against the Kingdom of Saudi Arabia, the Saudi High Commission and officials of the Saudi government. I reserve three minutes for rebuttal off my fifteen minutes. Your Honors, it is the principal contention in this appeal that the district court clearly erred in failing to assess, analyze and find, based upon unrebutted allegations in our First Amended Complaint, RICO statements and Affirmations, that as organs and alter egos of the Kingdom of Saudi Arabia, the separate juridical identity of the defendant charities, had to be rejected and their tortious conduct was attributable to the Kingdom for purposes of FSIA jurisdiction on Rule 1605(a)(5). I submit to you, that federal common law principles of agency and attribution and this Court's test particularly in Robinson for FSIA determination required the district court to conclude that the conduct of Saudi Arabia's alter egos and dominated, rigidly controlled organs provided grounds for finding that the Kingdom was not immune under the FSIA, especially where it did not dispute its domination and control of the alter egos and agents in question. Its whole defense was a legal defense, not a sufficiency of a pleading defense or a contradiction of pleading defense. The district court then compounded that initial clear error by holding that both knowing and intentional sponsorship of, or actual participation, as an integral component of international terrorist organization which has been called *jihad* against the United States of America, is a form of tortious conduct that was immunized under the discretionary function exclusion of 1605(a)(5)(a). Notwithstanding that such conduct was a clear violation of international law and the basic precepts of humanity. The district court as to 1605(a)(5) Your Honors, was obliged under this Court's decision in Robinson to meet a three prong text. One – look at the alleged activities. Two – decide if they were tortious under New York law and any other applicable legal standard. And three – decide whether the conduct was non-discretionary. There is no indication in his opinions of January 18 or September 21, 2005 that the district court dealt at all with problems one and two. Therefore, if you did mentally decide that the alleged activities were tortious under 1605(a)(5) before he concluded erroneously that they were discretionary, or if he didn't, he committed clear error because one has to assess the nature of the conduct before deciding whether it was non-discretionary. The bottom line Your Honors is either Judge Casey conducted no Robinson analysis and the opinion doesn't indicate that he did. But either he conducted no Robinson analysis and totally ignored or disregarded the Bancec doctrine and the dismissal of the Kingdom, Sultan and Turki and the Saudi High Commission should be reversed. Or the district court implicitly found that the first two prongs of Robinson have been met and the only question was whether

based upon the allegations of the First Amended Complaint it is proper to conclude that the tortious and illegal acts of the charities for which the Kingdom is vicariously liable can actually fall within the discretionary function exclusion of 1605(a)(5). The clear answer is that they cannot and the judgment requires reversal. Now, we are mindful Your Honors that governments don't act except through people or entities, both for purposes of jurisdiction and liability. The question before the district court was squarely whether the tortious conduct of those people or entities was imputable or attributable to the Kingdom. It is the same question whether we are dealing with individual and juridical entities. Although it seems to be conceded that if government officials acted in their official capacity render the government liable for their tortious acts under principles of respondeat superior that is not contested. I would propose to this Court that the presumption of separateness with which some of you Judges have dealt with in other contexts. The presumption is set for juridical entities recognized in Bancec is usually overcome by a determination that a defendant is an organ for 1603(b)(2) purposes. Because the test for organ whether you use the Lake Tahoe standards or the USX standards to determine what is an organ. In terms of control and domination referred to in Bancec is essentially the same test and that is true also of political sub-divisions. Certainly Your Honors, the Kingdom has never asserted either that the charities in question were not organs for FSIA purposes or that they were formed in such a way as to intentionally try to insulate them from some liability. As to each of the charities, in addition to a detailed description of its activities and conduct, in an over 600 page First Amended Complaint, which I will not rehearse in great detail for you unless you ask me to. It is alleged that they are agents or organs of the Kingdom. The Kingdom controls and directs the operations of the entity, appoints and terminates its personnel, provides it with virtually all of its funding, determines how the funds are being distributed worldwide and otherwise controls and supervises its activities. These allegations are not denied by the Kingdom and were in fact confirmed by each of the charities. Had they been specifically and adequately denied, then the district court would have been obliged under Judge Cabrenes the First City case, to fashion and provide some jurisdictional discovery, something it refused to do notwithstanding our rigorous request to do so if in fact that the balance after meeting burdens had been met. Both the district court and the Appellees have mischaracterized and misrepresented the factual thesis. Now you can do an independent review and I would love you to do it of our First Amended Complaint. Now let me give it to you in synoptic form. 9-11 was a product of a larger conspiracy spearheaded by Al Qaida. That is set forth in paragraphs 71, 75, 78. The planning, coordination and execution of 9-11 was not possible without the global financial and logistical infrastructure established by Al Qaida for the ten years previous – paragraphs 70, 77, 79, 83. The resources used to build the infrastructure were provided through Al Qaida by donors in Saudi Arabia, channeled through a network of Islamic charities – paragraphs 79, 398, 399. It is the misconduct of the charities and of the government officials which forms the gravity of our Complaint. Knowingly channeling, financial and logistical support to Al Qaida, those charities or officials actively participated in and aided and abetted an Al Qaida conspiracy to conduct terroristic attacks against the United States – paragraphs 72 & 74. Then there is a key paragraph 79 – these charities are fully

	integrated components of Al Qaida's organizational structure and that is alleged as to the Saudi High Commission – paragraphs 182-187. And have served as a primary vehicle for raising, laundering and distributing funds on behalf of Al Qaida. These charities were actively involved at every level – recruitment, training, planning, and conduct of attacks. 600 paragraphs of detailed factual data in a complaint without one single iota of discovery. As to the Princes, it is alleged that each was expressly aware for the years prior to 9-11 that the charities to which they funneled money were in fact Al Qaida fronts and that they intended notwithstanding that knowledge to continue to do so. Now here is the bottom lines Your Honors. The First Amended Complaint asserts that the charities engaged in tortious conduct and violated international law and intended the consequences of their acts. The Kingdom and its officials knew and intended to support Al Qaida through these charities. The Kingdom established these charities, appointed those who controlled them, used civil servants, supervised and directed them at all levels, paid them so they dominated them so much that the charities had no separate juridical identity. The Kingdom does not challenge our allegations or evidence that we offered. Its challenge was based on legal sufficiency only. If this court would like me to I would be happy to hand out the chart that I have available to you on the control issue that shows you every single piece of allegation and where it comes from and I would be happy to leave that with you. But that's the facts that the district court had before. Now here is the legal analysis. The burdens with respect to FSIA and jurisdiction are clear. When a defendant does not make the factual challenge to the allegations underlying that immunity I believe that Nelson and Robinson tell us that the district court has to accept those allegations as true and draw all reasonable inferences from them. The defendant bears the ultimate burden of persuasion, but here these were unchallenged. The district court was required to accept allegations as true and I leave it to you independently to determine whether anyone other than the Kingdom ever challenged these allegations. But the Judge clearly erred in not going through the Bancec analysis in order to determine whether or not the conduct of the charities would be directly attributable to the Kingdom. That leaves us with the discretionary function exclusion. The knowing and intentional sponsorship of terrorism violates international law and fundamental precepts of humanity, and that type of conduct cannot be discretionary function under the FSIA. The district court did not analyze the conduct of the charities in arriving at those discretionary function exclusion determinations vis-a-vis the Kingdom. It is clear error not to do so. For instance as to the Saudi High Commission, the district court assumed _____(?) claims without going through a Robinson analysis but said it was covered by the discretionary function exclusion. Make no mistake Your Honors about our allegations of tortious conduct against the Saudi High Commission. They are not grounded in the general proposition that it was directed in the distribution of relief funds by government officials as a matter of policy. That is not our argument. It is that rather….,
Judge Jacobs	You are reserving about 3 minutes of rebuttal and you could use it now or…
SAC	I will just finish this statement and I'll sit down Your Honor.

Judge Jacobs	By all means, go ahead.
SAC	I just want to draw the distinction.
Judge Jacobs	Yeah.
SAC	We are not complaining about Saudi Arabia's right to make a determination at this moment to fund Islamic charities. What we are talking about is that the charities themselves that we are complaining about is not that they made some decision based on policy to act as a charity, but rather that they knowingly and intentionally participated in the finance and planning of illegal acts and terrorist activities as part of Al Qaida (See paragraphs 182-187) and I'll …
Judge Cabrenes	I have a very uncomplicated question based on your allegations of fact. Everything you have told us about your allegations in this Complaint indicate that these tortious actions were in effect the actions of the Saudi state right?
SAC	Attributable to the Saudi state for purposes both of jurisdiction Judge Cabrenes and jurisdiction under the FSIA and ultimately to be determined that whatever the legal standard is, as substantive law, if it was you know something for which they were vicariously liable. Does that answer your question sir?
Judge Cabrenes	Thank you. It does.
SAC	Thank you very much.
Andrea Bierstein	Good morning Your Honors, my name is Andrea Bierstein. I'm just going to apologize at the outset for my voice. I had the flu all week and I actually am feeling much better today.
Judge	We can hear you perfectly with the amplification, so…
AB	You can hear me? I feel better than I sound…
Judge	We all do.
AB	I represent the *Burnett*, *Euro Brokers* and *World Trade Center Property* Plaintiff/Appellants and the way we divided the arguments up thematically I'm going to be addressing primarily issues that relate to the individual Saudi Princes, Sultan, Salmon, Naif and Turki. Just to point a little clarification on that although I think it relates to the question addressed to Mr. Cozen. In the *Burnett*, *Euro Brokers* and *World Trade Center Property* cases, we did not actually sue the Kingdom of Saudi Arabia. We sued just the individuals and am not seeking to hold the actual Kingdom of Saudi Arabia liable vicariously or otherwise for their acts. That is a minor difference between our position and the *Federal Insurance* position. I don't think it affects any of the arguments I am going to make but it is a difference of

