06-0319-cv(L); 06-0321-CV (CON); 06-0348-CV (CON); 06-0397-CV (CON); 06-0398-CV (CON); 06-0436-CV (CON); 06-0442-CV (CON); 06-0453-CV (CON); 06-0458-CV (CON); 06-0461-CV (CON); 06-0473-CV (CON); 06-0477-CV (CON); 06-0487-CV (CON); 06-0657-CV (CON); 06-0674-CV (CON); 06-0693-CV (CON); 06-0700-CV (CON); 06-0702-CV (CON)

United States Court of Appeals

for the

Second Circuit

IN RE TERRORIST ATTACKS ON SEPTEMBER 11, 2001

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES HRH CROWN PRINCE SULTAN BIN ABDULAZIZ AL-SAUD, HRH PRINCE NAIF BIN ABDULAZIZ AL-SAUD, AND HRH PRINCE SALMAN BIN ABDULAZIZ AL-SAUD

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

Defendants-Appellees Crown Prince Sultan bin Abdulaziz Al-Saud ("Crown Prince Sultan"), Prince Naif bin Abdulaziz Al-Saud ("Prince Naif"), and Prince Salman bin Abdulaziz Al-Saud ("Prince Salman") respectfully submit this consolidated brief.

STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded, in accordance with virtually every other court, that individual foreign officials may claim sovereign immunity under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq. ("FSIA"), for their official acts.

2. Whether the district court correctly concluded that the claims against Crown Prince Sultan, Prince Naif, and Prince Salman do not fall within any exception to the FSIA.

3. Whether the district court correctly concluded that it lacked personal jurisdiction over any claims arising from Crown Prince Sultan's, Prince Naif's, and Prince Salman's allegedly personal contributions in Saudi Arabia to international Islamic charities.

4. Whether the district court abused its discretion by concluding that the plaintiffs' conclusory allegations were insufficient to warrant jurisdictional discovery.

STATEMENT OF THE CASE

Two different district courts have concluded that because Crown Prince Sultan, Prince Naif, and Prince Salman are foreign sovereigns entitled to immunity under the FSIA, federal courts do not have jurisdiction over plaintiffs' claims against them. The first of the suits comprising these consolidated actions, Burnett v. Al Baraka Investment & Development Corp., was filed in the U.S. District Court for the District of Columbia on August 15, 2002. On November 14, 2003, the district court dismissed the Burnett complaint as to Crown Prince Sultan for lack of subject-matter jurisdiction under the FSIA and lack of personal jurisdiction. 292 F. Supp. 2d 9 (D.D.C. 2003).

The Judicial Panel on Multidistrict Litigation then consolidated Burnett and the rest of these (nearly identical) cases before Judge Casey of the U.S. District Court for the Southern District of New York. On January 18, 2005, that court likewise dismissed claims against Crown Prince Sultan for lack of subject matter and personal jurisdiction. 349 F. Supp. 2d 765 (S.D.N.Y. 2005). On May 5, 2005, the district court extended its findings to all other cases naming Crown Prince Sultan as a defendant. SPA-63 – SPA-66.

On September 21, 2005, the district court dismissed the claims against Prince Naif and Prince Salman brought by the Ashton, Burnett, and Federal Insurance plaintiffs. 392 F. Supp. 2d 539 (S.D.N.Y. 2005). On December 16,

2005, the district court entered judgment pursuant to Federal Rule of Civil Procedure 54(b) in favor of Crown Prince Sultan with respect to all consolidated cases, and in favor of Prince Naif and Prince Salman with respect to the Ashton, Burnett, and Federal Insurance cases. SPA-103 – SPA-105. This appeal followed.[1]

FACTS

I. BACKGROUND

A. Crown Prince Sultan, Prince Naif, and Prince Salman

Crown Prince Sultan, Prince Naif, and Prince Salman are all members of the royal family of the Kingdom of Saudi Arabia (the "Kingdom") and—most important for present purposes—high-ranking officials in the Kingdom's government.[2] Crown Prince Sultan is now the First Deputy President of the Council of Ministers, the Kingdom's highest governing body. A-1332 (Decl. of Abdulaziz H. Al-Fahad, ¶4). As such, he is the Kingdom's second highest-ranking official and the designated successor to the current King.[3] For the past 44 years,

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[1] As several plaintiffs note, Prince Naif and Prince Salman have stipulations with plaintiffs such that any appellate decisions will be applied to all remaining consolidated cases against them.

[2] Defendants are sons of former King Abdulaziz Al-Saud, the founder of modern Saudi Arabia, and half-brothers of current King Abdullah bin Abdulaziz Al-Saud.

[3] See http://www.saudiembassy.net/country/Government/bio-CP-Sultan-05.asp. Crown Prince Sultan ascended to this position with the recent death of his brother, King Fahd bin Abdulaziz Al-Saud. Id. Previously, Crown Prince Sultan

Crown Prince Sultan has served as Saudi Arabia's Minister of Defense and the Inspector General of its Armed Forces. Id. ¶ 4.

Crown Prince Sultan is also the Chairman of the Supreme Council for Islamic Affairs (the "Supreme Council"). Id. ¶¶ 7, 8. Created by King Fahd in 1995, this governmental body ensures that the Kingdom's support of international charities is consistent with its foreign and religious policies. Id. ¶ 8. Consistent with that mission, the Supreme Council (among other things) reviews requests for assistance from Islamic charities based outside Saudi Arabia and makes funding recommendations to the Council of Ministers. A-1333 at ¶ 11. The Supreme Council does not itself make grants, nor does it oversee the activities of recipient organizations. Id.

Prince Naif has served as Saudi Arabia's Minister of Interior since 1975. The Ministry is responsible for Saudi public security, fire service, police, and special investigative forces, and it maintains the Kingdom's laws. Prince Naif is also a member of the Saudi Council of Ministers. See In re Terrorist Attacks on Sept. 11, 2001, 392 F. Supp. 2d 539, 549, 556 (S.D.N.Y. 2005) ("In re Terrorist Attacks II").

Prince Salman is the Governor of Riyadh province and the head of the Saudi High Commission ("SHC"). The SHC is an organ of the Kingdom's government

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was the Kingdom's third highest-ranking official. A-1332 (Decl. of Abdulaziz H. Al-Fahad, ¶ 4).

formed in 1993 to organize and fund relief efforts in Bosnia-Herzegovina in response to the "ethnic cleansing" campaign of former Serbian dictator Slobodan Milosevic. The SHC now oversees the allocation of the Kingdom's charitable contributions in that region consistent with the Kingdom's foreign policy goals. See generally SHC Br. 4-6.

B. Bin Laden's Declared War Against The Saudi Government

The Kingdom's relationship with Osama bin Laden was one of enmity long before the terrorist attacks of September 11, 2001. In 1994, the Kingdom, acting through Prince Naif, stripped bin Laden of his Saudi citizenship and ordered all of his assets frozen so that they could not be used for terrorist purposes. A-2193 (Decl. of Nizar bin Obaid Madani, ¶ 5). Bin Laden responded by aggressively advocating the overthrow of the Saudi government. As explained in the Final Report of the bipartisan National Commission on Terrorist Attacks Upon the United States (the "9/11 Commission Report"), bin Laden "condemned the Saudi monarchy for allowing the presence of [American troops] in a land with the sites most sacred to Islam" and called for attacks on the Kingdom. Id. at 48.

Bin Laden reserved much of his venom for Crown Prince Sultan, Prince Naif, and Prince Salman individually. In a 1995 Open Letter to King Fahd, bin Laden singled out the three princes by name, labeling them the "sources of all evil" in the Kingdom. Memo. of Law in Support of Prince Sultan's Mot. to Dismiss

(03-MDL-1570 Dkt. #136), at 1-2; Memo. of Law in Support of Prince Salman's Mot. to Dismiss (03-MDL-1570 Dkt. #141), at 1-2. In his 1996 "Declaration of War," he branded Crown Prince Sultan and Prince Naif as "traitors who implement the policy of the enemy." A-2314 (Bierstein Aff., Ex. 3, at 7).

The Saudi government actively attempted to bring bin Laden to justice prior to September 11, 2001. In a 1997 CNN interview, bin Laden himself acknowledged the Kingdom's many efforts to disrupt his activities, including "several attempts to arrest or to assassinate me." A-2341 – A-2342 (Bierstein Aff., Ex. 4, at 6-7). The 9/11 Commission documented the Kingdom's diplomatic efforts to pressure the Taliban in Afghanistan to return bin Laden to Saudi Arabia. 9/11 Commission Report at 115.

After thoroughly examining the Saudi government's relationship with bin Laden and al Qaeda before September 11th, the 9/11 Commission definitively concluded that "the ruling monarchy" of Saudi Arabia "knew bin Laden was an enemy." It further concluded that there was "no evidence that the Saudi government as an institution or senior Saudi officials individually funded [al Qaeda]." Reply Memo. of Law in Support of Prince Sultan's Mot. to Dismiss (03-MDL-1570 Dkt. #175), at 1; A-2721.

II. THE SUITS AGAINST CROWN PRINCE SULTAN, PRINCE NAIF, AND PRINCE SALMAN

Although plaintiffs seek damages stemming from the terrorist attacks of September 11, 2001, they do not seek recovery solely from the individuals and organizations that perpetrated the attacks—bin Laden and al Qaeda. They also seek to hold scores of businesses, banks, charities, governments, and individuals liable because, according to plaintiffs, they provided "financial, logistical, and other support to al Qaeda." See In re Terrorist Attacks on Sept. 11, 2001, 349 F. Supp. 2d 765, 780 (S.D.N.Y. 2005) ("In re Terrorist Attacks I"). Crown Prince Sultan, Prince Naif, and Prince Salman are included among the more-than 200 named defendants. Id.

