IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MOSES STRAUSS, et al., Plaintiffs, v. CRÉDIT LYONNAIS, S.A, Defendant.	Civil Action No.: 06-CV-702-DLI-MDG
BERNICE WOLF, et al., Plaintiffs, v. CRÉDIT LYONNAIS, S.A, Defendant.	Civil Action No.: 07-CV-914-DLI-MDG

BRIEF OF *AMICI CURIAE*
THE INSTITUTE OF INTERNATIONAL BANKERS,
THE EUROPEAN BANKING FEDERATION, AND
THE FRENCH BANKING FEDERATION IN
SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTEREST OF THE *AMICI CURIAE*[1]

The Institute of International Bankers ("IIB"), the European Banking Federation ("EBF"), and the French Banking Federation ("FBF") jointly submit this memorandum of law as *amici curiae* in support of the motion for summary judgment filed by Defendant Crédit Lyonnais, S.A. ("CL"). The *amici* each represent the interests of international financial institutions and make this submission in order to alert the Court to the potentially far-reaching and deleterious effects of Plaintiffs' proposed interpretation of the civil liability provisions of the U.S. Anti-Terrorism Act, 18 U.S.C. § 2333(a) ("ATA").

Founded in 1966, the IIB is the only national association devoted exclusively to representing and advancing the interests of the international banking community within the United States. IIB's members include 100 internationally headquartered financial institutions, from 38 countries around the world. Collectively, the U.S. branches, agencies, banking subsidiaries, securities affiliates and other operations of IIB's member institutions enhance the depth and liquidity of U.S. financial markets and are an important source of credit for U.S. borrowers.

One of IIB's goals is to ensure that the global operations of its member institutions are not restricted by the unjustified extraterritorial application of U.S. laws. These laws may conflict or be in tension with the laws or regulations of the home countries of IIB's member institutions. In addition, IIB members have a strong interest in continuing to do business in the U.S., and in encouraging their non-U.S. clients to expand their cross-border business in the U.S. To the extent that the U.S. legal framework is viewed as drawing what are

[1] No party or party's counsel authored this brief in whole or in part or contributed money intended to fund preparing or submitting the brief. No person other than the *amici curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

essentially non-U.S. disputes into U.S. courts, the interests of IIB members will be adversely affected. The question posed by these cases is, therefore, of great significance to IIB and its members.

The EBF is the leading professional organization of European banks. The EBF provides a forum for European banks to discuss good practices and legislative proposals, and to take common positions on matters affecting the European banking community. In addition, the EBF actively promotes the positions of the European financial services industry in international fora.

The FBF represents commercial, cooperative, and mutual banks operating in France, and its members include both French and foreign organizations. It promotes the banking and financial services industries in the French, European, and international markets, and sets out the industry's positions and proposals to officials and regulatory authorities in the fields of business and finance. The FBF also issues professional recommendations.

SUMMARY OF ARGUMENT

Amici's member associations are fully committed and willing to be at the forefront of global efforts to combat the financing of terrorism. Plaintiffs were the victims of despicable terrorist attacks allegedly perpetrated by Hamas. Under Plaintiffs' overreaching interpretation of the ATA, however, no foreign bank could provide legitimate banking services to customers outside of the U.S. in the ordinary course of its business and in compliance with applicable local law without risking exposure to claims for treble damages brought by U.S. persons injured in terrorist attacks overseas.

Amici understand that CL maintained bank accounts opened in the name of *Comité de Bienfaisance et de Solidarité avec la Palestine* ("CBSP"), an association established

under French law. These accounts were held in France. In 2001, CL reported on two successive occasions to the appropriate French authorities its suspicions that CBSP was engaging in money laundering. CL fully cooperated with the ensuing criminal investigations in France. These investigations did not result in any charges against CBSP, which to this day has not been listed on any terrorist watch list in Europe, in particular not in France. CL nevertheless decided to close these accounts in 2002 based on its money laundering suspicions.[2] The United States government did not link CBSP to terrorist activities until August 2003, when the Treasury Department's Office of Foreign Assets Control ("OFAC") listed CBSP as a Specially Designated Global Terrorist ("SDGT"). Significantly, this designation did not entail a determination that CBSP should also be treated as a designated foreign "terrorist organization" under the ATA (18 U.S.C. § 2339B(g)(6)), and in fact the United States government has not made any such determination regarding CBSP. Yet, under the Plaintiffs' interpretation of the ATA, CL – a financial institution headquartered and doing business mainly outside the U.S. – would be held responsible for independently identifying CBSP as involved in terrorist financing activities even though neither France nor the U.S. had reached that conclusion as of 2002 and notwithstanding the determination by CL's home country government, after careful and repeated scrutiny of CBSP and its operations, that there is no basis for concluding that CBSP has any such involvement.

Simply put, internationally active banking organizations are not, and should not be, tasked with the responsibility of conducting exhaustive independent investigations of their customers for the purpose of making their own, definitive determination that they are engaging

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2 *Amici* understand that these accounts were in fact closed in 2003, following a delay attributable in part to CBSP, and that OFAC listed CBSP as a SDGT well after CBSP made its last international transfer from the CL accounts.

in terrorism financing. Banking organizations are charged with knowing their customers, and taking appropriate action should they develop a reasonable suspicion that a customer may be involved in illegal activity, but, contrary to Plaintiffs' mistaken reading of the ATA, these obligations do not require that international financial institutions in effect function as deputized agents of U.S. law enforcement, and without consideration of whether a transaction has any relationship with the U.S. Imposing such requirements would constitute an unwarranted extraterritorial extension of U.S. law and severely disrupt the conduct of international banking activities

First, France and the other Member States of the European Union, and the European Union itself, have developed, and continue to develop, a robust legal and regulatory framework for combating the financing of terrorism. As a French bank, CL operated within that framework and complied with all applicable laws and regulations with respect to its provision of routine banking services to CBSP. To read the ATA as imposing on banks headquartered outside the United States, in connection with their provision of banking services to non-U.S. customers outside the United States in the ordinary course of their business, an additional layer of U.S.-prescribed regulation that is quite clearly inapplicable, would undermine work that has been done and continues to be done in these countries, and the policy choices they have made in the area of terrorism financing.

Second, Plaintiffs' interpretation of the ATA is not realistic and demonstrates a fundamental misunderstanding of the manner in which the international banking system operates. Banks are not and should not be required to conduct their own exhaustive investigations to determine whether customers engage in terrorism financing. Instead, banks are required to report suspicious activity to the relevant authorities, and it is the responsibility of law

enforcement to investigate and take such further action as it considers appropriate.

Third, when construing a statute, U.S. courts should be guided by principles of international comity. An act of Congress should not be construed to require a person to violate the law of a foreign nation, if there is any other possible construction. The *amici* understand that Plaintiffs contend that CL should have frozen CBSP's account balances following OFAC's designation of CBSP as an SDGT in August 2003. But Plaintiffs' erroneous construction of the ATA ignores that OFAC's designation has no legal effect in France on transactions involving a French bank and its French customer. In addition, under French law, upon closing CBSP's accounts CL had no basis to withhold the account balance and would have been subject to civil liability and disciplinary sanctions had it done so. If accepted, Plaintiffs' construction of the ATA would improperly create a conflict with French law. The Court should not accept plaintiffs' attempt to expand the ATA's extraterritorial application and create through the civil liability provisions of this statute a sanctions regime that Congress and the Executive Branch have not seen fit to enact, especially where such a judicially created regime would conflict with the terrorism financing regulations and other laws of a sovereign state. Further, a foreign bank's knowledge that OFAC has designated one of its non-U.S. customers as a SDGT cannot suffice to establish *scienter* under the ATA. Imputing such *scienter* to a foreign bank would attribute inappropriate extraterritorial effect to OFAC's regulations, which they quite clearly do not have, and would be especially uncalled for in circumstances, such as those presented by these cases, where OFAC's designation occurred only *after* the foreign bank had ceased processing transactions through its customer's account.

Fourth, the *amici* understand that Plaintiffs argue that the elements of standing and causation should be defined more broadly in litigation concerning terrorism than in other

contexts. The Court should strongly reject this argument and, as have several federal district courts in this Circuit, affirm that standing and causation are fundamental requirements of civil liability under the ATA. A contrary determination would be inconsistent with Congressional intent and unfairly expose banks headquartered outside the United States to potentially severe monetary and reputational damages in connection with the ordinary course of their banking business outside the United States undertaken in compliance with applicable non-U.S. law.

In short, this Court should not accept Plaintiffs' interpretation of the ATA, which ignores principles of international comity, well-established requirements of standing and causation and reflects a fundamental misunderstanding about the manner in which the international banking system operates.

