16-2119(L), 16-2098(CON), 16-2134(CON)

United States Court of Appeals

for the

Second Circuit

LINDE,

– v. –

ARAB BANK, PLC.

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

BRIEF FOR PLAINTIFFS-APPELLEES

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INTRODUCTION

Plaintiffs are American victims of terrorist attacks perpetrated by the U.S.-designated Foreign Terrorist Organization[1] Hamas. Beginning in July 2004, they brought claims pursuant to 18 U.S.C. §2333(a) of the Anti-Terrorism Act (1992) ("ATA") against Arab Bank for knowingly providing material support to, *inter alia*, Hamas and proximately causing those attacks.

After more than a decade of delay, largely caused by the Bank's discovery misconduct, Plaintiffs' cases finally went to trial in August 2014. At trial, the District Court carefully applied an evidence-balancing discovery sanction it crafted, after applying a "well-elaborated legal scheme," conducting a "fact-intensive inquiry" and "recogniz[ing] the legal conflict faced by Arab Bank and the comity interests implicated by the bank secrecy laws." *Linde v. Arab Bank, PLC*, 706 F.3d 92, 111, 120 (2d Cir. 2013). The District Court instructed the jury that Plaintiffs had to prove that the Bank *knowingly* provided material support to Hamas, consistent with the *mens rea* standard articulated in *Weiss v. National Westminster Bank PLC*, 768 F.3d 202, 207-08 (2d Cir. 2014), and that the Bank's acts proximately caused Plaintiffs' injuries, based on the proximate causation standard from *Rothstein v. UBS AG*, 708 F.3d 82 (2d Cir. 2013).

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[1] The Secretary of State designates Foreign Terrorist Organizations ("FTOs") pursuant to 8 U.S.C. §1189. Hamas has been designated an FTO since 1997. *See* http://www.state.gov/j/ct/rls/other/des/123085.htm.

The jury returned a liability verdict based on: largely undisputed evidence that the Bank provided millions of dollars to notorious Hamas leaders, operatives and "charities" in the period before the attacks; what the District Court characterized as "volumes of damning circumstantial evidence that defendant knew its customers were terrorists," SPA191; and overwhelming evidence that Hamas committed the attacks.

Realizing that it has no credible challenge to the sufficiency of this evidence, the Bank instead takes aim at three of this Circuit's opinions.

QUESTIONS PRESENTED

1. Did the District Court err by giving a *mens rea* instruction consistent with *Weiss*'s holding that §2333(a) requires proof that the Bank had actual knowledge that, or exhibited deliberate indifference to whether, it provided material support to a terrorist organization, and not that the Bank intended to engage in terrorism?

2. Did the District Court err by giving a causation instruction based on *Rothstein*'s holding that proximate causation requires proof that the Bank's "unlawful acts were a substantial factor in the sequence of events responsible for causing plaintiffs' injuries and that plaintiffs' injuries were reasonably foreseeable or anticipated as a natural consequence of such acts," and not that the Bank's acts were the "but-for" cause of Plaintiffs' injuries?

3. Did the District Court abuse its discretion in applying this Circuit's balancing test to impose remedial discovery sanctions by taking into account the Bank's discovery misconduct and delay, unauthorized violations of Palestinian and Lebanese bank secrecy laws, and dollar-clearing activities for Hamas through its New York branch, instead of giving dispositive weight to foreign bank secrecy laws?

4. Did the District Court deny the Bank due process when it applied remedial discovery sanctions at trial by permitting the jury to draw adverse inferences from both the evidence Plaintiffs offered and from the Bank's non-production, and by precluding the Bank from offering testimony concerning documents it withheld?

5. Does 18 U.S.C. §2333(d), codifying common law civil aiding and abetting, provide an alternative basis to affirm the jury's verdict?

STATEMENT OF THE CASE

This Court summarized the facts of this case in *Linde*, 706 F.3d at 96-103. Plaintiffs update those facts to reflect developments and the trial evidence.

1. Commencement of the Litigation and Resulting Government Investigation. In July 2004, Plaintiffs filed their initial complaint against Arab Bank under the ATA. As a direct result of the lawsuit, the Office of the Comptroller of the Currency ("OCC") and the Financial Crimes Enforcement Network ("FinCEN") investigated the Bank's then-operating New York branch ("ABNY") for failing to

monitor or report suspected terror financing.[2] In February 2005, the Bank was fined $24 million and agreed to convert ABNY into an agency that would no longer undertake U.S.-dollar clearing. JA1809-31.

2. Initial Discovery. Plaintiffs served their initial document requests on February 24, 2005, JA1689-1725, seeking, *inter alia,* records located in New York that the Bank acknowledged were not subject to foreign bank secrecy, JA1888, relating to transactions involving senior Hamas leaders; various so-called Palestinian "charities" (several identified by the U.S. government as Hamas fronts in the *United States v. Holy Land Foundation* prosecution[3]); and Specially Designated Global Terrorists ("SDGTs")[4] like HLF. *See, e.g.* JA2057. The Bank objected in part, claiming that the requests were made "without regard to when, for example, the Bank was supposed to have known that these entities were anything other than the legitimate charities that they held themselves out to be." Instead, the Bank proposed to produce ABNY records "that post-date the Holy Land Foundation indictment,"

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[2] *See* https://www.fincen.gov/sites/default/files/enforcement_action/arab081705.pdf.

[3] The Holy Land Foundation ("HLF") was convicted of providing material support to Hamas through many of the same "charities" for which the Bank held accounts. *See United States v. El–Mezain*, 664 F.3d 467, 489 (5th Cir. 2011) (noting that "[t]he evidence of Hamas control of the ... committees was substantial").

[4] SDGTs are designated under Exec. Order No. 13224, 66 Fed. Reg. 49079 (Sept. 25, 2001).

i.e., only for transactions *after* this lawsuit was filed in July 2004. JA2104-05. Even after the District Court rejected these objections, *e.g.*, JA2258-60, the Bank still delayed production. JA2451-53.

3. ABNY's Transactional Records and the District Court's Reprimand of the Bank for Delay and Obfuscation. Having received only a subset of responsive records from ABNY, Plaintiffs also requested the Bank produce all transactional records it previously produced to the OCC and FinCEN. In response, the Bank claimed ignorance of what it had given to the OCC. JA2354. In its December 13, 2006 Order, the District Court concluded that notwithstanding the Bank's prior representations, "the Bank *is* able to determine the documents which the OCC reviewed." JA2960. It ordered the Bank to produce those documents and found that the Bank's conduct "does not create confidence that reliance on other requests will be effective. Discovery in the federal courts *depends upon good faith compliance with demands*, and a party requesting documents should not be required to police its adversary's responses to its requests." JA2961-62 (emphasis added). It also chastised the Bank for "obfuscat[ing] its obligation to produce evidence of funds transfers that went through New York," even though FinCEN had found that these transfers "posed heightened risks of money laundering and terrorist financing." JA2963. The Court concluded that it was "simply not acceptable at this late date for Arab Bank to

withhold the documents showing the funds transfers through New York which plaintiffs seek to make their case." *Id.*

4. The Bank's Belated Production of the Most Relevant and Incriminating New York Records. Notwithstanding the Court's order and admonition, the Bank waited until May 2008, JA3648-49, to produce ABNY wire transfers requested in 2006 and 2007 for, among others, Hamas founders Sheikh Ahmad Yassin, JA796, Salah Shehadah, JA670, 716, and Ismail Abu Shanab, JA658, 676, 717. The Bank's unjustified delay and blanket foreign bank secrecy claims limited the ability of Plaintiffs and the District Court to tailor discovery requests, as the Magistrate Judge explained in reaffirming the May 7, 2007, production order ("May 7 Order"):

> The bank has apparently produced few if any records disclosing whether it has any account relationship at all with the entities and organizations whose records are sought. The plaintiffs and the court are thus at a loss to determine what kinds of transaction records may exist and which ones may be relevant to the issues here. Ordinarily, in a case such as this, the court would have expected to limit the defendant's discovery burden through staged discovery…. Largely because the defendant decided not to produce documents protected by bank secrecy laws, that has not happened. [JA3417]

5. Osama Hamdan's Beirut Account. Although all of the complaints identified an Arab Bank (Beirut) account number because it was used to solicit funds on Hamas's website, JA2111-15, the Bank nonetheless initially refused to produce those account records, purportedly on *relevance* grounds. JA1948-49. When the

Magistrate overruled the objection and signed a stipulated order to assist the Bank in seeking permission to disclose the account records, JA2789-92, the Bank failed to inform the Magistrate that the records were *already* in the United States because the Bank had produced them to the OCC without the Lebanese government's knowledge or consent. SPA89. Although the Bank's then-Chief Banking Officer, Shukry Bishara, had sworn in an affidavit submitted in support of the Bank's motion to dismiss that it "is not true" that the Beirut account provided banking services to Hamas directly, JA1794-95, the records produced subsequently revealed that the account was held by Osama Hamdan, a senior Hamas leader (and SDGT). Furthermore, the account ("Hamdan Account") had received multiple incoming transfers listing "Hamas" as the beneficiary, JA862-63, 1025, that a senior Bank executive had manually approved. SPA210, JA5456-57. Bishara had also sworn that the "Bank 'closed this account [and] froze the balance of its funds.'" JA1795. Only after extensive motion practice did the Bank produce records showing that it "closed the account" by issuing a cashier's check to Hamdan for $8,677.92 in 2005 – more than 18 months *after* the U.S. government designated him an SDGT. JA1666-67.

The Hamdan Account was the *only* account in this litigation for which the Bank purportedly produced its complete internal file. Plaintiffs offered those account records at trial as one basis for inferring the content of the withheld account records

of ten other designated terrorists whom the Bank admitted held accounts with it. SPA189, 221.

6. The Bank Selectively Discloses Palestinian Customer Records to Serve Its Purposes. In connection with the HLF grand jury investigation in Texas, the Bank disclosed a still-undetermined number of records to the U.S. government without obtaining permission from, or even informing, the Palestinian Authority. The Court then issued an *uncontested* finding affirming that "Defendant has previously produced documents relevant to this case in the United States without obtaining the prior formal consent of the applicable governmental authorities in Jordan, Lebanon, or the Palestinian Authority." JA2811-13. At oral argument, the Bank's lawyer acknowledged that "[t]he practical matter is, your Honor, quite frankly, is those regulatory authorities don't know about the disclosures to date in Texas." JA2897.

The Bank later explained to the Magistrate that:

> To the extent Arab Bank might be willing to risk prosecution for violations of bank secrecy when confronted with an examination by U.S. bank regulators ... or for that matter a Court Order in criminal grand jury proceedings … but not in civil cases for money damages, those are decisions influenced by a variety of factors…. includ[ing] the authority of the requesting party, the confidentiality of the proceedings, and the consequences of non-compliance.[5]

[5] *Linde v. Arab Bank, PLC*, 10-4519, ECF No. 132 at SA-184.

7. The Saudi Committee Documents. On March 24, 2006, the Bank purportedly obtained the consent of one *non*-customer, the Saudi Committee for the Support of the Intifada al Quds ("Saudi Committee"), to disclose an undefined universe of documents relating to the Committee's payments during the "Second Intifada," the violent uprising marked by suicide bombings and other terrorist attacks that commenced in October 2000. JA2471-72. The Bank's payments of between $1,325.64 and $5,333.33 were explicitly made to "martyrs," "prisoners," and the "injured" (and their families) in the Palestinian Territories whose names appeared on lists maintained in the Bank's files that Hamas compiled. Over 90% of these beneficiaries were paid *in cash* and were *not* Bank customers. JA5715. The Bank nonetheless refused to disclose its internal correspondence and the documentation used to confirm the identity of these non-customers on the ground that those documents were "account records" shielded by foreign bank secrecy. JA3689-90.

8. Production Order Overruling the Bank's Foreign Bank Secrecy Objections. When the Bank continued to resist discovery on bank secrecy grounds, Plaintiffs moved to compel. The Magistrate carefully balanced all the factors set forth in the Restatement (Third) of Foreign Relations Law of the United States §442 (1987) ("Restatement §442"), "[m]ost critically … (on the one hand) the interests of foreign governments in enforcing their laws and the potential hardship created for the Bank by its conflicting legal obligations, with (on the other hand) the interests of

the [U.S.] in enforcing its laws and plaintiffs' need for the material in pursuing their claims." *Linde*, 706 F.3d at 98. The Magistrate overruled the bank secrecy objections. JA2950-57.

9. The Rule 37(b) Discovery Sanction. When the Bank still refused to comply with the production order on bank secrecy grounds, Plaintiffs filed a Rule 37(b) motion for remedial sanctions. JA70, *Linde* ECF No. 473. The Magistrate's Report and Recommendation found that the Bank had not acted "in the utmost good faith" and concluded that "some sanction must be imposed if for no other reason than to restore the 'evidentiary imbalance'" caused by the Bank's disobedience. SPA65, 68. He recommended a (later narrowed) adverse inference instruction as to the Bank's provision of financial services and an order precluding the Bank from offering at trial any documents "or other information" it had withheld. SPA73-74. The Bank contemporaneously described that order as "carefully measured discovery sanctions." JA3741.

Reviewing these recommendations and applying the multi-factor analysis this Circuit fashioned for deciding discovery sanctions, the District Court agreed that the record did not support the Bank's "argument that it has acted in utmost good faith." SPA91. This Court later found that this assessment was not clearly erroneous. *Linde*, 706 F.3d at 116 (adding, "we can hardly conclude that Arab Bank was faultless"). The District Court reviewed the Bank's prior discovery misconduct unrelated to

foreign bank secrecy (expressly quoting its 2006 admonition to the Bank); the Bank's admitted *unauthorized* disclosures that "highlight[] the limits of its supposed good faith and cast[] doubt on its claims of hardship," SPA92; and what this Court later deemed the "uncontested" fact that the Bank's discovery tactics had produced "years of delay." *Linde*, 706 F.3d at 113.

Even though the Bank "did not voice concern" about comity in its Rule 72 objections or "suggest that comity would be affected differently by one sanction rather than another," the District Court again acknowledged that foreign law can provide "a weighty excuse" for nonproduction and emphasized the consideration that both it and the Magistrate afforded comity. SPA99-100. Nevertheless, the discovery record demonstrated that "the Bank's invocation of foreign bank secrecy laws does not preclude the imposition of the sanctions awarded, particularly in light of my finding that the Bank has not acted in complete good faith." SPA99 n.1. The discovery sanctions were, therefore, not based solely on the Bank's refusal to produce discovery based on foreign bank secrecy, or on its selective compliance with foreign laws. They were based also on the Bank's dilatory, "unacceptable," and "obfuscat[ory]" conduct unrelated to its bank secrecy claims.

The District Court also precluded the Bank from offering evidence that would find "proof or refutation" in the withheld documents, while noting that the Bank "is entitled to rely on the documents it did produce to make its case that it did not have

the required state of mind. In addition, defendant can argue to the jury that it had no knowledge that certain accountholders, whose records have been produced, were terrorists." SPA96.

10. Subsequent Pre-trial Proceedings. On March 21, 2011, the Bank sought review of the sanctions by mandamus and collateral order appeal, telling this Court that if it suffered "an adverse judgment tainted by improper sanctions … it might not survive long enough to take an appeal." AB Mandamus Brief, *Linde*, 10-4519, at 19. This Court denied the Bank's appeal and mandamus petition in April 2013. *Linde*, 706 F.3d 92. The Bank petitioned for *certiorari*, and the Supreme Court invited the views of the Solicitor General, who recommended denial of the petition. The Supreme Court subsequently denied the petition, and this Court denied the Bank's *second* mandamus petition in January 2014.

11. The Evidence at Trial. The case went to trial in August 2014, a decade after it was commenced. After a nearly seven-week trial, a jury found the Bank liable based, as the District Court noted, "on volumes of damning circumstantial evidence that defendant knew its customers were terrorists." SPA191.

For example, the evidence established that the Bank knowingly made transfers totaling at least $3.2 million to Hamas's senior leadership, SPA206, including Sheikh Yassin, Hamas's iconic founder and spiritual leader, who maintained an account at Arab Bank in Gaza until at least May 2001. JA796, SPA181. Yet, even

on appeal, the Bank repeats the claim that funds transferred to Yassin slipped through ABNY's software monitoring because of a spelling error, omitting the fact that the funds were sent to Yassin's account *at Arab Bank in Gaza.* Brief for Appellant ("AB") at 11. The jury reasonably credited the testimony of Bank employees in the Palestinian Territories who acknowledged knowing Yassin's identity, SPA183, and the Bank's Chief Compliance Officer in Ramallah who acknowledged, "Sheikh Ahmed Yassin is known throughout the world through the mass media, that he is … the head of the Hamas organization in the Palestinian Territories, and this is no secret." JA5615.

Similarly, the evidence showed that Ismail Haniyeh, Yassin's former chief of staff and later Hamas's "prime minister," also maintained an account at Arab Bank in Gaza that received payments via ABNY totaling more than $420,000. SPA211. Again, the Bank's own employee admitted that he knew Haniyeh was a Hamas leader during the relevant time period. SPA211. Similarly, the record left no doubt that the Bank knowingly provided material support to Osama Hamdan, a U.S.-designated Hamas leader and media spokesman. This trial evidence refutes the Bank's repeated refrain that it "consciously avoids dealing with known terrorists." AB7.

