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)

BRIEF AND SPECIAL APPENDIX FOR DEFENDANT-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1, the undersigned hereby certifies as follows:

Petitioner Arab Bank, plc has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

s / Jeffrey W. Sarles
One of Petitioner's attorneys

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JURISDICTIONAL STATEMENT

In this case involving claims under the Alien Tort Statute, 28 U.S.C. §1350, and Anti-Terrorism Act, 18 U.S.C. §2333, the district court has federal question jurisdiction under 28 U.S.C. §1331.

On July 12, 2010, the district court entered an order imposing sanctions against defendant Arab Bank plc ("the Bank"). SPA1-SPA20. On October 5, 2010, the court denied the Bank's motion for reconsideration. SPA20-SPA24. On November 3, 2010, the Bank filed a timely Notice of Appeal invoking the collateral order doctrine. A1266. The next day, the Bank filed a Petition for Mandamus likewise challenging the Sanctions Order. A1267-A1308. After plaintiffs moved to dismiss the collateral order appeal, this Court consolidated the Bank's appeal and Petition and set an expedited briefing schedule.

This Court has mandamus jurisdiction under 28 U.S.C. §1651 and F.R.A.P. 21 and appellate jurisdiction under 28 U.S.C. §1291 and the collateral order doctrine. The grounds for this Court's mandamus and collateral order jurisdiction are discussed in Part I, *infra*.

STATEMENT OF THE ISSUES

The district court severely sanctioned the Bank for not producing customer account records located in countries with laws that make disclosure of such records a criminal offense. The Sanctions Order authorizes the jury to draw an adverse inference that the Bank knowingly and purposefully supported terrorist acts and precludes the Bank from introducing evidence to refute that contention. In all but name, the Order thus directs a verdict against the Bank with respect to its state of mind. That is the central question in this case, in which liability turns on whether the Bank through its commercial activities *knowingly and purposefully* promoted terrorism. The issues presented are as follows:

1. Whether the Sanctions Order should be vacated for violating established limits on civil sanctions where the Bank in good faith sought authorization to disclose *all* requested records, production of the subset of records that the Bank was forbidden to disclose would subject the Bank to criminal penalties, and nothing in the produced records indicates that the non-produced records would substantiate plaintiffs' claims that the Bank knowingly and purposefully supported terrorism.

2. Whether the Sanctions Order, on its own and when combined with the district court's elimination of traditional causation requirements of causation and

imposition of expansive aiding and abetting liability, deprives the Bank of its defenses in violation of the Due Process Clause.

3. Whether the Sanctions Order, which conflicts with the criminal law of other sovereign governments, violates principles of international comity.

STATEMENT OF THE CASE

In these consolidated lawsuits, thousands of plaintiffs claim that the Bank violated the Alien Tort Statute and Anti-Terrorism Act by allegedly providing financial assistance to terrorists in the Middle East. As the district court recognized, plaintiffs must prove that the Bank's traditional banking services to customers not only provided such "assistance" but also that the Bank acted "*knowingly and intentionally, i.e., with the purpose* of financing or incentivizing the terrorist acts alleged." SPA7 (emphasis added). The issue of knowledge and intent has been the primary focus of six years of discovery. The court nonetheless imposed sanctions that would essentially remove plaintiffs' burden of proving the Bank's culpable state of mind and preclude the Bank from explaining to the jury that its actions were entirely innocent.

The sole reason for these draconian sanctions was the Bank's inability to produce certain requested customer account documents because disclosure of these documents is barred by financial privacy laws in the countries where the documents are located. The Bank made every reasonable effort to obtain

permission to disclose the requested information, resulting in the production of over 200,000 account documents otherwise subject to financial privacy laws. Nothing in those documents suggests that the non-produced documents contain any information that would support plaintiffs' state-of-mind allegations. Yet the district court issued a severe Sanctions Order violating established sanctions rules, the requirements of due process, and principles of international comity.

The initial complaint was filed in July 2004. R.1 (*Linde*). The district court denied motions to dismiss (A958-A978, A994-A1032, A1244-A1247), rejecting the Bank's arguments that plaintiffs failed to allege facts creating a plausible inference of causation and that aiding and abetting liability is unavailable under these statutes.

Magistrate Judge Pohorelsky granted in part plaintiffs' motion to overrule the Bank's objections to producing information barred from disclosure by foreign law. A986-A993. The district court affirmed that ruling. A1033-A1034. The Magistrate Judge issued a Report and Recommendation ("R&R") granting and denying in part plaintiffs' request for sanctions (A1131-A1153), which he subsequently modified (A1154-A1157). Judge Gershon sustained plaintiffs' objections to the R&R and imposed the far more severe sanctions at issue here. SPA1-SPA20. Judge Gershon denied the Bank's motions for reconsideration (SPA20-SPA24) and for certification under 28 U.S.C. §1292(b) (SPA25-SPA26).

STATEMENT OF FACTS

1. Parties and Claims. Plaintiffs are foreign nationals asserting claims under the Alien Tort Statute, 28 U.S.C. §1350, and claimants asserting injury to U.S. nationals under the Anti-Terrorism Act, 18 U.S.C. §2333. They seek damages for injuries they and their family members suffered as a result of terrorist acts in Israel and the Palestinian Territories.

The Bank is headquartered in Jordan and has 500 offices in 30 countries and the world's major financial centers, including London, New York, Singapore, Zurich, Paris, Frankfurt, Dubai, Sydney, and Bahrain.[1] As described by the Kingdom of Jordan in a letter to the United States that was submitted to the district court, the Bank is "the leading financial institution" in that nation and "a pivotal force of economic stability and security in the Kingdom and the broader region." A1264-A1265. The Bank also is the largest bank in the Palestinian Territories, with more than 20 branches there. The Bank has won widespread recognition for fostering financial stability in the region. It was recently named the "best bank in the Middle East" by *Euromoney*[2] and "best trade finance" provider in the Middle East by *Global Finance*.[3]

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[1] http://www.ameinfo.com/228023.html.

[2] http://mideast-times.com/left_news.php?newsid=898.

[3] http://www.gfmag.com/tools/best-banks/10928-worlds-best-trade-finance-banks-2011.html#axzz1DgOIOaeG.

Plaintiffs allege that the Bank maintained accounts and transferred funds for individuals and charitable entities that it knew were "fronts" for terrorist organizations. They also allege that the Bank supported terrorism by administering a program whereby the "Saudi Committee in Support of the Intifada Al Quds" ("Saudi Committee")—a Saudi government-created charity—distributed payments to family members of persons killed or imprisoned during the Israeli-Palestinian conflict. The Bank denies that the program supported or incentivized terrorism and consistently has opposed terrorism in cooperation with its regulators in this regard. A statement in the record from the Israeli Defense Forces confirms 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. Applicable financial privacy laws. Plaintiffs served requests for customer account records, most of which are located in Jordan, Lebanon, and the Palestinian Territories. A989. Jordan, Lebanon, and the Palestinian Monetary Authority (the U.S.-recognized entity that governs the banking system in the West Bank and Gaza) have laws that prohibit banks from disclosing customer records, reflecting their official and oft-repeated commitment to personal privacy. *Id*.; A987-A989. These are similar to financial customer privacy laws adopted in nations throughout the world (including the European Union).

The applicable laws include Jordanian Banking Law No. 28 (Articles 72-75),[4] Palestinian Monetary Authority Banking Law No. 2 (Articles 2 & 26),[5] and Lebanese Banking Secrecy Law (Articles 2-8).[6] Violations carry criminal penalties, including fines and imprisonment. A989. It is undisputed, as the Magistrate Judge overseeing discovery found, that disclosure of these records "would violate the laws of foreign jurisdictions and expose not only the Bank, but its employees, to criminal sanctions." A1135. As Jordan's government wrote to Secretary of State Clinton in a letter filed with the district court, "any violations by Arab Bank of these banking laws will expose it to the imposition of sanctions," including fines, imprisonment, and damages. A1265.

Each affected government provided its views to the district court, describing the importance of its banking laws and urging the court to respect them. The Central Bank of Jordan wrote that it "would strongly urge the New York Court not to take a position that would place the Arab Bank in violation of the Banking Law." A1076. The Palestinian Monetary Authority similarly declared that "any such disclosure would constitute a criminal violation and subject Arab Bank and

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[4] http://www.cbj.gov.jo/pages.php?menu_id=123&local_type=0&local_id=0&local_details=0&local_details1=0&localsite_branchname=CBJ; see A1264 (Jordan's explanation of relevant provisions).

[5] http://www.pma.ps/resources/file/pages/laws_regulations/Banking-Law-No-2-2002.pdf; see A1078, A1261, A1263 (PMA's explanation of relevant provisions).

[6] http://www.bdl.gov.lb/circ/lawpdf/Law030956_en.pdf; see A1075, A1259 (Lebanon's explanation of relevant provisions).

Bank employees to possible imprisonment [and] fines." A1078. Jordan, Lebanon and the Palestinian Authority repeated these statements in subsequent filings urging the district court to reconsider the Sanctions Order. A1259-A1265.

3. The Bank's largely successful efforts to produce the requested information. The Bank has made extensive efforts to comply with plaintiffs' discovery demands within the framework of these privacy laws. In 2006, the Bank obtained permission from the Lebanese Special Investigation Committee ("LSIC") to produce documents relating to a specific account in Lebanon identified in plaintiffs' pleadings. A1047-A1053. The Bank likewise produced all documents previously provided to the Department of Justice for its prosecution of the Holy Land Foundation, including account records of seven entities alleged by plaintiffs to be terrorist "fronts." A1045; R.641 at 14 (*Linde*).

