

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 OF DEFENDANT-APPELLEE
THE KINGDOM OF SAUDI ARABIA

MICHAEL K. KELLOGG
MARK C. HANSEN
COLIN S. STRETCH
KELLY P. DUNBAR
KELLOGG, HUBER, HANSEN, TODD,
EVANS & FIGEL, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, DC 20036
(202) 326-7900

Attorneys for Defendant-Appellee
The Kingdom of Saudi Arabia

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT	1
JURISDICTIONAL STATEMENT	2
ISSUES PRESENTED.....	2
STATEMENT OF THE CASE.....	3
A. The <i>Federal Insurance</i> Complaint	3
B. District Court Proceedings and the Court’s Order Dismissing Saudi Arabia	7
C. Stipulation of Dismissal of Other Actions and Entry of Judgment	11
SUMMARY OF ARGUMENT	11
STANDARD OF REVIEW	15
ARGUMENT	17
I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT IT LACKED SUBJECT MATTER JURISDICTION OVER PLAINTIFFS’ CLAIMS AGAINST SAUDI ARABIA	17
A. The “State Sponsor of Terrorism” Exception Does Not Apply	18
B. The Noncommercial Torts Exception Does Not Apply	21
1. Application of the Noncommercial Torts Exception Here Would Improperly Circumvent the Limitations in the “State Sponsor of Terrorism” Exception	21
2. The Noncommercial Torts Exception Applies Only to Actions That Took Place in the United States	31

3. The Noncommercial Torts Exception Does Not Apply to Discretionary Functions	34
C. The Commercial Activities Exception Does Not Apply.....	39
II. PLAINTIFFS’ ALLEGATIONS REGARDING THE SUPPOSED “ALTER EGO” STATUS OF OTHER DEFENDANTS DO NOT WARRANT A REMAND.....	47
CONCLUSION	56
ADDENDUM	

TABLE OF AUTHORITIES

	Page
CASES	
<i>Argentine Republic v. Amerada Hess Shipping Corp.</i> , 488 U.S. 428 (1989).....	17, 34
<i>Arriba Ltd. v. Petroleos Mexicanos</i> , 962 F.2d 528 (5th Cir. 1992).....	48, 55
<i>Asociacion de Reclamantes v. United Mexican States</i> , 735 F.2d 1517 (D.C. Cir. 1984).....	17, 21, 29, 33
<i>Banco Nacional de Cuba v. Chemical Bank New York Trust Co.</i> , 782 F.2d 377 (2d Cir. 1986)	52, 53
<i>Berkovitz v. United States</i> , 486 U.S. 531 (1988)	35
<i>Booking v. General Star Mgmt. Co.</i> , 254 F.3d 414 (2d Cir. 2001)	46
<i>Bruh v. Bessemer Venture Partners III L.P.</i> , 464 F.3d 202 (2d Cir. 2006)	46
<i>Burnett v. Al Baraka Inv. & Dev. Corp.</i> , 292 F. Supp. 2d 9 (D.D.C. 2003)	24, 34, 36, 38, 40, 41, 45
<i>Cabiri v. Government of the Republic of Ghana</i> , 165 F.3d 193 (2d Cir. 1999)	26, 33
<i>de Sanchez v. Banco Central de Nicaragua</i> , 770 F.2d 1385 (5th Cir. 1985)	25
<i>Drexel Burnham Lambert Group Inc. v. Committee of Receivers for Galadari</i> , 12 F.3d 317 (2d Cir. 1993)	45
<i>El-Fadl v. Central Bank of Jordan</i> , 75 F.3d 668 (D.C. Cir. 1996).....	16
<i>Filetech S.A. v. France Telecom S.A.</i> , 157 F.3d 922 (2d Cir. 1998)	15
<i>First City, Texas-Houston, N.A. v. Rafidain Bank</i> , 150 F.3d 172 (2d Cir. 1998)	16

<i>First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba</i> , 462 U.S. 611 (1983).....	14, 48, 49
<i>Flatow v. Islamic Republic of Iran</i> , 999 F. Supp. 1 (D.D.C. 1998).....	29
<i>Foremost-McKesson, Inc. v. Islamic Republic of Iran</i> , 905 F.2d 438 (D.C. Cir. 1990).....	16
<i>Garb v. Republic of Poland</i> , 440 F.3d 579 (2d Cir. 2006)	17, 24, 25, 28, 39
<i>Gilson v. Republic of Ireland</i> , 682 F.2d 1022 (D.C. Cir. 1982)	50
<i>Gooch v. United States</i> , 297 U.S. 124 (1936).....	44
<i>Hartford Courant Co. v. Pellegrino</i> , 380 F.3d 83 (2d Cir. 2004)	46
<i>HCSC-Laundry v. United States</i> , 450 U.S. 1 (1981)	24
<i>I.T. Consultants, Inc. v. Islamist Republic of Pakistan</i> , 351 F.3d 1184 (D.C. Cir. 2003).....	52
<i>Kensington Int’l Ltd. v. Societe Nationale des Petroles du Congo</i> , No. 05 Civ. 5101 (LAP), 2006 WL 846351 (S.D.N.Y. Mar. 31, 2006)	44
<i>Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit</i> , 507 U.S. 163 (1993)	15
<i>Letelier v. Republic of Chile</i> , 488 F. Supp. 665 (D.D.C. 1980)	29, 36, 37, 38
<i>Liu v. Republic of China</i> , 892 F.2d 1419 (9th Cir. 1989).....	29, 36, 37, 38
<i>Letelier v. Republic of Chile</i> , 748 F.2d 794 (2d Cir. 1984)	10, 13, 41, 42, 43, 44, 53
<i>McKeel v. Islamic Republic of Iran</i> , 722 F.2d 582 (9th Cir. 1983).....	34
<i>McKesson Corp. v. Islamic Republic of Iran</i> , 52 F.3d 346 (D.C. Cir. 1995)	49

<i>Persinger v. Islamic Republic of Iran</i> , 729 F.2d 835 (D.C. Cir. 1984)	12, 17, 31, 32, 33, 34, 37
<i>Phoenix Consulting, Inc. v. Republic of Angola</i> , 216 F.3d 36 (D.C. Cir. 2000)	16
<i>Price v. Socialist People’s Libyan Arab Jimahiriya</i> , 294 F.3d 82 (D.C. Cir. 2002)	19, 22, 23, 30, 38
<i>Republic of Argentina v. Weltover, Inc.</i> , 504 U.S. 607 (1992)	27
<i>Robinson v. Government of Malaysia</i> , 269 F.3d 133 (2d Cir. 2001)	15, 16
<i>Saudi Arabia v. Nelson</i> , 507 U.S. 349 (1993)	10, 17, 18, 40, 43
<i>Schooner Exch. v. McFaddon</i> , 11 U.S. (7 Cranch) 116 (1812)	17
<i>Southway v. Central Bank of Nigeria</i> , 198 F.3d 1210 (10th Cir. 1999)	44
<i>Tel-Oren v. Libyan Arab Republic</i> , 726 F.2d 774 (D.C. Cir. 1984)	34
<i>Transamerica Leasing, Inc. v. Republica de Venezuela</i> , 200 F.3d 843 (D.C. Cir. 2000)	48, 50, 51
<i>United States v. Bishop</i> , 66 F.3d 569 (3d Cir. 1995)	44
<i>United States v. Goodwin</i> , 141 F.3d 394 (2d Cir. 1997)	43, 44
<i>United States v. Lopez</i> , 514 U.S. 549 (1995)	43
<i>United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)</i> , 467 U.S. 797 (1984)	10, 13, 35
<i>United States v. Sage</i> , 92 F.3d 101 (2d Cir. 1996)	44
<i>USX Corp. v. Adriatic Ins. Co.</i> , 345 F.3d 190 (3d Cir. 2003)	48, 50
<i>Virtual Countries, Inc. v. Republic of South Africa</i> , 300 F.3d 230 (2d Cir. 2002)	16, 46

CONSTITUTIONS, STATUTES & REGULATIONS

U.S. Const. art. I, § 8.....	43
18 U.S.C. § 1956.....	42, 43
18 U.S.C. § 1957.....	42
18 U.S.C. § 1956(a)(1).....	41
18 U.S.C. § 1956(a)(1)(B)(i).....	42
22 U.S.C. § 2371(a)	20
28 U.S.C. § 1603(a)	49
28 U.S.C. § 1603(d)	39, 44
28 U.S.C. § 1603(e)	45
28 U.S.C. § 1604.....	17
28 U.S.C. § 1605.....	17
28 U.S.C. § 1605(a)(2).....	10, 18, 39, 45
28 U.S.C. § 1605(a)(3).....	25
28 U.S.C. § 1605(a)(5).....	8, 18, 21, 26, 27, 31
28 U.S.C. § 1605(a)(5)(A)	9, 34, 37
28 U.S.C. § 1605(a)(7).....	6, 8, 18, 19, 22, 24, 27
28 U.S.C. § 1605(a)(7)(A)	20, 26
28 U.S.C. § 1605(a)(7)(B)(i).....	28
28 U.S.C. § 2680(a)	34
50 U.S.C. App. § 2405(j)(1)(A).....	20

22 C.F.R. § 126.1(d)20

OTHER AUTHORITIES

H.R. Rep. No. 94-1487 (1967), *reprinted in* 1976 U.S.C.C.A.N. 660421, 31,
34, 41

I Restatement (Third): The Foreign Relations Law of the United
States (1987)40

*The 9/11 Commission Report: Final Report of the National
Commission on Terrorist Attacks Upon the United States* (July
2004)1, 7, 39

U.N. General Assembly, Report of the International Law Commission
on the Work of its Thirty-Sixth Session, U.N. Doc. A/39/10
(May 7-July 27, 1984)33

U.N. Leg. Series, Materials on Jurisdictional Immunities of States and
Their Property (1982)32

U.S. Dep’t of State, Press Briefing with Saudi Arabian Foreign
Minister Prince Saud Al-Faisal (Mar. 19, 2004) (Statement of
Secretary Colin L. Powell), *available at*
[http://www.state.gov/secretary /rm/30623.htm](http://www.state.gov/secretary/rm/30623.htm)2, 7

PRELIMINARY STATEMENT

Following an exhaustive and authoritative investigation, the National Commission on Terrorist Attacks Upon the United States (“9/11 Commission”) concluded that the Kingdom of Saudi Arabia had no role in the attacks of September 11, 2001. The 9/11 Commission found that Saudi Arabia did *not* provide financial or material assistance to the September 11 terrorists or their Al-Qaeda organization: “Saudi Arabia has long been considered the primary source of al Qaeda funding, but we have found no evidence that the Saudi government as an institution or senior Saudi officials individually funded the organization.” *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* 171 (July 2004) (“9/11 Report”).

Nevertheless, Saudi Arabia has been named as a defendant in several of the cases consolidated before this Court. In these cases, plaintiffs claim that Saudi Arabia, both directly and through various charities supposedly acting on its behalf, provided funding and other support to Al-Qaeda, and thereby facilitated that organization’s growth into a terrorist group capable of perpetrating the attacks of September 11. Those claims are not only false and contrary to the conclusions of the 9/11 Commission; they also are not cognizable in a United States court.

Saudi Arabia is a “foreign state” within the meaning of the Foreign Sovereign Immunities Act (“FSIA”), and it is therefore immune from suit unless

one of the FSIA's exceptions to immunity applies. Here, Saudi Arabia is alleged to have provided material support for terrorism, so the relevant exception is the FSIA's "state sponsor of terrorism" exception. Critically, however, that exception applies only when the Department of State has designated the defendant state as a state sponsor of terrorism. Here, far from designating Saudi Arabia as a sponsor of terrorism, the State Department has proclaimed that the United States and Saudi Arabia are "*united* in the war against terror."¹ In view of that core, indisputable fact, this Court must reject plaintiffs' efforts to name Saudi Arabia as a defendant, and thereby to force an ally of the United States into the extraordinary posture of defending itself in a United States court against claims that it provided material support to terrorists.

