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 HIS ROYAL HIGHNESS PRINCE TURKI AL-FAISAL BIN ABDULAZIZ AL-SAUD

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PRELIMINARY STATEMENT

His Royal Highness Prince Turki Al-Faisal bin Abdulaziz Al-Saud ("Prince Turki") has been named as a defendant in these actions for conduct allegedly taken in an official capacity during the years he was Director of Saudi Arabia's Department of General Intelligence ("DGI"). In essence, plaintiffs contend that he caused the terrorist attacks of September 11, 2001, by brokering an alleged deal with the Taliban (which, at that time, was the de facto government of Afghanistan) not to seek extradition of Osama bin Laden in exchange for bin Laden's agreement not to direct terrorist attacks toward Saudi Arabia, and by otherwise providing material support and resources to Al-Qaeda.

These claims are completely fabricated. Uncontroverted evidence in the district court, including Prince Turki's sworn declaration, make clear that Prince Turki has spent much of his official career combating terrorism in general and Al-Qaeda in particular, and that in doing so he has earned the enmity of Osama bin Laden towards both himself and his country. Under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602 *et seq.*, plaintiffs had to come forward with *evidence* to rebut Prince Turki's sworn statement and to establish that the conduct they allege fits within one of the FSIA's exceptions to immunity. Plaintiffs were repeatedly and openly challenged to present such evidence and just as repeatedly declined. Instead, plaintiffs have said they want to use discovery to

see if they can find some evidence implicating Prince Turki in the attacks of September 11. Having named Prince Turki as a defendant without any proper basis for doing so, plaintiffs have suggested, incredibly, that "if it turns out at the end of the case [Prince Turki] didn't do it, [he] didn't know and [he was] innocent, well, we can shake [his] hand[] and say, sorry, we put you through the trouble." Tr. of Mot. Hr'g, *Burnett v. Al Baraka Inv. Corp.*, Docket No. CA 02-1616 JR, at 77:12-16 (D.D.C. Oct. 17, 2003) (A-1735).

The FSIA doesn't work that way. The actions Prince Turki undertook in his official capacity are the acts of the Kingdom of Saudi Arabia, and those acts, no less than those attributed to the Kingdom itself, are subject to sovereign immunity. In the absence of *evidence* establishing that the conduct they allege fits within one of the FSIA's exceptions to immunity, plaintiffs cannot proceed against Prince Turki.

Plaintiffs have utterly failed to carry that burden. Indeed, the exception on which plaintiffs primarily rely — the noncommercial torts exception in 28 U.S.C. § 1605(a)(5) — is not even available when, as here, plaintiffs' claim is that the defendant provided material support to terrorism, a matter comprehensively addressed in the "state sponsor of terrorism" exception in § 1605(a)(7). Beyond that, plaintiffs' tort theory — that Prince Turki made a deal with the Taliban to protect Saudi Arabia from terrorism, which in turn deflected Al-Qaeda toward the

United States, which in turn resulted in the attacks of September 11 — is far too attenuated to support a claim under § 1605(a)(5), and it, in any event, involves discretionary decision-making that is protected from suit under established law. The district court, in short, properly concluded that Prince Turki cannot be forced to answer in U.S. courts for actions in his official capacity that, in plaintiffs' own telling, were taken in furtherance of the foreign relations and national security interests of the Kingdom of Saudi Arabia. This Court should affirm.[1]

JURISDICTIONAL STATEMENT

The district court ruled that it lacked subject matter jurisdiction over claims brought by several sets of plaintiffs against Prince Turki and the Kingdom of Saudi Arabia and also that it lacked personal jurisdiction over claims concerning alleged acts taken by Prince Turki in his personal capacity. *See In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765 (S.D.N.Y. 2005) (Casey, J.) ("*In re*

[1] Prince Turki was until recently the Ambassador of Saudi Arabia to the United Kingdom. In the district court, Prince Turki accordingly urged the dismissal of the suits against him under principles of diplomatic immunity. Plaintiffs objected, arguing that such immunity applied only to suits brought in the receiving state of the diplomat. *But see Bergman v. De Sieyes*, 170 F.2d 360, 362-63 (2d Cir. 1948) (L. Hand, J.). The district court did not decide this issue and it is not presented here. But Prince Turki is now the Ambassador of Saudi Arabia to the United States. Given Prince Turki's current status, in the unlikely event this matter is remanded to the district court, the district court will be required to dismiss the suit against Prince Turki. *See Prince Turki Bin Abdulaziz v. Metropolitan Dade County*, 741 F.2d 1328, 1329-32 (11th Cir. 1984) (diplomatic status granted to a different Prince Turki after commencement of suit required dismissal based on diplomatic immunity).

Terrorist Attacks I") (SPA-1-62).[2] On May 5, 2005, pursuant to stipulation, the district court dismissed similar claims against Prince Turki and Saudi Arabia brought by other plaintiffs. *See In re Terrorist Attacks on September 11, 2001*, No. 03 MDL 1570 (RCC) (S.D.N.Y. May 5, 2005) ("*In re Terrorist Attacks II*") (SPA-63-66). On December 16, 2005, the court entered a final judgment in all actions relating to Prince Turki and Saudi Arabia under Federal Rule of Civil Procedure 54(b). *See* SPA-102. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the district court properly held that the FSIA requires the dismissal of claims against a foreign official for acts taken in an official capacity, when no exception to immunity under the FSIA is applicable.

2. Whether the district court properly held that plaintiffs have not carried their burden of establishing a prima facie case of personal jurisdiction based on conclusory and unsubstantiated allegations.

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[2] Prince Turki was originally named as a defendant in the following actions: *Ashton*, *Barrera*, *Burnett 9849*, *Burnett 5737*, *Cantor*, *Continental*, *Euro Brokers*, *Federal Insurance*, *NY Marine*, *Salvo*, *Tremsky*, and *World Trade Center Properties*. The court's dismissal in *In re Terrorist Attacks I* was with respect to *Burnett*, *Ashton*, *Tremsky*, *Salvo*, *Barrera*, and *Federal Insurance*. *See In re Terrorist Attacks I*, 349 F. Supp. 2d at 837. The subsequent stipulated dismissal was with respect to all remaining cases.

STATEMENT OF THE CASE

A. Plaintiffs' Allegations

Although plaintiffs' complaints vary in length, they share the common feature that only a handful of paragraphs relate to Prince Turki. The district court considered the allegations in the *Ashton*, *Burnett*, and *Federal Insurance* complaints. Because the other plaintiffs that named Prince Turki as a defendant subsequently stipulated that the allegations in their complaints are encompassed within the allegations in the *Ashton*, *Burnett*, and *Federal Insurance* complaints, we summarize only those allegations here.

Plaintiffs allege that "Prince Turki was head of Saudi Arabia's Department of General Intelligence (Istakhbarat) from 1977 until 2001." *Ashton*, Third Am. Compl. ¶ 256, No. 02-6977 (S.D.N.Y. filed Sept. 5, 2003) ("*Ashton* Compl.") (A-1604); *see Burnett*, Third Am. Compl. ¶ 343, No. 02-1616 (D.D.C. filed Nov. 22, 2002) ("*Burnett* Compl.") (A-1233); *Federal Insurance*, First Am. Compl. ¶ 445 (filed Mar. 10, 2004) ("FAC") (A-2010). Plaintiffs assert that, in that capacity, "Prince Turki met personally with [Osama] bin Laden at least five times while in Pakistan and Afghanistan during the mid-eighties to mid-nineties. Prince Turki also had meetings with the Taliban in 1998 and 1999." *Ashton* Compl. ¶ 257 (A-1604); *see Burnett* Compl. ¶ 344 (A-1233).

Plaintiffs claim that Prince Turki first met bin Laden at the Royal Embassy of Saudi Arabia in Islamabad, Pakistan, during the Soviet Union's occupation of Afghanistan in the 1980s. *Ashton* Compl. ¶ 254 (A-1604). Plaintiffs further allege that, around the time Iraq invaded Kuwait in 1990, bin Laden met with H.R.H. Prince Sultan bin Abdulaziz Al-Saud ("Prince Sultan"), then and now the Minister of Defense of Saudi Arabia, and "offered the engineering equipment available from his family's construction company and suggested bolstering Saudi forces with Saudi militants who [he] was willing to recruit," *id.* ¶ 253 (A-1603-04), and that this offer was also made to Prince Turki, *id.* ¶ 254 (A-1604). Plaintiffs allege that Prince Turki had an "ongoing relationship" with bin Laden and helped to arrange a meeting between Iraq's Ambassador to Turkey and bin Laden in 1998, all while Prince Turki was Director of the DGI. *Id.* ¶¶ 254, 262 (A-1604-06).

Plaintiffs also allege that Prince Turki attended a meeting in July 1998 at which he is alleged to have promised oil and financial assistance to the Taliban (not to Al-Qaeda) in Afghanistan and Pakistan. *Id.* ¶ 261 (A-1605). Plaintiffs claim that, "[a]fter the meeting, 400 new pick-up trucks arrived in Kandahar for the Taliban, still bearing Dubai license plates." *Id.* Plaintiffs also state that, as part of an agreement supposedly reached at the meeting, "the Saudis would make sure that no demands for the extradition of terrorist individuals [were made], such as [for]

Osama bin Laden,…[nor permit] the closure of terrorist facilities and camps." *Id.*; *see Burnett* Compl. ¶ 348 (A-1234).

Some plaintiffs also claim, without elaboration and without drawing any connection to the attacks of September 11, that Prince Turki was "the facilitator" of "the transfer of funds from wealthy Saudis directly to al Qaeda and [Osama] bin Laden in Afghanistan." *Ashton* Compl. ¶ 259 (A-1605); *see* FAC ¶¶ 66, 446, 448 (A-1925-29, 2010). These plaintiffs further allege that the DGI "served as a facilitator of Osama bin Laden's network of charities, foundations, and other funding sources." *Ashton* Compl. ¶ 263 (A-1606); *see Burnett* Compl. ¶ 350 (A-1234).