ARGUMENT

I. FRANCE AND THE EUROPEAN UNION HAVE ESTABLISHED LEGAL FRAMEWORKS FOR COMBATING THE FINANCING OF TERRORISM

France and the European Union have a robust and continually evolving legal and regulatory framework aimed at combating the financing of terrorism. At the time CL closed CBSP's accounts in August 2003, the Council of the European Union had adopted two sets of regulations and common positions designed to fight terrorism financing: (i) regulations specifically targeting the Taliban and Al Qaeda; and (ii) regulations and common positions with a broader scope setting forth specific measures to combat terrorism, including terrorism financing.[3] The European Council Common Position of December 27, 2001 applied to "persons, groups and entities involved in terrorist acts and listed in the Annex."[4] The Council Regulation

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[3] Council Regulation No. 337/2000, 2000 O.J. (L 43) 1 (EC); Council Regulation No. 467/2001, 2001 O.J. (L 67) 1 (EC); Commission Regulation No. 1354/2001, 2001 O.J. (L 182) 15 (EC); Council Regulation No. 881/2002, 2002 O.J. (L 139) 9 (EC); Council Common Position No. 2001/930/CFSP, 2001 O.J. (L 344) 90; Council Regulation 2580/2001, 2002 O.J. (L 139) 9-21 (EC).

[4] Council Common Position No. 2001/930/CFSP; Council Regulation No. 2580/2001, Arts. 1-3.

of December 27, 2001 required that all funds, financial assets, and economic resources of specific persons, groups and entities be frozen, and that financial services, including banking services, not be provided to them.[5]

Further, this Council Regulation stated that "the Council, acting by unanimity, shall establish, review and amend the list of persons, groups and entities to which this Regulation applies . . . ."[6] This legal framework in the E.U. reflected the European position that a list-based approach is the most effective approach to fight terrorism financing. The E.U. Council Regulation and Common Position reflected careful and respectable policy choices about the specific organizations that would be targeted in Europe and required that amendments to these lists be approved by a unanimous vote of the European Council.[7] The Common Position expressly states that "the list in the Annex shall be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned."[8]

In France, Decree No. 2001-875, dated September 25, 2001, required that "[e]xchange transactions, movements of capital and settlements of any nature between France and foreign countries carried out on behalf of the natural or legal persons referred to in the attached annex are subject to prior authorization by the Minister of the Economy."[9] Bank wire transfers were within the scope of the activities requiring the approval of the Minister, so long as such transfers were made on behalf of bank customers listed in the Decree. These lists were

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5 Council Regulation No. 2580/2001, Arts. 1, 2.

6 Council Regulation No. 2580/2001, Art. 2.3.

7 *Id.*.

8 Council Common Position No. 2001/930/CFSP, Art. 4.

9 Decree No. 2001-875 of 25 September 2001, as supplemented by Decree No. 2002-1270 of 10 October 2002.

regularly updated by the French authorities between 2001 and 2003 based on policy.[10]

Accordingly, at the time relevant to these lawsuits, the European Union and France considered that a list-based approach was the most effective approach to fight terrorism financing and made specific choices about the persons and entities that would be included in these lists. To this day, neither the European Union nor France has added CBSP to any such list.

Over the course of the last several years, there have been significant changes in France's anti-money laundering and anti-terrorism financing framework. This includes additional customer due diligence and risk evaluation obligations imposed through France's implementation of the E.U. Third Anti-Money Laundering Directive.[11] The European and French framework continues to evolve and respond, among other things, to U.N. Security Council resolutions, recommendations of the Financial Action Task Force ("FATF"), and other international measures. There continue to be differences between the regulatory and legal frameworks in the European Union and France, on the one hand, and the United States, on the other. In this context, the Court should not adopt the Plaintiffs' expansive extraterritorial application of the ATA and thereby obligate internationally headquartered banks to conform their operations outside the United States to U.S.-mandated requirements, especially where those requirements are inconsistent with, or in actual conflict with, those prescribed by the bank's home country.

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10 *See* Chantal Cutajar, *Freezing Terrorist Assets, a New Tool to Fight Terror Financing*, Bull. Joly Bourse, No. 3 (May 1, 2006).

11 *See* Articles L. 562-1, L. 561-10-2, L. 561-15, L. 561-31; L. 561-32, L. 561-38, and R. 561-33 of the Monetary and Financial Code; Order No. 2009-104 of 30 January 2009 (transposing Council Directive No. 2005/60, 2005 O.J. (L 309) 15 (EC) into French law); Indranil Ganguli, *The Third Directive: Some Reflections on Europe's New AML/CFT Regime*, 29 No. 5, Banking & Fin. Services Pol'y Rep., 1, 1-2 (May 2010).

II. THE ATA SHOULD NOT BE INTERPRETED TO REQUIRE CL OR ANY OTHER FOREIGN BANK TO INVESTIGATE A FOREIGN CUSTOMER'S CONDUCT FOR THE PURPOSE OF MAKING ITS OWN, DEFINITIVE DETERMINATION REGARDING THE LEGALITY OF THAT CONDUCT UNDER U.S. LAW IN CONNECTION WITH THE PROVISION OF LAWFUL BANKING SERVICES TO THE CUSTOMER OUTSIDE THE UNITED STATES

Plaintiffs' interpretation of the ATA is not realistic and demonstrates a fundamental misunderstanding of the manner in which the international banking system operates. The responsibility of banks is not to conduct their own exhaustive investigations to assess whether customers engage in terrorism financing. Banks are required by certain laws to report suspicious activity, and it is the responsibility of law enforcement to investigate the matter further and make a determination regarding its legality. That is particularly true in the area of terrorism financing because banks, unlike sovereign governments, do not possess intelligence assets and capabilities allowing them to identify terrorist fund raisers, and it is difficult to distinguish terrorist funds from other funds.[12] Terrorism financing, in contrast to money laundering, does not require any prior criminal activity.

Amici understand that CL reported its money laundering suspicions regarding CBSP's transactions to the appropriate French authorities, which prompted two criminal investigations by the French police and prosecutors. CL fully cooperated with these investigations. The French public prosecutors subsequently closed these cases without any charges brought against CBSP. There is no reason to expect or require that CL should have conducted its own further investigation of terrorism financing involving CBSP when (i) the

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[12] In 2002, the U.S. Treasury Department's Office of the Comptroller of the Currency stated that "[i]dentifying suspicious transactions that may be indicative of terrorist financing is a relatively new and difficult endeavor. Traditionally, anti-money laundering programs have focused on large suspicious cash and non-cash transactions, both domestic and international. Terrorist financing may also involve smaller dollar amounts entering the country, and the funds may often be used in typical retail consumer activity." Office of the Comptroller of the Currency, *Money Laundering: A Banker's Guide to Avoiding Problems*, 21 (December 2002) available at http://www.occ.gov/static/publications/moneylaundering2002.pdf.

French authorities were satisfied that CBSP did not engage in any crimes, and (ii) the French and E.U. authorities never designated CBSP on any list of entities suspected of engaging in terrorism financing. Further, it is especially unwarranted, and would be wholly at odds with the principles of comity (see also Part III below), to expect or require that CL should have done so based on concerns expressed by the U.S. government. Instead, in the period 2001-2003, a French bank was expected to apply national and E.U. sanctions lists and to comply with certain specific requirements of the French Monetary and Financial Code and that is exactly what CL did.[13]

The FATF, an international organization that establishes guidelines intended for States with respect to money laundering and terrorism financing, has acknowledged that "financial institutions will probably be unable to detect terrorist financing as such. Indeed, the only time that financial institutions might clearly identify terrorist financing as distinct from other criminal misuse of the financial system is when a known terrorist or terrorist organization has opened an account."[14] The United States government has similarly recognized that, while a bank may be able to report suspicious activity – as CL did with respect to its suspicions that CBSP may have been engaged in money laundering – it is not the responsibility of any bank to conduct a criminal investigation.[15]

The 9/11 Commission further noted that "[a]lthough the U.S. government may possess the intelligence that could reveal terrorist operatives and fund-raisers, financial

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13 These requirements included due diligence obligations with respect to certain transactions and the filing of suspicious activity reports if the bank noticed suspicious activity in the course of this due diligence. *See* Articles 562-2, 563-3 of the Monetary and Financial Code.

14 FATF, Guidance for Financial Institutions on Detecting Terrorist Financing, at 3 (April 24, 2002), available at http://www.fatf-gafi.org/dataoecd/39/21/34033955.pdf

15 For example, the Federal Financial Institutions Examination Council ("FFIEC") Bank Secrecy Act / Anti-Money Laundering Examination Manual (2010) clearly states that "banks are not obligated to investigate or confirm the underlying crime . . . Investigation is the responsibility of law enforcement." FFIEC Manual at 75. The FFIEC Manual is available online at http://www.ffiec.gov/bsa_aml_infobase/documents/BSA_AML_Man_2010.pdf, at page 75.

institutions generally do not."[16] Likewise, the U.S. Treasury Department's Financial Crimes Enforcement Network ("FinCEN") has recognized that "the government has greater access to information than any individual institution."[17] FinCEN further stated that, by "instituting a reporting requirement, the government will be able to observe whether this customer is conducting similar transactions at many other institutions and, if so, can see that the person may be avoiding detection by spreading transactions across many market participants. Additionally, the government has access to more information than banks and money transmitters."[18]

Amici understand that the U.S. government itself did not make any determination that CBSP was engaging in terrorist financing until August 2003, and made such a determination for purposes of OFAC's asset freezing regulations, which are quite clearly inapplicable to CL outside of the U.S. In this context, there is no reason in law or equity to support holding CL in violation of the ATA for not, on its own initiative, investigating CBSP to determine if it was financing terrorism – a determination that neither the French government nor the European Union has made to this day. Yet that would be exactly the result of Plaintiffs' reading of the ATA. Accepting such an interpretation of the ATA would establish a precedent that not only would be contrary to the provisions of the statute, but also would have a disruptive, adverse impact on foreign banks' conduct of legitimate banking operations outside the United States.