In 2006, the Bank obtained the Saudi Committee's consent to disclose all documents relating to its transactions. The Bank then produced *every document in its possession* relating to the Saudi Committee, including all payment instructions, internal communications relating to those instructions, and related correspondence. A1043-A1044, A1097-A1099, A1183-A1208; R.641 at 12-14 *(Linde*). The Bank, however, could not produce individual Saudi Committee beneficiaries' account records over which the Bank and the Saudi Committee lacked disclosure authority. R.641 at 13 (*Linde*). The Bank's production of Saudi Committee materials

comprised some 180,000 documents. A1137. Overall, the Magistrate Judge noted, "defendant's efforts have resulted in the disclosure of over 200,000 documents that are subject to bank secrecy laws." A1138.

The Bank also produced redacted customer account opening records to respond to a specific claim by plaintiffs relating to Saudi Committee beneficiaries. Deposition testimony had suggested that in 122 instances the Saudi Committee's payment instructions did not identify the beneficiary by name but only as a surviving family member. A1071-A1072. Plaintiffs alleged (and the Bank denied) that to obtain payment, those beneficiaries had to show a "martyr certificate," which might show involvement in terrorism. To address that claim, the Bank produced the documents provided by the beneficiaries relating to the 122 funds transfers, with account-identifying information redacted. This additional production showed that the beneficiaries provided only inheritance documentation to establish their entitlement to payments and refuted plaintiffs' "martyr certificate" allegation. *Id*.

Foreign courts and governments rejected the Bank's efforts to secure permission to disclose other customer records. The Bank successfully petitioned the Jordanian courts to allow it to disclose records covered by Jordan's financial privacy law, but that ruling was overturned on the account holder's appeal. The Bank's requests to the LSIC for additional account records, as well as its requests

to Palestinian courts and authorities for account documents, also were denied. Surveying these efforts, the Magistrate Judge found that "defendant has undertaken a number of steps contemplated to permit disclosure of documents prohibited by foreign bank secrecy laws, and by virtue of those steps has been able to produce a substantial quantity of documents sought by the plaintiffs." A1140. The only requested records not produced were those for which the Bank would face liability for unauthorized disclosure.

4. Sanctions for the Bank's inability to produce remaining customer records. Plaintiffs moved for an order overruling the Bank's objections to producing information barred by foreign law, which the Magistrate Judge granted in part. A986-A993. The district court affirmed that ruling, summarily rejecting the Bank's objections. A1033-1034.

Plaintiffs also asked for sanctions, which Magistrate Judge Pohorelsky refused. Instead, he authorized the Bank to make additional "good-faith" efforts to secure permission to produce the requested documents. A992. In 2007 the Bank prepared—and the Magistrate Judge issued—formal Letters of Request to Palestinian and Jordanian authorities seeking waiver of their financial privacy laws. A1137.

The governments denied those requests, explaining that they lacked power to waive applicable laws. A1056-A1067. Jordan's banking authorities warned that

"waiving banking secrecy as reflected in the request would expose your bank to the imposition of a sanction or action or broader sanctions or actions provided for in Article (88) of the Banking Law," including imprisonment, fines, and damages. A1057.

a. The Magistrate Judge's sanctions report. Plaintiffs then renewed their request for sanctions. Having closely supervised discovery for four years, Judge Pohorelsky was intimately familiar with the bank records dispute. Drawing on that knowledge, he refused to make a finding of bad faith and instead fashioned a limited sanction that would "restore the evidentiary balance" created by the Bank's inability to produce materials without violating financial privacy laws. A1132-A1133, A1139. In particular, he drew a distinction between sanctions addressing the Bank's performance of financial services and sanctions addressing the Bank's *state of mind*.

Because the withheld records would have revealed the identity of the customers for whom the Bank performed financial services, the Magistrate Judge held that the jury should be allowed to draw adverse inferences on that issue. Thus, for example, the jury could infer that certain individuals who received assistance through the Saudi Committee program were in fact terrorists or their relatives without any affirmative evidence that this was true. A1147-A1149, A1154-A1157.

Significantly, however, Judge Pohorelsky rejected plaintiffs' proposed state-of-mind sanctions. He explained that an instruction about the Bank's knowledge and intent in providing financial services was not supported by the record and would be impermissibly punitive: "There has been *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); see also A1150 ("Neither the proposed factual findings nor an adverse inference instruction are warranted with respect to the defendant's knowledge or state of mind").

Judge Pohorelsky also refused to preclude the Bank from offering testimony or evidence that might be subject to cross-examination using withheld evidence. A1150-A1151. He explained that such a sanction, based on speculation about these documents, would unfairly "prevent the defendant from offering a broad range of evidence." A1150. Finally, in rejecting plaintiffs' request for attorney's fees, he found that "defendant's failure to provide court-ordered discovery is substantially justified." A1151.

Later, Judge Pohorelsky further tempered his recommended sanctions. A1154-A1157. He acknowledged that his failure "to appreciate the nature and extent of the information provided by the defendant" led him "to overestimate the importance of the evidence that has been withheld and the extent of the consequent

prejudice to the plaintiffs," which "in turn resulted in an overstatement of the remedy necessary to restore the evidentiary balance that is a central object of any sanction." A1156.

b. The District Court's Sanctions Order. The parties appealed. Without holding any hearing, Judge Gershon imposed the very state-of-mind sanctions that Judge Pohorelsky found unwarranted. First, the district court ruled that plaintiffs were entitled to an adverse inference that the withheld materials "would have demonstrated that defendant acted with a culpable state of mind"—that is, that the Bank *knowingly and purposefully* provided financial services to terrorists. SPA17. Second, the court ruled that the Bank would be precluded from introducing *any* evidence of its state of mind "that would find proof or refutation in the withheld documents." SPA19. As a practical matter, this sanction would deny the Bank the right to introduce evidence that it "had no knowledge a certain Bank customer was a terrorist if it did not produce that person's complete account records." *Id.*

These sanctions—inaccurately characterized by Judge Gershon as not "severe" (SPA14 n.11)—all but eliminate plaintiffs' burden of proof on the critical (and hotly contested) *mens rea* issue at the heart of this case. They also threaten to strip away the Bank's ability to mount a full defense using a range of evidence other than the withheld records, including the 200,000 produced records and

voluminous deposition transcripts of Bank witness testimony, even though plaintiffs made "no showing" that any document demonstrates a guilty state of mind. A1145. Lebanon told the district court that its ruling "violates principles of mutual respect for the laws of sovereign nations and puts a commercial enterprise in an untenable position of having to choose between breaking the laws of our Republic where it operates and being subject to severe sanctions." A1259.

The district court denied the Bank's motions for reconsideration and for certification under 28 U.S.C. §1292(b). SPA20-SPA26. The reconsideration order confirms the severity of the sanctions, reiterating that at trial the Bank will be barred "from making evidentiary submissions or arguments in its defense that the withheld documents *could* disprove." SPA22 (emphasis added). The court called its sanctions order "remedial" (*id*.), even though the "remedy" all but eliminates plaintiffs' burden of proving that the Bank acted with culpable purpose and gags the Bank before the jury on that pivotal issue. Judge Gershon also dismissed recent Supreme Court comity decisions without discussion and disregarded letters from Lebanon and the Palestinian National Authority asking the court to reconsider its Sanctions Order in light of the affront to their national interests, as well as a similar letter from Jordan to Secretary of State Clinton. A1259-A1265.

Judge Gershon attempted to buttress her extraordinary Sanctions Order by characterizing the Bank's behavior as recalcitrant, complaining that the Bank

withheld internal documents relating to the Saudi Committee, denying that the Bank faces a real risk of prosecution, and turning the Bank's production of documents to the Department of Justice into evidence that confidentiality laws were no real impediment to disclosure. SPA12-SPA17. But as we show in Part V, and as the Magistrate Judge who oversaw discovery recognized, the record refutes these characterizations.

It shows that:

- The Bank made every reasonable effort to obtain permission to disclose requested documents beyond the 200,000 pages that were produced, including by litigation, appeals, and letters of request. Plaintiffs obtained every payment instruction originated by the Saudi Committee, including each beneficiary's name and each payment amount and date—as well as all Bank correspondence and internal communications.
- Each jurisdiction involved has stated, in letters that were before the court, its intent to subject the Bank to criminal prosecution in the event the Bank breaches confidentiality laws.
- The Bank's prior production of documents in response to formal and confidential U.S. government requests reflects Jordan's stated commitment to assisting other nations in law enforcement or national

security activities and does not lessen the Bank's confidentiality obligation in these civil suits.

The district court's pejorative characterizations are thus baseless. But even if they had some evidentiary basis, which they do not, as a matter of law the district court abused its discretion in sanctioning the Bank so severely, and depriving it of its due process right to mount a defense, for failing to produce documents made confidential by foreign criminal laws.

The Bank also had asked the district court to dismiss all of plaintiffs' ATS claims in light of this Court's holding in *Kiobel* v. *Royal Dutch Petroleum*, 621 F.3d 111, 149 (2d Cir. 2010), rehearing denied, 2011 WL 338048 (Feb. 4, 2011), that "the Alien Tort Statute does not provide subject matter jurisdiction over claims against corporations." R.699 (*Almog*). The district court has not acted on that request, or on the Bank's alternative request to establish a briefing schedule to address jurisdiction over plaintiffs' ATS claims in light of *Kiobel*.

