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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

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In re ARAB BANK, PLC,

Petitioner.

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**PETITION FOR WRIT OF MANDAMUS**

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Proceeding Below: Linde v. Arab Bank, PLC, No. 04 CV 2799 (BMC) (VVP) (E.D.N.Y.) (Eleven Consolidated Cases)
Honorable Brian M. Cogan


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## CORPORATE DISCLOSURE STATEMENT

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

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

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

## STATEMENT AS TO RELATED CASES

This case previously has been before this Court on a Petition for Mandamus challenging a district court discovery sanctions order not at issue here. See *Linde v. Arab Bank, PLC*, 706 F.3d 92 (2d Cir. 2013), petition for cert. pending, No. 12-1485 (U.S. June 24, 2013). This case also is directly related by subject matter to two cases that addressed the same causation issue, *Rothstein v. UBS AG*, 708 F.3d 82 (2d Cir. 2013), and *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 118 (2d Cir. 2013).

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Petitioner Arab Bank plc (the "Bank") respectfully petitions for mandamus to vacate the district court's order denying the Bank's motion for summary judgment on plaintiffs' Anti-Terrorism Act claims; the court's order consolidating hundreds of claims involving dozens of alleged terrorist incidents in one trial; and orders excluding evidence that is critical to the Bank's defense. On July 30, 2013, after Judge Cogan replaced Judge Gershon in this case, the district court rejected the Bank's request that it reconsider those orders. See A11.

## STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1651 and F.R.A.P. 21.

## STATEMENT OF THE ISSUE PRESENTED

Whether mandamus should issue to vacate the district court's (1) adoption of an erroneous causation standard that conflicts with precedent of the Supreme Court and this Court before it fatally infects a lengthy series of massive trials; (2) order to consolidate for trial claims of more than 300 plaintiffs involving 24 disparate terrorist attacks; and (3) exclusion of testimony essential to the Bank's defense.

## INTRODUCTION

In these Anti-Terrorism Act ("ATA") suits seeking hundreds of millions of dollars in damages, hundreds of plaintiffs claim that the Bank is liable for virtually every terror attack in Israel and the Palestinian Territories between 1995 and 2005. They allege the Bank maintained accounts and transferred funds for individuals

and charities that allegedly are Hamas "fronts," and administered payments from a Saudi government-created charity ("Saudi Committee") to family members of persons killed or injured in the Israeli-Palestinian conflict. Plaintiffs contend that these banking services facilitated terrorist attacks.

Plaintiffs must prove that the Bank's services caused their injuries and that the Bank knew or intended that its services would facilitate terrorist attacks. See 18 U.S.C. §§ 2333(a), 2339A(a). The Bank denies that its services caused plaintiffs' injuries or that it knowingly or intentionally provided any support for terrorist organizations. The Bank conducted its activities in accordance with local and United States laws to ensure that it did not transact business with terrorist organizations. With regard to the Saudi Committee, the Bank processed electronic payments from a trusted correspondent bank to beneficiaries as part of a humanitarian program that has garnered praise from U.S. government officials. Plaintiffs' allegations and the Bank's defenses put causation and the Bank's state of mind at the heart of this case.

The district court, in direct conflict with recent precedent, relieved plaintiffs of the duty to prove but-for and direct causation. In *University of Texas Southwestern Med. Center v. Nassar*, 133 S. Ct. 2517, 2524 (2013), the Supreme Court explained that "any tort claim," including a statutory claim, requires proof of but-for causation. In *Rothstein v. UBS AG*, 708 F.3d 82 (2d Cir. 2013), and *In re*

*Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 118 (2d Cir. 2013) ("*Al Rajhi Bank*"), this Court held that ATA plaintiffs must prove *both* but-for causation *and* a direct causal link between the defendant's conduct and their injuries. The district court nonetheless ruled that "but-for causation cannot be required in the section 2333(a) context" and that plaintiffs' injuries need only be a foreseeable—not a direct—consequence of the Bank's conduct. A286. That error means that the Bank's summary judgment motion was reviewed under the wrong legal standard—a dispositive error. And a massive and costly trial is now imminent that will proceed under the wrong causation standard.

The court compounded its causation error by consolidating in a single trial claims of nearly 300 plaintiffs involving 24 separate incidents over 3½-years. Plaintiffs must prove that the Bank's services were the but-for and direct cause of injuries arising from each incident, and that the Bank knew or intended that its services would cause such injuries. Causation and state-of-mind as to each claim cannot be resolved fairly in such a muddled mass proceeding, where plaintiffs will present evidence of financial transactions that have no possible relevance to incidents that occurred before those transactions. This morass creates the impression of wrongdoing where individual analysis would show there was none.

In addition, one-sided evidentiary rulings prevent the Bank from countering plaintiffs' state-of-mind and causation allegations, and indeed from offering any

defense. These include exclusion of all evidence of the Bank's compliance practices, which it adopted to prevent money laundering and terrorism finance; all evidence of its compliance with foreign banking laws; all evidence that the activities of the Saudi Committee were known and endorsed by the United States, among other nations; all evidence from members of the Israeli military and intelligence community showing that, after extensive investigation, the Bank was found blameless of plaintiffs' charges; and all evidence from former American diplomats that the United States vetted, funded, and endorsed the charitable organizations that plaintiffs allege to be "front organizations" for Hamas. Instead, the jury will hear only the testimony of plaintiffs' witnesses that customers of the Bank were affiliated with terrorists. These exclusions far exceed the scope of previously imposed discovery sanctions and gut the Bank's central defenses.

