UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

COURTNEY LINDE, et al. Plaintiffs, - v - ARAB BANK, PLC, Defendant.	CV-04-2799 (NG)(VVP) and all related cases[1]

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT ARAB BANK PLC'S MOTION FOR PARTIAL RECONSIDERATION OF THIS COURT'S APRIL 24, 2013 DECISION TO DENY, IN SUBSTANTIAL PART, THE BANK'S MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL

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[1] *Litle, et al. v. Arab Bank, PLC*, Case No. CV 04-5449 (E.D.N.Y. 2004) (NG) (VVP); *Coulter, et al. v. Arab Bank, PLC*, Case No. CV 05-365 (E.D.N.Y. 2005) (NG) (VVP); *Almog v. Arab Bank, PLC*, Case No. CV 04-5564 (E.D.N.Y. 2004) (NG) (VVP); *Afriat-Kurtzer v. Arab Bank, PLC*, Case No. CV 05-388 (E.D.N.Y. 2005) (NG) (VVP); *Bennett, et al. v. Arab Bank, PLC*, Case No. CV 05-3183 (E.D.N.Y. 2005 (NG) (VVP); *Roth, et al. v. Arab Bank, PLC*, Case No. CV 05-3738 (E.D.N.Y. 2005) (NG) (VVP); *Weiss, et al. v. Arab Bank, PLC*, Case No. CV 06-1623 (E.D.N.Y. 2006) (NG) (VVP); *Jesner, et al. v. Arab Bank, PLC*, Case No. CV 06-3689 (E.D.N.Y.) (NG) (VVP); *Lev, et al. v Arab Bank, PLC*, Case No. CV 08-3251 (E.D.N.Y. 2008) (NG) (VVP); and *Agurenko v. Arab Bank, PLC*, CV 10-626 (E.D.N.Y. 2010) (NG) (VVP).

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Arab Bank plc ("Arab Bank" or the "Bank") respectfully submits this memorandum of law in support of its motion for partial reconsideration of this Court's April 24, 2013 Order, or, in the alternative, for certification of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

PRELIMINARY STATEMENT

> ***"Now Your Honor, we'll never be able to prove – not just because of bank secrecy, but in general – that [a terrorist] used this money to [commit a terrorist attack]."***[2]

Through the imposition of permissive causation standards that have been repeatedly rejected by the Supreme Court and the Second Circuit, Plaintiffs seek to hold Arab Bank trebly liable for "each and every terrorist attack perpetrated by Palestinian terrorists [during] the [Second] Intifada"[3]—a four-year period of violent conflict in which thousands of Israeli and Palestinian citizens were killed or injured.[4] Plaintiffs concede that they cannot prove that Arab Bank participated in the planning or execution of the attacks that injured them, or that these incidents, which they allege to have been carried out by Hamas terrorists, would not have occurred absent the banking services at issue. Nor can they prove that these automated banking services were a direct cause of these attacks. Their concessions in this regard require dismissal of their claims under the causation standards set forth in *Rothstein v. UBS AG*, 708 F.3d 82, 94-97 (2d Cir. 2013) ("*Rothstein IV*"), *In re Terrorist Attacks on Sept. 11, 2001*, --- F.3d ---, 2013 WL 1591883, at *2-4 (2d Cir. Apr. 16, 2013) ("*Al Rajhi Bank*"), and the Supreme Court precedent upon which both of those courts relied. This Court has declined to do so and has

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[2] Hr'g Tr. 54:12-15, Apr. 24, 2013 ("Hr'g Tr.") (statement of Plaintiffs' counsel conceding that Plaintiffs cannot prove that money transferred through Arab Bank was a direct or 'but for' cause of any of the 24 Hamas attacks at issue in this case).

[3] Pls.' 12(b)(6) Opp'n Mem. (*Linde* ECF No. 53-4) at 51, dated Dec. 14, 2004.

[4] *See, e.g.*, *Israeli-Palestinian Fatalities Since 2000 - Key Trends*, United Nations, Office for the Coordination of Humanitarian Affairs (OCHA), Aug. 21, 2007.

found in its ruling from the bench that unspecified "factual issues" preclude a grant of summary judgment.

In this action, Plaintiffs are not suing the terrorists who attacked them, or the individuals who provided those terrorists with weapons or logistical support, or the Hamas organization, or Hamas's alleged "front" charities, or individuals affiliated with Hamas, or the Kingdom of Saudi Arabia, or the Saudi Committee, or USAID, or any other party that allegedly provided funds to Hamas, or its alleged fronts, affiliates or leaders. They are suing an international bank that processed automated, electronic fund transfers in accordance with the laws and regulations of the jurisdictions in which it offered commercial services. The conduct of the Bank in processing financial transfer instructions and providing other financial services to its customers is wholly unconnected to the actual injuries sustained by the Plaintiffs.

In denying, in substantial part, the Bank's summary judgment motion, this Court relied on *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010)—a case involving a constitutional challenge to the criminal provisions of Section 2339B of the Anti-Terrorism Act ("ATA")—in rejecting the requirement that Plaintiffs prove that the Bank's activities were a direct and 'but for' for cause of their injuries. Hr'g Tr. at 73:19-74:10. This Court's reliance on *Humanitarian Law Project* was misplaced and contrary to the holding of Judge Jed S. Rakoff who, in writing the opinion that was recently affirmed by *Rothstein IV*, concluded that *Humanitarian Law Project* has no application to the causation requirements for civil ATA claims.

In considering civil ATA causation requirements, this Court concluded that "the *Rothstein* [*IV*] court was concerned about foreseeability." Hr'g Tr. at 17:12-13. In fact, the *Rothstein IV* court held that foreseeability is not enough to state a civil claim under the ATA;

instead *Rothstein IV* determined that the *Rothstein* plaintiffs failed adequately to plead direct and 'but for' causation.