SUMMARY OF ARGUMENT

This case is extraordinary. Thousands of plaintiffs, most of whom reside in the Middle East, demand that a Bank headquartered in Jordan produce documents located in Jordan, Lebanon, and the Palestinian Territories relating to transactions occurring in those jurisdictions that allegedly facilitated terrorism in Israel and the Palestinian Territories. It is undisputed that financial privacy laws of the countries

in which the documents are located bar disclosure of customer records and that the Bank and its employees would be subject to criminal punishment for producing them in this litigation. As the record shows, the Bank took reasonable steps to overcome the obstacles posed by these laws and managed to obtain authorizations to produce over 200,000 documents. Nothing in these produced documents suggests that anything in the documents barred from disclosure by foreign penal laws would provide any support for plaintiffs' claims that the Bank knowingly or purposefully supported terrorism.

The district court has severely punished the Bank for obeying these laws, authorizing an adverse inference that the Bank knowingly and intentionally supported terrorism and precluding the Bank from introducing evidence to defend its innocent state of mind. By effectively abrogating the Bank's central state-of-mind defense as a penalty for its obedience to foreign criminal laws, the district court violated established limits governing the imposition of sanctions, as well as fundamental principles of due process. The Sanctions Order is severe and unjustifiable on its own. But it raises particular concerns because the court also eliminated traditional standards of causation and endorsed a sweeping theory of aiding and abetting liability. And it violated principles of international comity established in recent decisions of the Supreme Court.

The Sanctions Order strips away the Bank's defenses and reduces this litigation to a show trial. That erroneous ruling is fundamentally unfair and legally unsupportable and should be vacated.

ARGUMENT

Standard of Review. A district court's imposition of sanctions is reviewed for abuse of discretion and will be reversed if the sanctions are "based on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Wolters Kluwer Fin. Servs. v. Scivantage*, 564 F.3d 110, 113 (2d Cir. 2009).

I. IMMEDIATE REVIEW OF THE SANCTIONS ORDER IS WARRANTED.

This Court has jurisdiction to review the Sanctions Order under its mandamus authority and the collateral order doctrine.

A. Mandamus Review Of The Sanctions Order Is Warranted.

There are "three conditions" to issuance of a writ of mandamus: "(1) the party seeking issuance of the writ must have no other adequate means to attain the relief [it] desires; (2) the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances; and (3) the petitioner must demonstrate that the right to issuance of the writ is clear and indisputable." *Dinler v. City of New York*, 607 F.3d 923, 932-33 (2d Cir. 2010). All three requirements are met here.

Review of the Sanctions Order after final judgment is not a viable option. A successful post-judgment appeal could not begin to repair the damage to the Bank's reputation and business from an adverse judgment tainted by improper sanctions. If a jury were to brand the Bank as a terrorist accomplice, it might not survive long enough to take an appeal. Customers and correspondent banks are unlikely to do business with a bank that has been adjudicated a supporter of terrorism. And the aggregation of claims by numerous plaintiffs, carrying the potential of huge (and trebled) damages, only increases the risk to the Bank, creating a "bet-the-company" situation. *Parker v. Time Warner*, 331 F.3d 13, 22 (2d Cir. 2003).

In less dire situations, where banks have been forced to choose between contempt sanctions and violating foreign privacy laws, courts have not hesitated to grant mandamus. As the Ninth Circuit explained in *Credit Suisse v. U.S. Dist. Ct.*, 130 F.3d 1342, 1346 (9th Cir. 1997), "[r]equiring the Banks to choose between being in contempt of court and violating Swiss law clearly constitutes severe prejudice that could not be remedied on direct appeal." Accord *Philippine National Bank v. United States Dist. Ct.*, 397 F.3d 768, 774 (9th Cir. 2005) (granting mandamus where discovery risked "violating Philippine bank secrecy laws," imposing "severe prejudice that could not be remedied on direct appeal").

Delaying appellate review also would threaten the interests of the jurisdictions whose laws the district court disregarded. As the Palestinian Monetary Authority explained below, a forced breach of its financial privacy laws would lead to "the flight of individual customers from the Palestinian banking system, with the residual impact on the ability of the PMA to regulate that system, including the identification and interdiction of unauthorized or illegal monetary transactions." A1262. The Kingdom of Jordan told this Court that, unless the Sanctions Order is reversed, the impact on the Bank "could result in political instability and grave harm to the Jordanian and surrounding regional economies." Brief *Amicus Curiae* in Support of Petition for Mandamus, at 3 (2d Cir. Nov. 5, 2010). Reviewing the Sanctions Order now is essential to guard against such financial and political destabilization, which can only undermine the fight against terrorism.

"Mandamus has shown prominently in the constellation of appellate devices to review discovery orders," particularly when "important interests are at stake." 16 Wright, Miller & Cooper, FEDERAL PRACTICE & PROCEDURE §3935.3, at 604-05 (2d ed. 1996). The writ facilitates "immediate review" of "consequential" rulings and serves as a "useful safety valve[] for promptly correcting serious errors." *Mohawk Indus. v. Carpenter*, 130 S. Ct. 599, 608-09 (2009).

Accordingly, this Court frequently has granted mandamus in the discovery context. *E.g.*, *SEC v. Rajaratnam*, 622 F.3d 159 (2d Cir. 2010) (compelled production of wiretap recordings); *Dinler*, 607 F.3d at 939 (applicability of privilege to discovery of police records); *In re Sims*, 534 F.3d 117, 129-30 (2d Cir. 2008) (compelled disclosure of privileged mental health records); *Pritchard v. County of Erie*, 473 F.3d 413, 417 (2d Cir. 2007) (disclosures subject to attorney-client privilege); *Becher v. Long Island Lighting Co.*, 129 F.3d 268, 270-71 (2d Cir. 1997) (production order raising novel privilege issue). In such cases, mandamus "may forestall future error" by providing "guidance for the courts of our Circuit in an important, yet underdeveloped, area of law." *Dinler*, 607 F.3d at 942. Other courts of appeals agree. *E.g.*, *EEOC v. Carter Carburetor Div.*, 577 F.2d 43, 48 (8th Cir. 1978) (mandamus where "the district court exceeded its judicial power in limiting the evidence" at trial as a discovery sanction).

If the modest single-party interest underlying a privilege claim in an ordinary case is important enough to warrant mandamus, the far more consequential interests underlying financial privacy laws—involving the privacy of thousands of customers and public policies of sovereign governments—are even more so, especially in such a gargantuan proceeding.

Finally, the Sanctions Order goes to the heart of the integrity of the upcoming trials in this matter. Addressing it now eliminates the risk of a waste of judicial resources and the need for duplicative trials.

In sum, the Bank's right to the writ is clear and indisputable due to the "strong public interest in expeditiously deciding the issues presented." *Duveen v. United States Dist. Ct.*, 250 F.3d 156, 163 (2d Cir. 2001). Because the Sanctions Order amounts to "a clear abuse of discretion" and "works a manifest injustice" (*Mohawk*, 130 S. Ct. at 607), this Court should utilize its mandamus power to review and vacate it.

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

The collateral order doctrine authorizes immediate appeal of a conclusive ruling that is separate from the merits, raises an issue of public importance, and cannot be reviewed effectively after final judgment. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). This doctrine is given a "practical rather than a technical construction" (*Cohen*, 337 U.S. at 546), and any doubts are resolved "in favor of appealability." *United States v. Parker*, 439 F.3d 81, 90 n.9 (2d Cir. 2006).

The Supreme Court has continued to affirm the availability of collateral order review. *E.g.*, *Osborn v. Haley*, 549 U.S. 225, 238 (2007). Most recently, the Court in *Mohawk* reiterated the *Cohen* standard, explaining that collateral order

review is warranted for orders that are "conclusive," "resolve important questions separate from the merits," and are "effectively unreviewable" after final judgment because delayed review would "imperil a substantial public interest or some particular value of a high order." 130 S. Ct. at 605. After *Mohawk*, the courts of appeals have continued to authorize collateral order appeals in a wide variety of circumstances. See Arab Bank's Opposition to Plaintiffs' Motion to Dismiss the Appeal 8 (collecting cases).

All three prongs of the collateral order appeal test are satisfied here.

First, the legal defects in the Sanctions Order are separate from the merits of plaintiffs' underlying claims. Whether the Bank knowingly or purposefully assisted terrorist actions overseas is the merits issue to be resolved at trial. Here the question is whether the Bank should be barred from defending itself against plaintiffs' state of mind allegations simply because it did not produce documents subject to foreign privacy laws. To resolve that purely legal question, the Court need not make any judgment about the merits of plaintiffs' claims.

Second, the public importance of this question is undeniable. Depriving the Bank of any opportunity to defend itself eviscerates its right to a fair trial, a right this Court deemed sufficiently important for collateral order review in *Katz v. Realty Equities Corp.*, 521 F.2d 1354 (2d Cir. 1975) (order consolidating cases for trial). If indirect interference with the right to present a defense was reviewable in

Katz, the far more egregious gag order here meets the collateral order standard *a fortiori*. Furthermore, the Sanctions Order overrides the sovereign rights of several governments and threatens to harm U.S. foreign relations in a volatile part of the world. The impact on international comity is of far greater consequence than failing to obtain the protection of a small security bond (*Cohen*) or having to make advance payment for class notices (*Eisen*).

Third, as explained *supra* pp. 19-20, the Sanctions Order cannot effectively be reviewed after final judgment, which would come too late to restore the irreparable business and reputational harm from an adverse verdict. As this Court has observed, an interlocutory order warrants immediate review under *Cohen* if it may cause the defendant to "'be ruined before he is permitted to avail himself of the right' to appeal." *Eisen v. Carlisle & Jacqueline*, 479 F.2d 1005, 1007 n.1 (2d Cir. 1973). Such a judgment might well be coupled with damages too staggering to bond, making fanciful any theoretical right to a post-judgment appeal.