JURISDICTIONAL STATEMENT

Saudi Arabia adopts the jurisdictional statement of H.R.H. Prince Turki Al-Faisal bin Abdulaziz Al-Saud ("Prince Turki").

ISSUES PRESENTED

1. Whether plaintiffs can circumvent limitations on the FSIA's "state sponsor of terrorism" exception to sovereign immunity by casting their allegation that Saudi Arabia provided material support to Al-Qaeda as one sounding in tort.

¹ *E.g.*, U.S. Dep't of State, Press Briefing with Saudi Arabian Foreign Minister Prince Saud Al-Faisal (Mar. 19, 2004) (Statement of Secretary Colin L. Powell), *available at* <http://www.state.gov/secretary/rm/30623.htm>.

2. Whether, in any event, the FSIA’s noncommercial torts exception to sovereign immunity does not apply to allegations that Saudi Arabia provided material support to Al-Qaeda because, as the D.C. Circuit has held, that exception covers only actions in which the entire tort occurred in the United States.

3. Whether, in addition, the noncommercial torts exception to sovereign immunity does not apply because any supposed material support provided directly or indirectly to Al-Qaeda would have been a discretionary activity.

4. Whether, as the district court held, the donation of funds to humanitarian organizations is not a commercial activity within the meaning of the FSIA’s “commercial activities” exception to sovereign immunity.

STATEMENT OF THE CASE

A. *The Federal Insurance Complaint*²

1. The crux of plaintiffs’ allegations against Saudi Arabia is that the Saudi government, through senior officials and various entities acting on Saudi Arabia’s behalf, provided financial and material assistance to Al-Qaeda and

² Saudi Arabia was named as a defendant in six of the consolidated cases appealed to this Court (*Federal Insurance, Vigilant, Cantor, NY Marine, O’Neill, and Pacific Employers*). This Statement focuses on the *Federal Insurance* complaint because it was principally before the district court in the decision under review, *see In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 782 & n.15 (S.D.N.Y. 2005) (“*In re Terrorist Attacks I*”), and because, as explained further below, the remaining plaintiffs that named Saudi Arabia as a defendant stipulated that their allegations and evidence did not materially differ from that of the *Federal Insurance* plaintiffs.

thereby assisted that organization's growth into a terrorist network capable of perpetrating the attacks of September 11. *See Federal Insurance, First Am. Compl.* ¶¶ 398-410 ("FAC") (A-2001-04).

The complaint alleges that Al-Qaeda's "phenomenal growth and development into a sophisticated global terrorist network" was made possible by the "massive financial, logistical [sic] and other support it received from the Kingdom of Saudi Arabia." *Id.* ¶ 398 (A-2001). It asserts that Saudi Arabia "established, funded, managed, maintained, directed and controlled many of the ostensible charities and banks that operate within al Qaeda's support infrastructure," and that "[t]he vast majority of these funds" for Al-Qaeda "have been provided by the Kingdom of Saudi Arabia [sic] and members of the Saudi Royal Family." *Id.* ¶ 399 (A-2001). The complaint further alleges that Saudi Arabia "has appointed senior members of the al Qaeda movement to high-ranking positions within the charities it controlled, thereby providing a cover for their terrorist activity." *Id.* And the complaint asserts that Al-Qaeda has "planned and coordinated terrorist attacks from branch offices of the charities, including branches which operated from within Saudi embassies throughout the world." *Id.*

Plaintiffs also contend that French and U.S. government officials raised with Saudi officials their concern that Saudi charities were deeply involved "in the sponsorship and funding of terrorist organizations." *Id.* ¶ 400 (A-2002). The

complaint then contends that, despite international opposition, Saudi Arabia “continued to funnel enormous amounts of money and other resources to the charities supporting al Qaida’s operations.” *Id.* ¶ 401 (A-2002). Plaintiffs further allege that “the Kingdom ... and members fo [sic] the Royal Family knew and intended that the funding and support funneled to al Qaida through the charities and banks would be used to attack U.S. interests.” *Id.* ¶ 402 (A-2002).

Plaintiffs also seek to link Saudi Arabia to the September 11 attacks through support the Saudi government allegedly provided to the Taliban (which was at the time the *de facto* government of Afghanistan). *See id.* ¶¶ 403-407 (A-2002-03). Without that support, plaintiffs assert, Al-Qaeda would not have been able to grow into a network capable of conducting “large scale acts of terrorism on a global scale.” *Id.* ¶ 409 (A-2003).

Plaintiffs do not assert any direct link between Saudi Arabia and the September 11 attacks, but rather contend that those attacks were a “direct, intended and foreseeable product of the Kingdom of Saudi Arabia’s participation in al Qaida’s jihadist campaign.” *Id.* ¶ 425 (A-2006).

The *Federal Insurance* complaint also names as defendants numerous charities, including charities organized and based in Saudi Arabia that were, during the time period at issue in the complaint, regulated by the Saudi government. *See id.* ¶¶ 84-179, 208-216 (A-1934-59, 1964-66). Additional defendants include the

Saudi Red Crescent, the Saudi High Commission, and the Saudi Joint Relief Committee (“SJRC”), which are agencies or instrumentalities of Saudi Arabia that conduct humanitarian relief efforts in various parts of the world. *See id.* ¶¶ 180-207 (A-1959-64). The allegations against these defendants parallel those against Saudi Arabia itself: While none of them is alleged to have had knowledge of or participated in the September 11 attacks, each of them is alleged to have “provided critical financial and logistical support to al Qaida in relation to that terrorist organization’s global jihad.” *Id.* ¶¶ 111, 128, 148, 165, 178, 188, 201, 206, 215 (A-1942, 1947, 1951, 1955, 1959-60, 1963-65). In addition, with the exception of the SJRC, each of these organizations is alleged to be an “agency” or “instrumentality” of Saudi Arabia. *See id.* ¶¶ 85, 114, 131, 151, 168, 181, 191, 209 (A-1934, 1943, 1947-48, 1952, 1955, 1959, 1961, 1964).

2. Plaintiffs’ claims are directly rebutted by facts found by the United States government. First, the complaint concedes by omission that the Department of State has not designated Saudi Arabia as a state sponsor of terrorism, as required for the federal courts to exercise jurisdiction under the FSIA, 28 U.S.C. § 1605(a)(7).³

Second, as noted at the outset, the 9/11 Commission concluded that Saudi Arabia did *not* assist the September 11 terrorists. While not ruling out the

³ The FSIA and other relevant statutes and regulations are excerpted in the Addendum to this brief.

possibility that some charities diverted funds to Al-Qaeda, the 9/11 Commission “found no evidence that the Saudi government as an institution or senior Saudi officials individually funded” Al-Qaeda. 9/11 Report at 171. The 9/11 Report further concluded that “we have seen no evidence that any foreign government — or foreign government official — supplied any funding” to the September 11 hijackers. *Id.* at 172.

The 9/11 Commission further stated that Saudi Arabia, along with the United States, is “now locked in mortal combat with al Qaeda.” *Id.* at 373. As far back as 1996, Osama bin Laden “condemned the Saudi monarchy for allowing the presence of [American troops] in a land with the sites most sacred to Islam.” *Id.* at 48. Saudi Arabia itself thus became a target of Al-Qaeda because of its ties to the United States. Shortly thereafter, Saudi Arabia and the United States established a joint intelligence committee and worked together in an effort to stop Al-Qaeda. *Id.* at 115-22. As then-Secretary of State Powell remarked in 2004, the United States and Saudi Arabia are “united in the war against terror.”⁴

B. District Court Proceedings and the Court’s Order Dismissing Saudi Arabia

Because Saudi Arabia is entitled to sovereign immunity under the FSIA, Saudi Arabia filed a motion to dismiss for lack of jurisdiction under Rule 12(b)(1). The district court granted that motion in *In re Terrorist Attacks I*.

⁴ Powell, *supra* note 1.

The court explained that, “[u]nder the FSIA, a foreign state and its instrumentalities are presumed immune from United States courts’ jurisdiction,” and that “[t]he FSIA’s exceptions to immunity provide the sole basis for obtaining subject matter jurisdiction over a foreign state and its instrumentalities.” 349 F. Supp. 2d at 782. Because “[t]here [wa]s no dispute that the Kingdom of Saudi Arabia is a foreign state,” *id.* at 802, the court addressed the relevant FSIA exceptions to determine whether it could exercise jurisdiction.

The court first addressed the terrorism exception, which provides for jurisdiction in cases “in which money damages are sought against a foreign state” that the U.S. State Department has designated as “a state sponsor of terrorism,” where the plaintiff alleges that the state provided “material support or resources” for terrorist activity. 28 U.S.C. § 1605(a)(7). The district court determined that this exception did not apply because Saudi Arabia “has not been designated a state sponsor of terrorism.” 349 F. Supp. 2d at 794.

The court also addressed the FSIA’s “noncommercial torts” exception. *See* 28 U.S.C. § 1605(a)(5). Saudi Arabia contended that this exception does not apply to claims based on alleged support for terrorism, reasoning that construing it to apply to such claims would permit plaintiffs to make an end-run around the “state sponsor of terrorism” exception and the careful limits Congress put on that exception. The court rejected this argument on the ground that, in drafting the

terrorism exception in § 1605(a)(7), Congress “did not include mutually exclusive language that would preclude the application of the torts exception here.” 349 F. Supp. 2d at 796.

At the same time, the court emphasized that the noncommercial torts exception, by its terms, does not establish jurisdiction over discretionary actions. *Id.* at 794; *see* 28 U.S.C. § 1605(a)(5)(A). The court explained that “[t]he FSIA’s discretionary function exception replicates the discretionary function exception found in the Federal Tort Claims Act,” and it observed that, “[g]enerally, acts are discretionary if they are performed at the planning level of government, as opposed to the operational level.” 349 F. Supp. 2d at 794.

The court found that, with respect to Saudi Arabia, “Plaintiffs’ allegations c[ould] not overcome the discretionary function exception to the tortious acts exception.” *Id.* at 803. The court explained that “[t]he *Federal* Plaintiffs’ allegations arise predominantly from misconduct of ostensible charities under the Kingdom’s control. Thus, the *Federal* Plaintiffs claim the Kingdom of Saudi Arabia aided and abetted the terrorists through these charities” and “urge the Court to find that the Kingdom had previously willfully ignored the charities’ support for terrorism.” *Id.* at 802-03 (internal quotation marks, citation, and footnote omitted). The district court observed that “conclusory ... allegations” cannot support jurisdiction under the FSIA, and it further noted that Saudi Arabia’s “treatment of

and decisions to support Islamic charities are purely planning level ‘decisions grounded in social, economic, and political policy.’” *Id.* at 803-04 (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984)).⁵

The district court also addressed the FSIA’s “commercial activities” exception. *See* 28 U.S.C. § 1605(a)(2). The court held that “the act of contributing to a foundation is not within our ordinary understanding” of a commercial activity, “nor, apparently was it within the contemplation of ... Congress.” 349 F. Supp. 2d at 793 (internal quotation marks omitted; alteration in original). The court rejected plaintiffs’ allegation that “contributing to or supporting charities known to support terrorist activities” amounts to “money laundering and, therefore, a commercial activity.” *Id.* Money laundering, the court noted, is “an illegal activity” under the federal criminal code, and it therefore “cannot be the basis” for invoking the commercial activities exception. *Id.* (citing *Letelier v. Republic of Chile*, 748 F.2d 790, 798 (2d Cir. 1984); *Saudi Arabia v. Nelson*, 507 U.S. 349, 360-62 (1993)).

⁵ With respect to plaintiffs’ allegations that charities named as defendants were agencies or instrumentalities of Saudi Arabia, the court noted that an inquiry into “the instrumentality status of these charities ... may be more appropriate when the Court considers each of the charities’ motions to dismiss.” 349 F. Supp. 2d at 803 n.30.