	approach among the lawsuits. The first point I wanted to touch on is as far as the Foreign Sovereign Immunities Act doesn't apply we believe to individual defendants at all. It applies to and provides jurisdiction and immunity for a foreign state. The question is what is a foreign state? Does the foreign state include its officials or not.
Judge Jacobs	The narrower question is does it include its officials acting in a official capacity?
AB	That's correct.
Judge Jacobs	Can I ask you this? How does an entity or state act otherwise than through the agency of human beings?
AB	Well actually that is a good question. It acts through instrumentalities and organs which are clearly included into the definition of the state.
Judge Jacobs	But those organs consist of offices and desks and doors with stenciled names on them and then inside there has got to be people, right?
AB	That doesn't mean that most of the people were legally liable. For example in a commercial case where the state acts through, you know if the state has a state airline and if you have a claim against the state airline, you are suing the airline, you are not suing the individuals through whom it may enacted. The Foreign Sovereign Immunities Act acts to decide when that state airline is immunized and when its not. And there are a number of lawsuits including Mr. Cozen's where people sue the state directly. In fact the FSIA jurisprudence is every case you look at…
Judge Jacobs	Well its one thing to be able to sue the state directly for things that were done by the human agents of the state acting in their official capacity. It's something else to sue the human agents when arguably the state for which they work or the agency or instrumentality for which they work enjoys immunity under the FSIA.
AB	Well typically what happens Your Honor in most foreign countries it doesn't really help you to sue the individual person because in many instances the individual person is not going to be able to answer a judgment and when you sue the individual personally you are suing them in their official capacity because you are suing them for acts they took officially. But when you choose to sue only the individual, you forego the possibility of having the state answer for the judgment, which is what we did when we sued only Sultan and Turki. We didn't sue their governments. And so it puts us in an unusual posture…
Judge Vitaliano	There is no question is there not that if in fact the act of the entity is immunized under FSIA, that anyone, any employee of that entity acting in his or her official capacity is also immunized.
AB	I think not. I think there are two important arguments to consider. I think absolutely not. I think the first argument that you have to consider…you said if the individual officials are included in immunity, then what do you do about ambassadors? What

	do you do about diplomats? The Supreme Court has said over and over that at least once, that the Foreign Sovereign Immunities Act is the exclusive means of jurisdiction and the immunities in it, that's what covers the foreign state. If you construe state to include the officials, then that's going to include an ambassador. The problem is that the United States is party to a treaty called the Vienna Convention. And the Vienna Convention governs the immunity of the ambassadors and it's different from the Foreign Sovereign Immunities Act. If the FSIA covers the immunity and diplomats then we're out of compliance with their treaty obligations to the rest of the world. Similarly there is separate kind of immunity for the head of state…
Judge Jacobs	How does that work…I am not following you at this point. I mean if an ambassador takes an action that is official then wouldn't you agree that that person enjoys the sovereign immunity of the country itself, of the state itself.
AB	The ambassador's immunity is determined separately. It is not determined by the Foreign Sovereign Immunities Act. If it is official or if its personal in any capacity an ambassador's immunity, and this by the way is the funds argument as well as ours, the ambassador's immunity is determined by the Vienna Convention. It is broader than the FSIA. The ambassador's immunity has nothing to do with….
Judge Jacobs	Well its pretty clear that ambassadors and others who are resident abroad might need some additional or different protection particularly with respect to what they do in their personal capacities. I mean they can track debt, they buy suits, they buy dresses, they buy shoes, and these transactions you know one needs to know what kind of immunity they have or don't have. But, when someone is abroad and the only way you can reach them jurisdictionally is through the FSIA, then that might be a different story. I am sure that the ambassador is an analog.
Judge Vitaliano	An immunity that would provide a lesser coverage is not inconsistent with an immunity that would provide a greater coverage, is it?
AB	Well except if the FSIA is exclusive, then its not just that its lesser or greater, its different; different criteria. I want to make two other points which I think are important. When Congress wants to talk about a state and they want to include individuals or officials, they know how to say it. I'm gonna give you an example of that which is something called Anti-Terrorism Act which is a statute very much at issue in these cases but not with these defendants and they'll see why not with these defendants in a minute. 18 U.S.C. § 2337. This is not a _____(?). I apologize. 18 U.S.C. § 2337 says no action shall be maintained under § 2333, that was the section that creates the cause of action against and here is what they say. A foreign state, an agency of a foreign state, or an officer or employee of a foreign state or agency thereof while active within his or her official capacity. So in the Anti-Terrorism Act, Congress wanted to immunize not only foreign states but individuals and that's what it says. It says an officer or an employee, but when they wrote the FSIA that's not what they said. They didn't talk about officers and employees, they left out that language. The language that's here in the Anti-

	Terrorism Act doesn't appear in the Foreign Sovereign Immunities Act. Instead, the Foreign Sovereign Immunities Act says state includes agencies and instrumentalities and then we have a definition of agencies and instrumentalities that as this Court itself pointed out in the Tachiona case where the court expressed skepticism that the FSIA could include individual officials although the Court didn't reach the issue, that in expressing skepticism about it, this Court noted that the language of the definition of agencies and instrumentalities is not the kind of language generally applicable to individuals and for that reason this court expressed some skepticism about whether it could in fact be interpreted to include individuals. When we looked at 18 U.S.C. § 2337 and you see what Congress does when it needs to include individuals and you compare it to what they did in the Foreign Sovereign Immunities Act, you see this big gap. Suddenly the word officials or individuals doesn't appear and if you ask yourself why doesn't it appear. If you go back and look at the Tachiona case I think one of the reasons that this Court in that case had its skepticism, it is because under some reports that have come to the opposite conclusion, this Court was looking at the Foreign Sovereign Immunities Act in the context of the other immunities that were available to individual officials.
Judge Jacobs	In terms of what the Foreign Sovereign Immunities Act is trying to protect, wouldn't you agree that if you can sue the minister instead of the ministry, then that would have much the same invasive impact, the same kind of policy invasion that the FSIA seems to be trying to protect. I mean after all not every minister is penniless. I mean you had said if you sue low ranking people, or low ranking officials, then how are you going to get anything, but there are prosperous people who are very active in government and not just in Saudi Arabia.
AB	It's true that not every minister is penniless but it is also true…..
Judge Jacobs	But wouldn't it paralyze a ministry if you could sue the minister and the assistant ministers and the sub-ministers and everybody else, and they actually had to respond, and they actually had to pay? Wouldn't you be able by litigation to control what a foreign ministry does?
AB	I think first of all there is the issue of what was Congress trying to do in the Foreign Sovereign Immunities Act and I think in terms of trying to regulate our relationship with foreign government and not so much concern with the individuals. There are commonwealth immunities that apply to individuals and they apply in some circumstances for common law and I think that the evidence if you are looking at the statute and you look at these other common law immunities, including treaty immunities what conclusion you can draw would be that Congress meant to do was to leave intact the common law immunities that individual officials have which we argued in our brief would not protect these defendants here. It is not that they are not without any immunities, but the scope of those immunities is different.
Judge Cabrenes	So the FSIA is not as you suggested at the beginning of your argument the exclusive source of law here. That is, the common law survives the enactment of the funds.

AB	Well what the Supreme Court said it was the exclusive source for the state. The common law survives for the individuals. I think the common law and the treaty law survives through the individuals and that what the FSIA did was to take all immunity of the state and it defined the state and it didn't include the individual officials when it defined …
Judge Vitaliano	I also wanted to obviate for the state the pains and tribulations of discovery and the costs of litigation and the involvement of the court and the operations of the ministry. If in fact the minister is not immune, then the alleged protection from that kind of complex litigation becomes a nullity for the ministry as well as the minister, does it not?
AB	I think some of the policies are different and the scope of these other immunities are different. For example head of state immunity. If we don't include the individuals, their logical push/pull at the extreme of your examples was well what if you sued the head of state. Well, we have head of state immunity and I think one of the reasons Congress didn't put the individuals in the FSIA is that head of state immunity is not delegated to the courts. It's in the discretion of the State Department. It's always worked in terms of the State Department making its recommendations that who is entitled to have state immunity. The problem isn't that there; the way you posit it is either there is you know FSIA immunity or no immunity. Our argument is that Congress left intact the existing framework of immunity, head of state immunity from the State Department. They have a convention immunity for diplomats and whatever common law immunities existed for everybody else, it enacted the FSIA to deal with the immunity of the state itself and I think the reason it did that was because these immunities were so different if you have the Vienna Convention. If you put those two diplomats into the FSIA we are out of our treaty obligations, and so I think they left those alone and I think if you looked at those common law immunities would you see is that there are any instances in which they were protecting individuals, but not here and again that's in our reply brief, the explanation of why the common law immunity would not protect them here and I don't want to revisit that.
Judge Jacobs	Ok, but thank you. You reserved some rebuttal.
AB	I reserved some rebuttal and I have to say that I actually…I didn't get to the rest of my argument or the rest of the issues that I had …..
Judge Jacobs	Well we do have the briefs and there is no shortage of them. If you want to use rebuttal now you can do that as well.
AB	You know, I will save it for rebuttal because if I don't need it for rebuttal I can make the point at the end that I would have made now. So I will do that, thank you.
Judge	Good Morning.