A post-judgment appeal also could not restore the Bank's right to a fair trial. See *Sell v. United States*, 539 U.S. 166, 177 (2003) (upholding review of collateral order that "may make a trial unfair" because a post-trial appeal would come "too late"). Here, as in *Sell*, an ordinary post-judgment appeal would come "too late" to vindicate the Bank's right to a fair trial given the irreparable injury this depository institution would suffer if judicially branded a terrorist accomplice.

Mohawk made clear that courts should look to the category into which an order falls to determine its eligibility for collateral order review. Orders like the Sanctions Order—precluding a defendant from establishing its innocence at trial for failure to produce documents protected from disclosure by foreign criminal law—are categorically suitable for collateral order review.

The Tenth Circuit accepted a collateral order appeal from a similar order. In *Ohio v. Arthur Andersen & Co.*, 570 F.2d 1370 (10th Cir. 1978), the appellants disobeyed a discovery order because compliance would violate Swiss privacy laws. The Tenth Circuit held the resulting sanctions order appealable because it was "a final disposition of a claimed right which is not an ingredient of the cause of action." *Id.* at 1372. As the Tenth Circuit later explained, *Arthur Andersen* involved an order that would "arguably put the complaining party in violation of foreign law. If such an injury were erroneously imposed and left until the end of the entire case, we would be unable to ameliorate the consequences on the delayed appeal." *D&H Marketers, Inc. v. Freedom Oil & Gas, Inc.*, 744 F.2d 1443, 1446 (10th Cir. 1984). Furthermore, the Supreme Court upheld collateral order review of an order denying Eleventh Amendment immunity due to "the importance of ensuring that the States' dignitary interests can be fully vindicated." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 146 (1993). Even more

so here, established limits on permissible sanctions, international comity, and the "dignitary interests" of foreign sovereigns require immediate review.

II. THE SANCTIONS ORDER VIOLATES ESTABLISHED PRECEDENT LIMITING THE IMPOSITION OF SANCTIONS.

The district court's Sanctions Order improperly uses the Bank's obedience to foreign criminal law as a reason to deprive it of any effective defense.

Over fifty years ago, the Supreme Court stressed the importance of a defendant's obligations under foreign law in determining the propriety and scope of discovery sanctions. In *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 200 (1958), the Court overturned a sanction for refusing disclosure of bank records that "would violate Swiss penal laws and consequently might lead to imposition of criminal sanctions." There, as here, the sanction was excessive because the party's "inability [was] fostered neither by its own conduct nor by circumstances within its control." *Id*. at 211.

Rogers makes clear that a party's "inability to comply because of foreign law" is a "weighty" reason for non-compliance with discovery obligations—one that must be carefully considered in fashioning any remedy. *Id*. at 211-13. Further, the Court later explained, courts must "take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state." *Société Nationale Industrielle Aérospatiale v. U.S.*

Dist. Ct., 482 U.S. 522, 546 (1987). As the Fifth Circuit put it in a case on remand from the Supreme Court in light of *Société Nationale*, where "sensitive interests of sovereign powers are involved," courts must "respect properly such interests" in fashioning discovery orders and remedies. *In re Anschuetz*, 838 F.2d 1362, 1364 (5th Cir. 1988).

For this reason, in *Trade Development Bank v. Continental Insurance Co.*, 469 F.2d 35, 39-41 (2d Cir. 1972), this Court disapproved sanctions for failure to disclose the identity of Swiss bank customers that would have violated Swiss criminal law. See also *United States v. First Nat'l Bank*, 699 F.2d 341, 345-46 (7th Cir. 1983) (reversing enforcement of summons where disclosure risked criminal penalties under Greek financial privacy law).

The Tenth Circuit gave effect to these principles where a party declined to produce documents because doing so would put it "in violation of Canadian law and subject to criminal sanctions." *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 994, 997 (10th Cir. 1977) ("foreign illegality may prevent the imposition of sanctions for subsequent disobedience to the discovery order"). Because the district court "erred in failing to consider [Canada's] legitimate interest" in barring disclosure, the court of appeals overturned the imposed sanction. *Id.* at 999. See also *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 139 (2d Cir. 2007) (vacating sanction where disclosing documents

would subject party "to criminal sanctions under Russian law"); *Cochran Consulting v. Uwatec USA, Inc.*, 102 F.3d 1224, 1232 (Fed. Cir. 1996) (vacating sanctions as inconsistent where foreign party's compliance with discovery order would risk criminal penalties). The principle that a litigant cannot be forced to choose between violating foreign criminal law and avoiding severe sanctions operates as an independent check on judicial discretion in such cases.

The Bank is headquartered and licensed in Jordan, and the documents at issue are predominantly in Jordan, Lebanon, and the Palestinian Territories. Jordan, Lebanon, and the Palestinian Authority repeatedly advised the district court that their privacy laws barred disclosure of customer account records and that disclosure would subject the Bank and its employees to criminal sanctions. *E.g.*, A1069-A1073, A1259-A1265. A foreign nation's statements on these subjects are "conclusive." *United States v. Pink*, 315 U.S. 203, 220 (1942).

The penal laws barring disclosure of those documents reflect a policy commitment to personal privacy prevalent throughout the Middle East and Europe. See *European Union Directive 95/46/EC*, 1995 O.J. L281 (EC); Brief *Amicus Curiae* of Institute of International Bankers in Support of Arab Bank's Petition for Mandamus, at 6-8 (2d Cir.) (filed Nov. 5, 2010). Indeed, the courts of Israel, where most of the plaintiffs reside, similarly require stringent protection of bank customer privacy absent customer consent. See Bank Hapoalim's Memorandum of

Law, R.376 at 7-13 (*Linde*); Ruth Plato-Shinar, *Bank Secrecy in Israel*, 29 Comp. L. Y.B. Int'l Bus. 269 (2007). These laws protect personal privacy as a matter of domestic policy, distinguishing them from "blocking statutes" enacted to impede discovery in U.S. courts. See *Reinsurance Co. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1280 (7th Cir. 1990) ("Unlike a blocking statute, Romania's law appears to be directed at domestic affairs rather than merely protecting Romanian corporations from foreign discovery requests"). Thus, producing the requested information "would affect important substantive policies or interests" of the affected nations. *Restatement (Third) of the Foreign Relations Law of the United States* §442 cmt. c (1987).

The privacy policies of the Middle Eastern nations involved mirror the public policy of the United States "that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information." Gramm-Leach-Bliley Act, Pub. L. 106-102, 113 Stat. 1436 (1999) (codified at 15 U.S.C. §6801). And these foreign privacy laws sit side-by-side with banking laws requiring vigilance in the fight against terrorism. Jordanian banks, for example, are required by Jordanian law "to adhere to and implement the provisions of the U.N. Security Council anti-terrorism resolutions, such as: freezing of funds,

inspection of customer accounts, and methods to combat money laundering and other suspicious transactions." Jordan's Brief *Amicus Curiae*, *supra* p. 20, at 4.

The remarkably severe sanctions imposed here cannot survive review under these established standards. Fear of foreign prosecution constitutes a "weighty excuse" for non-production. *Rogers*, 357 U.S. at 211. This Court therefore has admonished courts to "empathize with the party or witness subject to the jurisdiction of two sovereigns and confronted with conflicting commands." *United States v. First National City Bank*, 396 F.2d 897, 901 (2d Cir. 1968). The district court turned these warnings on their head by treating unwillingness to violate foreign law as "recalcitrance" and depriving the Bank of a meaningful defense as to its state of mind. SPA6, SPA12, SPA20. As a matter of law, these "significant sanctions" (SPA12) are not a proper response to a bank's obedience to criminal statutes of other nations.

III. THE SANCTIONS ORDER VIOLATES DUE PROCESS.

The district court characterized the Sanctions Order as purely remedial. But far from restoring the evidentiary balance or leveling the playing field, the Sanctions Order improperly deprives the Bank of any meaningful defense.

The harshly punitive effect of the Sanctions Order is to transform this massive case into little more than a show trial. The state-of-mind sanctions twist the fact-finding process by precluding evidence that the Bank lacked guilty

knowledge or intent, and by foreclosing the Bank from arguing "that it had no knowledge a certain Bank customer was a terrorist if it did not produce that person's complete account records." SPA19. Those sanctions violate due process by eviscerating the Bank's defenses on the central issue of knowledge and intent—of decisive importance here given Judge Gershon's elimination of but-for and proximate cause requirements in prior rulings on motions to dismiss—and render futile the Bank's years of effort to comply with the court's discovery orders.

The adverse impact of the Sanctions Order also extends well beyond this case by providing a blueprint for future discovery abuse. If this ruling stands, plaintiffs can simply sue banks operating in nations with financial privacy laws and demand documents they know cannot be produced—and then claim sanctions that effectively direct a verdict against the defendant. Federal discovery rules were never intended to countenance such extraordinary injustice.

A. Sanctions That Prevent An Effective Defense For Refusing To Violate Foreign Criminal Laws Exceed Constitutional Limits.

"[T]here are constitutional limits, stemming from the Due Process Clause of the Fifth and Fourteenth Amendments, on the imposition of sanctions." 8B Wright, Miller & Marcus, FEDERAL PRACTICE & PROCEDURE §2283, at 427 (3d ed. 2010). Due process forbids harsh sanctions where the circumstances do not support a presumption that withholding documents amounts to an admission of guilt. "First, there must be a sufficient relationship between the discovery and the

merits sought to be foreclosed by the sanction to legitimate depriving a party of the opportunity to litigate the merits. Second, the party cannot have been unable to comply with the discovery." *Id*.