The Bank *admitted* that eleven of its account holders were U.S. government-designated Palestinian terrorists and terrorist organizations that received transfers

totaling over $2.5 million through the Bank *after* their designations. SPA182, 211, JA3828. Furthermore, the evidence showed that the Bank transferred Saudi Committee payments to the families of twenty-four Hamas suicide bombers, SPA182, (including five bombers who killed and injured Plaintiffs in these cases), JA5914, and to Hamas operatives who participated in twelve of the twenty-four attacks (including two involved in the June 2003 shooting attack at issue in this appeal). JA5915-18.

Finally, Plaintiffs presented a "substantial record," SPA212, of mainly ABNY documents establishing that the Bank maintained accounts in the Palestinian Territories for eleven Hamas "charities" that received more than $32 million in transfers, more than $6.5 million of which definitively passed through ABNY during the relevant time period. SPA182, 206, JA5706. Evidence of their affiliation with Hamas included not only multiple governments' findings that they were Hamas-controlled, SPA212, but also a 2001 FBI Memorandum (the "Watson Memorandum," admitted without objection) identifying five as "controlled by HAMAS" and noting that "GOI [government of Israel] analysis, as well as open source reporting, has identified that the civilian population is aware that the services being provided by the [charitable] committees … are being provided by HAMAS." JA1096-97. The District Court described these and other documents and testimony

as "a cornucopia of circumstantial evidence to support a jury finding that defendant knew or was willfully blind to the charities' Hamas affiliations." SPA213.

Because the evidence established that the Bank provided Hamas tens of millions of dollars annually during the relevant period, its chief defense was ignorance: that it did not know that its customers and payees were affiliated with Hamas. Thus, it argued that Hamas worked in secret (the "hidden Hamas" defense), JA5361; that it could not know whether its customers were terrorists unless their names appeared on the Office of Foreign Assets Control ("OFAC") list of designated terrorists (the "OFAC-only" and "routine banking" defenses), JA5369-70, repeated at AB19; and that the failure of OFAC software in New York to detect spelling variations exonerated the Bank for maintaining accounts for U.S.-designated Hamas leaders and entities in the Palestinian Territories and Lebanon. JA5345-49, repeated at AB11.

The "hidden Hamas" defense collapsed under the weight of overwhelming evidence that senior Hamas officials often rallied in public, that Hamas actually sought public credit for its "charities" (as the FBI's Watson Memorandum concluded), and that Bank employees admitted knowing the identities of senior Hamas leaders who maintained accounts at the Bank. JA5597-98, 5611-12, 5615.

Despite listing four experts[6] to challenge the connection between Hamas and the eleven "charities," JA5730-31, the Bank ultimately chose to call only Dr. Beverley Milton-Edwards. After listening to her testimony and observing the jury's reactions, the District Court concluded that "[t]he effect of cross-examination on Dr. Milton-Edwards' testimony, and its potential spillover effect on the credibility of defendant's entire case, is … hard to overstate." SPA184.

For example, she testified that these "charities" were neither controlled by Hamas nor perceived as Hamas affiliates by the Palestinian public during the relevant period, based in part on her close review of the "paraphernalia" in their offices during personal visits. SPA184, JA6379. As the District Court noted, this testimony "backfired in spectacular fashion" when "it came out on cross-examination that she could not read Arabic." SPA192-93.

Dr. Milton-Edwards also testified that one leading "charity," the Islamic Society of Gaza, was neither affiliated with Hamas nor perceived by the Palestinian public as such, after Plaintiffs' evidence showed that it received more than $2 million through its accounts at the Bank between 2001 and 2003. JA5707. She was then again impeached, this time by a passage from her own book stating, "[t]he work of the Islamic Society and the rest of Hamas's network in the decades up to, during and

[6] Jonathan Benthall, Barouch Yadid, Pinhas Shmilovitch and Beverley Milton-Edwards.

after the second intifada, when families needed it most, represented not so much a donation as an investment by Hamas, one that reached a lucrative political dividend in the 2006 election." JA6625-31, 7193.

The testimony of the Bank's own employees also undermined its "routine banking" defense. David Blackmore, former head compliance officer for Arab Bank's London branch, confirmed the obvious – that wire transfers like the one listing the beneficiary as the "family of the martyr Ibrahim Abdul Karim Beni Awda," JA883-85, were anything but routine. Memorably, Mr. Blackmore volunteered: "*We would never in a million years have dealt with a payment order such as this*." SPA183 (emphasis in original).

As the District Court noted, the OFAC-only theory, "the central tenet of the Bank's defense, was myopic. It allowed the possibility that a well-known Hamas figure could enter the Bank, be recognized as such by every employee there, and yet, if his name did not yet show up on an OFAC list, the Bank not only could, but would be required to treat him like any other non-terrorist customer. This theory not only tolerated willful blindness—it mandated it." SPA192. In any event, Mohammed Dabbour, the Bank's Senior Vice President and Director of Compliance, admitted that the Bank looked beyond the OFAC list: "[I]f upon discovering an unusual transaction by—by one of our customers as part of the investigation in the account

of our customer, we might look to see if there is any information available in the public domain. And that would be part of the investigative process." *Id.*

Plaintiffs also presented the jury with spreadsheets from Arab Bank's files listing Saudi Committee payees, their relationship to the "martyrs" whose deaths gave rise to the payments, and their causes of death – including "martyr operations." *E.g.* JA1057. The jury was then shown the videotaped deposition testimony of Mohammed Al-Tahan, one of the Bank's senior employees, who stated that he found the martyr lists suspicious only "for one reason: the Bank does not pay persons who are deceased," SPA213, and *not* because the Bank was making cash payments to the families of suicide bombers who died in "martyrdom operations." This is what the Bank continues to call "routine banking activities." AB19, 39.

12. Post-trial Proceedings. Addressing post-trial motions, the District Court exhaustively reviewed the evidence and found overwhelming support for the verdict. SPA177-88, 206-13. Thereafter, the Court selected three attacks presented during the liability trial for an initial "bellwether" damages trial.

Before that trial commenced, the parties reached a settlement that applied to *all* 597 Plaintiffs' claims in the consolidated litigation. However, as part of the settlement, the Bank reserved the right to take this appeal, and the parties therefore agreed to jointly seek a Rule 54(b) final judgment for sixteen ("bellwether") Plaintiffs' claims, solely to facilitate this appeal. Under the settlement terms, *this*

Court's decision will end the litigation and provide finality for Plaintiffs – some of whose injuries date back more than fifteen years.

Although the Bank tells this Court that the judgment "threatens the existence of one of the most important financial institutions of a key U.S. ally," AB48, it previously told its shareholders a different story. In its *Annual Report* 2015, the Bank announced that it settled the cases "upon acceptable and satisfactory terms," that it can "cover the expected financial obligations under this agreement," and that it continues to enjoy successful growth.[7]

SUMMARY OF ARGUMENT

Arab Bank knew from the beginning that discovery concerning accounts and payments for notorious Hamas leaders, Hamas "charities," families of Hamas "martyrs," and U.S.-designated Palestinian terrorists would clearly establish its liability for knowingly violating U.S. anti-terrorism laws. It therefore spent a decade withholding that evidence and obstructing and delaying production even of evidence located in the U.S.

Now that the jury has found it liable, the Bank argues that "these cases … are fundamentally not about terrorism," AB3, and that it was really held liable for refusing to violate foreign laws. It blames the verdict on the District Court's *mens*

[7] *Arab Bank Group, Annual Report* 2015 at 5, 6. http://www.arabbank.com/uploads/File/Annual%20Report%20English%202015.pdf.

rea instruction, failure to apply a "but-for" causation standard, and application of remedial sanctions that purportedly "disregard" foreign law and "sealed [its] fate." AB57. But the District Court faithfully followed this Circuit's precedents, and the Bank's appeal really asks this panel to overrule them.

The Bank's *mens rea* arguments deliberately conflate the knowledge required by §2333(a) with the objective definitional requirement of "apparent intent" set forth in §2331(1)(B). The District Court's knowledge instruction conforms to this Court's holding in *Weiss*, 768 F.3d at 207-08; the Bank's subjective intent is irrelevant. Because the Bank stipulated that Plaintiffs were injured as a result of acts of international terrorism within the meaning of §2331(1)(B), the predicate requirement of §2333(a) is satisfied, and the Bank's knowing violation of §2339B satisfies §2331(1)(B)'s apparent intent as a matter of law.

The District Court also faithfully adhered to the causation standard set forth in *Rothstein* and *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 118 (2d Cir. 2013). That standard is determined by text, context, statutory policy, and the background tort principles for multi-causal torts that the Supreme Court has consistently recognized. Applying that controlling precedent, the District Court properly rejected the Bank's untenable "but-for" theory, as has every court that has reached the issue.

The jury's verdict thus satisfied all elements of civil liability under §2333(a). In addition, the recently enacted Justice Against Sponsors of Terrorism Act ("JASTA"), Pub. Law No. 114-222, 130 Stat. 852 (2016), ADD-23-28, provides an alternative legal basis for affirming the jury's verdict, as every element of aiding and abetting liability under JASTA's newly-codified §2333(d) is satisfied by the factual findings the jury necessarily made.

Finally, the District Court properly applied this Circuit's fact-intensive multi-factor test (re-affirmed in *Linde,* 706 F.3d at 120) to fashion remedial discovery sanctions necessary to counter-balance the Bank's refusal to provide essential discovery concerning its terrorist customers. It neither ignored nor even questioned the foreign bank secrecy laws the Bank invoked. It simply balanced them against other factors, including U.S. interests in preventing terror financing by dollar-clearing transactions routed through ABNY; U.S. interests in exposing the financial transactions of customers the Bank *admitted* were U.S.-designated terrorists; the Bank's lack of good faith, "particularly" its dilatory and obfuscatory discovery misconduct unrelated to foreign laws; and the Bank's selective (and admittedly tactical) compliance with those laws.

The resulting sanctions were well within what the Supreme Court has characterized as a district court's "wide discretion" to draw inferences unfavorable *even* to a party who in good faith refuses discovery on foreign bank secrecy grounds.

The Bank itself insisted on the permissive adverse inference language to which it now objects. Moreover, preclusion of its self-serving testimony merely prevented it from unfairly offering testimony as a proxy for withheld documents, while shielding that testimony from effective cross-examination by that withholding. In any case, given what the District Court called "volumes of damning circumstantial evidence," the Bank's "myopic" and inherently implausible defenses, and the "spectacular" self-destruction of its principal expert, the District Court correctly concluded that the remedial sanctions applied at trial played little or no role in the verdict.

The Bank now asserts that the judgment below makes it "virtually impossible to operate a bank in the Middle East without incurring crushing liability," AB2, while amicus once again warns that the verdict "jeopardizes the Bank's continued existence," Brief of Amicus Curiae the Hashemite Kingdom of Jordan at 28. Neither brief discloses to this Court that the Bank has already publicly settled *all* Plaintiffs' claims on "satisfactory" terms. The hyperbole continues the Bank's decade-long effort to divert attention from its now proven liability for violating U.S. laws by knowingly providing massive material support to Hamas.

The judgment below should be affirmed.

STANDARDS OF REVIEW

Although the Bank does not expressly challenge the sufficiency of evidence for the verdict, its brief contains assertions that contradict the evidence and necessary

findings by the jury.[8] The reasonable jury standard governs attacks on the sufficiency of the evidence, *Smith v. Lightning Bolt Prods., Inc.*, 861 F.2d 363, 367 (2d Cir. 1988), and the evidence must be reviewed in the light most favorable to Plaintiffs. *Gronowski v. Spencer*, 424 F.3d 285, 291-92 (2d Cir. 2005). The Bank's brief identifies other applicable standards of review, except that the "clearly erroneous" standard applies to factual findings underlying a discovery sanction. *Daval Steel Prods. v. M/V Fakredine*, 951 F.2d 1357, 1365 (2d Cir. 1991).

Insofar as the Bank's arguments attack this Court's prior holdings in *Weiss, Rothstein,* or *Linde*, "this panel is 'bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court.'" *In re Zarnel*, 619 F.3d 156, 168 (2d Cir. 2010) (quoting *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004)).

ARGUMENT

I. THE DISTRICT COURT'S *MENS REA* INSTRUCTIONS WERE CONSISTENT WITH *WEISS,* AND §2331'S "APPARENT INTENT" ELEMENT DOES NOT DEPEND ON THE BANK'S STATE OF MIND.

The Bank argues that the District Court erred by failing to instruct the jury that the §2333(a) civil remedy "[r]equires [i]ntent to [p]articipate in [t]errorism." AB23. *See also* AB33 ("to support international terrorism"); AB35 ("to engage in

[8] This Court may look at the jury instructions, trial evidence, and summations to determine what the jury "necessarily decided" by its verdict. *See, e.g.*, *United States v. Davis*, 726 F.3d 357, 370 (2d Cir. 2013).

terrorism"). It implicitly urges this Court to reject its prior holding in *Weiss*, 768 F.3d at 206, that §2333(a) incorporates by reference the knowledge *mens rea* required by §2339B(a)(1). This argument conflates §2333(a)'s subjective *mens rea* requirement with the §2333(a) requirement that Plaintiffs' injuries result from acts of violence that bear the §2331(1)(B) objective "apparent intent" to intimidate or coerce a government or civilian population.

A. §2339B(a)(1)'s *mens rea* requirement is incorporated into §2333(a).

In *Weiss*, this Court held that ATA civil liability predicated on violations of §2339B(a)(1) requires proof that the defendant "had actual knowledge that, or exhibited deliberate indifference to whether, [it] provided material support to a *terrorist organization*." 768 F.3d at 206. Consistent with *Weiss*'s holding, the District Court instructed the jury that it had to find that the Bank "knew it was providing material support to Hamas, and that [it] also knew" that Hamas had been designated an FTO, engaged in terrorist activity, or engaged in terrorism. SPA148-49. It properly instructed the jury about the meaning of "knowingly," the designation of Hamas, and the meaning of terrorist activity or terrorism, and it emphasized that "ignorance, mistake, accident, or carelessness" is not enough. SPA144-45, 149-50.

The *Weiss mens rea* standard does not impose a "zero-tolerance" scheme of negligence or strict liability on the Bank, as it now asserts. AB30-31. "Providing routine banking services, *without having knowledge* of the terrorist activities" or

FTO designation of its customer, would not subject a bank to liability. *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 835 (S.D.N.Y. 2005) (emphasis added). But providing the same services *with knowledge* that the customer is a terrorist – the antithesis of "routine banking" – is a crime under the material support statutes. *See Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 588 (E.D.N.Y. 2005); *Strauss v. Crédit Lyonnais S.A.*, No. CV-06-0702 (CPS), 2006 WL 2862704, at *12 (E.D.N.Y. Oct. 5, 2006).

The Bank ignores the *Weiss mens rea* standard. Instead, it argues that the District Court erroneously incorporated into §2333(a) the "knowledge" standard from the "unrelated" and "entirely different" criminal material-support statute, §2339B. AB1, 17, 18, 24-25. Indeed, the Bank claims that Congress explicitly chose *not* to incorporate §2339B into §2333(a) by not specifically listing §2339B as a predicate crime. AB25.

This is a direct attack on this Court's holding that "§2339B(a)(1)'s scienter requirement [is] incorporated into § 2333(a)," *Weiss*, 768 F.3d at 208, and the unanimous case authority to the same effect.[9] The "act of international terrorism"

[9] *See, e.g.*, *Boim v. Holy Land Found. for Relief and Dev.* (*Boim III*), 549 F.3d 685, 693-694 (7th Cir. 2008) (en banc); *Abecassis v. Wyatt*, 7 F. Supp. 3d 668, 675, 676 (S.D. Tex. 2014); *In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.*, 690 F. Supp. 2d 1296, 1313 (S.D. Fla. 2010), *on reconsideration in part,* No. 08-01916-MD, 2015 WL 71562 (S.D. Fla. Jan. 6, 2015); *Strauss*, 2006 WL 2862704, at *13-14.

that §2333(a) requires to impose liability does not list *any* predicate crime. Rather, as defined in §2331(1)(A), it includes all violations of "the criminal *laws* of the United States or of any State." §2331(1)(A) (emphasis added). Furthermore, nothing in the definition limits such crimes to those that pre-dated §2333(a)'s enactment. "There is no textual, structural or logical justification for construing the civil liability imposed by section 2333 more narrowly than the corresponding criminal provisions." *Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief and Dev.* (*Boim I*), 291 F.3d 1000, 1015 (7th Cir. 2002).

B. §2331(1)(B)'s apparent intent element is not a *mens rea* requirement and is satisfied by knowing support for an FTO.

As this Court held in *Weiss*, "[t]he requirement to 'appear to be intended …' does not depend on the actor's beliefs, but imposes on the actor an objective standard to recognize the apparent intentions of actions." 768 F.3d at 207 n.6 (citing and quoting *Boim III*, 549 F.3d at 693-94). It is *not* a *mens rea* requirement; it is "a matter of external appearance rather than subjective intent." *Boim III*, 549 F.3d at 694. Contrary to the Bank's claim, there is no "plain text" in §§2339B, 2333(a), *or* 2331(1) that requires proof that it had an "Intent to Participate in Terrorism." AB23.