Jacobs	
James P. Kreindler	Good Morning Your Honors. I am Jim Kreindler and I represent the *Ashton* plaintiffs and I'm going to be speaking only about Prince Mohamed and I'm going to say nothing about immunity because there is no immunity issue at all involving Prince Mohamed. I'm also going to say nothing about pleading standards because our allegations meet Twombly, Iqbal flexible plausibility standards as well as the old standard. Before focusing on Prince Mohamed though I do want to take a minute to talk about Al Qaida and 9-11 and then focus in on Prince Mohamed's essential role, his essential role in Al Qaida being able to do what it did. In preparing for today Your Honors, you and all the attorneys have become familiar with obviously a very tragic stream of cases and all the terrorism cases. Most of the terrorism cases such as Boim, Ungar and Weiss involve Hamas shootings. And really those shootings do not require years of planning an intricate organization, it involves Hamas terrorists getting a car, and all you need is guns and bullets, driving through a street and shooting Israelis or Jews. Their akin to gangland slayings. Al Qaida is a completely different beast. Everything Al Qaida did took years of planning and Al Qaida operated as a multi-national corporation would. After Khalid Sheikh Mohammad's nephew Ramsey Yousef succeeded the '93 World Trade Center bombing, Khalid Sheikh Mohammad, the mastermind of 9-11 planned the Bojinka plot to blow up simultaneously ten (10) aircrafts in mid-air. When that plot was foiled, he immediately turned to other long-term plots. The surveillance of the U.S. Embassies in Nairobi, Kenya and Dar Es Salaam, Tanzania began 5 years before the bombing of August 6, 1998. That was a 5-year plan. The 9-11 plan was a 5-year plan. Khalid Sheikh Mohammad proposed it to Bin Laden in 1996.
Judge Cabrenes	Where is all of this taking us?
JPK	The point I want to make Your Honor is for Al Qaida to do what it did, it needed four essential things. It needed a country to host, harbor and protect it, to provide intelligence, passports to let it operate. Number 2 – it needed terrorists that was supplied worldwide by radical Imams in the mosques. Number 3 – it needed money - that was provided through the charities; charities headed up by co-defendant and global terrorist Batterjee who we link to Mohamed by Yassin Al Kadi, specially designated terrorist, head of charities we link to Mohamed; by Julaidan, specially designated terrorist. And number 4th and what I'm going to focus on; it needed banking. It needed an international bank.
Judge Jacobs	Now what was Mohamed's connection to any of the banks that held, what's the closest connection? Just do the closest one…it's all you need is one, right?
JPK	Well, it's all five. If I could just take a minute and I'll explain this relation to the five because they are all significant. Mohamed headed up DMI, Dar al Maal al Islami. He was the chairman. Underneath DMI, 100% owned by DMI, was Islamic

	Investment Company of the Gulf. DMI is in Switzerland; Islamic Investment Company in the Gulf. That in turn had a subsidiary FIBS (Faisal Islamic Bank of Sudan) here we are in the Sudan. Mohamed was the Chairman of FIBS. FIBS was a major shareholder in Tadoman Bank in the Sudan. Then Tadoman Bank and FIBS were major shareholders in Al Shamal Bank. Now we put forward testimony showing that these three Sudanese banks, FIBS, Tadoman, Al Shamal, all had Al Qaida accounts and did it through 9-11. There's the statement of Carl Levin, right after 911, Senator Levin. Al Shamal still has Osama Bin Laden's money.
Judge Jacobs	You mean the money could have been put into you know, Chicago National. That doesn't mean that the CEO of Chicago National either knows what his…most of the banks don't care what their depositors are doing with the money unless they are actually laundering.
JPK	That is the key difference between Western banking and the know your customer principal in Islamic banking where because of an Islamic bank cannot show or collect interest; its partners. So let's take Al Shamal Bank. You have $50 million invested by Osama Bin Laden. On the board, the head of it is Batterjee, specially designated terrorist who runs charities that are funding Al Qaida. You have the President in Al Shamal Bank of the Sudan, and Sudan's designated a state sponsor of terrorism because it supports Al Qaida and remained designated through 9-11. Even when Afghanistan was not designated when Bin Laden and the leadership went to Afghanistan the banks stayed in Sudan. Now it is under the no re-customer rule, where you're partners, it is inconceivable that when the international communities criticize Sudan for hosting Al Qaida and Bin Laden puts in $50 million dollars and the principal shareholders are Tadoman and FIBS directly, with Mohamed as chair, it is inconceivable that he was not knowingly providing the financial banking services Al Qaida needed and contrary…
Judge Jacobs	Why shouldn't any bank be happy to provide financial services to a major depositor if the major depositor is willing to put money in without collecting any interest? It seems to me, why would the bank be suspicious or negative about it? It sounds to me like a terrific deal, and the fewer questions you ask, the better.
JPK	Because this is Osama Bin Laden and Al Qaida. I mean if you were to imagine hypothetically of today, Osama Bin Laden would approach the president of some financial entity and say hey let's partner up, you and me, my money, that financial entity would not be able to do so because then it would be providing material support to terrorism.
Judge Jacobs	Now let's just say suppose a terrorist had $20,000 at stake that was going to be used. The terrorist puts the money into a bank and then withdraws the money as the terrorist needs it. Why is the bank providing financial support? It sounds to me like the terrorist is supporting himself or herself.
JPK	Because if the terrorist needs to wire money to other people around the world and other financial institutions and pay its employees and buy training camps and buy

	airplanes to transport missiles, it needs a bank to do that. The terrorist sitting in a remote farm cannot pay the employees nor can it buy an aircraft in Arizona, nor can it move money around the world, nor can it collect the money that is slowly leaked through charities from radical mosques, it needs an international bank. Now we have alleged, paragraph 276, that Prince Mohamed knew of these activities. Mr. Cohen points out that poor drafting ships knew or should have known and fortunately an imperfect lawyer like myself can rely on Rule 8(e) that says we have a statement and another statement in the alternative if the first is legally sufficient, the insufficiency of should have known doesn't render the proving improper. Now if there is any doubt in anyone's mind when we said Prince Mohamed knew of these activities, this is allegation 276, after 275 previous allegations, 100 involving Mohamed's partnership in the Sudan. If there is any doubt, a simple remedy request a more definite statement into Rule 12(e) and obviously we would have said this refers to all the banking activities that Al Qaida needed that Prince Mohamed was providing through his five banks. I haven't mentioned Faisal Finance where the two specially designated global terrorist Julaidan and Al Kadi, had 23 accounts on 9-11. That was in our memorandum of opposition and Judge Casey took note of it and then later when we amended the DMI and other portions of the Complaint in a later complaint. Now, fundamentally as I see it what was the principal error here? Prince Mohamed says let's take each allegation, look at it under a microscope and when you do that it doesn't tell you much, it doesn't show the whole picture.
Judge Cabrenes	Well is it really the threshold issue a rather simple one of whether we have jurisdiction over this person. I mean can we agree that the issue is not whether he is a good guy or a bad guy. The issue is not whether he knowingly supported various nefarious activities of Osama Bin Laden. The question is whether as a court we are authorized by law to exercise jurisdiction over him. Now why don't you get to that point?
JPK	Your Honor he was a bad guy.
Judge Cabrenes	Assume he did everything for the sake of the discussion.
JPK	That's the question. We said he purposely directed his activities at the United States because he knew that Osama Bin Laden and Al Qaida were waging war against the United States when he partnered up with them in these acts.
Judge Vitaliano	Does it matter if he knew that he was doing other things that were not war against the United States; that if they were charitable works flowing from the same account?
JPK	I don't think that matters Your Honor as long as Vitalieno he knew that his partner is waging war against the United States, and that war requires financial services and funds, the fact that he does good deeds too. I mean after all the Mafia Dom could be beloved in the community for buying shoes for the orphan. That doesn't excuse, you know… excuse….

Judge Vitaliano	The question is whether or not Mohamed then had to intend to get jurisdiction here; that the money be used here for that purpose or that he knew it. The difference between knowing it and intending it may be the difference between jurisdiction and no jurisdiction.
JPK	Here is how I think we can answer that question. He knew that Al Qaida would use funds and use financial services to attack the United States. Neither he nor anyone else knew in 1991 the date of the attack or whether it be the World Trade Center or the Sears Tower. He intended to provide financial services to Al Qaida and…..
Judge Cabrenes	What did you say in your complaint in support of that proposition that he knew and/or intended?
JPK	We run through all these activities and then summarized in 276 by saying he knew of these activities and we use the word knowledge and intent under Rule 9, we aver it generally as we are permitted to do.
Judge Vitaliano	What is the basis for the information and belief that leads to the conclusion that he intended as opposed to just knowing?
JPK	Because especially in our Reply Brief as we demonstrate the facts of Islamic banking and know your customer. You are in the same project and you pool your resources to affect the deal rather than earning interest. So when what Al Qaida is dedicated to doing and you know Al Qaida needs your banks to do it. When you provide your financial services that's providing material support to terror because you intend to help Al Qaida.
Judge Jacobs	But doesn't that prove too much because Al Qaida is directed against the United States the way its directed against the West broadly speaking in westernizing influences. So if there is jurisdiction in the United States on that basis, then why wouldn't there likewise be jurisdiction in Spain and in Luxembourg and Indonesia and Figi and a score or maybe hundreds of other nations?
JPK	I think there are two answers to your question or a two-part answer. Number one before the U.S. bombing and invasion of Iraq, Al Qaida was focused on Israel, but primarily focused on the United States.
Judge Cabrenes	It wasn't concentrated on Israel as a matter of fact, but let's not get into that.
JPK	The point is the presence of U.S. troops in Saudi Arabia. The U.S. law in the Mideast was a focus of Al Qaida's war and the attacks were all directed against the United States. The '93 World Trade Center bombing, the Bojinka plot, the U.S. Embassy bombings.
Judge	Tanzania, I mean it was the United States Embassy but there were a lot of

Jacobs	Tanzanians who died there and Kenyans as well. I mean you can see all that you know particular.
JPK	The focus is the symbol. It is the U.S. Embassy. It's the ability to hit the U.S. whether it's the U.S. warship to call off Yeman or U.S. Embassy. After Iraq, then Al Qaida began attacking U.S. allies to break the coalition, Spain, Italy, the UK…
Judge Jacobs	Indonesia
JPK	Well, all post 9-11.
Judge Cabrenes	Would your view be that all of these places would have jurisdiction. It's a species of universal jurisdiction.
JPK	No, I'm not familiar with the law of the UK or Spain and I don't know if there is an equivalent to the Anti-Terrorism Act in Spain. But if you've asked me would a Spanish family or a UK family have jurisdiction over Al Qaida or the entities that supported Al Qaida and provided material support, I would say I assume they would, but that was all post-911 because those countries were not targeted until they joined with the U.S. and the Iraq coalition.
Judge Vitaliano	If I understand you Mr. Kreindler; I want to make sure I understand this. You are saying that the basis for the allegation with respect to intent is the nature of the banking system in Saudi Arabia or Sudan.
JPK	I would say it is the nature of Islamic banking, where your partners and you choose to partner with that entity and it's the knowledge of…
Judge Vitaliano	It's the equivalent of a partnership?
JPK	It is the equivalent of a partnership.
Judge Vitaliano	Its not really a bank?
JPK	That's really what it is and in fact it was interesting just a month after 9-11 the Bahani(?), the CEO then of DMI, Prince Mohamed's DMI, had a conference on banking when the world is saying to banks that we have to look and make sure you are not helping terrorists. He said it is much easier for us to do that in Islamic banking because we have this very different system involving small banks and knowing your customer and working together as a partnership. That's part of the answer…
Judge Cabrenes	To do what? To aid terrorism. You said it is much easier for us to do that.