C. Stipulation of Dismissal of Other Actions and Entry of Judgment

As the district court observed, the parties agreed that the district court's resolution of Saudi Arabia's motion to dismiss the *Federal Insurance* complaint would also apply to *Vigilant*. See 349 F. Supp. 2d at 782 n.15. In addition, following the court's decision, plaintiffs and defendants agreed that the court's decision as to the defendants that had been dismissed would apply to all actions naming those defendants, on the ground that the allegations and evidence presented against those defendants in the cases still pending did not materially differ from the allegations and evidence presented in the cases already dismissed. The parties prepared a stipulation to that effect, which the district court signed on May 5, 2005. See SPA-63-66. On December 16, 2005, the district court issued a final judgment as to Saudi Arabia pursuant to Rule 54(b). See SPA-103-05.

SUMMARY OF ARGUMENT

I. As a "foreign state," Saudi Arabia is immune from suit in United States courts unless the plaintiff comes forward with evidence establishing that one of the FSIA's exceptions to immunity applies. Here, plaintiffs have alleged that Saudi Arabia provided material support and resources to Al-Qaeda and is therefore culpable for the September 11 attacks. The FSIA includes an exception for precisely such an allegation: the "state sponsor of terrorism" exception in § 1605(a)(7). Critically, however, that exception applies *only* where the United

States Department of State has formally designated the defendant foreign state as a “state sponsor of terrorism.” Saudi Arabia is an *ally* of the United States in combating terrorism. It has not been designated as a state sponsor of terrorism, and it is therefore not subject to suit under § 1605(a)(7). That should be the end of the matter.

Plaintiffs contend, however, that the relevant FSIA exception is not the “state sponsor of terrorism” exception, but rather the noncommercial torts exception in § 1605(a)(5). But the crux of plaintiffs’ allegation is that Saudi Arabia provided material support to terrorists. If plaintiffs are to proceed under that theory, they must satisfy the “state sponsor of terrorism” exception, which Congress deliberately structured to require a State Department designation as a pre-condition for requiring a foreign state to defend itself, in a United States court, against charges that it sponsors terrorism. Any other result would permit plaintiffs to evade limitations designed to protect the Executive Branch’s authority to determine who is, and is not, a state sponsor of terrorism.

Beyond that, the noncommercial torts exception does not apply here because all of the actions attributed to Saudi Arabia took place outside the United States. As the D.C. Circuit has held, the noncommercial torts exception requires that both the harm *and the acts alleged to have caused it* took place in the United States. *See Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 842 (D.C. Cir. 1984).

The FSIA’s discretionary-function exemption likewise forecloses plaintiffs’ reliance on the noncommercial torts exception. The discretionary-function exemption is designed to prevent second-guessing of “decisions grounded in social, economic, and political policy.” *Varig Airlines*, 467 U.S. at 814. The decision to donate funds to particular foundations is such a decision, and it therefore cannot be challenged under the noncommercial torts exception. Indeed, even if the plaintiffs were correct that Saudi Arabia made such donations with the aim of supporting Al-Qaeda — and, as the 9/11 Commission found, they are not — any such support would necessarily have been the product of a policy decision and therefore protected by the discretionary function exemption.

Plaintiffs’ reliance on the FSIA’s commercial activities exception is likewise unavailing. That exception applies where a foreign state acts as a “merchant in the marketplace” engaged in “activity ... of the type an individual would customarily carry on for profit.” *Letelier*, 748 F.2d at 796, 797. As the text and legislative history of the FSIA make clear, the exception does not capture the act of donating funds to a foundation. Although plaintiffs seek to avoid this result by labeling the alleged donations “money laundering,” they make no effort to plead the elements of a money laundering offense, and in any case money laundering is criminal activity that is not “of the type an individual would *customarily* carry on for profit.” *Id.* at 797 (emphasis added). Finally, even if donating to charities were a

“commercial activity” within the meaning of the FSIA, plaintiffs have failed to establish, as they must in order to proceed under this exception, that the donations had a “direct effect” in the United States.

II. This analysis is unaffected by plaintiffs’ contention that Saudi Arabia is subject to suit not just for its own actions, but also for the actions of various charities that plaintiffs claim qualify as “alter egos” of Saudi Arabia under *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (“*Bancec*”).

Although plaintiffs assert that they provided evidence and allegations in the district court to establish that each of the charities at issue was an “alter ego” of Saudi Arabia under *Bancec*, in fact their showing was directed at establishing that the various charities were “agencies or instrumentalities” of Saudi Arabia under § 1603(b) of the FSIA. Those are different inquiries with different results. Most importantly, the “agency or instrumentality” inquiry, even if satisfied, does *not* result in attributing the actions of juridically separate entities (here, the charities) to the alleged parent (here, Saudi Arabia). In view of plaintiffs’ confusion on this point, they are wrong to contend that the district court committed “clear error” in declining to attribute the actions of the charities to Saudi Arabia.

More fundamentally, attributing the actions of the charities to Saudi Arabia would make no difference to the outcome here. Plaintiffs’ allegations against the

charities are substantively the same as the allegations against Saudi Arabia: Both are alleged to have provided funding and logistical support to Al-Qaeda and thereby to have facilitated that organization's growth into a terrorist group capable of perpetrating the September 11 attacks. For the reasons noted above and set out in more detail below, those allegations, whether made directly against Saudi Arabia or against charities supposedly acting on Saudi Arabia's behalf, do not come within any of the FSIA's exceptions to sovereign immunity.

STANDARD OF REVIEW

“The standard of review applicable to district court decisions regarding subject matter jurisdiction under the FSIA is clear error for factual findings and *de novo* for legal conclusions.” *Robinson v. Government of Malaysia*, 269 F.3d 133, 138 (2d Cir. 2001) (internal quotation marks omitted). This standard reflects the unique character of the FSIA. Although a district court ordinarily would assume the truth of a complaint's allegations when reviewing a motion to dismiss under Rule 12(b), *see, e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993), that is not the case when a court judges the adequacy of allegations involving the official acts of a foreign sovereign. In resolving immunity claims under the FSIA, a district court may not “accept the mere allegations of the complaint as a basis for finding subject matter jurisdiction.” *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 932 (2d Cir.

1998). Rather, where a defendant presents a “*prima facie* case that it is a foreign sovereign,” the plaintiff “has the burden of going forward with evidence showing that, under exceptions to the FSIA, immunity should not be granted.” *Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 241 (2d Cir. 2002) (internal quotation marks omitted).

Furthermore, “[w]hen the defendant has ... challenged the factual basis of the court’s jurisdiction ... the court must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss.” *Robinson*, 269 F.3d at 141 (quoting *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000)).

Finally, to the extent plaintiffs base their allegations of error on the district court’s refusal to grant discovery, this Court reviews such claims for abuse of discretion, *First City, Texas-Houston, N.A. v. Rafidan Bank*, 150 F.3d 172, 176 (2d Cir. 1998), and it has stressed that discovery against a foreign sovereign will not be permitted based on “generic allegations,” *Robinson*, 269 F.3d at 146; accord *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996) (allowing discovery prior to dismissal “would ‘frustrate the significance and benefit of entitlement to immunity from suit’”) (quoting *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 449 (D.C. Cir. 1990)).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT IT LACKED SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS AGAINST SAUDI ARABIA

The FSIA is “the only source of subject matter jurisdiction over a foreign sovereign in the courts of the United States.” *Garb v. Republic of Poland*, 440 F.3d 579, 581 (2d Cir. 2006); *see Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). In § 1604, the FSIA codifies the long-standing principle that “[f]oreign states are generally immune from the jurisdiction of federal and state courts.” *Persinger*, 729 F.2d at 838 (citing, *inter alia*, *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.)); *see* 28 U.S.C. § 1604. In § 1605, the FSIA creates exceptions to that principle, and thus “withhold[s] immunity,” for “commercial acts” and “certain narrowly defined public acts for which local adjudication was deemed imperative.” *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1520 (D.C. Cir. 1984) (Scalia, J.); *see* 28 U.S.C. § 1605. Under this framework, “a foreign state is presumptively immune from the jurisdiction of the United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state.” *Nelson*, 507 U.S. at 355.

As the district court noted, *see* 349 F. Supp. 2d at 802, there is no dispute that Saudi Arabia is a “foreign state” within the meaning of the FSIA and is thus

“presumptively immune from the jurisdiction of the United States courts,” *Nelson*, 507 U.S. at 355. The question, then, is whether one of the FSIA’s exceptions to sovereign immunity applies. Three such exceptions to sovereign immunity are relevant to this inquiry: first, the “state sponsor of terrorism” exception, *see* 28 U.S.C. § 1605(a)(7); second, the “noncommercial torts” exception, *see id.* § 1605(a)(5); and, third, the “commercial activities” exception, *see id.* § 1605(a)(2). None of these exceptions applies to the allegations in plaintiffs’ complaints, and accordingly none of them vitiates the sovereign immunity of Saudi Arabia.

A. The “State Sponsor of Terrorism” Exception Does Not Apply

1. The gravamen of plaintiffs’ claims against Saudi Arabia is clear: “for many years and in diverse regions throughout the world,” Saudi Arabia allegedly “played a central and critical role in funding, facilitating and supporting al Qaida’s global operations.” FAC ¶ 423 (A-2006). Furthermore, Saudi Arabia allegedly “knew and intended that the funding and support funneled to al Qaida ... would be used to attack U.S. interests.” *Id.* ¶ 402 (A-2002). Plaintiffs’ claims against Saudi Arabia, in short, arise from Saudi Arabia’s “tortious conduct in knowingly providing financial, physical and logistical support to al Qaida, the foreign terrorist organization responsible for the September 11, 2001 terrorist attack.” Fed. Ins. Br. 1.

The FSIA contains an exception to sovereign immunity for just such an allegation. Section 1605(a)(7) provides for jurisdiction over claims against foreign states in which

money damages are sought ... for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources ... for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office.

28 U.S.C. § 1605(a)(7).

Plaintiffs' allegations fall directly within the language of this exception.

Plaintiffs seek "money damages," *see* FAC at 181-82 (A-2071-72), for "personal injury or death," *see id.* ¶¶ 605, 608, 611, 637 (A-2062-63, 2069), "caused by ... the provision of material support or resources," *see, e.g., id.* ¶¶ 64, 423 (A-1920, 2006), for "an act of torture, extrajudicial killing, [or] aircraft sabotage," *see, e.g., id.* ¶¶ 619, 635 (A-2065, 2068).

The legislative purpose of § 1605(a)(7), moreover, confirms its applicability to plaintiffs' allegations. The point of § 1605(a)(7), which was added in 1996 as part of the Anti-Terrorism and Effective Death Penalty Act, *see* Pub. L. No. 104-132, tit. II, § 221, 110 Stat. 1241, was "to create a judicial forum for compensating the victims of terrorism, and in so doing to punish foreign states who have committed or sponsored such acts and deter them from doing so in the future," *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 88-89 (D.C. Cir.

2002). Here, plaintiffs are seeking to do exactly that — *i.e.*, to use a judicial forum to “compensate[e] the victims” of the September 11 terrorist attacks, and to “punish foreign states” that plaintiffs allege “sponsored” those attacks.

2. Although it is thus clear that plaintiffs’ allegations fall squarely within the “state sponsor of terrorism” exception in § 1605(a)(7), it is equally clear that this exception does not establish jurisdiction to hear such allegations against Saudi Arabia. By its terms, § 1605(a)(7) does *not* apply — and thus does *not* vitiate the sovereign immunity of a foreign state — “if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred.” 28 U.S.C. § 1605(a)(7)(A).

That limitation is dispositive here. As the district court recognized, the United States Department of State — which is charged with identifying “state sponsors of terrorism” under the referenced provisions, *see* 22 U.S.C. § 2371(a); 50 U.S.C. App. § 2405(j)(1)(A) — has *not* so designated Saudi Arabia. *See* 349 F. Supp. 2d at 794. It follows that, while the FSIA exception to sovereign immunity that precisely tracks plaintiffs’ allegations may provide jurisdiction over sovereign defendants that have been designated as state sponsors of terrorism, *compare* FAC ¶¶ 509-535 (A-2025-29) (raising claims against Sudan, Syrian Arab Republic, and the Islamic Republic of Iran) *with* 22 C.F.R. § 126.1(d) (identifying those foreign

states as among those “countries which the Secretary of State has determined to have repeatedly provided support for acts of international terrorism”), it necessarily does not establish jurisdiction over Saudi Arabia.