Nor is there any logic for such a requirement when the predicate crime is terrorism-related. Congress adopted the "apparent intent" definition "in order to distinguish terrorist acts from other violent crimes." *Boim III*, 549 F.3d at 694. *See also Abecassis*, 7 F. Supp. 3d at 676 ("to distinguish between acts of terrorism and

ordinary acts of violent crime").[10] The objective appearance requirement in §2331(1)'s definition differentiates terrorism crimes like material support for an FTO, which intrinsically demonstrate the apparent intent §2331(1)(B) requires, from non-terrorism crimes like street crimes and barroom brawls, which do not. A bank that violates §2339B by knowingly providing massive financial services to Hamas also knows that such services, "by augmenting Hamas's resources, would enable Hamas to kill or wound, or try to kill, or conspire to kill more people in Israel. And given such foreseeable consequences, such donations would 'appear to be intended ... to intimidate or coerce a civilian population' or to 'affect the conduct of a government by ... assassination'…." *Boim III,* 549 F.3d at 694. *See also Abecassis*, 7 F. Supp. 3d at 676 (holding that, by definition, any defendant who violates §2339B knows of the substantial probability that its support will facilitate terrorist acts and therefore satisfy the §2331(1)(B) apparent intent element). As a result, as this Court

[10] Before enacting the ATA, Congress drew the same distinction when it enacted what is now §2332, which makes it a crime to kill or injure a U.S. national. When Congress enacted §2332, it "did not intend that [what was then] chapter 113A reach non-terrorist violence inflicted upon American victims. Simple barroom brawls or normal street crime, for example, are not intended to be covered by this provision." H.R. Conf. Rep. 99-783 (1986), ADD-15. "To ensure that this statute is used only for its intended purpose," Congress therefore added what is now §2332(d), forbidding criminal prosecution under §2332 unless the "offense was intended to coerce, intimidate, or retaliate against a government or civilian population." *Id*. Because §2331(1)(A) by its terms includes *all* federal and even state crimes, the apparent intent requirement of §2331(1)(B) is likewise necessary to exclude ordinary non-terrorism crimes.

noted in *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 68-69 (2d Cir. 2012), "[t]he Seventh Circuit, and several district courts in this Circuit, have concluded that a defendant's violation of the criminal material-support statutes ... constitutes an act of 'international terrorism' within the meaning of section 2331(1)." In fact, *every court*[11] but one[12] that has reached the issue has so held.

As courts have held in construing intentional tort exclusions in insurance contracts, for particularly injurious tortious conduct, "cause and effect cannot be separated; ... to do the act is necessarily to do the harm which is its consequence…." *Allstate Ins. Co. v. Mugavero*, 589 N.E.2d 365, 369 (N.Y. 1992). "In such cases, if the act is intentional, so is the harm, and the courts will not inquire into the perpetrator's subjective intent to cause the injury." *Dodge v. Legion Ins. Co.*, 102 F.

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[11] *See Boim I*, 291 F.3d at 1015 (violations of *either* §2339A *or* §2339B "would certainly be sufficient" to meet §2331's requirements); *Abecassis*, 7 F. Supp. 3d at 675-76; *Goldberg v. UBS AG*, 690 F. Supp. 2d 92, 113-14 (E.D.N.Y. 2010) (cataloging other statutes that treat material support as a terrorism crime, and finding that "[t]he issue is not one on which there exists a substantial ground for difference of opinion"); *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 268 (E.D.N.Y. 2007); *Strauss*, 2006 WL 2862704, at *1; *Weiss v. National Westminster Bank PLC*, 453 F. Supp. 2d 609, 613 (E.D.N.Y. 2006); *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 49 (D.D.C. 2010).

[12] The lone exception is *Stansell v. BGP, Inc.*, No. 8:09-cv-2501-T-30AEP, 2011 WL 1296881, at *9 (M.D. Fla. Mar. 31, 2011), where the court, ruling on a motion to dismiss, erroneously relied on the subjective intent of the defendants as pled by the plaintiffs. As the *Abecassis* court subsequently correctly concluded in rejecting *Stansell*, "[t]he subjective intent of the defendant is not relevant" to §2331(1)(B). *Abecassis*, 7 F. Supp. 3d at 676.

Supp. 2d 144, 151 (S.D.N.Y. 2000). In enacting §2339B, Congress also expressly found that cause and effect of material support for an FTO cannot be separated: "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any contribution to such an organization facilitates that conduct*." Pub. Law No. 104-132 §301(a)(7), ADD-18-19 (emphasis added). *See Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (concluding that the congressional finding was "justified," *id.* at 29, and entitled to "significant weight," *id.* at 36, because providing material support to an FTO in any form "furthers terrorism … in multiple ways," *id.* at 30). Providing material support for an FTO is a tort whose cause (the Bank's knowing support for Hamas) is inseparable from its effect (Hamas's acts of terrorism).

For precisely these reasons, Congress devised §2339B's *mens rea* to preclude any knowing supporter of an FTO from asserting a benign intent defense. *See Weiss*, 453 F. Supp. 2d at 625-26. Therefore, once a jury finds that a defendant knowingly violated §2339B, it need not make an additional finding regarding the defendant's motive for engaging in the knowing misconduct the statute prohibits. Rather, Congress has found that knowingly providing material support *always* facilitates an FTO's terrorist acts. In arguing that its violations of §2339B do not even *appear* to

be intended to further terrorist purposes, the Bank seeks to resurrect the benign intent defense that Congress unequivocally rejected.[13]

Finally, the jury found not only that the Bank violated §2339B, but that the Bank's unlawful acts "were a substantial factor in the sequence of events responsible for causing plaintiffs' injuries *and that plaintiffs' injuries were reasonably foreseeable or anticipated as a natural consequence of such acts*." SPA150 (emphasis added). The Court also instructed the jury that the parties had stipulated that each of the attacks at issue was an act of international terrorism within the meaning of §2331(1) and thus carried the apparent intent of §2331(1)(B). SPA146. The jury found that Hamas committed the attacks. No reasonable jury could find that Arab Bank knowingly violated §2339B, *and* that this conduct was a substantial and foreseeable cause of Plaintiffs' injuries, yet still conclude as "a matter of external

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[13] The Bank argues that a violation of §2339B is not an "act of international terrorism" under §2333(a) because the two sections employ different definitions of "terrorism." AB26. Section 2331(1)(B) defines acts of international terrorism in part as acts that appear to be intended "to intimidate or coerce a civilian population," "to influence the policy of a government by intimidation or coercion" or "to affect the conduct of a government by … assassination, or kidnapping." Section 2339B(a)(1) incorporates by reference statutes that define "terrorism" as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups" and "terrorist activity" as seizing or threatening to kill someone "to compel ... a government organization" to do something. *See* 18 U.S.C. §2339B(a)(1) (incorporating 22 U.S.C. §2656f(d)(2) and 8 U.S.C. §1182(a)(3)(B)(iii)(II), respectively). To credit the Bank's argument, this Court would have to find that "acts of international terrorism" are not "terrorism" or "terrorist activity," and that Congress did not intend to accord a civil remedy to American nationals injured by "terrorism" or "terrorist activity."

appearance" that the same conduct did not carry the apparent intent §2331(1)(B) describes. *Abecassis*, 7 F. Supp. 3d at 676 (holding that donations appear to be intended within the meaning of §2331(1)(B) "when a donor knows the terroristic aims and activities of its recipient and when it is foreseeable that the donations will advance such terroristic aims").

II. THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY CONCERNING CAUSATION.

The District Court instructed the jury that to show proximate causation,

> [P]laintiffs must show that the defendant's unlawful acts *were a substantial factor in the sequence of events responsible for causing plaintiffs' injuries* and that plaintiffs' injuries were *reasonably foreseeable or anticipated as a natural consequence* of such acts. An injury is proximately caused by unlawful activity only when the activity, in natural and continuous sequence produces or contributes substantially to producing, such injury. In other words, the unlawful activity at issue must be a substantial and identifiable cause of the injury that plaintiffs claim. Activities that are too remote, too indirect, or too attenuated are insufficient. [SPA150 (emphasis added).]

This instruction encompassed both causation-in-fact ("substantial factor") and legal causation (foreseeability),[14] and tracked *Rothstein*'s causation standard nearly verbatim.[15] Nevertheless, the Bank asserts that this standard "eschewed the statute's

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[14] *See* Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, *The Law of Torts* §200 (2d ed. 2016) (noting that "proximate cause" is used both to refer to the two prongs of causation and, more narrowly, to refer just to foreseeability).

[15] "Central to the notion of proximate cause is the idea that a person is not liable to all those who may have been injured by his conduct, but only to those with respect to whom his *acts were a substantial factor in the sequence of responsible causation*

requirement of but-for causation" by failing to inform the jury that Plaintiffs must "trace[] the money provided by the Bank to the specific attacks," AB1, 45, and therefore created "*de facto* strict liability" for "routine banking services" in disregard of *Rothstein* and *In re Terrorist Attacks*. AB37-39, 47.

A. The ATA and the background tort principles which it incorporates do not require Plaintiffs to prove but-for tracing causation.

While the Bank cites a purported "wall of authority" for strict "but-for" causation *from other statutory regimes*, the wall of *ATA authority* is solidly against the Bank's position, as every court that has considered this argument has rejected it.[16]

The ATA civil remedy imposes liability up the "causal chain of terrorism" to "imperil the flow of money." S. Rep. No. 102-342 (1992), ADD-2. FTOs do not maintain firewalls or use transparent accounting to enable tracing of their fungible

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and whose injury was reasonably foreseeable or anticipated as a natural consequence." *Rothstein*, 708 F.3d at 91 (citing *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 123 (2d Cir. 2003)) (emphasis in original).

[16] *See, e.g., Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 474, 507-08 (E.D.N.Y. 2012); *Strauss v. Credit Lyonnais, S.A.*, 925 F. Supp. 2d 414, 433 (E.D.N.Y. 2013); *Stansell*, 2011 WL 1296881, at *9 n.5 ("Defendants have suggested that the Court adopt a 'but for' causation requirement. However, the Court is unaware of, and Defendants fail to point to, any ATA case in which such strict causation is required. In fact, many courts considering the ATA have definitively held that but for causation is not required."); *In re Chiquita Brands Int'l, Inc.,* 690 F. Supp. 2d at 1314; *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 429 (E.D.N.Y. 2009); *Weiss*, 453 F. Supp. 2d at 631-32.

assets by purpose or use; they use funds raised for non-terrorist purposes either to finance the purchase of arms and explosives or to free up other resources for such purposes; and even the funds they use for non-terrorist purposes help to legitimate them and thus recruit candidates for terrorism. *Holder*, 561 U.S. at 29-31. For this reason, Congress found, as noted above, that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any contribution to such an organization facilitates that conduct*." ADD-18-19 (emphasis added). For the same reason, their terrorist activity cannot usually be traced to specific contributions or funds. SPA206. A "but-for" requirement would therefore effectively nullify the ATA civil remedy by requiring evidence of an unprovable tracing of funds along the causal chain of terrorism. That is why no court has adopted the Bank's "but-for" formulation.

The Bank dismisses this uniform ATA authority as errant judicial policy-making that ignores RICO case law. AB42-44. But proximate cause is "always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent." *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 235 (2d Cir. 1999) (citation omitted). Congress intended the ATA civil remedy to incorporate the full range of traditional tort law "because the fact patterns giving rise to such suits will be as varied and numerous as those found in the law of torts," ADD-4, and "but-for" causation is only "one of the

traditional background principles 'against which Congress legislate[s].'" *Burrage v. United States*, 134 S.Ct. 881, 889 (2014) (citation omitted). In fact, the Supreme Court emphatically declared that "alternative and less demanding causal standards are necessary in certain circumstances to vindicate the law's purposes." *Paroline v. United States*, 134 S.Ct. 1710, 1724 (2014).

Such circumstances exist "when multiple sufficient causes independently, but concurrently, produce a result." *Burrage*, 134 S.Ct. at 890. *See also Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S.Ct. 2517, 2525 (2013) (recognizing an exception to but-for causation "for cases where an injured party can prove the existence of multiple, independently sufficient factual causes") (citing Restatement (Third) of Torts: Liability for Physical and Emotional Harm ("Restatement Torts") §27 and cmt. b (2010).

ATA claims based on a defendant's provision of funds to terrorists who obtain financing from multiple sources provide the quintessential example of multi-causality. *See Boim III,* 549 F.3d at 697-99. As the Supreme Court observed in *Paroline*, "[I]t would be nonsensical to adopt a rule whereby individuals hurt by the combined wrongful acts of many … would have no redress, whereas individuals hurt by the acts of one person alone would have a remedy." 134 S.Ct. at 1724. Contrary to the Bank's assertion, *Paroline* is no outlier. "There is near-universal recognition

of the inappropriateness of the but-for standard for factual causation when multiple sufficient causes exist." Restatement Torts §27 reporter's note for cmt. a.

In such cases, courts instead invoke the "substantial factor" test. *See* Dobbs, §189. The District Court therefore properly quoted *Rothstein* in instructing the jury that it had to find that the Bank's acts "were a substantial factor in the sequence of events responsible for causing plaintiffs' injuries." SPA150. The Court even twice re-emphasized that proximate causation is shown "*only* when the activity, in natural and continuous sequence produces or contributes *substantially* to producing, such injury," and that "the unlawful activity at issue must be a *substantial and identifiable cause* of the injury…." *Id.* (emphasis added). As in *Paroline*, it would be nonsensical to adopt a but-for rule that would immunize Arab Bank's conduct simply because Hamas also obtained funds from other sources.

B. The *Rothstein* causation standard adopted by the District Court does not create "strict liability."

The District Court's instruction also properly included legal causation, again tracking *Rothstein. See* 708 F.3d at 91 (quoting *Lerner*, 318 F.3d at 123). *Rothstein* rejected the plaintiffs' novel theory in that case that causation must be presumed from what they called a *per se* statutory violation. 708 F.3d at 94. The Court then provided non-exclusive examples of allegations that would have satisfied the causation pleading standard, including allegations that defendant "provided money to [FTOs] Hizbollah or Hamas." *Id*. at 97. *In re Terrorist Attacks* similarly found

that the pleadings lacked non-conclusory allegations that the defendant bank actually provided funds to Al Qaeda, or that it *knew* that one account holder had done so. *See* 349 F. Supp. 2d at 832-33, *aff'd*, 714 F.3d at 124.

In contrast, the evidence presented at trial showed, for example, that in the year before the 2002 Café Moment suicide bombing, the Bank transferred more than $14 million to the Arab Bank accounts of the eleven Hamas "charities." JA5707. That same year, the Bank paid almost $4 million to families of martyrs and more than $14 million to "prisoners." JA5716. Finally, in 2001 alone, ABNY transferred close to $3 million to senior Hamas leaders in the Palestinian Territories, including Hamas founder, Sheikh Yassin, and the head of its terror apparatus, Salah Shehadah. JA5720, 5912-13. From such evidence, the jury reasonably concluded that providing Hamas with millions of dollars in the months preceding a Hamas terrorist attack was a substantial factor in the sequence of events responsible for causing Plaintiffs' injuries, and that terror attacks like the 2002 Café Moment suicide bombing were the reasonably foreseeable consequence of that conduct. Similarly, the two attacks in 2003 were preceded in 2002 by "martyr payments" totaling $3.9 million and $11 million transferred to Hamas "charities." JA5707, 5714, 5716. In addition, two of

the terrorist operatives involved in the June 2003 roadside shooting previously received "prisoner" payments in 2001 payable to their fathers. JA878, 896, 5918.[17]

For all three attacks, these amounts were both sufficiently large and proximate in time to the attacks to allow a reasonable jury to find that the Bank's actions satisfied the *Rothstein* causation standard and to refute the Bank's feigned concern that "even a single transfer can render a bank liable for hundreds of terror attacks occurring into the indefinite future…." AB47.

III. THE NEWLY ENACTED §2333(d) PROVIDES A COMPLETE ALTERNATIVE LEGAL BASIS FOR AFFIRMING THE JUDGMENT.

In September 2016, Congress enacted JASTA, which provides a cause of action for Americans injured by an act of international terrorism "committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization …, as of the date on which such act of international terrorism was committed, planned, or authorized…." §2333(d), ADD-26. Under §2333(d), "liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance, … the person who committed such an act of

[17] The Bank downplays these payments, presumably because they were not paid directly to the Hamas operatives in their own names. AB20.

international terrorism." ADD-26.[18] This Court may affirm a judgment on any basis supported by the record, *Kovaco v. Rockbestos-Surprenant Cable Corp.*, 834 F.3d 128, 135 (2d Cir. 2016), including an intervening statute. *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 172-73 (2d Cir. 1967). Section 2333(d) provides a complete alternative legal basis for affirming the judgment below.

Congress enacted §2333(d) to codify the common law secondary liability that *Rothstein* and *Boim III* had rejected for §2333(a) claims, in order to "provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against persons, entities, and foreign countries, wherever acting and wherever they may be found, that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States." JASTA §2(b), ADD-25.