A. The Burnett Complaint

The first of the suits, Burnett v. Al Baraka Investment & Development Corp., was filed in the U.S. District Court for the District of Columbia on August 15, 2002. The Burnett complaint alleged, in essence, that Crown Prince Sultan, Prince Naif, and Prince Salman proximately caused the 9/11 attacks by contributing to Islamic charities or overseeing Saudi government humanitarian aid agencies that financially supported terrorist organizations. For example, the complaint alleged that Crown Prince Sultan, as Chairman of the Supreme Council, "could not have overlooked the role played by the Saudi charitable entities identified herein in financing al Qaeda." A-1236 – A-1237 (Burnett Compl. ¶¶

358-59). None of the charities identified in the Burnett complaint, however, was ever designated as a terrorist entity by the United States before September 11, 2001, and none of the charities allegedly supported by the Kingdom or the Princes has been designated as a terrorist entity since.[4]

B. The District Court for the District of Columbia Dismisses the Burnett Complaint As to Crown Prince Sultan

On April 8, 2003, Crown Prince Sultan moved to dismiss the Burnett complaint. After briefing and oral argument, Judge James Robertson granted the motion. The court explained that, under the FSIA, a foreign state is immune from suit in the United States unless one of the FSIA's exceptions to immunity applies. The court found that Crown Prince Sultan was a sovereign "entitled to immunity" to the extent he "was acting in his official capacity when he made or approved" the alleged charitable donations. Burnett v. Al-Baraka Inv. & Dev. Corp., 292 F. Supp. 2d 9, 16, 23 (D.D.C. 2003).

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[4] Contrary to plaintiffs' assertions, Burnett Br. 14 and Fed. Ins. Br. 9, the charity Al-Haramain has not been so designated. Some of Al-Haramain's 54 branch offices were designated as foreign terrorist organizations *after* the 9/11 attacks, but the Saudi parent organization was not. See http://www.treas.gov/offices/enforcement/key-issues/protecting/fto.shtml. The press release cited by plaintiffs refers only to the U.S.-based branch, to which Crown Prince Sultan is not alleged to have contributed. A-3659 (Carter Aff., Ex. 14). Likewise, it was not until August 2006 that two of the IIRO's twenty branches were designated—neither of which are the Saudi parent organization. See id.; see also http://www.treas.gov/press/releases/hp45.htm.

The court rejected plaintiffs' claims that the Kingdom's charitable donations, and Crown Prince Sultan's involvement, fell within one of the FSIA's exceptions. Id. at 18, 20. Plaintiffs' reliance on the FSIA's commercial-activities exception, 28 U.S.C. § 1605(a)(2), was "readily disposed of" because "[t]he act of contributing to a foundation is not within our ordinary understanding of 'trade and traffic or commerce.'" Id. at 18. Likewise, the court held that the FSIA's noncommercial-tort exception, 28 U.S.C. § 1605(a)(5), was inapplicable because the alleged causal link between the claimed charitable giving and the 9/11 attacks was too attenuated. Id. at 20. If plaintiffs' theory of causation were accepted, Judge Robertson found, it "would stretch the causation requirement of the non-commercial torts exception not only to 'the farthest reaches of the common law,' but perhaps beyond, to terra incognita." Id. at 20. The court also held that, even if the noncommercial-tort exception could otherwise apply, the discretionary-function exclusion of 28 U.S.C. 1605(a)(5) barred its application here. That exclusion bars jurisdiction with respect to otherwise tortious acts if they arise from "decisions grounded in social, economic, and political policy." Id. at 20-21. Recommendations regarding governmental support for international charities, Judge Robertson ruled, are unmistakably discretionary determinations grounded in social and political policy. Id. at 21-22.

The court further held that, to the extent Crown Prince Sultan made contributions in his personal capacity, personal jurisdiction was lacking. Id. at 22. Plaintiffs failed to show that Crown Prince Sultan had sufficient contacts with or purposefully directed any activity at the United States such that he should "reasonably anticipate that he might be subject to suit" here. Id. at 21-23. Judge Robertson ruled that plaintiffs were not entitled to jurisdictional discovery, emphasizing their "desultory effort" to carry their burden, and their failure to provide "even a basic outline" of how their showing "might be enhanced by jurisdictional discovery." Id. at 22.

C. Proceedings in the Southern District of New York

Shortly after Judge Robertson's ruling, the Judicial Panel on Multidistrict Litigation consolidated these cases before Judge Richard Casey of the U.S. District Court for the Southern District of New York. After full briefing, the submission of supplemental evidence, and oral argument, Judge Casey reached precisely the same result as Judge Robertson before him.

1. The District Court Dismisses All Claims Against Crown Prince Sultan

Crown Prince Sultan again moved to dismiss the complaints against him. Like Judge Robertson, Judge Casey granted the motion, holding that Crown Prince Sultan was entitled to immunity under the FSIA. In re Terrorist Attacks I , 349 F. Supp. 2d at 788-89, 792-802.

The court first rejected plaintiffs' assertion that the FSIA precludes individual foreign officials from claiming sovereign immunity for their official acts. Judge Casey explained that, in case after case, the federal courts had recognized that "[i]mmunity under the FSIA extends also to agents of a foreign state acting in their official capacities" because "a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly." Id. at 788 (citing cases).

Judge Casey rejected plaintiffs' effort to shoehorn this lawsuit into one of the FSIA's exceptions to immunity. Where a foreign defendant presents a prima facie case that it is a sovereign under the FSIA, "the plaintiff must present evidence that one of the statute's exceptions nullifies the immunity." Id. at 782 (citing Virtual Countries v. Republic of S. Africa, 300 F.3d 230, 241 (2d Cir. 2002)). In resolving any disputed issues under the FSIA, Judge Casey observed, a district court may not "accept the mere allegations of the complaint." Id. at 783 (quotation omitted). Rather, the court "must consult outside evidence if resolution of a proffered factual issue may result in the dismissal of the complaint for lack of jurisdiction." Id. (citing Robinson v. Gov't of Malaysia, 269 F.3d 133, 141 n.6 (2d Cir. 2001)).

Turning to the FSIA's commercial-activities exception, Judge Casey agreed with Judge Robertson that "contributions to charities . . . cannot be considered

commercial." Id. at 793. Judge Casey rejected plaintiffs' argument that the contributions amounted to "money laundering" and were, therefore, "commercial activity." This Circuit, he explained, "has made very clear that, for purposes of the FSIA, a commercial activity must be one in which a private person can engage lawfully." Id. (citing Letelier v. Republic of Chile, 748 F.2d 790, 797-98 (2d Cir. 1984)). Because money laundering is not an activity in which a private person can engage lawfully, it cannot serve as a basis for invoking the commercial-activities exception. Id.

Judge Casey likewise rejected plaintiffs' reliance on the FSIA's noncommercial-tort exception. To invoke the exception, plaintiffs had to show that the "alleged acts were tortious under the laws of New York," which requires "*evidence* demonstrating the [defendants'] . . . tortious acts or omissions *caused*" plaintiffs' injuries. Id. at 794, 797 (emphasis added). After "review[ing] the exhibits on which Plaintiffs rel[ied]" and "construing the[] allegations and exhibits in the light most favorable to Plaintiffs, and drawing all inferences in their favor," Judge Casey found proximate causation lacking. Id. at 799. "[N]one of these exhibits amount to admissible evidence that Prince Sultan . . . knew the charities [he] supported were fronts for al Qaeda." Id. For similar reasons, Judge Casey held that "the indirect nature" of the alleged contributions was fatal to plaintiffs'

effort to show that Crown Prince Sultan "knew that funds they donated to the Defendant charities were being diverted to al Qaeda." Id.

The district court likewise rejected plaintiffs' argument that "since Osama bin Laden and al Qaeda made no effort to hide their hatred for the United States," Crown Prince Sultan "had to have been aware that the United States was a target, making the atrocities of September 11, 2001, a foreseeable result of their actions." Id. at 799. Judge Casey found that plaintiffs had not "pleaded facts to support an inference that [Crown Prince Sultan was] sufficiently close to the terrorists' illegal activities to satisfy . . . New York law." Id. at 800-01.

Judge Casey further held that the FSIA's discretionary-function exclusion, 28 U.S.C. § 1605(a)(5)(A), "independently bars" plaintiffs' suit. Under the discretionary-function exclusion, tortious conduct cannot support jurisdiction if the challenged acts "involve an element of choice or judgment" that is grounded in "considerations of public policy" or susceptible to policy analysis. Id. at 801. Applying that standard, Judge Casey found:

> There can be little doubt that, as the chairman of the Supreme Council of Islamic Affairs, charged with making recommendations to the Council of Ministers regarding requests for aid from Islamic organizations located abroad, and as the head of the Special Committee of the Council of Ministers, charged with deciding which grants should be made to Islamic charities, Prince Sultan's decisions were made at the planning level of government, and grounded in social, economic, and political policy.

Id. at 802 (internal quotation marks and citations omitted).

Finally, like Judge Robertson, Judge Casey also concluded that personal jurisdiction was lacking over Crown Prince Sultan. Id. at 813. Judge Casey recognized that plaintiffs "need[ed] only [to] make a prima facie showing that personal jurisdiction exists" and could "rely entirely on factual allegations." Id. at 804. After extensive analysis of plaintiffs' various theories, however, Judge Casey agreed that plaintiffs had not pleaded sufficient facts to establish personal jurisdiction. Id. at 804-12. Plaintiffs, the court observed, had offered only "conclusory allegations" that fell short of a prima facie showing that "Prince Sultan purposefully directed his activities at this forum by donating to charities that he knew at the time supported international terrorism." Id. at 813. Judge Casey also denied plaintiffs' requests for jurisdictional discovery. Id. at 802 & 813.

On May 5, 2005, Judge Casey extended his findings that the court lacked both subject-matter and personal jurisdiction to all other cases naming Crown Prince Sultan as a defendant. SPA-63 – SPA-66.

2. The District Court Dismisses Claims Against Princes Naif and Salman

On September 21, 2005, Judge Casey dismissed claims against Prince Naif and Prince Salman on similar grounds. In re Terrorist Attacks II, 392 F. Supp. 2d at 553-59 (dismissing the Ashton, Burnett, and Federal Insurance complaints).

Plaintiffs alleged that Prince Naif, in his official capacity as Minister of Interior, aided, abetted and materially supported al Qaeda through unspecified monetary payments. A-1242 (Burnett Compl. ¶ 381); A-1611 (Ashton Compl. ¶ 288). The Federal Insurance plaintiffs added the claim that "Prince Naif made significant personal contributions to . . . charities he knew to be sponsors of al Qaeda's global operations," A-2009 (¶ 442), and that he "knew and intended that the [personal] contributions would be used to fund al Qaeda's global operations and acts of international terrorism," A-2009 (¶ 443).

