UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

COURTNEY LINDE, et al.,	:	
	:	
Plaintiffs,	:	
	:	CV-04-2799 (BMC)(VVP)
- against -	:	and all related cases*
	:	
ARAB BANK, PLC,	:	
	:	
Defendant	:	

BRIEF *AMICUS CURIAE* OF THE HASHEMITE KINGDOM OF JORDAN IN SUPPORT OF ARAB BANK, PLC

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* *Philip Litle, et al. v. Arab Bank, PLC,* 04-CV-5449 (BMC)(VVP)*; Oran Almog, et al. v. Arab Bank, PLC,* 04-CV-5564 (BMC)(VVP)*; Robert L. Coulter, Sr., et al. v. Arab Bank, PLC,* 05-CV-365 *(BMC)(VVP) Gila Afriat-Kurtzer, et al. v. Arab Bank, PLC,* 05-CV-388 (BMC)(VVP)*; Michael Bennett, et al. v. Arab Bank, PLC,* 05-CV-3183 (BMC)(VVP)*; Arnold Roth, et al. v. Arab Bank, PLC,* 05-CV-03738 (BMC)(VVP)*; Stewart Weiss, et al. v. Arab Bank, PLC,* 06-CV-1623 (BMC)(VVP).

STATEMENT OF INTEREST[1]

The Hashemite Kingdom of Jordan ("the Kingdom" or "Jordan") is a sovereign nation that borders Israel, Syria, Palestine, Iraq, and Saudi Arabia. Jordan has been one of the United States' closest allies in the Middle East for many years, and Jordan has enormous respect for the United States judiciary. As the United States has described the relationship, the United States views Jordan as "an invaluable partner in the region," and it "relies on Jordan in accomplishing a host of critical security and foreign-policy interests, including combatting terrorism." Br. of United States as *Amicus Curiae*, *Arab Bank, PLC* v. *Linde*, No. 12-1485, at 19 (U.S. May 23, 2014) ("U.S. Br.").

Jordan's interest in this case is as deep as possible, particularly with regard to certifying an interlocutory appeal as to the propriety of this Court's sanctions order punishing Arab Bank's compliance with Jordanian law. Arab Bank is Jordan's leading financial institution. The Court sanctioned the Bank for refusing to violate Jordan's banking laws, and then repeatedly implemented the sanctions order at trial by denying Arab Bank the right to present its defenses and evidence and by instructing the jury that it could infer that Arab Bank provided material support to terrorists and intended to do so. The jury did exactly that.

The sanctions order—and the use of that order to prevent Arab Bank from defending itself—is a grave affront to Jordan's sovereignty. The sanctions order failed to respect the banking laws of one of the United States' most critical allies. The disrespect for Jordanian law was exemplified during the trial where the Court prevented the jury from hearing about Arab

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[1] As there is no governing rule in the Federal Rules of Civil Procedure, the Hashemite Kingdom of Jordan makes the following disclosure consistent with Federal Rule of Appellate Procedure 29(c)(5): No party or counsel for a party authored or paid for this brief in whole or in part, or made a monetary contribution to fund the brief's preparation or submission. No one other than *amicus* or its counsel made a monetary contribution to the brief.

Bank's compliance with Jordanian law—both its compliance with Jordanian bank privacy law and its compliance with Jordanian law as it relates to international terrorist blacklists.

The sanctions order was imposed after the Plaintiffs—who are all private citizens—attempted to use civil discovery to obtain a wide variety of bank records that Arab Bank was precluded from disclosing under Jordanian law. Jordan, like the United States, has bank privacy laws that criminalize disclosing certain bank account information; Jordanian law, in fact, provides for imprisonment, fines, and revoking a bank's license as a penalty for violations of the bank privacy law.

Arab Bank went to extensive lengths to request permission from the Jordanian courts to disclose the information that the private plaintiffs requested, but those requests were denied. The Bank then adhered to Jordanian law in not disclosing customer information, and the Court issued what it is now clear was a case-dispositive sanction: Based on the Bank's unwillingness to violate Jordanian law by turning over bank records disclosing customer names and account information to private citizens, the Bank was precluded from defending its state of mind or providing evidence of its adherence to compliance procedures and international standards, its witnesses were precluded from explaining the foreign laws and regulations that prevented them from answering questions about foreign accounts, and the jury was instructed that it could conclude that Arab Bank knowingly and purposefully provided financial services to foreign terrorist organizations.