B. The Noncommercial Torts Exception Does Not Apply

The noncommercial torts exception permits, with certain limitations, actions “in which money damages are sought against a foreign state for personal injury or death ... occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.” 28 U.S.C. § 1605(a)(5). This exception does not apply to Saudi Arabia for three independent reasons.⁶

1. Application of the Noncommercial Torts Exception Here Would Improperly Circumvent the Limitations in the “State Sponsor of Terrorism” Exception

a. “The primary purpose of the ‘tortious act or omission’ exception of § 1605(a)(5) was to enable officials and employees of foreign sovereigns to be held liable for the traffic accidents which they cause in this country, whether or not in the scope of their official business.” *Asociacion de Reclamantes*, 735 F.2d at 1525 (citing H.R. Rep. No. 94-1487, at 20-21 (1976), *reprinted in* 1976 U.S.C.C.A.N.

⁶ Apart from the factors discussed below, plaintiffs cannot proceed under the noncommercial torts exception because they have failed to establish that Saudi Arabia or any official acting on its behalf “caused” the September 11 attacks. 28 U.S.C. § 1605(a)(5). On this point, Saudi Arabia incorporates by reference Part II.B. of the brief of Prince Turki and Part I.C. of the brief of Crown Prince Sultan and Princes Naif and Salman.

6604, 6619-20). To construe that exception to reach allegations that a foreign state acting solely overseas provided material support to a terrorist group — which, as discussed above, are precisely the sort of allegations covered in the “state sponsor of terrorism” exception — would impermissibly allow an end-run around the limitations in § 1605(7) and thereby invade the province of the Executive Branch.

The limitations in the “state sponsor of terrorism” exception are clearly defined. Section 1605(a)(7) permits actions against foreign states for providing “material support or resources” to terrorist groups, but only where (i) the plaintiff (or the victim) is a U.S. national, (ii) the plaintiff seeks “money damages ... for personal injury or death,” (iii) the plaintiff has afforded the defendant foreign state the opportunity to arbitrate (if the terrorist act occurred in the foreign state), and (iv), as discussed above, the defendant foreign state has been designated a state sponsor of terrorism. 28 U.S.C. § 1605(a)(7). These limitations are critical to the proper implementation of the FSIA. As the D.C. Circuit has observed, the Executive Branch “resisted” passage of § 1605(a)(7), “fear[ing] that the proposed amendment to FSIA might cause other nations to respond in kind, thus potentially subjecting the American government to suits in foreign countries for actions taken in the United States.” *Price*, 294 F.3d at 89. “[T]hese reservations ... left their mark” on the “delicate legislative compromise” that emerged from Congress in the form of the limitations noted above, the most important of which is the

requirement that “only a defendant that has been specifically designated by the State Department as a ‘state sponsor of terrorism’ is subject to the loss of its sovereign immunity.” *Id.*

Plaintiffs, however, would have this Court disregard that limitation and authorize their claims against Saudi Arabia under the noncommercial torts exception, irrespective of the fact that Saudi Arabia has not been designated as a state sponsor of terrorism. This Court should do no such thing. In amending the FSIA to add § 1605(a)(7), Congress balanced the interest in providing a remedy to victims of terrorist acts against the profound policy implications of adjudicating claims in a United States court against a foreign state based on accusations that the foreign state supported a terrorist act. Congress struck that balance by authorizing suits in specifically defined circumstances, and *only* where the Department of State has designated the defendant foreign state as a state sponsor of terrorism. To allow such a suit under the noncommercial torts exception of § 1605(a)(5) — which is implicated here for the sole reason that § 1605(a)(7) does *not* apply, because Saudi Arabia has *not* been designated a state sponsor of terrorism — would be to authorize a suit that both Congress and the Executive Branch have determined should not be heard.

The text of the noncommercial torts exception itself, moreover, confirms its inapplicability here. Whereas § 1605(a)(7) authorizes actions against state

sponsors of terrorism for the “provision of material support or resources” in support of a terrorist act, the noncommercial torts exception includes no such language. *See Burnett v. Al Baraka Inv. & Dev. Corp.*, 292 F. Supp. 2d 9, 20 & n.5 (D.D.C. 2003). Congress’s omission of the “provision of material support or resources” as an act giving rise to liability under § 1605(a)(5) “should be treated as intentional.” *Id.* at 20 n.5 (internal quotation marks omitted); *see also HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) (per curiam) (“a specific statute ... controls over a general provision ..., particularly when the two are interrelated and closely positioned”). It follows that the FSIA exception that specifically addresses the “provision of material support or resources” — § 1605(a)(7) — is the one implicated by plaintiffs’ allegation that Saudi Arabia “played a central and critical role in funding, facilitating and supporting al Qaida’s global operations.” FAC ¶ 423 (A-2006). As the *Burnett* court recognized, it would do violence to the statutory scheme to permit plaintiffs to circumvent the requirements of that exception — and to invoke the noncommercial torts exception instead — simply because they cannot satisfy them.

In this respect, this Court’s recent decision in *Garb* is instructive. There, the plaintiffs brought an action against the Republic of Poland for the confiscation of private property in the wake of World War II. *See* 440 F.3d at 588. The nature of the action, the Court explained, implicated the FSIA’s “takings” exception to

sovereign immunity, which, as relevant there, provides for jurisdiction when property has been “taken” “in violation of international law” and “is owned or operated by an agency or instrumentality of the foreign state [that] ... is engaged in commercial activity in the United States.” 28 U.S.C. § 1605(a)(3). The Court held that the takings exception did not apply because Poland’s Ministry of Treasury — the entity that “owned or operated” the property in question — was a “political subdivision” of Poland, rather than an “agency or instrumentality.” *See* 440 F.3d at 590.

Importantly, the Court then rejected plaintiffs’ attempt to “recharacterize[]” their claim as arising under the commercial activities exception in § 1605(a)(2). Plaintiffs’ claim was “‘essentially a claim for an unjust taking of property’” in violation of international law. *Id.* at 588 (quoting *de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1398 (5th Cir. 1985)). Because “Congress has provided an exception ... for takings of property that violate international law” in § 1605(a)(3) — albeit one that the plaintiffs could not satisfy — the Court refused to allow the plaintiffs “to escape the requirements of [that] section through artful recharacterization of their takings claim” as one arising under the commercial activities exception. *Id.* (internal quotation marks omitted).

The same analysis applies here. Again, plaintiffs allege that Saudi Arabia provided material support and resources to Al-Qaeda and thereby supported that

organization’s terrorist activities, including the attacks of September 11. Because Congress in § 1605(a)(7) provided an exception to sovereign immunity that precisely tracks such allegations — albeit one that plaintiffs cannot satisfy as against Saudi Arabia — it would be inconsistent with the text and structure of the FSIA to permit the plaintiffs to recast their claims as arising under the noncommercial torts exception. *See id.*; *see also Cabiri v. Government of the Republic of Ghana*, 165 F.3d 193, 200 (2d Cir. 1999) (rejecting plaintiffs’ “effort to plead around” an exclusion from the noncommercial torts exception by recasting claim arising out of misrepresentation as the intentional infliction of emotional distress).

b. The district court acknowledged the force of this argument, correctly explaining that the limitations in the “state sponsor of terrorism” exception reflect Congress’s “policy decision that the Executive branch, and not the courts, have the authority to label a foreign nation a terrorist.” 349 F. Supp. 2d at 796 (citing 28 U.S.C. § 1605(a)(7)(A)). The court declined to rule, however, that “subsections (a)(7) and (a)(5) are mutually exclusive.” *Id.* The court emphasized that, in both the “state sponsor of terrorism” exception ((a)(7)) and the noncommercial torts exception ((a)(5)), Congress specified that the cases falling within those exceptions are cases that are “not otherwise encompassed in paragraph (2)” (paragraph (2) being the commercial activities exception). 28 U.S.C. § 1605(a)(5), (7); *see* 349 F.

Supp. 2d at 796. In the court’s view, if Congress had intended to prevent plaintiffs from recasting “state sponsor of terrorism” charges as noncommercial torts cognizable under § 1605(a)(5), it would have included similar language — to wit, “not otherwise covered in paragraph (7)” — in the noncommercial torts exception itself. *See* 349 F. Supp. 2d at 796.

This reasoning is unpersuasive. The references in subsections 1605(a)(5) and (a)(7) to the commercial activities exception in (a)(2) merely reinforce the point that the commercial activities exception in (a)(2) is “[t]he most significant of the FSIA’s exceptions” to sovereign immunity, *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992), and is thus the one to be considered first in considering whether an FSIA exception applies. In this case, however, even if the noncommercial torts exception in § 1605(a)(5) included the language hypothesized by the district court, it would change nothing. That is to say, for the reasons set forth above, *see supra* pp. 18-21, plaintiffs’ claim that Saudi Arabia provided material support to Al-Qaeda is *not* “otherwise covered in paragraph (7)” (*i.e.*, the state sponsor of terrorism exception). Indeed, the point here is that, *because* plaintiffs cannot satisfy the requirements of the “state sponsor of terrorism” exception in (a)(7), their claims *cannot* be recast as arising under the noncommercial torts exception in (a)(5). If the presence of the language hypothesized by the district court would not alter the analysis, it follows that its

absence does nothing to undermine the conclusion that plaintiffs cannot evade the limitations in (a)(7) by recasting their claims as arising under (a)(5). *Cf. Garb*, 440 F.3d at 588 (rejecting effort to “plead around” the requirements of the takings exception in § 1605(a)(3) by casting claim as arising under commercial activities exception in (a)(2), irrespective of the fact that (a)(2) does not state that it is mutually exclusive of (a)(3)).

c. In the district court, plaintiffs also contended that the “state sponsor of terrorism” exception in (a)(7) and the noncommercial torts exception in (a)(5) “encompass different situations” — *viz.*, subsection (a)(7) covers “acts of terrorism *committed abroad* by a state sponsor of terrorism,” whereas (a)(5) “governs tortious acts, including terrorism, performed *in the United States*.” 349 F. Supp. 2d at 796 (summarizing plaintiffs’ argument) (emphases added).

This claim is belied by the text of the statute. By its terms, the “state sponsor of terrorism” exception in § 1605(a)(7) applies to the provision of material support or resources to terrorist acts committed *anywhere*, including in the United States. *See* 28 U.S.C. § 1605(a)(7)(B)(i) (imposing arbitration requirement where “act occurred in the foreign state against which the claim has been brought” but not otherwise limiting geographic scope of the exception). Because the plain language of § 1605(a)(7) applies to claims arising out of terrorist acts committed anywhere, including in the United States, so too do the limitations in § 1605(a)(7) —

including its application only to states that have been designated as state sponsors of terrorism — apply to all such claims, including plaintiffs’.⁷

In the district court, plaintiffs responded that this result “would lead to absurd results, such that if a foreign sovereign not designated a state sponsor of terror was involved in a car accident stemming from negligence it would not be immune; but if it undertook a deliberate act of violence it would enjoy immunity from suit.” 349 F. Supp. 2d at 796 (summarizing argument).

This argument misconceives the purpose of both the noncommercial torts exception and the “state sponsor of terrorism” exception. As noted above, the primary point of the noncommercial torts exception is “to enable officials and employees of foreign sovereigns to be held liable for the traffic accidents which they cause in this country.” *Asociacion de Reclamantes*, 735 F.2d at 1525.

