10-4519-cv(L)

10-4524-cv(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

COURTNEY LINDE, *et al.*,

Plaintiffs-Appellees.

—against—

ARAB BANK, PLC,

Defendant-Appellant.

APPEAL AND PETITION FOR MANDAMUS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK (ELEVEN CONSOLIDATED CASES)

REPLY BRIEF FOR DEFENDANT-APPELLANT

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Note: In this brief, "A" refers to the Appendix submitted with the Bank's opening brief; "SPA" refers to the Special Appendix appended to the Bank's opening brief; "SA" refers to the Supplemental Appendix submitted with plaintiffs' brief; and "RA" refers to the Bank's Supplemental Appendix submitted herewith.

INTRODUCTION

The Bank has demonstrated that the Sanctions Order violates settled precedent, due process standards, and international comity by depriving the Bank of a fair opportunity to defend itself against plaintiffs' charges simply because it obeyed foreign criminal law. Plaintiffs respond by urging deference to the district court's exercise of discretion. But a ruling is "necessarily" an abuse of discretion if it rests "on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Shcherbakovskiy*, 490 F.3d at 135, 139-40 (vacating sanctions for non-production necessitated by Russian privacy law). Furthermore, the requirement that "any sanction must be 'just'" is a "due process restrictio[n] on the court's discretion" (*Compagnie des Bauxites*, 456 U.S. at 707), as to which a district court's rulings are reviewed *de novo*. *Serra Chevrolet*, 446 F.3d at 1147. This Court owes no deference to a ruling that rests on a wrong legal standard or factual assessment or that improperly rejects a "due process" challenge. *Ibid.*

Under the correct legal standard, (i) severe sanctions may not be imposed for non-production unless it was motivated by a *culpable state of mind*; (ii) foreign law making disclosure a criminal offense provides a *weighty excuse* for non-production; (iii) international comity requires U.S. courts to *minimize conflicts* with foreign law; and (iv) sanctions may not be *disproportionate* to the discovery violation the court seeks to remedy. The district court failed to apply these legal

requirements. Moreover, plaintiffs cite no case in which a district court increased sanctions imposed by a Magistrate Judge, as the district court did here.

Plaintiffs attempt to transform the key legal question—the propriety of draconian sanctions for complying with foreign criminal law—into a factual dispute concerning particular accounts and transactions. But the sanctions are erroneous as a matter of law because the dispositive fact is undisputed: the laws of Jordan, Lebanon, and the Palestinian Territories make the Bank's disclosure of the records sought a criminal offense. Plaintiffs are unable to cite a single case in which discovery sanctions have been imposed where:

- the foreign law prohibiting disclosure is embodied in a statute of general application—as here;
- a foreign government objected to forced disclosure—as three governments have here; and
- there is no finding that the foreign statute is a sham designed to obstruct U.S. litigation, and foreign governments have authoritatively stated that they will enforce their privacy laws.

Lacking legal authority, plaintiffs point to a handful of accounts and transactions processed by the Bank for parties allegedly connected to Hamas. But a bank processing tens of millions of annual transactions must rely on computer-implemented lists provided by government agencies to block transactions on behalf

of terrorists or terrorist affiliates. As detailed below, the Bank utilizes such lists wherever it operates. And in the Middle East the Bank has pioneered application of computer screening that implements the U.S. government's terrorist list. The Bank promptly closed any account once it determined that the account holder was designated as a terrorist or affiliate. Plaintiffs ignore gaps between the dates of the transactions they cite and the dates on which individual depositors were designated as terrorists, as well as geographical disparities between the cited transactions and the governing lists of designated terrorists.

Hotly disputed factual issues regarding the Bank's knowledge and the nature of such transactions are central to the parties' claims and defenses and must be addressed at trial. The district court's conclusion that "the allegations of the complaints are taken as true" (SPA7 n.2)—for purposes of imposing a potentially outcome-determinative sanction—amounts to an improper ruling on the merits that the Bank supports terrorism. The Bank seeks a fair opportunity to prove the falsity of those allegations.

The appearance of the Kingdom of Jordan as amicus in this case demonstrates the extraordinary nature of the Sanctions Order and its adverse geopolitical implications. A federal court may not take U.S. foreign policy into its own hands by overriding foreign banking laws and the comity interests presented here.

ARGUMENT

I. THE SANCTIONS ORDER IS IMPROPER AS A MATTER OF LAW AND DEPRIVES THE BANK OF ITS DUE PROCESS RIGHTS.

The Sanctions Order is draconian in its severity, rests on a mistaken view of sanctions law, depends on characterizations of the facts that are flatly at odds with the record, and eviscerates the Bank's due process rights.

A. The Sanctions Order Is Severe.

Plaintiffs (at 48) attempt to downplay the impact of the adverse inference and preclusion sanctions. But the district court's own words refute that effort.

First, "the jury will be instructed that, *based on defendant's failure to produce documents*," it may infer that the Bank provided financial services to terrorists "*knowingly and purposefully*." SPA20 (emphasis added). Second, the Bank "is precluded from making *any* argument or offering *any* evidence regarding its state of mind or other issue *that would find proof or refutation in withheld documents*." *Id*. (emphasis added).