In light of all of this, the jury's liability verdict against Arab Bank was unsurprising. It is indisputable that the sanctions order colored the entire trial in this matter. The Plaintiffs relied on it from their opening statement to their closing statement as a chief reason to find in their

favor; the Bank was unable to put on the core of its defense; and the jury was instructed based upon it.

Jordan has exceedingly serious concerns over the unfair manner in which the trial was conducted in this case based on a sanctions order that is improper as a matter of law. As the largest financial institution in the Kingdom, Arab Bank plays a unique and important role in the Jordanian economy and surrounding region.[2] Jordan's economic wellbeing is tightly linked to Arab Bank's wellbeing. In issuing the sanction order that led to the verdict against Arab Bank, the Court essentially deemed it irrelevant that Jordanian law prohibited the Bank from turning over these materials.

It is not just Jordan who believes that there are numerous legal infirmities in the sanctions order; the United States has already explained that the order errs in several significant ways, is inconsistent with principles of international comity, and works to undermine the United States' "vital interest in maintaining close cooperative relationships with Jordan and other key regional partners in the fight against terrorism." U.S. Br. 19. The enormous potential consequences of this verdict apply not just to Arab Bank, but to the Jordanian economy, the region at large, and the United States' counterterrorism efforts. *Id.* at 19 ("The sanction order's potential to harm counterterrorism efforts is exacerbated by the lower courts' reasoning.").

In addition to the sanctions order, Jordan believes that Arab Bank's ability to obtain a fair trial was compromised for two additional reasons. First, the Court excused the Plaintiffs from showing that Arab Bank's conduct was a but-for cause of their injuries, apparently on the basis that the Plaintiffs could not meet a but-for requirement. And second, the Court eliminated the requirement that the Plaintiffs show a direct link between their injuries and Arab Bank's conduct

[2] The Bank's market capitalization has represented 20% to 33% of the total market capitalization of the Amman Stock Exchange in recent years. In addition, the pension fund for most of Jordan's labor force has an ownership stake of approximately 15% in Arab Bank.

by deleting—at the last minute—the word "direct" from multiple jury instructions. Jordan has a sovereign interest in protecting its leading financial institution from being improperly labeled as having committed " acts of international terrorism" based on an improperly watered down causation standard. In Jordan's view, by watering down the causation standard, the Court improperly permitted Arab Bank to be found liable based on its provision of routine banking services months or years before a terrorist attack to individuals or entities who (1) did not perpetrate the attack and (2) were not on any government terrorism list.

Jordan condemns terrorism and those who finance it in the strongest possible terms. At the same time, Jordan has a significant interest in asserting its sovereign prerogatives and protecting its corporate institutions from being improperly sanctioned by American courts for adherence to Jordanian law. It is those interests that compel Jordan to file this *amicus* brief requesting that the Court grant Arab Bank's request for interlocutory review.

ARGUMENT

I. THE STANDARDS FOR CERTIFYING AN INTERLOCUTORY APPEAL ARE ALL MET IN THIS CASE.

Section 1292(b) allows a district court to certify an interlocutory appeal if it is "of the opinion that such order involves [1] a controlling question of law as to which there is [2] substantial ground for difference of opinion and that [3] an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. §1292(b). All of those conditions are met here.

A. Whether The Sanction Imposed On Arab Bank For Adhering to Jordanian Law Was Legally Proper Is A Controlling Question Of Law.

The sanctions order, as applied at trial, poses an unequivocally clear controlling question of law: whether a court can impose a case-dispositive discovery sanction on a party based on the nonproduction of foreign documents, held in a foreign country, that fails to respect the governing

foreign laws over disclosure of those documents. In other words, was the sanction the Court issued and implemented at trial consistent with international comity, given that Jordanian bank privacy law plainly barred Arab Bank from producing the documents that led to the sanctions.