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16 9/11 Commission Staff Notes, Monograph on Terrorist Financing at 56, available at http://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf

17 Financial Crimes Enforcement Network; Cross-Border Electronic Transmittal of Funds, 75 Fed. Reg. 60377, 60382-83 (Sept. 30, 2010).

18 *Id.*

III. PLAINTIFF'S INTERPRETATION OF THE ATA VIOLATES PRINCIPLES OF INTERNATIONAL COMITY

A. Conflict Between U.S. and French Law

The Plaintiffs' overbroad interpretation of the ATA as applied to CL's alleged conduct should be rejected for the additional reason that it would create a conflict between U.S. and French law. When construing a statute, U.S. courts should be guided by principles of international comity to avoid unreasonable interference with the sovereign authority of other nations. This rule of statutory construction "helps the potentially conflicting laws of different nations work together in harmony – a harmony particularly needed in today's highly interdependent commercial world." *F. Hoffmann-La Roche Ltd. v. Empagran SA*, 542 U.S. 155, 164-65 (2004); *see also Murray v. The Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains"); Restatement (Third) of Foreign Relations Law of the United States § 403(2) (1987).

Amici understand that Plaintiffs argue that CL should not have returned funds to CBSP following the closure of its account. First, the U.S. Global Terrorism Sanctions Regulations ("GTSR"), pursuant to which OFAC designated CBSP as an SDGT, only purport to freeze "property and interests in property of the following persons *that are in the United States, that hereafter come within the United States, or that hereafter come within the possession or control of U.S. persons, including their overseas branches . . . .*" 31 C.F.R. § 594.201 (emphasis added).[19] CBSP's bank accounts were located in France, and neither CL nor CBSP are U.S.

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[19] OFAC's regulations apply to "U.S. persons" and "U.S. financial institutions," which include foreign branches of U.S. financial institutions and U.S. branches of foreign financial institutions, but do not include foreign financial institutions themselves, such as CL. 31 C.F.R. § 594.304. CL maintained and operated a New York-licensed branch at the time relevant to these lawsuits, but that branch did not maintain any account for CBSP.

persons. The scope of these regulations reflects that the obligations imposed on U.S. persons and assets did not apply to foreign banks and assets they hold for their customers outside of the U.S.[20]

Second, a decision of the *Cour de cassation* (the French Supreme Court) demonstrates that OFAC's designation of CBSP as an SDGT is not given legal effect in France.[21] The *Cour de cassation* has held that French courts would not have jurisdiction to adjudicate a request made by a foreign State founded on foreign regulations on a matter which, from the perspective of France, relates to the exercise of State authority.[22] Like the U.S., France, in the exercise of its sovereign authority, has developed its own standards and made its own policy choices regarding the entities that would be designated on terrorist sanctions lists (*see* Section I, *supra*, at 6-8) and the resulting determinations are binding on CL and all other French financial institutions with respect to their activities in France, notwithstanding a contrary determination by the U.S. or any other country.

Third, the *amici* understand that CL was bound by a contractual obligation, pursuant to account agreements governed by French law, to return to CBSP the balance on its accounts. Absent exceptional circumstances set forth under French law, a bank's failure to comply with a customer's request to carry out a transaction would result in civil liability and

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20 In addition, the Supreme Court has recently reiterated the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (citation omitted); *see also Norex Petroleum Ltd. v. Access Industries, Inc.*, 631 F.3d 29, 33 (2d Cir. 2010).

21 *See* Cass. Civ., 2 May 1990, *Republic of Guatemala*, appeal on points of law No. 88-14.687; *Bull. civ.* I, No. 91, P. 68; *Rev. crit.* DIP 1991.378, note B. Audit; *JDI* 1991.386, note J.-M. Bischoff, *JDI*, 1991.137, 2nd case.

22 *Id.*

possibly disciplinary sanctions.[23]

The interest of France in regulating transactions between French banks and French customers that do not relate to the U.S. significantly outweighs any interest of the U.S. in regulating such transactions, as evidenced by the fact that the GTSR does not purport to apply to them. Interpreting the ATA to require foreign banks serving foreign customers in such transactions to violate the laws applicable in their jurisdiction would be inconsistent with fundamental principles of comity.

B. OFAC's Designation of an Entity as a SDGT and *Scienter* Under the ATA

A foreign bank's knowledge that OFAC designated one of its non-U.S. customers as a SDGT cannot suffice to establish *scienter* under the ATA. As described above, OFAC's regulations do not have such an extraterritorial effect. They do not directly restrict the activities of foreign banks and their customers outside of the U.S. *See supra* at 12-13. Thus, a foreign bank's knowledge of OFAC's designation could not have provided it with any knowledge regarding the merits of such designation. Imputing such knowledge to a foreign bank would attribute extraterritorial effect to OFAC's regulations, which on their face they do not have.

IV. THE COURT SHOULD NOT ALTER WELL ESTABLISHED PRINCIPLES OF STANDING AND CAUSATION IN ATA CASES

Amici understand that Plaintiffs argue that the elements of standing and causation should be defined more broadly in litigation concerning terrorism than in other contexts. Federal district courts construing the ATA have demonstrated that this argument has no basis. In *Rothstein v. UBS AG*, the U.S. District Court for the Southern District of New York held that neither the Anti-Terrorism Act nor the decision of the U.S. Supreme Court in *Holder v.*

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[23] *See* CA Paris, 15th ch. Sec. B, 9 April 2004, No. 2003/03522, *Vaglietti v. Sté Barclays Bank Plc.*, Juris-data No. 241 369, *Revue de droit bancaire et financier*, 2004.318, comments by F.J. Crédot and Y. Gérard; Y.

Humanitarian Law Project, 130 S. Ct. 2705 (2010), "alters in any way plaintiffs' obligation to satisfy the 'fairly traceable' prong of the standing inquiry, which requires them to plausibly plead that a defendant's alleged actions 'materially increase[d] the probability of injury.'" *Rothstein v. UBS AG*, No. 08 Civ. 4414, 2011 WL 70354, at *4 (S.D.N.Y. Jan. 3, 2011). Standing is not established where it is dependent on "very speculative inferences and assumptions" to connect the plaintiff's injuries to the alleged activities of the defendant. *Winpisinger v. Watson*, 628 F.2d 133, 139 (D.C. Cir. 1980).

With respect to causation, Section 2333(a) of the ATA permits an action for those injured "by reason of" an act of international terrorism. 18 U.S.C. § 2333(a). The *Rothstein* court held that proximate causation was an "indispensable element" of a civil claim under the ATA and noted that in *Humanitarian Law Project*, the U.S. Supreme Court held that the statute's "by reason of" causation requirement "has typically been construed to be synonymous with proximate cause – and proximate cause narrowly defined at that." *Rothstein*, 2011 WL 70354, at *1, 4; *see also Kaplan v. Jazeera*, No. 10 Civ. 5298, 2011 WL 2314783, at*7 (S.D.N.Y. June 6, 2011).

The *Rothstein* court held that it "does not believe that the Court in *Humanitarian Law Project* somehow intended to silently alter traditional Article III standing requirements or well-established definitions of the concept of proximate causation that serve as a limit on who may be held liable for what actions," and that standing and proximate causation "are the *sine qua non* of every private civil action brought in a federal court." *Rothstein*, 2011 WL 70354, at *6. Accordingly, the Court should not presume causation in cases arising under the ATA. The requirement of adequately pleading and demonstrating knowledge, deliberate wrongdoing, and

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Gérard, *La responsibilité civile*, *Revue de droit bancaire et financier*, Nov.-Dec. 2007, 29; Article 613-21 of the Monetary and Financial Code.

causation is particularly critical with respect to claims asserted under the ATA, a punitive statute contemplating the imposition of treble damages. That is particularly critical in light of the risks of interference with foreign laws and the disruption of well-established norms of international banking which Plaintiffs' legal theories necessarily entail.

CONCLUSION

For the foregoing reasons, the *amici* respectfully submit that the Defendant's motion for summary judgment should be granted in its entirety.