As to Prince Salman, plaintiffs alleged generally that he was aware that money was being diverted from the SHC for unspecified purposes, "knowingly failed to take appropriate actions regarding the management and use of funds of the" SHC, A-1248 (Burnett Compl. ¶ 406); A-1654 (Ashton Compl. ¶ 457), and knew that the SHC supported al Qaeda. A-2011 – A-2012 (Fed. Ins. Compl. ¶¶ 456-57).

For largely the reasons set forth in his prior decision, Judge Casey held that Prince Naif and Prince Salman were entitled to immunity for their alleged official acts. As before, Judge Casey concluded that the commercial-activities exception to the FSIA did not apply because the Saudi government's charitable donations were not commercial activities. In re Terrorist Attacks II, 392 F. Supp. 2d at 553-54. He likewise concluded that "even if Plaintiffs adequately plead a tort against

Prince Salman and Prince Naif, the discretionary function exception prevents this Court from exercising jurisdiction over them in their official capacities." Id. at 555.

Judge Casey also held that he lacked jurisdiction over Prince Naif and Prince Salman for their allegedly personal acts, because plaintiffs "have not satisfied the constitutional requirement of showing that the Princes have minimum contacts with the United States." Id. at 559. He rejected plaintiffs' argument that Prince Naif and Prince Salman had "purposefully directed" their activities at U.S. residents: "Donating money to established humanitarian organizations that may or may not have been diverting funds to support al Qaeda cannot be considered primary participation in international wrongdoing expressly aimed at the United States." Id.

On December 16, 2005, Judge Casey entered judgment pursuant to Federal Rule of Civil Procedure 54(b) in favor of Crown Prince Sultan with respect to all consolidated cases, and in favor of Prince Naif and Prince Salman with respect to the Ashton, Burnett, and Federal Insurance cases. SPA-103 – SPA-105.[5] Plaintiffs now appeal.[6]

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[5] The district court amended its judgment on January 17, 2006, to make certain technical clarifications. SPA-113.

[6] The plaintiffs in three of the cases on appeal—O'Neill, Vigilant Ins., and Pacific Employers Ins.—made no claims against Crown Prince Sultan, Prince Naif,

SUMMARY OF ARGUMENT

I. Crown Prince Sultan, Prince Naif, and Prince Salman are members of the Saudi royal family and—most important—high-ranking government officials of the Kingdom of Saudi Arabia. As a result, the FSIA immunizes them from the jurisdiction of U.S. courts for their official conduct unless plaintiffs' claims fall within one of the FSIA's narrow exceptions to immunity.

A. Plaintiffs err in asserting that the FSIA does not accord immunity to individual government officials for their official acts. The great weight of authority, pre-FSIA precedent, international custom, and the history and purpose of the FSIA all demonstrate that the FSIA extends immunity to individual officials. To the extent plaintiffs urge that Congress radically altered the law of foreign sovereign immunity by excluding individual officers when it enacted the FSIA in 1976, plaintiffs misread the FSIA's text. The FSIA declares that the term "foreign state" "includes" three listed entities—political subdivisions, agencies, and instrumentalities. When Congress specifies that a term "includes" listed items, that list is only partial. Here, Congress had no reason to specify that individual foreign officers are entitled to immunity for their official conduct because that was settled law. Nothing in the FSIA suggests an intent to alter this precedent.

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or Prince Salman below and make none in this Court. The plaintiffs in three other cases—New York Marine & General Insurance Co. Br. at 8, Continental Casualty Br. at 7, and Cantor Fitzgerald Br. at 12-13—assert claims only against Crown Prince Sultan. See also *supra* n.1.

B. None of the FSIA's narrowly tailored statutory exceptions to immunity applies here. The commercial-activities exception does not apply because governmental support of charities is not "commercial." Plaintiffs cannot avoid this result by mischaracterizing the conduct alleged as "criminal conduct" or "money laundering." Plaintiffs have never shown that the conduct constitutes money laundering, and illegal conduct cannot qualify as "commercial activity" within the meaning of the FSIA. Instead, the court must examine the *nature* of the alleged conduct—here, governmental support of charities—not plaintiffs' characterizations of the *motives* for it.

C. - D. Nor does the FSIA's noncommercial-torts exception apply. Plaintiffs' allegations and evidentiary submissions failed to create a reasonable inference that Crown Prince Sultan, Prince Naif, or Prince Salman *knew and intended* that the charitable contributions would benefit al Qaeda. The record is clear the district court did not disregard or ignore plaintiffs' proffered evidence, as plaintiffs speculate. The district court also properly concluded that the discretionary-function exclusion independently barred plaintiffs claims. That exclusion immunizes conduct involving judgments based on considerations of public policy. Making recommendations about government support for international charities is inherently discretionary; it rests on public policy and political judgment.

II. To the extent plaintiffs alleged that their injuries resulted from the Princes' *personal* conduct, the district court correctly ruled that it lacked personal jurisdiction. None of the Princes had "minimum contacts" with the United States, and plaintiffs failed to allege specific facts sufficient to establish they were "primary participants" in conduct purposefully directed toward the United States.

III. The district court did not abuse its discretion in denying jurisdictional discovery. Discovery is not warranted where (as here) plaintiffs' assertions of "facts" are merely conclusory allegations, devoid of any evidence of a factual predicate for jurisdiction. Granting jurisdictional discovery here is at odds with the purpose of the FSIA—to provide immunity to a foreign sovereign from the attendant burdens of litigation. Nor is the denial of discovery relating to personal jurisdiction, in the face of mere conclusory allegations, an abuse of discretion.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT CROWN PRINCE SULTAN, PRINCE NAIF, AND PRINCE SALMAN ARE ENTITLED TO SOVEREIGN IMMUNITY FOR THEIR OFFICIAL CONDUCT.

The FSIA provides "the sole basis for obtaining jurisdiction over a foreign state in our courts." Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989). A foreign state "shall be immune from the jurisdiction of the courts of the United States and of the States" unless a specific statutory exceptions applies. 28 U.S.C. § 1604; Saudi Arabia v. Nelson, 507 U.S. 349, 355

(1993). Two different district courts have now concluded that, under the FSIA, Crown Prince Sultan, Prince Naif, and Prince Salman are immune from suit for the conduct alleged in the complaints. Those judgments are unquestionably correct and should be affirmed.

Standard of Review. This Court reviews the district court's jurisdictional determinations under the FSIA for clear error with respect to factual findings, and de novo with respect to legal conclusions. Virtual Countries, 300 F.3d at 235; Robinson, 269 F.3d at 138.

A. Individual Government Officials Acting Within The Scope Of Their Official Duties Are Entitled To Immunity

Plaintiffs do not deny that, in large part, they seek to impose liability on Crown Prince Sultan, Prince Naif, and Prince Salman for their official acts as high-ranking Saudi government officials. Nonetheless, they contend that *only* government bodies such as "agencies and instrumentalities" are entitled to claim sovereign immunity—and that individual officials are not. That argument is inconsistent with the position many plaintiffs took below.[7] It has been rejected by

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[7] See A-2681 (Ashton and other plaintiffs arguing that "[t]he FSIA applies to a foreign official acting in an official capacity"). The Burnett plaintiffs have taken contradictory positions on this issue. Compare A-2285 (admitting that "the FSIA does, generally speaking, provide immunity from suit for foreign officials acting their official capacity . . . .") with A-2681 (n.13) (arguing that FSIA does not apply to foreign officials acting in their official capacities).

virtually every court to consider it. It is contrary to well-established law and settled sovereign immunity principles. And it is not supported by the FSIA's text.

1. Individual Officers Have Long Been Entitled To Sovereign Immunity For Their Official Acts

The text of the FSIA provides both that "a foreign state shall be immune from the jurisdiction" of U.S. courts, 28 U.S.C. § 1604, and that the term "foreign state . . . *includes* a political subdivision of a foreign state or an agency or instrumentality of a foreign state," id. § 1603 (emphasis added). In case after case, the courts of appeal have held that sovereign immunity under the FSIA extends to individual government officials for acts undertaken in their official capacities. See Velasco v. Gov't of Indonesia, 370 F.3d 392, 398-99 (4th Cir. 2004) (immunity available because claims "against the individual in his official capacity are the practical equivalent of claims against the foreign state"); Keller v. Cent. Bank of Nigeria, 277 F.3d 811, 815 (6th Cir. 2002) ("[F]oreign sovereign immunity extends to individuals acting in their official capacities."); Byrd v. Corporacion Forestal y Industrial De Olancho S.A., 182 F.3d 380, 388 (5th Cir. 1999) ("Normally, the FSIA extends to protect individuals acting within their official capacity as officers of . . . foreign sovereigns."); Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1103 (9th Cir. 1990) ("We thus join the majority of courts which have similarly concluded that [the FSIA] can fairly be read to include individuals sued in their official capacity."); Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan, 115 F.3d

1020, 1027 (D.C. Cir. 1997) ("Individuals acting in their official capacities" are considered part of "a foreign state[.]").