This Court's misplaced reliance on *Humanitarian Law Project* and flawed interpretation of *Rothstein IV* led it to erroneously conclude that the proximate causation standards for civil ATA claims do not require a showing of direct or 'but for' causation. Application of the resulting improper standard of causation will permit Plaintiffs to pile inference upon speculative inference in an attempt to convince a jury that the Bank's services were a foreseeable cause of their injuries.

This Court also erred in concluding that *respondeat superior* principles applied in garden variety tort cases also apply to claims brought under the civil remedies provision of the ATA. Hr'g Tr. at 71:16-72:6. It is inappropriate to evaluate the state of mind of a corporation through the acts of low-level employees, and it is especially improper to hold a corporation trebly liable for the conduct of such low-level employees. This Court's contrary ruling conflicts with the same line of analogous authority relied on by the *Rothstein IV* and *Al Rajhi Bank* courts in evaluating ATA causation standards.

Reconsideration of this Court's decision is warranted because the Court made mistakes of both law and fact and overlooked controlling authority. Alternatively, this Court should certify its April 24th Order for an interlocutory appeal so that the Second Circuit can consider whether its rulings in *Rothstein IV* and *Al Rajhi Bank* have been properly interpreted by this Court before a trial of many months begins under circumstances that may lead to reversal on appeal.

STANDARDS OF REVIEW

The decision to grant or deny a motion for reconsideration under Local Civil Rule 6.3 is within the sound discretion of the district court. *McCarthy v. Manson*, 714 F.2d 234, 237 (2d Cir. 1983). Reconsideration is appropriate where "the Court overlooked the controlling decisions or factual matters that were put before the Court in the underlying motion and which, had they been considered, might have reasonably altered the result reached by the Court." *Certain Underwriters at Lloyd's, London v. ABB Lummus Global, Inc.*, 337 B.R. 22, 25 (S.D.N.Y. 2005). Although the rules are designed to prevent relitigation of issues that have already been decided, they "provide[ ] the Court with an opportunity to correct manifest errors of law or fact, hear newly discovered evidence, consider a change in the applicable law or prevent manifest injustice." *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., Ltd.*, 182 F.R.D. 97, 100 (S.D.N.Y. 1998). Reconsideration is warranted because this Court's decision to deny, in substantial part, the Bank's motion for summary judgment contained manifest errors of law with regard to the proximate causation standard to be applied under the ATA and with regard to its analysis of the issue of *respondeat superior*.

In the alternative, certification of an interlocutory appeal is appropriate because this Court's summary judgment order conflicts with the Second Circuit's recent decisions in *Rothstein IV* and *Al Rajhi Bank* on the controlling issue of ATA proximate causation. This Court may certify an order for appellate review if it "involves a controlling question of law as to which there is substantial ground for difference of opinion" and if the Court determines that "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *Maestri v. Westlake Co., Inc.*, 894 F. Supp. 573, 577 (N.D.N.Y. 1995). For the reasons stated herein, there is "substantial ground for difference of opinion" with

respect to this Court's interpretation of the proximate causation holdings in *Rothstein IV* and *Al Rajhi Bank*, as well as the Supreme Court precedent upon which both of those courts relied. Moreover, an immediate appeal will materially advance the termination of the litigation; if the Bank's interpretation of the *Rothstein IV* and *Al Rajhi Bank* cases is correct, Plaintiffs' claims must be dismissed.

ARGUMENT

I. This Court Committed Manifest Errors Of Law And Fact In Finding That A Reasonable Juror Could Conclude That The Banking Services At Issue Were A Proximate Cause Of 24 Hamas Attacks.

This Court recently acknowledged that its analysis of the proximate causation requirements for a civil ATA claim "was not the analysis that *Rothstein* [*IV*] has adopted." Hr'g. Tr. at 28:22-23. It then concluded that the correct standard was "the ordinary tort law requirement of proximate cause," under which Plaintiffs must prove that the Bank's acts "were a substantial factor in the sequence of responsible causation and [Plaintiffs'] injuries were reasonably foreseeable or anticipated as a natural consequence of those acts." *Id*. at 74:11-17.

In fact, however, the Court's ruling last month regarding the governing standard of causation is substantially the same as that adopted by it at the inception of this litigation. *Compare* Pls.' 12(b)(6) Opp'n Mot. (*Linde* ECF No. 53-4) at 53-54 (proximate causation satisfied if Bank was a "substantial factor" and Plaintiffs' injury was in "zone of foreseeable injury"; Plaintiffs need only prove that they were injured by a terrorist who qualified to receive a Saudi Committee payment, or whose heirs qualified to receive such a payment, whether or not payments had any relationship to terrorist attack); *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 585 (E.D.N.Y. 2005) (adopting same analysis); *with* Hr'g Tr. at 72:7-74:25 (permitting claims to go forward without evidence of 'but for' or direct causation between financial transfer

and terrorist attack). The standard imposed by *Rothstein IV* is far more rigorous, however, and compels dismissal of Plaintiffs' claims.

A. This Court Erred In Concluding That *Rothstein IV* And *Al Rajhi Bank* Do Not Require Plaintiffs To Prove That Arab Bank's Conduct Was A Direct And 'But For' Cause Of Their Injuries.

The Second Circuit has now twice concluded in the past three months that in order to plead a civil ATA claim against a banking institution, a plaintiff must allege that the bank's activities were a direct and 'but for' cause of the terrorist attacks that gave rise to his injuries. Applying this standard, the Second Circuit first affirmed the dismissal of ATA claims brought against UBS AG, a large Swiss bank, by Israeli victims of Hamas and Hezbollah terrorism, after concluding that the plaintiffs' allegations were insufficient to plead ATA causation:

- Plaintiffs do "not allege that if UBS had not transferred U.S. currency to Iran, Iran . . . would not have funded the attacks in which plaintiffs were injured."
- Plaintiffs do not allege "that Iran would have been unable to fund the attacks by Hizbollah and Hamas without the cash provided by UBS."
- Plaintiffs do not allege a direct connection "between the cash transferred by UBS to Iran and the terrorist attacks by Hizbollah and Hamas that injured plaintiffs."