Plaintiffs also allege that an alleged Al-Qaeda financier named Zouaydi "had close financial ties" with Prince Turki, but nowhere do they specify what those "ties" were. *Ashton* Compl. ¶ 241 (A-1601); *see Burnett* Compl. ¶ 345 (A-1233). Similarly, the *Federal Insurance* complaint mentions two persons — Nabil Kosaibati and Omar Al-Bayoumi — who were allegedly associated with the DGI and Al-Qaeda during the period Prince Turki was Director of the DGI and who are alleged to have had some connection to one or more of the September 11 hijackers. FAC ¶ 449 (A-2010).

Finally, the *Federal Insurance* complaint alone alleges that Prince Turki "made significant *personal* contributions to Saudi-based charities that he knew to

be sponsors of Al Qaida's global operations." *Id.* ¶ 451 (A-2011) (emphasis added).

B. Prince Turki's Declaration

In support of his claim to sovereign immunity, Prince Turki submitted a sworn declaration directly rebutting plaintiffs' allegations. Decl. of H.R.H. Prince Turki Al-Faisal Bin Abdulaziz Al-Saud (May 2, 2003) ("Decl.") (A-2151).

In that declaration, Prince Turki expressly and unequivocally denied that he "encouraged, funded, or provided any form of material or other assistance — direct or indirect — to enable Osama bin Laden and his Al-Qaeda network of terrorists to perpetrate these attacks." Decl. ¶ 4 (A-2152). Prince Turki's statement is corroborated by the findings of the congressionally chartered National Commission on Terrorist Attacks Upon the United States ("9/11 Commission"), which, after an exhaustive study, found that: "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) (emphasis added) ("9/11 Report").[3]

[3] Prince Turki has publicly condemned bin Laden and the terrorist attacks: "For me, [September 11] was an especially calamitous event, as I had devoted all of my working life to combating such crimes. It also brought back the pain and

The declaration also establishes that all of the acts allegedly taken by Prince Turki would have been in an official capacity. The declaration states that Prince Turki served as Director of the DGI from September 1977 until August 2001. Decl. ¶ 5 (A-2152-53). The DGI carries out functions similar, in many respects, to those of the U.S. Central Intelligence Agency ("CIA"), including collecting and analyzing foreign intelligence and carrying out foreign operations. *Id.* The declaration establishes that the activities of the DGI are an integral part of Saudi Arabia's foreign relations and national security apparatus. *Id.*

Among his other duties as Director of the DGI, Prince Turki was actively involved in Saudi Arabia's efforts to combat international terrorism generally and the threat posed by Osama bin Laden and Al-Qaeda in particular. In so doing, he shared information and cooperated closely with other intelligence agencies, including the CIA. *Id.* ¶ 6 (A-2153); *see also id.* ¶ 10 (A-2154-55) (describing Prince Turki's involvement in joint committee, formed in 1997, with United States to combat terrorism).

The declaration also establishes that, contrary to plaintiffs' unsupported allegations, Prince Turki's trips to Afghanistan in 1998 were for the purpose of conveying the official Saudi request that Osama bin Laden be extradited to Saudi

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outrage I felt when my father, the late King Faisal, was killed in a terrorist attack." Prince Turki Al-Faisal, *Allied Against Terrorism*, Wash. Post, Sept. 17, 2002, at A21 (A-2170-72).

Arabia for trial. *Id.* ¶ 11 (A-2155). After the Taliban leader, Mullah Omar, denied the request for extradition, Prince Turki recommended that Saudi Arabia withdraw its representative from Kabul and suspend diplomatic relations with the Taliban regime, which Saudi Arabia did in September 1998. *Id.* ¶ 13 (A-2155).[4] The declaration establishes, moreover, that all of Prince Turki's interactions with bin Laden, Al-Qaeda, and the Taliban were in his official capacity as Director of the DGI. Decl. ¶ 5 (A-2152-53). In addition, the declaration refutes plaintiffs' naked allegations that, during these meetings in Afghanistan, Prince Turki reached an agreement with bin Laden, or otherwise supported Al-Qaeda. *See id.* ¶¶ 15-16 (A-2156-57).

In support of his declaration, Prince Turki submitted to the district court a transcript of a television interview of Osama bin Laden by John Miller of ABC News. Bin Laden told ABC News he had "heard of [Prince] Turki's secret mission" to arrest him. *ABC News: Nightline,* 2001 WL 21773072 (Dec. 10, 2001) (A-2176). Bin Laden stated: "He returned empty-handed. He looked ashamed, as if he had come at the request of the American government. It's none of the business of the Saudi regime to come and ask for handing over Osama bin Laden." *Id.*

[4] Well before the current suits were filed, in February 2002, Prince Turki described most of the events detailed in his declaration in a speech to the Center for Contemporary Arab Studies at Georgetown University. That speech was attached as an exhibit to Prince Turki's motion to dismiss. (A-2162-69).

This version of events was confirmed by the 9/11 Report, which stated that, after the Kingdom of Saudi Arabia had disrupted an Al-Qaeda plot to attack U.S. forces in 1998, then-CIA Director George Tenet asked for the assistance of Saudi Arabia in capturing Osama bin Laden. 9/11 Report at 115. The 9/11 Report found that, in response to Director Tenet's request, Saudi officials promised "an all-out secret effort to persuade the Taliban to expel Bin Ladin so that he could be sent to the United States or to another country for trial." *Id.* Prince Turki, as the Saudi "intelligence chief," was chosen as the "Kingdom's emissary" for that effort. *Id.* The 9/11 Report further documented that Prince Turki, "employing a mixture of possible incentives and threats, … received a commitment [from the Taliban] that Bin Ladin would be expelled, but Mullah Omar did not make good on this promise." *Id.*

Prince Turki's declaration also makes clear that, contrary to plaintiffs' allegations, at no time did Prince Turki or the DGI knowingly transfer funds or "facilitate" the transfer of funds, either directly or indirectly, to bin Laden or Al-Qaeda. Decl. ¶ 14 (A-2156). The declaration also establishes that Prince Turki did not know Zouaydi, and had no known financial ties to him. *Id.* ¶ 17 (A-2157-58).

Finally, the declaration states that Prince Turki "own[ed] no property, conduct[ed] no business, and h[eld] no bank accounts in the United States." *Id.* ¶ 20 (A-2159). It also states that, with respect to non-official visits, he had made

only "occasional trips to the United States over the years for medical reasons or on holiday." *Id.*

Despite repeated opportunities to do so, plaintiffs have submitted no evidence contradicting Prince Turki's declaration.

C. Decisions of the District Courts

1. In the most advanced of these cases, the United States District Court for the District of Columbia — prior to the consolidation of these cases by the Judicial Panel on Multidistrict Litigation — held that the FSIA required the dismissal of all claims against Prince Turki. *See Burnett v. Al Baraka Inv. & Dev. Corp.*, 292 F. Supp. 2d 9, 23 (D.D.C. 2003) (Robertson, J.) (A-1757-84).

The *Burnett* court first held that plaintiffs' claims involved alleged conduct that would have been taken in Prince Turki's "official capacity" as Director of the DGI, and thus that he was presumptively entitled to immunity under the FSIA. *See id.* at 15. The court then concluded that the so-called noncommercial torts exception to immunity in 28 U.S.C. § 1605(a)(5) was not applicable to the claims against Prince Turki. The court reasoned that the legislative history of the FSIA "'counsels that the exception to immunity [in § 1605(a)(5)] should be narrowly construed so as not to encompass the farthest reaches of the common law.'" *Id.* at 19 (quoting *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 921 (D.C. Cir. 1987)) (emphasis omitted). Applying that principle, the court held that

plaintiffs' allegations did not come within the limited scope of § 1605(a)(5) because "allegations that (i) Prince Turki … funded (ii) those who funded (iii) those who carried out the September 11th attacks would stretch the causation requirement of the noncommercial tort exception not only to 'the farthest reaches of the common law,' but perhaps beyond, to terra incognita." *Id.* at 20.

The *Burnett* court also explained that the conduct alleged against Prince Turki fell within the discretionary-function exception, and therefore was outside § 1605(a)(5). Section 1605(a)(5) is inapplicable to "any claim based upon the exercise or performance" of "a discretionary function regardless of whether the discretion be abused." 28 U.S.C. § 1605(a)(5)(A). The court concluded that it was "nearly self-evident" that acts allegedly taken by Prince Turki "as director of [the DGI]" "to protect Saudi Arabia from terrorism" were "decisions grounded in social, economic, and political policy." *Burnett*, 292 F. Supp. 2d at 20-21 (internal quotation marks omitted). Accordingly, § 1605(a)(5) was inapplicable to the claims against Prince Turki. *Id.*

2. *Burnett* was subsequently transferred to, and consolidated with other cases in, the United States District Court for the Southern District of New York. The district court, reviewing the decision in *Burnett* "de novo," *In re Terrorist Attacks I*, 349 F. Supp. 2d at 780 n.2, agreed that the FSIA required the dismissal of all official capacity claims against Prince Turki. The court also concluded that

the *Federal Insurance* plaintiffs had not made a prima facie case of personal jurisdiction with respect to alleged personal capacity conduct.

At the outset, the district court noted that plaintiffs had set forth two primary sets of allegations against Prince Turki: that Prince Turki brokered a deal with Osama bin Laden whereby bin Laden would not be extradited from Afghanistan in exchange for a pledge not to attack Saudi Arabia; and that he "facilitated money transfers from wealthy Saudis to the Taliban and al Qaeda." *Id.* at 786.