The impact of these orders taken together is breathtaking. The district court has ruled that the Bank "cannot argue that it had no knowledge a certain Bank customer was a terrorist if it did not produce that person's complete account records." SPA19. And the court further ruled that the Bank will be precluded from arguing that "it closed the terrorists' accounts as soon as the accountholders were so designated." SPA21.

The Sanctions Order therefore is not simply a permissive inference. It not only relieves plaintiffs of their burden of proof by inviting the jury to infer that the Bank had a guilty state of mind, but also gags the Bank by preventing it from responding with meaningful evidence to challenge that negative inference. The order falls like a sledgehammer and all but guarantees a verdict for plaintiffs on the Bank's state of mind. It bars any evidence that "could disprove" plaintiffs' allegations of knowledge and intent. SPA22. The jury will never know that the Bank was complying with legal obligations backed by criminal penalties, or that the Magistrate Judge found that the proposed adverse inference was "not adequately supported by the record." A1150.

Plaintiffs say (at 49) that the Bank may rely on the documents it did produce to make its case. But those are simply a portion of the documents requested *by plaintiffs*. In other words, plaintiffs seek to dictate the evidence the Bank may use to refute their claims. With respect to accountholders covered by bank secrecy laws—all persons whose "complete account records" the Bank could not produce (SPA19)—the Bank witnesses can offer no state-of-mind defense at all.

Throughout their brief, plaintiffs falsely state that the Magistrate Judge and District Judge ruled the same way. But the Magistrate Judge concluded that neither the adverse state-of-mind inference nor the preclusion order was warranted. A1150-A1151. And the district court made characterizations about the withheld

documents that the Magistrate Judge called "necessarily a subject of speculation." A1157. The district court was not "uniquely positioned" to assess the sanctions issue, as plaintiffs assert (at 35). Only the Magistrate Judge held hearings and examined the evidence in detail, and on that basis concluded that the sole supportable inference was that some customers who turned out to be terrorists had accounts at the Bank.

Plaintiffs (at 51) say it is "premature" to consider the consequences of the preclusion order. But the district court already has rejected the Bank's objections, and it did so again on reconsideration. There is no need to wait for trial to know that large swaths of critical defense evidence and argument will be cut off. And if the scope of the preclusion order is as uncertain as plaintiffs contend, the Bank has no meaningful way to prepare its defense in this gargantuan proceeding.

B. The Sanctions Order Is Improper As A Matter Of Law.

This Court has made clear that severe sanctions are legally impermissible where a party "cannot obtain" requested documents due to foreign law. *Shcherbakovskiy*, 490 F.3d at 138. Plaintiffs cite *no* case where a foreign bank was severely sanctioned for complying with foreign criminal statutes that, like the bank privacy statutes here, were laws of general application rather than sham statutes designed to block U.S. litigation. Under plaintiffs' approach, privacy laws would be overridden in virtually every case involving a foreign bank.

This Court and the Supreme Court have agreed that federal judges must "empathize" with a party "subject to the jurisdiction of two sovereigns and confronted with conflicting commands." *First Nat'l City*, 396 F.2d at 901; see *Aérospatiale*, 482 U.S. at 546 (courts must "take care to demonstrate due respect" for "any sovereign interest expressed by a foreign state"). Courts therefore have been careful not to impose sanctions on parties facing this Hobson's choice. *E.g.*, *Shcherbakovskiy*, 490 F.3d at 139 ("If Russian law prohibits appellant from obtaining and producing the documents" then "the matter is at an end"); *Cochran Consulting*, 102 F.3d at 1232 (vacating sanctions where foreign party's compliance with discovery order would risk criminal penalties); accord *Trade Dev. Bank*, 469 F.2d at 39-41; *Westinghouse*, 563 F.2d at 994, 997; *First Nat'l Bank*, 699 F.2d at 345-46. This Court, unlike the district court, accords foreign criminal law "great weight." Foreign law is not a feather on a discretionary scale.

Plaintiffs cite *Kronisch v. United States*, 150 F.3d 112 (2d Cir. 1998), and *Residential Funding v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002). But those cases directly refute plaintiffs' argument.

Kronisch involved evidence spoliation—a defendant's destruction of key documents. This Court upheld an adverse inference sanction based on "the common sense notion that a party's destruction of evidence" suggests that "the evidence was harmful." 150 F.3d at 126. *Residential Funding* involved a

plaintiff's failure to produce discovery materials in time for trial. This Court held that a "culpable state of mind" is required for an adverse inference and that a finding that the plaintiff "purposefully" obstructed discovery supported an inference that the withheld materials were harmful.

In both cases a culpable state of mind gave rise to a reasonable inference that the non-produced evidence was harmful. The same was true in *Daval Steel v. M/V Fakredine*, 951 F.2d 1357 (2d Cir. 1991), where a sanction was upheld because of a party's "willful" failure to comply with discovery. But sanctioning a party who evinces no such culpable state of mind is unjust and impermissible. *E.g.*, *Akinyemi v. Napolitano*, 347 F. App'x 604, 608 (2d Cir. 2009). In this case, the reason for non-production was not a "culpable state of mind" but rather the compulsion of foreign law. There is nothing "just" about severely penalizing a party for obeying criminal statutes. As explained in *Rogers*, 357 U.S. at 211, severe sanctions violate due process where a party's non-production was "fostered neither by its own conduct nor by circumstances within its control."