These principles are longstanding. A century ago, the Supreme Court explained that harsh sanctions are proper only where a refusal to produce evidence is "an admission of the want of merit in the asserted defense." *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351 (1909). The Court later explained that due process is violated "if the behavior of the defendant will not support the *Hammond Packing* presumption." *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982). Thus, "two standards" constrain "a district court's discretion":

> First, any sanction must be "just"; second, the sanction must be specifically related to the particular "claim" which was at issue in the order to provide discovery. While the latter requirement reflects the rule of *Hammond Packing*, * * * the former represents the general due process restrictions on the court's discretion.

Id. at 707.

In *Rogers*, the Court disapproved a sanction in light of these "constitutional limitations" where failure to comply with discovery was "due to inability, and not to willfulness, bad faith, or any fault of petitioner." 357 U.S. at 212. This ruling reflected the Court's explanation in *Hammond Packing* that the party in that case was not being penalized "for a failure to do that which it may not have been in its

power to do" and that "any reasonable showing of an inability to comply" would have been sufficient. 212 U.S. at 347.

Although the Court in *Rogers* addressed a dismissal sanction, the same principles apply to sanctions that effectively eliminate a plaintiff's burden of proof on state of mind. "[D]ue process precludes the severest sanctions, and may limit a number of sanctions, where the party to be sanctioned was unable to comply with the court's discovery order." 8B Wright & Miller, *supra*, §2283, at 433-34. As the Ninth Circuit has explained, "neither dismissal nor ***preclusion of evidence*** that is tantamount to dismissal may be imposed when the failure to comply with discovery orders is due to circumstances beyond the disobedient party's control." *United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365 (9th Cir. 1980) (emphasis added).

Indeed, this Court has reversed "the extreme sanction of preclusion" where the district court failed to account for the "actual difficulties" caused by the violation or to consider "less drastic responses." *Outley v. City of New York*, 837 F.2d 587, 591 (2d Cir. 1988); see also *New Pac. Overseas Group v. Excal Int'l Dev. Corp.*, 2000 WL 377513, at *6 (S.D.N.Y. Apr. 12, 2000) ("preclusion" orders "are severe" because they effectively gag the defendant before the jury). The Sanctions Order violates these principles.

It is precisely in a case like this one that an adverse inference or preclusion order violates due process. Failure to produce resulted from external legal compulsion, not the Bank's "own conduct." *Rogers*, 357 U.S. at 211; see *Cochran*, 102 F.3d at 1232 (vacating sanctions; "Rule 37 is not a legal requirement to do the impossible"). As this Court has explained:

> Where the party makes good faith efforts to comply, and is thwarted by circumstances beyond his control, for example, a foreign criminal statute prohibiting disclosure of the documents at issue[,] an order dismissing the complaint would deprive the party of a property interest without due process of law.

Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1066 (2d Cir. 1979). The same is true of the adverse inference and preclusion sanctions imposed here. See *Serra Chevrolet, Inc. v. General Motors Corp.*, 446 F.3d 1137, 1150-53 (11th Cir. 2006) (sanctions striking defenses violated due process).

These cases make clear that good faith is an important factor in determining the propriety and scope of any sanctions. In cross-border litigation, courts may consider the factors listed in Section 442 of the *Restatement (Third)*, but where a litigant has made reasonable efforts to comply with discovery orders, a severe sanction is unfair and improper. Here, where the Bank was unable to comply due to foreign criminal statutes prohibiting disclosure, the district court had no basis for characterizing the Bank as recalcitrant. By focusing on good faith, "[c]ourts are

not forced to undertake the judicially unmanageable tasks of assessing and weighing competing national interests." Lenore Browne, Note, *Extraterritorial Discovery: An Analysis Based on Good Faith*, 83 Colum. L. Rev. 1320, 1346 (1983).

The Bank's good faith is manifest. See Section V, *infra*. This is not a case like *Jorgensen v. Cassiday*, 320 F.3d 906, 912 (9th Cir. 2003), where the sanctioned party did not show "that he attempted to obtain the [requested documents] from the Philippines court," or that "production of the documents would subject him to civil or criminal sanctions." To the contrary, the record shows that the Bank made extensive efforts to obtain the account records and faced substantial risk of criminal prosecution. See *supra* pp. 8-10. Where a litigant has made reasonable efforts to comply with discovery orders, a severe sanction is unfair and improper.

As the Magistrate Judge found, the Bank conscientiously obtained "permission to produce substantial quantities of documents otherwise prohibited from disclosure." A1302. By pursuing every avenue to obtain governmental or judicial authorization or private party consent, the Bank managed to produce over 200,000 account records, as well as providing plaintiffs with access to Bank officials from Jordan, Lebanon, and the Palestinian Territories through dozens of days of depositions. The Bank's production included records of every Saudi

Committee payment that was processed through the Bank, records that named each of the thousands of recipient-beneficiaries. A1156. The Bank also produced thousands of account opening and transaction records for entities identified by plaintiffs. A1043-A1045. Having made every effort, and spent huge sums, to comply with all discovery orders without subjecting itself to criminal penalties, the Bank cannot constitutionally be deprived of "an opportunity to present every available defense." *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007).

But even if the Bank's good faith were in question, Section 442 of the Restatement bars sanctions unless "there is reason to believe that the information, if disclosed, would support a finding adverse to the non-complying party." The produced materials and other evidence of record offer no indication that the Bank knowingly or intentionally facilitated terrorism and no reason to think that producing still more records (those subject to the financial privacy laws) would turn up anything inculpatory. As the Magistrate Judge concluded: "There has been ***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). For example, *none* of the 180,000 produced documents relating to the Saudi Committee indicates any agreement by Arab Bank to provide financial services to terrorists. The same is true of the lengthy Rule 30(b)(6) deposition testimony relating to the Saudi

Committee. To the contrary, these records show that payments were directed to assist impoverished families, subsidize education, purchase food baskets, and serve other humanitarian purposes. A1096-A1099. The district court's speculation that such payments "incentivized" terrorism is not evidence and provides no reason to infer that the non-produced account records of individual beneficiaries would disclose any link to terrorism, let alone the Bank's knowledge of any such link. Because the Sanctions Order shifts the burden of proof and gags defense witnesses on a purely speculative basis, it violates due process for that reason too.

B. Prior Rulings By The District Court Compound The Unconstitutional Impact Of The Sanctions Order.

The due process violation is exacerbated by the district court's prior rulings on the scope of the ATA and ATS causes of action. The district court held that plaintiffs' allegations state a cause of action against the Bank under the ATA, 18 U.S.C. §2333—which provides a treble-damages remedy for U.S. nationals injured "by reason of an act of international terrorism"—both as a direct violation for which the Bank is primarily liable, and a secondary violation for which it is liable as an aider and abettor or co-conspirator. A969-A972. It held that these allegations also state a cause of action under the ATS, 28 U.S.C. §1350, for aiding and abetting a tort committed in violation of the law of nations. A1006-A1031, A1244-A1246. In doing so, the court eliminated proximate cause as an element of these claims and accepted plaintiffs' sweeping theory of secondary liability.

With those safeguards against unbounded liability gone, it becomes all the more critical for the Bank to demonstrate at trial its lack of knowledge and intent. But the Sanctions Order—speculating that the documents at issue are "direct evidence of defendant's knowledge and circumstantial evidence of defendant's intent" and barring any "defense that the withheld documents could disprove" (SPA21-SPA22)—deprives the Bank of the ability to make that showing and mount an effective defense.

Causation. The plain text of Section 2333 requires proof that the plaintiff was injured "by reason of" conduct of the defendant that constituted "an act of international terrorism." As Judge Rakoff recently explained in dismissing an ATA suit, this "by reason of" language "has typically been construed to be synonymous with proximate cause—and proximate cause narrowly defined at that." *Rothstein v. UBS AG*, 08 Civ. 4414, at 3 (S.D.N.Y. Dec. 30, 2010). Before Congress inscribed the "by reason of" language in Section 2333, the Supreme Court in *Associated General Contractors v. Carpenters*, 459 U.S. 519 (1983), had interpreted that same phrase in Section 4 of the Clayton Act to "requir[e] a showing that the defendant's violation [of the antitrust laws] not only was a 'but for' cause of his injury, but was the proximate cause as well." *Holmes v. Sec. Investor Protection Corp.*, 503 U.S. 258, 268 (1992). And in *Holmes*—also decided before Congress enacted Section 2333—the Court interpreted RICO's "by

reason of" requirement the same way, rejecting a more "expansive reading." *Id.* at 266-68. This Court likewise has held that the "by reason of" language requires a plaintiff to establish but-for *and* proximate causation. *E.g.*, *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 222 (2d Cir. 2008). When it "used the same words" in Section 2333, Congress "intended them to have the same meaning that courts had already given them." *Holmes*, 503 U.S. at 268; see *Leonard F. v. Israel Discount Bank*, 199 F.3d 99, 104 (2d Cir. 1999).

To establish proximate causation, each plaintiff would have to plead and prove a "direct relation between the injury asserted" and the Bank's alleged conduct. *Holmes*, 503 U.S. at 268; see *McBrearty v. Vanguard Group*, 353 F. App'x 640, 641-42 & n.1 (2d Cir. 2009) (the "proximate causation" required by the "by reason of" language is more stringent than "proximate causation at common law," requiring that "'the alleged violation led directly to the plaintiff's injuries,'" quoting *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006)). Each plaintiff would have to show that this "direct injury" resulted from Bank conduct that was both "'a substantial factor in the sequence of responsible causation'" and "'reasonably foreseeable.'" *Lerner v. Fleet Bank*, 318 F.3d 113, 120-123 (2d Cir. 2003) (Sotomayor, J.). And "when factors other than the defendant's [misconduct] are an intervening direct cause of a plaintiff's injury, that same injury cannot be said to have occurred *by reason of* the defendant's actions."

