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06-0348-CV (CON); 06-0392- 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 SAUDI HIGH COMMISSION

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Defendant-Appellee Saudi High Commission (SHC), an agency of the Kingdom of Saudi Arabia (KSA), submits this brief on the consolidated appeals filed by Plaintiffs-Appellants. Plaintiffs appeal from Opinions and Orders issued by the United States District Court (Casey, J.) on January 18, 2005, May 5, 2005, September 21, 2005, and December 16, 2005, pursuant to which SHC and other sovereign entities were dismissed on the ground that they are immune from suit under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602 et seq.

STATEMENT OF THE ISSUES

1. Whether the district court properly held that SHC – an entity that was formed by High Order of the King of Saudi Arabia to provide humanitarian assistance in accordance with the foreign policies of KSA and that is run by a high-ranking Saudi official and staffed with Saudi civil servants – is a foreign sovereign within the meaning of the FSIA.

2. Whether a representation to the Bosnian government that SHC is a "non-governmental" organization – meaning that it is not a part of the government of Bosnia-Herzegovinia – is an unmistakable, unambiguous statement amounting to an implied waiver of SHC's sovereign immunity in this litigation.

3. Whether the district court was correct in holding that no FSIA exception applied to the allegations against SHC.

STATEMENT OF THE CASE

These cases, which were consolidated for pretrial proceedings in the district court, arise from the terrorist attacks of September 11, 2001. Plaintiffs have named more than 200 individuals, entities and organizations – including SHC – as defendants.

SHC moved to dismiss the claims against it on the ground that it is immune from suit under the FSIA, because it is an agency or political instrumentality of the Kingdom. SHC also moved to dismiss Plaintiffs' claims for lack of personal jurisdiction and for failure to state a claim upon which relief can be granted. On September 21, 2005, the district court granted SHC's motion. See *In re Terrorist Attacks on September 11, 2001* (*In re Terrorist Attacks II)*, 392 F. Supp. 2d 539 (S.D.N.Y. 2005). In its opinion, the court held that it lacked subject-matter jurisdiction because SHC is a sovereign entity, and none of the FSIA's exceptions applies. In light of its decision that SHC is entitled to sovereign immunity, the court declined to address SHC's remaining arguments in favor of dismissal.

Subsequently, and after a request from the parties, the district court entered an Order directing the Clerk of Court to enter a final judgment in favor of SHC, among others, pursuant to Federal Rule of Civil Procedure 54(b). SPA 103 (Dec. 16, 2005 Order). The Clerk entered final judgment in favor of SHC and others on January 10, 2006, SPA 106, and the district court subsequently issued an order curing a technical problem with that judgment. SPA 113 (Jan. 18, 2006 Order).

Plaintiffs have appealed from the dismissal of SHC in the following actions: *Federal Insurance* (03 CV 06978), *Burnett* (03 CV 9849) and *Ashton* (02 CV 6977). In addition, Plaintiffs in *New York Marine and General Insurance Company* (NYMAGIC) (04 CV 6105), *World Trade Center Properties* (04 CV 07280), *Euro Brokers, Inc.* v. *Al Baraka Invest. & Develop. Corp.* (04 CV 07279), and *Cantor Fitzgerald & Co.* (04 CV 0765) contest the dismissal of SHC because they have agreed – and the district court has ordered – that they will be bound by this Court's forthcoming decision in these consolidated appeals. See SPA 99, A 5498 (Nov. 28, 2005 and Feb. 8, 2006 Endorsed Stips.).[1]

STATEMENT OF FACTS

In their haphazard effort to assign blame for the September 11 attacks, Plaintiffs filed lawsuits against hundreds of defendants, many of whom have no connection to the atrocities committed that day. SHC – an agency of the KSA, created to assist victims of the Serb genocide in Bosnia-Herzegovina – is one such

[1] Although it does not appear that Plaintiffs in *Continental Casualty Company* (04 CV 05970) have appealed from the orders dismissing SHC, they too have agreed to be bound by this Court's forthcoming decision regarding SHC. A 4903 (May 19, 2005 Endorsed Stip.).

innocent party that has been burdened with defending itself in this litigation as a result of Plaintiffs' overreaching.

I. The Saudi High Commission

SHC was formed in 1993 at a time of civil war in the former Yugoslavia. The Bosnian Muslims and Croats reached a peace agreement and formed the Federation of Bosnia-Herzegovina in 1994 – but the Bosnian Serbs, supported by neighboring Serbia under the dictator Slobodan Milosevic, continued the war. Serbian atrocities included the destruction of historical treasures – mosques, libraries, and entire ancient cities – as well as brutal massacres of thousands of civilians. A 2516 (Decl. of Saud bin Mohammad Al-Roshood (Al-Roshood Decl.) ¶ 3 (Exh. A to the Decl. of Max Huffman)). The United States hosted talks at Wright-Patterson Air Force Base, and the 1995 Dayton Peace Accord ended the fighting. *Id.* ¶ 4.

During and after the civil war, there was much interest among the citizenry and government of KSA in supporting humanitarian causes in Bosnia-Herzegovina, particularly with respect to Bosnian Muslims. In Decision No. 17419, dated 2/12/1412 (1993 Gregorian), the President of the Council of Ministers of Saudi Arabia, King Fahad bin Abdulaziz Al-Saud, decreed the formation of SHC by High Order. The same High Order named as President of SHC his Royal Highness Prince Salman bin Abdulaziz Al-Saud, a Saudi Royal Family member who is a high-ranking government official and the Governor of Riyadh Province. King Fahad vested in SHC and its President, Prince Salman, sole authority to collect donations and provide aid and humanitarian relief in Bosnia-Herzegovina, so KSA would "speak with one voice" as a nation toward Bosnia-Herzegovina. *Id.* ¶¶ 5, 6. The largest source of funding for SHC is the treasury of KSA, which has provided approximately 30 percent of the total funds used and distributed by SHC. *Id.* ¶ 24.

SHC, acting on behalf of KSA, has funded a broad range of humanitarian relief efforts and provided foreign aid directly to the Bosnian government. SHC has worked closely with the United Nations High Commission for Refugees and the United Nations Educational, Scientific and Cultural Organization, which had missions overlapping that of SHC. *Id.* ¶¶ 15-19.

SHC is an agency of KSA. A 2533 (Decl. of Dr. Mutlib bin Abdullah Al-Nafissa (Al-Nafissa Decl.) ¶ 3 (Exh. C to the Decl. of Max Huffman)). The President of the Council of Ministers has the authority to order the formation of a governmental entity such as SHC. *Id.* ¶ 4. Formation by High Order is a different procedure from that by which private charities are formed. *Id.* ¶ 5. As an agency of KSA, SHC is subject to suit in the Board of Grievances, which exercises jurisdiction over government organs' administrative decisions that are not of a sovereign nature. *Id.* ¶ 8. Actions by SHC are necessarily in keeping with the foreign, political, social, and economic policies of KSA, and properly are viewed as actions of KSA. *Id*. ¶¶ 3, 10. Prince Salman is head of both decisionmaking bodies within SHC – the Executive Committee and the Supreme Commission. A 2517 (Al-Roshood Decl. ¶ 7.) SHC is staffed primarily with civil servants on detail from other ministries of KSA. *Id*. ¶ 10.

Approximately half of all of SHC's donations have been in the form of foreign aid to the Bosnian government. *Id*. ¶¶ 12-13, 20-21. Prince Salman and the Executive Committee and Supreme Commission make discretionary decisions regarding how to spend humanitarian and foreign assistance funds. A 2534 (Al-Nafissa Decl. ¶ 9.) In no case has SHC humanitarian relief or foreign aid been given for "commercial purposes," and in no case has SHC expected, or received, anything in return for the donation of money. A 2519 (Al-Roshood Decl. ¶ 14.)