As the Magistrate Judge found, production of the withheld records "would violate the laws of foreign jurisdictions and expose not only the Bank, but its employees, to criminal sanctions." A1135. Unlike the non-producing parties in *Kronisch* and *Residential Funding*, the Bank had a "weighty excuse" for non-production. *Rogers*, 357 U.S. at 211.

Plaintiffs suggest (at 41) that a paucity of reported prosecutions means that the foreign laws are not enforced. But widespread compliance is the logical explanation. The foreign governments themselves have insisted in an amicus brief and several letters that they will prosecute any violations. *E.g.*, A1259, A1261, A1264. Those governmental views are "conclusive" under *Pink*, 315 U.S. at 220. And a federal court may not put a foreign sovereign to the Hobson's choice of waiving enforcement of its criminal laws or risking destruction of a financial institution vital to the sovereign's welfare. Plaintiffs further suggest (at 42) that these laws protect "the privacy of terrorists." But the record shows that the laws apply generally and protect the privacy of *all* bank customers (A1067, A1075-76, A1079, A1259-A1265), which would be destroyed by disclosure of the "wide range of documents" demanded by plaintiffs (A988).

Plaintiffs (at 33) deny that the Bank acted in good faith. But the Magistrate Judge found that "over 200,000 documents that are subject to bank secrecy laws" were produced to plaintiffs due to "defendant's efforts" (A1138) and "by virtue of" the Bank's efforts (A1140). The Bank cannot be faulted for refusals of foreign governments to accede to the Bank's requests to allow disclosure. Plaintiffs (at 34) quibble about the wording of one of the Bank's many request letters and the time it took to produce some documents in New York. But the Magistrate Judge found that the letter, which expressed the Bank's consistent view that the charges against

it are unfounded, was "not inaccurate." A1138-A1139. And the Bank produced the New York documents voluntarily and as soon as legitimate objections were resolved. Bank Br. 58-59. Plaintiffs' premise—that the Bank had no right to object to what it believed were unduly broad discovery demands—is wrong as a matter of civil procedure and cannot sustain their charges of bad faith.

Plaintiffs contend (at 34-35) that the Bank's production of documents subpoenaed by OCC and by a Texas grand jury evinces bad faith. But those contentions were carefully considered and rejected by the Magistrate Judge, who properly distinguished non-public disclosures to governmental bodies in criminal proceedings from the disclosures demanded by private plaintiffs in this civil proceeding. A1136-A1137. As Jordan's amicus brief explains, the U.N. International Convention for the Suppression of the Financing of Terrorism provides "a narrow exception to otherwise applicable domestic bank confidentiality laws" for "official state-to-state requests" in criminal and terrorism financing investigations, but "does *not* establish any exception to otherwise applicable domestic bank confidentiality laws for requests made by ordinary, private third parties in foreign civil litigation." Jordan Br. 12-13, see also SA410-412 (describing criminal law focus of Convention). Moreover, materials submitted to a grand jury are secret (see *Douglas Oil v. Petrol Stops Nw.*, 441 U.S. 211, 218 (1979)), and OCC asserted an examination privilege over communications between

it and the Bank (R.128 (*Linde*)). By contrast, materials produced in private discovery are generally publicly available even if initially filed under seal, especially after a court makes its ruling. *Lugosch v. Pyramid Co.*, 435 F.3d 110, 124 (2d Cir. 2006).

With no evidence of bad faith, plaintiffs speculate that the documents were withheld for suspicious reasons. But the case law requires *proof* of a "culpable state of mind" (*Residential Funding*), not mere speculation. And a party's inability to produce that is "fostered neither by its own conduct nor by circumstances within its control" is a "weighty excuse" (*Rogers*).

Plaintiffs attempt to leap over the culpable state-of-mind requirement by raising (at 44-46) disputed factual issues regarding accounts allegedly maintained for Hamas operatives and payments allegedly made to families of suicide bombers. Plaintiffs disregard the timing of the transactions, the jurisdictions responsible for the terrorist designations, and other highly pertinent facts. There is no logical basis for inferring knowing support for terrorism from the fact that the Bank processed a handful of transactions (out of tens of millions) for persons *later* or *elsewhere* designated as terrorists. Allowing the district court to invade the jury's province on these disputed issues would violate the Bank's Seventh Amendment right. See *Wilson v. Volkswagen*, 561 F.2d 494, 503-04 (4th Cir. 1977) (unduly severe

sanctions for discovery violations are "an infringement upon a party's right to trial by jury under the seventh amendment").