⁷ *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 15 (D.D.C. 1998), on which plaintiffs relied in the district court, does not support their position. There, the court ruled that the “state sponsor of terrorism” exception applies to terrorist acts abroad, a matter that, as noted, is evident from the statute. To the extent the court stated that § 1605(a)(5) applies to terrorist acts in the United States, *see id.*, it is dictum. Furthermore, the cases on which *Flatow* relied for that statement, *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989), and *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980), are questionable and in any event distinguishable, as discussed *infra* pp. 37-39.

In the district court, plaintiffs noted that the “state sponsor of terrorism” exception applies to actions for personal injury and death but not for property damage. That merely highlights that Congress included limitations in that exception that must be given effect. Any terrorist act is likely to result in property damage. If plaintiffs could circumvent § 1605(a)(7)’s limitations by including such a claim against a foreign state, those limitations would be meaningless.

Because “local adjudication” of cases involving traffic accidents and the like “was deemed imperative,” *id.* at 1520 — and because the international comity concerns of adjudicating such cases against foreign states are limited — Congress saw no need to provide an Executive Branch check on such actions.

But the adjudication of allegations that a foreign state committed or even supported a terrorist act against United States citizens is a very different animal. Particularly when brought against a state, like Saudi Arabia, that is an *ally* of the United States in the war on terror, the adjudication of such a case in a United States court would raise complex issues in the foreign relations of the United States. For that reason, the “delicate legislative compromise” that resulted in the “state sponsor of terrorism” exception, *Price*, 294 F.3d at 89, included an Executive Branch check on such actions, by authorizing them only against states that the State Department has designated as state sponsors of terrorism.

Here, the Executive Branch has exercised that check by declining to designate Saudi Arabia as a state sponsor of terrorism. And, contrary to plaintiffs’ assertion, there is nothing “absurd” about giving effect to that determination. Indeed, the only absurdity here would arise if plaintiffs *can* proceed against Saudi Arabia under § 1605(a)(5), in which case the Kingdom would be forced to defend against charges that it sponsored terrorism without the protections built into

§ 1605(a)(7), which would continue to apply to those defendant states that *have* been designated as state sponsors of terrorism.

2. The Noncommercial Torts Exception Applies Only to Actions That Took Place in the United States

The FSIA’s noncommercial torts exception is also inapplicable here because the actions Saudi Arabia supposedly took to support Al-Qaeda all took place outside the United States. To fall within the noncommercial torts exception, the allegedly tortious activity itself, not just the injury that results from it, must occur in the United States.

As the D.C. Circuit has observed, the text of § 1605(a)(5) itself is “ambiguous on this point.” *Persinger*, 729 F.2d at 842.⁸ “The ambiguity,” however, “goes no deeper than the surface of the text, ... for the briefest consideration of the purposes of the statute shows that ... both the tort and the injury must occur in the United States.” *Id.* In enacting § 1605(a)(5), “Congress’ principal concern was with torts committed in this country” — again, primarily ““traffic accidents.”” *Id.* at 840, 842 (quoting H.R. Rep. No. 94-1487, at 20-21,

⁸ The exception applies to claims against a foreign state “for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.” 28 U.S.C. § 1605(a)(5). On its face, the exception may plausibly be read to require either (a) that only the injury itself occur in the United States, or (b) that both the injury *and* the “tortious act or omission” that caused it occur in the United States.

1976 U.S.C.C.A.N. at 6619-20). As one of the principal draftsmen of the FSIA explained, “[i]f a dispute arises as a result of an activity which a government carries on *in this country*, the most appropriate place to resolve such a dispute would be through the courts.” *Id.* at 840 (quoting testimony of FSIA draftsman Bruno Ristau).

This legislative history confirms not only that Congress intended, in § 1605(a)(5), to establish jurisdiction for allegedly tortious conduct occurring in the United States, but also that it did *not* intend to establish jurisdiction for conduct occurring elsewhere. As the *Persinger* court explained, “[i]f Congress had meant to remove sovereign immunity for governments acting on their own territory, with all of the potential for international discord and for foreign governmental retaliation that that involves, it is hardly likely that Congress would have ignored those topics and discussed instead automobile accidents in this country.” *Id.* at 841. Moreover, limiting § 1605(a)(5) to acts occurring in the United States aligns with “codifications by other nation-states and international organizations — with which Congress sought to be consistent” and which “have provided that a state loses its sovereign immunity for tortious acts only where they occur in the territory of the forum state.” *Id.* at 840.⁹

⁹ See U.N. Leg. Series, Materials on Jurisdictional Immunities of States and Their Property 159 (1982) (Article 11 of European Convention on State Immunity provides that a state is not immune from action seeking redress for injury or

This reading also accords with the statutory structure. Although, as noted, the text of § 1605(a)(5) is “susceptible of the interpretation that only the effect of the tortious action need occur here, where Congress intended such a result elsewhere in the FSIA it said so more explicitly.” *Asociacion de Reclamantes*, 735 F.2d at 1524. In the commercial activities exception, Congress withheld immunity for “a foreign sovereign’s commercial activities ‘outside the territory of the United States’ having a ‘direct effect’ inside the United States.” *Persinger*, 729 F.2d at 843. By contrast, “[a]ny mention of ‘direct effect[s]’ is noticeably lacking from the noncommercial tort exception.” *Id.* “When Congress uses explicit language in one part of a statute to cover a particular situation and then uses different language in another part of the same statute, a strong inference arises that the two provisions do not mean the same thing.” *Id.* Applied here, that inference confirms that Congress did not intend the noncommercial torts exception to vitiate sovereign immunity for acts undertaken by foreign states outside the United States. *See id.*; *see also Cabiri*, 165 F.3d at 200 n.3 (“the Supreme Court has held that [the noncommercial torts] exception ‘covers only torts occurring within the territorial

damage to property “if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.”); U.N. General Assembly, Report of the International Law Commission on the Work of its Thirty-Sixth Session 62, 66-67, U.N. Doc. A/39/10 (May 7-July 27, 1984) (provisionally adopting similar article; emphasizing goal of excluding actions taken in one state that cause injury in forum state and noting importance of that exclusion to principle of *lex loci delicti commissi*).

jurisdiction of the United States’”) (quoting *Amerada Hess*, 488 U.S. at 441); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 588 (9th Cir. 1983) (“[N]othing in the legislative history [of the 1976 Act] suggests that Congress intended to assert jurisdiction over foreign states for events occurring wholly within their own territory.”).¹⁰

3. The Noncommercial Torts Exception Does Not Apply to Discretionary Functions

Finally, the noncommercial torts exception is inapplicable here because the actions Saudi Arabia is alleged to have taken involve the exercise of discretion and are thus exempt from § 1605(a)(5).

a. The noncommercial torts exception does not 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). This discretionary function limitation is modeled on a similar exception to jurisdiction under the Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 2680(a). *See* H.R. Rep. No. 94-1487, at 20-21, 1976 U.S.C.C.A.N. at 6619-20. The purpose of both limitations is to “prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political

¹⁰ The district court noted but did not address this argument. *See* 349 F. Supp. 2d at 796. The *Burnett* court rejected it in reliance on a passing reference in a concurring opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984). *See* 292 F. Supp. 2d at 19 n.4. That reference is dictum that predates *Asociacion de Reclamantes* and *Persinger*.

policy through the medium of an action in tort.” *Varig Airlines*, 467 U.S. at 814 (construing FTCA).

That rationale applies here. As explained at the outset, plaintiffs’ claims against Saudi Arabia are based primarily on contributions the Saudi government allegedly made to Islamic charities that, in turn, are alleged to have funded Al-Qaeda. As explained in the brief for Crown Prince Sultan, Prince Naif, and Prince Salman (in Part I.D.), the Saudi government’s decisions to support Islamic charities, and its determination of which charities to support, are integral aspects of Saudi Arabia’s leadership role in the Islamic world. Those decisions are accordingly imbued with social and political policy dimensions and are thus immune from challenge under the FSIA.

To be sure, plaintiffs further allege that Saudi Arabia “knew and intended” that the support it provided to these charities “would be used to attack U.S. interests.” FAC ¶ 402 (A-2002). But, even putting aside the absence of any support for that accusation — and the 9/11 Commission’s refutation of it — any such support would still have “involve[d] an element of judgment” or “choice” based on “considerations of public policy,” *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988); see *Varig Airlines*, 467 U.S. at 814, and would thus be immune from challenge pursuant to § 1605(a)(5)(B).

The same is true with respect to plaintiffs' allegation that Saudi Arabia facilitated the growth and development of Al-Qaeda through alleged links to the Taliban. *See* FAC ¶¶ 403-407 (A-2002-03). According to plaintiffs, Saudi Arabia "extended formal diplomatic relations to the Taliban, and provided funding and logistical support to sustain the regime," knowing and intending "that the financial and logistical support it provided to the Taliban would materially benefit al Qaida." *Id.* ¶¶ 406-407 (A-2003). It is "nearly self-evident," *Burnett*, 292 F. Supp.2d at 20, that such acts implicate official discretion in carrying out the foreign relations and international security policies of Saudi Arabia and are thus not subject to attack through a tort suit.

b. Plaintiffs do not dispute that their allegations against Saudi Arabia implicate discretionary decisions. Instead, they contend that some such decisions are sufficiently "illegal, malevolent, or extraordinary" as to deprive governments and their agencies and officials of sovereign immunity. *E.g.*, Fed. Ins. Br. at 29. In particular, relying on *Liu*, 892 F.2d at 1431, and *Letelier*, 488 F. Supp. at 673, plaintiffs contend that the Saudi government and its officials "have no discretion to engage in conduct that contravenes international law or violates fundamental precepts of humanity," which they claim Saudi Arabia's alleged "sponsorship of al Qaida" did. Fed. Ins. Br. at 30.

Plaintiffs' reliance on *Liu* and *Letelier* is misplaced. In *Liu*, the Director of the Republic of China's Defense Intelligence Bureau had ordered two gunmen to assassinate a United States resident. *See* 892 F.2d at 1422-23. In *Letelier*, the Republic of Chile had ordered, and then aided in, the assassination in the United States of two former diplomats. *See* 488 F. Supp. at 665, 673. In both cases, the courts held that assassinations carried out by agents of a foreign state were not protected by the discretionary function limitation, because the agents of foreign states have "no 'discretion' to perpetrate conduct designed to result in the assassination of an individual or individuals." *Id.* at 673; *see Liu*, 892 F.2d at 1431.

As a threshold matter, *Liu* and *Letelier* have not been followed on this point in the Second Circuit and are of questionable merit. The discretionary function limitation applies to "any claim" grounded in a policy decision "*regardless of whether the discretion be abused.*" 28 U.S.C. § 1605(a)(5)(A) (emphases added). It would rob that language of all meaning if, as *Liu* and *Letelier* arguably suggest, discretionary decisions could be second-guessed for consistency with international norms. As the D.C. Circuit has explained, the alleged "heinousness" of a discretionary decision "is not sufficient to give [courts] jurisdiction," because "[n]either the substantive basis of the tort, nor the seriousness of the crime, is relevant to the question of jurisdiction" under the FSIA. *Persinger*, 729 F.2d at

843 n.12; *see also Price*, 294 F.3d at 87-88 (the FSIA “was not intended as human rights legislation” and “no matter how allegedly egregious a foreign state’s conduct, suits that [do] not fit into one of the [FSIA’s] discrete and limited exceptions” must be dismissed).

Even if *Liu* and *Letelier* are good law in this Circuit, they are inapplicable here. Both cases “involved causal links significantly shorter and more direct than those alleged” here. *Burnett*, 292 F. Supp. 2d at 21. Again, plaintiffs have not alleged, nor could they in light of the findings of the 9/11 Commission, that Saudi Arabia directed or authorized the attacks of September 11, or even that it knew of those attacks in advance. Likewise, plaintiffs have not alleged, nor could they, that any of the September 11 hijackers were agents of the Saudi government. Instead, plaintiffs have alleged that Saudi Arabia directly and indirectly provided funding and other support to Al-Qaeda, which Al-Qaeda then used to develop into a terrorist organization capable of perpetrating the September 11 attacks. Those allegations — spurious as they are — are a far cry from the proof in *Liu* and *Letelier* that agents of foreign governments, acting on orders from those governments, carried out assassinations in the United States.¹¹

¹¹ In *Liu*, the Ninth Circuit emphasized that the defendant had “violate[d] ... [Chinese] law,” which itself made his conduct non-discretionary. 892 F.2d at 1431. Here, plaintiffs have not alleged that Saudi Arabia or any of its officials acted *ultra vires* or otherwise violated Saudi law.