The combined force of these errors reduces the upcoming trial to a sham, which only mandamus can prevent. There *cannot* be a fair trial if plaintiffs need not prove but-for and direct causation, if a single jury is presented with a mass of evidence unrelated to incidents on which liability is premised, and if the Bank is barred from rebutting plaintiffs' witnesses with witnesses of its own, or introducing evidence relevant to the legitimacy and lawfulness of its operations. Appeal after final judgment will be too late to repair the harms. A single liability verdict tainting the Bank with the brush of terrorism will inflict great reputational

harm, thereby driving away depositors, destroying correspondent relationships, and risking devastation both to the Bank and financial stability in this volatile region. Whereas this Court previously found mandamus unwarranted because the impact of the challenged discovery sanctions was speculative (*Linde*, 706 F.3d at 117), here the cumulative impact of the district court's rulings is manifest.

A grant of the Bank's petition in this exceptional case will serve both purposes of mandamus: "promptly correcting serious errors" in cases involving "particularly injurious" and "consequential" rulings that work "a manifest injustice" (*Mohawk Indus. v. Carpenter*, 558 U.S. 100, 110-11 (2009)), and formulating "the necessary guidelines" so that district courts can "settle new and important problems" (*Schlagenhauf v. Holder*, 379 U.S. 104, 111-12 (1964)).

## FACTUAL AND PROCEDURAL BACKGROUND

### A. The Parties And Plaintiffs' Allegations

Plaintiffs assert claims under the ATA, 18 U.S.C. § 2333. As this Court summarized their claims in the prior mandamus proceeding:

> First, plaintiffs allege that the Bank assisted in administering a "death and dismemberment benefit plan" pursuant to which the Saudi Committee … made cash payments to terrorists and their families. The payments were allegedly designed to provide an incentive for suicide bombers and others who killed or injured plaintiffs and their kin. … Second, plaintiffs allege that the Bank provided financial services to various entities and individuals acting on behalf of Hamas and other State Department-designated foreign terrorist organizations. These services included … maintaining bank accounts, making wire transfers, and otherwise facilitating the movement of funds. *Linde*, 706 F.3d at 97.

Arab Bank is the leading financial institution in Jordan and a major bank throughout the Middle East. The Bank's role in fostering financial stability in the region has been widely recognized. The Israeli Defense Forces has stated that it had no evidence that Arab Bank was "involved in any way whatsoever in terrorist activities, or funded terrorism." A456-A457. Arab Bank was the first bank in the region to computerize and use the U.S. government's OFAC list of designated terrorists to monitor transactions and customers outside the United States. A441-A442.

### B. District Court Proceedings

In 2005, the district court denied the Bank's motion to dismiss plaintiffs' ATA claims for failure to plead causation. The court ruled that plaintiffs need not allege and prove but-for causation, stating that "[t]here is no requirement of a finding that the suicide bomber would not, or could not, have acted but for the assistance of Arab Bank." *Linde v. Arab Bank*, 384 F. Supp. 2d 571, 584-85 (E.D.N.Y. 2005). The court also ruled that plaintiffs had sufficiently pleaded proximate cause, construing the statutory requirement of injury "by reason of an act of international terrorism" to mean that plaintiffs need not allege and prove that they "were injured by reason of Arab Bank's conduct." *Id*. at 581.

This Court's opinions in *Rothstein* and *Al-Rajhi Bank* forced the district court to revisit the causation standard on the Bank's motion for summary

judgment. Those opinions, holding that ATA claimants must prove *both* but-for *and* direct causation, make clear that the district court's initially adopted standard is erroneous. But in denying the Bank summary judgment, the district court again rejected the need to prove but-for causation and pronounced a lax "foreseeability" standard inconsistent with *Rothstein* and *Al-Rajhi Bank*. According to the court, "but-for causation cannot be required in the section 2333(a) context": plaintiffs need prove only "that the bank's acts with respect to the plaintiff's injuries were a substantial factor in the sequence of responsible causation and their injuries were reasonably foreseeable." A286.

The district court also ordered a series of trials. The first will address "24 different incidents" and involve "300 odd plaintiffs." A288. Judge Cogan recently denied the Bank's challenge to this mass consolidation of unrelated plaintiffs, incidents, and claims. A13, A107-A112.

In addition, the district court has excluded evidence central to the Bank's defense that it did not knowingly or intentionally support terrorism. In December 2011, without a *Daubert* hearing, the court excluded *inter alia*:

- All Bank experts testifying about "Arab Bank [and] whether or not Arab Bank supported terrorism." A315-A317.
- All Bank experts from the Israeli military and intelligence communities, who would testify that the Israeli government had no information that Arab Bank was engaged in the financing of terrorism. A318.

- All Bank experts testifying about the humanitarian practices of the Saudi Committee. A318.
- All expert testimony that the Bank complied with U.S. and governing foreign law. A320.