Rothstein IV, 708 F.3d at 97 (emphasis added).

Only weeks ago, the Second Circuit reached the same conclusion in affirming the dismissal of ATA claims brought against Al Rajhi Bank and Saudi American Bank by American victims of al Qaeda terrorism:

- Plaintiffs failed to allege "that the money allegedly donated by the Rule 12(b)(6) defendants to the purported charities actually was transferred to Al Qaeda and aided in the September 11, 2001 attacks."

Al Rajhi Bank, 2013 WL 1591883, at *4 (emphasis supplied).

Despite this Court's recognition that *Rothstein IV* requires Plaintiffs to prove that the Bank's conduct was a "factual cause" of their injuries, it ultimately declined to require proof of "factual" or "but-for" causation:

> But-for cause in some ways is more, in some ways is less. It seems to me the *Rothstein* Court was concerned about foreseeability. It is not enough to have a factual cause. There has to be foreseeability, which is part of the proximate cause standard that *Rothstein* has set out. That, to my mind, is what the heart of the *Rothstein* case is about.

Hr'g Tr. at 17:11-17 (emphasis supplied); *id*. at 74:24 ("but-for causation cannot be required").

Foreseeability is not irrelevant to the proximate causation inquiry under the ATA. It is, however, only one element of such an inquiry; it is well settled that an ATA plaintiff must also plead and prove direct and 'but for' causation. *Cf. Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268-69 (1992) ("[A]mong the many shapes this [proximate cause] concept took at common law . . . was a demand for some direct relation between the injury asserted and the injurious conduct alleged. . . . Although such directness of relationship is not the sole requirement . . . it has been one of its central elements[.]" (emphasis supplied)).

Contrary to this Court's conclusion, foreseeability was the least important factor in the *Rothstein IV* court's analysis of ATA proximate causation. In fact, the *Rothstein IV* court found that it was foreseeable that the alleged support provided by the defendant bank might lead to more terrorist attacks by the very terrorists who injured the plaintiffs, yet nonetheless dismissed the action because allegations of foreseeability were insufficient. 708 F.3d at 93 ("[i]t is reasonable to infer" that UBS AG's conduct increased Iran's ability "to fund Hizbollah and Hamas for the conduct of terrorism" and "the greater the financial support Hizbollah and Hamas received, the more frequent and more violent the terrorist attacks they could conduct"). It was of far greater significance to the *Rothstein IV* court to identify—as it could not—allegations that the

defendant's banking conduct was a direct and 'but for' cause of the specific terrorist attacks that injured plaintiffs; finding none, the court affirmed dismissal of the complaint. *Id.* at 95.

In rejecting the need for direct and 'but for' causation, this Court quoted from that section of the *Rothstein IV* opinion that pertains to the pleading requirements to establish Article III standing, rather than proximate causation. *See* Hr'g Tr. at 72:11-19. In fact, the point made by the *Rothstein IV* court in that section of its opinion is that in order to pass constitutional muster the requirement that an injury be "fairly traceable" to a defendant's conduct is less rigorous than the separate requirement that a plaintiff prove that a defendant's conduct proximately caused his injury. *See Rothstein IV*, 708 F.3d at 91 ("The 'fairly traceable' standard is lower than that of proximate cause. . . . 'Central to the notion of proximate cause is the idea that a person is not liable to all those who may have been injured by his conduct, but only to those with respect to whom his acts were a substantial factor in the sequence of responsible causation and whose injury was reasonably foreseeable or anticipated as a natural consequence.'" (quoting *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 123 (2d Cir. 2003) ("*Lerner I*") (other citations omitted)).

In *Lerner I*, the Second Circuit dismissed RICO claims after concluding that the plaintiffs failed adequately to plead proximate causation under governing RICO standards. The fact that *Lerner I* examined the 'substantial factor' and 'foreseeability' elements of proximate causation does not, of course, mean that direct and 'but for' causation are not essential elements of a RICO claim—they plainly are. *See, e.g.*, *Holmes*, 503 U.S. at 268. In fact, the *Rothstein IV* court's quotation of *Lerner I* was followed by its quotation from *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006), for the proposition that "with respect to 'proximate causation, the central question . . . is whether the alleged violation led directly to the plaintiff's injury.'"

The *Lerner I* decision quoted by the court is only the first, moreover, of two decisions of the Court of Appeals involving these parties. In *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273 (2d Cir. 2006) ("*Lerner II*") the Second Circuit underscored the fact that the word "proximate," as used in *Lerner I*, means "direct": "we have subsequently interpreted our decision in *Lerner I* to stand for the proposition that 'a plaintiff does not have standing if he suffered an injury that was indirectly (and hence not proximately) caused by the racketeering activity or RICO predicate acts . . . .'" *Lerner II*, 459 F.3d at 285. The *Lerner II* court also emphasized that "[a] plaintiff must make a different showing of proximate cause—one that is often more difficult to make—when bringing suit under the RICO statute than when bringing a common-law cause of action." 459 F.3d at 278 (emphasis supplied).

The Second Circuit has clearly stated that in assessing the essential elements of an ATA claim, courts must look exclusively to civil cases interpreting RICO and the Clayton Act—statutes which, like the ATA, require a plaintiff to prove injury "by reason of" a defendant's conduct.[5] *See Rothstein IV*, 708 F.3d at 95 (citing *Holmes*, 503 U.S. 258); *see also id.*, 708 F.3d at 91 (citing *Anza*, 547 U.S. at 461); *Al Rajhi Bank*, 2013 WL 1591883, at *3 (citing *Holmes*, 503

[5] The analogous features of the civil remedies provisions of the Clayton Act, RICO and the ATA are apparent:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee [(15 U.S.C. § 15(a)—Clayton Act)];
>
> Any person injured in his business or property by reason of a violation of section 1692 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee [(18 U.S.C. § 1964(c)—RICO)];
>
> Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism . . . may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees [(18 U.S.C. § 2333(a)—ATA)].