As one treatise explains, "[t]here is no doubt that a question is 'controlling' if its incorrect disposition would require reversal of a final judgment, either for further proceedings or for a dismissal that might have been ordered without the ensuing district-court proceedings." 16 Charles Alan Wright, Arthur R. Miller & Edward C. Cooper, *Federal Practice & Procedure* § 3930. That statement applies with force here. If the Court's sanction order is reversed, the liability judgment against Arab Bank will necessarily be reversed as well.

Indeed, there can be no question that the Court's view on this controlling question of law had a highly coercive effect on the trial and severely restricted the Bank's ability to defend itself. Of particular concern to Jordan, Arab Bank was not permitted to tell the jury that it was restricted from disclosing the missing records by Jordanian law or that it complied with Jordanian law regarding terrorism watchlists. Forbidding the Bank from explaining why it did not produce foreign account records is a sanction that exceeds what is done even in spoliation cases in U.S. courts, where the party who destroyed records is still permitted to explain the circumstances that caused the records to be destroyed.

In addition, the Bank's witnesses were not permitted to explain the foreign laws and regulations that precluded them from answering questions about foreign accounts. The testimony of the Chairman of Arab Bank was not even permitted to answer the critical question whether Arab Bank supported terror; when he was asked that question, the Court "sustained the plaintiffs objections that any response would offer improper state-of-mind evidence." Andrew Keshner, *Arab Bank Chairman Takes Stand, Denies Funding Terrorists*, New York Law Journal,

Sept. 9, 2014.[3] And the Bank could not offer any evidence to the jury of its adherence to compliance procedures and international standards outside of the United States except with regard to one account located in Lebanon. *See generally* D.E. 1113, Order (Aug. 26, 2014).

In these circumstances, the propriety of the Court's sanctions order is a controlling question of law. It permitted a liability verdict against Arab Bank even absent any evidence establishing Arab Bank's liability. It infected the whole of the liability proceedings against the Bank and made the finding of liability a foregone conclusion based on " 'an erroneous view of the law or on a clearly erroneous assessment of the facts.' " *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002) (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (addressing appellate review of discovery sanctions)).

B. The Substantial Ground For Difference Of Opinion As To The Propriety Of The Sanctions Order Is Unequivocal Given The United States' Detailed Explanation Of The "Several, Significant Respects" In Which The United States Government Believes That Order Was Legally Improper.

There has been considerable debate in courts around the country as to when production orders and sanction orders are appropriate and when they are not in situations where foreign criminal laws conflict and domestic discovery obligations. The substantial ground for difference of opinion in this case could not be clearer. The United States filed a brief *amicus curiae* in the Supreme Court when this case was pending on a petition for certiorari that unequivocally

[3] Indeed, news story after news story about the trial has discussed the effect of the sanctions order on the trial. *See, e.g.*, Daniel Fisher, *In Trial Starting Next Week, Terrorism Victims Seek Damages From Arab Bank*, Forbes, Aug. 8, 2014 ("The trial will be unusual because Cogan's predecessor, Judge Nina Gershon, eliminated many of Arab Bank's defenses as punishment for failing to turn over bank records the plaintiffs say they need to prove their case. Arab Bank says it would violate Jordanian law and possibly face criminal sanctions if it gave U.S. lawyers the confidential bank records of its customers."); *see also* Stephanie Clifford, *At Trial, Arab Bank's Lawyer Spars With Witness*, N.Y. Times, Sept. 4, 2014; Bernard Vaughn, *Arab Bank called Hamas 'paymaster' as trial opens in New York*, Reuters.com, Aug. 14, 2014; Tania Karas, *After 10 years, a Jury Gets Arab Bank Case*, N.Y. L.J., Aug. 15, 2014; Andrew Keshner, *Trial Challenges Bank's Liability in Terrorist Acts*, N.Y. L.J., Aug. 11, 2014; Joe Palazzolo, *Terror Victims to Press Claims Against Arab Bank*, Wall St. J., Aug. 8, 2014.

demonstrates the United States' view that the sanctions order in this case was legally erroneous. In that brief, the United States explained that:

- The Court's international comity analysis in the sanctions order "is erroneous in several respects." U.S. Br. at 8; *see also id.* at 9 ("The district court's comity analysis, however, was erroneous in important respects.").
- One chief legal error in the analysis was "fail[ing] to give adequate weight to United States and foreign sovereign interests." *Id.*
- The sanctions order improperly conflates private-plaintiff actions and governmental investigations by, among other things, suggesting that Arab Bank could not invoke foreign bank privacy laws since the Bank had previously produced some of the documents at issue to the Departments of the Treasury and Justice. That reasoning "fails to account for the distinct United States and foreign interests implicated when the government, as opposed to a private party, seeks disclosure." *Id.* at 12.
- As a matter of law, the issuance of the sanctions order thus "threatens to undermine important United States law-enforcement and national-security interests by deterring private entities and foreign jurisdictions from cooperating with government requests." *Id.* at 14.
- Similarly, the sanctions order failed to recognize that "[p]rivate requests may intrude more deeply on foreign sovereign interests because private parties often do not 'exercise the degree of self-restraint and consideration of foreign governmental sensibilities exercised by the U.S. Government.' " *Id.* at 14 (citing *F. Hoffman-La Roche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 171 (2004) (internal

quotation marks and citation omitted); Restatement (Third) of the Foreign Relations Law of the United States (1987)§ 442).

- The United States also explained that the sanctions order failed to consider that "banks may be able to produce documents to government agencies—but not private parties—consistent with foreign bank secrecy laws," or that "a foreign state considering whether to permit or facilitate a bank's cooperation with a disclosure request—or whether to prosecute a bank for its disclosures—may view the matter differently based on whether the party requesting the information is a government entity or a private one." U.S. Br. 14.

In addition, of particular importance to Jordan, the United States acknowledged that the sanctions order was improper because it "gave insufficient weight to the interests of foreign governments in enforcing their own laws within their own territories." *Id.* at 16. The sanctions order discounted the "criminal statutes governing bank secrecy in a number of foreign jurisdictions"—like Jordan—that "prohibit disclosing the records sought by [the Plaintiffs.]" *Id.* Jordan's bank privacy law and those of the other foreign sovereigns at issue are "laws of general applicability that reflect legitimate sovereign interests in protecting foreign citizens' privacy and confidence in the nations' financial institutions." *Id.* In sum, the sanctions order failed to give more than "scant weight" to Jordan's sovereign interest in enacting and enforcing its laws and it failed to properly account for the United States' own counterterrorism goals and efforts. *Id.* at 17, 19-20.

The United States' brief alone is more than sufficient to establish a substantial ground for difference of opinion.[4] That is particularly the case given that "[t]he level of uncertainty

[4] There are also further indications of the substantial ground for difference of opinion. Among others, this Court and the Magistrate Judge who oversaw years of discovery in this case

required to find a substantial ground for difference of opinion should be adjusted to meet the importance of the question in the context of the specific case." 16 Charles Alan Wright, Arthur R. Miller & Edward C. Cooper, *Federal Practice & Procedure* § 3930. The question is of critical importance in the context of this case, and as the Wright & Miller treatise advises, even a "relatively low threshold of doubt" is sufficient when the proceedings threaten to endure for an extended period of time before a final judgment would be entered—as is the case here, give the several seriatim liability and damages trials that will need to occur before final judgments are entered. *Id.*

C. An Immediate Appeal Of The Sanctions Order Will Materially Advance The Ultimate Termination Of The Litigation.

The liability trial that just concluded was the first in a series of contemplated liability and damages trials. The validity of the sanctions order, and whether it can be implemented to preclude much of the Bank's defenses and all of its evidence of state of mind, affected every aspect of the trial that just concluded and will continue to affect every aspect of the future liability trials in this case. If the sanctions order is reversed, even in part, every trial will have to be repeated. The propriety of the sanctions order directly impacts both the evidence that will be presented to each jury and the instructions each jury will receive. The Bank has already been severely prejudiced by an adverse verdict rendered as a result of the improper sanctions order.