In February 2013, the district court excluded additional Bank expert evidence on "whether any of the relevant charities were connected to Hamas," a critical issue in the case. A303. And it excluded the Bank's only remaining expert witness on the Saudi Committee, Robert Lacey, who has briefed the staffs of Presidents G.W. Bush and Obama on Saudi Arabia. The court found "irrelevant" Lacey's testimony that the Saudi Committee was engaged only in humanitarian activities; that there was no evidence that the Committee was formed to encourage terrorism; and that the Saudi government, a victim of terrorism itself, had adopted strict policies to prevent terrorism in general and suicide bombers in particular. A304-A306. Yet, the court admitted plaintiffs' expert testimony that the Saudi Committee worked with Hamas to support terrorism. A293-A294.

In May 2013, the district court ruled that the Bank may not introduce *any* evidence that it complied with foreign banking laws governing money laundering and the prevention of terrorism finance which would show that it did not intend to support terrorism. A218-A221. On June 18, 2013, Judge Gershon denied the Bank's motion for reconsideration of her summary judgment order or alternatively for interlocutory appeal certification. A161-A162.

On July 30, 2013, Judge Cogan refused to "reconsider Judge Gershon's rulings." A11. In addition, in granting plaintiffs' motions in limine, Judge Cogan excluded from trial all evidence of (i) foreign banking laws designed to ensure the Bank's safe and sound operations (A16), (ii) the Bank's adherence to international counter-terrorism-financing standards (A24, A35, A43-A44), and (iii) funding from aid organizations and governments, including the U.S. Agency for International Development and the European Union, to the Palestinian organizations that plaintiffs allege to be "fronts" for Hamas (A57-A58).

On August 23, 2013, Judge Cogan completed the process of excluding vital testimony by barring eight proposed non-party fact witnesses who would testify that there was no connection between the zakat committees and Hamas, and that the zakat committees were not known to be terrorist organizations (A1-A2), a critical issue that plaintiffs have placed in dispute through the testimony of expert witnesses whom the court did not exclude. He also excluded the testimony of Major General Gadi Shamni, former Commander of the Israel Defense Forces in Judea and Samaria. Shamni would have testified that the IDF conducted an investigation at his direction of the very claims that plaintiffs have made and found no evidence that Arab Bank or any of its employees were involved in any terrorist activity or funded terrorism. See A461-A462; A4. In sum, the vast majority of the Bank's proposed witnesses were excluded by the rulings above.

Judge Cogan has ordered trial to begin in January 2014. A7.

## REASONS WHY THE WRIT SHOULD ISSUE

The writ of mandamus facilitates "immediate review" of "consequential" rulings and serves as a "useful safety valve[] for promptly correcting serious errors." *Mohawk*, 558 U.S. at 111-12. It also is a critical tool for ensuring "supervisory control of the District Courts." *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259 (1957); accord *Schlagenhauf*, 379 U.S. at 111-12; *In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1288 (3d Cir. 1994) (Alito, J.) (mandamus "further[s] supervisory and instructional goals").

Such "supervisory control" is especially warranted where a district court "flagrantly misapplies a well-settled principle of law." *In re City of New York*, 607 F.3d 923, 940 n.17 (2d Cir. 2010); see *Linde*, 706 F.3d at 107 (mandamus may direct a district court "to correct an erroneous order"). In *Schlagenhauf*, for example, the Supreme Court reversed denial of mandamus to correct the district court's erroneous standard for medical examination of the defendant. 379 U.S. at 111, 122; see also *In re Bieter Co.*, 16 F.3d 929, 933 (8th Cir. 1994) (mandamus corrected district court's failure "to apply the proper legal standard"). "Summary-judgment orders … may turn on issues of law that warrant review by mandamus," especially where there is "[p]articularly clear error." 16 Wright, Miller, & Cooper, FEDERAL PRACTICE AND PROCEDURE §§ 3935.7, 3934.1 (3d ed. 2012).

The writ also is appropriate where the district court disobeyed governing Supreme Court or Circuit precedent. See *Asbestos Sch. Litig.*, 46 F.3d at 1289 (granting mandamus where summary judgment ruling was "squarely inconsistent" with Supreme Court precedent); *United States v. Amante*, 418 F.3d 220, 224 (2d Cir. 2005) (granting mandamus where Circuit precedent made procedural ruling erroneous); *United States v. Coppa*, 267 F.3d 132, 135, 144 (2d Cir. 2001) (issuing writ where district court "reinterpret[ed]" binding precedent).

The writ also will issue where erroneous pre-trial rulings are likely to prevent a fair trial. Thus, in *In re Repetitive Stress Injury Litigation*, 11 F.3d 368, 373-74 (2d Cir. 1993), mandamus was issued to prevent consolidation of 44 personal injury actions in a single trial. Accord *IBM v. Edelstein*, 526 F.2d 37, 42-44 (2d Cir. 1975) (pretrial orders that undermined right to a fair trial); *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990) (erroneous mass adjudication).