As this Court has put it, there is no provision in "any" rule of civil procedure "for any tentative, provisional or other makeshift determination of the issues of any case on the merits for the avowed purpose of deciding a collateral matter." *Eisen v. Carlisle*, 479 F.2d 1005, 1015 (2d Cir. 1973). Such a mini-trial approach would be "extremely prejudicial" to parties bearing "the brunt of such findings and conclusions, and such prejudice may well be irreparable." *Id*. The Supreme Court agreed:

> a preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials. The court's tentative findings, made in the absence of established safeguards, may color the subsequent proceedings and place an unfair burden on the defendant.

417 U.S. at 178. The district court committed legal error by preempting the jury's role and adjudicating these disputed factual issues.

C. Nothing In The Documents Cited By Plaintiffs Supports The District Court's Severe Sanctions.

Plaintiffs argue (at 43-47) that they proved that the undisclosed documents are incriminating. But the Magistrate Judge expressly found that plaintiffs made "no showing that the withheld evidence would be likely to provide direct evidence of the *knowledge and intent* of the Bank in providing the financial services at the

heart of this case." A1145 (emphasis added). The district court had no superior familiarity with the facts warranting a different conclusion, and no authority to displace the jury.

1. Plaintiffs falsely claim the Bank supports terrorism.

Over many years, the Bank regularly has revised its procedures to comply with banking laws and regulations of the United States and other jurisdictions where it operates. The Bank's New York office ("ABNY") consistently screens its accounts and wire transfers against the "OFAC list." RA160; see RA3-8. This frequently updated list of "Specially Designated Nationals And Blocked Persons" is maintained by the U.S. Office of Foreign Assets Control.[1] OFAC compliance is the principal tool used by banks to combat terror financing. The Bank's filtering software enables it automatically to identify and prevent transactions involving a person on the OFAC list, and ABNY has used it to block numerous transfers and accounts. RA105-06; RA161-62.

While all banks operating in the United States must use OFAC screening, overseas branches of foreign banks are governed by laws of the jurisdictions where they operate. RA103; RA190. Nonetheless, in 2002 the Bank voluntarily decided to implement OFAC screening at branches outside the United States. RA60-62;

[1] Available at http://www.treasury.gov/ofac/downloads/t11sdn.pdf.

RA125. Arab Bank was one of the first financial institutions in the Middle East to do so. RA61; RA125.

The Bank's voluntary adoption of U.S. standards at its Middle East branches refutes plaintiffs' claim that the Bank knowingly or intentionally facilitated terrorism. Furthermore, in Jordan, Lebanon, and the Palestinian Territories, the Bank also applied Know-Your-Customer and Anti-Money Laundering protocols designed to detect and prevent abuses. RA64-68; RA120-23; RA175-78. The Bank likewise screened all accounts and wire transfers against its own internal blacklist of prohibited customers. RA124.

Beyond this, the Bank's overseas operations were subject to comprehensive regulatory oversight. In the Palestinian Territories, the Bank's regulator required it to screen all accounts and transfers against a blacklist of prohibited customers. *Id*. The Bank also was required to report monthly every transaction it processed. RA129. The Bank engages in similar compliance efforts in Lebanon and Jordan. RA31-36; RA175-88. No wonder the Israeli Defense Forces concluded—in a statement of record ignored by plaintiffs and the district court—that there is no evidence that "[Arab] Bank or any of its employees were involved in any way whatsoever in terrorist activities, or funded terrorism." A1255.

2. The transactions cited by plaintiffs were processed in accordance with governing law.

The district court sought to justify the Sanctions Order by citing a few of the many thousands of documents produced by the Bank. Plaintiffs now argue (at 4) that "withheld documents" would "yield similar evidence." Plaintiffs point (at 15, 44-50, 56-57) to three categories of records relating to (i) transfers made by the Saudi Committee, (ii) transfers for the benefit of individuals who were subsequently designated terrorists, and (iii) an account opened by an individual named Hamdan. None supports the assertion that the Bank knowingly provided services to terrorists, and none supports displacement of the jury's role.

Plaintiffs possess all Saudi Committee records. The Saudi Committee was created by royal decree of a U.S. ally to administer a humanitarian relief program. RA91. Saudi Arabia's Minister of the Interior, who is responsible for security and counterterrorism, oversaw the Committee. RA95-97. Plaintiffs do not deny that senior representatives of the U.S. government have acknowledged the legitimate humanitarian work of the Committee. Bank Br. 57; RA92-93. Plaintiffs' characterization (at 6) of the Saudi Committee payments as a "terrorist death benefit plan" is simply unsupported rhetoric.

The Bank has produced Saudi Committee transaction records *in full*. They include documents identifying the names of all beneficiaries and amounts and dates of all payments, as well as payment correction sheets. Bank Br. 56-57. None

of the beneficiaries identified on these transfer records appeared on the OFAC or any other blacklist (except in one instance where the Bank blocked the transfer). RA135; RA193-94.

Plaintiffs' assertion (at 8) that the Bank has concealed "reports that it generated regarding suspicious activities" is pure fabrication. Any suspicions regarding an account holder would be documented in the account file. The Saudi Committee was not the Bank's customer, but rather a customer of the Bank's correspondent bank, Arab National Bank. Nothing in the record, including all produced correspondence between the Bank and Arab National Bank, suggests the existence of any such reports. RA14-26; RA135-40; RA193-97.