II. Allegations Relating to SHC

In contrast to the sworn statements offered by SHC with its Motion to Dismiss, Plaintiffs offered sparse allegations, which amount to nothing more than "Headline News" sound-bites and unsubstantiated assertions, designed to create impressions about some imagined role that SHC has had in supporting world terror. Plaintiffs' allegations fall into two categories: allegations about terror financing and allegations about logistical support. As to financing, Plaintiffs alleged that:

- "In a 1995 interview, Osama Bin Laden [said], 'The bin-Laden Establishment's aid covers 13 countries . . . this aid comes in particular from the Saudi High Commission.'" (Ashton Compl. ¶ 462);

- SHC "has been identified by Bosnian intelligence as a source of Taibah's funds" (Ashton Compl. ¶ 376; Burnett Compl. ¶ 298; *see* Fed. Ins. Compl. ¶ 243);

- investigators have been unable to account for approximately $41 million donated to SHC (Burnett Compl. ¶ 407; Ashton Compl. ¶ 456; Fed. Ins. Compl. ¶ 184).

These allegations at most might support a claim that SHC donations, after being given for charitable purposes, were diverted to groups that supported bin Laden in some undefined manner. They do not demonstrate a connection between SHC charitable donations and the September 11th attacks, nor do they show that SHC knew that its funds might be used improperly.

The second type of allegation made by Plaintiffs relates to the alleged logistical support SHC provided. Plaintiffs alleged that:

- SHC has been criticized by "aid agencies and Bosnian intellectuals" for importing a radical form of Islam to Bosnia (Burnett Compl. ¶ 393; Ashton Compl. ¶ 447);

- al Qaida mujihadeen fighters began entering Bosnia in 1992, "frequently disguised as relief workers for the SHC" (Fed. Ins. Compl. ¶ 183);

- The head of the Zagreb office of SHC allegedly was a member of a group that planned a 1993 bombing in Croatia (which apparently never took place) (Fed. Ins. Compl. ¶ 138);

- SHC employed an Algerian national as a language translator who is suspected of having ties to Al Qaida (Burnett Compl. ¶¶ 394-396);

- supposedly suspicious material, most notably before and after pictures of the World Trade Center, were found on a computer located in offices used by the SHC in Bosnia in a raid conducted in October 2001 (Burnett Compl. ¶¶ 404-407; Ashton Compl. ¶ 451; Fed. Ins. Compl. ¶¶ 186, 458);

- in October 2001, the Financial Police of the Federation of Bosnia Herzegovina Ministry of Finance described SHC as a "front for radical and terrorism-related activities" (Burnett Compl. ¶ 398; Ashton Compl. ¶ 452; Fed. Ins. Compl. ¶¶ 187, 459).

Like the allegations regarding SHC's financial involvement in terrorism, these allegations offer nothing to support Plaintiffs' claims that SHC is somehow responsible for the September 11th attacks. Even if the allegations are taken at face value, they show only that the SHC might have had a few rogue employees who might (or might not) have been involved in terrorism-related activities. None of the allegations demonstrates that SHC knowingly provided logistical support for al Qaida or the September 11th attacks.

Finally, in an effort to cure the obvious deficiencies with their substantive allegations, the Federal Insurance Plaintiffs make several conclusory and unsubstantiated allegations about SHC's support for al Qaida:

- SHC has served as a "fully integrated component of al Qaida's logistical and financial support infrastructure and provided material support and resources to al Qaida and affiliated FTOs." (Fed. Ins. Compl. ¶ 182);

- SHC "funneled millions of dollars to al Qaida operations in Bosnia" (Fed. Ins. Compl. ¶ 184);
- The September 11 attacks were a "direct, intended and foreseeable product of [SHC's] participation in al Qaida's jihadist campaign" (Fed. Ins. ¶ 189).

These allegations, which appear to have been created out of whole cloth, prove nothing.

III. The Proceedings Below

On June 25, 2004, SHC moved to dismiss the claims against it, arguing that it is immune from suit under the FSIA, that the district court lacked personal jurisdiction, and that Plaintiffs failed to state a claim upon which relief can be granted. Memo. in Support of SHC Mot. Dismiss. Other sovereign defendants filed motions to dismiss raising similar arguments.[2] On January 18, 2005, after extensive briefing and multiple oral arguments, the district court decided the first set of motions filed by sovereign defendants. In its Opinion, the court dismissed Their Royal

[2] The following entities and individuals filed motions with the district court raising similar FSIA arguments: KSA, Prince Sultan bin Abdulaziz Al-Saud (Prince Sultan), Prince Turki Al-Faisal bin Abdulaziz Al-Saud (Prince Turki), Prince Naif bin Abdulaziz Al-Saud (Prince Naif), and Prince Salman bin Abdulaziz Al-Saud (Prince Salman). As they explain more fully in their own briefs, some of the defendants had previously been dismissed from some of these actions in *Burnett* v. *Al Baraka Inv. & Dev. Corp*. (*Burnett II*), 292 F. Supp. 2d 9 (D.D.C. 2003), before the Judicial Panel on Multidistrict Litigation transferred all these actions to the Southern District of New York.

Highnesses Prince Sultan bin Abdulaziz Al-Saud (Prince Sultan) and Prince Turki Al-Faisal bin Abdulaziz Al-Saud (Prince Turki), as well as KSA, for lack of subject-matter jurisdiction. *In re Terrorist Attacks on September 11, 2001* (*In re Terrorist Attacks*), 349 F. Supp. 2d 765 (S.D.N.Y. 2005).[3] That Opinion discussed many issues related to SHC's then-pending motion to dismiss.

A. The District Court's January 18, 2005, Opinion

The district court commenced its FSIA analysis by recognizing that a foreign state and its instrumentalities are presumed immune from suit in the United States' courts and that the sole method for obtaining subject-matter jurisdiction is to satisfy one of the FSIA's exceptions. *Id.* at 782 (citing *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993); 28 U.S.C. §§ 1602-1607; *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989); *Robinson* v. *Gov't of Malaysia*, 269 F.3d 133, 138 (2d Cir. 2001)).[4] The district court proceeded to analyze the parties' FSIA arguments using the framework set forth by this Court in *Virtual Countries* v.

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[3] The district court also held that it lacked *in personam* jurisdiction over Prince Sultan and Prince Turki for actions taken in their personal capacities. *In re Terrorist Attacks*, 349 F. Supp. 2d at 812-814.

[4] See also *Burnett II*, 292 F. Supp. 2d at 14 (noting the unique treatment given to a motion to dismiss based on FSIA arguments, which "'provides protection from suit' and 'not merely a defense to liability'") (quoting *Foremost-McKesson, Inc.* v. *Islamic Republic of Iran*, 905 F.2d 438, 449 (D.C. Cir. 1990)).

Republic of South Africa, 300 F.3d 230, 241 (2d Cir. 2002): it required Defendants to "present a prima facie case that [they] are foreign sovereign[s]," and Plaintiffs to present evidence that one of the statute's exceptions nullifies the immunity. *In re Terrorist Attacks*, 349 F. Supp. 2d at 782 (citing *Virtual Countries,* 300 F.3d at 241).