JPK	Oh, oh yes to scrutinize who to know our customers or whether they are our depositors because unlike large western banks where money comes in and you charge interest and its anonymous, we're effectively partners, certainly with our major depositors.
Judge Cabrenes	So your allegations of fact regarding the nature of so-called Islamic banking to follow-up the question of our colleague on the bench. That is at the heart of your claim of jurisdiction.
JPK	That combined with knowing what Al Qaida was dedicated to do in the Sudan when the world is focused on Sudan's support of Al Qaida and our public enemy number 1. When you put those two together it is impossible in our opinion for Prince Mohamed to say "gee I didn't know that my $50 million dollar partner waging war on the United States was gonna do in Sudan." But the point is, my last sentence in thirty seconds on my jigsaw puzzle analogy. What the court was required to do at this stage in the pleading stage and what we're asking is obviously we don't have all the pieces of a jigsaw puzzle. There has not been one moment of discovery, but we've presented a number of allegations were entitled to those being accepted as true and drawing reasonable inferences. We're entitled at this stage to have Your Honors look at our allegations or pieces of the jigsaw puzzle and say have we presented a plausible, reasonable claim with inferences we're entitled to draw on from our many allegations.
Judge Vitaliano	Your Complaint alleges the partnership concept?
JPK	Yes it does Your Honor.
Judge Vitaliano	Were there any affidavits or other admissible proof that provided to Judge Casey the permissible proof?
JPK	No this was all done on the pleadings and really I don't think it's a matter in dispute. Everyone recognizes…
Judge Cabrenes	Maybe when you come back on your rebuttal you might want to give some thought on this. In the meantime I would be interested to know what sort of discovery you would contemplate would be appropriate in these circumstances were you to prevail and this Complaint were to survive for another day.
JPK	I'm happy to do it now if you prefer or later.
Judge Cabrenes	Later.
Judge Vitaliano	And also what discovery was specifically requested of Judge Casey that was rejected by Judge Casey?

Judge Jacobs	Okay. Thank You.
JPK	Thank you.
Michael Kellogg	Good morning. I'll give you the line-up for the defense side and whose going to be talking. We made some slight adjustments with the court's permission in light of the plaintiff's presentation. I will be talking for 18 minutes on behalf of the Kingdom of Saudi Arabia and Prince Turki addressing general FSIA issues. Mr. Robbins will appear on behalf of the Saudi High Commission for two minutes, then Mr. Jeffress will be up for 15 minutes to talk about the application of the FSIA to individual members of the government of Saudi Arabia and also personal jurisdiction issues. And finally, Mr. Cohen will have 10 minutes to talk about Prince Mohamed.
Judge Jacobs	That will be fine.
MK	May it please the court, I represent both the Kingdom of Saudi Arabia and Prince Turki. The Kingdom of Saudi Arabia has been identified as a critical ally of the United States in the war on terrorism.
Judge Jacobs	(whispering … unintelligible)
MK	They also themselves have been subject to a number of terrorist attacks launched by Al Qaida. As we know the president just completed a state visit there and a new arms deal with the Kingdom.
Judge Cabrenes	Mr. Kellogg why don't you skip all of that which I think, you know …
Judge Jacobs	Its neither here nor there.
Judge Cabrenes	We read newspapers and all of that.
Judge Vitaliano	(laughing)
Judge Cabrenes	Why don't you just assume for the argument as we are required to do under the rules that all the allegations of nefarious conduct by the Kingdom and Prince Turki. Just assume for the argument. I want to make it clear and I am not trying to defame these people nor is anyone trying to defame them at least not on the bench. We have to assume its all true. Now if its all true tell us why this case has to be dismissed anyway.

MK	I will go directly to that although I would point out in the FSIA context it is slightly different, you don't simply take the pleadings at face value particularly in a case such as this where Prince Turki put in a declaration of his own explaining his relations with Al Qaida, his efforts to extradite Bin Laden and the plaintiffs came up with no evidence whatsoever in response to that affidavit. But let's just assume…
Judge Cabrenes	Why go on that point about the affidavit of Prince Turki. How did the district court in this context consider an affidavit of that sort without admitting the opposing counsel to test it?
MK	Well this court explained in the Robinson case and in the Virtual Countries cases that there is a fairly strict framework in FSIA cases. If you don't challenge their allegations then you look to see the legal sufficiency of those. If you challenge the allegations the plaintiffs have the burden of coming forward with some indication that discovery is even warranted.
Judge Cabrenes	How would they do that?
MK	Presumably, Your Honor that they have a basis for having brought these complaints in the first place, that they have a reason to make these allegations.
Judge Cabrenes	Let me put it another way. You forwarded this affidavit of Prince Turki. What did they in fact, how in fact did they respond in the district court? Why in your view is that inadequate.
MK	Well they responded by saying that the Court just has to accept our allegations at the pleading stage. That is not in fact correct.
Judge Cabrenes	Why is it not correct?
MK	We challenged them repeatedly in open court and if they had any basis whatsoever for challenging these statements made in Prince Turki's affidavit that now is the time for them to indicate to the court and indicate what sort of discovery would enable them to overcome that showing and FSIA.
Judge Cabrenes	So that's what they would have to show. I think it's a little unreasonable, isn't it to expect plaintiffs in this context, faced with a detailed affidavit by a statesman of substantial sovereign, given details of activities in a far away place of which we know nothing. What is it that they're supposed to do?
MK	Well, Your Honor, the FSIA creates a strong presumption against suing foreign sovereigns and they are immune not only from liability but from the burdens of litigation. Absent some specific showing which the plaintiffs have the burden of going forward and producing something well that conduct in question falls within

	one of the FSIA exceptions.
Judge Vitaliano	Was this conduct the allegation that Turki personally as opposed to his in official capacity made contributions?
MK	No, the allegations here are specifically geared to Prince Turki's public capacity as head of Saudi intelligence. If you look at footnote 4 on page 10 of the *Burnett* Reply Brief they say we seek to hold Prince Turki liable for actions he took in his public capacity and the allegation is that Prince Turki went to Afghanistan and cut a deal essentially that says you don't attack us and we won't try to extradite you and we'll give the Taliban certain resources. Now he denied that and we challenged him to come through with any sort of indication that his denial was incorrect and that there was a basis for going ……
Judge Cabrenes	What would that have been? What could that have been?
MK	It could have been for example a sworn statement which they claimed to have had but never produced in court.
Judge Cabrenes	A sworn statement of whom?
MK	Of somebody who was present at the meeting?
Judge Cabrenes	Your average Taliban affidavit. (laughter)
MK	They claimed to have had one Your Honor and we challenged them to produce it and they never did.
Judge Cabrenes	It wouldn't have been enough to come back with an affidavit attaching an article from the newspaper of record.
MK	I don't think so although they did attach various articles and such. But if I could turn to the specific FSIA exceptions. The essence of their claim is that the Kingdom and Prince Turki knowingly and intentionally provided resources to Al Qaida so that Al Qaida could attack the United States on U.S. soil. Now the FSIA has an exception specifically geared to the material supported terrorism in 1605(a)(7). The problem with the plaintiffs admits that they can't meet that exception because Saudi Arabia has not been designated as a state sponsor or terrorism, and you can almost see under that provision if the country in question has been designated. It can even, I would note, be designated after the fact. After the act in question, the State Department can say yes there is sponsored terrorism and you can sue them. But the State Department did not do that and some of the other defendants in this case – Iran, Syria, Sudan were designated sponsors of terrorism, were sued under the (a)(7) exception, but the Kingdom did not fit that. Now they claim that they can

	circumvent that simply by recasting the claim under a different exception, but Congress created this exception and imposed limits on it for a very important purpose to insure that the Executive Branch gets to negotiate tricky issues of foreign policy. Essentially a claim that Saudi Arabia waged war against the United States and this court in the Garb case and in the Cabiri case made it clear that you can't just plead around the limitations of a particular FSIA exception by recasting them under a different exception which is what they tried to do today. Now let me turn to the non-commercial torts exception which is the one that they primarily rely upon. I would note at least 3 problems with their reliance on that exception. First of all they haven't identified a single action that either Saudi Arabia or Prince Turki is alleged to have taken in the United States. All the material support took place abroad. What the DC Circuit has indicated …
Judge Cabrenes	All of it while he was serving in an official capacity?
MK	Yes, all of it while he was serving in his official capacity either in Saudi Arabia or in Afghanistan when you went there to negotiate with the Taliban. The FSIA is based on background principals of international law and as a 1984 UN report which we cite at footnote 9 in our Kingdom's brief states for the tort exception to apply, the state actor must himself have been present and committed his actions in the state in question. They actually give an example in that report of one country lobbing shells across the border into another. They said that would not be covered. That is act of war policy, issues, etc. That's not the sort of torts, the accidental torts, the traffic accidents, etc. that this exception is designed to get at. Now second problem is that the extended and speculative chain of causation
Judge Cabrenes	Are you referring to the report of the International Law Commission?
MK	(Note: During this section of Kellogg's presentation, there is whispered discussion between the judges at various points, although the audio is unintelligible). I am referring to the 1984 UN report which we cited in footnote 9…yes. The second point is they rely on a very extended spectrum of a chain of causation and conclusory allegations of scienter to get from anything that the Kingdom or Prince Turki has done to the actions of 9-11 and what the district court reasonably held is that that chain was just too extended and too speculative to allow them to abrogate FSIA immunity. The third problem with their theory is the discretionary functions. Even taking their allegations at face value, which again, we denied them and they failed to come up with anything in response and I don't think that they're properly accepted, but even taking them at face value the suggestion that Saudi Arabia gave money to various religious causes and international Islamic charities is a classic discretionary function about the causes that the state wants to aid. Even the plaintiffs' reckless allegation that Saudi Arabia directly funded Al Qaida directly and suicidedly since Al Qaida, has repeatedly attacked the Kingdom. But setting that aside, even if they directly funded Al Qaida that would still be a policy level