Dated: New York, New York
August 25, 2011

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MOSES STRAUSS, *et al.*, Plaintiffs, v. CRÉDIT LYONNAIS, S.A., Defendant.	Case No. 06-CV-702-DLI-MDG
BERNICE WOLF, *et al.*, Plaintiffs, v. CRÉDIT LYONNAIS, S.A., Defendant.	Case No. 07-CV-914-DLI-MDG

PLAINTIFFS' MEMORANDUM OF LAW IN RESPONSE TO BRIEF OF *AMICI CURIAE*

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PRELIMINARY STATEMENT

The Institute of International Bankers, the European Banking Federation and the French Banking Federation (collectively, "*Amici*") previously sought—and provisionally obtained—the Court's leave to join defendant Crédit Lyonnais, S.A.'s ("CL") effort to turn the Anti-Terrorism Act, 18 U.S.C. § 2331 *et seq.*, (the "ATA") into a dead letter. The content of *Amici*'s brief underscores Plaintiffs' prior objection that *Amici*'s brief is "merely another attempt by [CL] to add [sixteen] pages of argument . . . to the fifty that the Court allotted."[1] Accordingly, the Court should revoke *Amici*'s leave, and simply refuse to consider their brief, which in its entirety: (i) completely misapprehends the nature of Plaintiffs' claims against CL, (ii) attempts to resurrect a comity argument that Judge Sifton unequivocally and correctly rejected at the motion to dismiss stage, and (iii) wholesale parrots CL's proximate cause argument.

In the alternative, the Court may just as easily dismiss the *Amici*'s brief on the merits. *Amici*'s comity and proximate cause arguments—quite aside from having *both* been previously rejected by Judge Sifton—are totally inapposite. As to comity, the ATA is not even susceptible to an international comity analysis, does not actually conflict with any French or European regulation, and in any case embodies U.S. interests that would easily predominate over any conflicting foreign regime. As to proximate cause, *Amici*, like CL before them, rely entirely on a solitary, *explicitly distinguished* precedent, to the exclusion of a mountain of precedent directly on-point.

As much as *Amici*—and CL—might otherwise prefer, this litigation is not about lofty principles of customary international law or intricate minutia of competing financial regulatory regimes. Nor, despite *Amici* and CL's labored efforts to paint them as such, does it concern

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[1] *See* Plaintiffs' Opposition To The Institute Of International Bankers, The European Banking Federation, And The French Banking Federation For Leave To File Amicus Brief (Docket No. 279) at 1.

whether CL deviated from U.S. Office of Foreign Asset Control ("OFAC") reporting and blocking regulations with respect to Specially Designated Global Terrorists ("SDGTs") or other regulations regarding U.S. terrorism designations. This litgation instead concern CL's knowing transfer of hundreds of thousands of dollars into the hands of HAMAS, a Foreign Terrorist Organization ("FTO"), responsible for the fifteen horrific terrorist attacks that injured Plaintiffs. To this analysis, *Amici* do not, *and cannot*, add anything of value.

ARGUMENT

I. THE *AMICI'S* BRIEF PROVIDES NO HELPFUL GUIDANCE TO THE COURT

As Plaintiffs' argued in their opposition to the *Amici*'s motion for leave to file—which Plaintiffs hereby incorporate in full—*Amici* add nothing useful to the Court's evaluation of CL's motion for summary judgment. *Amici* present only three arguments in their brief: (i) that foreign banks should not be required to investigate their customers, (ii) that extraterritorial application of the ATA violates principles of international comity, and (iii) that Plaintiffs cannot prove proximate cause and standing without tracing the specific dollars that Defendant sent to HAMAS to the specific attacks that injured Plaintiffs. The first is irrelevant, as Plaintiffs do not seek to impose any "investigation" requirement on foreign banks. The second baldly resurrects the same comity argument that Judge Sifton rejected at the motion to dismiss stage. And the third is completely duplicative of the proximate cause/standing arguments CL presents (in somewhat greater depth) in its own brief. In sum, there is nothing to see here.

A. *Amici*'s "No Duty to Investigate" Argument is Founded on a Misapprehension of Plaintiffs' Position

Amici grossly misapprehend Plaintiffs' position regarding foreign banks' anti-terror finance duties, falsely accusing Plaintiffs of trying to transform foreign banks into "deputized agents of U.S. law enforcement." *Amici* Mem. at 4. *Amici* contend that "the responsibility of

banks is not to conduct their own exhaustive investigations to assess whether customers engage in terrorism financing. *Id.* at 9. But Plaintiffs do not contend that CL is liable under the ATA for failing to "independently identify," CBSP's terror financing activities. *See id.* at 3. Rather, Plaintiffs assert that CL continued to provide banking services to CBSP and transmit funds to CBSP's counterparties in the Palestinian Territories despite CL's knowledge—or at least its apprehension of an unjustified risk—that CBSP was funding HAMAS. Simply put, the question is not whether a bank must conduct "exhaustive investigations" to discover a customer's terrorist ties, but what a bank must do when it already knows of those ties. The ATA provides a clear response: when a foreign bank that does business in the United States is aware of specific terrorism financing risks, it cannot choose to ignore them.

Accordingly, the fact that Plaintiffs point to CBSP's designation as an SDGT and HAMAS fundraiser as *additional* evidence of CL's state of mind has nothing to do with whether certain OFAC regulations apply extraterritorially.[2] Instead, and as explained in detail in Plaintiffs' other submissions on summary judgment, it has everything to do with how CL's *knowledge* of that designation demonstrates that CL knowingly provided material support to HAMAS. Thus, the SDGT designation, and CL's reaction thereto, both (a) cement CL's knowledge of CBSP's terrorist ties to HAMAS, and (b) belie CL's claim that it never even suspected that its customer (or its customer's counterparties) was connected to a terrorist organization.

But even if *Amici* had not mischaracterized the role of the SDGT designation in Plaintiffs' case, they would have nothing to add to these proceedings. *Amici*—marching orders notwithstanding—are not CL, are not privy to the full discovery record in this case, and can say

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[2] It is worth noting that in addition to being wholly irrelevant, *Amici*'s arguments about the applicability of OFAC regulations to CL's conduct are also generally incorrect. *See* Memorandum of Law of Café Hillel Plaintiffs in Support of their Motion for Partial Summary Judgment at 20-27.

nothing regarding the credibility of CL's claimed suspicions (or lack thereof) regarding CBSP and CBSP's counterparties. *Amici*'s argument merely *assumes* that CL's narrative of events is factually accurate.[3] But as this case centers on a factual dispute, *Amici*'s uninformed assumptions have no place, and are not helpful in resolving the competing summary judgment motions.

B. *Amici*'s Comity Argument Attempts to Relitigate Issues CL Lost at the Motion to Dismiss Stage

Amici turn next to the argument that the Plaintiffs' interpretation of the ATA violates principles of international comity. CL previously made the same argument in it Motion to Dismiss, and Judge Sifton soundly rejected it. *See Strauss v. Crédit Lyonnais S.A.*, 2006 WL 2862704, *18 (E.D.N.Y. Oct. 5, 2006). Nothing has changed since then: *Amici*'s comity argument, like CL's at the motion to dismiss stage, is a purely legal argument that has not gained anything from the completion of discovery.

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[3] *Amici*'s brief contains numerous allusions to their "understandings" regarding the facts of the case. Unsurprisingly, each of these understandings mirrors arguments made by CL itself. Moreover, some of *Amici*'s points echo arguments that CL has made in the past but did not include in its own brief, confirming Plaintiffs' fear that CL would use *Amici*'s brief to evade the Court's page limitations on the parties' briefs in this case.

For example, *Amici*'s brief repeats, nearly verbatim, the arguments of certain of CL's putative legal experts. Tellingly, though CL was unable to find room in its own brief to set forth the opinions of its French law expert, Professor Herve Synvet, *Amici* dutifully summarize various of Synvet's assertions, often citing the same authority for the same propositions. *Compare, e.g.*, Synvet Report at 7-8, *with Amici*'s Mem. at 6-8 (both citing OJ L 43, 67 and 182); Synvet Rep. at 16-17, *with Amici* Mem. at 13 (both discussing the *Cour de Cassation* decision in *Republic of Guatemala*); Synvet Rep. at 46-47 and n.69, *with Amici* at 13-14 and n.23 (discussion of French law on contractual obligations, with identical footnotes. Indeed, when Plaintiffs wrote to *Amici*'s counsel and requested that they identify the sources informing *Amici*'s "understanding" of facts in is litigation (*see* Sept. 26, 2011 letter from Joshua D. Glatter to Thomas Kinzler and Daniel Schimmel, attached hereto as Exhibit "A"), *Amici* identified Synvet's report as a principal source (*see* Oct. 5, 2011 letter from Daniel Schimmel to Joshua D. Glatter, attached hereto as Exhibit "B").

Similarly, in motions practice before Magistrate Judges Matsumoto and Go, CL submitted a declaration from a French law professor, Chantal Cutajar. *See* Defendant's June 17, 2011 letter to Magistrate Judge Go at 2-3 (Docket No. 256). *Amici*'s reliance on Professor Cutajar in describing French anti-terrorism law, *see Amici* Mem. at 8 n.10, is unlikely to be coincidental.