The district court held that Prince Sultan, Prince Turki, and KSA are sovereign. It then turned to the question whether any of the FSIA's exceptions applies. The district court considered three exceptions: the commercial activity exception, 28 U.S.C. § 1605(a)(2); the state-sponsor-of-terror exception, 28 U.S.C. § 1605(a)(7); and the non-commercial tort exception, 28 U.S.C. § 1605(a)(5). Disposing of Plaintiffs' commercial activity argument first, the court held that the exception did not apply because the alleged activities – donating money to charities – were not commercial in nature. *In re Terrorist Attacks*, 349 F. Supp. 2d at 792-93. The court also held that money laundering – which the Federal Insurance Plaintiffs alleged occurred when Defendants donated money to charities known to support terrorist activities – does not fall within the commercial activity exception because that exception does not encompass illegal activities. *Id.* at 793. The district court then concluded that the state-sponsor-of-terror exception does not apply because KSA has not been designated by the United States as a terror sponsor. *Id.* at 793-94.

Turning to the next exception, the district court held that the "non-commercial tort" exception did not apply.[5] The court based its conclusion on Plaintiffs' failure to come forward with evidence demonstrating that the alleged tortious acts or omissions by the Princes or the Kingdom caused Plaintiffs' injuries. *Id.* at 798-801. It also concluded that the discretionary function exception independently barred Plaintiffs' claims. *Id.* at 801-804. As to the first point, the district court held that "there must be some facts presented to support an inference that the defendant knowingly provided assistance or encouragement to the wrongdoer." *Id.* at 801. The court considered Plaintiffs' allegations about terrorist financing and support and concluded that Plaintiffs failed to present "factual bases" for their assertions. *Ibid.* (citing *Robinson*, 269 F.3d at 146). Plaintiffs offered only conclusions, which were insufficient to circumvent the jurisdictional hurdle of the FSIA. *Ibid.*; see also *Burnett II*, 292 F. Supp. 2d at 20 (To find causation based on allegations that "Prince Turki or Prince Sultan funded * * * those who funded * * * those who carried out the September 11th attacks would stretch the causation requirement * * * not only to the 'farthest reaches of [the] common law,' but perhaps beyond, to terra incognita.")

[5] That exception allows injured parties to seek redress if a foreign sovereign commits a tort that causes injury within the United States. 28 U.S.C. § 1605(a)(5). The exception specifically excludes acts or omissions that involve discretionary decisions by the sovereign. *Id.* § 1605(a)(5)(A).

(quoting *MacArthur Area Citizens Ass'n* v. *Republic of Peru*, 809 F.2d 918, 921 (D.C. Cir. 1987)).

The district court then turned to the discretionary function "exception"[6] – a provision that preserves immunity for "claims based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the exception be abused." 28 U.S.C. § 1605(a)(5)(A). The court held that the actions allegedly taken by Prince Sultan, Prince Turki, and KSA – specifically, the treatment of and decisions regarding the donation of funds to charities – involve decision-making "at the planning level of government" that is "grounded in social, economic, and political policy." *In re Terrorist Attacks*, 349 F. Supp. 2d at 801-802; see also *Burnett II*, 292 F. Supp. 2d at 20-21 (The conduct alleged – "making recommendations to the Council of Ministers about requests for assistance * * * or, * * * deciding what disbursements should be made" – was "clearly" exercising a discretionary function, which necessarily rendered the non-commercial tort exception

[6] The discretionary function "exception" is an exception to the non-commercial tort exception to immunity. To fall within the discretionary function "exception" is to *have* immunity, whereas to fall within the exceptions to immunity (such as the non-commercial tort exception or the commercial activity exception) is to *lack* immunity. To try to avoid confusion in the two different uses of the word "exception," we will refer in the remainder of this brief to "discretionary function immunity," but that phrase means neither more nor less than the discretionary function exception to the non-commercial tort exception.

inapplicable to that conduct.) As a result, the court held that discretionary function immunity applies, and Prince Sultan, Prince Turki, and KSA retain sovereign immunity for those actions under the FSIA.[7]

B. The District Court's September 21, 2005, Opinion

On September 21, 2005, the district court – after additional briefing and another series of oral arguments – decided the next set of FSIA motions. In that Opinion, the district court dismissed Their Royal Highnesses Prince Salman bin Abdulaziz Al-Saud (Prince Salman) and Prince Naif bin Abdulaziz Al-Saud (Prince Naif), as well as SHC, for lack of subject-matter jurisdiction.[8]

The district court first considered whether SHC is an "organ, agency, or instrumentality" of KSA. *In re Terrorist Attacks II*, 392 F. Supp. 2d at 551-553. To

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[7] The district court decided additional issues in its January 18, 2005, Opinion, which, for the sake of brevity, SHC does not address here. To the extent relevant to this appeal, those issues will be addressed in the briefs of other defendants, and SHC incorporates their arguments by reference to the extent applicable.

[8] The district court also held that it lacked *in personam* jurisdiction over Prince Salman and Prince Naif for actions taken in their personal capacities. *In re Terrorist Attacks II*, 392 F. Supp. 2d at 558-559. The court did not consider whether it had *in personam* jurisdiction over SHC because its decision on sovereign immunity made resolution of that question unnecessary. Even though the district court never addressed the issue, Plaintiffs ask this Court to decide whether there is *in personam* jurisdiction over SHC. See World Trade Center Prop. & Euro Brokers Pl. Proof Br. 21-22; see also Burnett Pl. Proof Br. 55 n.12. Analysis of that issue, which would arise only if the judgment dismissing SHC on other grounds is reversed, is best performed in the first instance by the district court if there is a remand.

resolve that question, the district court considered – and gave "great weight" to – affidavits submitted by SHC regarding its status and the scope of its mission. *Id.* at 551. Relying on those affidavits, the court held that SHC made a "prima facie showing that it is a foreign sovereign." *Id.* at 553.

> Because SHC was formed by order of the Kingdom's governing body, it provides the Kingdom's aid to Bosnia, it is governed by a Saudi official, and its employees are civil servants, it is an organ of the Kingdom of Saudi Arabia.

Ibid. (citing *Filler* v. *Hanvit Bank*, 378 F.3d 213, 217 (2d Cir. 2004)). The district court also rejected Plaintiffs' argument that SHC had waived its sovereign immunity by representing itself to be a "non-governmental" entity to the Bosnian government. *Ibid.* The court found no evidence of an explicit waiver. *Ibid.*

Turning to the FSIA's exceptions, the district court concluded that the non-commercial tort exception "is the only exception relevant to the allegations * * * against SHC, Prince Salman, and Prince Naif." *In re Terrorist Attacks II,* 392 F. Supp. 2d at 553 (referencing its January 18, 2005, decision). The district court held that the non-commercial tort exception did not apply because Plaintiffs' allegations are insufficient to overcome discretionary function immunity. *Id.* at 555. Relying on "undisputed evidence" submitted by SHC, the court found that all of SHC's decisions regarding the distribution of humanitarian funds were discretionary and that it was guided by the Kingdom's policies regarding Bosnia-Herzegovina in making funding determinations. *Ibid*. Given that evidence, the court held that "SHC's alleged misuse of funds and/or inadequate record-keeping – even if it resulted in the funds going to terrorists – was the result of a discretionary function and cannot be the basis for overcoming SHC's immunity." *Ibid.* (citing *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814-15 (1984)). In light of its conclusion that SHC's actions were discretionary, the court did not decide whether Plaintiffs had carried their burden of coming forward with evidence "from which it reasonably can be inferred that the Defendants knew or should have known that their tortious actions were supporting terrorists or terrorist fronts." *Id*. at 554.

SUMMARY OF ARGUMENT

The district court properly dismissed Plaintiffs' claims against SHC for lack of subject-matter jurisdiction. The court's holdings – that SHC is an organ of KSA and is immune from suit because none of the FSIA's exceptions applies – are factually and legally correct. This Court should affirm them.