U.S. at 266-67). *Holmes* concluded that Congress knew that courts interpreted the statutory language of the Clayton Act to require a showing of 'but for' and direct causation when it enacted RICO, *Holmes*, 503 U.S. at 266-68; so too did the *Rothstein IV* court conclude that Congress was undoubtedly aware of this consistent interpretation over many decades when it grafted the same language into the civil remedies provision of the ATA. *Rothstein IV*, 708 F.3d at 95; *see also Rothstein v. UBS AG*, 647 F. Supp. 2d 292, 293 (S.D.N.Y. 2009) ("*Rothstein I*") (finding that the ATA's "by reason of" language "has typically been construed to be synonymous with 'proximate cause'" and "proximate cause narrowly defined at that." (emphasis supplied)).

It is a maxim of statutory interpretation that when statutory language has a "well understood meaning," courts "can only assume" that Congress intended the same meaning to apply when it incorporated the same language into new legislation. *Holmes*, 503 U.S. at 268 (finding that "by reason of" was interpreted in Clayton and Sherman Act cases to require 'but for' and direct proximate causation, and applying that same standard to RICO claims). Accordingly, the *Rothstein IV* court found that the ATA's "by reason of" language required a plaintiff to demonstrate that the defendant's conduct was both a 'but for' and direct cause of his injuries:

> "[A] plaintiff's right to sue [under the Clayton Act] required a showing that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well." . . . We reach the same conclusion here with respect to the ATA[.]

Rothstein IV, 708 F.3d at 95 (quoting *Holmes*, 503 U.S. at 267-68).

The *Rothstein IV* court's pronounced reliance on *Holmes* and *Anza,* two civil RICO cases, provides additional refutation of this Court's conclusion that "foreseeability" is "at the heart" of the *Rothstein IV* court's proximate causation analysis. As the Supreme Court has observed, "*Anza* and *Holmes* never even mention the concept of foreseeability." *Hemi Grp.,*

LLC v. City of New York, 130 S. Ct. 983, 991 (2010) (emphasis supplied). Rather, *Holmes* and *Anza* both underscore the burden faced by a RICO plaintiff of proving that there is "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268 (emphasis supplied); *see also Anza*, 547 U.S. at 460 (plaintiff must demonstrate "a direct causal connection" between injury and injurious conduct) (emphasis supplied). In the banking context, the absence of a direct relationship between a financial institution's services and the particular incidents that caused plaintiff's injuries requires dismissal of the complaint:

> Plaintiffs' conclusory allegations . . . do not meet *Twombly*'s plausibility standard with respect for the need for a proximate causal relationship between the cash transferred by UBS to Iran and the terrorist attacks by Hizbollah and Hamas that injured plaintiffs.

Rothstein IV, 708 F.3d at 97 (emphasis supplied). This requirement of a direct causal connection is consistent with "[t]he general tendency of the law, in regard to damages at least, . . . not to go beyond the first step" in assigning liability. *Holmes*, 503 U.S. at 271-72.

This Court erred by relieving Plaintiffs of their burden to allege and prove that banking services provided to alleged Hamas front organizations or alleged Hamas operatives were used to perpetrate the terrorist attacks at issue (or, indeed, any terrorist attacks); and by relieving them of their burden to prove that the terrorist attacks would not have occurred without the financial services allegedly provided by the Bank.[6] The absence of such allegations is precisely the reason why the *Rothstein IV* and *Al Rajhi Bank* courts affirmed the dismissal of

[6] The participants who are directly connected to the incidents placed at issue by the Plaintiffs are numerous: the persons who transported terrorists to the locations of the attacks, the persons who manufactured bombs and other weapons, the persons who trained the assailants, and others similarly situated. The actions of all these individuals might be considered to be a 'direct' and 'but for' cause of the incidents at issue. But, as the Second Circuit found in *Al Rajhi Bank*, the processing of banking transactions is many steps removed from this type of conduct, and cannot in itself be found to be the proximate cause of a terrorist attack. 2013 WL 1591883, at *4 ("[w]e also are not persuaded that providing routine banking services to organizations and individuals said to be affiliated with al Qaeda—as alleged by plaintiffs—proximately caused the September 11, 2001 attacks or plaintiffs' injuries").

ATA claims against the defendant banks in those actions. Notably, in *Rothstein IV* and *Al Rajhi Bank*, the alleged banking activity at issue was both significant in sum (hundreds of millions of dollars in the case of UBS) and temporally proximate to the terrorist attacks that caused plaintiffs' injuries (UBS provided services between 1996 and 2003, and plaintiffs were injured by terrorist attacks between 1997 and 2006), but those allegations, accepted as true, were insufficient to state a claim under the ATA. *Rothstein* Am. Compl. (*Linde* ECF No. 927-1) ¶¶ 61-112 (alleging, *inter alia*, that Iran is a state sponsor of terrorism that created, funded, controlled and operated Hizbollah).

Plaintiffs concede without hesitation that they cannot meet their burden to prove direct or 'but for' causation under the standards set forth by *Rothstein IV* and *Al Rajhi Bank*. *See, e.g.*, Hr'g Tr. at 54:12-15 ("[W]e'll never be able to prove – not just because of bank secrecy, but in general – that [a terrorist] used [money that passed through Arab Bank] to purchase [the materials he used to commit his terrorist attack]."). But the fact that it is difficult for the Plaintiffs to prove their claims under the causation standards set forth in *Rothstein IV* and *Al Rajhi Bank*, and the RICO precedents upon which those courts relied, is not a legitimate basis for this Court to relieve Plaintiffs of their evidentiary burden.