McLaughlin, 522 F.3d at 226 (emphasis added); see *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 769 (2d Cir. 1994) (proximate cause inquiry turns on "the intervention of other independent causes, and the factual directness of the causal connection"); *Anza*, 547 U.S. at 459 (finding fatal "discontinuity" when plaintiff's injury "could have resulted from factors other than" defendant's conduct).

The proximate cause requirement that Congress conspicuously included in the ATA's private compensatory and treble damages remedy—but nowhere else in the statute—serves the important goal of ensuring that massive penal civil liability is not based on purely "speculative" or "attenuated connection[s]" of the sort plaintiffs assert here, which require "intricate, uncertain inquiries" into cause and effect that would "overrun[n]" litigation. *Anza*, 547 U.S. 459-60; see also *First Nationwide*, 27 F.3d at 770 ("requiring direct causation" avoids "unworkable difficulties" and "problems of proof"). Congress did not intend that a Section 2333 plaintiff, by "creative pleading," should obtain treble damages for "every possible injury that can, with some ingenuity, be attributed to a defendant's injurious conduct." *Lerner*, 318 F.3d at 116 (affirming dismissal of RICO claim for failure to plead proximate cause).

Despite this clear law, the district court has not required plaintiffs to plead and prove proximate causation. Instead of applying the strict causation

requirement of Section 2333, the court required only that plaintiffs allege they were directly harmed by violent acts of *terrorists* covered by 18 U.S.C. §2331(1), and then asked only whether plaintiffs alleged that the Bank violated the criminal prohibitions of Sections 2339A-C, which it held "serve as predicate crimes giving rise to civil liability under the ATA." A968. The effect of these rulings is that a plaintiff need show no causal link at all—let alone a direct and foreseeable link not broken by some other intervening direct cause—between plaintiff's injury and the Bank's alleged conduct. See *id.* (holding that it "misstates the statutory requirement" to say that "plaintiffs must allege that they were injured by reason of Arab Bank's conduct"). According to the district court, a plaintiff may instead prevail by showing that the Bank provided ordinary banking services to persons who later committed acts of terrorism prohibited by Sections 2339A-C, which do not require causation for such offenses but only proof of "knowledge" and "intent." A968-A975.

Judge Gershon's elimination of proximate cause from the private treble damages action is erroneous. It conflicts with the plain "by reason of" language of Section 2333. It is flatly at odds with the courts' recognition that the same phrase in RICO imposes a proximate cause requirement *separate* from the requirements of the predicate offenses that are essential to RICO liability. *Anza*; *McLaughlin*. And it ignores Congress's carefully designed statutory structure, in which there are

lower barriers to criminal enforcement by federal prosecutors using their "informed judgment" in "seeking to prevent imminent harms in the context of international affairs and national security," *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2728 (2010), but more stringent requirements for treble damages suits by private claimants who are unconstrained by these "sensitive and weighty interests." *Id.* at 2727.

After effectively stripping the Bank of a causation defense, the district court then removed even the remaining defense of lack of knowledge and intent by barring it from rebutting documents that the court presumes show "'direct evidence of defendant's knowledge and circumstantial evidence of defendant's intent.'" SPA18-SPA21. The Sanctions Order thus deprives the Bank of its primary remaining defense after the court's misconstruction of the statute, destroying its due process rights.

Secondary liability under ATA §2333. In addition to eliminating proximate cause as an element of primary liability under Section 2333, the district court further expanded the scope of that provision by holding that those who "aid and abet" or "conspire" with terrorist organizations may be liable, even though "the statute is silent" on this issue. A969-A972. That also was error, for as the court held in *Boim v. Holy Land Foundation*, 549 F.3d 685, 689 (7th Cir. 2008) (en banc), "statutory silence on the subject of secondary liability means there is none."

That is the general rule under *Stoneridge Investment Partners v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), and *Central Bank v. First Interstate Bank*, 511 U.S. 164, 176 (1994), in which the Supreme Court explained that "Congress knew how to impose aiding and abetting liability when it chose to do so" by "us[ing] the words 'aid' and 'abet' in the statutory text." It is a rule that applies "to conspiracy claims as well." *Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837, 841 (2d Cir. 1998). And it is an especially important rule in a case like this where the effect of judicially extending the reach of the statute to secondary actors is to expand extraterritorial jurisdiction. *Boim*, 549 F.3d at 689-90; see, *e.g.*, *Morrison*, 130 S. Ct. at 2880 (there is "in all cases" a "presumption against extraterritoriality").

Courts must use "great caution" when "considering the kinds of individual claims that might impl[icate]" statutes like the ATA, because any "decision to create"—or expand—"a private right of action is one better left to legislative judgment," especially when an action impinges on legislative and executive discretion in managing "foreign relations." *Sosa*, 542 U.S. at 725, 727-28. Secondary liability also is especially harmful because of its broad and uncertain reach. See *Central Bank*, 511 U.S at 188-90 ("unclear" rules for "determining aiding and abetting liability" make the issues "'hazy, their litigation protracted, and their resolution unreliable,'" leading defendants "to pay settlements in order to

avoid the expense and risk of going to trial").

Had the district court applied these established principles, it could not have endorsed open-ended theories of secondary liability under Section 2333. It only compounded that error when it sanctioned away the Bank's knowledge and intent defense, turning a judge-created cause of action with no basis in the statute into a treble damage windfall for plaintiffs.

Secondary liability under the ATS. This Court has allowed aiding and abetting liability under the other statute on which plaintiffs rely, the ATS. But it made clear that, given the potential breadth of such liability, a very strong "*mens rea* standard for aiding and abetting liability in ATS actions"—"purpose rather than knowledge alone"—is essential to constrain the cause of action. *Presbyterian Church v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009). Under this standard, the defendant must have been "in the atrocity business"—"purposefully engaged in the business of genocide, slavery, piracy, etc." *Kiobel*, 2011 WL 338048, at *3 (2d Cir. Feb. 4, 2011) (Jacobs, J., concurring in denial of panel reh'g); see also *id.* at *5 ("significant protection" from "excessive expense and intrusion" of ATS suits is provided because "courts can dismiss at the outset cases in which the plaintiffs' pleadings fail to allege [a] purposive violation") (Leval, J., dissenting from denial of panel reh'g).

Judge Gershon removed this essential safeguard by ruling that the ATS's

"purpose" element is satisfied by showing knowledge that financial services were provided to parties linked in some manner to terrorism (A1244-A1246), and imposing sanctions that prevent the Bank from establishing its innocent state of mind. That due process violation would be moot, however, if the district court followed *Kiobel*, which squarely held that corporate defendants like the Bank may not be sued at all under the ATS—something the district court to date has not done.

The combined effect of the district court's three rulings—authorizing an adverse inference of a guilty state of mind and precluding evidence to rebut it, discarding proximate causation, and authorizing liability for "aiding and abetting" and "conspiracy"—is to transform all banks into insurers against any injury suffered in a regional conflict. The formula to plunder these financial institutions is now clear: a plaintiff need only sue a bank domiciled in this region, demand documents that cannot be lawfully produced, and then insist on sanctions precluding any defense testimony on innocent state of mind. With the traditional defense of causation gone and the bank liable as an "aider and abettor" of any customer who subsequently engages in violent actions, banks would be strictly liable for all losses suffered in this tragic and protracted regional conflict.

The mere fact that plaintiffs allege complicity with terrorism cannot justify that shocking denial of due process. "It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely

tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) (plurality op.). By depriving the Bank of any fair opportunity to defend itself, the Sanctions Order is glaringly inconsistent with those principles.

In addition to vacating the Sanctions Order, this Court should provide guidance to the district court on these interrelated issues under the ATS and ATA to prevent a patent miscarriage of justice and avoid an unfair and legally flawed trial. See *Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964) (expanding scope of mandamus ruling "to avoid piecemeal litigation and to settle new and important problems"); accord *Miller v. United States*, 403 F.2d 77, 79 (2d Cir. 1968) (Friendly, J.); 16 Wright & Miller, *supra*, §3934, at 569 (extending scope of mandamus review "to related questions that would not independently support such review seems entirely appropriate").

IV. THE SANCTIONS ORDER VIOLATES INTERNATIONAL COMITY.

The Sanctions Order also clashes with principles of international comity. International comity requires a district court "to minimize possible conflict between its orders and the law of a foreign state affected by its decision." *First Nat'l City Bank*, 396 F.2d at 902. It applies in particular "where the issues to be resolved are entangled in international relations." *Maxwell Communication Corp. v. Société Generale*, 93 F.3d 1036, 1047 (2d Cir. 1996). Applying international

comity, courts "approach cases touching the laws and interests of more than one country" in a "spirit of cooperation" that fosters reciprocity. *Id*. at 1053. "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." *The Bremen M/S v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). The district court defied those principles. It imposed extraordinarily severe sanctions without reference to the compelling interests of Jordan, Lebanon, and the Palestinian Authority. That action trenches "sharply on national nerves." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

A. The Sanctions Order Conflicts With The Public Policies Of Foreign Governments And Foreign Relations Of The United States.

"[I]nternational comity questions" are in particular implicated by "attempts to overcome protections afforded by the laws of another nation." *Doe v. United States*, 487 U.S. 201, 218 n.16 (1988). Thus, quashing a subpoena for records from Canadian banks based on "fundamental principles of international comity," this Court recognized that "[w]hether removal of records from Canada is prohibited is a question of Canadian law." *Ings v. Ferguson*, 282 F.2d 149, 152 (2d Cir. 1960). Comity prohibits imposition of severe sanctions for refusing to violate the criminal law of one's domicile.