The district courts in this Circuit have uniformly reached the same conclusion. See, e.g., Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah, 184 F. Supp. 2d 277, 286-87 (S.D.N.Y. 2001); Granville Gold Trust-Switzerland v. Commissione Del Fallimento/Interchange Bank, 928 F. Supp. 241, 243 (E.D.N.Y. 1996). Plaintiffs cite not one case to support their contrary position. See Burnett Br. 27-29.[8]

Plaintiffs' position is foreclosed by established immunity principles. Chuidian, 912 F.2d at 1100-02. Before Congress enacted the FSIA, it was well established that sovereign immunity extended to, *inter alia*, "any . . . official . . . of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state." Restatement (Second) of Foreign Relations Law § 66(f) (1965). This Circuit

[8] The only arguably contrary authority is Enahoro v. Abubakar, 408 F.3d 877 (7th Cir. 2005)—a case plaintiffs never cite. That case recognized that "[t]he FSIA has been applied to individuals . . . [when such individual is] acting in his official capacity," id. at 882, but nonetheless determined that a Nigerian general was not entitled to immunity. In reaching that conclusion, the Enahoro court relied on a Ninth Circuit case in which the foreign defendant, by default, had admitted she was acting solely on her own authority and not on her official authority. Id. (citing In re Estate of Ferdinand E. Marcos, 978 F.2d 493 (9th Cir. 1992)). In stark contrast, Crown Prince Sultan, Prince Naif, and Prince Salman claim FSIA immunity solely for their official conduct. In any event, to the extent Enahoro is inconsistent with the views of the remaining circuits, those other five circuits are clearly correct. See pp. 22-27, *infra*.

recognized that rule. Heaney v. Gov't of Spain, 445 F.2d 501, 505 (2d Cir. 1971) (representative immune because the sovereign "immunity of a foreign state extends to any other 'official or agent of the state with respect to acts performed in his official capacity . . . .'") (quoting Restatement, supra). The State Department had long followed it as well. Kim v. Kim Yong Shik, Civ. No. 12565 (Cir. Ct. 1st Cir. Hawaii 1963), reported in 58 Am. J. Int'l L. 186 (1964) (deferring to a State Department suggestion of immunity for a foreign minister). And so has the international community. 2 Y.B. Int'l L. Comm'n 8, UN Doc. A/46/10, reprinted in 30 ILM 1554 (1991) ("Actions against such representatives or agents of a foreign Government in respect of their official acts are essentially proceedings against the State they represent.").

That, moreover, is precisely the rule followed in this country for domestic officers. A suit against a government officer in his official capacity has long been understood to be, in effect, a suit against the government itself. Chuidian, 912 F.2d at 1101-02 (citing Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 n.55 (1978)).

Nothing in the FSIA or its history suggests that Congress intended to depart from that settled rule. Congress's silence would be telling in any context, since the "party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change," Green v. Bock Laundry Mach. Co., 490 U.S. 504, 521 (1989), and a statute ordinarily should not be read

"to abrogate a common-law principle" unless it "speak[s] directly to the question," United States v. Bestfoods, 524 U.S. 51, 63 (1998).

But here that silence is dispositive. The FSIA was not merely enacted against the backdrop of existing law. It was adopted "primarily" to "*codify[]* pre-existing international and federal common law." Stephens v. Nat'l Distillers & Chem. Corp., 69 F.3d 1226, 1234 (2d Cir. 1996). Congress's failure to suggest any intent to depart from established law "is particularly significant in light of numerous statements that Congress intended the Act to codify the existing common law principles of sovereign immunity. . . . If in fact the Act does not include such officials, the Act contains a substantial unannounced departure from prior common law." Chuidian, 912 F.2d at 1101.

Plaintiffs' contrary approach, moreover, would deprive the FSIA of practical effect. If plaintiffs were correct, one could always avoid sovereign immunity by suing foreign officials in their official capacity rather than the foreign state itself. Since States cannot act except through individuals, such lawsuits would become a means of controlling the acts of the sovereign itself. Congress certainly did not, in enacting the FSIA, intend that plaintiffs be permitted to circumvent immunity—effecting "a blanket abrogation of foreign sovereign immunity"—simply by changing the caption to name government officials rather than the government itself. Id. at 1102.

2. *Plaintiffs' Argument Is Contradicted By the FSIA's Text And Insufficient To Support A Radical Departure From Prior Law*

Disregarding the history and purpose of the FSIA, plaintiffs argue that the text of the Act prohibits its application to individual foreign officials. Plaintiffs misread the statutory text. According to plaintiffs, the FSIA "defin[es] the terms 'foreign state' and 'agency or instrumentality'" without "mention[ing]" individual officials or agents. Burnett Br. 27, 28. But the FSIA does *not* "define" the term "foreign state" by stating that it "*means* 'political subdivision of a foreign state or agency or instrumentality.'" The FSIA declares that the term "'foreign state' . . . *includes* a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a) (emphasis added). Congress's use of the word "includes" is dispositive: Where a statute uses "includes" or "including," what follows is neither "an all-embracing definition," Fed. Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95, 100 (1941), nor an "exhaustive" list, Barnhart v. Peabody Coal Co., 537 U.S. 149, 181 (2003). It is instead a partial list. Cobell v. Norton, 240 F.3d 1081, 1100 (D.C. Cir. 2001) ("It is hornbook law that the use of the word including indicates that the specified list" is "not exclusive.").[9]

[9] Congress's choice of the word "includes" rather than "means" was clearly deliberate. When Congress defined "agency or instrumentality" in 28 U.S.C. § 1603(b), it stated that the phrase "*means* . . . any entity" meeting specified standards (emphasis added). Congress used similar language when defining "commercial activity" and related phrases in 28 U.S.C. § 1603(d) and (e). By

Plaintiffs for that reason err in relying on the definition of "agency or instrumentality" in Section 1603(b) and its accompanying legislative history. Burnett Br. 28-29. Instead, the term "foreign state" is most naturally understood to encompass everything ordinarily thought to be part of the foreign state—such as individual officers acting in their official capacities—*plus* those items specifically named as "include[d]" in Section 1603(a). Plaintiffs' reliance on a clearly non-exhaustive list in the FSIA is too thin a reed to support a radical departure from a century of established law, the settled views of the State Department, and the international norms that Congress intended to codify.

Indeed, plaintiffs' construction would give the term "foreign state" a meaning that is facially absurd. Under their view, the "foreign state" that is entitled to immunity would be limited to the three specifically listed categories—political subdivisions, plus any agencies and instrumentalities that are "separate legal person[s]," 28 U.S.C. § 1603(b)—but nothing more. That construction would deny immunity to core components of the foreign state that do not fall within those categories, including the foreign state's legislature and judiciary. Cf. Franklin v. Massachusetts, 505 U.S. 788, 800 (1992) (definition of "agency" "does not include" either "the Congress" or "the courts of the United States"). It strains credulity to suggest that Congress, in enacting the FSIA, intended to define

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contrast, Congress used the word "includes" when describing what constitutes a "foreign state" under Section 1603(a).

"foreign state" to include "instrumentalities" such as the foreign equivalent of the Federal Reserve or the Veterans Administration, but not core components long considered part of the state such as the Congress and the courts.

Further, as the other circuits have recognized, the definition of "agency or instrumentality" in Section 1603(b) is not so narrow as to exclude individual officers. Jungquist, 115 F.3d at 1027 ("Individuals acting in their official capacities are considered 'agenc[ies] or instrumentalit[ies] of a foreign state[.]'"); Chuidian, 912 F.2d at 1100-1102 (similar). Absent reason to believe Congress intended to alter existing law, there is no reason to read those definitions parsimoniously.[10]

B. The Commercial-Activities Exception Does Not Apply

Plaintiffs argue that, even if Crown Prince Sultan, Prince Naif, and Prince Salman are sovereigns entitled to immunity, their alleged actions fall within the FSIA's exception for "commercial activity." See 28 U.S.C. § 1605(a)(2). As

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[10] Quoting dictum from Tachiona v. United States, 386 F.3d 205 (2d Cir. 2004), plaintiffs assert that the FSIA's definition of "agencies and instrumentalities" uses terms "not usually used to describe natural persons." Burnett Br. 28. Tachiona, however, did not address whether Section 1603(a) provided an exhaustive or exclusive list. See Brecht v. Abrahamson, 507 U.S. 619, 631 (1993) (holding that where a decision does not "'squarely addres[s] [an] issue,'" the court "'remains free to address [it] on the merits at a later date'"). This Court, in any event, found that the defendant in Tachiona was entitled to head-of-state immunity. 386 F.3d at 220-21. As a result, the court had no reason to undertake a detailed exploration of the term "agency or instrumentality" against the backdrop of settled pre-FSIA law and practice.

explained more thoroughly in the Kingdom's brief (at 40-42)—and as both district courts properly concluded—governmental support of international charities cannot be considered "commercial activity." The FSIA's legislative history makes that clear: "[A] foreign state's mere participation in a foreign assistance program administered by the Agency for International Development (AID) is an activity whose essential nature is public or governmental, and it would not itself constitute a commercial activity." H.R. Rep. No. 94-1487, at 16, reprinted in 1976 U.S.C.C.A.N. at 6615. That makes sense: The key inquiry is "whether the particular actions that the foreign state performs . . . are the type of actions by which a private party engages in 'trade . . . or commerce.'" Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992). Thus, the "court must inquire whether the activity is of the type an individual would *customarily* carry on *for profit*." Letelier, 748 F.2d at 797 (emphasis added); see, e.g., H.R. Rep. No. 94-1487, *supra*, at 16 (describing "contracts," "transaction[s] to obtain goods or services from private parties," "leasing of property," "borrowing of money," "sale of a service or a product"). Mere financial support for international charities is not an activity customarily, if ever, done "for profit."

Plaintiffs' effort to re-characterize charitable donations as "money laundering," Fed. Ins. Br. 43, is unpersuasive. Plaintiffs do not show that the donations could constitute money laundering, and money laundering cannot be

"commercial activity" under the FSIA in any event because "a private person" cannot "lawfully engage" in commerce through that activity. Letelier, 748 F.2d at 797. See Kingdom Br. 42-45. More fundamentally, plaintiffs' "money laundering" argument erroneously focuses on the alleged *motive* for the governmental charitable donations, rather than on the *nature* of the conduct. "[T]he issue is whether the particular actions that the foreign state performs (*whatever the motive behind them*) are the *type* of actions by which a private party engages in 'trade and traffic or commerce.'" Weltover, 504 U.S. at 614 (emphasis added). Attaching the naked label "money laundering" does not alter that analysis because the disbursement of government money to charitable organizations is not something that private organizations do in trade or commerce. It is instead the paradigm of governmental activity undertaken in pursuit of foreign policy, political, and social goals.

Even if such charitable donations could be commercial activity—and they cannot—the commercial-activities exception applies only if one of three geographic conditions in Section 1605(b)(2) are met. Here, none were met. See Kingdom Br. 45-47.