Plaintiffs have no idea how the terrorists who committed the crimes at issue obtained their weapons, or what, if any, funds were used to finance their attacks. Plaintiffs rely entirely on rank speculation to bridge the chasm between the Bank's processing of wire transfer instructions and performance of other routine banking transactions, and the specific terrorist attacks that caused their injuries. Permitting Plaintiffs to move forward with such speculative claims would "stretch the law beyond all recognizable limits," *Rothstein I*, 647 F. Supp. 2d at

293, and would violate the clear mandates of *Rothstein IV* and *Al Rajhi Bank*, and the Supreme Court precedent upon which those courts relied.

B. The Court Relied On Inapposite Authority In Concluding That The 'Fungibility Of Money' Requires A Rejection Of Direct And 'But For' Causation.

This Court ruled that requiring a direct or 'but for' causal relationship between the banking services at issue and the attacks that injured the Plaintiffs "would contradict the basic holding of the *Humanitarian Law Project* decision and its recognition that money is fungible." Hr'g Tr. at 74:8-10. This Court's reliance on *Humanitarian Law Project* for guidance in determining the causation standards to be applied to a civil ATA claim was misplaced and contrary to the controlling law of this Circuit.

Humanitarian Law Project involved a First Amendment and Due Process challenge to the criminal provisions of Section 2339B of the ATA. *See* 130 S. Ct. at 2716. The central question in *Humanitarian Law Project* was whether it was constitutional to criminalize the provision of "material support," as so defined, to a Foreign Terrorist Organization, even when that support is being provided for "peaceful" purposes. *Id.* at 2716-20. As Judge Jed S. Rakoff stated in the opinion affirmed by *Rothstein IV*, "*Humanitarian Law Project* does not address Section 2333(a)'s proximate causation requirement."

> Section 2339B is a purely criminal measure and has no causation element. . . . Accordingly, any potential connection between *Humanitarian Law Project*'s analysis of Section 23339B and this Court's analysis of Section 2333's proximate causation element would appear to be strained at best and more likely irrelevant.

Rothstein v. UBS AG, 772 F. Supp. 2d 511, 516 (S.D.N.Y. 2011) ("*Rothstein III*") (emphasis supplied). With regard to *Humanitarian Law Project*'s reference to the fact that "[m]oney is fungible"—*dicta* relied on by this Court—the *Rothstein III* court dismissed its application to civil ATA claims in unambiguous terms: "applying the *dicta* of *Humanitarian Law Project* outside its

criminal context would be like applying the rules of hockey to a game of lacrosse, on the theory that they both involve big sticks." *Rothstein III*, 772 F. Supp. 2d at 518. *Humanitarian Law Project* thus does not have any application to the concept of proximate causation, nor does it displace the clear and controlling ATA causation jurisprudence embodied in *Rothstein IV* and *Al Rajhi Bank*.

C. This Court Failed To Consider Intervening Causes That Break The Chain Of Proximate Causation Between Banking Services And Terrorist Attacks.

The only district court decision concerning the ATA that was referenced by the Court of Appeals in its causation analysis was *Burnett v. Baraka Inv. and Dev. Corp.*, 274 F. Supp. 2d 86 (D.D.C. 2003). *Al Rajhi Bank*, 2013 WL 1591883, at *4. *Burnett* was quoted by the *Al Rajhi Bank* court for the proposition that: "'Plaintiffs offer no support, and we have found none, for the proposition that a bank is liable for injuries done with money that passes through its hands in the form of deposits, withdrawals, check clearing services, or any other routine banking service.'" *Al Rajhi Bank*, 2013 WL 1591883, at *4 (quoting *Burnett*, 274 F. Supp. 2d at 109). The *Al Rajhi Bank* court additionally held that "[w]e also are not persuaded that providing routine banking services to organizations and individuals said to be affiliated with al Qaeda . . . proximately caused the September 11, 2001 attacks or the plaintiffs' injuries." *Id.* (citing *Burnett*, 274 F. Supp. 2d at 109). This holding compels dismissal of Plaintiffs' claims.

The *Al Rajhi Bank* court's adoption of the *Burnett* holding that banking services cannot be considered to be direct causes of terrorism, as required by the ATA, is not surprising. These holdings reflect the well-settled understanding at common law that the chain of proximate cause is severed when intervening criminal conduct occurs, even when there is a "real possibility that [defendant's] products can be used for criminal purposes." *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830, 837-38 (5th Cir. 1989) (dismissing wrongful death claim against

magazine that published an advertisement seeking the "hit man" who committed murder at issue, and finding that it is not enough to "publis[h] an ad that later played a role in criminal activity"); *Moore v. R.G. Indus.*, 789 F.2d 1326, 1327-28 (9th Cir. 1989) (firearm manufacturer not liable for injuries caused by criminal misuse of firearm); *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1031 (W.D. Wa. 2005) (dismissing claims by residents of Gaza Strip against Caterpillar bulldozers—"a manufacturer or distributor of non-defective, legal products, cannot be liable in tort for alleged criminal acts committed with those products by third parties").

The Second Circuit has also held, interpreting the "by reason of" statutory language from RICO that has been incorporated into the ATA, that "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 v. Am. Tobacco Co.*, 522 F.3d 215, 226 (2d Cir. 2008) (emphasis supplied); *see also, e.g.*, *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 769 (2d Cir. 1994) ("the intervention of other independent causes, and the factual directness of the causal connection," are critical to the proximate cause inquiry).