Plaintiffs argue (at 53-54) that the state-of-mind sanctions are justified by non-production of individual account records for each beneficiary of the 170,000 Saudi Committee payments, which are barred from disclosure by foreign criminal law. They speculate that these missing documents might provide additional proof of identity and deposit and withdrawal histories. But plaintiffs do not suggest how such additional records would support their claims, as they already know the identity of every Saudi Committee beneficiary. Moreover, the Magistrate Judge's recommended sanctions would preclude the Bank from using any information from such unproduced records for any purpose. A1152.

The Bank did not knowingly process transfers to terrorists. Plaintiffs cite (at 44-46) transfer records as additional justification for the Sanctions Order. But they conspicuously fail to mention that each of the referenced payments was processed *before* any of the individuals in question was added to the relevant blacklist. *E.g.*, RA162-64.

As plaintiffs are well aware, the few instances when the Bank mistakenly processed transfers for an individual or entity on the OFAC list were caused by either human error or the appearance of the name on the transfer record in a format that the software then available to the banking industry could not recognize. RA46-58. The Bank reported each of these instances to the regulator and had the software updated. *Id*.

***The Hamdan account records do not show support for Hamas*.** Plaintiffs also claim (at 15, 45, 50) that the complete account records produced by the Bank for Osama Hamdan demonstrate support for Hamas. These records show nothing of the sort.

Plaintiffs received every document relating to the Hamdan account and deposed Bank witnesses concerning it. Documents produced to plaintiffs show that the Hamdan account was opened and cleared by the central bank of Lebanon in 1998 (RA37-38)—*prior* to the addition of Hamdan to the OFAC list in 2003—and that there were no withdrawals or outbound transfers after August 2001.

RA73-77. The Bank froze and reported this account to Lebanon's Special Investigation Committee once allegations of possible irregularity were brought to its attention in July 2004. RA43-45; RA74-82. The Bank followed Lebanese law in maintaining this account, closing it, and remitting the $8600 balance to Hamdan upon closure, having received no instructions from the Special Investigation Committee to the contrary. RA79-84.

Plaintiffs further contend (at 34) that the Bank improperly asserted foreign bank privacy laws with respect to the Hamdan account records. In fact, the Bank never invoked foreign bank privacy laws to withhold records located in New York and repeatedly stated it was *not* doing so. See, *e.g.*, RA2. Nothing about the production of the Hamdan account records was hidden from plaintiffs or the court, and there is no dispute that *all these records were produced*, whether from New York or Lebanon.

Plaintiffs mischaracterize the OCC settlement. Plaintiffs finally argue (at 34, 54-55) that OCC findings regarding ABNY's compliance program support the Sanctions Order. But those findings—made in settlement without any admissions of "wrongdoing" (SA81, 95)—refute plaintiffs' argument.

OCC made clear that the Bank fully cooperated with its examination of ABNY in 2004. SA80. OCC identified "inadequacies" in the Bank's monitoring procedures, finding that "effective monitoring of fund transfers [for originators and

beneficiaries without accounts at ABNY] required automation." Prior to that time, OCC consistently had rated the Bank's compliance programs highly. *E.g.*, RA108.

Plaintiffs falsely contend (at 11) that the Bank "revised its position," claiming initially that the records examined by OCC could not be identified with precision, but later disclaiming that statement. In fact, the Bank consistently told the district court that because OCC had direct access to all of the Bank's paper and electronic records, the Bank could identify only general categories of records, not the precise records that OCC inspected. *E.g.*, RA11-13. Notwithstanding this reasonable explanation, the district court mischaracterized the Bank's assertion as meaning it had "no idea" what OCC had reviewed. SA33.

Plaintiffs also cite (at 7) a list of "individuals and entities with the same or similar names as suspected terrorists" that OCC compiled. But OCC created that list for the first time *during* its review; it was *not* the OFAC list that banks operating in the United States use for screening purposes. SA122. The Acting Comptroller's statement to Congress (see Pl. Br. 7) does not even suggest that anyone at the Bank knowingly or purposefully supported terrorism. See RA108-14; RA166-67 (over 90 banks have been subject to similar OCC enforcement actions since 2002).

Although FinCEN concluded that ABNY experienced "failures in internal controls" (SA90), the former Chief Counsel to OCC emphasized that "[t]here was

no finding that Arab Bank—New York had any accounts for anyone involved with terrorism, or that Arab Bank—New York processed any transaction that it should not have processed." RA110.

Of greatest importance, OCC and FinCEN found that ABNY *complied* with its obligation to screen accounts and transfers against the OFAC list—the *official published list* used by banks to block terrorist financing. RA106; RA173-74. The agencies concluded that ABNY had proper procedures in place to prevent transfers to or from anyone then designated on the OFAC list, and they expressly found that ABNY "complied with the requirement to cease clearing funds transfers once [OFAC] designated an entity" as a "specially designated terrorist," "specially designated global terrorist," or "foreign terrorist organization." SA94.