C. The Commercial Activities Exception Does Not Apply

Finally, the FSIA's commercial activities exception is also inapplicable here.

1. Section 1605(a)(2) provides for jurisdiction against a foreign state in any case

in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). Section 1603(d) defines a “commercial activity” as “either a regular course of commercial conduct or a particular commercial transaction or act.” *Id.* § 1603(d). The commercial character of an activity is “determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.” *Id.*

The “threshold step in assessing plaintiffs’ reliance on the ‘commercial activity’ exception” is to “identify the act of the foreign sovereign State that serves as the basis for plaintiffs’ claims.” *Garb*, 440 F.3d at 586; *see Nelson*, 507 U.S. at

Plaintiffs complain that the district court failed “to specifically analyze the conduct” of three individuals alleged to have assisted the September 11 hijackers, and, while not claiming error on this basis, they assert that this failure “underscores the superficiality of [the district court’s] decision.” Fed. Ins. Br. at 22 n.10. But, although plaintiffs noted these allegations in the district court, *see Federal Insurance Pls.’ Mem. in Opp’n to Mot. To Dismiss* at 5 (A-3434) (“Fed. Ins. Opp’n”), they did not assert them as a basis for vitiating Saudi Arabia’s sovereign immunity, and in any case they have been largely discredited by the 9/11 Commission, *see 9/11 Report* at 217-18.

356. Here, the alleged “commercial activity” is the funding of charities which in turn provided funds and other support to Al-Qaeda. The argument that such conduct constitutes “commercial activity” within the meaning of the FSIA “is readily disposed of.” *Burnett*, 292 F. Supp. 2d at 17.

First, the act of contributing to a foundation is not within the ordinary understanding of “trade and traffic or commerce.” *Nelson*, 507 U.S. at 360-61 (internal quotation marks omitted). Contributing to foundations is what many people do with some portion of the *proceeds* of their “trade and traffic or commerce”; it does not constitute “trade and traffic or commerce” itself. Moreover, the commercial activities exception stems from the concern that the prior, “absolute” rule of sovereign immunity announced in *Schooner Exchange* “gave states an unfair advantage in competition with private commercial enterprise” and prevented private parties in commercial disputes against foreign states from seeking recourse in the courts. I Restatement (Third): The Foreign Relations Law of the United States at 391 (1987). It strains credulity to suggest that Congress, in seeking to remove this “unfair advantage,” had in mind a “marketplace” for donations to foundations and other charitable organizations.

The legislative history confirms that charitable contributions were not “within the contemplation of the Congress that enacted the FSIA in 1976.” *Burnett*, 292 F. Supp. 2d at 18. In adopting the commercial activity exception,

Congress expected courts to look to the “‘essential nature’” of the act in question, and the “legislative history makes clear that courts should not deem activity ‘commercial’ as a whole simply because certain aspects of it are commercial.” *Letelier*, 748 F.2d at 796 (citing H.R. Rep. No. 94-1487, at 16, 1976 U.S.C.C.A.N. at 6615). Congress thus sought to distinguish between purely commercial acts (such as a “contract to make repairs on an embassy building”) and governmental acts that contain some commercial component (such as a state’s “mere participation in a foreign assistance program”). H.R. Rep. No. 94-1487, at 16, 1976 U.S.C.C.A.N. at 6615. The latter of these “is an activity whose essential nature is public or governmental, and it would not itself constitute a commercial activity.” *Id.*

Plaintiffs seek to avoid this result by describing the alleged contributions to charities as “money laundering,” which they claim constitutes a “commercial activity.” *See Fed. Ins. Br.* at 39. But, conclusory labels aside, plaintiffs’ allegations lend no support to their money-laundering characterization. Plaintiffs have not sought to establish, for example, that the funds Saudi Arabia supposedly donated to charities in support of Al-Qaeda were “the proceeds of some form of unlawful activity,” 18 U.S.C. § 1956(a)(1), much less that Saudi Arabia effectuated those donations “knowing that the transaction[s] [were] designed in whole or in part ... to conceal or disguise the nature, the location, the source, the ownership, or

the control of the proceeds of specified unlawful activity,” *id.* § 1956(a)(1)(B)(i). Absent such allegations, it is inaccurate to describe the alleged conduct here as “money laundering.”

Moreover, even if plaintiffs had properly alleged “money laundering,” the district court correctly ruled that such conduct would not constitute “commercial activity” for purposes of the FSIA. A “commercial activity” for this purpose is that of a “merchant in the marketplace” engaged in “activity ... of the type an individual would customarily carry on for profit.” *Letelier*, 748 F.2d at 796, 797. Money laundering is a federal criminal offense that carries severe sanctions. *See* 18 U.S.C. §§ 1956, 1957. “[A] private person cannot lawfully engage in that activity,” much less does a “merchant in the marketplace” “customarily” do so “for profit.” *Letelier*, 748 F.2d at 796, 797. It follows that money laundering is not a “commercial activity” under the FSIA. *See* 349 F. Supp. 2d at 793.

It matters not that, when individuals commit a money laundering offense, they often do so to make money. Kidnapping, too, is often engaged in for pecuniary gain, yet this Court has squarely held that such unlawful activity does not qualify as “commercial activity” under the FSIA. *See Letelier*, 748 F.2d at 797. Likewise, in *Nelson*, the Supreme Court rejected the claim that “allegedly abusive treatment” of the plaintiff qualified as “commercial activity” despite allegations that the “abuse alleged [w]as retaliation for [the plaintiff’s] persistence

in reporting hospital safety violations” and “was consequently commercial.” 507 U.S. at 363-64. The Court noted, moreover, that, under the “restrictive” rule of sovereign immunity that the FSIA codified, the State Department had recognized immunity in a case involving a “claim that [a] Cuban armed guard seized cash from [the] plaintiff” — an action that one must presume was undertaken for monetary gain. *Id.* at 362 n.5. The point, then, is that each of these activities, even if engaged in for “profit” in a given case, is criminal activity that is not “of the type an individual would *customarily* carry on for profit.” *Letelier*, 748 F.2d at 797 (emphasis added). The same is true of money laundering.

United States v. Goodwin, 141 F.3d 394 (2d Cir. 1997), does not suggest a different result. *See, e.g.*, Fed. Ins. Br. 39-40. There, this Court rejected the argument that the federal money-laundering statute, 18 U.S.C. § 1956, exceeds Congress’s authority under the Commerce Clause, U.S. Const. art. I, § 8, and in so doing it described money laundering as “obviously commercial” and “a quintessential economic activity,” 141 F.3d at 399. The court described money laundering in that way, however, in the course of concluding that money laundering is among “those activities having a substantial relation to interstate commerce, ... i.e., those activities that substantially affect interstate commerce.” *Id.* at 398 (quoting *United States v. Lopez*, 514 U.S. 549, 558-59 (1995)). The Court did not purport to apply the definition of “commercial activity” set out in the

FSIA, *see* 28 U.S.C. § 1603(d), much less did it suggest that money laundering is an activity “of the type an individual would *customarily* carry on for profit.”

Letelier, 748 F.2d at 797 (emphasis added). Indeed, there are any number of activities that fall within Congress’s Commerce Clause authority yet would presumably not qualify as “commercial activities” for purposes of the FSIA.¹²

Because there is no correlation between the two inquiries, the Court’s decision in *Goodwin* is beside the point.¹³

2. Even if plaintiffs were correct that the act of transferring governmental funds to charitable organizations is a “commercial activity,” plaintiffs’ allegations would still fail to come within any of the three scenarios necessary to trigger the commercial activities exception.

¹² *See, e.g., Gooch v. United States*, 297 U.S. 124, 128 (1936) (transporting kidnapping victim across state lines); *United States v. Sage*, 92 F.3d 101, 105-07 (2d Cir. 1996) (failure to pay child support); *United States v. Bishop*, 66 F.3d 569, 579 (3d Cir. 1995) (car theft).

¹³ The remaining cases that plaintiffs cite are likewise inapposite. *See* Fed. Ins. Br. 42-43. In *Southway v. Central Bank of Nigeria*, 198 F.3d 1210, 1217 (10th Cir. 1999), the action was based on “alleged assistance in the execution of an assignment contract,” which the court “easily conclude[d]” was “commercial activity” under the FSIA irrespective of any alleged illegality. 198 F.3d at 1217-18. *Southway* establishes only that an activity that qualifies as “commercial activity” under the FSIA does not lose that status because it is undertaken in an unlawful manner, a proposition that has no application here. *Kensington Int’l Ltd. v. Societe Nationale des Petroles du Congo*, No. 05 Civ. 5101 (LAP), 2006 WL 846351 (S.D.N.Y. Mar. 31, 2006), upon which plaintiffs also rely, is to the same effect.

Plaintiffs do not meet the first aspect of § 1605(a)(2) because no “commercial activity” of Saudi Arabia was allegedly “carried on in the United States.” All of the supposed transfers of funds occurred in Saudi Arabia; none was alleged to have occurred in the United States. Moreover, even if some transfers did occur in the United States, plaintiffs have nowhere alleged that those commercial activities had “substantial contact with the United States.” 28 U.S.C. § 1603(e).

Nor do the allegations satisfy the second clause of § 1605(a)(2) because there is no assertion of any “act performed in the United States *in connection with* a commercial activity of the foreign state elsewhere.” *Id.* § 1605(a)(2) (emphasis added). To meet that requirement, the allegations must assert a connection between the putative act of the foreign state elsewhere — here, the giving of funds to charities — and the “act performed in the United States.” Yet the causal connection between the alleged donations to charities and the September 11 attacks is, as the district courts held both here and in *Burnett*, completely attenuated. *See* 349 F.3d at 798-801; 292 F. Supp. 2d at 20; *see also Drexel Burnham Lambert Group Inc. v. Committee of Receivers for Galaderi*, 12 F.3d 317, 330 (2d Cir. 1993) (commercial activities exception not triggered by “tangential commercial activities to which the ‘acts’ forming the basis of the claim have only an attenuated connection”).

Finally, and relatedly, the third clause of § 1605(a)(2) applies only when “an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere ... causes a direct effect in the United States.” “[A]n effect is direct if it follows as an *immediate* consequence of the defendant’s activity.” *Virtual Countries*, 300 F.3d at 236 (internal quotation marks omitted). Plaintiffs have not asserted (and cannot plausibly assert) a “direct effect” between any of Saudi Arabia’s alleged actions elsewhere and the United States.

Plaintiffs’ briefs do not dispute any of this. Instead, they claim that these issues are “beyond the scope of the present appeals,” because the district court resolved the applicability of the commercial activities exception at the threshold, by concluding that donating funds to charities is not a commercial activity. Fed. Ins. Br. 43. But this Court may “decide issues that were argued before but not reached by the district court,” *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 90 (2d Cir. 2004), and the exercise of that authority is particularly appropriate when, as here, the issues are “purely legal,” *Booking v. General Star Management Co.*, 254 F.3d 414, 419 (2d Cir. 2001). Indeed, this Court commonly affirms lower court decisions even as it “arrive[s] at that result by a different route.” *Bruh v. Bessemer Venture Partners III L.P.*, 464 F.3d 202, 203 (2d Cir. 2006). In the unlikely event the Court were to disagree with the district court’s conclusion that donating funds to charities is not a “commercial activity,” it can and should affirm

the result reached below by holding that plaintiffs' allegations do not trigger any of the three scenarios contemplated in the commercial activities exception.