This Court's failure to examine the obvious intervening acts of the alleged terrorists in this case was clear legal error. As noted above, each of the attacks at issue was perpetrated by individual actors. The record reflects that the Plaintiffs have no idea how these attacks were funded, how the responsible individuals obtained funding for their crimes or what assistance their accomplices supplied. Plaintiffs openly acknowledge that they will never know this information. Hr'g Tr. at 54:12-15. Plaintiffs' own experts do acknowledge, however, that Hamas has multiple sources of funds, including the Iranian government, which provides Hamas with weapons, supplies and deliveries of cash through tunnels, cash couriers, and other means.

See, e.g., Matthew Levitt, *Hamas: Politics, Charity, and Terrorism in the Service of Jihad* (2007) at 172 ("Iran directly aids Hamas with money, training camps, and logistical support"); at 176-77 (noting Iran's well-documented provision of weapons to Hamas).[7] The actions of the terrorists and their accomplices who committed the crimes at issue here are clearly intervening causes that break any conceivable chain of proximate causation between the Bank's provision of routine financial services and the incidents at issue here. *McLaughlin*, 522 F.3d at 226.

D. The Plaintiffs' 'Best Evidence' Does Not Demonstrate Direct Or 'But For' Causation.

At the recent summary judgment hearing, the Plaintiffs presented their "best evidence" against the Bank through a slide show. The Plaintiffs specifically highlighted four payments originated by the Saudi Committee and processed through Arab Bank, and stated "we can show that these payments had real and practical impact not just in the abstract, but in concrete terms for people actively involved in many of the attacks at issue." Hr'g Tr. at 54:16-19.

This statement was demonstrably false, as three of the fund transfers were not for the benefit of "people actively involved in the attacks at issue," but for their relatives, and were made months before or after the date of the attacks. *See, e.g.*, Hr'g Tr. at 52:20-53:3 (transfer to family of Izz al-Din al-Masri more than two months after the Sbarro attack); 53:10-16 (transfer to family of Ayman Halawa "six months after the bombing when he was killed"). One of the wire transfers that Plaintiffs' counsel highlighted during oral argument was processed nearly 8

[7] Unfortunately, recent events only confirm the fact that terrorists do not require access to significant funds to perpetrate their heinous crimes. The bombing of the Boston marathon was committed by two young men who packed firecrackers into cooking kettles. Nobody can seriously suggest that banking services were a proximate cause of this attack. In the Middle East, terrorists receive support from many sources, including state sponsors of terror like Iran and Syria—countries willing to supply arms, explosives, training, and logistical support to terrorists to help them commit their reprehensible acts of violence. It defies reason to conclude that isolated banking services are a direct, substantial or 'but for' cause of all crimes committed by these terrorists.

months prior to the attack at issue. Hr'g Tr. at 54:5-11. It is inconceivable that any of these transfers could be a direct or 'but for' cause of the incidents in question.

Plaintiffs also contended at the April hearing that evidence of the Bank's processing of automated, electronic fund transfers involving Ahmad Ismail Yasine, Salah Shehadeh, and Ismail Haniyeh, constitutes a *prima facie* showing of proximate causation under the ATA. Hr'g Tr. at 43:17-44:10, 46:3-47:2. There is no evidence in the record, however, that Yasine, Shehadeh or Haniyeh had any involvement in the 24 incidents, or that any of the fund transfers to them funded the operations of Hamas, or, indeed, that they used any banking services from any source to conduct any acts of Hamas terrorism, let alone the 24 attacks at issue. Judge Weinstein reached this very conclusion. *Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 542, 573 (E.D.N.Y. 2012) (applying pre-*Rothstein IV* causation standards and concluding that Plaintiffs' evidence was "insufficient . . . to tie the personal bank accounts of individuals who may be affiliated with Hamas to Hamas itself. More is required to establish liability of the Bank."). Plaintiffs' evidence concerning an account held at Arab Bank's al-Mazra'a branch in Lebanon for an individual named Osama Hamdan suffers from the same deficiencies. Hr'g Tr. at 45:2-12. In particular, Plaintiffs have offered no evidence of any connection between the banking activity in Hamdan's account and any act of Hamas terrorism.

This evidence, which the Plaintiffs chose as their best evidence to present at oral argument, which this Court referenced generally, in denying in substantial part, the Bank's motion for summary judgment, is clearly inadequate to prove proximate causation under the standards set forth in *Rothstein IV* and *Al Rajhi Bank.*

II. This Court's Rejection Of The Bank's *Respondeat Superior* Arguments Overlooked Relevant Authority.

In support of its motion for summary judgment, the Bank argued that common law *respondeat superior* principles do not apply to ATA claims, just as they do not apply to RICO claims:

> Many courts, for instance, have considered civil claims filed against corporate defendants under the RICO statute. These courts have held that in order to establish a civil RICO claim against a corporation, there must be evidence demonstrating knowing misconduct by the corporate defendant's officers or directors. *Gruber v. Prudential-Bache Secs., Inc.*, 679 F. Supp. 165, 181 (D. Conn. 1987). In reaching this conclusion, courts have typically cited the criminal nature of the RICO statute as a primary basis for eschewing the *respondeat superior* principles applied in garden variety tort cases. These courts have also found the prospect of subjecting corporations to liability under RICO's "punitive, financially ruinous treble damages remedy" for the misconduct of low-level employees to be untenable.

See Bank Br. at 6-7 (Filed Under Seal), dated Aug. 8, 2012 (citing *Banque Worms v. Luis A. Duque Pena E Hijos, Ltda.*, 652 F. Supp. 770, 771-72 (S.D.N.Y. 1986) ("it would be entirely inappropriate" to "hold the corporation liable under RICO for the independent acts of malefactors at a low corporate level"); *Rush v. Oppenheimer & Co.*, 628 F. Supp. 1188, 1194-95 (S.D.N.Y. 1985) (traditional vicarious liability principles should not be applied to "the RICO criminality requirements") (other citations omitted). *See also Linde v. Arab Bank, PLC*, 353 F. Supp. 2d 327, 331 (E.D.N.Y. 2004) ("[T]he private right of action in Section 2333(a) arises from injuries caused by an act of international terrorism, which requires . . . 'a violation of the criminal laws of the United States or any State[;]' [t]hus, there is no claim under Section 2333(a) absent a criminal act.") (citation omitted) (emphasis supplied); *Litle v. Arab Bank, PLC*, 611 F. Supp. 2d 233, 242 (E.D.N.Y. 2009) ("[t]he very idea of treble damages [in the ATA] reveals an intent to punish past, and to deter future, unlawful conduct" (citation and quotation omitted)).