The district court concluded that SHC is a "foreign sovereign" for purposes of the FSIA because it is an "organ" of KSA. See 28 U.S.C. § 1603(a). The court had ample evidence before it to support that conclusion: Declarations submitted by SHC established that SHC was created by the King of Saudi Arabia, run by a high-ranking KSA official, staffed with KSA civil servants, treated as a governmental entity for purposes of KSA's legal system, and operated as KSA's humanitarian force in Bosnia. On appeal, the Federal Insurance Plaintiffs concede that SHC is an agency of KSA.

The Burnett Plaintiffs, on the other hand, argue that SHC should not be treated as a foreign sovereign. They contend that the district court erred because it placed undue emphasis on certain facts relevant to the organ analysis and overlooked other considerations, such as who "owned" SHC. The Burnett Plaintiffs' argument is frivolous. The district court's decision reflects careful consideration of the evidence and application of controlling precedent from this Court. Contrary to the Burnett Plaintiffs' argument, the fact that the district court focused on certain facts and failed to mention others does not undermine the soundness of its decision.

Similarly misguided is the Burnett Plaintiffs' argument that SHC waived its sovereign immunity by filing a form with the Bosnian government stating that it is a "non-governmental" entity. Even if that statement had the meaning that the Burnett Plaintiffs ascribe to it, no implied waiver exists here. As this Court has repeatedly held, implied waivers of sovereign immunity must be unambiguous, unmistakable, and related to the litigation at hand. None of those things can be said about the statement on which the Burnett Plaintiffs rely. In any event, the only evidence in the record on this point establishes that SHC's registration as a "non-governmental" entity in Bosnia means only that SHC is not part of the Bosnian government. It has no bearing on SHC's status vis-à-vis the Kingdom. Thus, there is no merit to the argument that SHC waived its sovereign immunity.

The district court properly concluded that two exceptions to the FSIA – the non-commercial tort exception and the commercial activity exception – did not apply to Plaintiffs' allegations against SHC. In the portions of their appellate briefs that relate to SHC, Plaintiffs focus on the non-commercial tort exception. They contend that the district court erred when it concluded that SHC's alleged actions were discretionary decisions to which the non-commerical tort exception did not apply. See 28 U.S.C. § 1605(a)(5)(A). Contrary to Plaintiffs' assertion, the district court was correct in holding that decisions regarding how to expend SHC funds were discretionary. Indeed, such decisions involve judgment and choice and are designed to further the policy goals of KSA. Plaintiffs' allegations regarding logistical support that was supposedly provided by individuals who were (at one time) employed by SHC are also insufficient. Those allegations, at most, show that rogue employees *might* have supported terrorists. They do not show that SHC itself took any non-discretionary actions. In any event, Plaintiffs did not allege facts sufficient to establish that SHC's actions caused the September 11th attacks. Thus, the district court properly concluded that the non-commercial tort exception did not apply.

The district court's holding that the commercial activity exception is inapplicable was also correct. On this point, SHC refers to and incorporates by reference Part I.C of KSA's appellate brief. See FED. R. APP. P. 28(i).

STANDARD OF REVIEW

This Court reviews the district court's determinations under a mixed standard of review: Conclusions of law regarding jurisdiction under the FSIA are reviewed de novo while factual findings are reviewed for clear error. *City of New York* v. *Permanent Mission of India*, 446 F.3d 365, 368 (2d Cir. 2006), petition for cert. filed, 75 U.S.L.W. 3061 (July 25, 2006) (No. 06-134) (citing *Cabiri* v. *Gov't of the Republic of Ghana*, 165 F.3d 193, 196 (2d Cir. 1999); *Shapiro* v. *Republic of Bolivia*, 930 F.2d 1013, 1016 (2d Cir. 1991)).

ARGUMENT

I. The District Court's Conclusion That SHC Is Entitled to Sovereign Immunity Under The FSIA Is Correct and Should Be Affirmed

A. SHC Is A "Foreign State"

Under the FSIA, foreign sovereigns and their agencies or instrumentalities are immune from suit in the United States. 28 U.S.C. § 1603(a). A central policy driving the passage of the FSIA was "to make it difficult for private litigants to bring foreign governments into court, thereby avoiding affronting them." *USX Corp.* v. *Adriatic Ins. Co.*, 345 F.3d 190, 207 (3d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004). The statute defines "agency or instrumentality" as (1) a separate legal person (2) that is an "organ of a foreign state" (3) and that is a non-citizen. 28 U.S.C. § 1603(b). Giving "great weight" to the sworn declarations offered by SHC regarding its sovereign status, the district court concluded that SHC satisfies each criterion: it is a separate legal entity; it is an "organ" of KSA; and it is a non-citizen. *In re Terrorist Attacks II*, 392 F. Supp. 2d at 551 (citing *Leutwyler* v. *Office of Her Majesty Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277, 287 (S.D.N.Y. 2001)).[9]

The district court was entirely correct when it concluded that SHC is an "organ" of the Kingdom.[10] Its decision was based on the sworn statements presented

[9] Plaintiffs concede – as they did in the district court – that SHC satisfies the first and third criteria of the "foreign state" test. Burnett Pl. Proof Br. 29; see also *In re Terrorist Attacks II*, 392 F.Supp. 2d at 552 ("There is no dispute that SHC is a separate legal person * * * and not a citizen of the United States or any third country").

[10] In briefing submitted to the district court, SHC argued that, if SHC was not deemed to be an "organ" of KSA, it should be considered a "political subdivision." Memo. In Support of Mot. Dismiss at 13 (citing 28 U.S.C. § 1603(a)). "[P]olitical subdivisions were intended to include 'all governmental units beneath the central government.'" *O'Connell Mach. Co., Inc.* v. *M.V. "Americana"*, 734 F.2d 115, 116 (2d Cir. 1984) (quoting 1976 U.S.C.C.A.N. 6604, 6613). Because it held that SHC was an "organ" of KSA, the district court did not reach the question whether it is a

by SHC and the various factors used by this Court in *Filler,* 378 F.3d 213. Those factors are:

> (1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds some exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law.

Id. at 217. The district court applied those factors to the evidence about SHC: It noted that "SHC was formed by order of the Kingdom's governing body," that SHC provides aid from KSA to Bosnia, and that SHC is governed by a Saudi official and staffed with civil servants. *In re Terrorist Attacks II*, 392 F. Supp. 2d at 553.

The Federal Insurance Plaintiffs *agree* with the district court's decision, Fed. Ins. Pl. Proof Br. 7 (SHC is an "agent[] of the Kingdom"); Fed. Ins. Pl. Compl. ¶ 181 (SHC "is an agency, instrumentality and organ of the Kingdom of Saudi Arabia"), yet the Burnett Plaintiffs argue that it is wrong. The Burnett Plaintiffs claim that the district court placed too much emphasis on certain factors used to determine organ status, while ignoring others. See Burnett Pl. Proof Br. 30 (citing factors used in *USX Corp.*, 345 F.3d at 209).[11] That argument is frivolous.

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political subdivision.