The district court first held that, although the FSIA is applicable by its terms to "foreign states," immunity under the FSIA was "available to … Prince Turki, as the Director of Saudi Arabia's [DGI], to the extent [his] alleged actions were performed in [his] official capacit[y]." *Id.* at 788. The court based that conclusion on the decisions of several federal courts of appeals and district courts that have held that the immunity of a foreign state under the FSIA extends to individuals acting in an official capacity, because a suit against individual officials in that circumstance "is the practical equivalent of a suit against the sovereign directly." *Id.* (collecting cases; internal quotation marks omitted).

Turning to the FSIA's exceptions to immunity, the court held that neither the commercial activities exception, 28 U.S.C. § 1605(a)(2), nor the state sponsor of terrorism exception, *id.* § 1605(a)(7), was applicable. 349 F. Supp. 2d at 792-94. The former was not relevant, the court held, because "contributing to a foundation

is not within our ordinary understanding of trade and traffic or commerce," *id.* at 793 (internal quotation marks omitted); the latter was not relevant because "[t]he parties agree that the Kingdom of Saudi Arabia has not been designated a state sponsor of terrorism," *id.* at 794.

The district court also held that plaintiffs' claims against Prince Turki did not fit within the noncommercial torts exception to immunity. First, the court held that plaintiffs failed to "plead[] facts to support an inference that [Prince Turki] [was] sufficiently close to the terrorists' illegal activities to satisfy" New York tort standards. *Id.* at 800-01. The court held that "there must be some facts presented to support the allegation that the defendant knew" the receiving organization was a front for terrorists. *Id.* at 801. Having reviewed the complaints and weighed the evidence presented, the court found plaintiffs' allegations against Prince Turki on that issue were conclusory, and therefore insufficient to bring plaintiffs' claims within § 1605(a)(5). *Id.*

Second, the court held that all of the allegations against Prince Turki — both that he funded charities and that he brokered a deal with bin Laden — involved "judgments based on considerations of public policy" and thus were expressly excluded by § 1605(a)(5)(A). *Id.* at 801-02.

Because the *Federal Insurance* plaintiffs alleged that Prince Turki donated money to charities in a personal capacity, the district court also addressed whether

it had personal jurisdiction over Prince Turki with respect to those allegations. Rejecting plaintiffs' bare allegations that Prince Turki intended that his alleged donations would result in terrorist attacks in the United States, the court found that plaintiffs had presented no "specific facts" showing "Prince Turki's primary and personal involvement in, or support of, international terrorism and al Qaeda," and thus that it lacked personal jurisdiction. *Id.* at 813.[5]

SUMMARY OF ARGUMENT

I. The district court correctly held that the FSIA applies to suits against foreign officials for alleged acts taken in an official capacity. The district court's decision on this point is in accord with a majority of federal courts to consider the issue. The broad consensus in support of that view reflects the common-sense proposition that a suit against a foreign official acting in an official capacity is, in all materials respects, a suit against a "foreign state" itself. Indeed, the immunity afforded foreign states under the FSIA would be meaningless if plaintiffs could subject the official acts of a foreign state to suit in United States courts simply by naming individual officials of the foreign state rather than the foreign state itself.

[5] Because the remaining plaintiffs stipulated that their allegations did not differ from those of plaintiffs in *In re Terrorist Attacks I*, the district court subsequently dismissed those claims as well. *See In re Terrorist Attacks II*, slip op. at 3 (SPA-105) (dismissing remaining claims against Prince Turki and noting "the parties agree … that the allegations and evidence presented … do not materially differ from the allegations and evidence presented in the cases already dismissed").

This case illustrates that concern. Prince Turki has been sued for alleged acts taken as Director of the DGI that were purportedly carried out on behalf of the Kingdom of Saudi Arabia in furtherance of the foreign and national security policies of the Kingdom. Subjecting Prince Turki to suit in United States courts for those acts is, in all practical respects, suing the Kingdom of Saudi Arabia itself, as the district court properly held.

II. Because Prince Turki is thus presumptively entitled to immunity, plaintiffs had the burden to establish that one of the exceptions under the FSIA divested Prince Turki of that immunity. Plaintiffs failed to carry that burden.

The principal exception relied upon by plaintiffs with respect to Prince Turki, the noncommercial torts exception set out in § 1605(a)(5), does not apply for multiple reasons. First, because the crux of plaintiffs' claims is that Prince Turki provided material support to terrorists, those claims may be brought, if at all, only under the state sponsor of terrorism exception in § 1605(a)(7), not the noncommercial torts exception in § 1605(a)(5). Any other result would permit plaintiffs to circumvent the limitation in § 1605(a)(7), including, most importantly, the limitation that only states designated as "state sponsors of terrorism" can be forced to defend against accusations that they harbored terrorists. Second, as the district court correctly held, plaintiffs have failed to show that their novel and attenuated theory of causation — under which actions that Prince Turki supposedly

took in Afghanistan in the 1990s "caused" the attacks of September 11 — fits within § 1605(a)(5). Third, the alleged conduct taken by Prince Turki was discretionary, grounded in the foreign and national security policies of the Kingdom of Saudi Arabia, and therefore is outside the scope of § 1605(a)(5). Finally, because Prince Turki's alleged tortious conduct occurred entirely outside the United States, § 1605(a)(5) is inapplicable.

III. The district court also properly held that it lacked personal jurisdiction over Prince Turki with respect to acts taken in a personal capacity. Only the *Federal Insurance* plaintiffs made such allegations, and those allegations are baseless. Prince Turki never made any personal donations to the charities alleged by the *Federal Insurance* plaintiffs, and plaintiffs have not responded — because they cannot respond — to Prince Turki's demand that they set forth a good faith basis for those allegations. In any event, the district court correctly held that plaintiffs had not pleaded a prima facie case of personal jurisdiction because no specific facts suggested that Prince Turki knew the charities to which he allegedly contributed were fronts for terrorism. Finally, in light of the conclusory and unsubstantiated nature of plaintiffs' allegations, the district court did not abuse its discretion by refusing jurisdictional discovery.

STANDARD OF REVIEW

This Court reviews the district court's findings of fact under the FSIA for "clear error," while it reviews the court's legal conclusions "*de novo*." *Robinson v. Government of Malaysia*, 269 F.3d 133, 138 (2d Cir. 2001). A district court's decision to deny discovery under the FSIA is reviewed "for an abuse of [the court's] discretion." *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 176 (2d Cir. 1998); *see Grady v. Affiliated Cent., Inc.*, 130 F.3d 553, 561 (2d Cir. 1997) ("The management of discovery lies within the sound discretion of the district court, and the court's rulings on discovery will not be overturned on appeal absent an abuse of discretion.").

It is well settled that "sovereign immunity under the FSIA is immunity from suit, not just from liability." *Robinson*, 269 F.3d at 141 (internal alterations and quotation marks omitted). A corollary to that principle is that, in resolving a claim of immunity under the FSIA on a motion to dismiss, courts must "look beyond the pleadings to factual submissions, including affidavits, submitted to the court in order to resolve a factual dispute as to whether" an exception to immunity applies. *Id*. at 140-41. Thus, when the 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) (emphasis and internal quotation marks omitted).

ARGUMENT

I. THE FSIA APPLIES TO INDIVIDUALS ACTING IN AN OFFICIAL CAPACITY

"The FSIA provides the 'sole basis' for obtaining jurisdiction over foreign states and their instrumentalities in the United States." *Rafidain Bank*, 150 F.3d at 176 (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989)). The FSIA prescribes "when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and … when a foreign state is entitled to sovereign immunity." H.R. Rep. No. 94-1487, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6604. A foreign state is "'immune from the jurisdiction of United States courts, unless a specified statutory exception applies.'" *Garb v. Republic of Poland*, 440 F.3d 579, 582 (2d Cir. 2006) (quoting *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993)) (internal alterations omitted); *see also* 28 U.S.C. §§ 1604-1607 (setting out exceptions to immunity).

A. Properly construed, the FSIA shields foreign officials sued for acts taken in their official governmental capacity. The Act provides that a "foreign state shall be immune from the jurisdiction" of United States courts. 28 U.S.C. § 1604. A "foreign state," in turn, is defined to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." *Id.* § 1603(a).

Five federal courts of appeals — the D.C., the Fourth, Fifth, Sixth, and Ninth Circuits — have squarely held that the FSIA applies to foreign officials acting in an official capacity. *See Velasco v. Government of Indonesia*, 370 F.3d 392, 399 (4th Cir. 2004) ("[c]laims against the individual in his official capacity are the practical equivalent of claims against the foreign state"); *Keller v. Central Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002) ("foreign sovereign immunity extends to individuals acting in their official capacities"); *Byrd v. Corporacion Forestal y Industrial De Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999) ("the FSIA extends to protect individuals acting within their official capacity"); *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996) ("[a]n individual can qualify as an 'agency or instrumentality of a foreign state'") (quoting 28 U.S.C. § 1603(b)); *Chuidan v. Philippine Nat'l Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990) ("[w]e thus join the majority of courts which have similarly concluded that [the FSIA] can fairly be read to include individuals sued in their official capacity"). Numerous district courts, including courts in this Circuit, have reached the same conclusion.[6]

[6] *See Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277, 286-87 (S.D.N.Y. 2001) ("it has been generally recognized that individuals employed by a foreign state's agencies or instrumentalities are deemed 'foreign states' [under the FSIA] when they are sued for actions undertaken within the scope of their official capacities"); *Bryks v. Canadian Broad. Corp.*, 906 F. Supp. 204, 210 (S.D.N.Y. 1995); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1197 (S.D.N.Y. 1996); *Kline v. Kaneko*, 685 F. Supp. 386, 389 (S.D.N.Y. 1988); *Rios v. Marshall*, 530 F. Supp. 351, 371 (S.D.N.Y. 1981).