The Supreme Court has laid particular emphasis on avoiding conflicts with foreign regulatory schemes such as the banking privacy laws at issue here. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817, 820 (1993) (Scalia, J. concurring and dissenting in part) (urging courts to "take[] account of foreign regulatory interests" to avoid "sharp and unnecessary conflict with the legitimate interests of other countries"); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165, 169 (2004) (any application of U.S. law that creates "a serious risk of interference" with a foreign nation's regulation of its own affairs would amount to "an act of legal imperialism").

These comity principles are so important that the Court recently construed U.S. securities laws to have no extraterritorial application in order to prevent even *potential* conflict with foreign law. *Morrison v. Nat'l Austl. Bank*, 130 S. Ct. 2869 (2010). The Court found no justification for applying U.S. law "incompatibly with the applicable laws of other countries." *Id*. at 2885. Stressing that foreign law often "differs from ours" on a range of issues, including "what discovery is available in litigation," *Morrison* heeded the warnings of foreign governments about "interference with foreign securities regulation." *Id*. at 2885-86.

The Supreme Court also has explained that comity requires special vigilance to avoid even potential interference with the Executive Branch's foreign affairs authority. The "potential implications for the foreign relations of the United

States" should "make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004). *Sosa* mandates "great caution" because "many *attempts by federal courts to craft remedies*" in the international arena "would raise risks of adverse foreign policy consequences." *Id*. at 727-28 (emphasis added).

That admonition applies directly here. The United States' efforts to conduct foreign policy (including counter-terrorism operations and peace negotiations) in a particularly volatile region should not be undermined by ad hoc rulings in discovery disputes that severely punish compliance with laws of our allies and diplomatic partners. See *Estate of Amergi v. Palestinian Auth.*, 611 F.3d 1350, 1364 (11th Cir. 2010) ("politically sensitive issues that are especially prominent in the foreign relations problems of the Middle East" require judicial restraint so as not to "undermine American objectives in the region"). That is "legal imperialism" of the worst kind.

The potential for international antagonism is all the greater given that this litigation is brought by "private plaintiffs," who "often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government." *Empagran*, 542 U.S. at 171. These private individuals seek broad information about the accounts of tens of thousands

of persons with no involvement in this litigation. "[R]equests by private parties, particularly private plaintiffs, should be scrutinized more carefully than requests initiated by the United States government" because private parties tend to have less "concern for the national interest." *Restatement (Third) of Foreign Relations Law* §442, Reporters' Note No. 9.

As the Jordanian government told this Court: "The Kingdom and the United States have signed numerous bilateral and multilateral accords, and have cooperated in many areas, including civil aviation, defense, extradition, science, investment, and trade. The Kingdom has been and remains a steadfast ally of the United States in combating terrorism and terrorism financing." Brief *Amicus Curiae*, *supra* p. 20, at 3. It is particularly inappropriate for courts to impose draconian discovery sanctions in a civil "terrorism" case where the Executive has neither condemned the Bank for terrorist financing nor supported plaintiffs' claims or discovery demands.

It does not matter whether the Executive has spoken in the particular case. Because courts lack the "aptitude, facilities, [or] responsibility" to conduct "foreign policy," *Chicago & S. Airlines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948), they may not do injury to U.S. international relations irrespective of whether the Executive chooses to object. Indeed, the Supreme Court has applied comity principles to prevent international friction even when the United States has

affirmatively urged a different result. *E.g.*, *Zschernig v. Miller*, 389 U.S. 429, 434, 441 (1968) (striking down state law that had an "impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems," though the U.S. argued the law did not "unduly interfer[e] with the United States' conduct of foreign relations"); *Mitsubishi Motors v. Soler Chrysler-Plymouth.*, 473 U.S. 614, 629, 661 (1985).

The Sanctions Order cannot be reconciled with comity principles. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 376 (2000). Just as "American antitrust laws do not regulate the competitive conditions of other nations' economies" (*Matsushita Elec. Indus. v. Zenith Radio*, 475 U.S. 574, 582 (1986)), U.S. discovery rules should not be stretched to regulate other jurisdictions' financial privacy policies. As the Solicitor General and State Department have put it, "sovereign compulsion"

> should be available as a defense when the conduct at issue was in fact compelled by a foreign government, for it is in such cases that the imposition of liability by American courts is likely to touch most sharply on foreign concerns, and thus pose the greatest difficulties for the conduct of our foreign relations.

Brief for the United States as *Amicus Curiae* at 8, *Matsushita*, 475 U.S. 574 (No. 83-2004), 1985 WL 669667. The Sanctions Order's generation of international discord—by demanding that foreign governments waive their bank privacy laws as a precondition of allowing a key financial institution in their region to survive civil

litigation in the U.S.—cries out for reversal under this principle. See *Ex Parte Peru*, 318 U.S. 578, 586-87 (1943) (mandamus appropriate in case involving "the dignity and rights of a friendly sovereign state" and Executive Branch's "conduct of foreign affairs"); *Whiteman v. Dorotheum GmbH*, 431 F.3d 57, 60 (2d Cir. 2005) (Holocaust-related claims against Austria dismissed, as requested in mandamus petition, in deference to "foreign policy interests of the United States").

B. The Sanctions Order Improperly Confronts Foreign Sovereigns With A Hobson's Choice.

The Sanctions Order improperly puts foreign governments to a Hobson's choice: they must either waive their bank secrecy laws or trigger the downfall of a leading financial institution on which national and regional economic stability depends. Imposition of "a choice between the rock and the whirlpool" (*Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593 (1926)) is an impermissible intrusion into international relations by a federal court presiding over a private civil dispute.

A federal court plainly could not directly order a foreign sovereign to waive its bank secrecy laws. The Sanctions Order represents an impermissible attempt "to accomplish indirectly what [the court] admittedly lacks the remedial authority to mandate directly." *Missouri v. Jenkins*, 515 U.S. 70, 92 (1995); see also *New York v. United States*, 505 U.S. 144 (1992).

In *Medellin v. Texas*, 552 U.S. 491, 511 (2008), the Court held that judgments of an international criminal court were not directly enforceable as domestic law, explaining that the opposite conclusion would transfer "sensitive foreign policy decisions * * * to state and federal courts," which the Court described as a "particularly anomalous" result. The Hobson's choice in this case similarly cuts deeply into international relations where the district court has neither expertise nor institutional legitimacy. As the Supreme Court has warned, "the nuances of foreign policy" are not "the province" of the judiciary. *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 76 (1993).

In short, the Sanctions Order runs afoul of this Court's admonition that "each nation should make an effort to minimize the potential conflict flowing from their joint concern with the prescribed behavior" and that courts "must take care not to impinge upon" the "delicate area of foreign affairs." *First Nat'l City Bank*, 396 F.2d at 901. By defying that legal principle, the Sanctions Order works a "manifest injustice" and should be vacated. *Dinler*, 607 F.3d at 943.

V. THE SANCTIONS ORDER RESTS ON A CLEARLY ERRONEOUS ASSESSMENT OF THE EVIDENCE.

The Sanctions Order represents a clear abuse of discretion because it indisputably rests on a series of factual errors and misstatements by the district court. It overrides rulings by the Magistrate Judge who closely supervised discovery, received 27 submissions, and held 13 hearings on the Bank's efforts to

produce records subject to privacy laws. By contrast, the district court *did not conduct a single hearing* on these matters. "[T]he hope of effective judicial supervision is slim" where district judges lack information concerning "sprawling, costly, and hugely time-consuming" discovery. *Bell Atl. v. Twombly*, 550 U.S. 544, 560 n.6 (2007).

Identifying these errors requires no appellate second-guessing of elusive factual determinations. The discovery record is clear, and this Court is well-positioned to assess what the Bank did and did not produce. As the Magistrate Judge found, the Bank conscientiously obtained "permission to produce substantial quantities of documents otherwise prohibited from disclosure." A1302. By pursuing every avenue to obtain governmental or judicial authorization or private party consent, the Bank managed to produce over 200,000 account records, as well as providing plaintiffs with access to Bank officers and employees from Jordan, Lebanon, and the Palestinian Territories through dozens of days of depositions.

Judge Gershon asserted that the Bank "never intended to produce certain documents." SPA15. This characterization is belied by the Bank's extensive efforts to obtain relief from foreign financial privacy laws, including: (i) direct requests to the central bank regulatory authorities in Jordan, Lebanon, the Palestinian Territories, Yemen, and the United Arab Emirates; (ii) court actions filed in Jordan and the Palestinian Territories and appealed to the highest court;

and (iii) Letters of Request, endorsed by the Magistrate Judge, submitted in Jordan, the Palestinian Territories, Lebanon, Qatar, Israel, Morocco, Egypt, Great Britain, Germany, and France. A1088-A1094; R.641 at 5-6 nn.4-6 (*Linde*).

In light of this record, the Magistrate Judge, who was far closer to the discovery issues than the district court, found that the Bank undertook reasonable efforts to comply with discovery orders, and rejected plaintiffs' suggestion that the Bank "dragged its feet" or otherwise showed bad faith. A981.

It is undisputed that the Bank's efforts resulted in the production of hundreds of thousands of records that were otherwise subject to foreign bank confidentiality laws. Plaintiffs' Saudi Committee allegations constitute one of their core theories of liability. R.4 at ¶¶ 302-342 (*Linde*). Through extensive government contacts, the Bank obtained consent from Saudi authorities to produce every transfer record and communication related to the Saudi Committee.