	decision and the same is true for the allegations that Prince Turki allegedly cut a deal with Bin Laden not to attack the Kingdom. Prince Turki refutted those allegations, the 9-11 Commission confirmed his account of it, but in any event recalled that the U.S. funded the mujihadeen in their fight against Russia in Afghanistan in the 1980's. Could this head of the CIA be hailed into court in Afghanistan to answer for civilian injuries from that conflict based on the support that they give. Clearly not. This is a classic discretionary function. We owe the same comity to other countries on this sort of issue that they would grant to us. The *Federal Insurance*, Mr. Cozen's argument, basically claims that various charities were alter-egos of the Kingdom and that under Bancec you should pierce the variable and hold the Kingdom responsible for their actions. There are three problems with that argument. First of all, the plaintiff showing below was focused not on the Bancec test but on showing that they were agencies and instrumentalities of Saudi Arabia. Now some of the charities, the Kingdom has said yes, like the Saudi High Commission, this is an instrumentality that we set up specifically to deal with certain issues abroad. Other charities such as the Muslim World League are not...we supervise them but they are not part of our government. Their brief centered on trying to show under the standard agency or instrumentality test that they belonged to the Kingdom. Not that you would pierce the veil and treat their actions as actions of the Kingdom and to each would ignore their separate steps. In any event, they didn't come close to satisfying the Bancec test. Mr. Cozen invited the court to do an independent investigation. That would be fine with me. The showing that the plaintiffs purported to make is at 834-35 to 836-79 of the appendix and it is complete and utter garbage. It's a collection of newspaper articles, reports and press releases that show at most that the Kingdom exercises some supervisory control over the charities. And indeed following 9-11 the U.S. asked them as an ally to exercise even more control and to shut down some of the charities which they did. It in no way abrogates the immunity of the Kingdom. In any event and the third point is suppose you attributed all of the charities' conduct to the Kingdom and suppose you pierce the veil, it still wouldn't make a difference because the charities were alleged to have done the exact same thing that Saudi Arabia is alleged to have done which is to provide material support to Al Qaida. That is a direct allegation in the *Federal Insurance* Complaint at paragraph 398 that if Kingdom itself did it, then it doesn't make a difference whether the Kingdom did it itself or did it to its charities, it's still not cognizable under the FSIA for all the reasons that I have already given, because they are not designated as a sponsor to terrorism and their foreign policy is a classic discretionary function that is not subject to suit in this court. Now I would like to conclude with two specific points. Prince Turki first of all as to Judge Jacobs pointed out – the FSIA protections would be pretty meaningless if foreign officials acting in an official capacity were not covered. Five courts of appeals as well as a number of district courts in this district have all held that it is the …..
Judge Jacobs	The Seventh Circuit seems to have held otherwise.

MK	The Second Circuit …
Judge Jacobs	True they're out in Chicago and everything but they're …
MK	The Second Circuit indicated otherwise although it was not actually critical to the decision in that case, but they did express skepticism.
Judge Cabrenes	Mr. Kellogg – you very kindly sent us a 28(j) letter on October 23 in which you attached some material from the U.S. government that the Department of Justice submitted in Kensington International against Bruno Jon Richard Itoua, et al. Do you remember that?
MK	Yes, Your Honor.
Judge Cabrenes	And that was very useful and it raises the question since you spoke earlier of tricky issues of foreign policy which are raised by this case. How do you explain or is it relevant that unlike virtually all other major cases involving the FSIA we have not had the benefit of the views of the Department of State in this particular case.
MK	A couple points on that. One of the points of passing the FSIA was to regularize the legal principles and not require the State Department to enter into every case. Actually in most of the FSIA cases that I have examined, it is actually the exception rather than the rule that the government intervenes. The third point I would make which the Supreme Court I believe in the Nelson case and this case re-echoed in Garb is that you don't defer to the governments views of the FSIA. They put those before the court and _____(?) and other cases and …
Judge Cabrenes	On the theory that it's the courts that construe statutes and that's a statutory question now …
MK	Right, Your Honor. That is absolutely correct. The final point that I'll make has to do with there are some allegations in the *Federal Insurance* Complaint alone against Prince Turki in his personal capacity. After he was dismissed from the *Burnett* case and other cases, they added some boilerplate allegations saying here is a list of charities and he gave money to them. We sent them a Rule 11 letter saying it is false but your basis for it they never responded to that letter but the allegations are there and they are trying to rely on them. Mr. Jeffress is gonna make this point in more detail, but I would merely note that conclusory allegations that Prince Turki donated money to certain charities international, recognized Muslim charities, none of which at the time were on any prescribed list or any list of designated terrorist entities is pointly not sufficient to shove any personally and purposely directed his activities toward….
Judge Cabrenes	Are they now on any such list?

MK	One of the charities Al Haramain was since their branch in the U.S. was criminally prosecuted by the government. Their international branch was not but it was shut down by Saudi Arabia at the request of the Kingdom. Does this court have further questions?
Judge Jacobs	Thank you.
Lawrence Robbins	May it please the court I am Larry Robbins and I represent the Saudi High Commission for the Relief of Bosnia and Herzegovina so I am taking two minutes to make 3 quick points all relating to the argument made by Mr. Cozen for the *Federal Insurance* plaintiffs. First, the very core of his argument is that we are indeed an organ of the state of Saudi Arabia, thus making us a sovereign and obviating the first half of the argument as far as my client is concerned. Second, insofar as he argues that we are subject to the non-commercial tort exception, there are two points that I want to respond to and then I'm going to sit down. The first is the contention that we are, as he says in paragraph 182, a "fully integrated part of the Al Qaida operation" is precisely the kind of _____(?) conclusory, unsupported allegations that this court in Iqbal doesn't tolerate in the Supreme Court.
Judge Jacobs	Well, just a second. I mean … one of the major functions is to provide aid to people in the former Yugoslavia, correct?
LR	That's correct.
Judge Jacobs	But the office in Sarajevo was shut down and by the government there of by the United States forces there and what they found there were pictures of the Trade Center, maps of Washington with little targets all over it. I mean it was shut down on the theory that it was not…what they were doing was incompatible with the role of a humanitarian organization.
LR	Well, no, I think Judge Jacobs that is not correct that they were shut down for that reason. It is true that the offices once occupied by some members of the Saudi High Commission were raided, that is true. And it is true that on some computers operated by someone unknown people there were pictures, as there doubtless were throughout the world in the wake of the World Trade Center bombing. But, the point however, is that particularly in the face of factual submissions by our client regarding detailed auditing of the work that we did and that's the third point I wanted to come to and then I'm ..
Judge Jacobs	Well, people may have postcards of the World Trade Center all over the world, but people don't usually have information on how to make phony U.S. State Department badges.
LR	Well there is an allegation that there were computers I agree.

Judge Jacobs	I'm not saying it is written, just that these are the allegations that we are dealing with.
LR	Yes, they are the allegations and for the reasons that time doesn't permit me to address now, we don't think they are close to sufficient either under pleading standards or especially under the doctrine specific to FSIA jurisdiction.
Judge Jacobs	Well, time permits, why not?
LR	Well, let me start with the proposition that even if you take these as true and even if you ignore as you ought not to, the detailed Declarations submitted by our client and this is the one point I wanted to make, the suggestion that we just ignored and therefore you have to take as gospel the allegations in the Complaint is simply not true. We submitted two detailed Declarations of their work, the audit of the operations of our organization with exhibits reflecting the audit by the Bosnian government of precisely where our money went. It is true that there is an allegation, Judge Jacobs, about computers found in workspace that may have been used by one or more unidentified people who once worked for us. What they were used for, how those people operated, what they may have done is the worst sort of conclusory and the link of causation I would respectfully suggest is so long as to make Mrs. Pulsegraft(?) blush. But, let me just say this, even if you grant all of that, even if you ignore the causative chain, you cannot escape the fact that as Judge Casey found below, the decisions of the Saudi High Commission about how to spend its money constitute the exercise of foreign policy for the sovereign state of Saudi Arabia.
Judge Cabrenes	Can you describe in very summary form what the Saudi High Commission is?
LR	I'm glad to and it's reflective in the two Declarations. It was formed in 1993 Your Honor to coordinate the provision of foreign aid and foreign assistance to Bosnia in the wake of Serb atrocities. It gave $448,000,000, the use of which is detailed in Exhibit 3 to the Al Rashood Declaration, laying out precisely the categories of its work including paying rebuilding libraries, rebuilding orphanages, paying for you know religious centers. A substantial portion of its money was given directly as foreign aid to the government of Bosnia. This is the foreign policy of the Kingdom of Saudi Arabia and it is the very core of the discretionary functions exception even if you grant every computer, every conceivable inference from the computer evidence to which Your Honor referred to…
Judge Cabrenes	It is an integral part of the Saudi State?
LR	And conceded to be in paragraph 182 of the *Federal Insurance* Complaint. Thank you Your Honor.