This broad consensus arises from the reality that the protections afforded by the FSIA would be largely meaningless if foreign officials acting in an official capacity were beyond the scope of the Act. Were foreign officials unprotected by the FSIA, a plaintiff could simply alter the caption of a complaint against a foreign state, name foreign officials of the state as defendants, and thereby subject the sovereign acts of the state to suit in United States courts. As the Ninth Circuit has explained, the view that "Congress … intended to allow unrestricted suits against individual foreign officials acting in their official capacities" "would amount to blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what they are barred from doing directly." *Chuidian*, 912 F.2d at 1102; *see also id.* (provisions of "sections 1605-07 [of the FSIA] would be vitiated if litigants could avoid immunity simply by recasting the form of their pleadings").

This case convincingly illustrates that concern. Plaintiffs have acknowledged that Prince Turki was Director of the DGI from 1977 until 2001. And Prince Turki has averred — and plaintiffs have not challenged — that all of his dealings with Al-Qaeda and the Taliban during that period were in his official capacity in carrying out the foreign and national security policies of the Kingdom of Saudi Arabia. *See* Decl. ¶ 5 (A-2152-53). Accordingly, allowing plaintiffs to sue Prince Turki for actions taken in his official capacity would allow the very

result that the FSIA was intended to preclude — namely, subjecting foreign sovereigns to liability in United States courts for official acts.

As is also explained by Princes Sultan, Naif, and Salman, *see* Prince Sultan Br. 22-24, the conclusion that the protection afforded foreign states extends to foreign officials is confirmed by the common law prior to the FSIA. Before the adoption of the FSIA, it was well established that federal common law "extended immunity to individual officials acting in their official capacity." *Chuidian*, 912 F.2d at 1101. The Restatement (Second) of Foreign Relations Law § 66 (1965), for example, provided that "[t]he immunity of a foreign state … extends to … any … official … with respect to acts performed in his official capacity." Congress, in enacting the FSIA, evinced no desire to restructure the law of foreign immunity by abrogating the common law on that point, and "[i]t would be illogical to conclude that Congress would have enacted such a sweeping alteration of existing law implicitly and without comment." *Chuidian*, 912 F.2d at 1102; *see also National Archives & Records Admin. v. Favish*, 541 U.S. 157, 169 (2004) (courts should "assume Congress legislated against [a] background of law, scholarship, and history when it enact[s]" a statute). Reading the FSIA as silent with respect to foreign officials would therefore "defeat the purpose" of the FSIA to serve as "a comprehensive codification of immunity and its exceptions." *Chuidian*, 912 F.2d at 1102; *see also id.* at 1101 (pre-FSIA common law extended protection to

individuals, and the legislative history contains "numerous statements that Congress intended the Act to codify the existing common law principles"); H.R. Rep. No 94-1487, at 7, 1976 U.S.C.C.A.N. at 6605 (noting the lack of a "comprehensive provisions" addressing foreign immunity, and stating a desire to "codify" immunity principles).

B. The contrary view of the *Burnett* plaintiffs — that the FSIA protects foreign states but not foreign officials acting in an official capacity — is in error.

The *Burnett* plaintiffs rely (at 27-28) largely on the point that the FSIA does not expressly identify "foreign officials" as a distinct subset of a "foreign state." But, as the district court recognized, a suit brought against a foreign official *is* a suit against a "foreign state." *See* 349 F. Supp. 2d at 788; *see also Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 153 (D.C. Cir. 1994) ("armed forces are as a rule are so closely bound up with the structure of the state that they must in all cases be considered as the 'foreign state' itself"); *Garb*, 440 F.3d at 591-93 (following *Transaero*). The immunity of the Director of Saudi Arabia's DGI is, in other words, entirely derivative of the immunity of the Kingdom of Saudi Arabia for purposes of the FSIA. As is explained elsewhere, agencies and instrumentalities do not exhaust the categories of official actors that may be considered part of a "foreign state." *See* Prince Sultan Br. 24-26. Interpreting the

FSIA to protect foreign officials acting in an official capacity is thus fully consistent with the text of the Act.[7]

In this respect, principles of domestic sovereign immunity are instructive. The Eleventh Amendment to the United States Constitution speaks of "any suit … commenced or prosecuted against one of the United States" and makes no mention of state officers. Yet federal courts have long held that the Eleventh Amendment generally applies to actions brought against individuals acting in their official capacity. *See Edelman v. Jordan*, 415 U.S. 651, 663 (1974) ("[i]t is … well established that even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment … when … the state is the real, substantial party in interest") (internal quotation marks and alterations omitted). As the Supreme Court has explained, "official-capacity suits generally represent

[7] This analysis addresses plaintiffs' reliance on *Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004), *cert. denied*, 126 S. Ct. 2020 (2006). *See* Burnett Br. 28. In *Tachiona*, a panel of the Second Circuit expressed that it had "some doubt as to whether the FSIA was meant to supplant the 'common law' of head-of-state immunity," in part because agencies and instrumentalities, which are defined in § 1603(b), "are defined in terms not usually used to describe natural persons." 386 F.3d at 220-21. To begin with, the court made clear that its statements should not be taken as deciding the issue, as it "ha[d] no occasion to decide whether [defendants] were protected from suit by head-of-state immunity — whether under the terms of the FSIA" or otherwise. *Id.* at 221. Furthermore, the court did not consider the specific arguments made here regarding "foreign state" based on the history and purposes of the FSIA. In any event, as the Ninth Circuit has held, although the terms defining agency and instrumentality may "more readily connot[e] an organization or collective," they "do not in their typical legal usage necessarily exclude individuals." *Chuidian*, 912 F.2d at 1101; *see Jungquist v. Sheik Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997).

only another way of pleading an action against an entity of which an officer is an agent." *Monell v. Department of Social Servs.*, 436 U.S. 658, 690 n.55 (1978). Because such suits may "implicate the dignity of the State as a sovereign" no less than a suit against the state itself, they may be barred by the Eleventh Amendment. *Kitchen v. Upshaw*, 286 F.3d 179, 184 (4th Cir. 2002) (internal quotation marks omitted).

That principle applies here. As the Fourth Circuit has explained, protection for foreign officials under the FSIA "models federal common law relating to derivative U.S. sovereign immunity." *Velasco*, 370 F.3d at 399; *see also id.* ("Claims against the individual in his official capacity are the practical equivalent of claims against the foreign state."); *Chuidian*, 912 F.2d at 1102 (drawing on domestic immunity principles in construing the FSIA to protect against official capacity suits). In other words, just as "an official-capacity suit" against an official of a domestic sovereign "is, in all respects other than name, to be treated as a suit against the [sovereign] entity," *Kentucky v. Graham*, 473 U.S. 159, 166 (1985), so too should the claims against Prince Turki for acts taken on behalf of Saudi Arabia be treated as a suit against Saudi Arabia itself.[8]

[8] Plaintiffs decline to rely on *Enahoro v. Abukakar*, 408 F.3d 877, 881-82 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1341 (2006), and for good reason. There, the court refused to find jurisdiction over a Nigerian general based on allegations that, plaintiffs claimed, fell within an FSIA exception to sovereign immunity. The court held that the general, as an individual, was not covered by the FSIA, and thus

II. PLAINTIFFS HAVE NOT CARRIED THEIR BURDEN OF SHOWING THAT AN EXCEPTION TO IMMUNITY APPLIES

Under the FSIA, "immunity remains the rule rather than the exception." *MacArthur Area Citizens Ass'n*, 809 F.2d at 919 (internal quotation marks omitted). Because Prince Turki is presumptively entitled to immunity under the FSIA for acts taken in his official capacity, plaintiffs "ha[ve] the burden of going forward with evidence showing that, under exceptions set forth in the FSIA, immunity should not be granted." *Robinson*, 269 F.3d at 141 (internal quotation marks omitted). Plaintiffs have failed to meet that burden.

Plaintiffs rely primarily on the FSIA's noncommercial torts exception in § 1605(a)(5), which permits, with important exceptions, actions "in which money damages are sought against a foreign state for personal injury or death … occurring in the United States and caused by tortious act or omission of that foreign state or

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that jurisdiction could not be founded on an exception to the FSIA. The court's holding resulted in the *dismissal* of the suit, which was consistent with the court's concern about the oddity of "[a] courtroom in Chicago" as the place for "a case involving seven Nigerian citizens suing an eighth Nigerian for acts committed in Nigeria." *Id.* at 878. Without addressing the abundant precedents on this issue, *see supra* pp. 21-22, the court stated that the "issue [of individual immunity was] a long way from being settled." *Id.* at 881. The court also overlooked the history and purposes of the FSIA; did not consider whether an official could qualify as a "foreign state" (as opposed to an agency or instrumentality); and did not discuss the analogy to domestic immunity principles.

any official or employee of that foreign state while acting within the scope of his office or employment." Section 1605(a)(5) is inapplicable here for four reasons.[9]

A. Plaintiffs' Claims Must Be Brought, If At All, Under Section 1605(a)(7)

The gravamen of plaintiffs' claims against Prince Turki is that he "provided material support and resources to al Qaida," FAC ¶ 446 (A-2010), both by entering an agreement with Osama bin Laden and by "facilitat[ing] … money transfers in support of the Taliban, al Qaeda, and international terrorism," Burnett Br. 23 (internal quotation marks omitted).

As explained in more detail in the brief of the Kingdom of Saudi Arabia, *see* KSA Br. Part I.B.1, the FSIA contains an exception to sovereign immunity for just such allegations. Section 1605(a)(7) provides jurisdiction over claims in which "money damages are sought" for "personal injury or death" arising out of the "provision of material support or resources" to terrorists. 28 U.S.C. § 1605(a)(7). Critically, however, that exception does not apply unless "the foreign state was … designated as a state sponsor of terrorism … at the time the act occurred." *Id.* § 1605(a)(7)(A). There is no dispute here that the Kingdom of Saudi Arabia has not been designated as a state sponsor of terrorism. It is accordingly clear that the

[9] For reasons set forth elsewhere, the commercial activities exception of the FSIA, 28 U.S.C. § 1605(a)(2), is inapplicable to Prince Turki. *See* KSA Br. Part I.C.

