

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

KINDHEARTS FOR CHARITABLE)
HUMANITARIAN DEVELOPMENT, INC.,)
Plaintiff,)
)
v.)
)
HENRY M. PAULSON, in his official capacity as)
the Secretary of the Treasury, ADAM SZUBIN, in)
his official capacity as the Director of the Office of)
Foreign Assets Control, and MICHAEL B.)
MUKASEY, in his official capacity as the Attorney)
General of the United States,)
Defendants.)
)

Civil Action No: 3:08-cv-2400
Judge James G. Carr

**DEFENDANTS’ MEMORANDUM IN OPPOSITION TO PLAINTIFF’S MOTION
FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT’S MOTION
TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

ATTACHMENT A

Declaration of Adam Szubin

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

KINDHEARTS FOR CHARITABLE
HUMANITARIAN DEVELOPMENT, INC.,

Plaintiff,

v.

HENRY M. PAULSON, in his official capacity
as the Secretary of the Treasury,
ADAM J. SZUBIN, in his official capacity as the
Director of the Office of Foreign Assets Control,
and MICHAEL B. MUKASEY, in his official
capacity as the Attorney General of the
United States,

Defendants.

Civil Action No. 3:08-CV-02400
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DECLARATION OF ADAM J. SZUBIN

I, Adam J. Szubin, pursuant to 28 U.S.C. § 1746, declare the following under penalty of perjury:

1. I am the Director of the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") and have held this position since September 3, 2006. Prior to becoming OFAC Director, I served as the Senior Advisor to the Under Secretary of the Treasury, Office of Terrorism and Financial Intelligence, a position I assumed in August 2004. Before joining the Treasury Department, I served as Counsel to the Deputy Attorney General, coordinating the U.S. Department of Justice's efforts to combat terrorism financing. Prior to assuming that position, I was a Trial Attorney in the Civil Division of the Department of Justice.

2. I am familiar with the mission and operations of OFAC. I am also familiar with OFAC's blocking pending investigation of the property of KindHearts for Charitable Humanitarian

Development, Inc. (“KindHearts”) and OFAC’s provisional determination to designate KindHearts as a Specially Designated Global Terrorist (“SDGT”). I make this declaration based upon information within my personal knowledge or provided to me in my official capacity.

OFAC’s Mission and Authority

3. OFAC is the office principally responsible for administering U.S. economic sanctions programs. These programs are primarily directed against foreign states and nationals, including sponsors and supporters of global terrorism, to further U.S. foreign policy and national security goals. Pursuant to authority delegated by the President to the Secretary of the Treasury, OFAC acts under Presidential national emergency powers, as well as under authority granted by specific legislation, to impose controls on transactions and to freeze, or “block,” certain property in which any foreign country or foreign national has any interest that is within the United States or in the possession or control of U.S. persons.

4. OFAC currently administers over 20 economic sanctions programs against foreign governments, entities, and individuals. OFAC administers, *inter alia*, sanctions programs relating to Iran, Sudan, Burma, and Cuba. Several of OFAC’s other sanctions programs, including those relating to Syria, Lebanon, Iraq, Zimbabwe, the Western Balkans, the former Liberian Regime of Charles Taylor, the Democratic Republic of the Congo, and Cote D’Ivoire, are “list-based” programs, affecting members of government regimes and other selected individuals and groups whose activities threaten or conflict with U.S. national security and foreign policy interests. OFAC also implements list-based sanctions programs against narcotics traffickers and kingpins; terrorism-related governments, entities, and individuals; and proliferators of weapons of mass destruction and their supporters.

5. As Director of OFAC, I am responsible for the implementation, administration, and enforcement of such economic sanctions programs. These responsibilities include enforcement of blocking orders to ensure the segregation and safeguarding of blocked property, as well as enforcement of certain restrictions on trade and financial transactions.

Blockings under IEEPA and UNPA

6. The International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (“IEEPA”), grants the President a broad spectrum of powers to deal “with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.” 50 U.S.C. § 1701(a). The President typically exercises these IEEPA powers through Executive orders that declare a national emergency and impose economic sanctions to address the emergency.

7. Section 5 of the United Nations Participation Act, 22 U.S.C. § 287c, grants the President the authority to apply certain measures that the United States has been called upon to apply by the United Nations Security Council. This authority includes the power to “investigate, regulate, or prohibit, in whole or in part, economic relations . . . involving property subject to the jurisdiction of the United States.” 22 U.S.C. § 287c(a). As with IEEPA, the President typically exercises his UNPA powers through Executive orders. Often, a single Executive order will be based on authority derived from IEEPA and the UNPA, as well as other sources.

8. In addition to identifying a particular threat in an Executive order, the President also may identify for sanctions specific entities and individuals who pose or contribute to the threat in the Executive order, and the President may set forth standards pursuant to which additional entities and individuals may be designated for sanctions. The President typically delegates the task of

identifying, or “designating,” such additional entities and individuals to a cabinet official, usually the Secretary of the Treasury, in consultation with other cabinet officials such as the Secretary of State and Attorney General. Those who are determined to meet these standards are “designated” and thus made subject to the Executive order’s restrictions. Typically, such a designation results in the blocking of any property or interest in property of the designated person that is in the United States or in the possession or control of a U.S. person.