Neither the parties, nor the Court, nor the individual jurors should not be forced to engage in a series of lengthy trials without first obtaining clarity from the Second Circuit as to whether

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had differing views of whether, and what, sanctions were consistent with principles of international comity. In addition, another judge on this Court (Judge Weinstein) denied a motion for sanctions and granted Arab Bank's motion for summary judgment based on substantially the same factual record. *See Gill v. Arab Bank*, 893 F. Supp. 2d 542 (E.D.N.Y. 2012). And the Court's sanctions order all but ignores what the Supreme Court itself has described as a "weighty excuse for nonproduction": the risk of foreign criminal prosecution for producing documents protected from disclosure by foreign law. *Societe Internationale pour Participations Industrielles et Commerciales, SA v. Rogers*, 357 U.S. 197, 211 (1958).

those trials can be governed by the sanctions order. This is not a situation in which the certified question "may be mooted by further proceedings," where "the character of the trial is not likely to be affected," or where the issue is "an essentially collateral matter"—all of which might be a basis for denying interlocutory appeal. 16 Charles Alan Wright, Arthur R. Miller & Edward C. Cooper, *Federal Practice & Procedure* § 3930.

The degree to a district court's discovery sanctions order must respect Jordan's and other foreign nations bank privacy laws has been a central issue in this case for years; and it critically hampered the Bank's ability to defend itself on the most important and hotly contested issues of fact during the trial phase that just concluded. Reviewing that issue now is not only important for U.S. foreign relations, but would facilitate efficient resolution of this case.

D. The Bank's Motion For Certification Presents Additional Controlling Questions of Law That Should Be Certified For An Immediate Appeal.

In addition to the sanctions order, there are two additional issues that should be certified for immediate appeal. The first relates to whether but-for and direct causation is required for a liability finding. This is plainly a controlling question of law in this case, because the Plaintiffs admitted they could not make a "but for" causal showing if it were required, and that they cannot trace the financial services at issue to any of the attacks that caused their injuries. Tr. 3115-16. That there is a substantial ground for difference of opinion is manifest in the Supreme Court's consistent and unambiguous pronouncements requiring but-for causation for similarly worded statutes and the uniform holdings of the Second Circuit that direct injury is a key element to establish proximate cause. *See Burrage v. United States*, 134 S. Ct. 88, 889 (2014); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2525-27 (2013); *Gross v. FBL Fin. Servs. Inc.*, 557 U.S. 167 (2009); Arab Bank Mem. of Law in Supp. of Mot. for Certification of Interlocutory Appeal at 12-15(citing cases). And this issue clearly has the potential to materially advance the

ultimate termination of this litigation, given Plaintiffs acknowledgement they cannot meet this standard if it is required.

In addition, the Court's instruction to the jury regarding whether a violation of 18 U.S.C. § 2339B resulting from the provision of banking services automatically equates to a violation of 18 U.S.C. § 2331(1) warrants review. The statutory definition of international terrorism in § 2331(1) does not, under a plain reading, encompass Arab Bank's provision of banking services; those services were not a "violent act" or "dangerous to human life" and were not intended "to intimidate or coerce" anyone or "affect the conduct of a government by mass destruction, assassination, or kidnapping." 18 U.S.C. § 2331(1). The substantial ground for difference of opinion over the Court's statutory interpretation, and the reversal that would result from the jury instruction given in this case both support interlocutory review now, rather than after the conclusion of a series of lengthy, complicated trials that will all be for naught if the Court's statutory interpretation is held incorrect.

Jordan has a strong interest in having these issues reviewed immediately. Jordan's leading financial institution—and the mainstay of its economy—has been saddled with this litigation for a decade; and it now has a liability finding clouding its reputation. That jury verdict, in Jordan's view, resulted from an unfair and prejudicial trial in which the Bank was not permitted to present its defense, the Plaintiffs were not required to meet the proper causation standard, and the jury was erroneously instructed as to what constitute an international act of terrorism. While the Court obviously views these issues differently, Jordan requests that as a matter of respect for it as a foreign sovereign, the Court certify these issues for immediate appeal. As the U.S. brief presaged (U.S. Br. 19), this case is impacting and will continue to impact Jordan's relationship with the United States.

CONCLUSION

For the foregoing reasons, the motion for interlocutory appeal should be granted and the three questions set out in Arab Bank's Memorandum of Law in Support of its Motion for Interlocutory Appeal should be certified for immediate appeal.

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Respectfully submitted,

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