"state sponsor of terrorism exception" does not establish jurisdiction against Prince Turki for acts taken in an official capacity on behalf of Saudi Arabia.

It is equally clear, moreover, that plaintiffs' effort to plead around that hurdle, by recasting their "state sponsor of terrorism" charges as noncommercial tort claims, is an impermissible effort to circumvent the limitations set forth in § 1605(a)(7). Those limitations — in particular, the requirement that a defendant be designated a "state sponsor of terrorism" before being required to answer charges that it supported terrorism — are an indispensable part of the "delicate legislative compromise" that led to the enactment of § 1605(a)(7), *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 89 (D.C. Cir. 2002), and they serve to protect the Executive branch's authority to designate which nations are, and are not, state sponsors of terrorism. To allow plaintiffs to proceed against the Kingdom and its officials on a "state sponsor of terrorism" theory in the absence of such a designation would be to authorize a lawsuit that both Congress and the Executive branch have determined should not be brought.

B. Plaintiffs' Theories of Causation Do Not Fall Within the Scope of Section 1605(a)(5)

Plaintiffs' claims against Prince Turki were also properly dismissed because plaintiffs' novel, attenuated, and uncorroborated theories of causation do not fit within the scope of § 1605(a)(5).

1. As a threshold matter, it bears emphasis that Congress's purpose in enacting § 1605(a)(5) was narrow. The legislative history of the FSIA makes clear that, in enacting § 1605(a)(5), Congress was concerned primarily with the narrow, but recurring, problem of traffic accidents involving employees of foreign embassies. *See* H.R. Rep. No. 94-1487, at 20, 1976 U.S.C.C.A.N. at 6619 ("[s]ection 1605(a)(5) is directed primarily at the problem of traffic accidents"); *id.* at 21, 1976 U.S.C.C.A.N. at 6620 ("[t]he purpose of section 1605(a)(5) is to permit the victim of a traffic accident or other noncommercial tort to maintain an action"). As then-Judge Scalia explained, this exception was intended "for certain narrowly defined public acts for which local adjudication was deemed imperative (*e.g.*, traffic accidents caused by employees and officials of a foreign embassy)." *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1520 (D.C. Cir. 1984). The Supreme Court has made the same point, emphasizing that Congress's "primary purpose" in enacting § 1605(a)(5) was to treat foreign sovereigns like other employers with respect to respondeat superior liability for injuries, primarily arising from traffic accidents caused by employees of foreign states. *Amerada Hess*, 488 U.S. at 439. In light of that purpose, § 1605(a)(5) "'should be narrowly construed so as not to encompass the farthest reaches of the common law.'" *Burnett*, 292 F. Supp. 2d at 19 (quoting *MacArthur Area Citizens Ass'n*, 809 F.2d at 921) (emphasis omitted).

Applying those principles, the *Burnett* court held that plaintiffs' untrodden and attenuated legal theories of causation would broaden the scope of § 1605(a)(5) well beyond the narrow limits Congress intended. The court explained that plaintiffs' allegations, in essence, were that "(i) Prince Turki … funded (ii) those who funded (iii) those who carried out the September 11 attacks." *Id.* at 20. The court held that the theories of causation underlying those allegations would "stretch the causation requirement of the noncommercial tort exception not only to the farthest reaches of the common law, but perhaps beyond, to terra incognita." *Id.* (internal quotation marks omitted).

Beyond that, as the district court here concluded, plaintiffs' theory also fails on the facts. *See* 349 F. Supp. 2d at 797-801. Under New York law, the two theories under which plaintiffs proceeded, conspiracy and aiding and abetting, are each variants of concerted action liability. For both, a plaintiff must show "(1) an express or tacit agreement to participate in a common plan or design to commit a tortious act, (2) the tortious conduct by each defendant, (3) the commission by one of the defendants, in pursuance of the agreement, of an act that constitutes a tort." *Pittman v. Grayson*, 149 F.3d 111, 122 (2d Cir. 1998) (internal quotation marks omitted); *see also Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983) (describing elements of aiding and abetting and conspiracy).

As the district court held, neither set of plaintiffs' allegations against Prince Turki meets these standards. Plaintiffs have alleged, first, that Prince Turki, three years prior to the September 11 attacks, brokered a deal on behalf of Saudi Arabia not to extradite Osama bin Laden in exchange for a pledge not to attack Saudi Arabia, and, second, that, in his capacity as Director of the DGI, Prince Turki facilitated the transfer of resources to Al-Qaeda.

The conduct described in the first set of allegations — apart from being fully contradicted by Prince Turki's declaration, as well as bin Laden's public statements and the 9/11 Report — cannot plausibly be said to have *caused* the terrorist attacks of September 11. Plaintiffs have not alleged, for example, specific facts showing that the supposed agreement with bin Laden was intended, or constituted an agreement, to further the agenda of Al-Qaeda. Nor have plaintiffs alleged any specific facts connecting that agreement to terrorist attacks that occurred three years later. Nothing about an agreement that bin Laden would *not* attack Saudi Arabia suggests that Prince Turki intended that the alleged agreement would cause an attack on the United States. As the district court here recognized, *see* 349 F. Supp. 2d at 800-01, broad and conclusory allegations on those points are insufficient as a matter of law. *See First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 772 (2d Cir. 1994) ("courts do not accept conclusory allegations on the legal effect of the events plaintiff has set out if these allegations do not

reasonably follow from his description of what happened") (internal alterations and quotation marks omitted).

With respect to the second set of allegations (regarding supposed funding of Al-Qaeda), plaintiffs, as the district court correctly found, failed "to allege specific facts showing that [Prince Turki] knew or should have known that the charities [he allegedly] supported were actually fronts for al Qaeda." 349 F. Supp. 2d at 800. Furthermore, plaintiffs did not "plead[] facts to support an inference that [Prince Turki] [was] sufficiently close to the terrorists' illegal activities" to establish causation. *Id.* Rather, plaintiffs presented "only conclusions" that Prince Turki "knowingly provided assistance or encouragement" to Al-Qaeda. *Id.* at 801. Allowing the case against Prince Turki to go forward on such "'vague'" and "'conclusory'" allegations, the district court correctly held, would be "'at odds with the goal of the FSIA to enable a foreign government to obtain an early dismissal when the substance of the claim against it does not support jurisdiction.'" *Id.* (quoting *Robinson*, 269 F.3d at 146); *see also Gelt Funding Corp.*, 27 F.3d at 772 (courts need not accept conclusory allegations).

2. Plaintiffs raise three basic objections to the district court's holding on this point. None of those objections is availing.

First, relying on *Boim v. Quranic Literacy Institute*, 291 F.3d 1000 (7th Cir. 2002), and *Halberstam*, plaintiffs assert that their allegations were sufficient under

the common law of "aiding and abetting" because they "alleged that [Prince] Turki gave assistance to Osama bin Laden to carry out terrorist attacks on other countries, specifically the United States, so that bin Laden would not attack Saudi Arabia." Burnett Br. 48; *see also id.* at 42-45.

Plaintiffs' reliance on *Boim* and *Halberstam* is misplaced. *Boim* involved claims against U.S.-based charities that allegedly provided *direct* financial support to Hamas with the *express* goal of supporting terrorist activities by Hamas, which had been designated by the United States as a terrorist organization. *See* 291 F.3d at 1002. That circumstance is far removed from the allegations against Prince Turki here, which are nothing more than that Prince Turki brokered an agreement to avoid attacks against Saudi Arabia and facilitated the funding of charities (none of which was designated as a terrorist organization), which in turn funded Al-Qaeda, which in turn committed terrorist acts. What is more, the district court, after "review[ing] the complaints in their entirety," found *no* allegation from which it could be credibly inferred that Prince Turki "knew the charities to which [he allegedly] donated were fronts for al Qaeda." 349 F. Supp. 2d at 801. Without specific facts, any allegations by plaintiffs to that effect, especially in the face of Prince Turki's declaration, were nothing more than conclusions masquerading as facts; they are insufficient to sustain plaintiffs' burden under the FSIA, and nothing in *Boim* is to the contrary. *See Robinson*, 269 F.3d at 146.

Similar analysis applies with respect to *Halberstam*. There, the D.C. Circuit affirmed the decision of the trial court that a live-in companion of a burglar aided and abetted the burglar based upon, among other things, the defendant's role as a "secretary and recordkeeper" for the burglar's criminal activities. 705 F.2d at 486. The court held that conduct satisfied aiding-and-abetting liability, which requires a showing of, among other things, "knowing[] and substantial[] assist[ance] of the principal violation." *Id.* at 477. By contrast, plaintiffs here did not allege any specific facts showing knowing and substantial assistance to Al-Qaeda; nor did plaintiffs rebut Prince Turki's sworn declaration denying plaintiffs' version of Prince Turki's interactions with bin Laden and the Taliban and that he knew about or assisted the "principal violation," namely, the attacks of September 11. *See* Decl. ¶ 4 (A-2152).[10]

Second, plaintiffs complain that the district court set too high a bar, insofar as it required them to substantiate their theory of causation with evidence or

[10] Plaintiffs suggest that Prince Turki must have known that the charities he allegedly supported themselves supported terrorists because, as Director of DGI, he was purportedly warned that Saudi charities were funding terrorist groups. *See* Fed. Ins. Br. 16, 38. Those assertions, however, are immaterial, *see* Prince Sultan Br. 35-39, and are, in any event, contradicted in full by Prince Turki's declaration. Moreover, plaintiffs' view is inconsistent with the finding of the 9/11 Report that senior Saudi officials provided no assistance to Osama bin Laden or Al-Qaeda. *See supra* p. 8. Plaintiffs also omit the key fact that none of the charities allegedly supported by Prince Turki in an official capacity were designated by the United States as state sponsors of terrorism at the time of the alleged support to those charities.

specific facts. *See* Fed. Ins. Br. 33-35. But that is precisely what is required under the FSIA. This Court has been quite clear that a plaintiff has a "burden of production" to "come forward with sufficient evidence" when a foreign sovereign presents evidence of an entitlement to immunity. *Robinson*, 269 F.3d at 141; *see also City of New York v. Permanent Mission of India to the United Nations*, 446 F.3d 365, 369 (2d Cir. 2006) ("party seeking to establish jurisdiction bears the burden of producing evidence establishing that a specific exception to immunity applies"), *petition for cert. filed*, 75 U.S.L.W. 3061 (U.S. July 25, 2006) (No. 06-134); *Virtual Countries*, 300 F.3d at 242 (same). Here, Prince Turki submitted a sworn declaration denying, in detail, the allegations made against him. In the face of that declaration, plaintiffs had an obligation to come forward with reliable evidence substantiating their allegations. It is undisputed that they did not do so.