II. PLAINTIFFS' ALLEGATIONS REGARDING THE SUPPOSED "ALTER EGO" STATUS OF OTHER DEFENDANTS DO NOT WARRANT A REMAND

Plaintiffs contend that Saudi Arabia is subject to jurisdiction under the FSIA not just on the basis of its own alleged actions, but also on the basis of alleged conduct by various charities that, according to plaintiffs, provided material support to Al-Qaeda. Although acknowledging the presumption that the acts of such juridically separate organizations are not attributable to Saudi Arabia, plaintiffs contend that their showing in the district court overcame that presumption and that the district court therefore committed "clear error" in failing to attribute the acts of the charities to Saudi Arabia. *See Fed. Ins. Br.* at 18, 21-26. This claim fails for two independent reasons.

A. First, plaintiffs are wrong to assert that the allegations and evidence they presented to the district court were sufficient to establish that any (much less all) of the charities named as defendants qualifies as an "alter ego" of Saudi Arabia. *See Fed. Ins. Br.* at 25.

Plaintiffs emphasize that, under *Bancec*, "the presumption of juridical independence" can be overcome where "the corporate entity is so extensively controlled by its owner *that a relationship of principal and agent is created.*" *Id.*

at 23 (quoting *Bancec*, 462 U.S. at 632) (emphasis added). But, to establish alter ego status under *Bancec*'s "agency" theory, a plaintiff must show, "[a]t a minimum," that the alleged "parent" — here, Saudi Arabia — "has manifested its desire for the subsidiary to act upon the parent's behalf, the subsidiary has consented so to act, the parent has the right to exercise control over the subsidiary with respect to matters entrusted to the subsidiary, and the parent exercises its control in a manner more direct than by voting a majority of the stock in the subsidiary or making appointments to the subsidiary's Board of Directors." *Transamerica Leasing, Inc. v. Republica de Venezuela*, 200 F.3d 843, 849 (D.C. Cir. 2000); *see also Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 535-36 (5th Cir. 1992) (rejecting claim that "private defendants were 'agents' and 'alter egos'" of state agency where plaintiff "failed to allege any manifestations *by* [the state agency], the alleged 'principal' in this agency relationship, that the private defendants could act *for* [the state agency]").

Plaintiffs' showing before the district court did not even attempt to satisfy this standard. Instead, consistent with the allegations in their complaint, *see supra* pp. 5-6, plaintiffs directed their efforts at attempting to satisfy a test designed to determine whether a given entity is an "organ" of a foreign state and, therefore, an "agency or instrumentality" under § 1603(b)(2). *See Fed. Ins. Opp'n* at 9-18 (A-3438-47) (applying *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 209 (3d Cir.

2003)). But that is a very different inquiry. Even if plaintiffs had established that each charity itself qualified as an “agency or instrumentality” of Saudi Arabia, that would have served only to bring those charities within the scope of the FSIA. *See* 28 U.S.C. § 1603(a). It would *not* have rendered the actions of those charities attributable to Saudi Arabia. Rather, in light of *Bancec*’s holding that “juridical entities” established separate from the state “should normally be treated as such,” 462 U.S. at 627, plaintiffs would *still* have had to overcome that presumption by establishing “a relationship of principal and agent,” *id.* at 629. Plaintiffs made no tenable effort to do so in the district court.¹⁴ They are therefore wrong to suggest

¹⁴ Plaintiffs’ only statement below that suggests a principal/agency relationship is the assertion that the Saudi government “frequently directs the charities to perform specific functions, and to carry out specific acts on behalf of the Kingdom.” Fed. Ins. Opp’n at 14 (A-3443). To support that broad assertion, plaintiffs pointed, without citation, to statements that (i) “al Haramain sent aid to Afghan refugees ‘under the direct supervision of the Saudi Committee for Relieving Afghans, which is headed by Prince Naif bin Abdul Aziz, the Minister of Interior,’” and (ii) that the SJRC “had resumed its aid program ‘in accordance with the directives of Prince Naif bin Abdul Aziz.’” *Id.* Allegations that an organization took a discrete action *at the direction* of a state do not establish that the organization acted *on behalf of* the state. *Compare McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 352 (D.C. Cir. 1995) (agency relationship established where dairy had acted to effectuate a governmental policy “designed to injure some of the corporation’s own shareholders ... through a corporate policy guided by government representatives”). Beyond that, plaintiffs do not suggest that the specific actions alleged — providing aid to Afghan refugees and the resumption of an “aid program” — are in any way related to the alleged support for Al-Qaeda that forms the basis for plaintiffs’ claims; that failure too renders that allegation insufficient to create jurisdiction over Saudi Arabia. *See Transamerica Leasing*, 200 F.3d at 850 (“jurisdiction [over the sovereign] cannot be maintained if the agent’s actions are not related to the substance of plaintiff’s cause of

that the district court committed “clear error” (Fed. Ins. Br. at 21) in declining to attribute to Saudi Arabia the conduct of charities supposedly operating under the Kingdom’s control.

Indeed, far from “cast[ing] aside the conduct of the Kingdom’s controlled charities” as plaintiffs contend, Fed. Ins. Br. at 21, the district court properly recognized the distinction between, on the one hand, establishing “agency or instrumentality” status under § 1603(b) and *USX*, and, on the other hand, establishing “alter ego” status under *Bancec* and *Transamerica Leasing*. Because the plaintiffs’ showing was directed at establishing the former — *i.e.*, that the charities “named as Defendants ... are agencies, instrumentalities, arms or organs of the Kingdom,” which would bring those charities within the FSIA — that

action”) (quoting *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1029-30 (D.C. Cir. 1982)).

Plaintiffs’ further allegations — regarding such things as the Saudi government’s “creation of the relevant charities,” Fed. Ins. Opp’n at 10 (A-3439), its “oversight of the charities,” *id.* at 13 (A-3442), “the presence of high-ranking governmental officials on the boards of those charities,” *id.* at 14 (A-3443), Saudi government funding, *see id.* at 15 (A-3444), and the authorization to “solicit funds for charitable purposes,” *id.* at 16-17 (A-3445-46) — involve conventional oversight. While such allegations may be relevant to establishing “agency or instrumentality” status under *USX*, *see* 345 F.3d at 209, they are on their face insufficient to establish either that the Kingdom’s “control” over the charities “significantly exceed[ed] the normal supervisory control exercised by any corporate parent over its subsidiary and, indeed, amount[ed] to complete domination of the subsidiary,” *Transamerica Leasing*, 200 F.3d at 848, or that any particular charity operated as the agent of the Kingdom, *see, e.g., id.* at 851-52 (describing governmental actions *vis-à-vis* regulated entities that do not suggest agency relationship).

showing had no bearing on the sovereign immunity of Saudi Arabia itself, but rather would be relevant, if at all, “when the Court considers each of the charities’ motions to dismiss.” 349 F. Supp. 2d at 803 n.30. Contrary to plaintiffs’ assertion, that statement is correct as a matter of law and is far short of the “clear error” plaintiffs acknowledge would be necessary to warrant a remand on this issue.¹⁵

Nor have plaintiffs established that attributing the charities’ conduct to Saudi Arabia is warranted under “the exception for fraud or injustice recognized in *Bancec*.” *Transamerica Leasing*, 200 F.3d at 853. Plaintiffs assert that, under *Bancec*, the Saudi government’s dissolution of one charity named as a defendant (al Haramain) “require[s] attribution of that organization’s conduct to the Kingdom, regardless of the degree of control the Kingdom exercised,” and they

¹⁵ For the same reason, plaintiffs’ assertion that their allegations “were substantially corroborated by several of the charities’ own evidentiary submissions to the district court,” Fed. Ins. Br. at 18, misapprehends the relevant inquiry. Plaintiffs point to answers filed by two charities, the International Islamic Relief Organization and Muslim World League, in which those entities noted plaintiffs’ allegations that the charities were agencies or instrumentalities of the Kingdom and, without admitting those allegations, pleaded in the alternative that, if plaintiffs were correct, the charities were entitled to sovereign immunity. *See id.* at 15 (citing MWL Answer at 66 (A-2608); IIRO Am. Answer at 66 (A-5497)). Again, even assuming those entities *are* agencies and instrumentalities of the Kingdom — a point the Kingdom has disputed, *see* KSA Mot. To Dismiss Reply at 2 (A-3686) — it would serve only to bring them within the scope of the FSIA; it would not render the conduct of those entities attributable to the Kingdom under *Bancec*. The same is true of plaintiffs’ allegations with respect to the Saudi High Commission, the SJRC, and the Saudi Red Crescent, *see* Fed. Ins. Br. at 15, the only difference being that these organizations *are* “agencies or instrumentalities” of the state.

ask the Court to remand so the district court may consider this theory. Fed. Ins. Br. at 25-26 n.11.

Plaintiffs' theory misconstrues the fraud/injustice holding in *Bancec*. In *Bancec*, a Cuban instrumentality (Banco Nacional) sought recovery against Citibank on a letter of credit, and, because that same instrumentality had played a "significant role with respect to the expropriation of Citibank's [Cuban] assets," Citibank sought to set-off the value of those assets. *Banco Nacional de Cuba v. Chemical Bank New York Trust Co.*, 782 F.2d 377, 379 (2d Cir. 1986). Subsequently, however, in a transaction that the Supreme Court disregarded as a "device to gain a litigation advantage" by defeating Citibank's claim for setoff, the claim on the letter of credit was "transferred to ... another Cuban government agency" that had not participated in the expropriation of Citibank's assets. *Id.* at 379-80.

The equitable holding in *Bancec* thus turned on the "fundamental precept of Anglo-American jurisprudence that you cannot have your cake and eat it, too," *I.T. Consultants, Inc. v. Islamist Republic of Pakistan*, 351 F.3d 1184, 1191 (D.C. Cir. 2003) — *i.e.*, that it would be "unfair" to give "posthumous effect to *Bancec*'s separate juridical status," where doing so would "allow the Cuban government and Banco Nacional to enforce their claim against Citibank without allowing Citibank to set off against them its own claim for their unlawful seizure of its assets,"

Banco Nacional, 782 F.2d at 379. Plaintiffs do not, because they cannot, allege that a comparable shell game — in which a party uses the corporate form to defeat the opposing party’s right to collect on a claim, while at the same time continuing to press a claim against that same party — has occurred here. The fraud/injustice holding in *Bancec* accordingly has no bearing on this case. *Accord Letelier*, 748 F.2d at 794 (reversing district court; “[j]oint participation in a tort is not the ‘classic’ abuse of corporate form to which the Supreme Court referred” in *Bancec*).

B. Even if plaintiffs’ showing in the district court had been sufficient to warrant attributing the actions of any charity to Saudi Arabia under *Bancec*, it would not alter the conclusion that Saudi Arabia is immune from suit under the FSIA.

Plaintiffs’ allegations against the charities mirror the allegations made against Saudi Arabia directly: Both the charities and Saudi Arabia are alleged to have provided funding and other support to Al-Qaeda and thereby assisted its development into a global terrorist organization. Thus, plaintiffs allege that “Islamic charities under the control of the Kingdom” have “served as the primary vehicle for raising, laundering and distributing funds on behalf of al Qaida,” FAC ¶ 79 (A-1932); they generically assert that “these charities have provided arms, false travel documentation, physical assets and logistical support to al Qaida,” *id.*; they claim with respect to each charity that it “has, for a period of many years and

in diverse regions throughout the world, provided critical financial and logistical support to al Qaida in relation to that terrorist organization’s global jihad,” *id.* ¶¶ 111, 128, 148, 165, 178, 215 (A-1942, 1947, 1951, 1955, 1959, 1965); but they do *not* allege that any of the defendant charities had knowledge of the attacks or complicity in their perpetration.

For purposes of the FSIA, those allegations add nothing to those leveled directly against Saudi Arabia, which is accused (falsely) of contributing “massive financial, logistical [sic] and other support” to Al-Qaeda, *id.* ¶ 398 (A-2001), with knowledge that the “enormous amounts of money and other resources” provided “would be used to attack U.S. interests,” *id.* ¶¶ 401-402 (A-2002).