Congress also expressly found that *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), a comprehensive opinion regarding civil aiding and abetting and conspiracy, "provides the proper legal framework for how such liability should function in the context of" the ATA. JASTA §2(a)(5). In *Halberstam*, Hamilton was sued for aiding and abetting her boyfriend, who murdered a doctor during a burglary. Although she assisted only by laundering the proceeds and keeping the books, knew

[18] JASTA applies to any action pending on the date of its enactment (September 28, 2016) arising out of injuries sustained on or after September 11, 2001. JASTA §7.

only that her boyfriend committed criminal activity at night, and never intended to assist any killing, the court held her civilly liable for aiding and abetting the murder. 705 F.2d at 488.

Here, the Bank stipulated that Plaintiffs were injured by reason of acts of international terrorism that meet the statutory definition set forth in §2331, and the jury found that Hamas injured each Plaintiff. SPA146. These findings satisfy the first element of aiding-abetting liability, that "the party whom the defendant aids must perform a wrongful act that causes an injury." *Halberstam,* 705 F.2d at 477.

The jury further found that the Bank knowingly provided material support to Hamas (an FTO), SPA148-150, and that its support "substantially contributed to [each Plaintiff's] … injury," SPA151. These findings satisfy the requirements that "the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance" and "must knowingly and substantially assist the principal violation." *Halberstam,* 705 F.2d at 487-88. The Bank asserts that §2333(d) requires specific intent, AB28, but *Halberstam*, not criminal aiding and abetting case law, governs §2333(d) claims.

Whether assistance is substantial depends in part on the amount and timing of the assistance. *Halberstam*, 705 F.2d at 478. In *Halberstam*, although the amount of assistance Hamilton gave her boyfriend "may not have been overwhelming as to any given burglary in the five-year life of this criminal operation, it added up over time

to an essential part of the pattern." *Id*. at 488. Here, too, the "Plaintiffs' theory of the case, *accepted by the jury*, is that defendant engaged in *a lengthy course of conduct* that provided material support to Hamas." SPA226 (emphasis added).

Finally, *Halberstam* noted "that a person who assists a tortious act may be liable for other reasonably foreseeable acts done in connection with it." 705 F.2d at 484. Liability does not require "but-for" causation. *Id*. at 482-85. In *Halberstam,* Hamilton's bookkeeping was obviously not a "but-for" cause of the murder. Instead, the court held that "when she assisted [her boyfriend], it was enough that she knew he was involved in some type of personal property crime at night—whether as a fence, burglar, or armed robber made no difference—*because violence and killing is a foreseeable risk in any of these enterprises*." *Id*. at 488 (emphasis added). Because violence and killing are equally foreseeable risks of providing large sums of money to Hamas while it is committing repeated terror attacks, JASTA's aiding-abetting liability provides an alternative basis for sustaining the jury's verdict. SPA150.

IV. THE DISTRICT COURT'S MEASURED APPLICATION OF THE LONG-ESTABLISHED MULTI-FACTOR BALANCING TEST FOR DISCOVERY DISPUTES IMPLICATING FOREIGN LAW WAS NOT AN ABUSE OF DISCRETION.

The Bank argues that the District Court abused its discretion by "misappl[ying] the required comity analysis" both in ordering the Bank to produce documents and in fashioning the remedial discovery sanctions it applied at trial. AB48. On the Bank's first appeal, this Court found that the District Court applied

the "existing legal framework" involving a "well-elaborated legal scheme and a fact-intensive inquiry" for deciding an appropriate sanction for a foreign party's violation of a discovery order. *Linde,* 706 F.3d at 120.[19] This Court also found that the District Court "carefully explained" its application of that framework, *id*. at 102, and that, "[i]n general, the careful application of Restatement § 442 will faithfully adhere to the principles of international comity." *Id.* at 111. In addition, this Court found that the District Court's opinion "did not reflect a disregard for [foreign states'] interests" in "enforcing the bank secrecy laws," and that it "recognized the legal conflict faced by Arab Bank and the comity interests implicated by the bank secrecy laws." *Id.*

The Bank therefore retreats to three narrower grounds for its comity-based attack on the District Court's order. First, it claims that the Magistrate and two District Judges all abused their discretion by failing to give dispositive weight to foreign interests in protecting bank secrecy. AB48-50. Second, it claims that "[i]t was sanctioned *simply* for obeying the criminal laws of the foreign nations" and for disclosing documents to the U.S. government in "coordinated multi-government investigations." AB52-53 (emphasis added). Finally, it asserts that *In re Vitamin C*

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[19] *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522, 544 n.28 (1987), approved a multi-factor test now reflected in Restatement §442. This Circuit has added the non-producing party's good faith and hardship (including its risk of prosecution for compliance) as factors relevant to the §442 analysis. *Linde,* 706 F.3d at 109-110 (citing, *inter alia*, *Minpeco S.A. v. Conticommodity Servs., Inc.,* 116 F.R.D. 517, 523 (S.D.N.Y. 1987)).

Antitrust Litig., 837 F.3d 175 (2d Cir. 2016), rejected the long-established legal framework approved by this Court in *Linde*, retroactively making the District Court's careful application of that framework an abuse of discretion.

A. The sanctions applied at trial primarily implicated accounts belonging to terrorists who received material support through ABNY in the United States.

The Bank's brief emphasizes the privacy interests protected by the laws of Middle Eastern jurisdictions, focusing solely on the "sensitive information … [including] political … affiliations" of customers and other payment beneficiaries *there*. AB49. It dismisses the U.S. interests embodied in the ATA remedy by asserting that it is "hardly the primary or most effective tool" for combating terrorism. AB52. Yet the U.S. government has itself emphasized that the ATA is "an effective weapon in the battle against international terrorism," Brief for the United States as Amicus Curiae Supporting Affirmance, *Boim v. Quranic Literacy Institute,* 2001 WL 34108081, at *2 (7th Cir. Nov. 14, 2001), as has this Court. *See, e.g.*, *Linde,* 706 F.3d at 112 ("[t]he District Court here appropriately recognized the important U.S. interests at stake in arming private litigants with the 'weapons available in civil litigation' to deter and punish the support of terrorism," including "'[s]ubpoenas for financial records, [and] banking information [of alleged terrorists]'") (brackets in original; citation omitted).

In any case, the U.S. interest in the ATA remedy is not the *only* U.S. interest implicated. The Bank pointedly ignores the U.S. interest in preventing Hamas from utilizing ABNY to process its U.S.-dollar payments. In fact, more than 85% percent of the actual wire transfer records admitted at trial were transactions the Bank *purposefully* directed *through the U.S.*, and it was the Bank's failure to properly monitor suspected terrorist financing *through ABNY* that prompted the FinCEN fine[20] and conversion of ABNY to an agency. JA1819.

When the Bank knowingly used ABNY as a vehicle for Hamas transactions, it had to "confront the choice … to 'surrender to one sovereign or the other the privileges received therefrom' or, alternatively … to accept the consequences." *United States v. First Nat'l City Bank*, 396 F.2d 897, 905 (2d Cir. 1968) (citation omitted). That choice was of the Bank's own making. No principle of comity allows a bank to violate U.S. laws by clearing transactions for Hamas through a profitable U.S. branch for which it freely accepted operating privileges, yet evade accountability by shielding the accounts of hundreds of Hamas customers and cash beneficiaries under the cover of foreign laws. *See SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 119 (S.D.N.Y. 1981).

[20] *See* https://www.fincen.gov/sites/default/files/enforcement_action/arab081705.pdf.

Furthermore, the Bank misstates even the foreign interests at issue. First, its reference to "full account records for more than 15,000 customers," AB49, refers chiefly to Saudi Committee beneficiaries, over 92% of whom were paid in cash and were *not customers* of the Bank. JA5715. The Bank has never cited any legal authority stating that the privacy protections afforded accountholders in the Palestinian Territories apply equally to non-customer cash recipients, and the Palestinian Authority's submissions to the District Court were silent on this issue. *See, e.g.,* JA3823-24, 3045-52, 3066-67. Yet the Bank declined to disclose its internal correspondence and the documentation used to confirm the identity of these non-customer Saudi Committee beneficiaries on the ground that they were "account records" and therefore shielded by (presumably) Palestinian bank secrecy laws. JA3689-90.

More importantly, the Bank withheld account records of ten designated Palestinian terrorists. Although the Solicitor General erroneously believed that the Bank only *allegedly* maintained accounts for designated terrorists (Brief for United States as Amicus Curiae, *Arab Bank, PLC v. Linde*, 134 S.Ct. 2869 (2014), JA5242), and the Bank even now asserts that Plaintiffs merely *argued* that the Bank maintained such accounts, AB35, the Bank *admitted* this fact in sworn answers to interrogatories. SPA93. Still, it produced records for only one of them, the Hamdan Account. The "political … affiliations (through donations) … and, most obviously,

financial condition," AB49, of such designated terrorists are not privacy interests entitled to protection; they are criminal affiliations that go to the heart of the ATA civil remedy.

The Bank nonetheless insists that discovery must be compatible with foreign law, citing *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 269 (2010) and *Microsoft Corp. v. United States*, 829 F.3d 197, 221 (2d Cir. 2016). AB53. But in both cases, the underlying statutes did not have extraterritorial reach. The ATA, in contrast, expressly has that reach, as *Microsoft* itself affirmed. *Microsoft*, 829 F.3d at 211 (citing *Weiss*, 768 F.3d at 207 n.5 (finding that "Congress clearly expressed its intention for § 2333(a) to apply extraterritorially")). "When Congress has manifested clear intent that a statute apply extraterritorially, it will generally apply extraterritorially *regardless of whether there is a risk of conflict with foreign law*." *Weiss*, 768 F.3d at 211 (emphasis added). Thus, no basis exists for the Bank's contention that Congress intended the reach of discovery in §2333(a) actions to fall short of the scope of the §2333(a) civil remedy, especially when the Bank invokes foreign law to protect the privacy of admitted U.S.-designated terrorists.

B. The District Court based the sanctions order on *both* the Bank's discovery misconduct unrelated to its bank secrecy claims *and* on its tactical violation of foreign bank secrecy laws.

The record does not support the Bank's claim that it was sanctioned *simply* for obeying foreign bank secrecy laws. AB53. The District Court properly

considered *all* of the Bank's discovery conduct in rejecting its claim that it had acted in good faith. SPA91-92. *See Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1068 (2d Cir. 1979) (upholding preclusion sanction and holding that "sanctions must be weighed in light of *the full record in the case*") (citation omitted) (emphasis added). That conduct included the Bank's dilatory and obfuscatory discovery misconduct entirely unrelated to bank secrecy, summarized *supra* at 5-6. In considering that record, the District Court heeded this Court's reminder that acts that hinder discovery can support an inference that withheld documents might be adverse to a party, "*even if those acts are not ultimately responsible for the unavailability of the evidence*." *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 110 (2d Cir. 2002) (emphasis added) (finding that lower court erroneously failed to consider the non-producing party's "purposeful sluggishness").

Furthermore, although the District Court based its sanctions order in part on the Bank's prior disclosure of some records to U.S. authorities, the Bank misstates the record of this "selective compliance," AB52, as did the Solicitor General. JA5250-51. While a subset of the Bank's disclosures to the U.S. government resulted from a Mutual Legal Assistance Treaty request to the United Kingdom, JA5492-94, and was therefore authorized by a British court, the remaining disclosures were *not* part of a "coordinated multi-government investigation[]," AB52, made under the

"auspices" or with "approval by governmental authorities" pursuant to foreign bank secrecy "exceptions." JA5251-52.[21] Instead, as summarized *supra* at 8, the Bank disclosed Palestinian account records without even notifying the Palestinian Authority, let alone obtaining its formal (or informal) permission. These disclosures violated the very bank secrecy laws the Bank now relies upon in its comity argument. In fashioning an appropriate sanction, the District Court was entitled to take the Bank at its word when it admitted that it made these disclosures without notice or permission, and consequently to take into account the Bank's "selective compliance," admitted "willing[ness] to risk prosecution" (the Bank's own words), and its non-prosecution.

C. This Court's decision in *In re Vitamin C* did not *sub silentio* overrule the long-established multi-factor balancing test that the District Court properly employed.

In *In re Vitamin C*, this Court held that in determining whether a true conflict of substantive law existed, a district court should accept a foreign state's formal

[21] The Solicitor General's factual errors in characterizing the basis for the sanctions order (including his failure to realize that the Bank *admitted* holding accounts for eleven designated terrorists) should make the Court "wary of giving too much credence to the Solicitor General's brief because it demonstrates that the Solicitor General goes beyond explaining federal foreign policy and appears to make factual determinations." *Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712, 724 (9th Cir. 2014). As *Von Saher* recognized, "the Solicitor General's role in addressing how a matter may affect foreign policy" does not "extend[] to making factual findings in conflict with the allegations in the complaint, the record and the parties' arguments." *Id.*

submission regarding the content of its law, and then consider it under Restatement (Third) of Foreign Relations Law §403 (1987) ("Restatement §403") in deciding whether to abstain from hearing the case. Regarding that conflict, this Court held that the district court "confuse[d] the question of what Chinese law required with whether the vitamin C regulations were enforced." *In re Vitamin C*, 873 F.3d at 192.

Here, however, the District Court, applying a *different* balancing test, never questioned what foreign bank secrecy laws required. Instead, it balanced the weight of the interests reflected in those laws against U.S. interests favoring disclosure, the importance of the withheld discovery, the Bank's absence of good faith, potential hardship for the Bank, among other factors. As this Court found in *Linde*, 706 F.3d at 98, 120, the District Court applied the appropriate balancing test, Restatement §442, to decide the discovery sanction, and not the Restatement §403 test to decide a true conflict.

Furthermore, applying the Restatement §442 test, courts in this Circuit for at least a quarter of a century have considered the likelihood of "enforcement of foreign law …" as part of the "extent and the nature of the hardship" the non-producing party might face. *See Minpeco*, 116 F.R.D. at 522, 526. *Minpeco* was cited with approval in *Linde*. 706 F.3d at 110. In reviewing the District Court's application of that test, this Court itself observed that "foreign states would not necessarily prosecute the Bank or any of its employees for the disclosure of sensitive banking

information to private civil litigants in the context of the current proceedings." *Id*. at 114.

Vitamin C, applying a different balancing test for a different purpose, did not (and *could* not, without en banc consideration) *sub silentio* overrule almost thirty years of case law and retroactively render the District Court's careful application of this Circuit's modified Restatement §442 balancing test an abuse of discretion.

V. THE DISTRICT COURT DID NOT VIOLATE DUE PROCESS BY PERMITTING AN ADVERSE INFERENCE TO ADDRESS THE EVIDENTIARY IMBALANCE CREATED BY THE BANK'S NON-PRODUCTION, OR BY PRECLUDING THE BANK FROM PROFITING FROM THAT NON-PRODUCTION.

Arab Bank's final argument is that the remedial sanctions applied at trial violated due process because the jury was allowed to draw inferences from the Bank's non-production; the Bank was not allowed to explain that foreign laws required it to disobey the production order; and it was not permitted to offer testimony about the evidence it withheld.[22] But in *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 213

[22] The Bank's claim that the District Court also "summarily grant[ed] nearly all of the Plaintiffs' motions *in limine*, without any briefing," AB15, is false. *See, e.g.* JA5903-05 (permitting the Bank to introduce evidence of banking industry standards and compliance); JA5923-24 (denying Plaintiffs' motion to exclude testimony of Defendant's 30(b)(6) witnesses); JA5294-97 (granting the Bank's motion *in limine* to exclude evidence concerning its support of terrorist organizations other than Hamas); JA5300-01 (overruling Plaintiffs' objections to various categories of evidence).

(1958), the Supreme Court observed that even when faced with *good faith* non-production on foreign bank secrecy grounds, "the District Court would be justified in drawing inferences unfavorable to petitioner as to particular events." *See also* Restatement §442(2)(c). "[T]he District Court possesses wide discretion" to fashion a response to a party's non-production on bank secrecy grounds in order to prevent that party from "profit[ing] through its inability to tender the records called for." *Rogers*, 357 U.S. at 212, 213.

A. The District Court did not violate due process by permitting (but not requiring) the jury to draw an adverse inference from the credible evidence offered by Plaintiffs *and* from the Bank's non-production of relevant and essential evidence.

The jury was instructed that:

> [T]he defendant refused to produce certain documents that the plaintiffs requested and refused to permit their witnesses to answer questions during depositions. Accordingly, based on this refusal, you may, but you are not required to infer … that the defendant provided financial services to Hamas, and to individuals affiliated with Hamas … processed and distributed payments on behalf of the Saudi Committee to terrorists, including those affiliated with Hamas, the[ir] relatives or representatives … [and] did these acts knowingly. [SPA143.]

Plaintiffs had previously proposed an instruction whereby the jurors could only draw those adverse inferences if they found the Plaintiffs had put forward "*some credible evidence to support*" those statements. JA5921 (emphasis added). *See Byrnie v. Town of Cromwell*, 243 F.3d 93, 110 (2d Cir. 2001) (after plaintiff presents "circumstantial evidence" suggesting contents of destroyed evidence, "[i]t then

becomes a matter for the jury to decide, *based on the strength of the evidence presented*, whether the [missing] documents likely had such content") (emphasis added); *cf. Kronisch v. United States*, 150 F.3d 112, 128 (2d Cir. 1998) (holding that innocent party need only produce "*some* (not insubstantial) evidence" to warrant an inference about the missing documents' contents) (emphasis added).