C. The Noncommercial-Torts Exception Does Not Apply

Alternatively, plaintiffs invoke the noncommercial-torts exception codified in 28 U.S.C. § 1605(a)(5). See Burnett Br. 38-49; Fed. Ins. Br. 33-36. As the

Kingdom explains in its brief (at 21-31), that exception does not extend to the support of terrorism—which is covered instead by a more specific statutory provision, 28 U.S.C. § 1605(a)(7)—and does not cover conduct (like the donations at issue in this case) undertaken abroad. As we explain below, the district courts also properly rejected its invocation based on the plaintiffs' failure to establish the statutorily required element of causation.

1. Plaintiffs Failed To Meet the Statutory Causation Requirement

Immunity can be denied under the noncommercial-torts exception only if the injury is "*caused* by the tortious act or omission of that foreign state . . . ." 28 U.S.C. § 1605(a)(5) (emphasis added). Because this case concerns sovereign immunity—a threshold jurisdictional issue—it is not enough for plaintiffs simply to allege causation. They must present evidence to support it. See Virtual Countries, 300 F.3d at 230. Where both the legal and factual sufficiency of the claims are disputed, the district court may not "accept the mere allegations of the complaint" but must consult outside evidence if resolution of a proffered factual issue may result in dismissal for lack of jurisdiction. Filetech S.A. v. France Telecom S.A., 157 F.3d 922, 932 (2d Cir. 1998).

Here, the district court properly concluded that plaintiffs failed to provide evidentiary support for causation, and plaintiffs do not come close to establishing the clear error necessary to overturn that determination. Plaintiffs failed to

establish the "direct relation between the injury asserted and the injurious conduct" that is a prerequisite to proximate cause. Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268 (1992); see Anza v. Ideal Steel Supply Corp., 126 S. Ct. 1991, 1998 (2006) (proximate cause exists only if the defendant's wrongful conduct "led directly to the plaintiff's injuries."). Here, plaintiffs do not urge that Crown Prince Sultan, Prince Naif, or Prince Salman perpetrated the attacks of September 11, 2001, or that they had any relationship with the individuals and organizations that perpetrated that attack. Instead, plaintiffs urge that the Princes recommended that the Saudi government support international charities that, in turn, may have supported organizations that, in turn, financed the attack. That is far too attenuated a connection to satisfy proximate causation. It would be one thing to premise financial liability on direct support for terrorism. But it is wholly another to impose liability on individuals merely because they gave money to established charities that allegedly diverted funds to terrorists—or that diverted money to other charities that supported terrorists. As the courts below recognized, that "would stretch the causation requirement of the noncommercial torts exception not only to 'the farthest reaches of the common law,' but perhaps beyond, to terra incognita." Burnett, 292 F. Supp. 2d at 20; In re Terrorist Attacks I, 349 F. Supp. 2d at 798. If Congress had intended that such web-like liability could attach for indirect financial contributions under Section 1606(b)(5), it would have provided relevant

standards. That it did not do so—but expressly addressed the issue of financial support of terrorism in another provision—speaks volumes about its intent.

Plaintiffs' "[a]idling and abetting" theory fails for the same reason. Aiding and abetting requires proof that "the defendant ha[s] given substantial assistance or encouragement to the primary wrongdoer" and "*know[s] the wrongful nature* of the primary actor's conduct." In re Terrorist Attacks I, 349 F. Supp. 2d at 798 (citing Pittman v. Grayson, 149 F.3d 111, 123 (2d Cir. 1998)) (emphasis added). There is no dispute that, in this case, the "primary actor" was al Qaeda—the organization that planned and executed the 9/11 attacks. Plaintiffs do not and cannot show that Crown Prince Sultan, Prince Naif, or Prince Salman themselves gave "substantial assistance" or caused the Kingdom to render assistance to al Qaeda. For that reason alone, their claims fail.

Plaintiffs' claim that the international charities were mere "fronts" for al Qaeda, Burnett Br. 7; WTC Prop. Br. 8; Fed. Ins. Br. 11, is utterly lacking in support. As the declarations submitted by Crown Prince Sultan amply demonstrate, the relevant charities are not "fronts" at all, but large, "established humanitarian organizations" operating throughout the world. In re Terrorist

Attacks II, 392 F. Supp. 2d at 559.[11] Plaintiffs provided nothing to the district court to dispute that these charities are engaged in legitimate humanitarian work.

Nor have plaintiffs made the requisite showing that Crown Prince Sultan, Prince Naif, and Prince Salman knew "the wrongful nature of the" conduct and intended their donations to support that conduct. The 9/11 Commission found "no evidence that the Saudi government . . . or senior Saudi officials individually funded [al Qaeda]." Reply Memo. of Law in Support of Prince Sultan's Mot. to Dismiss (03-MDL-1570 Dkt. #175), at 1; A-2721. The district court found that plaintiffs presented none either. See In re Terrorist Attacks I, 349 F. Supp. 2d at 800 ("Plaintiffs have not pleaded facts to suggest the Princes knew they were making contributions to terrorist fronts. . . ."). Particularly given the open enmity and "war" between bin Laden on the one hand and the Kingdom, Crown Prince Sultan, Prince Naif, and Prince Salman on the other, it was incumbent on plaintiffs

[11] See, e.g., A-1335 – A-1336 (Decl. of Saleh Abdullah Al Saykhan, ¶ 2) ("The IIRO is an Islamic charitable relief organization established by the Muslim World League in 1978 to provide relief and humanitarian assistance to people in need around the world . . . . In the years 2000 and 2001, the IIRO supported 2,190 separate humanitarian projects, benefiting over 10 million people worldwide."); A-1427 (Decl. of Ali Muhammad Al-Kamal, ¶ B) (MWL's purposes include "to call for the rejection of violence and terrorism and to achieve peace and security of human societies through the promotion of dialogue with other cultures and civilizations."); A-1434 – A-1435 (Decl. of Mutaz Saleh Abu Unuq, ¶ 2) (WAMY's purposes include "to sponsor exceptional Muslim students and provide financial and cultural support to them."); A-1443 – A-1444 (Decl. of Khalid Eid Al-Dhahiri, ¶ 2) ("Al Haramain is a charitable and humanitarian organization whose purpose is to . . . provide assistance to Muslims affected by disasters, natural and otherwise.").

to allege specific facts supporting their claim that the Kingdom and the Princes knowingly supported bin Laden and al Qaeda. They did not even come close.

The cases cited by plaintiffs demonstrate precisely the sort of showing that plaintiffs needed to, but did not, make here. In Halberstam v. Welch, 705 F.2d 472 (D.C. Cir. 1983), the defendant was held liable for aiding and abetting when she "knowingly and substantially assist[ed] the principal violation" directly by offering "invaluable service to the [criminal] enterprise as banker, bookkeeper, record keeper and secretary." Id. at 487-88. Here, plaintiffs can neither claim nor show that the Princes assisted "the principal violation"—the terrorist attacks—through direct support or assistance. In Halberstam, moreover, there was evidence that the defendant "knew she was assisting . . . wrongful acts," because she "performed these services in an unusual way under unusual circumstances over a long period of time." Id. at 487. Here, by contrast, plaintiffs can point to nothing unusual or otherwise furtive about the Princes' support of facially legitimate charities that might raise an inference of knowledge.

Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 18 (D.D.C. 1998), and Boim v. Quranic Literacy Institute, 291 F.3d 1000 (7th Cir. 2002), likewise undermine plaintiffs' position. In Flatow, defendant Iran had knowingly provided $2 million directly to the terrorist group responsible for a suicide bombing to "support" its "terrorist activities," and had supplied "training" to the group in the Gaza

Strip. 999 F. Supp. at 9. Boim was a suit against two charities that had given direct financial support to Hamas, a designated terrorist entity; further, each defendant had either employed a known Hamas terrorist or had direct links to Hamas itself. 291 F.3d at 1002-04. Even then, the Seventh Circuit first held that "funding *simpliciter*" does not constitute an act of terrorism, and that liability can be imposed only "on those who knowingly and intentionally supply the funds to the persons who commit the violent acts." Id. at 1012, 1021. Here, by contrast, there is no allegation that Crown Prince Sultan, Prince Naif or Prince Salman directly funded terrorists. Instead, plaintiffs claim that the Princes were involved in the Kingdom's support of charities that in turn may have diverted funds to other organizations supporting terrorism. Burnett, 292 F. Supp. 2d at 20. Moreover, as the district court found, there was no evidence that the Princes knew, much less intended, that the money be used for terrorist purposes. In re Terrorist Attacks I, 349 F. Supp. 2d at 800-01.

2. The District Court Correctly Found that Plaintiffs' Causation Theory Lacks Factual Support

After considering voluminous exhibits and the allegations in the complaints, the district court concluded that plaintiffs failed to plead "facts to support an inference that the Princes were sufficiently close to the terrorists' illegal activity to satisfy Halberstam and New York law," and had not alleged facts "to suggest that the Princes knew they were making contributions to terrorist fronts and provided

substantial assistance or encouragement to the terrorists to satisfy Boim or New York law." Id. Taking issue with that assessment, plaintiffs assert that the district court "disregarded evidence whose significance [the court] apparently failed to appreciate." Burnett Br. 41.

The argument is baseless. The district court made it crystal clear that it "consider[ed] the affidavits submitted by the parties," "reviewed the exhibits," and examined those "that relate to Plaintiffs' arguments" in detail. In re Terrorist Attacks I, 349 F. Supp. 2d at 783, 799. The district court may have found certain exhibits unworthy of specific mention in its opinion, but there is no indication that it "disregarded" them. Furthermore, we are aware of no authority (and plaintiffs cite none) obligating the district court to discuss every exhibit that a party submits. Where, as here, the district court's decision is not plainly incorrect in light of the evidence, it must be sustained. See Gualandi v. Adams, 385 F.3d 236, 240 (2d Cir. 2004).

The allegedly "overlooked" "evidence" was immaterial in any event; plaintiffs simply mischaracterize it in their briefs. For example, plaintiffs incorrectly assert that the allegedly supported charities were designated as terrorist entities by the Treasury Department. Burnett Br. 14-15; Fed. Ins. Br. 9. There is no dispute that none was so designated before September 11, 2001, despite the

Department's authority to make such designations.[12] Moreover, none of the charities to which contributions allegedly were made—neither the MWL, WAMY, nor the Saudi Arabia headquarters of the IIRO or Al-Haramain—has been so designated since. See p. 8 n.4, *supra*. Some other Al-Haramain branches were designated in 2002 and 2004. But plaintiffs nowhere explain how the designation of those branches *after* September 11, 2001—branches not alleged to have been supported by the Kingdom—could constitute warnings that the charities were directing funds to al Qaeda before September 11, 2001. See id.