Nor is it the case that this Court's requirement — that a plaintiff has a burden to present evidence on whether an exception to immunity applies — is, as some plaintiffs have argued, *see* Fed. Ins. Br. 34, unlawful. In fact, the Second Circuit's position tracks precisely Congress's intent in adopting the FSIA. The House Report explained that, "[o]nce the foreign state has produced such prima facie evidence of immunity, the burden of going forward would shift to the plaintiff to *produce evidence* establishing that the foreign state is not entitled to immunity." H.R. Rep. No. 94-1487, at 17, 1976 U.S.C.C.A.N. at 6616 (emphasis

added). The Second Circuit's holding, moreover, is in accord with the holdings of other courts of appeals. *See, e.g.*, *In re B-727 Aircraft Serial No. 21010*, 272 F.3d 264, 271 (5th Cir. 2001) (after foreign sovereign makes out prima facie case of immunity, "burden shifts to the party opposing immunity to present evidence that one of the exceptions to immunity applies") (internal quotation marks omitted); *Southway v. Central Bank of Nigeria*, 328 F.3d 1267, 1274 (10th Cir. 2003) ("Whether subject matter jurisdiction is raised under Rule 12(b)(1) or Rule 56, the plaintiff's burden [under the FSIA] remains the same — plaintiff must present affidavits or other evidence sufficient to establish the court's subject matter jurisdiction by a preponderance of the evidence."); *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) (upon motion to dismiss, court "may not deny the motion to dismiss merely by assuming the truth of the facts alleged by the plaintiffs").

Third, plaintiffs claim that the district court erred in not allowing discovery against Prince Turki in order to rectify their deficient allegations. *See* Fed. Ins. Br. 34-37. The court's decision to deny jurisdictional discovery easily survives the deferential abuse of discretion standard that applies here. *See Rafidain Bank,* 150 F.3d at 176.

The FSIA provides immunity not only from liability, but also from the burdens of litigation, including discovery. *See Robinson*, 269 F.3d at 146; *see also*

Rafidain Bank, 150 F.3d at 176 (noting the "comity concerns implicated by allowing jurisdictional discovery against a foreign sovereign"). Here, plaintiffs' claims against Prince Turki were based on only a handful of conclusory and vague allegations. Prince Turki denied those allegations in full in a sworn declaration and asserted his entitlement to immunity as a foreign official of the Kingdom of Saudi Arabia. In the face of that declaration — to which a court should attach "great weight," *Leutwyler*, 184 F. Supp. 2d at 287 — plaintiffs stood mute, relying upon only their initial allegations. Faced with that one-sided evidentiary record, the district court was comfortably within its discretion to deny discovery. *See*, *e.g.*, *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 849 (5th Cir. 2000) (because FSIA immunity protects against "the costs, in time and expense, and other disruptions attendant to litigation," "jurisdictional discovery is *not* permitted as a matter of course").

Arriba Ltd. v. Petroleos Mexicanos, 962 F.2d 528 (5th Cir. 1992), is instructive on this point. There, plaintiffs sought discovery to determine whether alleged commercial conduct was attributable to the defendant and therefore vitiated the defendant's entitlement to sovereign immunity under the FSIA's commercial activities exception. *See id.* at 537. The court denied the request, reasoning that "limited discovery" is permissible under the FSIA only when there are reliable allegations of "*specific facts* that, if proved," would demonstrate that an exception

to immunity applies. *Id.* at 537 n.17. That standard was not satisfied, the court held, based on "speculative inferences of behind-the-scenes activity," nor could discovery be permitted to "supplant the pleader's duty to state [specific] facts at the outset of the case." *Id.*

The same analysis applies here. Indeed, the case for refusing discovery here is even *stronger* than in *Arriba*. Not only have plaintiffs sought to rely on generic allegations that are themselves insufficient to warrant discovery under *Arriba*; but Prince Turki has denied those allegations in a sworn declaration that has not been challenged in any material respect. Moreover, as the district court noted, *see* 349 F. Supp. 2d at 802, plaintiffs have failed to describe any specific discovery that could ameliorate the deficiencies in their allegations against Prince Turki. In these circumstances, the district court did not abuse its discretion in denying discovery based on the generic charge that Prince Turki knew his conduct was aiding terrorists. *See Robinson*, 269 F.3d at 146 (to "sustain jurisdiction" in order to authorize discovery based on "generic allegations" would "invite plaintiffs to circumvent the jurisdictional hurdle of the FSIA by inserting vague and conclusory allegations of tortious conduct in their complaints"); *In re Republic of Philippines*, 309 F.3d 1143, 1152 (9th Cir. 2002) (denying request to remand FSIA case "for

discovery on the sovereign immunity issue" because plaintiffs failed to "point[] to any discovery that would help support their claim").[11]

C. Prince Turki's Alleged Conduct Is Discretionary and Therefore Falls Outside the Scope of Section 1605(a)(5)

Section 1605(a)(5) 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). It is nearly "self-evident" that acts allegedly taken by Prince Turki "as director of intelligence … to protect Saudi Arabia from terrorism" were "squarely covered" by § 1605(a)(5)(A) and therefore insufficient to establish jurisdiction under the FSIA. *Burnett*, 292 F. Supp. 2d at 20-21.

The purpose of the discretionary-function exception — whether under the FSIA or the Federal Torts Claim Act ("FTCA"), on which the FSIA exception is modeled, *see* KSA Br. 34-35 — is to "prevent judicial 'second-guessing' of

[11] *See also El-Fadl*, 75 F.3d at 671 (plaintiff was "not entitled to discovery … in light of the evidence that [the foreign sovereign] proffered to the district court and the absence of any showing by [plaintiff] that [defendant] was not acting in his official capacity" because "discovery would frustrate the significance and benefit of entitlement to immunity from suit") (internal quotation marks omitted); *Evans v. Petroleos Mexicanos (PEMEX)*, No. 05-20434, 2006 WL 952265, at *2 (5th Cir. Apr. 18, 2006) (rejecting claim that a plaintiff was entitled to discovery because under "the broad scope of protections that sovereign immunity affords a defendant" a foreign sovereign is "immun[e] from the burdens of becoming involved in any part of the litigation process" and plaintiff was "not entitled to burden [the foreign sovereign] with the lengthy and costly process of discovery to build his case.") (internal quotation marks omitted).

legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984).

That principle applies with considerable force here. Plaintiffs' claims against Prince Turki arise out of conduct Prince Turki is alleged to have taken to further the foreign and national security policies of Saudi Arabia — *viz.*, "that [Prince] Turki had reached an agreement with Osama bin Laden and his followers pursuant to which bin Laden agreed not to use his terrorist infrastructure to subvert the royal family's control of Saudi Arabia and [Prince] Turki agreed that the Saudis would make no demands for the extradition of terrorist individuals, such as Osama bin Laden." Burnett Br. 48. But Prince Turki can no more be haled into the courts of the United States to answer for such official actions than the head of the CIA could properly be sued in a foreign tribunal for official acts. *See United States v. Gaubert*, 499 U.S. 315, 323 (1991) (exception under the FTCA covers "governmental actions and decisions based on considerations of public policy") (internal quotation marks omitted); *Macharia v. United States*, 334 F.3d 61, 66-67 (D.C. Cir. 2003) (allegations that United States government failed to warn and negligently failed to secure U.S. Embassy in Nairobi, Kenya were encompassed by discretionary-function exception of FTCA because of policy judgments and balancing of interests inherent in security decisions); *In re Agent Orange Prod.*

Liab. Litig., 818 F.2d 194, 199 (2d Cir. 1987) (discretionary-function exception of FTCA prevented judiciary from "pass[ing] judgment upon … military decisions involving Agent Orange" and "second-guessing … discretionary legislative and executive decisions … made concerning Agent Orange") (internal quotation marks omitted).