Plaintiffs intended this instruction to be what this Court has called a "fact-finding instruction." That is, if the jury found that the credible evidence Plaintiffs put forward (chiefly wire transfers, martyr lists and related correspondence, and the Hamdan Account records, summarized *supra* at 12-18) supported the inferences, it could (but was not required to) infer that the withheld evidence would also. *See Mali v. Fed. Ins. Co.*, 720 F.3d 387, 393 (2d Cir. 2013) (holding that a fact-finding instruction explains a reasoning process, for example, that if the jury finds a witness has lied on one matter, it could infer that he has lied on another as well). As Plaintiffs' counsel explained, "we put that in… because the inference is based on … the documents that have been withheld, *not based on the act of refusing to produce them*…. We were actually trying to clarify the limits of what the inference is for…." JA6182 (emphasis added).

The Bank objected. It insisted instead on the original instruction containing the preamble "based on this refusal" "to provide certain documents." *Id*. The Court agreed to give the preamble instruction that tracked the one the Bank requested in

every relevant respect. SPA143. If the phrase "refused to provide certain documents" was error, as the Bank now insists, AB56-57, it was error the Bank invited.[23]

An adverse inference instruction was necessary to restore the evidentiary imbalance caused by the Bank's withholding of the best evidence of its knowledge: its internal communications and account records. *See Residential Funding*, 306 F.3d at 108. As this Court observed in *Linde*, "it is a calibrated device imposed by district courts to address specific discovery violations after considering the seriousness of the violations, the course of the litigation, and the legal issues at stake in the case." 706 F.3d at 117. The District Court explained, "'[t]he inference is *adverse* … not because of any finding of moral culpability, but because the risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its [nonproduction].'" SPA92 (brackets and emphasis in original; citation omitted).

At the same time, Plaintiffs were required to offer credible evidence to support the inference and prove their case. SPA88. That is why the District Court instructed

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[23] The Bank also complains that Plaintiffs' counsel emphasized, in closing argument, the Bank's refusal to produce records. The party who suffered from non-production in *Reilly v. NatWest Markets Group Inc*. also "repeatedly accus[ed] NatWest of discovery wrongdoing." 181 F.3d 253, 271 (2d Cir. 1999). But this Court found no error, observing that "[a] district court is entitled to give attorneys wide latitude in formulating their arguments." *Id.* Even without any sanction, Plaintiffs' counsel would have been entitled in closing argument to stress what the withheld records might show and how the Bank benefited from withholding them.

the jury that "the mere existence of an inference against the defendant, does not by itself relie[ve] the plaintiffs of the burden of establishing their case by a preponderance of the evidence. If the plaintiffs are to obtain a verdict, *you must still find from the credible evidence that they have sustained the burden cast upon them.*" SPA143-44 (emphasis added). Except for the Court's insertion of the words "by itself," this instruction regarding the Plaintiffs' burden of proof tracked almost *word-for-word* the one the Bank requested. SPA144. *Cf.* JA6009.

B. The District Court did not abuse its discretion by declining to permit a mini-trial over foreign bank secrecy laws.

The Bank claims it has a *constitutional* right to "explain" that foreign law prevented it from complying with the production order. This argument rests on a mistaken analogy to spoliation cases like *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739 (8th Cir. 2004) and *Tupman Thurlow Co. v. S.S. Cap Castillo*, 490 F.2d 302 (2d Cir. 1974), AB55, which raise *fact* questions concerning how evidence was lost or destroyed and whether the nonproducing party was responsible. Here, in contrast, the Bank's violation of a court order raised no fact questions. The District Court therefore reasoned, "[w]eighing the factors in ordering production and later imposing sanctions was the job of the court, not the jury. Granting the Bank's

application would defeat the court's analysis, mislead and confuse the jurors, and improperly invite them to decide legal issues." SPA116.[24]

Moreover, while the District Court weighed all the competing foreign interests at both the production and remedy phases of the process in carefully applying the modified Restatement §442 balancing test, at trial nearly all of the account records that implicated the remedial sanction originated from the Palestinian Territories, *not Jordan.*[25] The Bank's brief is understandably silent about how the jury could have been expected to evaluate the bank secrecy laws of a non-state,[26] the deference owed them, or their applicability to non-customer cash recipients, let alone how the jury would balance those factors against U.S. interests to determine whether the Bank's refusal was reasonable.

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[24] The Bank cites dictum from *Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 542, 551 (E.D.N.Y. 2012), for its claimed right to explain its non-production to the jury. But Judge Weinstein explained that "[e]valuating a litigant's reasons for withholding documents that might be relevant requires an understanding of the foreign laws applicable to the withholding litigant, a balancing of national interests, as well as other pressures based on such matters as obligations to clients. An extensive trial by the court, and understanding by the jury, would be necessary to establish good faith," *id*. – exactly the mini-trial that the District Court here properly avoided.

[25] The exceptions were the withheld Lebanese account records of Yousef al-Hayek, which were mentioned on several occasions, and a small subset of "charity" account records from the Bank's London branch that were admitted into evidence without reference to the Bank's refusal to produce records from the U.K.

[26] This Court has held that Palestine is not a state under applicable principles of international law. *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 329 (2d Cir. 2016).

Finally, after observing the jury's reaction to the "volumes of damning circumstantial evidence that defendant knew its customers were terrorists," SPA191, the Bank's "myopic" "OFAC-only" defense, SPA192, and the devastating "friendly fire" from the Bank's chief expert, SPA183-84, 192-93, the District Court found that the permissive adverse inference instruction "was effectively lost in the nearly seven weeks of trial proceedings," SPA191, overshadowed by the credible evidence Plaintiffs presented. Given that volume of evidence, the District Court's conclusion that the inference instruction did not play a "very large, if any role, in the jury's verdict" was not clearly erroneous. SPA193.

C. The District Court did not violate due process by precluding the Bank from profiting from its non-production through self-serving, unverifiable testimony.

Before the sanctions order was entered, the Bank agreed to a direction "that the defendant is precluded from offering in evidence at any trial any documents *or other information* withheld from discovery on bank secrecy law grounds." JA3683 (emphasis added). The District Court interpreted the precluded "information" to include "any argument or … evidence regarding [the Bank's] state of mind or any other issue that would find proof or refutation in withheld documents." SPA97. The Bank's due process challenge to the preclusion remedy therefore boils down to the proper scope of excluded "information."

Arab Bank repeatedly complains that it was precluded from offering "clear evidence demonstrat[ing] that the Bank had closed" the accounts of designated terrorists to which "Plaintiffs[] accus[ed]" it of transferring $2.5 million. AB58. *See also* AB16, 35. But this oft-repeated example of alleged prejudice actually demonstrates why a remedy was necessary. What the Bank now describes as an "accusation" was the Bank's sworn *admission* in response to interrogatories. SPA189. By "clear evidence," the Bank means *testimony* by its own employees about accounts for which it refused to disclose even the names of the accountholders, let alone the dates or reasons for any account closings or what it did with the balances in those accounts. SPA187.

Had the Bank not been precluded from giving such self-serving testimony, it would have used bank secrecy as a shield against cross-examination, because the "proof or refutation" of the alleged account closings would only be found in the withheld account records and the Bank's internal communications about the accounts. *See* SPA189. Moreover, the jury would inevitably have understood testimony that "we lawfully closed the accounts as soon as we became aware that they were terrorists" as a proxy for the withheld records. Such testimony would therefore have allowed the Bank to use its non-production not just as a shield against

cross-examination, but as a sword by substituting self-serving testimony (including incontestable hearsay) for withheld documentary evidence.[27]

In any case, the District Court gave the Bank broad leeway to present evidence of its defenses. SPA183-88, 193-96. The Bank repeatedly emphasized the point that very few of the terrorists Plaintiffs identified were listed on the U.S. government blacklist to support its "OFAC-only" and "routine banking" defenses; its expert was given full vent to support the Bank's "hidden Hamas" defense; and, although the Bank should have been precluded from claiming that it followed internal procedures and international compliance standards for any accounts for which it withheld records (for without them, there was no way of testing such claims), it "proved difficult, in practice, to preclude much of defendant's evidence relating to its compliance programs." SPA193-94.

Ultimately, the Bank's fatal problem was neither the permissive inference nor the preclusion of self-serving testimony. Instead, it was the yawning gap that its withholding of evidence created between its claims of ignorance and its proof:

> In sum, the Sanctions Order did not play out to be a critical factor in the case. The strength of the plaintiffs' evidence of defendant's knowledge, the illogic of defendant's OFAC-only theory, the miscues within defendant's own case, and the gaping hole which defendant admittedly

[27] The Bank lumps the preclusion order together with District Court orders barring evidence of foreign law. AB16, 58. But the Court excluded this evidence on the independent basis that it was irrelevant and unfairly prejudicial. *Linde v. Arab Bank, PLC,* 920 F. Supp. 2d 282, 285-87 (E.D.N.Y. 2011); SPA114-15; SPA196. *See also* SPA221-23.

created by refusing to produce the key documents and testimony substantially overshadowed the Sanctions Order. [SPA196.]

CONCLUSION

More than a decade after these cases were filed, after a fair and sharply contested nearly seven-week trial, the jury returned a verdict "based on volumes of damning circumstantial evidence that defendant knew its customers were terrorists." SPA191. The District Court faithfully followed this Circuit's recent precedents in fashioning the discovery sanction and its instructions on *mens rea* and causation. The case has now settled on terms "satisfactory" to the Bank.

The long-delayed judgment should therefore be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the foregoing brief is in 14-Point Times New Roman proportional font and contains 13,909 words and thus is in compliance with the type-volume limitation set forth in Local Rule 32.1(a)(4)(A).

Dated: January 18, 2017

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ADDENDUM

ADDENDUM

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ADD-1

S. REP. 102-342, S. Rep. No. 342, 102ND Cong., 2ND Sess. 1992, 1992 WL 187372 (Leg.Hist.)
P.L. 102-572, ***1** FEDERAL COURTS ADMINISTRATION ACT OF 1992
FEDERAL COURTS STUDY COMMITTEE IMPLEMENTATION ACT
DATES OF CONSIDERATION AND PASSAGE
Senate: August 3, October 7, 1992
House: October 3, 1992
Cong. Record Vol. 138 (1992)
Senate Report (Judiciary Committee) No. 102-342,
July 27, 1992 (To accompany S. 1569)
House Report (Judiciary Committee) No. 102-1006,
Oct. 3, 1992 (To accompany H.R. 5933)

SENATE REPORT NO. 102–342

July 27, 1992
[To accompany S. 1569]

The Committee on the Judiciary, to which was referred the bill (S. 1569) to implement the recommendations of the Federal Courts Study Committee, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute, and recommends that the bill as amended do pass.

CONTENTS

The amendment is as follows:

* * * * * * *

J. TERRORISM CIVIL REMEDY

Title X is known as the Civil Remedies for Victims of Terrorism. This legislation was first introduced in the 101st Congress (as S. 2465) by Senator Charles Grassley. On July 25, 1990, the Senate Judiciary Subcommittee on Courts and Administrative Practice held a hearing on the Bill. It passed the subcommittee on September 25, 1990, and was thereafter incorporated into the fiscal year 1992 Military Construction Appropriations bill. In Conference, the conferees intended to delete the provisions of Civil Remedies for Victims of Terrorism. The enrolling clerk, however, erred and the provisions were included in Public Law 101–519 of November 5, 1990.

The Civil Remedies sections of the Military Construction Appropriations Act were repealed in 1991, and Senator Grassley reintroduced the bill, S. 740, in the 102d Congress. The Senate passed this bill by voice vote on April 16, 1991.

Title X would allow the law to catch up with contemporary reality by providing victims of terrorism with a remedy for a wrong that, by its nature, falls outside the usual jurisdictional categories of wrongs that national legal systems have traditionally addressed. By its provisions for compensatory damages, tremble damages, and the imposition of liability at any point along the causal chain of terrorism, it would interrupt, or at least imperil, the flow of money.

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TITLE X–TERRORISM CIVIL REMEDY

This title would provide a civil cause of action in Federal court for victims of terrorism.

Section 2331. Definitions

The definition of international terrorism is drawn from the Foreign Intelligence Surveillance Act, 50 U.S.C. 1801(c). It consists of activities that:

(a) are acts of violence that would, if committed in the United States, violate States or Federal criminal laws:

(b) appear to be intended to intimidate or coerce a civilian population or a government or to affect, through assassination or kidnapping, a government's conduct; and

(c) occur primarily outside the territorial jurisdiction of the United States or in ways that transcend national boundaries.

The definition of "person" reflects the experience of the Racketeering Influenced and Corrupt Organizations (RICO) Act, 28 U.S.C. 1961(3).

Section 2333. Civil remedies

This section creates the right of action, allowing any U.S. national who has been injured in his person, property, or business by an act of international terrorism to bring an appropriate action in a U.S. district court. The substance of such an action is not defined by the statute, because the fact patterns giving rise to such suits will be as varied and numerous as those found in the law of torts. This bill opens the courthouse door to victims of international terrorism.

This section extends the same jurisdictional structure that undergrids the reach of American criminal law to the civil remedies that it defines.

This section also creates a rule of estoppel that would permit civil plaintiffs to introduce evidence of criminal conviction–both U.S. and foreign–to establish conclusively civil liability for the same act. This section does not, however, require that a civil action be preceded by American or foreign criminal prosecution of the terrorists guilty of the act in question.

Section 2334. Jurisdiction and venue

This section establishes reasonable venue rules that take into account the unusual mobility of terrorists, their organizations, and their financiers.

***46** Section 2335. Limitation of actions

This section provides for a 4-year statute of limitations, but in recognition of the peculiar characteristics of terrorism, it tolls the limitation during any periods when the terrorists have concealed their acts or identities or remain outside the United States.

Section 2336. Other limitations

This section excludes from the scope of any civil action a claim brought on account of "an act of war." The intention of this provision is to bar actions for injuries that result from military action by recognized governments as opposed to terrorists, even though governments also sometimes target civilian populations. Injuries received by noncombatants as a result of open, armed conflict, including civil war, should not be actionable.

The section also provides that a stay of discovery may be sought by the Department of Justice, in the event of a pending criminal investigation or prosecution of the incident. The Department of Justice may object to the discovery request in certain limited circumstances–if compliance will interfere with a criminal investigation or a national security operation related to the incident. The objection will be heard by the judge, in camera, and it is within the court's discretion as to whether to grant the stay of discovery. In no case shall a stay of discovery be grounds for dismissal of the case.

This section also provides that a stay of the civil action may be sought by the Attorney General of the United States. The court has discretion as to whether to grant the stay and may only grant a stay if the continuation of the civil action will

substantially interfere with a criminal prosecution which involves the same subject matter and in which an indictment has been returned, or if it will interfere with national security operations related to the terrorist incident that is the subject of the civil action. A stay may be granted for up to 6 months and may be renewed for additional 6-month periods until the criminal prosecution is completed or dismissed.

Sections (b) and (c) were added to afford the Department of Justice the discretion it needs to conduct criminal investigations and prosecutions. These sections merely set forth well recognized standards for Government intervention in civil actions. The Department of Justice, under rule 26 of the Federal Rules of Civil Procedure, has the authority to assert a privilege against discovery of its investigative files. These provisions do not enhance the rights of the U.S. Government. These sections are not, however, intended to prevent victims and their survivors from conducting civil litigation against terrorists. It is expected the Department of Justice will demonstrate to the court's satisfaction that there is a live investigation and a significant likelihood of prosecution, or conduct of a national security operation, in order to stay the discovery. In instances where the Attorney General seeks to stay a civil action, the Attorney General will have a heavy burden of proof in order to establish that the continuation of the civil action will substantially interfere with a criminal prosecution underway or the conduct of a national security operation related to the terrorist incident which gave rise to the civil action. Moreover, the victims or their survivors ***47** are entitled to be heard at the Department of Justice or Attorney General's arguments on behalf of a stay.

Section 2337. Suits against Government officials

This section prohibits civil actions against the United States, U.S. officials, foreign states or foreign officials. This provision maintains the status quo, in accordance with the Foreign Sovereign Immunities Act, with respect to sovereign states and their officials: there can be no cause of action for international terrorism against them.

TITLE XI–EFFECTIVE DATE

Unless otherwise provided in this act, the effective date for this legislation is January 1, 1993.

* * * * * * *

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TITLE 18–CRIMES AND CRIMINAL PROCEDURE

PART I.–CRIMES

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

S 2331. Definitions

As used in this chapter–

(1) the term “act of war” means any act occurring in the course of–

(A) declared war;

(B) armed conflict, whether or not war has been declared, between two or more nations; or

(C) armed conflict between military forces of any origin;

(2) the term "international terrorism" means activities that–

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended–

***56** (i) to intimidate or coerce a civilian population;
(ii) to influence the policy of a government by intimidation or coercion; or
(iii) to affect the conduct of a government by assassination or kidnapping; and
(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum;

(3) the term "national of the United States" has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act; and

(4) the term "person" means any individual or entity capable of holding a legal or beneficial interest in property.