Thus, although *Amici* claim that "[n]o party or party's counsel authored this brief in whole or in part," *Amici* Mem. at 1 n.1, it is clear that *Amici*'s involvement in the case has allowed CL to outsource some arguments for which it could not find room in its own brief. Along with the argumentative and massive pleading that CL filed as a putative Statement of Facts under Local Rule 56.1, *Amici*'s Memorandum of Law has enabled CL to largely frustrate the Court's attempt to ensure that briefing in this case remained at a manageable volume.

But, law of the case aside,[4] "considerations of international comity" do not warrant awarding CL summary judgment any more than they warranted dismissing Plaintiffs' Complaints years ago. As Part II, below, makes clear, "comity" simply plays no role in these cases. Given Congress' clear intent that the ATA apply extraterritorially, the utter lack of conflict between American and French law, and the overwhelming predominance of the U.S. interest in these cases, the comity argument is thrice-doomed.

C. *Amici*'s Proximate Cause and Standing Argument is Just an Abridged Version of CL's

Amici finally turn to proximate cause and standing,[5] where *Amici* are no longer serve as CL's stalking horse and instead simply tread in CL's footsteps. *Amici*'s proximate cause argument is *identical* to the proximate cause argument that CL already makes, at some length, in its summary judgment brief. Three of the four cases that *Amici* cite to support their proximate cause argument are lifted directly from CL's brief. *Compare* CL Mem. at 25–29, *with Amici* Mem. at

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[4] As Judge Melançon observed in *Martal Cosmetics, Ltd. v. Int'l Beauty Exchange Inc.*, 2011 WL 3687633, at *1 (E.D.N.Y. Aug. 23. 2011):

> "Under the law of the case doctrine, a decision on an issue of law made at one stage of a case becomes binding precedent to be followed in subsequent stages of the same litigation. '[T]he doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *In re PCH Assocs*., 949 F.2d 585, 592 (2d Cir. 1991) (quoting *Christianson v. Colt Indus. Operating Corp*., 486 U.S. 800, 815–16, 108 S.Ct. 2166, 2177, 100 L.Ed.2d 811 (1988)). "We have limited district courts' reconsideration of earlier decisions . . . by treating those decisions as law of the case, which gives a district court discretion to revisit earlier rulings in the same case, subject to the caveat that 'where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again.' Thus, those decisions may not usually be changed unless there is 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent a manifest injustice.'" *Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 167 (2d Cir. 2003) (*quoting Zdanok v. Glidden Co*., 327 F.2d 944, 953 (2d Cir.1964) and *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd*., 956 F.2d 1245, 1255 (2d Cir.1992)).

As demonstrated herein, in Plaintiffs' opposition to CL's motion for summary judgment, and in the Café Hillel Plaintiffs' submission, no intervening change in the law, no new evidence, and no clear error or manifest injustice requires Judge Sifton's decision to be modified.

[5] It is worth noting that this is yet another argument that CL already lost at the motion to dismiss stage. *See Strauss*, 2006 WL 2862704 at *17–18.

14-15 (both citing *Rothstein v. UBS AG*, 722 F. Supp. 2d 511 (S.D.N.Y. 2011) ("*Rothstein II*");[6] *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010); *Kaplan v. Al Jazeera*, 2011 WL 2314783 (S.D.N.Y. June 7, 2011)). Moreover, both CL and *Amici* rely principally on *Rothstein II* throughout their respective proximate cause discussions, and both cite only to *Rothstein II*'s discussion of the *Holder* case, rather than to *Holder* itself. Indeed, the parallels between CL's and *Amici*'s treatment of *Rothstein II* are frankly stunning:

Credit Lyonnais's Memorandum of Law	***Amici's* Memorandum of Law**
". . . **[t]he 'by reason of' requirement**—which Congress incorporated from the Clayton Act and the civil liability provisions of the RICO statute—**'has typically been construed to be synonymous with proximate cause—and proximate cause narrowly defined at that.'**" CL Mem. at 18	". . . the 'by reason of' causation requirement 'has typically been construed to be synonymous with proximate cause—and proximate cause narrowly defined at that.'" *Amici* Mem. at 15
"**Holder is 'silent'** with respect to both section 2333(a)'s proximate causation element and the Article III standing requirement that every civil litigant must satisfy, and **did not 'alter traditional Article III standing requirements or well-established definitions of the concept of proximate causation that serve as a limit on who may be held liable for what actions,' and 'are the sine qua non of every private civil action brought in a federal court.'**" CL Mem. at 26	". . . the Court in *Humanitarian Law Project* somehow intended to *silently* alter traditional Article III standing requirements or well-established definitions of the concepts of proximate causation that serve as a limit on who may be liable for what actions,' and that standing and proximate causation 'are the sine qua non of every private civil action brought in federal court.'" *Amici* Mem. at 14-15
". . . under section 2333(a)'s civil liability provision, proof of both **proximate causation** and Article III standing **are 'indispensable element[s].'**" CL Mem. at 26	". . . proximate causation was an 'indispensible element' of a civil claim under the ATA." *Amici* Mem. at 15

Unfortunately for CL and its *Amici*, repeating a mantra does not make it any less wrong. As explained in Plaintiffs summary judgment opposition and the Café Hillel Plaintiffs' motion, CL and *Amici* doggedly cling to *Rothstein II*—a lonely outlier among ATA decisions which *ex-*

[6] *Amici* cite *Rothstein II* using the Westlaw citation, 2011 WL 70354.

plicitly distinguishes the facts of our case.[7] Following unanimous precedent, Judge Sifton held that, in the ATA context, "proximate cause [requires] only that defendant provided material support to, or collected funds for a terrorist organization which brought about plaintiffs' injuries." *Strauss* 2006 WL 2862704 at *18; *accord Boim v. Holy Land Found. for Relief and Dev.*, 549 F.3d 685, 699-700 (7th Cir. 2008) (en banc) ("*Boim III*"); *Hussain v. Mukasey*, 518 F.3d 534, 538 (7th Cir. 2008); *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 53 (D.D.C. 2010); *Lelchook v. Commerzbank AG*, 2011 WL 4087448, at *1 (S.D.N.Y. Aug. 2, 2011); *Abecassis v. Wyatt*, 2011 WL 1227780, at *29 (S.D. Tex. Mar. 31, 2011); *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1130 (D.C. Cir. 2004); *see also Holder v. Humanitarian Law Project*, 130 S.Ct. at 2725 (money is fungible, and FTOs with a dual structure often highlight the civilian and humanitarian purpose of funds while ultimately supporting terrorist operations).

Against this cornucopia of contrary authority dealing specifically with funding to terrorist organizations, the best CL and *Amici* can offer is (i) *Rothstein*, which—aside from explicitly distinguishing our litigation—dealt with claims against a bank that conducted business with the country of Iran, rather than a terrorist organization and its front groups, *see Rothstein I*, 647 F. Supp. 2d at 294, and (ii) *Kaplan v. Al Jazeera*, which, in addition to distinguishing several cases analogous to ours, like *Boim* and *Goldberg*, involved an attempt to sue a *news organization* for

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[7] In a prior opinion in the *Rothstein* litigation, Judge Rakoff explained that, unlike *Rothstein*, this case "involve[s] direct involvement between the defendant banks and the terrorist organizations or 'fronts' those organizations directly controlled." *Rothstein v. UBS AG*, 647 F. Supp. 2d 292, 294 (S.D.N.Y. 2009) ("*Rothstein I*") (citing *Strauss*, 2006 WL 2862704; *Linde*, 384 F. Supp. 2d 571).

Rothstein's status as a judicial outlier, even in the Southern District of New York, was underscored just two months ago when Judge Hellerstein rejected a defendant's reliance on *Rothstein II* for the proper ATA proximate cause standard. *See Lelchook v. Commerzbank AG*, 2011 WL 4087448, at *1 (S.D.N.Y. Aug. 2, 2011). Judge Hellerstein found *Rothstein II* unpersuasive because—like Plaintiffs here—the *Lelchook* plaintiffs alleged that the bank maintained a bank account for the fundraising front organization of a terrorist group. *Id*. Thus, instead of *Rothstein II*, Judge Hellerstein relied on "far more similar" cases, *including this one*. *See id.* at *2-3.

reporting on terrorist attacks, *see* 2011 WL 2314783 at *5-6.[8] Passing *Rothstein* and *Kaplan* off as persuasive precedent here does not pass the straight-face test.

II. BESIDES HAVING BEEN PREVIOUSLY REJECTED IN THIS CASE, *AMICI*'S COMITY ARGUMENT FAILS ON EVERY LEVEL

As discussed above, CL briefed, argued, and lost, the international comity argument when its motion to dismiss these cases was denied. Judge Sifton's well-reasoned opinion on comity, *see Strauss*, 2006 WL 2862704, at *18, provides sufficient basis not to re-litigate comity yet again. That said, the Court can also simply reject *Amici*'s ill-conceived comity argument at any step in the analysis. First, because Congress expressed a clear intent to apply the ATA to the activities of foreign entities subject to U.S. jurisdiction, and an equally clear intent to reach the broadest swath of terrorist financing possible,[9] there is no room for comity analysis here. Second, even if comity analysis were appropriate, the ATA creates no true conflict with French law, which unsurprisingly leaves CL free *not* to provide material assistance to terrorists. Third, even if comity analysis were permissible, and even if there were a true conflict, the interests of the U.S. in halting the flow of funds to terrorists would clearly predominate over any conceivable French interest in regulating bank-customer relations, let alone fostering a French bank's ability to engage in unhindered pursuit of corporate opportunities with Foreign Terrorist Organizations.