The other core aspect of plaintiffs' complaint is the Bank's asserted provision of financial services to HAMAS and other organizations identified by plaintiffs. With the permission of the LSIC, the Bank produced all account records relating to the only Arab Bank account identified by plaintiffs as one that HAMAS allegedly controls. The Bank also was able to produce account and transaction records located in the United States for many of the other organizations identified in the *Linde* complaint.

This record refutes Judge Gershon's pejorative characterizations of the Bank's efforts and demonstrates her patent abuse of discretion.

A. The Court's Statements About The Bank's Saudi Committee Production Are Indefensible.

Judge Gershon's assertion that the Bank withheld "internal Bank communications relating to the Saudi Committee" is wrong. SPA14. The Bank produced *all* its internal communications relating to the Saudi Committee. A1043-A1044, A1183-A1209; R.641 at 12-14 (*Linde*). Plaintiffs spent significant time deposing the Bank's employees with respect to the contents of these communications. A1234-A1238. The Bank raised this error in its motion for reconsideration of the Sanctions Order but Judge Gershon ignored it. Compare R.641 at 12-14 (*Linde*) with SPA20-SPA23.

Judge Gershon also erred in classifying the account files of the individual beneficiaries of Saudi Committee payments as "Saudi Committee documents" withheld by the Bank. SPA14. These personal account records of Bank customers are entirely distinct from Saudi Committee records. The Saudi Committee cannot waive foreign laws protecting this individual account information. By comparison, plaintiffs were given *ever*y instruction originated by the Saudi Committee for payment to these beneficiaries—including each beneficiary's name and the amount and date of each payment—as well as all Bank correspondence, including internal communications.

The district court also misdescribed the Saudi Committee payment program. According to the Sanctions Order, payments directed by the Saudi Committee through the Bank to a terrorist's relative in the Palestinian Territories are "direct evidence of the Bank's facilitation of terrorist activity" (SPA17)—an issue that otherwise would have been addressed by the jury at trial. This judicial finding that the Saudi government, which created and administered the payment program to benefit tens of thousands of indigents, is a state sponsor of terrorism clashes with U.S. foreign policy. The United States deems the Committee a legitimate humanitarian program and has encouraged other governments to follow the Saudi example. *E.g.*, A1110-A1111, A1084; R.9 at 10-13 (*Lev*); R.9(13)-(14) (*Lev*).

B. The Court Ignored Statements Of Foreign Governments.

Judge Gershon also concluded that "there is nothing in the record indicating that [the Bank] faces a real risk of prosecution" for violating the foreign bank confidentiality laws at issue. SPA12. In fact, the court had before it a 2006 letter from the Central Bank of Jordan informing the Bank that "[c]ompliance with [an order to disclose customer account information] would be in direct contravention of the confidentiality articles of Jordan's Banking Law, and subject Arab Bank to criminal prosecution and other sanctions" (A1075), as well as a 2006 letter from the Palestinian Monetary Authority advising the Bank that "disclosure would constitute a criminal violation and subject Arab Bank and Bank employees to

possible imprisonment, fines or both." A1078. The court disregarded these statements.

In support of the Bank's reconsideration motion, additional letters were submitted from the Prime Ministers of Jordan and the Palestinian National Authority, the Palestine Monetary Authority's Governor, and Lebanon's Minister of Finance. A1259-A1265. As Lebanon's Minister of Finance wrote: "Lebanon will seek to enforce its laws by instituting legal action against Arab Bank and its employees if it attempts to comply with the discovery orders of this Court." A1259. The Prime Ministers of Jordan and the Palestinian Authority also confirmed that the Bank and its employees would be subject to prosecution for violating their banking laws. A1263-A1265.

C. The Court Mischaracterized The Bank's Production Of Documents In New York.

The district court gave the Bank "little credit for its grudging production of the [Arab Bank of New York] documents, which were produced only after this court rejected the Bank's attempt to obfuscate the production obligations of its local branch." SPA13. But the Bank produced over 6,000 pages of responsive documents, including more than 1,500 transactional records, from ABNY from July 2005 to August 2006—long ***before*** Judge Gershon issued her December 2006 order. R.641 at 11-12; R.641(2)-(4) (*Linde*).

The Bank's objection was limited to plaintiffs' overbroad request for "all

documents provided by ABNY to the OCC." As the Bank explained, and the Magistrate Judge agreed, the nature of the OCC's examination—which involved independent on-site review of the Bank's systems—made it impossible to reconstruct which transactional records the OCC reviewed. A984. The Magistrate Judge, with his superior familiarity with the discovery record, *sustained* the Bank's objection. He found that because OCC's on-site investigators had "complete access to the records of the defendant," without Bank supervision, "accurately determining every document that was reviewed by the OCC during its investigation cannot be accomplished." *Id.* The Magistrate Judge also explained that plaintiffs' production demand was "not reasonably calculated to lead to admissible evidence" and that the transactional records reviewed by the OCC that were relevant to plaintiffs' claims "are covered by their other requests and are therefore subject to production anyway." A984-A985. Indeed, those records already had been produced to plaintiffs. R.641(2)-(4) (*Linde*).

D. There Is No Support For The Court's Assertion That The Bank's Discovery Efforts Were "Calculated To Fail."

The district court similarly criticized the Bank's efforts to obtain waivers of customer privacy because one of the Bank's letters to the LSIC denied plaintiffs' allegations and asserted that the Magistrate Judge "provided for respecting confidentiality laws." SPA14. The Magistrate Judge found this language "not inaccurate." A1138-A1139.

Judge Gershon's characterization of the Bank's efforts is particularly untenable given that another Bank request *to the LSIC* was successful, and none of the other unsuccessful waiver letters, including the Letters of Request approved by the Magistrate Judge, included any supposedly objectionable language. R.641 at 9 n.7 (*Linde*). The legal obstacles the Bank faced are demonstrated by the unambiguous expressions of intent by the foreign governments to enforce their bank privacy laws. Judge Gershon's view that the Bank's efforts to obtain permission to disclose additional documents "were calculated to fail" has no support. SPA14.

E. The Court Drew Legally Erroneous Conclusions From The Bank's Cooperation With The Department Of Justice And OCC.

The district court believed that the Bank's prior production of documents to the OCC and Department of Justice showed there was no real impediment to its production of foreign bank records. SPA14. The district court erred in comparing document production to *private plaintiffs* in the instant civil litigation with disclosures to *government agencies* in official criminal investigations. Those responses to formal and confidential Executive Branch requests do not override either the Bank's foreign legal obligations in responding to civil litigation demands or the directives of the foreign governments.

As Jordan has explained, its "continued commitment to providing such assistance to other nations for law enforcement or national security purposes" does

not evince "any general intention by the Kingdom to relieve a financial institution operating in Jordan of its obligations to comply with Jordanian banking laws concerning the confidentiality of customer accounts." A1264-A1265. A foreign financial institution should not be exposed to criminal prosecution for compliance with its home country's laws simply because it previously cooperated with federal prosecutors and now faces unproven claims in civil litigation.

F. There Is No Justification For The Court's Sanction Concerning The Bank's State Of Mind.

The district court made a number of other assertions regarding hotly disputed factual issues. These issues go to the merits, not sanctions, and cannot justify reversal of the burden of proof or a gag order. To the contrary, they require a fair trial in which the parties' arguments can be tested against the evidence. This Court should not be misled by the district court's characterizations and instead should allow the jury to resolve these disputed merits issues.

For example, Judge Gershon should not have accepted plaintiffs' assertion that the Bank admitted that it maintained accounts for eleven individuals or entities designated as supporters of terrorism by the U.S. Government. SPA16. In fact, *the Bank froze or closed all eleven accounts*, reflecting its decision to screen accounts and transactions against a U.S. government list of specially designated persons, notwithstanding the absence of any legal obligation to do so. A1180-A1181, A1225-A1226. Magistrate Judge Pohorelsky understood that these interrogatory

responses fell far short of proving plaintiffs' contentions regarding knowledge. See A1149-A1150. Plaintiffs must prove any such links at trial.

Judge Gershon also erred by speculating that individual account records of Saudi Committee beneficiaries—which the Bank was unable to produce due to customer privacy laws—would establish the Bank's knowledge of the Committee's alleged support for terrorism. The court surmised, for instance, that identification provided to the Bank by Ibrahim Ahmad Khaled al-Muqadama to collect a Saudi Committee payment is "essential" to prove he was the person by that name who founded Hamas. SPA17. But the Court never explained how an identification card is essential evidence of affiliation with a terrorist organization or the Bank's knowledge of such affiliation. Plaintiffs are free to prove that the persons who received the payment and founded Hamas are one and the same, and the Bank cannot use withheld account records to rebut any such proof. Judge Gershon should not have preempted jury resolution of the Bank's state of mind.

Plaintiffs remain free to argue these and other factual theories to the jury. But none justifies sanctions that would eliminate plaintiffs' burden of proof on *mens rea* or gag defense witnesses.

In sum, Judge Gershon's rationales for her unprecedented order not only offend basic sanctions law, due process, and international comity, but also rest on highly disputed factual assertions that require a fair trial. None of these rationales

suffices to justify severe punishment for obedience to foreign criminal law. Only interlocutory review by this Court can right the wrong inflicted by the Sanctions Order.

CONCLUSION

The Sanctions Order should be vacated. This Court should also 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 13,951 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: March 21, 2011

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on March 21, 2011 the foregoing Opening Brief for Appellant-Petitioner Arab Bank plc with Special Appendix, as well as the accompanying five volumes of the Appendix, were served by CM/ECF and e-mail on the following:

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