A writ of mandamus is evaluated under three criteria. First, the right to the writ must be "clear," as when the ruling was based "on an erroneous view of the law." Second, a post-judgment appeal must not provide "adequate means" to attain relief. Third, the writ must be "appropriate under the circumstances." Appropriateness may involve "the presence of a legal issue whose resolution will aid in the administration of justice," or a district court ruling that "flagrantly misapplies a well-settled principle of law." *Linde*, 706 F.3d at 107-08.

All three factors support mandamus here. The right to the writ is "clear" and indisputable because the Bank was denied summary judgment under the wrong causation standard and now faces protracted trials under that erroneous standard with improperly consolidated claims and exclusion of virtually all evidence essential to its defense. Mandamus is "appropriate" because the district court "flagrantly misapplie[d]" a principle of law that is now "well-settled" after *Nassar*, *Rothstein*, and *Al Rahji Bank*, and because courts may not deprive a party of a fair trial by excluding most of its witnesses while admitting those of its adversaries on the same subjects. And the Bank has "no other adequate means" of relief because an adverse verdict would cause "irreparable harm" to its reputation and business relationships before a post-judgment appeal could be adjudicated.

## I. MANDAMUS IS REQUIRED TO PREVENT A MASSIVE TRIAL UNDER AN INCORRECT CAUSATION STANDARD.

The ATA authorizes a claim by a U.S. national who is injured "by reason of an act of international terrorism." 18 U.S.C. § 2333(a). In *Rothstein*, this Court held that the but-for causation requirement applies to ATA claims. In *Nassar*, the Supreme Court confirmed that ***all*** statutory tort claims require proof of but-for causation. And in *Rothstein* and *Al-Rajhi Bank*, this Court held that an ATA plaintiff also must prove proximate causation, defined as a direct causal link between the alleged ATA violation and the asserted injury.

*Nassar*, *Rothstein*, and *Al-Rajhi Bank* make perfectly clear what the ATA plaintiffs must prove in this case. A generalized showing that the Saudi Committee payments "incentivized" terrorism or that the Bank performed banking services for charities that plaintiffs' experts contend are affiliated with Hamas or for individuals that these same experts assert are Hamas operatives is not sufficient. Plaintiffs must prove that the Bank's services were needed to fund—and actually funded—the terrorist operations that harmed plaintiffs. The district court's express rejection of but-for causation and its replacement of direct causation with a lax foreseeability standard flout precedent and warrant mandamus.

### A. The District Court Contradicted Recent Circuit Precedent By Dispensing With But-For Causation.

In *Rothstein*, this Court affirmed dismissal of ATA claims against UBS. Plaintiffs alleged that they were injured by terrorist acts perpetrated by Hamas. They asserted ATA claims against UBS for allegedly transferring dollars to Iran, a designated state sponsor of those terrorist groups, which enabled them to carry out the bombings and other terrorist acts. 708 F.3d at 92, 97. This Court held that those allegations did not satisfy the ATA causation standard, explaining that when Congress inscribes "by reason of" language in a statute, as in the ATA, a plaintiff must prove *both* "but for" causation and "proximate cause." *Id*. at 95.

The *Rothstein* complaint failed to allege but-for causation. *Id*. at 97. It did not allege that "if UBS had not transferred U.S. currency to Iran, Iran, with its

billions of dollars in reserve, would not have funded the attacks in which plaintiffs were injured." *Id*. By contrast, the district court ruled here that "but-for causation cannot be required in the section 2333(a) context." A286.

The district court thereby disregarded binding precedent and adopted the "*post hoc, ergo propter hoc*" fallacy that *Rothstein* expressly rejected because it "would mean that any provider of U.S. currency to a state sponsor of terrorism would be strictly liable for injuries subsequently caused by a terrorist organization associated with that state." 708 F.3d at 96. Terrorist organizations receive abundant financial resources from wealthy countries like Iran and and have the resources to obtain guns and explosives from multiple sources, so the mere fact that a particular cash transfer was made does not in itself establish any connection to a terrorist act. But-for causation precludes liability in these circumstances.

In *Nassar*, 133 S. Ct. at 2524, the Supreme Court held that but-for causation is "a standard requirement of any tort claim." The Court explained that the "because of" language in Title VII means the same as the "by reason of" language in other statutes (such as RICO and the ATA) and prevents an occurrence from being "a cause of an event if the particular event would have occurred without it." *Id*. at 2525. The district court's refusal to require but-for causation here conflicts directly with this holding, as well as with *Rothstein*.

### B. The District Court Contradicted Recent Precedent By Replacing The Direct Causation Requirement With Mere Foreseeability.

Although *Rothstein* and *Al-Rajhi Bank* require a direct link between the asserted ATA violation and the asserted harm, the district court ruled that plaintiffs need prove only that their injuries were "reasonably foreseeable" from the Bank's alleged conduct. A286. This refusal to require proof of proximate cause within the meaning of this Court's ATA precedents further warrants mandamus.

This Court found the *Rothstein* complaint deficient for failing to allege not only but-for causation, but also "a proximate causal relationship between the cash transferred by UBS to Iran and the terrorist attacks by Hizbollah and Hamas that injured plaintiffs." *Rothstein*, 708 F.3d at 97. For the meaning of proximate cause, the Court relied on recent Supreme Court cases requiring a "*direct relation* between the injury asserted and the injurious conduct." The *Rothstein* complaint was deficient because it did not allege "that the moneys UBS transferred to Iran were in fact sent to Hizbollah or Hamas" for use in their terror operations. *Id*.