A. Congress's Clear Intent to Provide an ATA Remedy against Foreign Defendants Obviates any Comity Analysis

Given Congress's clear intent to apply the ATA to foreign defendants, there is no room

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[8] *Compare Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 417 (E.D.N.Y. 2009) ("*Goldberg I*") ("Here, while a number of independent third parties were involved in the attack on Bus 19, plaintiffs have alleged a coherent and plausible causal nexus linking UBS's alleged wire transfers for ASP to the bombing of Bus 19.")

[9] *See* U.S. Congressional Research Service, *The "FTO List" and Congress: Sanctioning Designated Foreign Terrorist Organizations*, by Audrey Kurth Kronin (Oct. 21, 2003), at * 8 ("Another important benefit is the attention that the FTO list gives to the organizations that are on it. Drawing attention to terrorist groups aids in identifying them not only for states but for nongovernmental organizations and individuals.")

for the Court to "construe" the ATA based on comity principles. "Because the principle of comity does not limit the legislature's power and is, in the final analysis, simply a rule of construction, it has no application where Congress has indicated otherwise." *In re Maxwell Communications Corp.*, 93 F.3d 1036, 1047 (2d. Cir. 1996). "The doctrine is not an imperative obligation of courts but rather is a discretionary rule of practice, convenience, and expediency." *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 423 (2d Cir. 2005). Thus, comity may not be extended when, as here, "doing so would be contrary to the policies or prejudicial to the interests of the United States." *Int'l Nutrition Co. v. Horphag Research Ltd.*, 257 F.3d 1324, 1329 (Fed. Cir. 2001). Courts rely on this principle to foreclose comity challenges to statutes that Congress intends to give extraterritorial effect. *See, e.g., Chavez v. Carranza*, 2005 WL 2659186, at *4 (W.D. Tenn. Oct. 18, 2005) (citing *Maxwell* and holding that claims brought under Torture Victims Protection Act and the Alien Tort Statute did not warrant comity analysis in light of clear Congressional intent).[10]

Here, Congress has clearly indicated that the ATA, including its civil remedy provision, is to be broadly construed and applies to foreign conduct. The relevant part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") states:

> The purpose of this subtitle is to provide the Federal Government *the fullest possible basis*, consistent with the Constitution, to prevent persons within the United States, or *subject to the jurisdiction of the United States*, from providing material support or resources to foreign organizations that engage in terrorist activities.

110 Stat. 1247 § 301(b) (emphasis added). Extraterritoriality language can be found throughout the relevant ATA and AEDPA provisions. *See, e.g.*, 18 U.S.C. § 2339B(d)(1)(C) (extraterritorial

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[10] *See also In re Treco*, 240 F.3d 1448, 157 (2d Cir. 2001) (collecting cases and holding "[t]he principle of comity has never meant categorical deference to foreign proceedings. It is implicit in the concept that deference should be withheld where appropriate to avoid the violation of the laws, public policies, or rights of the citizens of the United States").

jurisdiction where "after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States"); § 2339B(d)(1)(D) (extraterritorial jurisdiction where "the offense occurs in whole or in part within the United States"); § 2339B(d)(1)(E) (extraterritorial jurisdiction where "the offense occurs in or affects interstate or foreign commerce"); § 2339B(d)(2) ("There is extraterritorial Federal jurisdiction over an offense under this section."); § 2339C(b)(2) (providing extraterritorial jurisdiction for overseas offenses where perpetrator is found in United States).[11]

Amici's reliance on *Morrison v. National Bank of Australia, Ltd.*, 130 S. Ct. 2869 (2010), in support of a statutory canon of construction applying a presumption against extraterritorial application of statutes is thus inapposite. Where Congressional intent is clear, both canons and presumptions are unnecessary. In *Goldberg v. UBS AG,* 690 F. Supp. 2d 92 (E.D.N.Y. 2010) ("*Goldberg II*"), Judge Trager comprehensively analyzed this issue and concluded that the ATA applied extraterritorially to foreign banks sending funds outside the U.S. to terrorists. *See also Stansell v. BGP, Inc*., 2011 WL 1296881 (M.D. Fl. Mar. 31 2011) (citing *Goldberg II* and concluding that *Morrison* does not bar extraterritorial application of ATA).

B. There is no True Conflict between Applicable U.S. and French Law

However, even in the absence of such a clear Congressional mandate, *Amici*'s comity ar-

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[11] That OFAC also requires banks to block SDGTs' assets held in the United States and report to various subdivisions of the U.S. government, has no bearing upon §§ 2333(a), 2339B(d) or 2339C(b)(2)'s express extraterritorial application. Congress *separately* criminalized extraterritorial conduct that facilitates the murder or injury of Americans. As Judge Sifton held with respect to the analogous § 2339B civil reporting provision:

> Defendant argues that Congress would not have created civil liability for the reporting provisions if the mere maintenance of accounts and provision of basic banking services was a criminal violation of 2339B(a)(1), since the two statutes would be duplicative. However, while Congress could well have intended that a bank in possession of FTO funds have not only an obligation to freeze and report the funds (under threat of civil liability), but also to create criminal and civil liability for banks that are providing basic banking services to FTOs.

Strauss, 2006 WL 2862704, at *12.

gument would fail for lack of a true conflict between the ATA and French law. True conflict is a threshold requirement before a court can conduct a balancing analysis under comity principles, and such a "true conflict" exists only if the laws of the other country "require conduct that violates American law." *Maxwell*, 93 F.3d at 1049-50. *Maxwell* relied on the Supreme Court's decision in *Hartford Fire Ins. Co. v. California*, where the Court declined to dismiss the suit on grounds of comity, because it was possible "[to] comply with the laws of both [the United States and Britain]." 509 U.S. 764, 799 (1993); *see also Maxwell*, 93 F.3d at 1050. Importantly, *Hartford Fire* held that British reinsurers could be held liable under U.S. antitrust law for boycotting activities that were "*consistent with comprehensive regulations* established by the British Parliament." *Maxwell*, 93 F.3d at 1050 (citing 509 U.S. at 799). Apparently, *Amici* believe that requiring French banks to not *knowingly* fund terrorists is more disruptive than requiring the London insurance market to comply with the entire corpus of U.S. antitrust law.

Since *Maxwell*, courts in the Second Circuit have consistently affirmed a "true conflict" threshold.[12] Unless foreign law either requires a foreign entity "to act in some fashion prohibited by the law of the United States," or makes "compliance with the laws of both countries . . . impossible," a court need not abstain based on principles of international comity "even where the foreign state has a strong policy to permit or encourage such conduct," *Hartford Fire*, 509 U.S. at 799, (citing Restatement (Third) of Foreign Relations Law of the United States § 415); *accord In re Vitamin C Antitrust Litig.*, ___ F. Supp. 2d ____, 2011 WL 3918165, at *17-18 (E.D.N.Y. Sept. 6, 2011) (rejecting comity argument based on China's "encouragement and approval of defendants' price-fixing" violation of U.S. antitrust laws, and observing that while "not clear that a

[12] *See, e.g., Linde v. Arab Bank plc*, 262 F.R.D. 136, 148 (E.D.N.Y. 2009); *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 282 (S.D.N.Y. 2009); *Container Leasing Int'l v. Navicon S.A.*, 2006 WL 861012, at *6 (D. Conn. Mar. 31, 2006); *In re CINAR Corp. Sec. Litig.*, 186 F. Supp. 2d 279, 291 (E.D.N.Y. 2002).

comity analysis is still permitted in the absence of the type of true conflict envisioned by *Hartford Fire* . . . even assuming that it were, any such analysis" could not be based on conflict between the laws of the two nations). *Amici* make no effort to show even a "strong policy" in France that a bank should not terminate a relationship with a customer it knows or suspects to fund terrorism, much less that it would be impossible for CL to comply with both the ATA and French law.

Instead, *Amici* devote nearly two and a half pages of their brief to extolling the French and European "frameworks" for combating the financing of terrorism, and argue that "differences between the regulatory frameworks in the European Union and France on the one hand, and the United States on the other hand" are somehow at odds with Plaintiffs' "expansive" extraterritorial application of the ATA. *Amici* Mem. at 6-9. But *Amici* never explain how the litany of laws and decrees identified in their brief actually conflict with U.S. laws. The most *Amici* can say is that the E.U. regulations reflect "*careful and respectable policy choices*." *Amici* Mem. at 7 (emphasis added).[13] Even if accurate,[14] this truism utterly fails to address *Hartford Fire*'s true

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[13] *Amici* also argue that the French Cour de Cassation's *Republic of Guatemala* decision demonstrates that OFAC's designation of CBSP as an SDGT is not given legal effect in France. *See Amici* Mem. at 13 (citing No. 188-14.687 (Cass. Civ. May 2, 1990)). Like the rest of *Amici*'s support, *Guatemala* is off point. In that customs duty dispute, the court held that French courts lacked jurisdiction to enforce Guatemalan tax laws. But the fact that a French court may lack jurisdiction to prosecute CL for violating the ATA does not mean that France *requires* CL to conduct business (in France or anywhere else) with U.S.-designated terrorists. As Judge Sifton noted years ago, permission is a far cry from compulsion. *See Strauss*, 2006 WL 2862704, at *18; *accord Weiss v. National Westminster Bank plc*, 453 F. Supp. 2d 609, 633 (E.D.N.Y. 2006).