This Court rejected the Bank's argument without any mention or analysis of the analogous RICO cases that the Bank cited and relied on in its motion papers. Instead, the Court concluded that "[t]here's so much in the history of the ATA that tells us that we are to apply traditional tort principles and of course those principles include that [an] entity is liable for the acts of agents who act with apparent authority." Hr'g Tr. at 71:19-23. This is, of course, the very same analysis that this Court applied in initially rejecting the Bank's motion to dismiss Plaintiffs' aiding and abetting claims: "Congress expressed an intent in the terms and history of section 2333 to import general tort law principles, and those principles include aiding and abetting liability." *Linde*, 384 F. Supp. 2d at 583 (citation and internal quotation omitted).

In granting the Bank's motion for summary judgment with respect to Plaintiffs' aiding and abetting claims, this Court has now recognized that its previous analysis of this issue was contrary to controlling precedent. Hr'g Tr. at 4:25-5:1; 67:3-8 ("We already addressed the aiding and abetting claims and those will be dismissed."). In fact, the notion that the ATA encompasses all "traditional tort principles" has been repeatedly rejected, including by this Court. *Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 474, 497 (E.D.N.Y. 2012) ("The reference to mere negligence [in the legislative history of the ATA] as a basis for ATA liability cannot be accepted in view of the trebling of damages required by the statute[.]"); *Litle v. Arab Bank, PLC*, 611 F. Supp. 2d 233, 242-43 (E.D.N.Y. 2009) (dismissing contribution claims after concluding that such claims conflicted with the treble damages provision of the ATA); *see also* Hr'g Tr. at 71:14-15 ("I would not use recklessness in a charge to the jury in this case.").[8]

[8] This Court also erroneously stated that the Bank "has relied in particular on foreign sovereign immunity act [("FSIA")] cases" in support of its argument that *respondeat superior* principles do not apply to civil ATA claims. Hr'g Tr. at 71:23-25 (holding that "I think those [FSIA] cases are different. They deal with foreign states and they do not provide persuasive reasoning for this case."). In fact, the Bank did not rely on any FSIA cases in its moving papers. *See* Bank Br. at 6-7, Aug. 8, 2012 (relying exclusively on RICO cases). However, in response to Plaintiffs' opposition to the Bank's motion for

It was error for this Court to overlook the RICO precedent cited by the Bank—the same line of authority that *Rothstein IV* and *Al Rajhi Bank* considered in evaluating ATA causation standards. Reconsideration is warranted.

III. Alternatively, This Court Should Certify Its Summary Judgment Order For An Interlocutory Appeal To Provide Clarity On A Controlling Issue Of Law And To Help Facilitate The Efficient Resolution Of This Case.

The Bank first requested this Court's permission to certify its decision denying a motion to dismiss the *Linde* action for an interlocutory appeal on the issue of ATA proximate causation more than seven years ago. *See* Bank Certification Mem. (*Linde* ECF No. 157-2), dated Jan. 27, 2006. In that motion, the Bank argued that the Court's holding that Plaintiffs were not required to prove that they were injured "by reason of" the Bank's conduct was contrary to well-established precedent. *Id.* at 6-8. The Bank cited *Holmes*, and argued that "Congress, in utilizing the very same language to create [ATA] liability, [intended] . . . to require the same standards for causation as have been developed for civil RICO claims and Clayton Act claims." *Id.* at 8. The Bank also argued, as it does today, that Plaintiffs were required to prove 'but for' and direct causation, consistent with RICO and Clayton Act precedent. This Court denied the Bank's motion for certification of an interlocutory appeal without explanation. Order (*Linde* ECF No. 207), dated July 18, 2006.

After the Supreme Court decided *Anza* in 2006, the Bank again requested that the Court allow it to take an interlocutory appeal to the Second Circuit so that the parties would have

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summary judgment, the Bank cited *Fisher v. Great Socialist People's Libyan Arab Jamahiriya*, 541 F. Supp. 2d 46 (D.D.C. 2008)—a FSIA case—for the limited proposition that when a statute is silent with respect to *respondeat superior* liability, no such liability should be read into that statute. *See* Bank Reply Br. (*Linde* ECF No. 895), at 7, Sept. 21, 2012. Of course, the *Rothstein IV* court concluded that since the ATA is silent with regard to aiding and abetting liability, aiding and abetting liability should not be read into the statute; it follows that the same reasoning should apply to *respondeat superior* liability, as the *Fisher* court so held. It was error for this Court to conclude that the Bank "relied in particular" on FSIA cases, and it was error for this Court to ignore the clear parallels between the *Rothstein IV* court's analysis of the aiding and abetting issue, and the *Fisher* court's analysis of the *respondeat superior* issue.

clear guidance on the causation standards applicable to ATA civil claims. *See* Second Bank Certification Mem. (*Almog* ECF No. 321-2), dated Feb. 26, 2007. Once again, the Bank argued that this Court should look to *Anza* and *Holmes* and apply the 'but for' and proximate causation standards from those cases to Plaintiffs' ATA claims. This Court again denied the Bank's motion without explanation. Order (*Almog* ECF No. 359), dated May 7, 2007.