[S 2331. Terrorist acts abroad against United States Nationals]

S 2332. Criminal penalties

* * * * * * *

[(d) Definition.–As used in this section the term "national of the United States" has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).]

[(e)] (d) Limitation on Prosection.–No prosecution for any offense described in this section shall be undertaken by the United States except on written certification of the Attorney General or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions that, in the judgment of the certifying official, such offense was intended to coerce, intimidate, or retaliate against a government or a civilian population.

S 2333. Civil remedies

(a) Action and Jurisdiction.–Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

(b) Estoppel Under United States Law.–A final judgment or decree rendered in favor of the United States in any criminal proceeding under section 1116, 1201, 1203, or 2332 of this title or section 902 (i), (k), (l), (n), or (r) of the Federal Aviation Act of 1958 (49 U.S.C. App. 1472 (i), (k), (l), (n), and (r)) shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding under this section.

(c) Estoppel Under Foreign Law.–A final judgment or decree rendered in favor of any foreign state in any criminal proceeding shall, to the extent that such judgment or decree may be accorded full faith and credit under the law of the United States, estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding under this section.

***57** S 2334. Jurisdiction and venue

(a) General Venue.–Any civil action under section 2333 of this title against any person may be instituted in the district court of the United States for any district where any plaintiff resides or where any defendant resides or is served, or has an agent.

Process in such a civil action may be served in any district where the defendant resides, is found, or has an agent.

(b) Special Maritime or Territorial Jurisdiction.–If the actions giving rise to the claim occurred within the special maritime and territorial jurisdiction of the United States, any civil action under section 2333 against any person may be instituted in the district court of the United States for any district in which any plaintiff resides or the defendant resides, is served, or has an agent.

(c) Service on Witnesses.–A witness in a civil action brought under section 2333 may be served in any other district where the defendant resides, is found, or has an agent.

(d) Convenience of the Forum.–The district court shall not dismiss any action brought under section 2333 on the grounds of the inconvenience or inappropriateness of the forum chosen, unless–

(1) the action may be maintained in a foreign court that has jurisdiction over the subject matter and over all the defendants;

(2) that foreign court is significantly more convenient and appropriate; and

(3) that foreign court offers a remedy that is substantially the same as the one available in the courts of the United States.

S 2335. Limitation of actions

(a) In General.–Subject to subsection (b), a suit for recovery of damages under section 2333 shall not be maintained unless commenced within 4 years from the date the cause of action accrued.

(b) Calculation of Period.–The time of the absence of the defendant from the United States or from any jurisdiction in which the same or a similar action arising from the same facts may be maintained by the plaintiff, or any concealment of the defendant's whereabouts, shall not be counted for the purposes of the period of limitation prescribed by subsection (a).

S 2336. Other limitations

(a) Acts of War.–No action shall be maintained under section 2333 for injury or loss by reason of an act of war.

(b) Limitation on Discovery.–If a party to an action under section 2333 seeks to discover the investigative files of the Department of Justice, the attorney for the Government may object on the ground that compliance will interfere with a criminal investigation or prosecution of the incident, or a national security operation related to the incident, which is the subject of the civil litigation. The court shall evaluate any objections raised by the Government in camera and shall stay the discovery if the court finds that granting the discovery request will substantially interfere with a criminal investigation or prosecution of the incident or a national security operation related to the incident. The court shall consider the likelihood of criminal prosecution by the Government and other factors it deems to be appropriate. A stay of discovery under this subsection ***58** shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(c) Stay of Action for Civil Remedies.–(1) The Attorney General may intervene in any civil action brought under section 2333 for the purpose of seeking a stay of the civil action. A stay shall be granted if the court finds that the continuation of the civil action will substantially interfere with a criminal prosecution which involves the same subject matter and in which an indictment has been returned, or interfere with national security operations related to the terrorist incident that is the subject of the civil action. A stay may be granted for up to 6 months. The Attorney General may petition the court for an extension of the stay for additional 6-month periods until the criminal prosecution is completed or dismissed.

(2) In a proceeding under this subsection, the Attorney General may request that any order issued by the court for release to the parties and the public omit any reference to the basis on which the stay was sought.

S 2337. Suits against Government officials

No action shall be maintained under section 2333 against–

(1) the United States, an agency of the United States, or an officer or employee of the United States or any agency thereof acting within the officer's or employee's official capacity or under color of legal authority; or

(2) a foreign state, an agency of a foreign state, or an officer or employee of a foreign state or an agency thereof acting within the officer's or employee's official capacity or under color of legal authority.

S 2338. Exclusive Federal jurisdiction

The district courts of the United States shall have exclusive jurisdiction over an action brought under this chapter.

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Restatement (Third) of Foreign Relations Law § 442 (1987)

Restatement of the Law - The Foreign Relations Law of the United States
October 2016 Update
Restatement (Third) of The Foreign Relations Law of the United States
Part IV. Jurisdiction and Judgments
Chapter 4. Jurisdiction and the Law of Other States
Subchapter A. Foreign State Compulsion

§ 442 Requests for Disclosure: Law of the United States

† **(1)**

† **(a) A court or agency in the United States, when authorized by statute or rule of court, may order a person subject to its jurisdiction to produce documents, objects, or other information relevant to an action or investigation, even if the information or the person in possession of the information is outside the United States.**

† **(b) Failure to comply with an order to produce information may subject the person to whom the order is directed to sanctions, including finding of contempt, dismissal of a claim or defense, or default judgment, or may lead to a determination that the facts to which the order was addressed are as asserted by the opposing party.**

† **(c) In deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.**

† **(2) If disclosure of information located outside the United States is prohibited by a law, regulation, or order of a court or other authority of the state in which the information or prospective witness is located, or of the state of which a prospective witness is a national,**

† **(a) a court or agency in the United States may require the person to whom the order is directed to make a good faith effort to secure permission from the foreign authorities to make the information available;**

† **(b) a court or agency should not ordinarily impose sanctions of contempt, dismissal, or default on a party that has failed to comply with the order for production, except in cases of deliberate concealment or removal of information or of failure to make a good faith effort in accordance with paragraph (a);**

† **(c) a court or agency may, in appropriate cases, make findings of fact adverse to a party that has failed to comply with the order for production, even if that party has made a good faith effort to secure permission from the foreign authorities to make the information available and that effort has been unsuccessful.**

Comment:

a. Discovery as exercise of jurisdiction. Discovery for use in a judicial or administrative proceeding is an exercise of

jurisdiction by a state, whether it emanates from an order of a court or from a demand by a party pursuant to a statute or rule of practice. In order to ensure that such exercise of jurisdiction is carried out consistently with the principle of reasonableness (§§ 403, 421), Subsection (1) contemplates that, in civil litigation in the United States affecting foreign interests, courts control discovery practice from the outset of the litigation pursuant to Rule 16 of the Federal Rules of Civil Procedure and comparable State rules. Thus, except as specifically authorized by statute or rule of court, Reporters' Note 3, requests to produce documents or information located abroad should, as a matter of good practice, be issued as an order by the court, not merely in the form of a demand by a private party. General authorizations to litigants, as under Rule 34 of the Federal Rules of Civil Procedure, should not be construed to support departure from this practice.

Before issuing an order for production of documents, objects, or information located abroad, the court—or, where authorized, the agency—should scrutinize a discovery request more closely than it would scrutinize comparable requests for information located in the United States. Under Rule 26(b)(1) of the Federal Rules of Civil Procedure, discovery (including requests for documents) may extend to any matter not privileged which is relevant to the subject matter of the action, even if the information sought would be inadmissible at trial, if it appears reasonably calculated to lead to the discovery of admissible evidence. However, the second paragraph of that Rule, added in 1983, calls for imposition by the court of limits on the extent of discovery comparable to those set out in Subsection (1)(c). Given the difficulty in obtaining compliance, and the resistance of foreign states to discovery demands originating in the United States, it is ordinarily reasonable to limit foreign discovery to information necessary to the action—typically, evidence not otherwise readily obtainable—and directly relevant and material. Requests for information that could lead to admissible evidence would ordinarily not be granted under this standard, but a court might in some instances order disclosure of the identity and location of persons who may have knowledge of such information, or production of documents that may lead to such information. Nothing in this section prevents parties from making disclosure of information without court intervention.

Typically, discovery requests and orders are addressed to parties before the court or agency, *i.e.*, to persons as to whom jurisdiction to adjudicate is not challenged or has been determined to exist. Discovery requests and orders may be addressed to nonparties within the United States as well. See Fed.R.Civ.P. 45 and corresponding State rules. For subpoenas issued to persons outside the United States, see Comment *b* and § 474, Reporters' Note 11. Discovery may be ordered also in aid of determining jurisdiction to adjudicate. See Reporters' Note 11.

This section deals with efforts to secure information under direct order of a United States court or comparable authority. For means to secure evidence located abroad through international judicial assistance, see §§ 473- 474.

b. Grand jury subpoenas and agency demands for information. A grand jury investigating crime may issue a subpoena to a person in the United States requiring production of documents or information located abroad. Such a subpoena does not require prior judicial approval, but its enforcement through civil or criminal contempt may be carried out only through judicial proceedings. See Comment *g*. Under 28 U.S.C. § 1783, subpoenas directed to persons outside the United States may be issued only by a court, and only to nationals or residents of the United States. See § 474, Reporters' Note 11.

Some federal administrative agencies have authority to issue subpoenas or other orders requiring disclosure of documents or information in connection with administrative hearings or investigations. Whether an agency's authority to require disclosure includes authority to demand production of documents or information located abroad is a matter of interpretation of the governing statutes, in the first instance by the agency itself, in line with the criteria of Subsection (1). General authorization to issue disclosure orders should not necessarily be construed as implying such authority. In interpreting the governing statutes, a significant consideration may be whether the subject matter regulated by the agency extends significantly to international commerce or other international matters. See Reporters' Note 3.

For judicial enforcement of grand jury subpoenas and agency demands for information, see Comment *g*.

c. Relevant foreign and United States interests. In making the necessary determination of foreign interests under Subsection (1)(c), a court or agency in the United States should take into account not merely a general policy of the foreign state to resist "intrusion upon its sovereign interests," or to prefer its own system of litigation, but whether producing the requested

information would affect important substantive policies or interests of the foreign state. In making this determination, the court or agency will look, *inter alia*, to expressions of interest by the foreign state, as contrasted with expressions by the parties; to the significance of disclosure in the regulation by the foreign state of the activity in question; and to indications of the foreign state's concern for confidentiality prior to the controversy in connection with which the information is sought. For the kinds of evidence of the foreign state's interest that a court might consider, see § 403, Reporters' Note 6.

In making the necessary determination of the interests of the United States under Subsection (1)(c), the court or agency should take into account not merely the interest of the prosecuting or investigating agency in the particular case, but the long-term interests of the United States generally in international cooperation in law enforcement and judicial assistance, in joint approach to problems of common concern, in giving effect to formal or informal international agreements, and in orderly international relations. In private actions, it is open to a court in the United States to invite the United States attorney or other appropriate official to advise it of the interests of the United States government.

d. Privileged matter. Discovery requests, whether in a civil or criminal action, may extend only to matters "not privileged." Fed.R.Civ.P. 26(b)(1); Fed.R.Crim.P. 17(c); 15 U.S.C. § 1312(c)(1). If the subject of a request for discovery in connection with a proceeding before a United States court is privileged under United States law or under the applicable law of a State of the United States, Fed.R.Evid. 501—for instance, a communication between a client and his United States lawyer—discovery cannot be compelled, even if the communication took place in a state where such communication is not privileged. If a communication made outside the United States, and not in connection with a proceeding in the United States, is not privileged where made—for instance, in some states intra-company memoranda involving corporate legal staff, or communications between an inventor and a patent agent not admitted to the practice of law—it would not ordinarily be privileged for purposes of United States discovery. On the other hand, a communication privileged where made—for instance, confidential testimony given to a foreign government investigation under assurance of privilege—is not subject to discovery in a United States court, in the absence of waiver by those entitled to the privilege. If a communication was made in more than one state—for instance, by letter or international telephone—the privilege is ordinarily determined by the law of the state with which the subject of the communication has its most significant connection. Accord: Restatement, Second, Conflict of Laws (1986 Revisions), § 139. For the somewhat narrower rule for discovery taken under the Hague Evidence Convention, see § 473(3) and Comment *i* to that section.

e. Government compulsion and disclosure. Like § 441, Subsection (2) of this section applies the principle of § 403(3). However, § 441 is concerned with conflicts in substantive law between two or more states in connection with activities or transactions in situations where both states have jurisdiction to prescribe; this section, in contrast, deals with the litigation process, and in particular with pretrial procedures, in situations where the forum state by definition has jurisdiction over the parties and the proceedings, and foreign substantive law would not ordinarily be involved. Accordingly, somewhat less deference to the law of the other state may be called for. See Reporters' Note 7.

f. Finding contrary to position of noncomplying party. In contrast to orders under Subsection (2)(b), a finding under Subsection (2)(c) is not deemed to be a penalty, but is designed rather as a form of pressure to induce compliance with justified requests for information by encouraging bona fide efforts by the party to secure permission to comply and enhancing willingness by the other state to permit compliance. Such a finding does not reflect a shift in the burden of proof, and is appropriate only when there is reason to believe that the information, if disclosed, would support a finding adverse to the noncomplying party, and if the court or agency is satisfied that the request was made in good faith, not simply as a way of obtaining the adverse finding. Furthermore, such a finding is normally made only after prior warning; where practicable, the finding should be made in a tentative form, subject to reopening if the information is produced by a given date.

g. Sanctions for noncompliance. Courts in the United States often hear controversies regarding discovery orders in two phases. In the first phase, the requesting party seeks an order to compel compliance with the request, and the responding party seeks to have it set aside. In this phase, the court will evaluate the request in light of the factors listed in Subsection (1)(c). In the federal courts, ordinarily, the decision of the district court is not subject to appeal at this stage. If the first phase is decided in favor of production and the responding party fails to comply, there may be a second phase to determine the consequences of noncompliance. A decision in that phase to impose contempt or dismissal as a sanction may be subject to a

right of appeal as a final order; a finding with respect to a fact or set of facts will not ordinarily be subject to appeal, except by leave of court, until judgment is rendered in the action. Ordinarily, the validity of the original discovery order may be challenged in an appeal from an order imposing sanctions for noncompliance. Agencies commonly determine the validity and scope of their discovery orders, and they sometimes make findings adverse to non-complying parties. Agencies ordinarily do not themselves impose sanctions for noncompliance with their discovery orders, but resort to courts for enforcement.

h. Good faith and sanctions for nondisclosure. Parties to litigation and targets of investigation, whether criminal or civil, may be required to show that they have made serious efforts before appropriate authorities of states with blocking statutes, Reporters' Note 4, to secure release or waiver from a prohibition against disclosure. Evidence that parties or targets have actively sought a prohibition against disclosure, or that the information was deliberately moved to a state with blocking legislation, may be regarded as evidence of bad faith and justification for sanctions in accordance with Subsection (2)(b). Merely notifying the authorities of another state or consulting with them about a request for discovery is not evidence of bad faith.

United States courts have disagreed on the obligations of non-party custodians, such as banks and brokers, with offices in the United States and foreign states, Reporters' Note 8. At a minimum, such custodians may not, without risking sanctions, transfer to a state with secrecy legislation records reflecting transactions based in the United States. Whether and to what extent such intermediaries must apply for waivers or appeal from adverse findings of foreign courts in order to avoid sanctions in the United States is not clear. Whether the United States government has an obligation to cooperate with efforts by custodians to secure release of information, for example by disclosing sufficient information from a grand jury investigation to enable a foreign court or other authority to rule on the applicability of an exception to a secrecy law, is also unclear.

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H.R. Conf. Rep. No. 783, 99TH Cong., 2ND Sess. 1986, 1986 U.S.C.C.A.N. 1926, 1986 WL 31900, H.R. CONF. REP. 99-783 (Leg.Hist.)

**1926 P.L. 99–399, OMNIBUS DISPLOMATIC SECURITY AND ANTITERRORISM ACT OF 1986

DATES OF CONSIDERATION AND PASSAGE
House March 18, August 12, 1986
Senate June 25, August 12, 1986
House Report (Foreign Affairs Committee) No. 99–494,
Mar. 12, 1986 [To accompany H.R. 4151]
Senate Report (Foreign Relations Committee) No. 99–304,
May 20, 1986 [To accompany H.R. 4151]
House Conference Report No. 99–783,
Aug. 12, 1986 [To accompany H.R. 4151]
Cong. Record Vol. 132 (1986)
Related Reports:
Senate Report (Judiciary Committee) No. 99–143,
Sept. 26, 1985 [To accompany S. 274]
House Report (Post Office and Civil Service Committee) No. 99–201(I),
July 15, 1985 [To accompany H.R. 2851]
House Report (Foreign Affairs Committee) No. 99–201(II),
Nov. 18, 1985 [To accompany H.R. 2851]

HOUSE CONFERENCE REPORT NO. 99–783

August 12, 1986

* * * * *

*53 JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 4151) to provide enhanced diplomatic security and combat international terrorism, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The Senate amendment struck out all of the House bill after the enacting clause and inserted a substitute text.