[14] *Amici*'s extended defense of the European regime against terrorism financing, while legally irrelevant, is apparently designed to comfort the Court that the discrepancies between the U.S. and European approaches do not evince European "softness" on terror, so the Court might carve out Europe from the ATA's clear extraterritorial applicability. The Court must decline. First, the difference between the American and European approach to terrorism is underscored by the fact that, during the overwhelming majority of the relevant period of time, it was perfectly legal in France to fund HAMAS *qua* HAMAS. In fact, as of September 11, 2003, eight years after the organization was designated by the United States for the wave of suicide bombings against Israeli civilians, France and the EU had still not designated HAMAS itself as a terrorist organization, and only designated HAMAS's "military" wing, the Izz al-Din al-Qassam Brigades, in December 2001. Second, the bona fides of the European approach to fighting terrorism finance is not for this—or any—court to decide: In passing the ATA, Congress decided that the power to define a group or an individual as a "terrorist" would belong exclusively to the United States Government. A decision to ac-

conflict requirement. That CL must comply with Euorpean terrorism blacklists, which do not include CBSP, does not give rise to *any* conflict, let alone true conflict.[15] French banks are not obligated to maintain an account and provide financial services to any particular customer. Thus, under French law, CL was free to exercise its discretion and decline to do business with HAMAS. Indeed, CL *did* eventually exercise that discretion when it decided to close CBSP's accounts. The fact that CL felt free to make the decisions to close, when to consummate the closure, and whether to facilitate additional transactions for CBSP before closing the accounts, proves that CL had nothing to fear from French law. But even if the Court were inclined to resolve even the most implausible inferences in *Amici*'s favor, and conclude that somehow Europe and France's failures to list CBSP amount to an affirmative desire to *encourage* French banks to assist CBSP's financing of HAMAS, this *still* would fall well short of what *Hartford Fire* requires.

Indeed, the only "conflict" *Amici* identify is CL's supposed obligation to return to CBSP the balance of funds in CBSP's account before closing those accounts. *Amici* claim CL was contractually bound to return the balance to CBSP and absent exceptional circumstances—apparently terrorists are unexceptional—could face civil liability and "disciplinary sanctions" if

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cord a foreign country veto power over the ATA, under the guise of "comity," would necessarily apply to *every* foreign country, not just France, even countries that affirmatively *support* organizations and individuals that the U.S. Government has determined are terrorists.

[15] Judge Sifton's rejection of National Westminster Bank plc's ("NatWest") comity argument in the companion *Weiss v. National Westminster Bank plc* lawsuit is instructive. NatWest argued that comity should be extended to the Charity Commission for England & Wales's conclusion that no evidence existed demonstrating that NatWest's customer—Interpal, whom OFAC designated a HAMAS-affiliated SDGT on the same day as CBSP—was affiliated with "terrorist activities." Rejecting that argument, Judge Sifton observed that "defendant has pointed to no case law, nor can this Court find any, which holds that an American Court must decline to apply the laws of this country to a defendant over which the court has jurisdiction *because the laws of the defendant's own country are more lenient.*"). *Weiss*, 453 F. Supp. 2d at 632-33 (emphasis added). The fact that British law did not explicitly bar NatWest from doing business with Interpal did not, therefore, mandate NatWest to provide such services, and thus concluded (just as he did in these cases) that NatWest was "free, and, indeed, *obligated*, to follow the more stringent American law." *Id.* at 633 (emphasis added).

it failed to comply with a customer's request to carry out a transaction. But once again *Amici*'s arguments only demonstrate the uselessness of their participation, given *Amici*'s have no knowledge as to whether CBSP ever demanded that CL return the funds, or—presumably—the expert testimony regarding whether CL's supposed duty to return the funds ever arose.[16]

But even if CL did face the *theoretical* prospect of contractual liability, that would not create a true conflict. Otherwise, any foreign entity could flout U.S. law by entering into contracts permitted—but not compelled—by its domicile.[17] Moreover, all *Amici* and CL can do is speculate as to the *possibility* that a French court *might* reach a result at odds with U.S. law, but creative speculation does not generate a true conflict. *See Filtech S.A. v France Telecom, S.A.*, 157 F.3d 922, 932 (2d Cir. 1998) ("In the first place, the district court found only that France Telecom had 'asserted a substantial claim' of true conflict. A 'substantial claim' is insufficient; a conflict must be clearly demonstrated."); *Farhang v. Indian Instit. of Tech.*, 2010 WL 2228936 (N.D. Cal. Jun. 1, 2010) ("Where there is only the possibility of an inconsistency between a future judgment of a domestic court and a future judgment of a foreign court, there is no such 'true conflict.'"); *Strauss*, 2006 WL 2862704, at *18.

C. Even if a True Conflict Existed, U.S. Law would Govern

Finally, even if a comity analysis were permissible over Congress's clear intent that the ATA apply to foreign institutions, and even if *Amici* had been able to demonstrate a true conflict between the ATA and some French or European law, *Amici* would *still* fail given that the United States' interest in effectively combating terrorism financing would trump any supposed French

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[16] Plaintiffs' Opposition to CL's motion for summary judgment, and the Café Hillel Plaintiffs' motion set forth in detail the *actual* facts and testimony in these regards.

[17] It is easy to imagine, for example, that the British reinsurers in *Hartford Fire* or the Chinese pharmaceutical manufacturers in *Vitamin C Antitrust* had memorialized their anticompetitive agreements. It is, on the other hand, impossible to imagine that if they did so, the U.S. antitrust laws would suddenly step aside.

interest in permitting the CL-CBSP relationship to persist. "If there is a true conflict, the decision whether to dismiss on comity grounds depends on the degree of legitimate offense to the foreign sovereign, steps the foreign sovereign may have taken to address the issues in the litigation, and the extent of the United States' interest in the underlying issues." *S. African Apartheid Litig.*, 617 F. Supp. 2d at 283 (citations omitted).

France's interest in enacting its own terrorism sanctions regime, let alone France's general interest in regulating bank-customer relationships, does not prevail over the United States' interest in assuring that 18 U.S.C § 2333(a) remains an effective tool for combating terrorism financing and continues to afford American citizens injured by terrorist attacks an effective remedy against the only reachable defendants, the financiers of the attacks. *See* Antiterrorism Act of 1990, Hearing Before the Subcommittee on Courts and Admin. Practice, Senate Committee on the Judiciary, 101st Cong. 2d Sess. at 136 (1990), Statement of Joseph A. Morris, former General Counsel of the U.S. Information Agency at 85 ("by its provisions for compensatory damages, treble damages, and *the imposition of liability at any point along the causal chain of terrorism*, it would interrupt, or at least imperil, the flow of terrorism's lifeblood: money") (emphasis added); *Compare Gross v. German Foundation Indus. Initiative*, 456 F.3d 363, 394 (3d Cir. 2006) (holding that comity did not prevent American court from adjudicating German companies' interest obligations on World War II slave labor settlement funds, and that "we are skeptical that Germany's interest in resolving the dispute in Germany eclipses the interests of the United States or its citizens in adjudicating the merits of the dispute in a United States court").[18]

As *Amici* themselves contend, the principle of international comity "'helps the potentially

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[18] *See also Goldberg II*, 690 F. Supp. 2d at 108 ("The ATA explicitly recognizes that 'combating international terrorism is a *paramount interest* of the United States,'") (quoting *Goldberg I*, 660 F. Supp. 2d at 431 (emphasis added).

conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world.'" *Amici* Mem. at 12 (citing *F. Hoffmann-La Roche Ltd v. Empagran SA*, 542 U.S. 155, 164-65 (2004)). Such harmony is more readily achievable if the anti-terrorism efforts of individual nations are seen as a floor, rather than a ceiling, and institutions like CL, which operate internationally, are required to adhere to the laws of each nation. Conversely, nullifying U.S. efforts to curtail terrorism financing by simply permitting all non-American financial institutions—regardless of their size or presence in the United States—to *knowingly* channel funds to terrorists, is the very antithesis of harmony.