[11] In addition to the factors listed in *Filler*, the Third Circuit considers the level of financial support by the foreign state and the ownership structure of the entity in

As an initial matter, the Burnett Plaintiffs are wrong to assert that the district court was required to consider – as if on a check list – each and every factor that has ever been identified by *any* court as relevant to the organ analysis. That is simply not the standard. As the legislative history of the FSIA and the case law relating to sovereign status make clear, courts should use a broad and flexible analysis of organ status. *Kelly* v. *Syria Shell Petroleum Dev. B.V.*, 213 F.3d 831, 847 (5th Cir. 2000) (refusing to apply the factors "mechanically or require that all five [factors] support an organ-determination"); see also *Murphy* v. *Korea Asset Mgmt. Corp.,* 421 F. Supp. 2d 627, 640 (S.D.N.Y. 2005) ("*Filler* invites district courts to engage in a balancing process, without particular emphasis on any given factor and without requiring that every factor weigh in favor of, or against * * * FSIA immunity"), *aff'd*, No. 05-5838-cv, 2006 WL 2129701 (2d Cir. July 6, 2005). No single factor is determinative. *USX Corp.*, 345 F.3d at 209.

In any event, there was more than ample evidence on nearly all of the factors outlined by this and other Circuits to establish definitively that SHC is an organ of KSA. The Declarations offered by SHC directly address six out of the seven factors set out by this Court in *Filler* and the Third Circuit in *USX*.[12] The last factor, which

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its organ analysis. *USX Corp.*, 345 F.3d at 209.

[12] SHC offered the Declarations of Dr. Al-Nafissa and Mr. Al-Roshood in

addresses ownership structure, is wholly irrelevant to a non-corporate governmental entity like SHC. Thus, there is an abundance of evidence that supports the district court's finding of organ status.

The first factor concerns the "circumstances surrounding [SHC's] creation" and "the purpose of its activities," *USX*, 345 F.3d at 209, specifically "whether the foreign state created the entity for a national purpose," *Filler*, 378 F.3d at 217. The district court made a specific finding – amply supported in the record and not disputed by Plaintiffs – that "SHC was formed by order of the Kingdom's governing body" to "'centralize all charitable giving from the Kingdom to Bosnia-Herzegovina.'" *In re Terrorist Attacks II,* 392 F.Supp. 2d at 553.

Second, concerning the degree of supervision by the foreign state, SHC is actively supervised by the Kingdom of Saudi Arabia. See *USX*, 345 F.3d at 209; *Filler*, 378 F.3d at 217. SHC submitted evidence on this point, including the fact that

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support of its motion to dismiss. A 2516-2521; A 2533-2535. Mr. Al-Roshood is the Director of the Executive Office of SHC. His Declaration addressed the circumstances of SHC's formation and operation. Dr. Al-Nafissa is a leading governmental lawyer and member of the Council of Ministers, the highest governing body in the Kingdom. Dr. Al-Nafissa was authorized to make his declaration by King Fahad, the President of the Council of Ministers. Both Declarations provided powerful proof of SHC's status, and played a large role in the district court's analysis. *In re Terrorist Attacks II*, 392 F. Supp. 2d at 551-53. See also *Robinson*, 269 F.3d at 141 (courts should consider factual submissions, including affidavits, in relation to a party's sovereign status).

Prince Salman, a member of the Saudi Royal Family and a high-ranking government official, heads SHC's Executive Committee and Supreme Commission, both of which also include several government officials appointed by the Prince. A 2517 (Al-Roshood Decl. ¶ 7) The Burnett Plaintiffs assert that the district court failed to consider the supervision factor. Burnett Pl. Proof Br. 31. That assertion is simply wrong; it is flatly inconsistent with the district court's specific finding that SHC "is governed by a Saudi official," namely Prince Salman, who was appointed by the President of the Council of Ministers, the highest governing body in the Kingdom, to supervise SHC. *In re Terrorist Attacks II*, 392 F. Supp. 2d at 553. In any event, it is clear from SHC's factual submissions that the Kingdom, through its officials, exercises a high degree of oversight over SHC.

Third, SHC's employment policies reflect control by KSA. See *USX*, 345 F.3d at 209; *Filler*, 378 F.3d at 217. SHC employs many public employees. For instance, SHC's President is a high-ranking government official and its director is a civil servant. A 2518 (Al-Roshood Decl. ¶ 10.) In addition, SHC is staffed with other civil servants of KSA. *In re Terrorist Attacks II*, 392 F. Supp. 2d at 551. Many of these civil servant employees are "detailed from other government ministries" and their salaries "are paid by their respective ministries and administrative organs." A 2518 (Al-Roshood Decl. ¶ 10.) The district court noted that "[t]he salaries of SHC employees are paid by either the Kingdom of Saudi Arabia or out of the SHC budget"; significantly, the district court also concluded that KSA is the largest source of funding for SHC's budget, one of the sources of employee payroll. *In re Terrorist Attacks II*, 392 F. Supp. 2d at 553.

Regarding the fourth factor, whether the entity holds an exclusive right in the foreign state, *Filler*, 378 F.3d at 217, as the district court observed SHC holds the "'sole authority to collect and distribute charitable funds in Bosnia'" in accordance with the foreign policy of the Kingdom. *In re Terrorist Attacks II*, 392 F.Supp. 2d at 552; A 2517 (Al-Roshood Decl. ¶ 5).

The fifth factor, "how the entity is treated under the foreign state's law" also confirms SHC's organ status. *Filler*, 378 F.3d at 217; *USX*, 345 F.3d at 209 (referring to "the entity's obligations and privileges under the foreign state's laws"). Although the Burnett Plaintiffs complain that the district court did not consider SHC's treatment under Saudi law (Burnett Pl. Proof Br. 31), the district court clearly found that SHC could be sued in the Board of Grievances, the Kingdom's administrative court. *In re Terrorist Attacks II*, 392 F. Supp. 2d at 552. And, although SHC is subject to suit in the Board of Grievances, "decisions of a sovereign nature" made by government agencies like SHC are *not* subject to review by the

Board. A 2534 (Al-Nafissa Decl. ¶ 8.) These facts establish that KSA treats SHC as sovereign.

Finally, the sixth factor, concerning the level of financial support offered by KSA to SHC, provides additional support for the district court's decision. *USX*, 345 F.3d at 209. "The largest source of funding for [SHC] is the treasury of the Kingdom of Saudi Arabia, which has provided approximately 30% of the total funds used and distributed." A 2521 (Al-Roshood Decl. ¶ 24); see also *In re Terrorist Attacks II*, 392 F.Supp. 2d at 552 (noting that KSA is SHC's "largest source of funding"). According to Plaintiffs themselves, KSA provides "virtually all of [SHC's] funding." Fed. Ins. Compl. ¶ 181.

Ignoring the overwhelming evidence offered by SHC relating to organ status, the Burnett Plaintiffs complain that SHC "offered no information" concerning the ownership structure of the entity, the last factor considered by the Third Circuit in *USX*. Burnett Pl. Proof Br. 30. Even if we were to assume that the ownership factor is a part of this Court's inquiry, it simply makes no sense to inquire into the ownership of a non-corporate, charitable entity such as SHC. Under Plaintiffs' reasoning, a non-U.S. court would be entitled to treat the U.S. State Department or the Agency for International Development as non-sovereign because no one owns shares in those governmental entities.

Not surprisingly, non-corporate entities are routinely found immune, without any proof of their "ownership" structure. See, *e.g.*, *Transaero, Inc.* v. *La Fuerza Aerea Boliviana*, 30 F.3d 148, 153 (D.C. Cir. 1994) (military); *El-Fadl* v. *Central Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996) (individual); see also H.R. REP. NO. 94-1487, at 15-16, *reprinted at* 1976 U.S.C.C.A.N. 6604, 6614 (listing a "governmental procurement agency or a department or ministry" as examples of FSIA organs). Given the flexible, balancing nature of the *Filler* and *USX* tests, and in light of the highly persuasive evidence that SHC has offered to support its organ status, the absence of evidence regarding SHC's ownership structure is legally insignificant.