D. The Sanctions Order, Unless Reversed, Will Prevent A Fair Trial In Violation Of Due Process.

The Sanctions Order does not "restore the balance of fairness." SPA23. To the contrary, it is an utterly disproportionate response to compliance with foreign law that reduces this massive litigation to a show trial. The very case cited by plaintiffs (at 43) makes clear that "due process restrictions" require all sanctions to be "just"—which these sanctions manifestly are not. *Compagnie des Bauxites*, 456 U.S. at 707.

As demonstrated in the Bank's opening brief (at 31-32), due process forbids such harsh sanctions for withholding documents unless the facts support a

presumption that withholding amounts to an admission of guilt. Here, far from supporting such a presumption, the record shows that the Bank withheld documents only because disclosure would be a criminal offense. And as the Magistrate Judge expressly found, plaintiffs have made no showing that the non-produced materials would establish guilty state of mind. A1145.

Severely punishing the Bank before any trial in this case repeats the Red Queen's command: "sentence first–verdict afterwards"—an analogy this Court invoked in overturning a sanction for failure to produce documents in *New York Currency v. CFTC*, 180 F.3d 83, 85 (2d Cir. 1999). Plaintiffs' charge (at 52) that the Bank's due process argument "blames the sanctions for what the evidence already damningly shows" confirms that the sanctions rest on a pre-trial adjudication of liability. That is impermissible outside of Wonderland.

E. The Court's Prior Rulings On Causation And Secondary Liability Compound The Sanctions Order's Injurious Impact.

Plaintiffs urge this Court to withhold guidance on related issues of causation and aiding and abetting liability that make the Sanctions Order especially injurious in practical operation. Although review of these rulings is of course unnecessary to establish legal error in the Sanctions Order, such review is within this Court's authority under *Schlagenhauf*, 379 U.S. at 111. Plaintiffs contend (at 27) that the Court's broad mandamus powers are constrained by *Swint* and its progeny. But as Judge Posner noted in reviewing related issues "virtually certain" to return on

appeal, "the Court in *Swint* cited [*Schlagenhauf*] with approval." *Underwood v. Hilliard*, 98 F.3d 956, 964 (7th Cir. 1996); see *In re Chambers*, 148 F.3d 214, 228-229 (3d Cir. 1998).

***Causation*.** Section 2333 requires proof of injury "*by reason of*" the defendant's "act of international terrorism." This language requires proof that the defendant proximately caused plaintiff's harm and that no independent cause intervened. Bank Br. 38-40. District courts interpreting Section 2333 likewise require proximate causation—including the very cases cited by plaintiffs (at 57, 59), as well as the *Rothstein* case currently being briefed in this Court, No. 08 Civ. 4414, at 3, on appeal (2d Cir. No. 11-211).

Boim v. Holy Land Foundation, 549 F.3d 685 (7th Cir. 2008) (en banc), is not to the contrary. Large donors there "deliberately funnel[ed] money" to terrorists, so proximate cause was satisfied. *Id.* at 701-02. By contrast, the Red Cross, because it provided "assistance without regard to the circumstances giving rise to the need for it," "would not be in violation of section 2333." *Id.* at 699. That is the Bank's situation: it had antiterrorism policies in place and broadly provided banking services to the public at large that improved the lives of millions and sustained economies across the Middle East. Plaintiffs contend (at 57-58) that the ATA's legislative history indicates Congress's intent to depart from the proximate cause requirement. In fact, Senate Report No. 102-342 (July 27, 1992)

expressly invokes "the law of torts" in discussing the scope of Section 2333, making clear Congress's intent to confine Section 2333's causal chain within proximate cause limits. SA105-06.

The 1996 Congressional findings plaintiffs cite (at 58) come from a bill that added *criminal* prohibitions to the ATA but did not modify Section 2333. SSPA3. It authorized the *Government* to rely on its "informed judgment" in deciding when to prosecute. *Holder*, 130 S. Ct. at 2728. Congress never suggested any intent to eliminate Section 2333's requirement that private *civil* plaintiffs prove proximate cause.

Secondary liability under ATA §2333. Section 2333 does not impose aiding and abetting or conspiracy liability. Plaintiffs (at 27) call the Bank's arguments and authorities (Br. 42-44) on this point "perfunctory." But the Bank cited copious precedent and plaintiffs muster no substantive response.

Liability under ATS. After the Bank filed its opening brief, this Court issued its mandate in *Kiobel* and denied the *Kiobel* plaintiffs' motion to recall the mandate, prompting the Bank to renew its request that the district court dismiss plaintiffs' ATS claims because *Kiobel* forbids ATS suits against corporations. R.764 (*Almog*). The district court responded by ordering a stay of briefing on the Bank's request until "a final determination of *Kiobel* by the Supreme Court" (R.766 (*Almog*))— although no petition for certiorari had then been filed and no

stay of the mandate was sought. The district court's refusal to apply the law of this Circuit—which would greatly reduce the burden of this massive litigation—confirms that this Court's intervention is needed.[2]

II. THE SANCTIONS ORDER VIOLATES INTERNATIONAL COMITY.

The Bank's opening brief (at 46-53) explained that principles of international comity require U.S. courts to minimize conflicts between their rulings and the laws of foreign jurisdictions, and that recent Supreme Court decisions give increased weight to those principles.