This Court has now concluded that its original analysis of the proximate causation standards under the ATA conflicts with the law of this Circuit, and that Plaintiffs do, in fact, need to prove that their injuries were proximately caused by the Bank. *See* Hr'g Tr. at 28:22-29:3; 36:15-17 ("under *Rothstein*, [the Bank's] material support has to be a proximate cause of the injury"). Yet this Court has also relied, erroneously, on *Humanitarian Law Project* in support of its holding that because "money is fungible" Plaintiffs do not need to demonstrate a direct and 'but for' causal connection between the Bank's services and the specific acts of terrorism that injured the Plaintiffs. Hr'g Tr. at 74:8-10.

There is a substantial ground for difference of opinion as to whether *Humanitarian Law Project* is relevant to the proximate causation standards for ATA civil claims; very recent Second Circuit precedent clearly rejects, for example, the application of the theory of "fungibility of money" to the required proximate causation analysis. *See supra* at I.B (discussing *Rothstein III*'s rejection of *Humanitarian Law Project*'s 'fungibility of money' *dicta* in determining proximate causation standards under the ATA). Moreover, the plain language of both the *Rothstein IV* and *Al Rajhi Bank* opinions—which rely entirely on *Holmes* and *Anza*—require a direct and 'but for' connection between the Bank's processing of financial services and the Plaintiffs' injuries, *i.e.*, the *Rothstein* plaintiffs' claims were properly dismissed because they failed to allege that "if UBS had not transferred U.S. currency to Iran, Iran . . . would not have

funded the attacks in which plaintiffs were injured" and "that Iran would have been unable to fund the attacks by Hizbollah and Hamas without the cash provided by UBS." *See supra* at I.A (discussing direct and 'but for' causation holdings of *Rothstein IV* and *Al Rajhi Bank*).

As noted at the last hearing, trial of this case will take several months. And this is just the first in a series of contemplated trials. The proximate causation standards will inform every aspect of this case. If direct and 'but for' causation is required, Plaintiffs' claims should be dismissed. If something less than direct and 'but for' causation is required, the governing standard will have a direct impact on the evidence that will be permitted to be presented at trial.

The Bank will be severely prejudiced by an adverse verdict rendered as a result of an improper jury instruction on the causation requirements for a civil ATA claim. An adverse verdict would immediately threaten the Bank's correspondent banking relationships and thereby compromise its ability to continue operating before it even has a chance to pursue an appeal. *Cf. Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) (reversing conviction of corporate defendant resulting from improper jury instructions after defendant had already been driven out of business by wrongful conviction). *Arthur Andersen LLP* is a cautionary tale; the Bank—with more than 7,000 employees, operating at more than 600 locations across the globe—should have the opportunity to seek appellate guidance before being forced to proceed to trial under the permissive causation standards adopted by this Court.

This Court has acknowledged that "many of [its prior decisions] have really gone by the board," Hr'g Tr. at 29:3; under the circumstances it is particularly prudent to seek appellate guidance before proceeding to trial without certainty as to the causation requirements for civil ATA claims. Indeed, this Court's decisions that have "gone by the board" extend beyond its original causation analysis, and relate to many of the central elements of the ATA and

Alien Tort Statute claims at issue in these related actions. *Compare, e.g.*, *Linde*, 384 F. Supp. 2d at 583 ("aiding and abetting liability is available under the ATA") *with Al Rajhi Bank*, 2013 WL 1591883, at *3 ("a defendant cannot be liable under the [ATA] on an aiding-and-abetting theory of liability"); *compare also Lev v. Arab Bank, PLC*, 08-CV-3251, 2010 WL 623636, at *3 (E.D.N.Y. Jan. 29, 2010) (the Bank's argument that "the ATS does not empower courts to hear disputes between foreign nationals concerning extraterritorial conduct" is "meritless") *with Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, 2013 WL 1628935, at *4-10 (Apr. 17, 2013) (the "presumption against extraterritoriality" applies to ATS claims); *compare also Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 286-87 (E.D.N.Y. 2007) (state of mind required for ATS aiding and abetting claims "requires . . . some knowledge that the assistance will facilitate the crime") *with Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258-59 (2d Cir. 2009) ("we hold that the *mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone"); *compare also Almog*, 471 F. Supp. 2d at 284-85 ("organized, systematic suicide bombings and other murderous attacks against innocent civilians for the purpose of intimidating a civilian population" *i.e.*, terrorism, "are a violation of the law of nations for which this court can and does recognize a cause of action under the ATS") *with Al Rajhi Bank*, 2013 WL 1591883, at *5 ("no universal norm against 'terrorism' existed under customary international law (*i.e.*, the 'law of nations') [as of 2001]").

The parties should not be forced to engage in a trial seeking massive damages without first obtaining clarity from the Second Circuit as to whether *Rothstein IV* and *Al Rajhi Bank* require Plaintiffs to prove that the Bank was a direct and 'but for' cause of their injuries. Nor should jurors have to sit through more than three months of testimony, only to render a verdict that may be reversed on appeal.

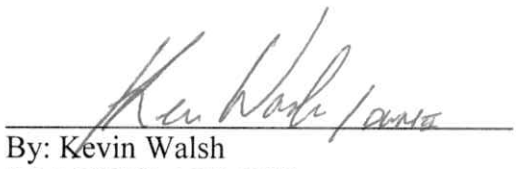
CONCLUSION

For the reasons stated herein, the Bank respectfully requests that the Court reconsider its decision to deny, in substantial part, the Bank's motion for summary judgment, and grant the Bank's motion in its entirety. In the alternative, the Bank respectfully requests that the following question be certified to the Second Circuit:

> In light of the Second Circuit's recent decisions in *Rothstein IV* and *Al Rajhi Bank*, was it error for the district court not to require the plaintiffs to prove that the Bank's conduct was a direct and 'but for' cause of the terrorist attacks that gave rise to the plaintiffs' claims?

Dated: New York, New York
May 8, 2013

Respectfully submitted,



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