As shown above, SHC has more than met its burden of making a *prima facie* case of immunity based on its status as an organ of KSA. See *Filler*, 378 F.3d at 217.

B. SHC Has Not Waived Its Sovereign Immunity

The Burnett Plaintiffs next argue that SHC implicitly waived its immunity by "[holding] itself out as a non-governmental organization" in filings with the government of Bosnia-Herzegovina. Burnett Pl. Proof Br. 31.[13] That argument is

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[13] The Burnett Plaintiffs argue – without legal citation – that the district court should have considered SHC's representations to Bosnia-Herzegovina in deciding whether SHC was an organ of the Kingdom in the first place. But neither the *Filler* nor the *USX* court considered the entity's actions or representations as part of the threshold organ analysis. In any event, SHC's representations to Bosnia-Herzegovina that it was "non-governmental" are irrelevant to SHC's status as an organ of the Kingdom of Saudi Arabia for the same reason they fail to establish any "waiver": as

legally and factually unsupportable for two independent reasons – first, because the evidence relied on has nothing to do with this litigation, and second, because the evidence constitutes only a representation that SHC is not part of the *Bosnian* government.

Under Section 1605(a)(1), personal jurisdiction exists over a foreign state if the state waives its immunity "either explicitly or by implication." 28 U.S.C. § 1605(a)(1).[14] This Court has consistently and repeatedly held that "'the implied waiver provision of Section 1605(a)(1) must be construed narrowly.'" *Cabiri*, 165 F.3d at 201; see also *Transatlantic Shiffahrtskontor* v. *Shanghai Foreign Trade*, 204 F.3d 384, 391 (2d Cir. 2000) ("the implied waiver exception is to be construed narrowly"); *Shapiro*, 930 F.2d at 1017 ("Federal courts have been virtually unanimous in holding that the implied waiver provision * * * must be construed narrowly"). That construction is supported by the provision's legislative history. The House Report accompanying the FSIA lists three examples of implicit waiver:

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the uncontradicted evidence from the only Bosnian lawyer who has submitted competent evidence plainly shows, SHC's "non-governmental" status in Bosnia meant only that it was not part of the *Bosnian* government, and had nothing to do with being part of the *Saudi* government.

[14] As neither KSA nor SHC has explicitly waived immunity (see *In re Terrorist Attacks II*, 392 F. Supp. 2d at 553), the only dispute is whether there has been an implicit waiver of sovereign immunity.

(1) when a foreign state has agreed to arbitration in another country; (2) when a foreign state has agreed that the law of another country must govern; and (3) when a foreign state has filed a responsive pleading without raising the defense of sovereign immunity. H.R. REP. NO. 94-1487, at 18, *reprinted at* 1976 U.S.C.C.A.N. 6617. As this Court has observed, all three examples "share a close relationship to the litigation process" and "are persuasive evidence that Congress primarily expected courts to hold a foreign state to an implied waiver of sovereign immunity by the state's actions *in relation to the conduct of litigation.*" *Smith* v. *Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 243-44 (2d Cir. 1997) (emphasis added). Furthermore, all of these examples "involve circumstances in which the waiver was *unmistakable*." *Shapiro*, 930 F.2d at 1017 (emphasis added). Courts are thus reluctant to find implicit waiver "where the circumstances were not similarly unambiguous." *Ibid.*

Nowhere do the Burnett Plaintiffs offer "unambiguous" or "unmistakable" evidence of implicit waiver on the part of SHC. Instead, they rely on SHC's registration as a "non-governmental" humanitarian organization in Bosnia-Herzegovina as proof of an alleged implicit waiver. Burnett Pl. Proof Br. 32, 34. Even if that registration could be construed as an admission regarding SHC's sovereign status (which it cannot), it does not constitute an implied waiver of SHC's sovereign immunity because it has no direct connection to the litigation process. See *Shapiro*, 930 F.2d at 1017; *Smith*, 101 F.3d at 243-44. Simply registering as a non-governmental organization is hardly evidence reaching the stringent legal standard for implied waiver. Rather, the effect of so registering was merely to be permitted *to provide humanitarian aid* in Bosnia-Herzegovina. Plaintiffs do not even have a theory as to how the representation was connected to the subject matter of this litigation.

In any event, the Burnett Plaintiffs misapprehend the purpose and effect of the registration under Bosnian law. As explained in a declaration submitted to the district court by SHC, the registration statement filed with the Bosnian government attests to the fact that SHC is "non-governmental," meaning only that it is not part of the *Bosnian* government. A 2908 (Decl. of Hadzimuratovic Hajrudin (Hajrudin Decl.) ¶ 4 (Exh. A to the Decl. of Max Huffman)). As Mr. Harjrudin, a Bosnian lawyer who was a judge for more than 30 years, explained, a foreign organization like SHC is required to register as a non-governmental organization in Bosnia to clarify that it is not part of the *Bosnian* state. *Ibid*. That requirement under Bosnian law has nothing whatsoever to say about the status that a humanitarian entity may have in its foreign homeland. *Ibid*. In fact, the Bosnian government has acknowledged that SHC is part of the government of KSA. *Id*. ¶ 6. See also *In re Terrorist Attacks II*, 392

F. Supp. 2d at 552 (noting that "the head of SHC's European Office received diplomatic status in Bosnia-Herzegovina in 1996 because SHC is an organization of the Saudi government"). In sum, Plaintiffs offer no factual or legal support for their argument that SHC waived its sovereign immunity.

II. The District Court Correctly Held That Plaintiffs Failed To Establish That An FSIA Exception Applies To SHC

Once it is determined that an entity is sovereign, plaintiffs bear "the burden of producing evidence establishing that a specific exception to immunity applies." *Permanent Mission of India*, 446 F.3d at 369; *Robinson*, 269 F.3d at 141; see also *In re Terrorist Attacks*, 349 F. Supp. 2d at 547 (citing *Virtual Countries*, 300 F.3d at 241). The FSIA exceptions are narrow, and "'immunity remains the rule rather than the exception.'" *MacArthur Area Citizens*, 809 F.2d at 78 (quoting *Gibbons* v. *Republic of Ir.*, 532 F.Supp. 668, 671 (D.D.C. 1982)).

Plaintiffs argue that two FSIA exceptions apply to SHC's alleged conduct: the non-commercial tort exception and the commercial activity exception. Fed. Ins. Pl. Proof Br. 21-26; Burnett Pl. Proof Br. 29-32, 36. The district court concluded that neither exception applied. *In re Terrorist Attacks II*, 392 F. Supp. 2d at 553-555. Plaintiffs' arguments regarding the non-commercial tort exception, which are based on their allegations regarding SHC, are addressed below. To avoid unnecessary duplication in briefing submitted to this Court, SHC does not address the commercial activity exception. Instead, it incorporates by reference Part I.C of KSA's brief.[15]

The FSIA's non-commercial tort exception – on which Plaintiffs principally rely, insofar as SHC is concerned (*see* Fed. Ins. Pl. Proof Br. 26-32) – provides that a sovereign is not immune in any action:

> in which money damages are sought 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; except that this [exception] shall not apply to –
>
> > (A) 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). The exception requires a two-part analysis. First, plaintiffs must demonstrate that the defendant's alleged actions were tortious under applicable