Plaintiffs' contention (at 36-40) that the district court fully accounted for international comity is plainly wrong. The Sanctions Order never so much as mentions international comity. It simply asserts that fear of criminal prosecution "is not, alone, sufficient justification" for non-production. And it brushes off the foreign laws as not posing "a real risk of prosecution." SPA12. The district court's reconsideration order merely refers back to its earlier discussion, dismisses the Supreme Court's recent comity cases and the foreign governments' submissions as raising nothing new, and concludes that only the propriety of sanctions—not their scope—implicates international comity. SPA23. This is empty lip service to international comity.

[2] To complete the destruction of the Bank's defenses, plaintiffs now seek to strike most of the Bank's expert witnesses, a motion the district court invited without any *Daubert* inquiry. RA85-86.

Plaintiffs (at 37) cite *Rogers*, 357 U.S. at 213, for the proposition that international comity does not prevent a district court from sanctioning parties "in whatever manner it deems most effective." But *Rogers* offered the district court certain procedural options on remand. Those options came into play only *after* the Court clearly held that a severe sanction could *not* be imposed merely because of an "inability to comply" with discovery orders due to foreign law. *Id*. at 212-13.

Plaintiffs argue (at 37-38) that international comity must take a backseat to policies against terrorism. But Congress has never said that discovery in private civil litigation could run roughshod over foreign privacy laws. Federal antitrust and securities fraud laws represent important Congressional policies as well, yet the Supreme Court has made clear that international comity limits their scope. Bank Br. 48-49.

In this very case, the Magistrate Judge recognized the centrality of financial privacy statutes in Israel, a country at the forefront of anti-terrorism efforts. In rejecting the Bank's efforts to obtain relevant documents from Israeli banks, Magistrate Judge Pohorelsky engaged in an "international comity analysis," found a "true conflict" with U.S. discovery rules because "Israeli bank-confidentiality laws protect bank customer account and transaction information," and explained that this protection is rooted in "important Israeli interests" that make privacy a

"basic right." A1125-A1128. Judge Pohorelsky thus held that U.S. discovery rules should not override foreign banking privacy laws even in a terrorism case.

There is nothing to plaintiffs' argument (at 39) that vacating the sanctions would confer "immunity." Plaintiffs remain free to attempt to prove their case with abundant documents the Bank has produced and extensive deposition evidence, just as civil litigants routinely do without resort to privileged materials. See *General Dynamics v. United States*, 2011 WL 1936073, at *5 (U.S. May 23, 2011) (under ordinary "evidentiary rules" the "privileged information is excluded and the trial goes on without it").

Plaintiffs finally contend (at 38-39) that U.S. discovery procedures trump international comity, citing *FG Hemisphere v. Congo*, 637 F.3d 373 (D.C. Cir. 2011). But that case did not involve any conflict between foreign law and U.S. discovery rules. Tellingly, plaintiffs do not mention recent Supreme Court cases such as *Empagran* and *Morrison*. Those cases recognize that we live in a "highly interdependent" world that requires that different nations "work together in harmony." *Empagran*, 542 U.S. at 164-65.

Plaintiffs (at 32) would undermine international cooperation by conferring unrestrained discretion on trial courts to override laws of foreign sovereigns based on vague balancing test standards. The factors emphasized by plaintiffs—relevance, no alternatives, need—could be asserted in *every* case to override

foreign law. In this case, according to plaintiffs, these factors allow the views of one District Judge (at odds with the views of a Magistrate Judge who conducted numerous hearings) to create serious international conflict with allies and diplomatic partners—with no effective appellate review. District courts should be constrained from disrupting U.S. international relations under the guise of imposing sanctions. See *Regan v. Wald*, 468 U.S. 222, 242 (1984) ("conduct of foreign relations" is "exclusively entrusted to the political branches of government").

III. IMMEDIATE REVIEW OF THE SANCTIONS ORDER IS WARRANTED.

The only court to squarely address the immediate reviewability of sanctions for failure to provide documents made confidential by foreign law held that the sanctioned party was "entitled to a review" and that "[i]t makes no practical difference whether [the] order be reviewed on direct appeal or by mandamus." *Arthur Andersen*, 570 F.2d at 1372. Plaintiffs provide no reason for a different result here.

A. Mandamus Review Of The Sanctions Order Is Warranted.

Plaintiffs argue (at 21, 24) that the Bank is engaging in "unsupported speculation" about harms caused by the Order. But filings by directly affected foreign governments establish the harms. Those submissions describe the "dramatic" impact that the sanctions will have on "the banking system and the

economy in the Palestinian Territories" (A1262) and the "potentially calamitous consequences for the region" as a whole. Jordan Br. 15.

In *Mohawk*, 130 S. Ct. at 606-09, the Supreme Court made clear that even if a party cannot take a collateral order appeal, it "may petition the court of appeals for a writ of mandamus" in cases involving "consequential" rulings. Indeed, if an immediate appeal of the Sanctions Order were unavailable, that would be reason to *exercise* mandamus authority, not withhold it. This Court has explained that mandamus is "the only 'adequate' means" for obtaining relief *because* the petitioner "cannot challenge the District Court's order by means of an interlocutory appeal." *Dinler*, 607 F.3d at 933.