This Court extended those principles in *Al Rajhi Bank*, affirming dismissal of ATA claims against Middle Eastern banks by American victims of al Qaeda terrorism. The plaintiffs alleged that the banks "provided funding to purported charity organizations known to support terrorism that, in turn, provided funding to al Qaeda." 714 F.3d at 124. But as this Court explained, they did not allege that the banks "provided money directly to al Qaeda" or that the money they donated "to

the purported charities actually was transferred to al Qaeda and aided in the September 11, 2001 attacks." *Id*. The Court rejected the notion that "providing routine banking services to organizations and individuals said to be affiliated with al Qaeda ... proximately caused the September 11, 2001 attacks or plaintiffs' injuries." *Id*. ATA claims against a financial institution cannot rest on injuries resulting from "money that passes through its hands in the form of deposits, withdrawals, … or any other routine banking service." *Id*.

The proximate causation defect in this case follows *a fortiori* from *Al-Rajhi Bank* and *Rothstein*. If providing funds to organizations that in turn transferred those funds directly to al Qaeda is too indirect to be a proximate cause of al Qaeda's September 11 terrorism, then the more remote account transactions alleged here, to individuals and entities not designated as terrorists in any of the jurisdictions where the transactions were processed, cannot have proximately caused plaintiffs' injuries. And if providing cash to a designated *state sponsor* of terrorist groups that committed the acts at issue is too indirect to meet the proximate cause requirement, then even more so is handling transfers from a correspondent bank of Saudi Committee payments—not unlawful in any jurisdiction when made—to *families* harmed in the Israeli-Palestinian conflict.

Plaintiffs admit that they cannot prove a direct connection between the Bank's services and the injuries that plaintiffs sustained from terrorist acts. See

A266 ("we'll never be able to prove" that a particular terrorist "used this money to purchase this car or this explosive or what have you"). Instead, like the *Rothstein* and *Al-Rajhi Bank* plaintiffs, they rely on speculation in the guise of foreseeability. As plaintiffs' counsel told the district court, "when the bank transfers money [to a Hamas operative], it is foreseeable … that many terrible things are going to occur" that "might include the death of American citizens." A270. The court accepted this "terrible things are foreseeable" standard rather than require proof of the direct causal link mandated by *Rothstein* and *Al-Rajhi Bank.*

According to the district court, "the *Rothstein* Court was concerned about foreseeability," which "is what the heart of the *Rothstein* case is about." A229; see also A271. The court stated incorrectly that *Rothstein* "said that a defendant is liable" under the ATA if "his acts were a substantial factor in the sequence of responsible causation and [the plaintiff's] injury was reasonably foreseeable or anticipated as a natural consequence." A284. In fact, the causation discussion in *Rothstein* does not even mention foreseeability. The foreseeability language cited by the district court is from the ***standing*** section of the *Rothstein* opinion, which addresses the "fairly traceable" element of Article III standing. 708 F.3d at 91. As *Rothstein* explains, this standing requirement is far less demanding than the ATA's proximate causation standard. *Id*. ("the 'fairly traceable' standard is lower than that of proximate cause").

*Rothstein* refutes the district court's view that "foreseeability" is "at the heart" of proximate cause. As the Supreme Court has observed, its decisions "never even mention the concept of foreseeability." *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 12 (2010). *Hemi Group* makes clear that for statutes with "by reason of" language, "the focus is on the *directness* of the relationship between the conduct and the harm." *Id*. (emphasis added). Accordingly, the Court rejected the dissent's proposed causation standard, which "would have RICO's proximate cause requirement turn on foreseeability, rather than on the existence of a sufficiently 'direct relationship' between the fraud and the harm." *Id*.

In fact, the Court in *Rothstein* found that it *was* foreseeable that the support allegedly provided by the defendant bank might lead to attacks by the very terrorists who injured the plaintiffs:

> Iran … had available more U.S. currency than it would have had without UBS's transfers; the more U.S. currency Iran possessed, the greater its ability to fund Hizbollah and Hamas for the conduct of terrorism; and the greater the financial support Hizbollah and Hamas received, the more frequent and more violent the terrorist attacks they could conduct.

*Rothstein*, 708 F.3d at 93. Although such foreseeability sufficed for Article III standing purposes, the Court found it *insufficient* to sustain causation. *Id*. at 93-94. The lax foreseeability standard adopted by the district court here, which invites 20-20 hindsight, would link totally innocent conduct to terrorist acts. Anyone who provides a routine service or product—rents a car or sells household goods—to

someone who later uses that service to commit a criminal act or fashions the goods into weapons would face liability for facilitating the crime.

The district court attempted to circumvent *Rothstein* and *Al-Rajhi Bank* by relying on *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010). See A285-A286. The district court cited *Humanitarian Law Project* for the proposition that "money is fungible" and thus that plaintiffs need not prove a direct causal link. But as Judge Rakoff explained in the opinion affirmed by *Rothstein*, Section 2339B is a purely criminal measure with no causation element, making *Humanitarian Law Project* irrelevant to the causation analysis under Section 2333(a). *Rothstein v. UBS AG*, 772 F. Supp. 2d 511, 516 (S.D.N.Y. 2011). Indeed, *Humanitarian Law Project* does not mention "proximate cause" or even address causation. The district court's misuse of that case to override the ATA's direct cause requirement cannot be reconciled with *Rothstein* and *Al-Rajhi Bank*, in which this Court held that transfers of fungible money to Iran and terrorist fronts did not *cause* the plaintiffs' injuries within the meaning of the ATA.