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[15] In addition, SHC incorporates KSA's argument regarding the state-sponsor-of-terror exception, which is located at Parts I.A and I.B.1 of KSA's brief. See FED. R. APP. P. 28(i). As KSA explains, the state-sponsor-of-terror exception to the FSIA lifts sovereign immunity for entities who provide "material support or resources" for an act of "extrajudicial killing [or] aircraft sabotage." KSA Br. 19 (citing 28.U.S.C. § 1605(a)(7)(A)). Even though Plaintiffs allege that SHC provided support and resources for exactly those types of acts, the state-sponsor-of-terror exception does not apply because KSA has not been designated as a state sponsor of terror by the U.S. Department of State. The State Department's political and diplomatic decisionmaking regarding which entities constitute state sponsors of terror should be respected, and plaintiffs should not be permitted to bring their claims against foreign sovereigns under a different FSIA exception. See KSA Br. Part I.B.1.

law. See *Robinson*, 269 F.3d at 142 ("If those activities could not render the Malaysian government liable for a tort under New York law, then it remained immune under § 1605(a)(5).") (quoted in *In re Terrorist Attacks*, 349 F. Supp. 2d at 794). Plaintiffs must also establish that the actions were not discretionary, meaning that they do not involve elements of judgment or choice and are not "grounded in the social, economic, or political policies of the [KSA]." *In re Terrorist Attacks II*, 392 F.Supp. 2d at 554. Furthermore, the standard of review is not the same as the standard of review for dismissal of a complaint for failure to state a claim. Rather, the district court must resolve disputed factual issues by reference to affidavits and other matters outside the pleadings. *Robinson*, 269 F.3d at 141 n.6; *Filetech S.A.* v. *France Telecom S.A.*, 157 F.3d 922, 932 (2d Cir.1998).

Plaintiffs failed to make either required showing in the district court. They did not show that SHC committed a tort that caused Plaintiffs' injuries, and they did not show that SHC's alleged actions were non-discretionary. In the portion of its September 21, 2005, Opinion that discusses SHC, the district court focused on discretionary function immunity. "Even if Plaintiffs alleged that SHC was tortiously liable for the attacks of September 11, such allegations could not overcome the discretionary function exception." *In re Terrorist Attacks II*, 392 F.Supp. 2d at 555. The court's conclusion was based on "undisputed evidence" proffered by the SHC “that all decisions regarding the distribution of humanitarian relief funds are within the sole discretion of its Chairman Prince Salman and the advisors he selected” and are “guid[ed] by the Kingdom’s policies.” *Ibid.*[16]

In their appellate briefs, Plaintiffs argue that application of discretionary function immunity to SHC “is inconsistent with the most fundamental principles governing any discretionary function analysis.” Fed. Ins. Pl. Proof Br. 29; see also Burnett Pl. Proof Br. 53-54. Indeed, they claim that SHC’s actions “fall far outside the realm of the kinds of legitimate governmental conduct the discretionary function exception was designed to shield, as they are malevolent, illegal and violate

[16] Judge Casey’s description of the “undisputed evidence” supporting discretionary function immunity is entirely accurate. By contrast, the Federal Insurance Plaintiffs are engaged in sheer fantasy in claiming on appeal (Fed. Ins. Pl. Proof Br. 27-28) that they made “uncontested allegations” that SHC “has acted as a fully integrated component of al Qaida’s logistical and financial support infrastructure,” that it “funneled millions of dollars to al Qaida operations in Bosnia,” and so on. Not only did SHC, through the Declaration of Mr. Al-Roshood, explain in detail that it is a legitimate humanitarian organization, but also SHC submitted the results of an audit conducted in 2002 by Bosnian authorities of the disbursements of funds by SHC in 1998, 1999, 2000, and 2001. A 2204 (Al-Roshood Decl. Exh. 3.) The audit reveals in detail many categories of humanitarian aid, and expresses not one word of concern about diversion of funds from humanitarian aid to al Qaida or any other non-humanitarian purpose. It is bad enough for Plaintiffs to accuse a legitimate humanitarian organization of complicity in a vicious, murderous attack. For them to come to this Court and say that their scurrilous allegations are “uncontested” is sheer chutzpah.

international law and fundamental precepts of humanity." *Id*. at 30. Plaintiffs' broad assertions are unsupported.

Discretionary function immunity limits the reach of the non-commercial tort exception: It provides that the non-commercial tort 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). Although this Court has not defined standards for discretionary function immunity in the FSIA context, other federal courts have borrowed jurisprudence from an identical provision in the Federal Tort Claims Act (FTCA). See 1976 U.S.C.C.A.N. at 6620; *MacArthur Area Citizens*, 809 F.2d at 921-22. Courts interpreting that provision have said that discretionary acts "involve an element of judgment and choice" and are grounded in "social, economic, and political policy." *United States* v. *Gaubert*, 499 U.S. 315, 335 (1991). See also *Varig Airlines*, 467 U.S. at 814.

The district court applied this two-part discretionary function test to the allegations against SHC. Relying on the declarations submitted by SHC, the court found that "all decisions regarding the distribution of humanitarian relief funds were within the sole discretion of its Chairman Prince Salman and the advisors he selected." *In re Terrorists Attacks II*, 392 F. Supp. 2d at 555 (citing Al-Nafissa Decl.

¶ 8). In addition, the court found that "SHC was guided by the Kingdom's policies regarding Bosnia-Herzegovina in making its funding determinations." *Ibid.* (citing Al-Nafissa Decl. ¶ 3). Based on this evidence, the court concluded that SHC's actions were "the result of a discretionary function and cannot be the basis for overcoming SHC's immunity." *Ibid.* (citing *Varig Airlines*, 467 U.S. at 814; *Marchisella v. Gov't of Japan*, 2004 WL 307248, at *2 (S.D.N.Y. Feb. 17, 2004); *Kline v. Kaneko*, 685 F.Supp. 386, 392 (S.D.N.Y. 1988)). That holding is well supported by the case law. See, *e.g.*, *Macharia* v. *United States*, 334 F.3d 61, 65-67 (D.C. Cir. 2003) (holding that the FTCA's discretionary function exception to liability shielded federal official's decisions regarding how to allocate funds for embassy security).

Plaintiffs claim that the district court's holding is "inconsistent with the most fundamental principles governing any discretionary function analysis," because it fails to account for SHC's alleged "knowing and intentional sponsorship of al Qaeda." Fed. Ins. Pl. Proof Br. 29; see also Burnett Pl. Proof Br. 53 (SHC's actions do not fall within discretionary function immunity because they were contrary to and beyond the scope of SHC's mandate from KSA). But, in making this argument, Plaintiffs depart from the actual allegations contained in their complaints. Plaintiffs nowhere have alleged that SHC *committed* the September 11 attacks (as indeed it did not). Plaintiffs nowhere have alleged that SHC *ordered* the September 11 attacks (as again it of course did not) – and plaintiffs' omissions are not accidental; any such utterly false and insupportable allegations would be sanctionable under FED. R. CIV. P. 11(b)(3).

Instead, Plaintiffs' allegations about SHC (if those allegations were true, which they are not) suggest that SHC supported terrorism in two ways – by providing relief and foreign aid funds that *might* have ultimately gone to support terrorist causes and by employing individuals who *might* have provided logistical assistance to terrorists. See pp. 7-9, *supra* (reciting allegations). Neither category of allegation defeats discretionary function immunity. As to Plaintiffs' allegations regarding funding, decisions regarding where and how to distribute SHC's foreign aid and humanitarian relief were discretionary and policy-based. Those decisions were within the sole discretion of Prince Salman and his advisors, and they were made with the goal of furthering KSA's foreign policy interests. See *In re Terrorist Attacks II*, 392 F. Supp. 2d at 555 (citing Al-Nafissa Decl. ¶ 8.) Therefore, they clearly are protected by discretionary function immunity. See *ibid*.[17]

[17] In light of the fact that SHC possessed discretion regarding how to allocate its funds, discretionary function immunity applies even if SHC abused its discretion by giving funds to organizations that ultimately supported terrorists. See 28 U.S.C. § 1605(a)(5)(A) (discretionary actions are protected even if they involve an abuse of discretion).