Judge Jacobs	Thank you.
William Jeffress	May it please the court I am William Jeffress and I represent Crown Prince Sultan, the second ranking official of Saudi Arabia, Interior Minister Prince Naif who has been the Interior Minister for decades, and I represent Prince Salman who is the Governor of Riyadh and most particularly to this case, is the President appointed by the President of the Counsel of Ministers to be the President of the Saudi High Commission. I am going to address the issue of the interpretation of the FSIA as to individuals. I am going to address some remarks to the question of personal jurisdiction of these individuals. But I thought I would start first because this issue of discovery has come up several times and tell the court what the record shows with respect to the issue of discovery. When the *Burnett* case was pending before Judge Robertson, the plaintiffs made a same argument that they made later before Judge Casey that we need discovery. Judge Robertson in dismissing the *Burnett* case found that the plaintiffs have never shown me any particular focus discovery that they request or would need that would assist the court in determining these issues. We came up to the Southern District of New York when the MDL assigned it, and other Complaints were filed, but never, never in the course of proceedings before Judge Casey did the plaintiffs identify any specific discovery that they wished. The court will find one reference to a specific discovery request in the entire record and that is that the transcript of the hearing before Judge Casey on September 14, 2004, pg. 116. I did read into the records some interrogatories that they had sent us. Those interrogatories were asked for, give us all new records relating to your, meaning Prince Sultan's, duties and responsibilities as chairman of the Supreme Counsel of Islamic Affairs. Give us all your records relating to his duties as head of the Special Committee of the Counsel of Ministers. This is the only thing that the record reflects. There were no motions to compel discovery, there was no specific showing. Now the Court reviews or denies our ruling as to limiting discovery for abuse of discretion. I would point out that Judge Casey made a quite different decision with respect to another defendant, the National Commercial Bank, which is in the same opinion that he issued on our motions to dismiss. He found that the plaintiffs had shown, that there was a factual issue with respect to National Commercial Bank's entitlement to immunity and he afforded discovery. He ordered that limited discovery be taken. But I would suggest Your Honor that when the plaintiffs' argument as to these officials turns on allegations which erodes his characterization such as what he knew, he knew that these charities were going to divert funds to Al Qaida. He intended that these monies be used for Al Qaida. It cost nothing for plaintiffs to simply fill in a word like that, but nowhere do you find in any of these Complaints, well when did he learn, who told him, what exactly did they tell him. Every time the plaintiff submitted some kind of evidence whether it's the Pasqual affidavit from France. It doesn't even mention Al Qaida. Whether it is some newspaper article about what Madeline Albright was planning to raise with Prince Sultan, it refers to two charities that are not even involved here, and that Saudi Arabia never supported. Every time Judge Casey took a look at what the plaintiffs submitted and what they claimed would be a basis to take discovery, he

	found that it didn't support the allegations. So I respectfully submit Your Honor and I know Mr. Kreindler is going to come up here and say what kind of discovery he wanted, but the plaintiffs never made any showing of that to Judge Casey.
Judge Cabrenes	While you are commenting on discovery, what is the state of this litigation in this Court? Not all issues are on appeal. So what is left in the District Court and before whom are these pending?
WJ	They are pending before Judge Daniels. There are, I believe, there are quite a number of defendants that defaulted and _____(?) your default has been made. There are other defendants who are defending their Rule 12(b)(6) motions pending. Some of them have been decided, but have not been certified for appeal. Some of them are yet to be decided. There is some discovery being taken as to some of the defendants, the charities for example, National Commercial Bank for example. So the case is proceeding in the District Court.
Judge Cabrenes	There is some discovery taking place?
WJ	Yes, there is. That is my understanding Your Honor and of course we haven't been in the District Court for a while. (short laughter by Jeffress) Let me turn if I may to this question about the immunity of officials under the FSIA. Your Honor, the issue as they panel this court, phrased it in the Kensington case recently is – is the immunity of officials governed by the FSIA or is it as the United States argues in its brief, is it governed by common law which existed, of course, prior to the FSIA. And may I say that this court in a pre-FSIA case Heaney v. Spain,which is cited in our briefs, held that officials of a foreign government are immune where, for actions in their official capacity. Now citing the Restatement of Foreign Relations which says that that is true in cases where the action seeks to impose a rule of law on a foreign state. Now of course suits to foreign states, Saudi Arabia in this case, can act only through its officials. And where the plaintiffs seek a ruling that Saudi Arabia and the exercise of its national policy and as a leader of the Islamic world cannot support particular organizations, of course they are seeking to impose a rule of law in Saudi Arabia, because these are officials of Saudi Arabia who are carrying out that policy. So the position of the United States in the Kensington case is actually more favorable to my clients because the position is that the officials are absolutely immune. They are not subject to the exceptions that the FSIA codifies. But I will say the issue that the Court did not decide in Kensington because the District Court had not reached it, is clearly presented in this case. This Court could find that it doesn't matter because of the well settled principals of law including Heaney v. Spain, these officials Prince Sultan, Prince Naif, Prince Salman are entitled to common law immunity, absolute immunity. And there is a suggestion in the 28(j) letter, I believe from Mr. Kreindler, that the defendants somehow waived the right to raise common law immunity by a Rule 12 motion. Your Honor, in this decision by this Court called Canadian Overseas Ores Limited, which is 727 F.2d 274, the court ruled that the question of immunity cannot be waived by a defendant official immunity except when it is not raised in the first responsive pleading, which

	of course has not been filed here, that would be the Answer. So there is really no question of having waived it and you know I would respectfully submit that the Court could use a jurisprudential matter, but the Court could hold that this issue doesn't have to be decided in this case because these defendants are entitled to common law immunity in any event. I would point out one other thing on that issue. Some courts, particularly the DC Circuit – there are five circuits of course that have held that officials are covered by the FSIA and only the Seventh Circuit in Enahoro has suggested otherwise. In some of those cases, for example the DC circuit has said that they are covered because they are "agencies or instrumentalities of the state." Now that is under Section 1603(b) which is the definitions section. I would suggest to the Court, that does not need to be the basis for coverage by the FSIA of officials. It also does raise two problems as the United States points out in its Kensington brief. it raises the problem – number 1 that under Section 1610, which says that generally the assets of an instrumentality of the state are generally available for seizure if found that the United States to satisfy a judgment, and the State Department says that has never been true for individuals and should not be true. The other one is under Section 1606 and instrumentality is subject to punitive damages. And again, according to the United States, that would create problems. The real basis….
Judge Jacobs	I'm sorry, but are you saying that in this case it would be unnecessary for us to decide whether or not individuals are entities or covered as agencies or instrumentalities of a foreign state because of the availability of common law immunities.
WJ	That's right…
Judge Jacobs	For every individual's, whose claims are at issue in this phase of the lawsuit.
WJ	The only question is whether they are suited for acts taken in their official capacity pursuant to their official duties. If they are, then they are absolutely immune.
Judge Jacobs	Yes, I understand that.
Judge Cabrenes	But not under the statute?
WJ	That's what I'm saying. If you adopt the United States' position in the Kensington case that would be true.
Judge Jacobs	Let me see…if we adopt the United States' position in the Kensington case, then we wouldn't have to look at the FSIA, we would just consider common law immunity.
WJ	That is correct Your Honor.

Judge Cabrenes	Because the FSIA refers only to political subdivisions and agencies or instrumentalities and there is no suggestion that these individuals are either political subdivisions or agencies or instrumentalities.
WJ	I would suggest that.
Judge Cabrenes	I guess what I am really asking you – are there any occasions when an individual somehow gets subsumed, or has been subsumed by a court under this rubric of agency or instrumentality?
WJ	That's the explicit holding of the DC Circuit. Yes. And in Chuidian they didn't go quite that far, but Chuidian is the most lengthy discussion in the Ninth Circuit in 1990 and I may say the United States made the same arguments before the Ninth Circuit then, that it made in Kensington here. The Ninth Circuit rejected it and found that this, Number 1 the definition of a state is not really a definition, it says state includes the following including political subdivisions. They apparently did that because there was some unclarity in the law prior to the FSIA, but that is not an all encompassing definition. They didn't say it includes courts, they didn't say it includes legislatures, but obviously they are included. And it didn't say that it includes individuals. I think the…
Judge Cabrenes	What about your adversary's argument that in the old saw that Congress knows how to draft the statute and if they had intended to grant immunity in the FSIA to individuals of this rank or position, they would have known how to do it and they didn't do it.
WJ	I would think the proper reasoning would be exactly the opposite. I mean courts held including in Heaney v. Spain this court said the immunity of a foreign state extends to officials with respect to acts, etc.
Judge Cabrenes	Why didn't Congress codify this principal in a statute of this sort?
WJ	I wish they had, but one would think that if the Congress was going to address the question of immunity in a statute that the legislative history makes clear was intended to codify common law and to take this role of the State Department out of determinations by the courts of who was entitled to immunity. If Congress intended to, and by the way, none of this applies to individuals who have always been covered by the state's immunity, one would think they would have sensed that.
Judge Vitaliano	Isn't the FSIA an act of Congress in derogation of common law? Providing less protection that the common law did?
WJ	Actually not because the State Department to whom courts looked again and deferred on issues of immunity prior to the FSIA had adopted a restrictive position with respect to commercial activities. For example, with respect to torts. And the

	FSIA codified that restrictive position by codifying these exceptions, commercial activities, tort exception and non-commercial tort. So you know I wouldn't say it was in derogation of common law. The legislative history seems to indicate that it was intended to codify common law as it existed at that time, but to remove the role of the State Department…
Judge Cabrenes	But not comprehensively I guess you would say. It obviously did not codify common law with respect to state officials, right?
WJ	That's not what…well I'm sorry. Yes, because if the FSIA applies to officials then they are subject to the same exceptions that under the common law…
Judge Cabrenes	If they fall under agency or instrumentality?
WJ	That's correct.
Judge Vitaliano	So your position is that if we construe it as being silent, then the immunity as it existed at common law still exists with respect to the officials?
WJ	I think the courts probably needs…well, there is an issue which was not presented in Kensington that is presented here. Judge Casey did rule that officials are covered by the FSIA. The court can decide that they are or the court can decide that they are not. Or the court cannot decide because it doesn't make any difference. These officials are entitled to immunity under common law even if the FSIA doesn't apply. That's what I was saying. I wanted to go just briefly to the personal jurisdiction issue because the only viable theory on which anybody has ever suggested that there could be personal jurisdiction over Prince Sultan for example for personal acts. That is for acts that he alleged personal contributions that he made to some of these charities. The only theory that has ever been advanced is that the purposeful direction theory from the Burger King case and the Calder case in the Supreme Court, and Magnetic Audiotape case in this circuit and a number of other circuits, Your Honor, Judge Casey and Judge Robertson again, addressed this specifically and it gets tied up in the question of causation, but to say that executives who meet in Seoul to fix prices in New York may be sued in New York is one thing. Those are people who are purposely directing their activities at citizens of the forum. To say that as in …that's Magnetic Audiotape by the way, or there is a case called….
Judge Cabrenes	Why isn't that substantially similar to what's being claimed by the plaintiffs here?
WJ	Because it is so far from what's being done. If Prince Sultan was alleged to have sat down with Osama Bin Laden and planned the attacks on the World Trade Center, that would be purposefully directed. There is no question. Nobody even suggests that. This case is so far removed from the cases that ever applied that. In Burger King for example, they sat in Michigan and purchased a franchise in Florida for Burger King from a Florida resident and that's what the lawsuit was about. In