The plaintiffs also assert that Crown Prince Sultan "personally received U.S. intelligence information" based on his participation "in a joint [intelligence] initiative with the United States" in 1997. Burnett Br. at 20. But plaintiffs' supporting evidence is an editorial by Prince Turki about Saudi Arabia's anti-terrorism efforts, which states merely that, "in 1997 the Saudi minister of defense, Prince Sultan, established a joint intelligence committee with the United States to share information on terrorism in general and on bin Laden (and al Qaeda) in particular." A-2416 (Bierstein Aff., Ex. 16). The editorial does not mention terrorist financing or charities, let alone the charities at issue here.

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[12] The 1979 Export Administration Act permitted designation of "state sponsors of terrorism," and the 1995 International Emergency Economic Powers Act likewise permits entities to be deemed "specially designated terrorists."

Equally phantom is plaintiffs' claimed evidence that Crown Prince Sultan and Prince Naif "received at least three official warnings from the United States and France regarding the use[] of charitable donations to Islamic charities as conduits for supporting terrorism," Burnett Br. 18-19. As proof of the first putative "warning," plaintiffs offer the affidavit of former French Interior Minister Charles Pasqua, which states that he met with Crown Prince Sultan and Prince Naif in November 1994 and "raised the question of financial aid furnished by Saudi charitable organizations enjoying state support." A-2403 (Bierstein Aff., Ex. 12) The affidavit, however, includes no mention of al Qaeda or terrorism directed against the United States, but only "certain Islamist groups active on French territory." Id.

For the second "warning," plaintiffs point to a four-page book excerpt describing a 1999 meeting during which a "U.S. delegation" informed unidentified "Saudis" that "assistance was needed and that U.S. pressure to deal effectively with those who fund terrorism would grow." A-2410 (Bierstein Aff., Ex. 13, at 287). The excerpt does not mention Crown Prince Sultan, Prince Naif, or the relevant charities. Nor does it identify any particular basis for the delegation's concerns about terrorist financing.

For the supposed third "warning," plaintiffs rely on newspaper articles stating that Secretary of State Albright was "expected to raise the issue" of funding

for bin Laden and mention two charities ("Islamic Relief" and "Blessed Relief") during Crown Prince Sultan's visit to the United States in October 1999. A-2411 (Bierstein Aff., Ex. 14-15). But neither of those were charities that the Kingdom, Crown Prince Sultan, Prince Naif, or Prince Salman is alleged to have supported. Moreover, plaintiffs failed to establish that Secretary Albright actually raised the issue. The district court did not err, much less clearly err, in concluding that those so-called "warnings" failed to prove knowledge and intent to support terrorist organizations.[13]

Plaintiffs are reduced to asserting that, because Crown Prince Sultan and Prince Naif (but not Prince Salman) participated on the Supreme Council for Islamic Affairs—the Saudi governmental entity created to recommend international Islamic charities for governmental support, they surely must have known that certain charities were "al Qaeda fronts."[14] Burnett Br. 45. As explained below, however, they were not "fronts," and plaintiffs ignore proof that

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[13] Except for the Pasqua declaration, the "evidence" to which plaintiffs refer is not evidence at all. Under the FSIA, a court must resolve disputed jurisdictional facts "by reference to *evidence* outside the pleadings, *such as affidavits*." Filetech, 157 F.3d at 932 (emphasis added). Plaintiffs' "evidence" is largely inadmissible hearsay contained in newspaper articles. These exhibits are not evidence and do not establish facts upon which this Court can rely.

[14] Plaintiffs cite a "report" by the Burnett plaintiffs' investigator, Jean-Charles Brisard, that purports to have been written "for the President of the Security Council United Nations." Burnett Br. 18, 38-39 (citing A-2369 – A-2402 (Bierstein Aff., Ex. 11)). But the United Nations has denied that it commissioned the report. A-2476 – A-2477.

the Supreme Council did not oversee the charities' activities. A-1333 – A-1334 (Decl. of Abdulaziz H. Al-Fahad, ¶¶ 9, 11, 12). More fundamentally, plaintiffs' assertion that the Princes "must" have known is little more than a guess. This Court has insisted that jurisdiction under the FSIA cannot be sustained "on generic allegations . . . absent an assertion or evidence of a factual predicate for such jurisdiction." Robinson, 269 F.3d at 146. It is precisely such generic allegations—devoid of evidentiary support—plaintiffs rely on here.

3. The District Court Did Not Impose A "Heightened Pleading" Requirement

Plaintiffs also urge that the district court erred by imposing a "heightened pleading standard." Fed. Ins. Br. 33-39. The district court held that—where the facts relating to sovereign immunity were in dispute—plaintiffs had the burden of pleading or producing evidence "to support an inference that the defendant knowingly provided assistance or encouragement to the wrongdoer." In re Terrorist Attacks I, 349 F. Supp. 2d at 801.

That approach is fully supported by Circuit precedent. Plaintiffs cannot merely insert "vague and conclusory allegations of tortious conduct in their complaints" and then "rely on the federal courts to conclude that some conceivable non-discretionary tortious act falls within the purview of these generic allegations under the applicable law." Robinson, 269 F.3d at 146. Instead, where *jurisdiction* depends on disputed facts, plaintiffs must produce "*evidence* showing that, under

exceptions to the FSIA, immunity should not be granted." Virtual Countries, 300 F.3d at 241 (emphasis added).[15]

Plaintiffs attempt to avoid the force of this rule by claiming that "defendants [did] not challenge[] the good faith allegations of the [complaint] regarding scienter on factual grounds" or "challenge . . . the specific allegations that they knew the charities receiving their support were fronts for al Qaeda." Fed. Ins. Br. 34-35. Because plaintiffs have the burden of production on these jurisdictional issues, however, the district court was not required to accept unsupported inferences or conclusory assertions. Cantor Fitzgerald v. Lutnik, 313 F.3d 704, 709 (2d Cir. 2002). In any event, the district court specifically found that the defendants challenged "both the legal and factual sufficiency of Plaintiffs' claims." In re Terrorist Attacks I, 349 F. Supp. 2d at 783. The district court was therefore required to "resolve disputed jurisdictional fact issues by reference to evidence outside the pleadings, such as affidavits." Filetech, 157 F.3d at 932.

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[15] This Court's decision in Twombly v. Bell Atlantic Corp., 425 F.3d 99 (2d Cir. 2005), cert. granted, 126 S. Ct. 2965 (U.S. June 26, 2006) (No. 05-1126), does not alter the analysis. Twombly rejected the imposition of an additional pleading requirement that antitrust plaintiffs "establish at least one 'plus factor' that tends to exclude independent self-interested conduct as an explanation for defendants' parallel behavior." Id. at 104. Where the issue of *jurisdiction* depends on disputed facts, however, plaintiffs must come forward with "*evidence* showing that, under exceptions to the FSIA, immunity should not be granted." Virtual Countries, 300 F.3d at 241 (emphasis added); Robinson, 269 F.3d at 146.

D. The Discretionary-Function Exclusion Independently Bars These Suits

Even if the noncommercial-torts exception to sovereign immunity might otherwise apply here—and it does not—the FSIA provides that the exception cannot apply to "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused . . . ." 28 U.S.C. § 1605(a)(5)(A). Conduct falls within the discretionary-function exclusion where (1) the challenged acts "involve an 'element of judgment or choice,'" and (2) the judgment or choice in question is "grounded in 'considerations of public policy' or susceptible to policy analysis." Coulthurst v. United States, 214 F.3d 106, 109 (2d Cir. 2000) (citations omitted).[16]

Each of the challenged actions by Crown Prince Sultan, Prince Naif, and Prince Salman was an exercise of foreign policy choice, grounded in judgments entrusted to them as government officials. Plaintiffs themselves allege that Crown Prince Sultan, as Chairman of the Supreme Council, was responsible for making recommendations to the Council of Ministers about governmental aid to charities

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[16] The FSIA's discretionary-function exclusion is interpreted in parallel with the identical exclusion in the Federal Tort Claims Act. See, e.g., MacArthur Area Citizens Ass'n v. Republic of Peru, 809 F.2d 918, 919 (D.C. Cir. 1987). Plaintiffs err in claiming (Burnett Br. 49) that foreign officials are entitled to *less* discretion than would otherwise be the case under the FTCA. The law is precisely to the contrary. "[T]he term 'discretionary function' should be given 'wider scope' under the FSIA, since the courts 'must consider the additional risk of interfering with foreign relations.'" Rodríguez v. Republic of Costa Rica, 139 F. Supp. 2d 173, 188 (D.P.R. 2001).

abroad, and for deciding which grants should be made to various charities. In re Terrorist Attacks I, 349 F. Supp. 2d at 802. Similarly, Prince Naif is alleged to have been responsible for supervising various charities under the auspices of the Saudi Joint Relief Commission. Prince Salman, as President of the SHC, is alleged to have overseen the SHC's use of its charitable funds.

As both district courts addressing this case recognized, governmental decisions regarding which international programs and charities to support "involve an 'element of judgment or choice' informed by" considerations of public policy. Determinations regarding the charities to support, or programs to fund, self-evidently require the exercise of judgment regarding what is (or is not) in the nation's foreign policy and other interests. Burnett, 292 F. Supp. 2d at 20-21 (support of Islamic charities in pursuit of the Kingdom's international social and political agenda "squarely covered" by the exclusion); In re Terrorist Attacks I, 349 F. Supp. 2d at 802 (similar).