Finally, the district court's proximate causation ruling conflicts sharply with a recent ruling by Judge Weinstein on the same issue in a nearly identical case against Arab Bank with the same discovery record. In granting the Bank's motion for summary judgment in *Gill v. Arab Bank*, Judge Weinstein found no triable proximate cause issue because the evidence did not "tie the personal bank accounts

of individuals who may have been affiliated with Hamas to Hamas itself. *More* is required to establish liability of the Bank." 893 F. Supp. 2d 542, 573 (E.D.N.Y. 2012) (emphasis added). Here, the district court ruled that plaintiffs may prevail without having to establish that "more." This intra-Circuit conflict on a recurring, important, and outcome-determinative legal issue warrants immediate review.

## II. MANDAMUS IS REQUIRED TO PREVENT AN UNFAIR TRIAL.

### A. Ordering A Single Trial Involving Hundreds Of Plaintiffs And Dozens of Separate Incidents Is An Abuse Of Discretion.

The district court plans a series of liability trials, each addressing the claims of numerous plaintiffs and numerous separate incidents. The first trial, scheduled to begin in January 2014, will address the claims of "300 odd plaintiffs" involving "24 different incidents." A288; see A323.

These 24 incidents span a 3½-year period from March 2001 to September 2004. See A174. The first trial will encompass five attacks from 2001, seven from 2002, ten from 2003, and two from 2004. A175. The trial plan permits plaintiffs to present evidence to the jury pertaining to all 24 incidents, even where that evidence is irrelevant to particular incidents. For example, the first of the 24 incidents occurred on March 28, 2001. The jury deciding whether the Bank knowingly or intentionally facilitated that attack—and whether it was the but-for and proximate cause of the attack—will hear evidence of bank transactions spanning 1995 through 2005 and other evidence from as late as 2010. A175. And the jury will

hear evidence of thousands of Saudi Committee payments that occurred after the March 2001 incident. A178. Transactions that post-date a particular incident cannot even arguably be relevant to the Bank's complicity in or facilitation of that incident. And a witness describing one incident will necessarily prejudice the jury as to incidents with which that victim had no connection. The planned trial will be replete with such timing and causation gaps and lump together a multitude of banking services that the jury could never separate from any perceived unlawful payment. Transactions that would clearly be innocent if carefully analyzed on an individual basis will be lost in this morass. A175-A178.

The planned trial structure puts the Bank in an impossible position. Some of the evidence that the jury will hear is relevant to some of the 24 incidents, but not to others. Objections that some incidents are not relevant to some claims may be sustained, but the jury will nonetheless hear about all the incidents because the claims of all 300 plaintiffs will be tried together. No instruction to the jury could "unring the bell" or otherwise cure this prejudice to the Bank. A180. And forcing the Bank to defend against these inflammatory claims in one sprawling proceeding deprives it of its right to a fair defense and justifies mandamus relief. See *Repetitive Stress Injury*, 11 F.3d at 373-74; *Fibreboard*, 893 F.2d at 711-12 (granting mandamus because "defendants' right to due process" would be undermined by "treating discrete claims as fungible"); 8 MOORE'S FEDERAL

PRACTICE § 42.10[5][d][i] (3d ed. 2013) ("Consolidation is inappropriate when it will adversely affect the rights of the parties").

In *Repetitive Stress Injury*, this Court granted mandamus to prevent consolidation of 44 personal injury actions for trial. The district court ordered consolidation based on an asserted common injury, in that case repetitive stress injury from using keyboard office machines. But this Court explained that "a district court must examine the special underlying facts with close attention before ordering a consolidation." 11 F.3d at 373. It rejected consolidation because the asserted commonality was "a claim of injury of such generality that it covers a number of different ailments for each of which there are numerous possible causes." *Id*. Because the 44 cases were not "sufficiently related," consolidation was "a sufficiently clear abuse of discretion to warrant mandamus relief." *Id*.

This Court's warnings about inappropriate consolidation fit this case—which involves hundreds of plaintiffs—like a glove: "Although consolidation may enhance judicial efficiency, considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial." Thus, "aggregate litigation must not be allowed to trump … individual justice," and courts must "take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation." *Id*. The Court reiterated that consolidation may "go too far in the interests of expediency" and thereby "sacrifice

basic fairness in the process." *Id*. at 374. Accord *Arnold v. Eastern Air Lines*, 712 F.2d 899, 906 (4th Cir. 1992) (en banc) (rejecting "convenience" of consolidation where the consequence is "harmful and serious prejudice"). Here, the very similarities among some Iran incidents would prevent the jury from distinguishing the evidence pertinent to each. See *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 349 (2d Cir. 1993) (48 injury claims consolidated for trial improperly presented jury with "a dizzying amount of evidence"). As in *Repetitive Stress Injury*, mandamus should issue to prevent a trial structure that is inherently unfair and abusive.