	Calder, they wrote for the National Enquirer about a California resident you know living in California making and distributed their newspaper in California. Of course, that is purposeful direction. But in this case, the central allegation, put aside all these words like front, or knew or intended and so forth, the central factual allegations of this case are number one – that the Princes donated either the Kingdom's money, or as to Prince Sultan his money, to well established international Islamic charities which are described in affidavits attached to the motions to dismiss the case before Judge Robertson. Number 2, that some of the funds of these charities were diverted to Al Qaida. Don't know when, what purpose, there is no allegation about that, and Number 3, that they knew or should have known that that was going to be done. There is no purposeful, other than, you know, using words like conspiracy or legal conclusions and with respect Your Honor particularly when you are dealing with the immunity of a foreign official, conclusory allegations under the cases we cited in our brief, are simply not sufficient. That's all we have.
Judge Jacobs	Thank you.
Louis Cohen	I am Louis Cohen for Prince Mohamed. I agree with Mr. Kreindler that the issue in Prince Mohamed's case is whether the *Ashton* Complaint and the *Federal Insurance* Complaint show or create a reasonable inference that he purposefully directed violent tortious activity at the United States. And the answer is no. They neither show that nor suggest that. They don't suggest that he supported tortious activity of any kind against anybody. If I may summarize in one sentence there is no allegation that Prince Mohamed transferred any money or property to anyone or that he had any significant connection with two of Mr. Kreindler's five banks, Al Shamal and Tadoman or that the other three banks – DMI, Faisal Islamic Bank and Faisal Finance – did anything that suggests that their chairman was targeting the United States for violence, or finally that Prince Mohamed knew about the one deposited account in Faisal Islamic Bank or the other accounts that Mr. Kreindler introduced in his brief below in Faisal Finance. Let me go back to Al Shamal which is the centerpiece of Mr. Kreindler's brief and his argument. There is no allegation that Prince Mohamed was ever a shareholder, a director, an officer, an employee, that he had any business dealings with Al Shamal at all.
Judge Cabrenes	What are the allegations?
LC	The only allegation is that Faisal Islamic Bank, which he chaired, invested in Al Shamal along with several other investors in 1984, seven years before Osama Bin Laden came to Sudan, nine years before Sudan was designated a sponsor of terrorism. To pick up on the metaphor that others have used, if you assume that we were…let's take the Eastern history out of this and instead of talking about Al Shamal, we were talking about the Carlyle Group and it had for some reason in the mid-1990's accepted an investment or a deposit from Osama Bin Laden, I don't think anyone would dream of saying that the chairman of the board of another entity

	that made its own investment in Carlyle a decade earlier, and isn't alleged to have done anything else, was somehow aiming terrorism at the United States.
Judge Vitaliano	Wouldn't Mr. Kreindler say that that's a false analogy because the legal forms are different, that in fact in Islamic banking, the bank that was the shareholder was a partner? These are people by the nature of the business.
LC	He does say that, developing and mostly in his Reply brief, and that is something I very much want to talk about because his position is completely illogical. He says that because Islamic banks don't pay interest and instead offer a sort of equity-like investment, they must know what their depositors are doing with their money. But that's backwards. A depositor who is looking to an equity return may have to know more than you and I have to know about what the bank is doing with his money, but there isn't any reason why the bank needs to know whether when he withdraws it, he is going to use it for good or evil. We're not talking about banks that are even alleged to have invested in …..
Judge Vitaliano	Well Mr. Cohen, as I understand Mr. Kreindler's argument, is that by the nature of Islamic banking world, that they do. The preliminary question – what is it that's in the Complaint or anything else that was before Judge Casey, were those facts stated before the Court below?
LC	There is essentially nothing in the Complaint. There is a sort of reference to this notice of Islam banking, but no claim that Islamic Banks have to know what their depositors are then going to do with their money. The theory is developed in his Reply brief and that's interesting too because in his Reply brief in this court, he says 2 or 3 times, that Islamic depositors participate in the business enterprises of the bank. Well, he gives the show away. That's backwards. There isn't any allegation that the business enterprises of these banks were bad. There isn't any allegation that the banks were investing in bad people or were lending money to bad people. There is only an allegation that the banks accepted deposits from one or two bad people, and from that Mr. Kreindler wants to say that for some reason unlike a U.S. bank, unlike a U.S. stockbroker who has to know his customer, the bank can be presumed to know what the bad guy is going to do with his money after he withdraws it from the account. We haven't responded to this before because as I said it was primarily developed in his Reply brief, but its an entirely illogical point. What we're talking about with respect to the three banks that Prince Mohamed does have some connection with is DMI has not actually alleged to have done anything bad itself. It says in multiply conclusory fashion that DMI supported terrorism through other banks. Faisal Islamic Bank is alleged to have had an account described in a single line of testimony from a guy who defected from Al Qaida in 1996 who just said at the end of a long explanation of irrelevant financing activities for Al Qaida. He was asked anywhere else and his answer was we got account in Bank Faisal Islami, end of testimony, we have no further information about that and plaintiffs are not entitled to say that because of that one-half sentence, they can assume that there were other accounts and that Prince Mohamed knew about them and that he must have been aiming terrorism at the United States any more than the Chairman of Sun Trust,

	where Mohamed Atta obviously had an ATM account, because there were pictures on 9-12 of him withdrawing funds from an ATM at Sun Trust, any more than the chairman of Sun Trust is somehow responsible. Let me say one more thing about discovery. In our case, there is no request for discovery by anybody other than Mr. Kreindler in *Ashton* and his request for discovery consists entirely of one page at the end of his brief below in which he says he'd like to find out more about Al Shamal's activities. Al Shamal is a defendant but I don't think he has asked them for that discovery. But he basically says some discovery would help me connect Prince Mohamed to terrorist activities. It seems to me that Judge Casey was entirely within his discretion to say no identification of an issue of jurisdictional fact and there isn't a prima facia case here so I have discretion to say no discovery. May I say one more thing? The Court doesn't have to decide whether Prince Mohamed was a good guy and my assurance that I know him and he is doesn't count for anything. But, there is a harm here that isn't at all commensurate of the harm suffered by the victims of 9-11, but is important. It is that a good man has been accused of some mysterious complicity in a horrific crime and he is entitled to have that accusation end. Thank you.
Judge Jacobs	Thank you. At this time we will hear rebuttal.
Stephen A. Cozen	Thank you very much and I will try to do this very quickly. But before I start, a caveat please. The caveat is that I want to distinguish between the parties here. I represent those parties who were the only ones who have sued the Kingdom of Saudi Arabia. We have also sued Prince Sultan and Prince Turki and all of these charities, and we have sued the Princes in their official capacity. But I want to make that clear because I don't all this melding together.
Judge Vitaliano	And not in their individual capacities?
SAC	That is correct Your Honor. Now point number 1. I assume that Mr. Kellogg has giving up the …..
Judge Cabrenes	Alright what are you distinguishing exactly…who are you not suing? You listed a lot of people you apparently are suing?
SAC	We are suing the Kingdom ..others…nobody else is, ok. We are also suing others, all the charities and the Princes as well, our theories are somewhat different, ok. We assume that Saudi High Commission, Muslim World League, etc., are all organs of the Saudi government. We don't contest that because we think organ is the same test that means do away with independent juridical identify. I want to make this clear. Mr. Kellogg, I assume, is withdrawing his quintessential argument before Judge Casey which was that (a)(7) and (a)(7) alone gives jurisdiction against foreign states for acts of terror. He didn't argue that today and I assume he is withdrawing that, the exclusivity of (a)(7). The entire tort argument pushes the text way too far. The tort took place in the United States. That's where four different planes went to

	four different places to bomb the United States' citizens and their property. Participation in that tort no matter where as an eager or better or a co-conspirator puts your conduct in the United States. This is not a question of comity. Mr. Kellogg never sent us a Rule 11 letter and he never filed any affidavit challenging our allegations and I dare him to say that he did. We did contest his allegations with regard to Prince Turki, look at A_____(?) through 415. We didn't confuse agencies and instrumentalities. We made the point that they were entitled to separate juridical identity. But what we said was Bancec requires control or the application of equitable principals to rebut the presumption of juridical identity and we will give you the chart that lays out every place that we said and alleged that that was the case here and they did not rebut. We never indulged in veil piercing. Go to anyone of our allegations with regard to the charities – paragraph 130 with respect to the IIRO or any of the others and you will see that that was never our theory. Judge Cabrenes, with regard to discovery, keep something in mind. The affidavits that they are talking about with regard to Turki and Sultan were filed before we ever filed our lawsuit. They were filed in the District of Columbia lawsuit. In *Burnett* and *Ashton*, way before we filed our lawsuit, then they were resurrected to try to rebut our allegations, but they don't because all they talk about is what a great thing this Saudi High Commission was constructed, who ran it, all the great things they did, they never addressed specifically a denial of what we put in paragraphs 182, 183, 184, 185, 186 and 187 of our Complaint. Nonetheless, out of an abundance of caution, when we were asked for discovery, and we did it with September 2nd and we did it with September 9th and Judge Casey denied it. He reasoned that the discovery was unnecessary because there were really no factual disputes raised. Now, as far as Prince Turki is concerned, as to Prince Turki and Prince Sultan, the judge imposed a heightened pleading, a heightened _____(?). It went beyond Iqbal. It went beyond pleading and went beyond any FSIA case. It said, you have to establish, you have to establish, that they knew and intended in order for you to go forward, and you may not have any discovery with respect to the same. Well, I submit to this Court that's never been the standard, that is not the standard and that would turn any FSIA standard on its head. They have the burden to show that they were immune. We have the burden to making allegations to show the accommodating exception. They need to contest our allegations. They never did. Look at the stuff that Turki submitted. It wasn't _____(?), it was from third parties. I just want to make one final thing clear Judge Jacobs, thank you for your patience and that is this: Kilburn recognized that clandestine and surreptitious conduct is the essence of global terrorism. So let's not be so fast to bar our own citizens from court and apply normal….once we get past the FSIA jurisdictional, I agree that's a rigorous test. But let's not be so fast to bar our own citizens from court because of heinous acts, violations of international law, which is why when you examine the conduct of the charities, not the policy to give money to Islamic charities but the conduct of those charities, why the discretionary function exclusion absolutely falls completely on its face. Thank you very much.
Judge Cabrenes	While we are waiting for co-counsel to get up maybe I can make a brief statement. Yesterday Judge Jacobs and I heard argument about body language in the context of