Nor is it the case that this principle gives way when the alleged acts are particularly objectionable, as plaintiffs claim is the case here. *See, e.g.*, Fed. Ins. Br. 32 ("illegal and malevolent actions cannot be deemed discretionary, even if grounded in policy judgment"). Nation-states routinely make policy judgments — including judgments of dubious morality — because they are deemed to be in the country's national interest. In the late 1930s, Britain and France acquiesced in the partition of Czechoslovakia in an effort to avoid war with Germany. *See* Winston Churchill, *The Second World War, Vol. 1: The Gathering Storm* ch. 17 (Houghton Mifflin Co. 1948). The United States sent agents to engage in the overthrow of democratically elected governments in Iran and Guatemala. *See* Kermit Roosevelt, *Countercoup: The Struggle for Control of Iran* (McGraw Hill 1979); Richard H. Immerman, *The CIA in Guatemala: The Foreign Policy of Intervention* ch. 7 (Univ. of Tex. Press 1982) (describing CIA's successful effort to overthrow Jacobo Arbenz). The fact that such decisions are morally dubious in no way alters the fact

that they are based on policy judgments, and are therefore protected as discretionary.[12]

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), do not suggest a different result. As the Kingdom explains, *see* KSA Br. 36-39, it is far from clear that those cases properly apply the discretionary-function exemption, which by its terms protects discretionary decisions "regardless of whether the discretion be abused." 28 U.S.C. § 1605(a)(5)(A). More fundamentally, the facts of *Liu* and *Letelier* are far afield from plaintiffs' allegations here against Prince Turki. *Liu* and *Letelier* were cases in which foreign agents, acting on orders from foreign states or their officials, carried out assassinations on United States soil. *See Liu*, 892 F.2d at 1422-23; *Letelier*, 488 F. Supp. at 665-66. Here, by contrast, plaintiffs have not alleged, nor could they, that Prince Turki committed the September 11 attacks. Nor have they alleged that Al-Qaeda was acting as an agent of Prince Turki, that Prince Turki ordered those attacks, or even that he knew of the attacks. And the allegations that plaintiffs do make — that Prince Turki facilitated aid to the Taliban

[12] "Millions for defense, not one cent for tribute" was our young Republic's famous policy decision regarding the Barbary pirates. Other states have chosen differently throughout history. *See*, *e.g.*, Herodotus, *The Histories* Bk. 6 (describing tribute paid by Greek states to the Persians to avoid attack); Thucydides, *History of the Peloponnesian War* Bk. 1 (describing tribute paid by Greek states to Athens for "protection" against Persian attack). No one can doubt that these are fundamental policy choices.

regime and Al-Qaeda and negotiated a treaty of sorts between Saudi Arabia and bin Laden (all of which are patently false) — are not themselves terrorist acts or crimes against humanity. *Liu* and *Letelier*, even if good law, are accordingly beside the point. *See Burnett*, 292 F. Supp. 2d at 21 (finding *Liu* and *Letelier* "factually distinguishable" because they "involved causal links significantly shorter and more direct than those alleged" against Prince Turki).

D. Section 1605(a)(5) Is Inapplicable Because the Entire Tort Did Not Occur in the United States

Finally, § 1605(a)(5) does not divest Prince Turki of immunity because the entire tort, as alleged by plaintiffs, did not occur within the United States.

As explained elsewhere, *see* KSA Br. 31-34, the D.C. Circuit has twice held that § 1605(a)(5) applies only to tortious conduct in the United States. In *Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir. 1984), the D.C. Circuit canvassed the legislative history of the FSIA, concluding that "Congress' principal concern was with torts committed in this country." *Id.* at 840. The court reasoned that "[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 government relations that that involves, it is hardly likely that Congress would have ignored those topics and instead discussed automobile accidents in this country." *Id.* at 841. Based on this observation and an analysis of the structure of the FSIA, the court concluded that "both the tort and the injury

must occur in the United States," and thus that the foreign defendant in that case, Iran, was "immune from tort suits here for actions taken by it on its own territory." *Id.* at 842. The court echoed that holding in *Asociacion de Reclamantes*, explaining that "for the exception of § 1605(a)(5) to apply the tortious act or omission must occur within the jurisdiction of the United States." 735 F.2d at 1524 (internal quotation marks omitted).

In *Amerada Hess*, moreover, the Supreme Court contrasted the commercial activity exception, which covers activity "'outside the territory of the United States,'" with the noncommercial tort exception, which is silent on conduct outside the United States. 488 U.S. at 441. That distinction, the Court held, was significant, and demonstrated that the noncommercial tort exception "covers only torts occurring within the territorial jurisdiction of the United States." *Id.* And this Circuit has similarly explained that, although the noncommercial tort exception is "cast in terms that may be read to require that only the injury rather than the tortious act occur in the United States, the Supreme Court has held that this exception 'covers only torts occurring within the territorial jurisdiction of the United States.'" *Cabiri v. Government of Republic of Ghana*, 165 F.3d 193, 200 n.3 (2d Cir. 1999) (quoting *Amerada Hess*, 488 U.S. at 441).

All of Prince Turki's alleged tortious acts occurred overseas; none occurred within the "territorial jurisdiction of the United States." *Amerada Hess*, 488 U.S.

at 441; *see, e.g.*, *Ashton* Compl. ¶ 254 (A-1604) (meeting in Pakistan); *id.* ¶ 257 (A-1604-05) (meetings in Pakistan and Afghanistan); *id.* ¶ 261 (A-1605) (meeting in Afghanistan). For this reason as well, § 1605(a)(5) does not strip Prince Turki of immunity under the FSIA.[13]

III. THE DISTRICT COURT PROPERLY HELD THAT IT LACKS PERSONAL JURISDICTION OVER PRINCE TURKI

With respect to the sole allegation against Prince Turki in his personal capacity — that he supposedly made donations to charities that were used to support Al-Qaeda — plaintiffs bear the burden of establishing personal jurisdiction. *See Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 784 (2d Cir. 1999). The district court correctly found that plaintiffs had failed to carry that burden.

[13] Even if an exception to immunity applies, principles of personal jurisdiction require dismissal of the claims against Prince Turki. *See infra* Part III. Plaintiffs concede that, under Second Circuit precedent, the Due Process Clause protects Prince Turki, even with respect to alleged official acts. *See* WTCP Br. 22 (citing *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1020 (2d Cir. 1991)); *see also Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 313 (2d Cir. 1981) (under Second Circuit precedent a foreign state is a "person" under Due Process Clause). Plaintiffs urge the Court to overrule *Shapiro*, *see id.* 22-25, but plaintiffs did not sufficiently present this argument to the district court and it is thus forfeited. *See Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005). In any event, "this court is bound by a decision of a prior panel unless and until its rationale is overruled … by the Supreme Court or this court *en banc*." *In re Sokolowski*, 205 F.3d 532, 534-35 (2d Cir. 2000) (internal quotation marks and alterations omitted).

A. Plaintiffs Have Not Properly Alleged That Prince Turki Took Any Acts in His Personal Capacity

As a threshold matter, no plaintiff has made a bona fide allegation that Prince Turki took *any* acts in his personal capacity. Although plaintiffs' briefs imply that each set of plaintiffs alleged that Prince Turki made donations in his personal capacity, *see, e.g.*, WTPC Br. 27, as the district court noted, only the *Federal Insurance* amended complaint set forth any such allegation. *See* 349 F. Supp. 2d at 813 ("consolidated Plaintiffs do not allege any acts taken by Prince Turki in his personal capacity").[14] And the allegations of the *Federal Insurance* plaintiffs, *see* FAC ¶¶ 451-452 (A-2011), can easily be set aside.

Like the other plaintiffs in these actions, the *Federal Insurance* plaintiffs originally made no allegations against Prince Turki in his personal capacity. *See Federal Ins.* Compl. ¶ 72, No. 03-6978 (S.D.N.Y. filed Sept. 10, 2003) (A-1727-31) (including Prince Turki in a laundry list of defendants, with no mention of personal capacity acts or donations). It was only after the *Burnett* court dismissed the official capacity claims against Prince Turki in November 2003 that the *Federal Insurance* plaintiffs amended their complaint to add identical boilerplate allegations of *personal* donations with respect to different defendants whom the

[14] Plaintiffs attempt to obfuscate this fact by stating that "each of the Four Princes is alleged to have made personal donations," *see* WTCP Br. 27, but, other than the cites to the *Federal Insurance* complaint, none of the cited paragraphs pleads facts indicating that Prince Turki made donations in a personal capacity.

Burnett court had dismissed under the FSIA, including Prince Turki. *See*, *e.g.*, FAC ¶ 442 (A-2009) ("Prince Naif has made significant personal contributions to Saudi-based charities … including IIRO, MWL, WAMY, BIF, the Saudi High Commission, SJRC and al Haramain"); *id.* ¶ 451 (A-2011) (same allegations with respect to Prince Turki); *id.* ¶ 467 (A-2014) (same allegations with respect to Prince Abdullah).

Prior to that amendment, however, Prince Turki had made clear that he never made or caused to be made donations to any of the charities named in the *Federal Insurance* complaint. *See* Decl. ¶ 4 (A-2152) (denying Prince Turki "in any way encouraged, funded, or provided any form of material or other assistance – direct or indirect – to enable Osama bin Laden and his Al-Qaeda network of terrorists to perpetrate these attacks"). In light of this denial, and because plaintiffs' allegations appear to have been added without any individual factual investigation, counsel for Prince Turki sent a letter to the *Federal Insurance* plaintiffs on July 15, 2004, invoking Federal Rule of Civil Procedure 11 and asking them to withdraw their allegations or to provide a good faith basis for them. *See* Letter from M. Kellogg, to E. Feldman (July 15, 2004) (A-2541-42). Plaintiffs have yet to provide any response to that letter, much less have they set forth any ground for alleging that Prince Turki, notwithstanding Prince Turki's express and

unequivocal denial, made personal donations to the charities named in the complaint.

Plaintiffs' failure to substantiate this allegation is reason enough to dismiss the claim. Although a plaintiff need ordinarily only allege a prima facie case of personal jurisdiction in order to survive a motion to dismiss, "jurisdictional claims" that are "clearly frivolous" should be dismissed prior to discovery. *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, 107 F.3d 1026, 1041-42 (3d Cir. 1997). In *Massachusetts School of Law*, the Third Circuit upheld the dismissal of claims for lack of personal jurisdiction against several individuals who were alleged, without any specific factual support, to have taken substantial acts in the forum state of Pennsylvania. *See id.* The court reasoned that "unsupported allegations" of conduct or effects in the forum state were insufficient. *Id.* The claim for dismissal is even stronger here given that Prince Turki's declaration contradicts the *Federal Insurance* plaintiffs' unsupported allegations, that the allegations appear to have been added without any factual investigation, and that plaintiffs have yet to set forth a good faith basis for making the allegations.