The House recedes from its disagreement to the amendment of the Senate with an amendment which is a substitute for the House bill and the Senate amendment. The differences between the House bill, the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

* * * * * * *

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EXTRATERRITORIAL CRIMINAL JURISDICTION OVER TERRORIST CONDUCT

The Senate amendment (sec. 714) includes a provision extending jurisdiction over certain crimes by terrorists against American citizens abroad.

The House bill contains no comparable provision.

The conference substitute (sec. 1202) establishes extraterritorial jurisdiction over serious violent attacks by terrorists upon U.S. nationals. Presently, Federal law prohibits extraterritorial murder of and assaults upon only certain high ranking U.S. officials, diplomats, and law enforcement officers. Chapter 113A of title 18, U.S.C., will extend coverage to any terrorist murder or manslaughter of and serious physical assault on any U.S. national.

Paragraph (a) of the conference substitute is identical in substance to the Senate amendment, except that fines are not specifically delineated, in deference to the alternative Federal fines statute at 18 U.S.C. 3623. As in the Senate amendment, there is no requirement that the U.S. Government prove during the criminal prosecution the purpose of the murder. The elements are (1) the murder (2) of a U.S. national (3) outside the territorial jurisdiction of the United States.

The conspiracy paragraph of the conference substitute incorporates two conspiracy provisions from the Senate amendment and reaches terrorist conspiracies or attempts abroad to kill a U.S. national whether that national is outside the United States or within the United States. Paragraph (c) of the conference substitute is designed to provide jurisdiction over violent attacks against property, including but not limited to bombings and arson, as well as violent attacks against persons. In any case, the attack must be one that is intended to, or does, result in serious bodily injury to a U.S. national. The maximum prison sentence is set at 5 years.

The committee of conference does not intend that chapter 113A reach nonterrorist violence inflicted upon American victims. Simple barroom brawls or normal street crime, for example, are not intended to be covered by this provision. To ensure that this statute is used only for its intended purpose, the conference substitute requires that the Attorney General certify that in his judgment such offense was intended to coerce, intimidate, or retaliate against a government or civilian population.

This paragraph also limits the authority to make the necessary certification for prosecution under this statute to the Attorney General or ‘the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions.’ The quoted language refers either to the Deputy Attorney General or the Associate Attorney General depending on their respective responsibilities. Although the Deputy Attorney General is the second highest ranking official of the Department of Justice, if the Associate Attorney General has primary responsibility for criminal prosecutions, he/she is the appropriate

certifying official in addition to the Attorney General.

****1961 *88** The determination of the certifying official is final and not subject to judicial review.

The term ‘civilian population’ includes a general population as well as other specific identifiable segments of society such as the membership of a religious faith or of a particular nationality, to give but two examples. Neither the targeted government nor civilian population, or segment thereof, has to be that of the United States.

* * * * * * *

PL 104–132, April 24, 1996, 110 Stat 1214

UNITED STATES PUBLIC LAWS
104th Congress - Second Session
Convening January 3, 1996

Additions and Deletions are not identified in this document.
8848

PL 104–132 (S 735)
April 24, 1996
ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

An Act to deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

<< 18 USCA § 1 NOTE >>

SECTION 1. SHORT TITLE.

This Act may be cited as the “Antiterrorism and Effective Death Penalty Act of 1996”.

SEC. 2. TABLE OF CONTENTS.

The table of contents of this Act is as follows:

* * * * * * *

TITLE III—INTERNATIONAL TERRORISM PROHIBITIONS
Subtitle A—Prohibition on International Terrorist Fundraising

<< 18 USCA § 2339B NOTE >>

SEC. 301. FINDINGS AND PURPOSE.

(a) FINDINGS.—The Congress finds that—
(1) international terrorism is a serious and deadly problem that threatens the vital interests of the United States;
(2) the Constitution confers upon Congress the power to punish crimes against the law of nations and to carry out the treaty obligations of the United States, and therefore Congress may by law impose penalties relating to the provision of material support to foreign organizations engaged in terrorist activity;
(3) the power of the United States over immigration and naturalization permits the exclusion from the United States of persons belonging to international terrorist organizations;
(4) international terrorism affects the interstate and foreign commerce of the United States by harming international trade and market stability, and limiting international travel by United States citizens as well as foreign visitors to the United States;
(5) international cooperation is required for an effective response to terrorism, as demonstrated by the numerous multilateral conventions in force providing universal prosecutive jurisdiction over persons involved in a variety of terrorist acts, including hostage taking, murder of an internationally protected person, and aircraft piracy and sabotage;
(6) some foreign terrorist organizations, acting through affiliated groups or individuals, raise significant funds within the United States, or use the United States as a conduit for the receipt of funds raised in other nations; and
(7) foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to

such an organization facilitates that conduct.
(b) PURPOSE.—The purpose of this subtitle is to provide the Federal Government the fullest possible basis, consistent with the Constitution, to prevent persons within the United States, or subject to the jurisdiction of the United States, from providing material support or resources to foreign organizations that engage in terrorist activities.

SEC. 302. DESIGNATION OF FOREIGN TERRORIST ORGANIZATIONS.

<< 8 USCA § 1189 >>

(a) IN GENERAL.—Chapter 2 of title II of the Immigration and Nationality Act (8 U.S.C. 1181 et seq.) is amended by adding at the end the following:

"SEC. 219. DESIGNATION OF FOREIGN TERRORIST ORGANIZATIONS.

"(a) DESIGNATION.—
"(1) IN GENERAL.—The Secretary is authorized to designate an organization as a foreign terrorist organization in accordance with this subsection if the Secretary finds that—
"(A) the organization is a foreign organization;
"(B) the organization engages in terrorist activity (as defined in section 212(a)(3)(B)); and
"(C) the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States.
"(2) PROCEDURE.—
"(A) NOTICE.—Seven days before making a designation under this subsection, the Secretary shall, by classified communication—
"(i) notify the Speaker and Minority Leader of the House of Representatives, the President pro tempore, Majority Leader, and Minority Leader of the Senate, and the members of the relevant committees, in writing, of the intent to designate a foreign organization under this subsection, together with the findings made under paragraph (1) with respect to that organization, and the factual basis therefor; and
"(ii) seven days after such notification, publish the designation in the Federal Register.
"(B) EFFECT OF DESIGNATION.—
"(i) For purposes of section 2339B of title 18, United States Code, a designation under this subsection shall take effect upon publication under subparagraph (A).
"(ii) Any designation under this subsection shall cease to have effect upon an Act of Congress disapproving such designation.
"(C) FREEZING OF ASSETS.—Upon notification under paragraph (2), the Secretary of the Treasury may require United States financial institutions possessing or controlling any assets of any foreign organization included in the notification to block all financial transactions involving those assets until further directive from either the Secretary of the Treasury, Act of Congress, or order of court.
"(3) RECORD.—
"(A) IN GENERAL.—In making a designation under this subsection, the Secretary shall create an administrative record.
"(B) CLASSIFIED INFORMATION.—The Secretary may consider classified information in making a designation under this subsection. Classified information shall not be subject to disclosure for such time as it remains classified, except that such information may be disclosed to a court ex parte and in camera for purposes of judicial review under subsection (c).
"(4) PERIOD OF DESIGNATION.—
"(A) IN GENERAL.—Subject to paragraphs (5) and (6), a designation under this subsection shall be effective for all purposes for a period of 2 years beginning on the effective date of the designation under paragraph (2)(B).
"(B) REDESIGNATION.—The Secretary may redesignate a foreign organization as a foreign terrorist organization for an additional 2–year period at the end of the 2–year period referred to in subparagraph (A) (but not sooner than 60 days prior to the termination of such period) upon a finding that the relevant circumstances described in paragraph (1) still exist. The procedural requirements of paragraphs (2) and (3) shall apply to a redesignation under this subparagraph.
"(5) REVOCATION BY ACT OF CONGRESS.—The Congress, by an Act of Congress, may block or revoke a designation made under paragraph (1).
"(6) REVOCATION BASED ON CHANGE IN CIRCUMSTANCES.—
"(A) IN GENERAL.—The Secretary may revoke a designation made under paragraph (1) if the Secretary finds that—

"(i) the circumstances that were the basis for the designation have changed in such a manner as to warrant revocation of the designation; or

"(ii) the national security of the United States warrants a revocation of the designation.

"(B) PROCEDURE.—The procedural requirements of paragraphs (2) through (4) shall apply to a revocation under this paragraph.

"(7) EFFECT OF REVOCATION.—The revocation of a designation under paragraph (5) or (6) shall not affect any action or proceeding based on conduct committed prior to the effective date of such revocation.

"(8) USE OF DESIGNATION IN TRIAL OR HEARING.—If a designation under this subsection has become effective under paragraph (1)(B), a defendant in a criminal action shall not be permitted to raise any question concerning the validity of the issuance of such designation as a defense or an objection at any trial or hearing.

"(b) JUDICIAL REVIEW OF DESIGNATION.—

"(1) IN GENERAL.—Not later than 30 days after publication of the designation in the Federal Register, an organization designated as a foreign terrorist organization may seek judicial review of the designation in the United States Court of Appeals for the District of Columbia Circuit.

"(2) BASIS OF REVIEW.—Review under this subsection shall be based solely upon the administrative record, except that the Government may submit, for ex parte and in camera review, classified information used in making the designation.

"(3) SCOPE OF REVIEW.—The Court shall hold unlawful and set aside a designation the court finds to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity; or

"(C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right.

"(4) JUDICIAL REVIEW INVOKED.—The pendency of an action for judicial review of a designation shall not affect the application of this section, unless the court issues a final order setting aside the designation.

"(c) DEFINITIONS.—As used in this section—

"(1) the term 'classified information' has the meaning given that term in section 1(a) of the Classified Information Procedures Act (18 U.S.C. App.);

"(2) the term 'national security' means the national defense, foreign relations, or economic interests of the United States;

"(3) the term 'relevant committees' means the Committees on the Judiciary, Intelligence, and Foreign Relations of the Senate and the Committees on the Judiciary, Intelligence, and International Relations of the House of Representatives; and

"(4) the term 'Secretary' means the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General.".

(b) CLERICAL AMENDMENT.—The table of contents for the Immigration and Nationality Act, relating to terrorism, is amended by inserting after the item relating to section 218 the following new item:

"Sec. 219. Designation of foreign terrorist organizations.".

SEC. 303. PROHIBITION ON TERRORIST FUNDRAISING.

<< 18 USCA § 2339B >>

(a) IN GENERAL.—Chapter 113B of title 18, United States Code, is amended by adding at the end the following new section:

"§ 2339B. Providing material support or resources to designated foreign terrorist organizations

"(a) PROHIBITED ACTIVITIES.—

"(1) UNLAWFUL CONDUCT.—Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 10 years, or both.

"(2) FINANCIAL INSTITUTIONS.—Except as authorized by the Secretary, any financial institution that becomes aware that it has possession of, or control over, any funds in which a foreign terrorist organization, or its agent, has an interest, shall—

"(A) retain possession of, or maintain control over, such funds; and

"(B) report to the Secretary the existence of such funds in accordance with regulations issued by the Secretary.

"(b) CIVIL PENALTY.—Any financial institution that knowingly fails to comply with subsection (a)(2) shall be subject to a

civil penalty in an amount that is the greater of—

"(A) $50,000 per violation; or

"(B) twice the amount of which the financial institution was required under subsection (a)(2) to retain possession or control.

"(c) INJUNCTION.—Whenever it appears to the Secretary or the Attorney General that any person is engaged in, or is about to engage in, any act that constitutes, or would constitute, a violation of this section, the Attorney General may initiate civil action in a district court of the United States to enjoin such violation.

"(d) EXTRATERRITORIAL JURISDICTION.—There is extraterritorial Federal jurisdiction over an offense under this section.

"(e) INVESTIGATIONS.—

"(1) IN GENERAL.—The Attorney General shall conduct any investigation of a possible violation of this section, or of any license, order, or regulation issued pursuant to this section.

"(2) COORDINATION WITH THE DEPARTMENT OF THE TREASURY.—The Attorney General shall work in coordination with the Secretary in investigations relating to—

"(A) the compliance or noncompliance by a financial institution with the requirements of subsection (a)(2); and

"(B) civil penalty proceedings authorized under subsection (b).

"(3) REFERRAL.—Any evidence of a criminal violation of this section arising in the course of an investigation by the Secretary or any other Federal agency shall be referred immediately to the Attorney General for further investigation. The Attorney General shall timely notify the Secretary of any action taken on referrals from the Secretary, and may refer investigations to the Secretary for remedial licensing or civil penalty action.

"(f) CLASSIFIED INFORMATION IN CIVIL PROCEEDINGS BROUGHT BY THE UNITED STATES.—

"(1) DISCOVERY OF CLASSIFIED INFORMATION BY DEFENDANTS.—

"(A) REQUEST BY UNITED STATES.—In any civil proceeding under this section, upon request made ex parte and in writing by the United States, a court, upon a sufficient showing, may authorize the United States to—

"(i) redact specified items of classified information from documents to be introduced into evidence or made available to the defendant through discovery under the Federal Rules of Civil Procedure;

"(ii) substitute a summary of the information for such classified documents; or

"(iii) substitute a statement admitting relevant facts that the classified information would tend to prove.

"(B) ORDER GRANTING REQUEST.—If the court enters an order granting a request under this paragraph, the entire text of the documents to which the request relates shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

"(C) DENIAL OF REQUEST.—If the court enters an order denying a request of the United States under this paragraph, the United States may take an immediate, interlocutory appeal in accordance with paragraph (5). For purposes of such an appeal, the entire text of the documents to which the request relates, together with any transcripts of arguments made ex parte to the court in connection therewith, shall be maintained under seal and delivered to the appellate court.

"(2) INTRODUCTION OF CLASSIFIED INFORMATION; PRECAUTIONS BY COURT.—

"(A) EXHIBITS.—To prevent unnecessary or inadvertent disclosure of classified information in a civil proceeding brought by the United States under this section, the United States may petition the court ex parte to admit, in lieu of classified writings, recordings, or photographs, one or more of the following:

"(i) Copies of items from which classified information has been redacted.

"(ii) Stipulations admitting relevant facts that specific classified information would tend to prove.

"(iii) A declassified summary of the specific classified information.

"(B) DETERMINATION BY COURT.—The court shall grant a request under this paragraph if the court finds that the redacted item, stipulation, or summary is sufficient to allow the defendant to prepare a defense.

"(3) TAKING OF TRIAL TESTIMONY.—

"(A) OBJECTION.—During the examination of a witness in any civil proceeding brought by the United States under this subsection, the United States may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible.

"(B) ACTION BY COURT.—In determining whether a response is admissible, the court shall take precautions to guard against the compromise of any classified information, including—

"(i) permitting the United States to provide the court, ex parte, with a proffer of the witness's response to the question or line of inquiry; and

"(ii) requiring the defendant to provide the court with a proffer of the nature of the information that the defendant seeks to elicit.

"(C) OBLIGATION OF DEFENDANT.—In any civil proceeding under this section, it shall be the defendant's obligation to establish the relevance and materiality of any classified information sought to be introduced.

"(4) APPEAL.—If the court enters an order denying a request of the United States under this subsection, the United States may take an immediate interlocutory appeal in accordance with paragraph (5).

"(5) INTERLOCUTORY APPEAL.—

"(A) SUBJECT OF APPEAL.—An interlocutory appeal by the United States shall lie to a court of appeals from a decision or order of a district court—

"(i) authorizing the disclosure of classified information;

"(ii) imposing sanctions for nondisclosure of classified information; or

"(iii) refusing a protective order sought by the United States to prevent the disclosure of classified information.

"(B) EXPEDITED CONSIDERATION.—

"(i) IN GENERAL.—An appeal taken pursuant to this paragraph, either before or during trial, shall be expedited by the court of appeals.

"(ii) APPEALS PRIOR TO TRIAL.—If an appeal is of an order made prior to trial, an appeal shall be taken not later than 10 days after the decision or order appealed from, and the trial shall not commence until the appeal is resolved.

"(iii) APPEALS DURING TRIAL.—If an appeal is taken during trial, the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals—

"(I) shall hear argument on such appeal not later than 4 days after the adjournment of the trial;

"(II) may dispense with written briefs other than the supporting materials previously submitted to the trial court;

"(III) shall render its decision not later than 4 days after argument on appeal; and

"(IV) may dispense with the issuance of a written opinion in rendering its decision.

"(C) EFFECT OF RULING.—An interlocutory appeal and decision shall not affect the right of the defendant, in a subsequent appeal from a final judgment, to claim as error reversal by the trial court on remand of a ruling appealed from during trial.

"(6) CONSTRUCTION.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States to protect against the disclosure of classified information, including the invocation of the military and State secrets privilege.

"(g) DEFINITIONS.—As used in this section—

"(1) the term 'classified information' has the meaning given that term in section 1(a) of the Classified Information Procedures Act (18 U.S.C. App.);

"(2) the term 'financial institution' has the same meaning as in section 5312(a)(2) of title 31, United States Code;

"(3) the term 'funds' includes coin or currency of the United States or any other country, traveler's checks, personal checks, bank checks, money orders, stocks, bonds, debentures, drafts, letters of credit, any other negotiable instrument, and any electronic representation of any of the foregoing;

"(4) the term 'material support or resources' has the same meaning as in section 2339A;

"(5) the term 'Secretary' means the Secretary of the Treasury; and

"(6) the term 'terrorist organization' means an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act.".