That is particularly obvious where, as here, the decisions involve the donation of Saudi government money to Islamic charities. The Kingdom is the home to the most holy sites of Islam, and "a core policy and function of the Kingdom . . . has been to foster and preserve Islamic faith and Islamic law within the Kingdom and abroad." A-1332 – A-1333 (Decl. of Abdulaziz H. Al-Fahad, ¶ 8). Support for worthy Islamic charities is critical to the Kingdom's moral

authority and leadership role in the Islamic world. Crown Prince Sultan's conduct in carrying out his official duties was coextensive with carrying out the Kingdom's foreign policy—as evidenced by the fact that the highest government body, the Council of Ministers, would make the final determination regarding "financial support" for "Islamic organizations." Id. at ¶ 11. As Judge Casey observed:

> There can be little doubt that, as the chairman of the Supreme Council of Islamic Affairs, charged with making recommendations . . . regarding requests for aid from Islamic organizations located abroad, and as the head of the Special Committee of the Council of Ministers, charged with deciding which grants should be made . . . , Prince Sultan's decisions were made at the planning level of government, and grounded in social, economic, and political policy.

In re Terrorist Attacks I, 349 F. Supp. 2d at 802 (internal quotation marks and citations omitted).

The same is true of the similar decisions by Prince Naif and Prince Salman. The Saudi Joint Relief Commission, supervised by Prince Naif as Minister of Interior, was established to "oversee the collection of assistance and in-kind and cash contributions," and has "authority to decide all matters relating to relief to Kosovo refugees." A-2886 – A-2887 (High Order 7/B/1863); see also A-2888 (Minister of Justice affirming that SIR given "discretion to donate funds on behalf of the Kingdom for charitable relief efforts"). The SHC, of which Prince Salman is President, likewise "makes its grant decisions based on the requirements of the Kingdom of Saudi Arabia's foreign policy." A-2256 (Decl. of Saud Bin

Mohammad Al-Roshood, ¶ 9]; see also A-2242 (Decl. of Dr. Mutlib bin Abdullah Al-Nafissa, ¶ 3) (Minister of State declaring that actions taken by SHC "may be viewed as actions of the government of Saudi Arabia" and are "taken in keeping with the foreign and domestic governmental policies of the Kingdom of Saudi Arabia").

Decisions regarding such foreign policy matters are inherently discretionary for purposes of this exclusion. See, e.g., Appleton v. United States, 69 F. Supp. 2d 83, 90 (D.D.C. 1999) ("U.S. foreign and/or national security interests . . . are precisely the type of policy decisions meant to be protected by" the FTCA discretionary-function exclusion.); Four Star Aviation, Inc. v. United States, 409 F.2d 292, 295 (5th Cir. 1979) (FTCA's discretionary-function exclusion applies to "the exercise of judgment and discretion with respect to a matter involving our international relations and affecting our foreign policy."). Two district courts in three different decisions have found all of these three defendants' alleged decisions to be "self-evident" exercises of discretionary powers under the FSIA, "made at the planning level of government, . . . and 'grounded in social, economic, and political policy.'" See In re Terrorist Attacks I, 349 F. Supp. 2d at 802; In re Terrorist Attacks II, 392 F. Supp. 2d at 555-56; Burnett, 292 F. Supp. 2d at 20-21. There is no persuasive reason to disturb those determinations.

Plaintiffs also urge that, even if the decisions were discretionary, this Court should refuse to apply the exclusion to the support of terrorism. Fed. Ins. Br. 26-33. But it is Congress that defines the scope of FSIA exceptions, and this Court has no authority to expand them based on public policy concerns. "[N]o matter how allegedly egregious a foreign state's conduct, suits that [do] not fit into one of the [FSIA's] discrete and limited exceptions invariably [are] rejected." Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 87-88 (D.C. Cir. 2002) (internal citation omitted).

The Supreme Court, moreover, has emphasized that the focus of the discretionary-function exclusion is the "nature of the actions taken and on whether they are susceptible to policy analysis." United States v. Gaubert, 499 U.S. 315, 325 (1991); see also Berkovitz v. United States, 486 U.S. 531, 536-37 (1988) (discretionary-function test looks solely at nature of conduct involved). Thus, the relevant inquiry is whether the defendants retained the discretion to perform the *particular* acts alleged by the plaintiffs—be they distribution of government funds to charities, oversight of charities, or other governmental functions. As shown above, there can be little doubt that the defendants did.

Congress expressly made the exclusion applicable "regardless of whether the discretion be abused." 28 U.S.C. § 1605(a)(5)(A). The discretionary-function exclusion, after all, would be meaningless if officials were subject to suit any time

a plaintiff purported to prove the officials' judgment was exercised poorly or in bad faith. Consequently, if the Court were to adopt the plaintiffs' standard, U.S. officials (under the parallel exclusion under the FTCA) and foreign officials (under the FSIA) would never be safe from a tort action arising out of the exercise of their discretion so long as a putative plaintiff alleges that they had an improper motive—such as a desire to harm the plaintiff or support terrorists—that "contravened" the law. Fed. Ins. Br. 30.[17]

None of the cases cited by plaintiffs support the "terrorist support" or "unlawful activity" interpretation they propose. Contrary to plaintiffs' assertions, Letelier v. Republic of Chile, 488 F. Supp. 665, 673 (D.D.C. 1980), and Liu v. Republic of China, 892 F.2d 1419 (9th Cir. 1989), do not hold that foreign officials lack "'discretion' to violate international law or commit crimes against humanity." Burnett Br. 50. In fact, the foreign sovereign defendants in those cases effectively abandoned the discretionary-function exclusion. In Letelier, the Chilean government did not invoke the exclusion; instead, it expelled the intelligence officer who engaged in the misconduct and denied that it authorized his actions. Letelier, 488 F. Supp. at 665, 673; A-2484 (Kropf Decl. Ex. 5, at 2). Similarly, in Liu, the Republic of China in effect declared that its agent had acted outside the

[17] Plaintiffs' assertion that applying the discretionary-function exclusion here "arguably would" be "in violation of international law," Fed. Ins. Br. 32, is absurd. International law does not require the United States to provide a right of action to sue foreign officials in tort for their official conduct.

scope of his official authority, and the agent was criminally prosecuted in Taiwan. Liu, 892 F.2d at 1423, 1431. By contrast, there is no allegation—or evidence—that the relevant charities operated unlawfully in Saudi Arabia or elsewhere, or that the Kingdom's support (and the official actions of Crown Prince Sultan, Prince Naif, and Prince Salman) was inconsistent with the Kingdom's laws and policies.[18]

Plaintiffs' reliance on Doe v. Holy See, 434 F. Supp. 2d 925 (D. Or. 2006), Burnett Br. 50-51, is equally misplaced. That decision does not hold that the discretionary-function exclusion becomes inapplicable whenever a court concludes that the conduct that "fall[s] so far outside acceptable norms of conduct that U.S. courts need not defer to a sovereign's choice to engage in them." Burnett Br. 51. Instead, the district court there held the exclusion inapplicable because the defendant failed "to warn parishioners of a known danger [the defendant] itself transplanted into a Portland parish," without presenting "any evidence that [its] failure to warn was the result of a policy judgment or was even susceptible to balancing competing policy interests." Id. at 956-57. While the correctness of that holding is far from clear,[19] Holy See extends only to failures to warn that do not

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[18] Moreover, as Judge Robertson found in the Burnett case, Letelier and Liu "involved causal links significantly shorter and more direct than those alleged here[.]" Burnett, 292 F. Supp. 2d at 21.

[19] Other courts have held that, even in failure to warn cases, it is "irrelevant" whether the "alleged failure to warn was a matter of deliberate choice or a mere

involve the exercise of policy judgment. This case does not involve such a determination. Instead, it involves governmental support of charities—precisely the sort of discretionary function and policy-based decision protected by the FSIA.[20] Moreover, Holy See was not a suit against government officials for financial support of charities that in turn gave financial support to the Holy See. It was a suit against the very organization that allegedly committed a tortious act by failing to issue warnings about a known hazard.

II. THE DISTRICT COURT CORRECTLY HELD THAT IT LACKED PERSONAL JURISDICTION OVER CROWN PRINCE SULTAN, PRINCE NAIF, AND PRINCE SALMAN

Because Crown Prince Sultan, Prince Naif, and Prince Salman showed that all of their alleged conduct was official in nature, sovereign immunity forecloses jurisdiction.[21] If "none of the exceptions to immunity" under the FSIA "applies, the court lacks both subject matter jurisdiction and personal jurisdiction." Cargill Int'l S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1016 (2d Cir. 1993).

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oversight." See, e.g., Ross v. United States, 129 F. App'x 449, 451-52 (10th Cir. 2005).

[20] Even if plaintiffs were correct that the relevant inquiry here is whether the Princes should have the discretion to support charities known to divert aid to terrorist agendas, the discretionary-function exclusion would still apply. As the Kingdom's brief explains in greater detail (at 36-37), such decisions are no less "grounded in 'considerations of public policy' or susceptible to policy analysis."

[21] For example, Crown Prince Sultan submitted several affidavits showing that his alleged charitable donations were either non-existent or from a government entity, rather than from him personally. See *supra* n.11.

Nonetheless, both district courts declined to resolve whether the three Princes' actions were personal or official. Instead, the courts held that, to the extent actions were personal, the courts lacked personal jurisdiction. In re Terrorist Attacks I, 349 F. Supp. 2d at 813; In re Terrorist Attacks II, 392 F. Supp. 2d at 560. Those holdings too were correct.

A. Foreign Government Officials Are Entitled to Due Process

The plaintiffs first invite this Court to reverse long-standing precedent in the Second Circuit that foreign states are entitled to due process protections. WTC Prop. Br. 22-25. This argument—which was not briefed below and not addressed by the district court—is out of place. The question of personal jurisdiction arises only if (like the district courts did) one assumes for the sake of argument that the Princes were acting *in their individual capacities* and therefore are *not sovereigns* entitled to immunity under the FSIA. To the extent that plaintiffs argue that individual defendants sued in their personal capacity lack due process rights, the argument is absurd.

Plaintiffs' claim that foreign sovereigns (including officers sued in their individual capacities) lack due process rights is likewise without merit. In Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 313 (2d Cir. 1981), this Court held that foreign states are entitled to due process protection with respect to personal jurisdiction. That holding was reaffirmed in Shapiro v.

Republic of Bolivia, 930 F.2d 1013 (2d Cir. 1991). This Court is bound by these prior decisions. Gelman v. Ashcroft, 372 F.3d 495, 499 (2d Cir. 2004).