	a criminal case in which there were findings by a district court on the basis of body language, and I know that even though we're an appellate court and we don't make findings of fact, I think the records should reflect that when counsel just now characterized Mr. Kellogg's argument as withdrawing a particular argument we were exhibited to body language in Court that suggested that he did not agree with your characterization. Since he doesn't have the chance to get up again, I just wanted the record to reflect that.
SAC	I appreciate because there is no jury here that that body language may not….
Judge Cabrenes	The jury is here.
SAC	To the extent that he really wants to argue that 1605(a)(7) is exclusive, we'll rely on our ….
Judge Jacobs	It's really not in our interest to deem every argument that's not raised an oral argument to be abandoned.
SAC	I understand.
Andrea Bierstein	I am absolutely determined on this round to get past the issue of the applicability of the FSIA to officials and get to at least a minute's worth of the rest of my argument. Nonetheless I do feel that I need to say, and I want to make it very clear to the court that the scope of common law immunity has never been briefed in this case with the exception of I think a paragraph or two in my Reply brief. It was never claimed by the defendants. The issue of whether it's been waived has never been briefed. Our position is very different from Mr. Jeffress' position about what the scope of that common law immunity would be. And because its never been raised up until now by the defendants, there are many things the Court might do with this issue but I think finding that the defendants are actually protected by common law immunity is not one of the things that this Court can do at this juncture as to say the issue has not been raised nor briefed and I think we have a very different view of what the scope of that immunity would be. I want to turn now on the possibility that the court might not agree with that part of the argument and might go ahead and apply the FSIA to the individual defendants. I do want to respond to some of the arguments that were made about the tortious act exception which is what I had not gotten to originally. I think everyone is in agreement here on the way this works is, but first of all that the burden of persuasion about sovereign immunity under the FSIA lies with the defendant claiming the immunity. Okay, and when the plaintiff makes their allegations if the defendant does not controvert those allegations, the court is supposed to accept them as true. One of the problems here, one of the errors in this case, is that Judge Casey didn't do that. And particularly with Prince Sultan, and I think this is the important point that I wanted to make, what we alleged, and this was in the *Burnett* Complaint at paragraph 357, and we alleged in 1994 the Saudi Kingdom issued a royal decree

	then in the collection of _____(?) Saudi Arabia for charitable causes without official permission. King Fahd set up a Supreme Counsel of Islamic Affairs headed by his brother Prince Sultan to centralize, supervise, and review aid requests from Islamic groups. This counsel was established to control the charity financing and look into ways of distributing donations to eligible Muslim groups. Now this allegation was important to the rest of our allegations that Prince Sultan knew what the charities he gave money to were up to. The Muslim World League and the IIRO because we said it was his job to know. Now I want to clarify one other point as an aside because I may run out of time and I want make sure I get it in. We sued Prince Sultan not only in his official capacity, but we also sued him personally for money that he gave individually and that has nothing to do with the FSIA so whether or not he has got immunity under anything he wouldn't have it for the personal capacity. But in his official capacity we said it was his job and what did he do, he gave the money exactly to the charities that were the biggest supporters of terrorism. Now they did not contradict those allegations. In fact, in the motion to dismiss in front of Judge Casey, they originally didn't put in anything at all to deal with that. But when they did on their reply papers, put in an affidavit, and this is an affidavit that is in the record and the Court should look at it. I don't have time to go through the precise wording. He basically admits…he's like oh no he had nothing to do with charities, he was implementing policy to assist Muslims overseas in their conditions and to promote religion, which is exactly what the Muslim World League and the IIRO and the so-called charities were doing. He had also put in an earlier affidavit in the District of Columbia in which he admitted that the counsel made recommendations to the Saudi government about which organizations to support in doing that. So he did not controvert our allegations. Judge Casey failed nonetheless to credit the allegations and to accept them as true. Accepting those allegations as true, and we supplemented those allegations with lots of additional evidence, was crucial to the causal chain that we established. That he received multiple warnings and that he began to get regular intelligence briefings from the United States about terror financing. That the French Ministry of the Interior specifically told him about the Muslim World League diverting money to terrorist causes and that it was his job to be looking into this and nonetheless who did he give money to … the IIRO which was a subsidiary of the Muslim World League, and the Muslim World League. So that was critical to the cause of chain and Judge Casey disregarded our evidence and failed to credit our allegations despite the fact that they never controverted them, they never put in anything that actually contradicted that. I want to just spend, if I can, ten seconds on personal jurisdiction because I had not gotten to that and again if you are looking at these individuals in their personal capacity.
Judge Cabrenes	Your ten seconds is up.
AB	Excuse Me?
Judge Cabrenes	In your warm-up, your ten seconds expired. (laughter)

AB	If with the court's indulgence, could I have…
Judge Jacobs	Go ahead, but let's just wrap up because we're human up here.
AB	I will wrap it up…I just wanted to say that on the issue of personal jurisdiction there is in addition to the purposeful directed theory, there is a conspiracy theory that's been briefed by some of the other parties in the case and that the allegation is that we know..
Judge Jacobs	We won't assume you waived any argument that you haven't expressly articulated.
AB	When you know that Al Qaida says they're attacking the U.S. and you decide to give them money anyway, that is purposefully directing your conduct at the U.S. and that's all and I'm going to sit down. Thank you so much for your indulgence.
James P. Kreindler	Thank you Your Honors. Last and probably least I just have four things to say and the last will be your question about discovery. First, what we say is Prince Mohamed is the principal actor acting through these various banks that he controls or owns. That's the point we're making, not that the banks are doing it independently, that he is using the banks for his purposes. Second point Your Honor, we're not focusing on 1984, we're not accusing Prince Mohamed of doing anything wrong in 1984 when FIBS invested in Al Shamal. If Mr. Cohen and I, for our own strange reasons decided to open a partnership in Sudan in 1984, that would be perfectly acceptable and we could split our profits 50/50. But after Turabi takes over in 1991 and invites Bin Laden in, hosts the world's number one terrorist whose dedicated to war against us, if Bin Laden comes in and adds his $50 million dollars to my few bucks and Mr. Cohen's few bucks, that is the issue. That's what we're accusing Prince Mohamed of. That partnering with Osama Bin Laden, when Bin Laden puts $50 million dollars into this little bank in Sudan and joins with the previous partners as a partner. That's the point we're making. Now just a word on the status of the case and then discovery. There is a little discovery on two defendants Saudi Bin Laden Group and NCB, but I think at last count there is about 180 undecided motions to dismiss, many of which are several years old including related defendants. DMI is a defendant, Al Shamal Bank is a defendant, FIBS is a defendant. Now when Judge Casey decided the initial motion three years ago. He denied some motions and for example…
Judge Cabrenes	There are 180 pending motions to dismiss? How many parties are there? How many defendants would there be that are capable of filing motions to dismiss?
JPK	I'm guessing, but its probably close to at least half that number. You know 75 defendants including parties you heard about today, DMI, Al Shamal, they have been sitting there. When Judge Casey denied NCB's motion, he said I'm gonna permit you to take limited discovery. Now last, you asked about the discovery, Mr.

	Cohen is quite right in our memorandum of opposition we say if Your Honor has doubts about jurisdiction, permit us to do some limited discovery as he permitted with other defendants like NCB. Its really only one page and what we say and we focused on new evidence we had acquired over the last year, we said discovery will expose links between Prince Mohamed and terrorists targeting America. Can say four things. So the Al Shamal bank account with Bin Laden's millions remained opened through 9-11 and we cite to the September 26th statement of Senator Levin saying "Bin Laden remains the leading shareholder of the bank." Second…
Judge Vitaliano	This is what you told Judge Casey?
JPK	Yeah. Second we talk about the 23 bank accounts of Julaidan and Al Kadi in these banks if they were frozen and we alert that Julaidan and Al Kadi have now been designated especially designated terrorist by the United States government because Al Rabita and their charities were fronted for Al Qaida. And last, and focused on New York, and remember we cite the witness Al Fadl who testified in the Embassy bombing trial. And we said the Al Shamal bank account that Prince Mohamed knowingly provided to Al Qaida was used to transfer $250,000 via the Bank of New York for the purchase of stinger missiles and an airplane for Osama Bin Laden. So we offered these examples of, if there is any doubt, permit us some limited discovery to Prince Mohamed and ultimately these other defendants Al Shamal, DMI and identify the counts. When were they opened? How much money was in them? Where were the deposits sent? Were there wire transfers?
Judge Vitaliano	You are not alleging that he knew, that those purchases were going to be made when he allowed Al Qaida to have its account there?
JPK	What we're alleging is that he provided the banking services when Bin Laden came and said here is my $50 million dollars so that this enormous sum of money gathered from charities could be used to fund and plan terrorist activities, not that he foresaw 6 years later the purchase of an airplane or a particular stinger missile.
Judge Vitaliano	Now there is a difference between could and what he knew. What do you say he knew?
JPK	He knew that the money would be used internationally for terror attacks against the United States, not that he knew dates or places, but that Bin Laden, once he could put his $50 million into international banking circulation would then use the money to pay operatives and to move money worldwide and plan and ultimately execute accounts. The point about Sun Coast is exactly our point, we're not suing the bank that Mohamed Atta withdrew cash from the ATM because there is no reason to say that the bank knew or approved of these activities. That proves our point. We are suing the man who used his banks to partner with Bin Laden so that attacks like 9-11 could happen.
Judge	Thank you. I am going to ask counsel if you could all just take a note. As to the

Jacobs	individual defendants who are being sued for acts done in their official capacities the Court asks that counsel for interested parties file simultaneous letter briefs two weeks from today, say at 5:00 p.m., explaining whether common law immunity is potentially applicable or controlling, and if so, how it applies? If you can, just refer us to present briefing on the subject and you may respond at such length as you think the Court's patience will support. Is two weeks from today convenient for those counsel who are involved in it?
Attorneys	Yes Your Honor. It is fine with us Your Honor.
Judge	Thank you all. We reserve decision. The last case on calendar has been taken on submission. Please adjourn Court.

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