### B. The District Court's Evidentiary Rulings Violate Due Process.

The district court further exceeded acceptable adjudication by categorically excluding evidence that is critical to the Bank's defenses. The court excluded all of the Bank's expert testimony that the Saudi Committee was a legitimate charity endorsed by senior representatives of the U.S. government, among others; all evidence that the charities that plaintiffs contend are Hamas fronts were vetted, endorsed, and funded by the United States, the European Union, and prominent international aid organizations; all evidence from the Israeli commander of the civil administration of the Palestinian Territories during the relevant period that these charitable organizations provided vital and legitimate humanitarian relief; and all evidence of foreign banking laws, as well as evidence of industry standards

and practices, that establish that the Bank was well ahead of its peers in its compliance practices. Exclusion of this evidence, which extends far beyond the material excluded by the previously imposed discovery sanctions, guts every line of defense on every material issue in this litigation. A party cannot constitutionally be deprived of "an opportunity to present every available defense" (*Philip Morris v. Williams*, 549 U.S. 346, 353 (2007)), and evidentiary rulings that "affect a party's substantial rights" are an abuse of discretion. *LILCO v. Barbash*, 779 F.2d 793, 795 (2d Cir. 1985). Especially when orders "threaten special values"—like a fair trial—mandamus is warranted. Wright & Miller, *supra*, § 3935.7, at 770.

**Saudi Committee Evidence**. Plaintiffs say the "heart" of their case is their claim that the Bank incentivized terrorism by facilitating the Saudi Committee's payments to family members of persons killed in the Israeli-Palestinian conflict. A390-A391. The nature and purpose of those payments are plainly important evidence as to whether the Bank knowingly and intentionally supported terrorism. Yet, the district court has excluded ***all*** expert and factual testimony proffered by the Bank to rebut plaintiffs' allegations and establish the legitimate humanitarian purpose of the Saudi Committee.

One such excluded expert is David Rundell, the former Chargé d'Affaires and Deputy Chief of Mission at the United States Embassy in Saudi Arabia. See A319. He would have testified that "Saudi Arabia's provision of financial

assistance to the Palestinian population through the Saudi Committee represent[ed] an effort to alleviate human suffering and [did] not in any way constitute support for terrorism," and that the U.S. government encouraged other nations in the region to follow the Saudi example. A340-A342.

Also excluded are Professor Avi Shlaim, an Oxford University Middle East specialist, who would have testified about Saudi Arabia's commitment to humanitarian relief in the Palestinian Territories and attempts to resolve the Israeli-Palestinian conflict. A318-A321. Professor Shlaim would have explained the legitimacy of, and need for, the Saudi Committee's humanitarian relief and thereby refuted plaintiffs' allegations that this program subsidized terror.

The Bank was left with only one expert witness to respond to plaintiffs' Saudi Committee allegations, Robert Lacey. Lacey would have testified that the Saudi Committee was "a philanthropic committee" that provided "medical, educational and general relief assistance to the inhabitants of the West Bank and Gaza"; was overseen by Prince Nayef bin Abdul Aziz, a former Saudi Minister and "principal director of [Saudi Arabia's] fight against terrorism," whom both President Obama and Vice-President Biden have praised for partnering with the United States in the fight against terrorism; and did not exclude relatives of terrorists from the thousands of beneficiaries identified by it to prevent them from falling into the hands of extremists. A357, A361, A364-A367; A379.

Lacey's testimony plainly would be relevant to a jury's determination of whether the Bank's processing of Saudi Committee payments was intended to support terrorism. Yet, the district court excluded it as "irrelevant." A304-A306. Moreover, the court *did* admit the opinion of plaintiffs' expert Arieh Dan Spitzen, who had never visited Saudi Arabia or done anything other than consult the Committee's website, "as to the Saudi Committee." A293-A297. Thus, the jury will hear about the Saudi Committee from only one side's expert, who will portray it as part of a conspiracy by Hamas and the Saudi government to terrorize Israel and its citizens, based on his perfunctory review of a website.

Significantly, Judge Weinstein *denied an identical motion* to exclude Lacey's expert testimony in the virtually identical *Gill* case:

> [Mr. Lacey] opines on the background and origins of the Saudi Committee and responds to plaintiff's allegations that the Saudi Committee was a Hamas-supporting organization. ... [His] testimony bears directly on the Saudi Committee's conduct. It will help the jury assess whether the Bank acted recklessly, knowingly, or intentionally in its provision of financial services to the Saudi Committee. *Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 523, 542 (E.D.N.Y. 2012).

This sharp conflict between judges in the same district cries out for this Court's intervention, as does the fact that the Bank *cannot* obtain a fair trial if it is barred from presenting evidence in response to plaintiffs' claims regarding the Saudi Committee. This Court should grant the petition to rectify this "clear and

important error" before it is "allowed to taint the proceedings remaining before final judgment." Wright & Miller, *supra*, § 3935.7, at 770.