Plaintiffs nonetheless assert that Weltover casts doubt on Shapiro. WTC Prop. Br. 22. Weltover, however, did not address the issue in dictum or otherwise. Instead, it assumed without deciding that due process protections apply to a foreign state. Weltover, 504 U.S. at 619-20. Consequently, far from "casting doubt" on Texas Trading and Shapiro, Weltover left things as they stood—without governing Supreme Court precedent, but with Circuit precedent on point.

B. Crown Prince Sultan, Prince Naif, and Prince Salman Lacked Minimum Contacts with the United States

Plaintiffs do not deny that they bore the burden of establishing personal jurisdiction over Crown Prince Sultan, Prince Naif, and Prince Salman by setting forth "legally sufficient allegations of jurisdiction." Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 566 (2d Cir. 1996). In particular, plaintiffs were required to allege "certain minimum contacts with [the United States] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." Int'l Shoe Co. v Wash., 326 U.S. 310, 316 (1945) (internal quotations omitted). Plaintiffs, however, failed to meet that burden.[22]

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[22] Plaintiffs' effort below to establish general *in personam* jurisdiction was rejected by the district courts as "desultory" and "insufficient." Burnett, 292 F. Supp. 2d at 21-22; In re Terrorist Attacks I, 349 F. Supp. 2d at 812; In re Terrorist

Plaintiffs assert that the Princes "purposefully directed" the injury-causing conduct at the United States consistent with Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), and Calder v. Jones, 465 U.S. 783 (1984). But plaintiffs do not claim that they can meet the "purposeful direction" standard head-on. Instead, they ask this Court to adopt a looser standard for allegations of terrorism, asserting that "[i]f ever a case called for recognition of the policy considerations that determine what process is due, it is this one." WTC Prop. Br. 33. Plaintiffs' contention is misplaced. Reasonableness is part of the analysis, but the "constitutional touchstone [for personal jurisdiction] remains whether the defendant purposefully established 'minimum contacts' in the forum state." Burger King, 471 U.S. at 474. As Judge Casey observed in his analysis of subject-matter jurisdiction in this case, while the "desire to find a legal remedy for the horrible wrongs committed on September 11, 2001" is understandable, courts must be "vigilant to exercise discipline to apply the law," including Supreme Court precedent, without inappropriately interjecting "policy considerations" into the requisite legal analysis. In re Terrorist Attacks I, 349 F. Supp. 2d at 796.

Here, plaintiffs allege no factual basis to support their theory that Crown Prince Sultan, Prince Naif, or Prince Salman "purposefully directed" their activities towards the United States, Burger King, 471 U.S. at 474, so as to

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Attacks II, 392 F. Supp. 2d at 559. Plaintiffs appear to have abandoned the argument on appeal that the court had general jurisdiction.

"knowingly cause the injury in" that forum, Calder, 465 U.S. at 790. As this Court explained in its most recent analysis of the "purposeful direction" test, a "court may exercise personal jurisdiction over defendant consistent with due process when the defendant is a *primary participant* in intentional wrongdoing—albeit extraterritorially—*expressly directed at the forum*." In re Magnetic Audiotape Antitrust Litig., 334 F.3d 204, 208 (2d Cir. 2003) (emphasis added).

Here, the plaintiffs have alleged no facts to support that Crown Prince Sultan, Prince Naif, or Prince Salman were "primary participants" or "personally involved" in the 9/11 attacks. Plaintiffs' theory is instead that the 9/11 attacks were the foreseeable consequence of supporting charities the Princes knew or should have known were diverting funds to al Qaeda. But that does not establish the direct connection necessary under Burger King. "[F]oreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction" under the purposeful direction test. Burger King, 471 U.S. at 474.

Plaintiffs' authorities confirm that "purposeful direction" exists only where the defendants are "primary participants" in the alleged principal wrongdoing. In Mwani v. Bin Laden, 417 F.3d 1 (D.C. Cir. 2005), the D.C. Circuit concluded that the defendants (Osama bin Laden and Afghanistan) had purposefully directed their actions at the United States by "orchestrat[ing] the bombing" of the American embassy in Nairobi. Id. at 13. Likewise, the district court in Pugh v. Socialist

People's Libyan Arab Jamahiriya, 290 F. Supp. 2d 54 (D.D.C. 2003), exercised jurisdiction over Libya and its intelligence service because they had "conspired to sabotage and succeeded in destroying a civilian commercial aircraft." Id. at 59. Here, there is no claim that the Princes orchestrated the 9/11 attacks or conspired to effect them.

In asserting that Morris v. Khadr, 415 F. Supp. 2d 1323, 1327 (D. Utah 2006), takes the contrary view, plaintiffs overlook the dispositive jurisdictional fact in that case. The critical fact was not that the defendant had encouraged his sons to join al Qaeda. It was that the defendant himself had held "several high-ranking al Qaeda positions" through which he had personally "provided substantial financial support and personnel assistance to help the group achieve its international terrorism objectives." Id. at 1327. The court concluded that the exercise of personal jurisdiction was appropriate because of the defendant's "personal or direct participation in the conduct giving rise to Plaintiffs' injuries." Id. at 1336 (quoting In re Terrorist Attacks I, 349 F. Supp. 2d at 809). In this case, by contrast, plaintiffs do not and cannot suggest that the Princes had "personal or direct participation in the" attacks of September 11 that "g[a]v[e] rise to [p]laintiffs' injuries."[23]

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[23] The other cases plaintiffs cite, Daliberti v. Republic of Iraq, 97 F. Supp. 2d 38 (D.D.C. 2000); Rein v. Socialist People's Libyan Arab Jamahiriya, 995 F. Supp. 325, 330 (E.D.N.Y. 1998), are equally inapposite. In those cases, jurisdiction was founded on the FSIA's state-sponsor-of-terrorism exception. Plaintiffs do not invoke that exception here.

Plaintiffs are also wrong in claiming that the district court erred in striking an omnibus brief on personal jurisdiction—a brief plaintiffs concede was "somewhat procedurally improper." WTC Prop. Br. 43-44 District courts have wide latitude to manage the proceedings before them, Chambers v. NASCO, Inc., 501 U.S. 32, 43-46 (1991), and the court here did not abuse its discretion by enforcing its page-limit rules, A-2506, and striking the noncompliant brief. See Holtz v. Rockefeller & Co., 258 F.3d 62, 73 (2d Cir. 2001). The court's decision to strike the brief, in any event, hardly affected the result. Plaintiffs could have but did not seek leave to refile or otherwise supplement the record. They do not explain why they could not incorporate stricken materials into later filings such as their opposition to Prince Naif's or Prince Salman's motions to dismiss. And they fail to explain to this Court how anything in the stricken brief alters the sound conclusions reached by both district courts in this case.

III. THE DISTRICT COURT WAS WITHIN ITS DISCRETION TO DENY PLAINTIFFS JURISDICTIONAL DISCOVERY

Plaintiffs complain about the dismissal of their suit "prior to discovery." Fed. Ins. Br. 33 & 35; WTC Prop. Br. 28; Ashton Br. 34. But they do not, and cannot, show that the district court abused its discretion in denying discovery on either subject-matter or personal-jurisdiction. See First City, Texas-Houston, N.A. v. Rafidain Bank, 150 F.3d 172, 175-76 (2d Cir. 1998).

Immunity under the FSIA is more than just immunity from liability; it is "immunity from trial and the attendant burdens of litigation." Rein v. Socialist People's Libyan Arab Jamahiriya, 162 F.3d 748, 756 (2d Cir. 1998) (quotation and citation omitted). As a result, this Court has made clear that, if the complaint contains "general allegations . . . absent any assertion of evidence of a factual predicate for such jurisdiction"—precisely the case here—then exposure to discovery is "at odds with the goal of the FSIA to enable a foreign government to obtain early dismissal when the substance of the claim against it does not support jurisdiction." Robinson, 269 F.3d at 146; see also Jazini v. Nissan Motor Co., 148 F.3d 181, 185 (2d Cir. 1998).

Moreover, contrary to plaintiffs' assertions (Burnett Br. 31, 38-39 & n.5; Fed. Ins. Br. 33, 34-35), the district court specifically considered plaintiffs' desire for discovery, A-3422 (Sept. 14, 2004 Oral Arg. Tr., at 31), and denied it only after finding that plaintiffs had offered no "factual basis for believing that discovery might reasonably be expected to result in evidence that would overcome the discretionary function" bar of the FSIA or otherwise place plaintiffs within an exception to sovereign immunity. In re Terrorist Attacks I, 349 F. Supp. 2d at 802. For that reason too, there was no abuse of discretion.

Nor did the district court abuse its discretion in denying discovery related to personal jurisdiction. This Court has made clear that, if plaintiffs only make

conclusory allegations, and cannot allege specific facts sufficient to establish jurisdiction, it is entirely their burden to establish personal jurisdiction without the benefit of discovery, no matter how onerous that may seem. Jazini, 138 F.3d at 185-86 (holding that "conclusory non-fact-specific jurisdictional allegations" are insufficient even if "without discovery it may be extremely difficult . . . to make a prima facie showing of jurisdiction"). There was, as a result, no abuse of discretion in denying jurisdictional discovery here. See Lehigh Valley Indus. v. Birenbaum, 527 F.2d 87, 93-94 (2d Cir. 1975). That is particularly apparent given plaintiffs' failure to provide "even a basic outline" of what they hoped to discover and how it might enhance their showing. Burnett, 292 F. Supp. 2d at 22; see Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 904 (2d Cir. 1981) (court has considerable leeway in deciding whether discovery would assist resolution of motion to dismiss for lack of personal jurisdiction).

In any event, the "jurisdictional" discovery sought by plaintiffs was precisely the far-ranging discovery plaintiffs sought on the merits. Ordering such discovery would have subjected Crown Prince Sultan, Prince Naif, and Prince Salman to the extensive burden of defending themselves in a distant forum with which they did not have even minimally adequate contacts—precisely what due process prohibits and the very interests the FSIA was designed to protect.

CONCLUSION

For all of the foregoing reasons, Crown Prince Sultan, Prince Naif, and Prince Salman respectfully request that this Court affirm the judgments entered in their favor by the district court.

Dated: January 5, 2007

Respectfully Submitted,

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