Plaintiffs mistakenly assert (at 24) that "appeal from a final judgment" is sufficient. Requiring a bank "to choose" between harsh punishment and "violating [foreign privacy] law," the Ninth Circuit twice has held, "clearly constitutes severe prejudice that could not be remedied on direct appeal." *Credit Suisse*, 130 F.3d at 1346; accord *Philippine Nat'l Bank*, 397 F.3d at 774. This Court itself recently determined that "final review would be an inadequate alternative" to mandamus where "privacy rights of hundreds of parties are at issue." *Rajaratnam*, 622 F.3d at 170. Here, privacy rights of *tens of thousands* of customers are at stake.

Plaintiffs argue (at 24) that mandamus is unavailable because the Sanctions Order does not raise "a question of first impression." But "a petition need not

present a novel question of law to warrant the writ of mandamus." *Dinler*, 607 F.3d at 940 n.17. Mandamus is "appropriate" when "[the] question is of extraordinary significance or there is extreme need for reversal" before final judgment. *Id.* at 939. That standard is easily satisfied in this massive case, which involves the privacy of tens of thousands of bank customers, public policies of three governments, and the abrogation of defenses critical to a fair trial. Beyond this, the question presented *is* one of first impression because this Court's "prior cases have never involved the circumstances here" (*Rajaratnam*, 622 F.3d at 171)— a sanctions order that deprives a defendant of its state-of-mind defense as a penalty for obeying foreign criminal laws.

Plaintiffs finally contend (at 26) that there is no indisputable right to mandamus to review a "discretionary determination." But "a clear abuse of discretion" is the most common reason for concluding that the right to the writ is "clear and indisputable." *Dinler*, 607 F.3d at 943. Here the Sanctions Order is erroneous as a matter of law. And the Bank is entitled to *de novo* consideration of its legal and constitutional arguments. *Supra* p.1.

B. Collateral Order Review Of The Sanctions Order Also Is Warranted.

Plaintiffs suggest (at 19) that the Sanctions Order is inconclusive because it "leaves other matters to be tried." But "[t]he relevant inquiry" is "whether the order is conclusive as to 'the disputed question,' not the action as a whole." *Godin*

v. Schencks, 629 F.3d 79, 84 (1st Cir. 2010). The district court refused to reconsider its Sanctions Order and thus conclusively resolved the disputed question.

Far from being "enmeshed" in the merits, as plaintiffs claim (at 19), the sanctions question is completely separate. Plaintiffs rely on *Evanson v. Union Oil*, 619 F.2d 72 (Temp. Emer. Ct. App. 1980), and *Cunningham v. Hamilton County*, 527 U.S. 198 (1999), but those cases involved sanctions for inaccurate interrogatory answers, where the accuracy issues were entangled with the issues to be tried on the merits.

Plaintiffs are wrong in contending (at 20-23) that any harm to the Bank from delayed review is "speculative" and the Bank cannot show irreparable harm in a relevant "category" of cases. As explained above, the harm is not speculative—it threatens the Bank's economic viability and nullifies the public policy of sovereign governments. The only court to have addressed whether an order of the type at issue is immediately appealable defined the relevant category as sanction orders "which if complied with would have arguably put the complaining party in violation of foreign law." *D&H Marketers*, 744 F.2d at 1446. Such orders are immediately appealable because they "implicat[e] principles of comity and attendant problems of denial of effective review on later appeal." If such injuries were "erroneously imposed and left until the end of the entire case," a court of

appeals "would be unable to ameliorate the consequences on the delayed appeal." *Ibid*.

* * *

In *Shcherbakovskiy*, 490 F.3d at 142, where this Court vacated a harsh sanction for failure to produce documents barred from disclosure by foreign law, reassignment to a different district judge was deemed "advisable to preserve the appearance of justice." The Bank respectfully suggests that the same course is appropriate here. In a case of extraordinary international sensitivity, Judge Gershon has dismissed the views of concerned foreign governments and branded the Bank a terrorist accomplice without any evidentiary hearing and in conflict with the Magistrate Judge. She is likely to have "substantial difficulty in putting out of [her] mind [those] previously-expressed views." *United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977). She also inexplicably has refused to follow this Court's ruling in *Kiobel*, which would greatly narrow the scope of these cases. Given the Magistrate Judge's detailed familiarity with the case, reassignment to a different district judge would not "entail waste and duplication." *Ibid*.

CONCLUSION

The Sanctions Order should be vacated. This Court also should provide guidance to the district court to ensure that the proper adjudicatory standards are applied to plaintiffs' Alien Tort Statute and Anti-Terrorism Act claims.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,997 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point New Times Roman.

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Dated: June 6, 2011

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on June 6, 2011 the foregoing Opening Brief for Appellant-Petitioner Arab Bank plc with Supplemental Reply Appendix were served by CM/ECF and e-mail on the following:

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