Critically, as explained above, the accusations leveled directly against Saudi Arabia — at bottom, that Saudi Arabia provided material support and resources to the Al-Qaeda terrorist organization and is thereby responsible for the attacks of September 11 — do not implicate any of the FSIA’s exceptions to sovereign immunity. The same is necessarily true if the actions of the charities — which likewise are alleged to have provided material support and resources to Al-Qaeda — are considered to be those of Saudi Arabia. Because plaintiffs thus cannot obtain jurisdiction over Saudi Arabia even if the actions of the charities are considered to be those of the Kingdom, their contention that the Court should remand this matter for the district court to explore their attribution theory fails.

That is particularly so, moreover, in view of the “increasingly important” principle of “[j]udicial comity among nations.” *Arriba*, 962 F.2d at 537. Plaintiffs’ theory of attribution before the district court not only “fail[ed] to conform to the standard articulation” of “alter ego” status under *Bancec*, “but it cannot be proved without massive, intrusive discovery in [Saudi Arabia] on highly sensitive domestic issues.” *Id.* at 536. Especially because plaintiffs’ attribution theory, even if successful, would not alter the nature of the allegations against Saudi Arabia or its entitlement to sovereign immunity, this Court should not authorize such an inquiry.

CONCLUSION

This Court should affirm the judgment of the district court dismissing Saudi Arabia from these actions.

Respectfully submitted,

Michael K. Kellogg
Mark C. Hansen
Colin S. Stretch
Kelly P. Dunbar
Kellogg, Huber, Hansen, Todd,
Evans & Figel, P.L.L.C.
1615 M Street, N.W.
Washington, D.C. 20036
(202) 326-7900
Attorneys for the Kingdom of Saudi Arabia
Defendant-Appellee

January 5, 2007

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(ii) because it contains 13,617 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14 point, Times New Roman.

Michael K. Kellogg

January 5, 2007

ANTI-VIRUS CERTIFICATION FORM
Pursuant to Second Circuit Local Rule 32(a)(1)(E)

CASE NAME: In Re: Terrorist Attacks on September 11, 2001

DOCKET NUMBERS: 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)

I, Cristina E. Stout, certify that I have scanned for viruses the PDF version of
the

_____ Appellant's Brief

__XX__ Appellee's Brief

_____ Reply Brief

_____ Amicus Brief

that was submitted in this case as an email attachment to <briefs@ca2.uscourts.gov>
and that no viruses were detected.

Please print the **name** and the **version** of the anti-virus detector that you used:

Symantec AntiVirus version 10.0 was used.

Cristina E. Stout

Date: January 5, 2007

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

ss.:

**AFFIDAVIT OF SERVICE
BY OVERNIGHT EXPRESS
MAIL**

I, _____, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On

deponent served the within: **Brief of Defendant-Appellee The Kingdom of Saudi Arabia**

upon:

SEE ATTACHED SERVICE LIST

the address(es) designated by said attorney(s) for that purpose by depositing **2** true copy(ies) of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Overnight Express Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of New York.

Attorneys for Appellants and for Co-Appellees were served by electronic service via email.

Sworn to before me on

Mariana Braylovskaya
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2010

Job # 205743

**APPELLANTS' COUNSEL
SERVICE LIST**

In re: Terrorist Attack on September 11, 2001
United States Court of Appeals for the Second Circuit

Plaintiffs' Counsel	Underlying Case Name
<p>COZEN O'CONNOR 1900 Market Street Philadelphia, PA 19103 Tel: (215) 665-2000 Fax: (215) 665-2013</p> <p>Stephen A. Cozen, Esquire Elliott R. Feldman, Esquire Sean P. Carter, Esquire MDL1570@cozen.com</p>	<p>Federal Insurance Co., et al. v. Al Qaida, et al. (03 CV 6978) (RCC)</p> <p>Vigilant Insurance Co. et al. v. The Kingdom of Saudi Arabia, et al. (03CV8591) (RCC)</p> <p>Pacific Employers Insurance Co., et al. v. The Kingdom of Saudi Arabia, et al. (04CV7216) (RCC)</p>
<p>DICKSTEIN SHAPIRO LLP 1825 Eye Street, NW Washington DC 20006 Tel: (202) 420-2200 Fax: (202)) 420-2201</p> <p>Kenneth L. Adams, Esquire AdamsK@dicksteinshapiro.com</p> <p>Chris Leonardo, Esquire leonardoc@dicksteinshapiro.com</p> <p>sept11pleadings@dsmo.com</p>	<p>Cantor Fitzgerald & Co., et al. v. Akida Bank Private Ltd., et al. (04-CV-7065)</p>
<p>FERBER CHAN ESSNER & COLLER LLP 530 Fifth Avenue New York, NY 10036-5101 Tel: (212) 944-2200 Fax: (212) 944-7630</p> <p>Robert M. Kaplan, Esquire rkaplan@ferberchan.com</p>	<p>Continental Casualty Company et al. v. Al Qaeda Islamic Army, et al. (04CV5970) (RCC)</p>

<p>HANLY CONROY BIERSTEIN SHERIDAN FISHER & HAYES LLP 112 Madison Avenue, 7th Floor New York, NY 10016-7416 Tel: (212) 784-6400 Fax: (212) 784-6420</p> <p>Paul Hanly, Jr., Esquire phanly@hanlyconroy.com</p> <p>Jayne Conroy, Esquire jconroy@hanlyconroy.com</p> <p>Andrea Bierstein, Esquire abierstein@hanlyconroy.com</p>	<p>Thomas E. Burnett, Sr., et al. v. Al Baraka Investment and Development Corp., et al., (03CV9849) (RCC), (03CV5738) (RCC)</p> <p>World Trade Center Properties LLC, et al. v. Al Baraka Invest. and Develop. Corp., et al. (04CV7280) (RCC)</p> <p>Euro Brokers Inc., et al. v.. Al Baraka Investment and Development Corporation, et al. (04CV7279) (04 CV 07279) (RCC)</p>
<p>KREINDLER & KREINDLER LLP 100 Park Avenue New York, NY 10017 Tel: (212) 687-8181 Fax: (212) 972-9432</p> <p>James P. Kreindler, Esquire jkreindler@kreindler.com</p> <p>Marc S. Moller, Esquire mmoller@kreindler.com</p> <p>Steven R. Pounian, Esquire spounian@kreindler.com</p> <p>Justin T. Green, Esquire jgreen@kreindler.com</p> <p>Andrew J. Maloney, III, Esquire amaloney@kreindler.com</p>	<p>Ashton, et al. v. Al Qaeda, et al., 02-CV-6977 (RCC)</p>

<p>LAW OFFICES OF JERRY S. GOLDMAN AND ASSOCIATES, P.C. Two Penn Center Plaza, Suite 1411 1500 JFK Boulevard Philadelphia, PA 19102 Tel: (215) 569-4500 Fax: (215) 569-8899</p> <p>Jerry S. Goldman, Esquire jgoldman@goldmanlawyers.com</p> <p>Frederick J. Salek, Esquire Fred.Salek@verizon.net</p>	<p>Estate of John P. O’Neill, Sr., <i>et al.</i> v. Kingdom of Saudi Arabia, <i>et al.</i> 04 CV 1922 (RCC)</p> <p>Estate of John P. O’Neill, Sr., <i>et al.</i> v. Al Baraka Investment and Development Corporation, <i>et al.</i> 04 CV 1923 (RCC)</p> <p>Estate of John Patrick O’Neill, Sr., <i>et al.</i> v. The Republic of Iraq, <i>et al.</i> 04 CV 1076 (RCC)</p>
<p>LAW OFFICES OF JOSHUA M. AMBUSH, LLC 600 Reistertown Road Suite 200 A Baltimore, MD 21208 Tel: (410) 484-2070 Fax: (410) 484-9330</p> <p>Joshua M. Ambush, Esquire joshua@ambushlaw.com</p> <p>Helen Louise Hunter, Esquire hlsh@aol.com</p>	<p>Estate of John P. O’Neill, Sr., <i>et al.</i> v. Kingdom of Saudi Arabia, <i>et al.</i> 04 CV 1922 (RCC)</p> <p>Estate of John P. O’Neill, Sr., <i>et al.</i> v. Al Baraka Investment and Development Corporation, <i>et al.</i> 04 CV 1923 (RCC)</p> <p>Estate of John Patrick O’Neill, Sr., <i>et al.</i> v. The Republic of Iraq, <i>et al.</i> 04 CV 1076 (RCC)</p>

<p>MOTLEY RICE LLC 28 Bridgeside Boulevard P.O. Box 1792 Mount Pleasant, SC 29465 Tel: (843) 216-9000 Fax: (843) 216-9450</p> <p>Ronald L. Motley, Esquire Jodi Westbrook Flowers, Esquire Donald A. Migliori, Esquire Michael E. Elsner, Esquire Robert T. Haefele, Esquire Justin Kaplan, Esquire John M. Eubanks, Esquire MDL1570@motleyrice.com</p>	<p>Thomas Burnett, Sr. <i>et al.</i> v. Al Baraka Investment and Development Corp., <i>et al.</i> (03CV9849) (RCC), (03CV5738) (RCC)</p> <p>World Trade Center Properties LLC, <i>et al.</i> v. Al Baraka Investment and Development Corporation, <i>et al.</i> (04CV7280) (RCC)</p> <p>Euro Brokers Inc., <i>et al.</i> v. Al Baraka Investment and Development Corporation, <i>et al.</i> (04 CV 07279) (RCC)</p>
<p>BROWN GAVALAS & FROMM LLP 355 Lexington Avenue New York, New York 10017 (212) 983-8500</p> <p>Frank J. Rubino, Esquire fjr@browngavalas.com</p>	<p>New York Marine and General Insurance Company v. Al Qaida, <i>et al.</i> (04-CV-6105) (RCC)</p>

**APPELLEES' COUNSEL
SERVICE LIST**

In re: Terrorist Attack on September 11, 2001
United States Court of Appeals for the Second Circuit

Defendants' Counsel

BAKER BOTTS LLP

The Warner
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004-2400
Tel: (202) 639-7700
Fax: (202) 639-7890

Counsel for HRH Prince Sultan Bin Abdulaziz Al-Saud, HRH Prince Salman Bin Abdulaziz Al-Saud, HRH Prince Naif bin Abdulaziz Al-Saud

Casey Cooper, Esquire
casey.cooper@bakerbotts.com

William H. Jeffress, Jr., Esquire
william.jeffress@bakerbotts.com

Jamie Kilberg, Esquire
Jamie.kilberg@bakerbotts.com

Sara Kropf, Esquire
sara.kropf@bakerbotts.com

MDL1570@bakerbotts.com

ROBBINS, RUSSELL, ENGLERT, ORSECK & UNTEREINER LLP

1801 K Street, NW, Suite 411

Washington, DC 20006

Tel: (202) 775-4500

Fax: (202) 775-4510

Counsel for Saudi High Commission

Lawrence S. Robbins, Esquire

lrobbins@robbinsrussell.com

Roy T. Englert, Jr., Esquire

renglert@robbinsrussell.com

Alison Barnes, Esquire

abarnes@robbinsrussell.com

WILMER CUTLER PICKERING HALE AND DORR LLP

1875 Pennsylvania Avenue, N.W.

Washington, DC 20006

Tel: (202) 663-6000

Fax: (202) 663-6363

Counsel for HRH Prince Mohamed Al Faisal Al Saud

Louis R. Cohen, Esquire

louis.cohen@wilmerhale.com

Tracey Allen, Esquire

tracey.allen@wilmerhale.com

Shirley Woodward, Esquire

Shirley.woodward@wilmerhale.com

WILMER CUTLER PICKERING HALE AND DORR LLP

399 Park Avenue

New York, NY 10022

Tel: (212) 230-8800

Fax: (212) 230-8888

Counsel for HRH Prince Mohamed Al Faisal Al Saud

David Bowker, Esquire

david.bowker@wilmerhale.com

Douglas Curtis, Esquire

Douglas.Curtis@wilmerhale.com