B. The District Court Properly Held That Plaintiffs' Allegations Were Insufficient to Support Personal Jurisdiction

In any event, the record makes clear that at the times plaintiffs commenced each of the relevant actions — the proper period for determining personal jurisdiction[15] — Prince Turki did not have sufficient contacts with New York (or the United States as a whole) such that the exercise of personal jurisdiction over him would not "offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotation marks and citation omitted).

1. For starters, there can be no serious argument that Prince Turki is subject to general jurisdiction in New York. When these suits were commenced, Prince Turki "own[ed] no property, conduct[ed] no business, and [held] no bank accounts in the United States." Decl. ¶ 20 (A-2159). His only non-official contacts with the United States were an occasional trip "over the years for medical reasons or on holiday." *Id.* Those sporadic contacts were unrelated to plaintiffs' claims and therefore cannot supply a basis for personal jurisdiction. *See Kulko v. Superior Ct.*, 436 U.S. 84, 93-94 (1978) (temporary visits to forum are insufficient bases for personal jurisdiction over unrelated action).

[15] *See Klinghoffer v. S.N.C. Achille-Lauro Ed Altri-Gestione Motonave Achille Laurao in Administrazione Straordinaria*, 937 F.2d 44, 52 (2d Cir. 1991) ("personal jurisdiction depends on the defendant's contacts with the forum state at the time the lawsuit was filed").

Personal jurisdiction over Prince Turki could therefore be based only on his alleged conduct abroad, and even then only if plaintiffs could establish that this conduct had a "substantial connection" with the forum state, as demonstrated by "an action of the defendant purposefully directed toward the forum State." *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 112 (1987) (plurality op.) (emphasis omitted).

Plaintiffs have not come close to satisfying their burden on this point. Even if it were true that Prince Turki, at some unspecified point in time, made personal donations to foreign charities that, in turn, made payments to Al-Qaeda, it would not follow that Prince Turki "purposefully directed" any funds toward the United States, much less toward New York. *Id.* Just as "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State," *id.*, so, too, an alleged contribution (in an unspecified way, at an unspecified time) to a foreign charity that allegedly used the contributions to fund global terrorism is not purposefully directed toward the forum. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) ("foreseeability" of injury in forum state "is not a sufficient benchmark for exercising personal jurisdiction") (internal quotation marks omitted).

Moreover, even if plaintiffs could show that Prince Turki's alleged donations outside the United States had "some causal relation to the alleged

injuries" that occurred inside the United States, "the test for in personam jurisdiction is somewhat more demanding" and requires at least that any injury be a "direct and foreseeable result of the conduct outside the territory." *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 1000 (2d Cir. 1975) (Friendly, J.) (internal quotation marks omitted). That is especially so here in light of the "[g]reat care and reserve" courts should exercise "when extending … notions of personal jurisdiction into the international field." *Asahi*, 480 U.S. at 115 (plurality op.) (internal quotation marks omitted); *see also Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1341 (2d Cir. 1972) (Friendly, J.) (principles of extraterritorial exercise of personal jurisdiction "must be applied with caution, particularly in an international context").

Plaintiffs do not, because they cannot, make that showing. As the district court observed, plaintiffs did not present any "specific facts from which [it] could infer Prince Turki's primary and personal involvement in, or support of, international terrorism and al Qaeda." 349 F. Supp. 2d at 813. "Conclusory allegations that [Prince Turki] donated money to charities" and that he knew those charities were funneling money to Al-Qaeda simply "do not suffice." *Id.* at 813-14. The court's refusal to credit such wholly conclusory allegations is in accord with Second Circuit precedent. *See Jazini v. Nissan Motor Co.*, 148 F.3d 181, 184 (2d Cir. 1998) ("conclusory statement" that was but "a restatement … of the legal

standard for determining agency" did not establish prima facie case of personal jurisdiction); *see also id.* at 185 (rejecting "conclusory statements — without any supporting facts" that defendant was controlled by foreign company because court was "not bound to accept as a true a legal conclusion couched as a factual allegation").

The district court's decision on this point is consistent, moreover, with the *Burnett* court's decision. In that case, the court dismissed nearly identical claims against Prince Sultan.[16] The court held that, notwithstanding allegations that Prince Sultan "personally donated money to [certain charities], knowing that those foundations funded terrorist organizations including Al Qaeda," the complaint "stops well short of alleging that Prince Sultan's actions were 'expressly aimed' or 'purposefully directed' at the United States." *Burnett*, 292 F. Supp. 2d at 22-23. In the absence of such allegations, the court ruled that it lacked personal jurisdiction. *Id.* The same result should apply here.

2. Plaintiffs rely upon five cases upholding personal jurisdiction over claims brought against foreign terrorists. *See* WTCP Br. 37-43. But in each of those cases, the defendants *themselves* were terrorists who had participated in or

[16] Because Prince Turki was not alleged to have committed personal capacity acts in *Burnett*, the court's holding was limited to Prince Sultan. The allegations there, however, were the same as those here, and therefore the *Burnett* court's reasoning applies equally here.

directly facilitated terrorist acts. *See Mwani v. bin Laden*, 417 F.3d 1, 13 (D.C. Cir. 2005) (allegations against bin Laden and Al-Qaeda); *Morris v. Khadr*, 415 F. Supp. 2d 1323, 1336 (D. Utah 2006) (allegations against Al-Qaeda member that "actively participated in and helped plan Al Qaeda's terrorist agenda"); *Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F. Supp. 325, 327-30 (E.D.N.Y.) (allegations against government of Libya, which was a designated state sponsor of terrorism, and "its agents"), *aff'd in part, dismissed in part*, 162 F.3d 748 (2d Cir. 1998); *Pugh v. Socialist People's Libyan Arab Jamahiriya*, 290 F. Supp. 2d 54, 56 (D.D.C. 2003) (allegations in connection with explosion "an act of terrorism committed by officials and agents of the government of Libya"); *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 40-41 (D.D.C. 2000) (allegations that the government of Iraq itself tortured plaintiffs); *see also In re Terrorist Attacks I*, 349 F. Supp. 2d at 809 (noting that the terrorism cases cited by plaintiffs required "personal or direct involvement" in terrorist acts).

Plaintiffs cannot overcome that dispositive difference with the conclusory charge that Prince Turki conspired with or aided and abetted terrorists. "The cases are unanimous that a bare allegation of a conspiracy between the defendant and a person within the personal jurisdiction of the court is not enough." *Stauffacher v. Bennett*, 969 F.2d 455, 460 (7th Cir. 1992) (Posner, J.). "Otherwise plaintiffs could drag defendants to remote forums for protracted proceedings even though

there were grave reasons for questioning whether the defendant was actually suable in those forums." *Id.*; *see also, e.g.*, *Lehigh Valley Indus., Inc. v. Birenbaum*, 527 F.2d 87, 93-94 (2d Cir. 1975) ("[T]he bland assertion of conspiracy … is insufficient to establish [personal] jurisdiction"); *Bank Brussels Lambert*, 171 F.3d at 793 ("conclusory statements" about defendant's role in conspiracy were insufficient to establish jurisdiction); *Jungquist*, 115 F.3d at 1031 ("bald speculation or a conclusory statement that individuals are co-conspirators is insufficient to establish personal jurisdiction under a conspiracy theory") (internal alterations and quotation marks omitted).

In short, plaintiffs have not alleged that Prince Turki carried out the attacks of September 11, or that the hijackers of September 11 were acting on behalf of Prince Turki. Nor have plaintiffs alleged any specific facts suggesting that Prince Turki conspired with or knowingly provided substantial assistance to those terrorists. *See In re Terrorist Attacks I*, 349 F. Supp. 2d at 813 (holding that plaintiffs set forth no "specific facts from which" the court "could infer Prince Turki's primary and personal involvement in, or support of, international terrorism and al Qaeda"). The district court thus properly held that it could not exercise personal jurisdiction over Prince Turki.

Plaintiffs also object to the district court's striking of certain evidence that they claim would have affected the court's jurisdictional analysis. *See* WTCP Br.

13-14, 43-44. But the so-called evidence was a legal memorandum, submitted in addition to plaintiffs' oppositions to motions to dismiss, which the district court found violated its rules regarding "page limitations." (A-2504-06). In any event, the memorandum is irrelevant. Plaintiffs point to no evidence in the memorandum pertinent to Prince Turki, and do not explain how it would have altered the court's jurisdiction analysis. Prince Turki, in fact, is mentioned only twice in the memorandum — in laundry lists in footnotes not relevant to the personal jurisdiction issues here.[17] Moreover, the memorandum was submitted to the district court by the *Burnett* and *Ashton* plaintiffs, neither of which made any allegations against Prince Turki in a personal capacity.

Finally, the district court did not abuse its discretion in denying jurisdictional discovery. *See* Fed. Ins. Br. 34; Ashton Br. 60-62. For the reasons stated above, plaintiffs failed to make a prima facie case of personal jurisdiction. In such circumstances, it is settled law that plaintiffs are not entitled to discovery in order to make their case. *See Nissan Motor Co.*, 148 F.3d at 185-86 (plaintiffs must allege facts establishing prima facie showing of personal jurisdiction before getting jurisdictional discovery); *Central States, S.E. & S.W. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 946 (7th Cir. 2000) ("plaintiff must

[17] *See* Pls.' Mem. of Law in Supp. of Their *Prima Facie* Showing of Personal Jurisdiction and In Opp'n to Defs.' Challenges to Personal Jurisdiction 1 n.1, 24 n.44 (filed May 14, 2004).

establish a colorable or prima facie showing of personal jurisdiction before discovery should be permitted"); *see also Burnett*, 292 F. Supp. 2d at 16 (plaintiffs did not make sufficient allegations against Prince Sultan to warrant jurisdictional discovery). At the least, the district court cannot be said to have abused its discretion by denying jurisdictional discovery in such circumstances.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's dismissal of all claims against Prince Turki.

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January 5, 2007 Michael K. Kellogg

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