<< 18 USCA Ch. 113B >>

(b) CLERICAL AMENDMENT TO TABLE OF SECTIONS.—The table of sections at the beginning of chapter 113B of title 18, United States Code, is amended by adding at the end the following new item:

"2339B. Providing material support or resources to designated foreign terrorist organizations.".

(c) TECHNICAL AMENDMENT.—

<< 18 USCA Ch. 113B >>

(1) NEW ITEM.—Chapter 113B of title 18, United States Code, relating to torture, is redesignated as chapter 113C.

<< 18 USCA Ch. 1 >>

(2) TABLE OF CHAPTERS.—The table of chapters for part I of title 18, United States Code, is amended by striking "113B. Torture" and inserting "113C. Torture".

JUSTICE AGAINST SPONSORS OF TERRORISM ACT

Public Law 114–222
114th Congress

An Act

Sept. 28, 2016
[S. 2040]

To deter terrorism, provide justice for victims, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Justice Against Sponsors of Terrorism Act.
18 USC 1 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Justice Against Sponsors of Terrorism Act".

18 USC 2333 note.

SEC. 2. FINDINGS AND PURPOSE.

(a) FINDINGS.—Congress finds the following:

(1) International terrorism is a serious and deadly problem that threatens the vital interests of the United States.

(2) International terrorism affects the interstate and foreign commerce of the United States by harming international trade and market stability, and limiting international travel by United States citizens as well as foreign visitors to the United States.

(3) Some foreign terrorist organizations, acting through affiliated groups or individuals, raise significant funds outside of the United States for conduct directed and targeted at the United States.

(4) It is necessary to recognize the substantive causes of action for aiding and abetting and conspiracy liability under chapter 113B of title 18, United States Code.

(5) The decision of the United States Court of Appeals for the District of Columbia in Halberstam v. Welch, 705 F.2d 472 (D.C. Cir. 1983), which has been widely recognized as the leading case regarding Federal civil aiding and abetting and conspiracy liability, including by the Supreme Court of the United States, provides the proper legal framework for how such liability should function in the context of chapter 113B of title 18, United States Code.

(6) Persons, entities, or countries that knowingly or recklessly contribute material support or resources, directly or indirectly, to persons or organizations that pose a significant risk of committing acts of terrorism that threaten the security of nationals of the United States or the national security, foreign policy, or economy of the United States, necessarily direct their conduct at the United States, and should reasonably anticipate being brought to court in the United States to answer for such activities.

(7) The United States has a vital interest in providing persons and entities injured as a result of terrorist attacks committed within the United States with full access to the

court system in order to pursue civil claims against persons, entities, or countries that have knowingly or recklessly provided material support or resources, directly or indirectly, to the persons or organizations responsible for their injuries.

(b) PURPOSE.—The purpose of this Act is to provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against persons, entities, and foreign countries, wherever acting and wherever they may be found, that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States.

SEC. 3. RESPONSIBILITY OF FOREIGN STATES FOR INTERNATIONAL TERRORISM AGAINST THE UNITED STATES.

(a) IN GENERAL.—Chapter 97 of title 28, United States Code, is amended by inserting after section 1605A the following:

"§ 1605B. Responsibility of foreign states for international terrorism against the United States 28 USC 1605B.

"(a) DEFINITION.—In this section, the term 'international terrorism'—

"(1) has the meaning given the term in section 2331 of title 18, United States Code; and

"(2) does not include any act of war (as defined in that section).

"(b) RESPONSIBILITY OF FOREIGN STATES.—A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which money damages are sought against a foreign state for physical injury to person or property or death occurring in the United States and caused by—

"(1) an act of international terrorism in the United States; and

"(2) a tortious act or acts of the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred.

"(c) CLAIMS BY NATIONALS OF THE UNITED STATES.—Notwithstanding section 2337(2) of title 18, a national of the United States may bring a claim against a foreign state in accordance with section 2333 of that title if the foreign state would not be immune under subsection (b).

"(d) RULE OF CONSTRUCTION.—A foreign state shall not be subject to the jurisdiction of the courts of the United States under subsection (b) on the basis of an omission or a tortious act or acts that constitute mere negligence.".

(b) TECHNICAL AND CONFORMING AMENDMENTS.—

(1) The table of sections for chapter 97 of title 28, United States Code, is amended by inserting after the item relating to section 1605A the following: 28 USC 1602 prec.

"1605B. Responsibility of foreign states for international terrorism against the United States.".

(2) Subsection 1605(g)(1)(A) of title 28, United States Code, is amended by inserting "or section 1605B" after "but for section 1605A".

SEC. 4. AIDING AND ABETTING LIABILITY FOR CIVIL ACTIONS REGARDING TERRORIST ACTS.

(a) IN GENERAL.—Section 2333 of title 18, United States Code, is amended by adding at the end the following:

"(d) LIABILITY.—

"(1) DEFINITION.—In this subsection, the term 'person' has the meaning given the term in section 1 of title 1.

"(2) LIABILITY.—In an action under subsection (a) for an injury arising from an act of international terrorism committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization under section 219 of the Immigration and Nationality Act (8 U.S.C. 1189), as of the date on which such act of international terrorism was committed, planned, or authorized, liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism.".

18 USC 2333 note.

(b) EFFECT ON FOREIGN SOVEREIGN IMMUNITIES ACT.—Nothing in the amendment made by this section affects immunity of a foreign state, as that term is defined in section 1603 of title 28, United States Code, from jurisdiction under other law.

Claims.
Courts.
18 USC 1605B note.

SEC. 5. STAY OF ACTIONS PENDING STATE NEGOTIATIONS.

(a) EXCLUSIVE JURISDICTION.—The courts of the United States shall have exclusive jurisdiction in any action in which a foreign state is subject to the jurisdiction of a court of the United States under section 1605B of title 28, United States Code, as added by section 3(a) of this Act.

(b) INTERVENTION.—The Attorney General may intervene in any action in which a foreign state is subject to the jurisdiction of a court of the United States under section 1605B of title 28, United States Code, as added by section 3(a) of this Act, for the purpose of seeking a stay of the civil action, in whole or in part.

(c) STAY.—

Certification.

(1) IN GENERAL.—A court of the United States may stay a proceeding against a foreign state if the Secretary of State certifies that the United States is engaged in good faith discussions with the foreign state defendant concerning the resolution of the claims against the foreign state, or any other parties as to whom a stay of claims is sought.

(2) DURATION.—

(A) IN GENERAL.—A stay under this section may be granted for not more than 180 days.

(B) EXTENSION.—

(i) IN GENERAL.—The Attorney General may petition the court for an extension of the stay for additional 180-day periods.

(ii) RECERTIFICATION.—A court shall grant an extension under clause (i) if the Secretary of State recertifies that the United States remains engaged in good faith discussions with the foreign state defendant concerning the resolution of the claims against the foreign state, or any other parties as to whom a stay of claims is sought.

SEC. 6. SEVERABILITY.

18 USC 2333 note.

If any provision of this Act or any amendment made by this Act, or the application of a provision or amendment to any person or circumstance, is held to be invalid, the remainder of this Act and the amendments made by this Act, and the application of the provisions and amendments to any other person not similarly situated or to other circumstances, shall not be affected by the holding.

SEC. 7. EFFECTIVE DATE.

Applicability. 18 USC 2333 note.

The amendments made by this Act shall apply to any civil action—

(1) pending on, or commenced on or after, the date of enactment of this Act; and

(2) arising out of an injury to a person, property, or business on or after September 11, 2001.

Mac Thornberry

Speaker of the House of Representatives pro tempore.

John Cornyn

Acting President of the Senate pro tempore.

IN THE SENATE OF THE UNITED STATES,

September 28, 2016.

The Senate having proceeded to reconsider the bill (S. 2040) entitled "An Act to deter terrorism, provide justice for victims, and for other purposes.", returned by the President of the United States with his objections, to the Senate, in which it originated, it was

Resolved, That the said bill pass, two-thirds of the Senators present having voted in the affirmative.

Julie E. Adams

Secretary.

I certify that this Act originated in Senate.

Julie E. Adams

Secretary.

IN THE HOUSE OF REPRESENTATIVES, U.S.

September 28, 2016.

The House of Representatives having proceeded to reconsider the bill (S. 2040) entitled "An Act to deter terrorism, provide justice for victims, and for other purposes.", returned by the President of the United States with his objections, to the Senate, in which it originated, and passed by the Senate on reconsideration of the same, it was

Resolved, That the said bill do pass, two-thirds of the House of Representatives agreeing to pass the same.

Karen L. Haas
Clerk.

LEGISLATIVE HISTORY—S. 2040:

CONGRESSIONAL RECORD, Vol. 162 (2016):
May 17, considered and passed Senate.
Sept. 9, considered and passed House.
DAILY COMPILATION OF PRESIDENTIAL DOCUMENTS (2016):
Sept. 23, Presidential veto message.
CONGRESSIONAL RECORD, Vol. 162 (2016):
Sept. 28, Senate and House overrode veto.

○

Restatement (Second) of Torts § 876 (1979)

Restatement of the Law - Torts
October 2016 Update
Restatement (Second) of Torts
Division Eleven. Miscellaneous Rules
Chapter 44. Contributing Tortfeasors

§ 876 Persons Acting in Concert

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

(a) does a tortious act in concert with the other or pursuant to a common design with him, or

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Caveat:

The Institute takes no position on whether the rules stated in this Section are applicable when the conduct of either the actor or the other is free from intent to do harm or negligence but involves strict liability for the resulting harm.

Comment on Clause (a):

a. Parties are acting in concert when they act in accordance with an agreement to cooperate in a particular line of conduct or to accomplish a particular result. The agreement need not be expressed in words and may be implied and understood to exist from the conduct itself. Whenever two or more persons commit tortious acts in concert, each becomes subject to liability for the acts of the others, as well as for his own acts. The theory of the early common law was that there was a mutual agency of each to act for the others, which made all liable for the tortious acts of any one.

Illustrations:

1. A, B, C and D come together to E's house at night to rob. A breaks in E's front door, B ties E up, C beats E and D steals and carries away E's jewelry. A, B, C and D are all subject to liability to E for all damages caused by the trespass to land, the false imprisonment, the battery and the conversion.
2. A and B are driving automobiles on the public highway. A attempts to pass B. B speeds up his car to prevent A from passing. A continues in his attempt and the result is a race for a mile down the highway, with the two cars abreast and both travelling at dangerous speed. At the end of the mile, A's car collides with a car driven by C and C suffers harm. Both A and B are subject to liability to C.

b. The same rule is applicable, in general, to tortious acts done pursuant to a common design or plan for cooperation in a tortious line of conduct or to accomplish a tortious end. It is in connection with these common designs or plans that the word "conspiracy" is often used. The mere common plan, design or even express agreement is not enough for liability in itself, and

there must be acts of a tortious character in carrying it into execution. When both parties engage in the acts, each becomes subject to liability for the cars of the other.

c. In order for the rule stated in Clause (a) to be applicable, it is essential that the conduct of the actor be in itself tortious. One who innocently, rightfully and carefully does an act that has the effect of furthering the tortious conduct or cooperating in the tortious design of another is not for that reason subject to liability.

Illustration:

3. A is drunk and disorderly on the public street. B, C and D, who are all police officers, attempt to arrest A for the misdemeanor committed in their presence. A resists arrest. B and C take hold of A, using no more force than is reasonable under the circumstances. A breaks away and attempts to escape. D draws a pistol and shoots A in the back. B and C are not liable to A for the shooting.

Comment on Clause (b):

d. Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortious it has the same effect upon the liability of the adviser as participation or physical assistance. If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other's act. This is true both when the act done is an intended trespass (see Illustrations 4 and 5) and when it is merely a negligent act. (See Illustration 6). The rule applies whether or not the other knows his act is tortious. (See Illustrations 7 and 8). It likewise applies to a person who knowingly gives substantial aid to another who, as he knows, intends to do a tortious act.

The assistance of or participation by the defendant may be so slight that he is not liable for the act of the other. In determining this, the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other and his state of mind are all considered. (See Illustration 9). Likewise, although a person who encourages another to commit a tortious act may be responsible for other acts by the other (see Illustration 10), ordinarily he is not liable for other acts that, although done in connection with the intended tortious act, were not foreseeable by him. (See Illustration 11). In determining liability, the factors are the same as those used in determining the existence of legal causation when there has been negligence (see § 442) or recklessness. (See § 501).

Illustrations:

4. A and B participate in a riot in which B, although throwing no rocks himself, encourages A to throw rocks. One of the rocks strikes C, a bystander. B is subject to liability to C.
5. A, a policeman, advises other policemen to use illegal methods of coercion upon B. A is subject to liability to B for batteries committed in accordance with the advice.
6. A and B are members of a hunting party. Each of them in the presence of the other shoots across a public road at an animal, which is negligent toward persons on the road. A hits the animal. B's bullet strikes C, a traveler on the road. A is subject to liability to C.
7. A persuades B, who is not an officer, to arrest C for a crime which A tells B was committed by C but which he knows has not been committed by anyone. A is subject to liability to C.
8. A sells to B for resale a gun known by him to be dangerously defective. B negligently fails to examine the gun before selling it to C, who is hurt while attempting to discharge it. A is subject to liability to C.
9. A is employed by B to carry messages to B's workmen. B directs A to tell B's workmen to tear down a fence that B believes to be on his own land but that in fact, as A knows, is on the land of C. A delivers the message and the workmen tear down the fence. Since A was a servant used merely as a means of communication, his assistance is so slight that he is not liable to C.
10. A and B conspire to burglarize C's safe. B, who is the active burglar, after entering the house and without A's

knowledge of his intention to do so, burns the house in order to conceal the burglary. A is subject to liability to C, not only for the conversion of the contents of the safe but also for the destruction of the house.

11. A supplies B with wire cutters to enable B to enter the land of C to recapture chattels belonging to B, who, as A knows, is not privileged to do this. In the course of the trespass upon C's land, B intentionally sets fire to C's house. A is not liable for the destruction of the house.

Comment on Clause (c):

e. When one personally participates in causing a particular result in accordance with an agreement with another, he is responsible for the result of the united effort if his act, considered by itself, constitutes a breach of duty and is a substantial factor in causing the result, irrespective of his knowledge that his act or the act of the other is tortious. Thus each of a number of trespassers who are jointly excavating a short ditch is liable for the entire harm done by the ditch, although each reasonably believes that he is not trespassing.

In a large undertaking to which the services of many persons contribute, the contribution to the enterprise of one individual may be so small as not to constitute substantial assistance within the meaning of the rule stated in this Section. Thus a workman who tortiously excavates for the foundation of one of a series of buildings to be used by a manufacturing plant is not necessarily a co-tortfeasor with other workmen simultaneously tortiously excavating for other buildings upon the same premises.

It is to be noted that a person may be privileged, and hence be committing no breach of duty, in assisting another who is committing or who later commits a tort. Thus one who reasonably believes that he is defending another against an aggressor may not be liable although the other is in fact the aggressor. (See § 76). Further, one who assists in doing an act that from his standpoint does not involve elements of undue risk is not liable merely because another with whom he co-operates is negligent. (See Illustration 12). Likewise one who supplies another with the means of committing a tort is not liable if he has no reason to suppose that a tort will be committed. (See Illustrations 13 and 14). In none of these cases is the defendant committing a breach of duty to the injured person.

Illustrations:

12. A and B hunt together but not in the prosecution of a joint enterprise. It is not negligent to hunt where they are, and neither of them has reason to believe that the other will be negligent. Under the unreasonable belief that it is an animal, A shoots at a moving object that proves to be a man. B is not liable for A's negligent act.
13. A sells to B a second-hand gun, knowing that it is defective but reasonably believing that B, who also knows of the defect, will repair it before it is used. B, however, uses it without repairs and C is harmed by the resulting explosion. A is not liable to C.
14. A supplies B with wrecking tools, knowing that B is going to use them on a specific tract of land but having no reason to know that B is planning to burglarize a building on the land. A is not liable to C, the owner of the building burglarized by B through the use of the wrecking tools.

Comment on Caveat:

f. On the liability for the escape of animals and for abnormally dangerous conduct for which there is strict liability, see §§ 504- 524. Liability in these cases is imposed, not on the ground that the conduct upon which it is based is wrongful, but on the ground that the conduct, although lawful because of the importance of the enterprise to the community, creates such great risk of harm to third persons that it is fair that the one conducting the enterprise should be required to compensate for the harm caused by it.

Illustrations:

15. In a state in which there is strict liability for harm resulting from the intentional explosion of dynamite, A and B are employees of C and make preparations for exploding dynamite at a place where it is not negligent to do so. Debris from the explosion strikes D. The Institute takes no position on the liability of A and B.

16. A is B's servant, employed to feed and care for the animals in a menagerie. Without fault on A's part, one of the wild animals escapes and harms C. Assuming that A was not a possessor of the animal and hence not liable as such, the Institute takes no position on A's liability to C.

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