The predominance of U.S. law is also underscored by Judge Matsumoto's repeated rejection of CL's bank secrecy objections to discovery in these cases.[19] In both decisions, Judge Matsumoto performed an exacting analysis of the relevant French and U.S. interests—including a detailed examination of France's counter-terrorism regime—and obliged CL to produce the requested documents. Judge Matsumoto determined that "France's interest—albeit not directly expressed to this court in this proceeding—in enhancing its anti-money laundering and anti-terrorist financing laws is consistent with the disclosures sought by plaintiffs and already made, in part, by Credit Lyonnais." *Strauss*, 249 F.R.D at 449. Judge Matsumoto further observed that "plaintiffs' actions seeking compensation for victims of international terrorist attacks and discovery from a bank alleged to be providing material support to terrorists, is not inconsistent with the French and American interests in international cooperation to detect and fight global terror and the financing of global terror." *Id.* at 452 (citing Article 12 of the UN International Convention for the Suppression of the Financing of Terrorism). Finally, Judge Matsumoto also held that

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[19] *See Strauss v. Crédit Lyonnais S.A.*, 242 F.R.D. 199, 222-24 (E.D.N.Y. 2007); *Strauss v. Crédit Lyonnais, S.A.*, 249 F.R.D 429, 451-53 (E.D.N.Y. 2008).

France's interest in enforcing its blocking statute and bank secrecy rules were outweighed by the U.S.'s interests in permitting the unfettered prosecution of these cases, including full discovery under the Federal Rules of Civil Procedure. *Id*. at 450.[20] It would be incongruous indeed for the Court to now conclude that France's interest exceeds the U.S.'s interest in permitting these cases to go forward *at all.*

CONCLUSION

Amici's submission nakedly duplicates CL's arguments—past and present—in support of CL's contention that this Court should permit financial institutions doing billions of dollars of business in the United States, and who are fully aware of U.S. terrorism designations, to consciously disregard those designations so long as the banks make certain that their transactions to terrorists are not processed on U.S. shores. For the reasons enumerated above, and in Plaintiffs Opposition to *Amici*'s Motion for Leave to File, the Court should simply decline to consider *Amici*'s brief in ruling on the pending motions for summary judgment. CL's and the Café Hillel Plaintiff's memoranda in support of their respective motions for summary judgment, and Plaintiffs' memorandum in opposition to CL's motion for summary judgment—to say nothing of the 400-plus pages of Local Rule 56.1 statements—fully detail all remaining issues in these cases. The *Amici* Memorandum adds nothing thereto.

Further, and also for the reasons enumerated above, in Plaintiffs' Memorandum in Opposition to Summary Judgment, and in the Café Hillel Plaintiffs Memorandum in Support of Partial Summary Judgment, the courts should deny CL's motion and enter summary judgment in favor of the Café Hillel plaintiffs.

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[20] Similarly, in denying UBS's motion for reconsideration of its prior motion to dismiss on *forum non conveniens* grounds, Judge Trager concluded that even the failure to award plaintiffs non-pecuniary damages was at odds with Congress's purposes in passing § 2333(a), and precluded dismissing the case in favor of proceedings in Israel. *Goldberg II*, 690 F. Supp. 2d at 99, n.10.

Dated: October 19, 2011
Washington, D.C.

Respectfully Submitted,

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EXHIBIT A

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September 26, 2011

VIA E-MAIL

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Re: ***Strauss, et al. v. Crédit Lyonnais, S.A.*, 06-cv-702 (DLI)(MDG)**
***Wolf, et al. v. Crédit Lyonnais, S.A.*, 07-cv-914 (DLI)(MDG)**

Dear Counsel:

We write in connection with your clients' *amici curiae* brief in support of Defendant Crédit Lyonnais's ("CL") motion for summary judgment. First, we ask you to confirm whether your clients have each executed the Confidentiality Agreement in the form of Exhibit A to the operative Protective Order in this litigation so that we can determine the form in which our opposition memorandum should be filed with the Court. If *Amici* have each done so, please arrange for Plaintiffs to receive copies of the executed documents for our records.

Second, review of the *Amici*'s brief reveals that, rather than limiting itself to a position of law, it makes certain representations concerning *Amici*'s "understanding" of facts in the record. Inasmuch as *Amici* are not Rule 56 movants (and thus are not obligated to file statements under E.D.N.Y. Loc. R. Civ. P. 56.1), it is difficult for Plaintiffs to determine either the basis or source of *Amici*'s "understandings." This determination becomes particularly complex, because certain "facts" set forth in *Amici*'s brief are not, to the best of our knowledge, matters in the public record. It is thus unclear to Plaintiffs whether these understandings derive from *Amici*'s independent investigation, information communicated to *Amici* by the Defendant, or are simply speculative assumptions. Thus, in the interest of assuring that the Court properly places these "understandings" (and any response of Plaintiffs thereto) in their proper context, kindly identify for us in writing what source(s) inform the following factual representations in your brief:

a. Your statement on page 3 (mirrored on page 9) that "*[i]n 2001 CL reported on two successive occasions to the appropriate French authorities that CBSP was engaging in money laundering.*"

b. Your statements on page 3 (mirrored on page 9) that "*CL fully cooperated with the ensuing criminal investigations in France.*"

c. Your statement on page 3 that "*CL nevertheless decided to close these accounts in 2002 based on its money laundering suspicions.*"

d. Your statement in footnote 2 on page 3 representing that "*Amici understand that these accounts were in fact closed in 2003.*"

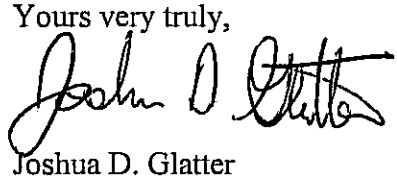
e. Your statement in footnote 2 on page 3 representing that the closure of CBSP's accounts followed "*a delay attributable in part to CBSP.*" We note in particular that this assertion, to the best of our knowledge, is not information in the public record and appears to derive from information CL had designated Highly Confidential under the terms of the Protective Order.

f. Your statement in footnote 2 on page 3 representing "*that OFAC listed CBSP as a SDGT well after CBSP made its last international transfer from the CL accounts.*" We note that this assertion, to the best of our knowledge, is also not information in the public record, and appears to derive from information CL had designated Highly Confidential under the terms of the Protective Order.

g. Your statement on page 3 that France has made a "*determination ... after careful and repeated scrutiny of CBSP and its operations, that there is no basis for concluding that CBSP has any such involvement.*"

Given our agreement with respect to Plaintiffs' time to serve a response to *Amici*'s submission, we appreciate your providing your response in the next 5 business days. Thank you in advance for your anticipated cooperation.

Yours very truly,



Joshua D. Glatter

cc: Lawrence B. Friedman, Esq. (by electronic mail)
Plaintiffs' counsel (by electronic mail)

EXHIBIT B

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October 5, 2011

VIA E-MAIL

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Re: Strauss, et al. v. Crédit Lyonnais, S.A., 06-cv-702 (DLI)(MDG)
Wolf, et al. v. Crédit Lyonnais, S.A., 07-cv-914 (DLI)(MDG)

Dear Joshua:

In your letter to me, you asked about the source of the amici's understanding regarding certain topics (a) through (g). The amici have submitted an amicus brief to alert the court to the potential impact of this case on an industry based on the facts as they understand them. The brief makes clear that the amici do not have an independent knowledge of the facts regarding topics (a) through (g). The amici's understanding is based on the following documents. Each of them supports, at least in part, the topics below:

a. Letter from CL's counsel to the Hon. Dora L. Irizarry, dated May 6, 2011 ("CL's Letter"), at 2; Declaration of Lawrence B. Friedman, dated March 20, 2006, Exhibit D; Report by Professor Herve Synvet ("Synvet Report"), ¶¶ 4-5.

b. Declaration of Maryvonne Caillibotte, ¶ 7.

c. CL's Letter, at 2; letter from Plaintiffs' counsel to Judge Irizarry, dated May 13, 2011 ("Plaintiffs' Letter"), at 4; Plaintiffs' memorandum of law in opposition to CL's motion to dismiss the complaint, dated April 10, 2006 ("Plaintiffs' Br."), at 8-9; Memorandum Opinion and Order, dated October 5, 2006 ("Memorandum Opinion and Order"), at 15, 17.

d. CL's Letter, at 2; Plaintiffs' Letter, at 4; Plaintiffs' Br., at 9, 15.

e. Synvet Report, ¶ 7.

f. CL's Letter, at 3; CL's letter to Judge Irizarry, dated May 20, 2011, at 3 n.3.

g. CL's memorandum of law in support of motion to dismiss, dated March 20, 2006, at 10; CL's Letter, at 3; Memorandum Opinion and Order, at 38; Declaration of Maryvonne Caillibotte, ¶¶ 6, 8.

CL's counsel has advised that all information provided to the *amici* has been produced to Plaintiffs, and that the filing of an amici brief containing such information would not violate any confidentiality obligations. CL has advised that information would otherwise need to be kept in confidence.

It is worth underscoring that, while the facts regarding topics (a) through (g) provide useful background information, the amici's analysis of the potential impact of this case does not depend upon any particular fact but rather upon a consideration of the implications for the amici's industry of plaintiffs' legal position.

Sincerely,

D. Schimmel

Daniel Schimmel

cc: Lawrence B. Friedman, Esq.