**Exclusion Of Other Vital Evidence**. The district court also excluded other expert and fact evidence vital to the Bank's defense. For example, it excluded Jonathan Benthall's testimony on the legitimacy of charities that plaintiffs allege are Hamas fronts, while admitting plaintiffs' conflicting expert testimony on those very groups. A302-A304. And it excluded Bank fact witnesses who, while serving as senior American diplomats, regularly interacted with the zakat committees that plaintiffs argue are Hamas fronts. A1-A6. The upshot of these exclusions is that the jury will hear, for example, that the U.S. designated a single Palestinian charity (among the 11 at issue) a terrorist entity in 2007—*after* the events in question—but not that the U.S. had vetted and funded that same charity during the period of the Bank's transactions with it. In conflict with the district court's ruling here, Judge Weinstein ruled that determining "whether the Bank provided material support to Hamas vis-a-vis *zakat* committees necessarily requires consideration of whether [they] were actually terrorist front groups." He therefore concluded that Benthall's "testimony will assist the jury in assessing the Bank's conduct and state of mind." *Gill*, 893 F. Supp. 2d at 540.

Judge Cogan also excluded the testimony of former Israel Defense Forces Commander Gadi Shamni, from whom the jury would have learned that he

personally directed an IDF investigation of the very same allegations that plaintiffs make here and found no evidence of support for or complicity with terrorism on the part of Arab Bank. See A461-A462; A4. The Bank cannot get a fair trial on plaintiffs' claims with such evidence excluded.

The district court excluded *all* Bank evidence regarding foreign banking laws governing the compliance practices of financial institutions. See A320-A321; A218-A221. This evidence is critical to the Bank's defense that it did not intend to assist terrorists. Judge Weinstein, by contrast, recognized that evidence of compliance with foreign law is highly probative of the Bank's state of mind: "[T]he jury will be aided by an explanation of the regulations under which the Bank operated," which "will help establish the Bank's state of mind in context." 893 F. Supp. 2d at 537-38.

The district court also excluded testimony from the Bank's industry experts, including a former Chief Counsel to the Comptroller of the Currency who described the compliance practices that responsible financial institutions followed during the time period at issue concerning anti-money laundering and anti-terror financing—while admitting plaintiffs' expert to testify on those same "industry standards and practices." Judge Weinstein ruled that testimony of the same Bank experts was admissible because "[t]estimony as to the content of banking industry

standards and practices—and the Bank's compliance with such standards and practices—will be valuable to a jury." *Gill*, 893 F. Supp. 2d at 537.

The practical upshot of these rulings is a blatant foreclosure of any fair defense. And the cumulative impact of the court's errors—a series of trials under an erroneous causation standard, improper consolidation of disparate claims, and exclusion of the Bank's exculpatory evidence—demands immediate review.

## III. A POST-JUDGMENT APPEAL WOULD COME TOO LATE TO AVOID IRREPARABLE HARM.

The district court's errors on causation, consolidation, and admissibility of critical evidence cannot practicably be corrected on appeal after final judgment. The series of liability trials, followed by damages proceedings, entails a lengthy delay between any liability verdict and final judgment. See A323, A184, A193-A194. An adverse jury verdict will immediately and irreparably harm the Bank. As Jordan formally told this Court, it would "stigmatize the Bank" as a terrorist accomplice, causing depositors to flee and "correspondent banks" to "cease doing business with it." A442; see also A448 (Union of Arab Banks describing "the dizzying magnitude of potential collateral consequences" from an ATA judgment). Such an assault on "reputation and goodwill can constitute irreparable injury" (*United Healthcare Ins. Co. v. Advance PCS*, 316 F.3d 737, 741 (8th Cir. 2002)), which cannot be undone by a later victory on appeal. See *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) (reversing wrongful conviction, after company

was driven out of business, due to improper jury instruction). The Bank should have the opportunity to obtain appellate guidance before being forced into an immensely consequential series of trials under erroneous standards and a trial structure that deprives it of its due process right to an effective defense.

Immediate review is warranted to ensure "supervisory control" of the district courts and provide "necessary guidelines" on these important issues of law. *La Buy*, 352 U.S. at 259; *Schlagenhauf*, 379 U.S. at 111-12. Such guidelines are urgently needed given the "strong public interest in expeditiously deciding the issues presented" (*In re Austrian & German Holocaust Litig.*, 250 F.3d 156, 163 (2d Cir. 2001)), the "gravity of the issue[s]" (*U.S. v. Lasker*, 481 F.2d 229, 235 (2d Cir. 1973)), and the "extraordinary size and complexity" of this case (*Asbestos Sch. Litig.*, 46 F.3d at 1296). Allowing such inflammatory claims to proceed to trial against a U.S. ally's leading financial institution—under an erroneous causation standard, with disparate claims erroneously consolidated for a single trial, and with the Bank's defenses gutted by improper evidentiary exclusions—would have serious repercussions for international comity as well as due process.

## CONCLUSION

This Court should issue a writ of mandamus. Because trial is set for January 2014, the Bank requests that the petition be considered on an expedited basis.

Dated: August 29, 2013 Respectfully submitted.

s/ Stephen M. Shapiro

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## CERTIFICATE OF SERVICE

The undersigned certifies that on August 29, 2013, he served the foregoing Petition for Writ of Mandamus, as well as the Appendix thereto, on the following:

By UPS Overnight Express

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