Plaintiffs' allegations regarding logistical support are also insufficient. Even if taken as true, which they need not be in this procedural context, the allegations fail to establish that SHC – as opposed to a bad actor with some tangential connection to SHC – provided logistical support for terrorists, including al Qaida. See, *e.g.*, Fed. Ins. Compl. ¶ 183 (alleging that al Qaida mujihadeen fighters began entering Bosnia in 1992, "frequently disguised as relief workers for the SHC"); Fed. Ins. Compl. ¶ 138 (alleging that an SHC employee was a member of a group that planned a 1993 bombing in Croatia (which apparently never took place)); Burnett Compl. ¶¶ 394-396 (alleging that SHC employed an Algerian national as a language translator who is suspected of having ties to Al Qaida); Burnett Compl. ¶¶ 404-407; Ashton Compl. ¶ 451; Fed. Ins. Compl. ¶¶ 186, 458 (alleging that supposedly suspicious material, most notably before and after pictures of the World Trade Center, were found on a computer located in offices used by SHC in Bosnia in a raid conducted in October 2001).[18]

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[18] Given the dramatic nature and historic importance of the destruction of the World Trade Center, it is a fair guess that before and after pictures could be found on the hard drives of many computers all around the world. The attitude of the persons who stored the photos undoubtedly ranged from abject horror at the destruction to support for the jihadist attack. To try to draw a conclusion about even the attitude (let alone the actions) of the person who stored the images on a hard drive (let alone about that person's *employer)* is to engage in rank speculation.

The allegations of Plaintiffs' complaints do not suggest that SHC *itself* took any non-discretionary action. See 28 U.S.C. § 1605(a)(1) (non-commercial tort exception requires that the "foreign state or of any official or employee of that foreign state * * * acting within the scope of his office or employment" commit the tort). At most, they raise the possibility that a few individuals affiliated with SHC took actions – separate and apart from their duties to assist SHC in providing humanitarian assistance – that ultimately aided terrorists. See Burnett Pl. Proof Br. 54 (arguing that SHC employees took actions that fell outside of SHC's humanitarian mandate). Those allegations do not demonstrate that SHC provided logistical support to terrorists; they do not establish that any alleged assistance provided by SHC employees was given at SHC's direction or with its oversight; and they do not identify a single non-discretionary action taken by SHC. See *Howland* v. *Hertz Corp.*, 431 F.Supp. 2d 1238 (M.D.Fla. 2006) (refusing to apply the FSIA's non-commercial tort exception to the Republic of Indonesia because the tort occurred when the Republic's employees were acting outside of the scope of their employment). In sum, Plaintiffs' allegations regarding actions taken by individuals affiliated with SHC are not enough to render discretionary function immunity inapplicable to SHC. See *Attallah* v. *United States*, 955 F.2d 776 (1st Cir. 1992) (holding that customs agents' acts of robbing and murdering courier, which were taken outside of the scope of their employment, did not defeat the Government's entitlement to the FTCA's discretionary function exception for the alleged failure of the agents' supervisors).

Finally, in order to show that the non-commercial tort exception applies, Plaintiffs were required to show that SHC's actions were tortious and that they caused the September 11th attacks. See 28 U.S.C. § 1605(a)(5).[19] Unable to show that SHC was a perpetrator of the attacks, Plaintiffs rely – as they must – on concerted-action theories of liability. Under New York law, those theories require that the defendant "know the wrongful nature of the primary actor's conduct." *In re Terrorist Attacks*, 349 F. Supp 2d at 798 (citing *Pittman* v. *Grayson*, 149 F.3d 111, 122-23 (2d Cir. 1998)). In keeping with that standard, the district court held that Plaintiffs had to allege "specific facts" showing that the defendants "knowingly provided assistance or encouragement to the wrongdoer." *Id.* at 800; see also *id*. at 801 (holding that there were no "factual bases" for Plaintiffs' assertion that Prince Sultan and Prince

[19] SHC raised this argument in the district court (see Memo. In Support Mot. Dismiss 19-20), but the district court did not address it because it found that discretionary function immunity applies. On appeal, Plaintiffs do not make a causation argument directed at SHC. However, in light of their general assertions regarding what is required to state a tort claim against a foreign sovereign (Burnett Pl. Proof Br. 36-49; Fed. Ins. Pl. Proof Br. 33-39), SHC briefly addresses the causation point here.

Turki knowingly supported terrorist causes linked to the September 11th attacks).[20] It is clear that jurisdiction cannot be conferred under the non-commercial tort exception over "tort" claims that rely on an excessively attenuated chain of causation. *Ibid.*; *Burnett II*, 292 F. Supp. 2d at 19-20.[21]

Plaintiffs' factual allegations against SHC are nothing if not attenuated. As described above, Plaintiffs' allegations consist of two types of assertions: (1) that a recipient of humanitarian funds gave money to somebody else, with the result that the money ultimately supported some terrorist act; and (2) that individuals with tangential connections to SHC – not SHC itself – provided non-monetary support to al Qaida. These indirect allegations do not suffice to establish causation under even the standards espoused by the authorities on which Plaintiffs rely. See *In re Terrorist Attacks*, 349 F. Supp. 2d at 798 (citing *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1023 (7th Cir. 2002); *Halberstam* v. *Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983)).[22]

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[20] That requirement reflects the fact that the causation requirement of Section 1605(a)(5) was not meant "'to encompass the farthest reaches of common law.'" *Burnett II*, 292 F. Supp. 2d at 19 (quoting *MacArthur Area Citizens*, 809 F.2d at 921).

[21] SHC incorporates by reference the discussions of the causation requirement contained in briefs filed by other foreign sovereign defendants. See Prince Turki Br. Part II.B; Prince Sultan, Prince Naif and Prince Salman Br. Part I.C.

[22] Neither *Boim* nor *Halberstam* involve the non-commercial tort exception to the FSIA.

Indeed, in *Boim* and *Halberstam*, in contrast to this case, the plaintiffs presented detailed and specific allegations linking the defendants to the wrongdoer. See *Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d 1002, 1018 (N.D. Ill. 2001) (relying on specific factual allegations tying the defendants to Hamas, a designated terrorist organization), *aff'd*, 291 F.3d at 1000; *Halberstam*, 705 F.2d at 477 (relying on facts showing that the defendant was so intimately involved with her long-term live-in boyfriend's illegal activities that she had to have known about them). Here, Plaintiffs allege no facts showing a clear link between Plaintiffs' injuries and SHC. The best they can muster are a few conclusory and unsupported allegations regarding the "direct" and "foreseeable" link between SHC's actions and the September 11th attacks. See Fed. Ins. Compl. ¶¶182, 189. Those allegations, which are entirely lacking in factual support, are simply insufficient to establish causation for purposes of the non-commercial tort exception.[23]

[23] Plaintiffs must overcome an additional hurdle to satisfy the non-commercial tort exception: They must show that the "entire tort" occurred in the United States. See 28 U.S.C. § 1605(a)(5). SHC incorporates KSA's argument, included at Part I.B.2 of its appellate brief, on this point.

CONCLUSION

This Court should affirm the district court's judgment granting SHC's motion to dismiss for lack of subject-matter jurisdiction.

Respectfully submitted,

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January 5, 2007

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January 5, 2007

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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); 06-0459-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)

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