9. An Executive order that blocks property constitutes the legal framework of a typical economic sanctions blocking program. In practice, such orders require holders of blocked property to freeze that property, including bank accounts, in their possession or control at the time of the order, as well as property that later comes into the holders’ possession. Blocking actions are not permanent and do not constitute a forfeiture or seizure of assets.

10. The property and property interests blocked pursuant to an Executive order may not be transferred, withdrawn, exported, paid, or otherwise dealt in by U.S. persons without OFAC’s prior authorization. As noted above, the blocking of a sanctioned foreign country’s or a designated person’s property encompasses the country’s or person’s property “interests.” OFAC interprets the term “interest” to include a property interest of any nature whatsoever, direct or indirect. See, e.g., 31 C.F.R. § 594.306 (Global Terrorism Sanctions Regulations). The blocking of the country’s or designated person’s property may affect property beyond that in the name or possession of the country or designated party – it extends as a matter of law to all property in the United States, or in the possession or control of U.S. persons, wherever they may be located, in which the country or designated party has any property interest whatsoever. Given this scope, bank accounts and other assets of potentially many others beyond the sanctioned party may also be blocked upon the designation, and the active participation and support of holders of blocked

property – in particular banks and other financial institutions – is crucial to the efficacy of the blocking. Many times, property that was not known at the time of blocking – and this is particularly the case with assets that are held in bank accounts of undesignated U.S. persons – will be discovered by banks and other financial institutions in the course of business and subsequently blocked.

11. The prohibition against dealing in property of a designated person serves important objectives, such as depriving the designated person of the benefit of the property that might otherwise be used to further ends that conflict with U.S. interests. Blocking property of designated terrorists and their supporters prevents its possible use in the orchestration, assistance, or support of unlawful and dangerous global terrorist plots. Blocking also allows for the preservation of assets for possible legal judgments and the preservation of the President's ability to use the blocked property as a bargaining chip or negotiation tool in resolving the national emergency that gave rise to the blocking. Blocking of a designated person's property is important even when the amount of assets is small because even small amounts of money can have deadly consequences in the hands of a terrorist organization.

12. OFAC typically does not provide prior notice of a pending investigation or impending blocking action and generally considers its target list of prospective designees under Executive order (E.O.) 13224 as classified information. If persons were to learn that they are the subject of an ongoing sanctions investigation, there is a significant risk that they would transfer, hide, sell, or destroy property that could be blocked; destroy or alter records relevant to the investigation; or otherwise frustrate or obstruct the investigation before the sanctions investigation, and the potential blocking of property, could be completed. Such an outcome would frustrate OFAC's law enforcement efforts.

13. Pursuant to IEEPA-based sanctions programs, OFAC asserts jurisdiction over U.S. persons wherever located in the world, including within the territory of the United States. These sanctions programs typically prohibit U.S. persons from dealing in or conducting transactions in blocked property. The term “person” includes both individuals and corporate entities.

14. A person’s status as a U.S. person does not exempt it from designation. If U.S. persons were deemed immune from designation, sanctioned countries and persons could shield property in which they had a beneficial interest from blocking by transacting their business through “untouchable,” complicit U.S. persons, thereby severely undercutting the sanctions program.

15. In certain instances, OFAC may use its authority to license certain transactions that otherwise would be prohibited, when doing so would further U.S. policy. OFAC regularly promulgates in its regulations what are known as “general licenses” authorizing certain categories of otherwise prohibited activity, and it grants specific licenses on a case-by-case basis. *See* 31 C.F.R. § 501.801. In its blocking notices, OFAC explains that it will consider license requests for use of blocked funds to pay costs such as living expenses, attorneys’ fees, and corporate operating costs. In addition, OFAC may license blocked parties to access their blocked documents under supervision. Because no two sanctions programs are exactly alike, and because applicants often present unique circumstances, OFAC considers such applications on a case-by-case basis in light of all facts presented, consistent with U.S. national security and foreign policy. OFAC does not guarantee that any particular license request will be granted.

16. OFAC provides a mechanism for a designated party to challenge its designation and for any person to challenge the blocking of its property. Adversely affected parties may submit arguments or evidence to challenge the basis for the blocking, to assert that the circumstances resulting in the designation no longer apply, or to assert mistaken identity. 31 C.F.R.

§§ 501.806-807. Any relevant information submitted by a designated party is considered by OFAC in making a determination with respect to such a challenge. OFAC has de-listed designated parties based upon new information provided by a designated party, most often in cases when the party has demonstrated a change in circumstances.

Executive Order 13224

17. After the September 11, 2001 attacks at the New York World Trade Center, in Pennsylvania, and against the Pentagon, the President issued Executive order 13224 of September 23, 2001 (“E.O. 13224”).¹ E.O. 13224 blocks all property and interests in property within the United States or in the possession or control of U.S. persons, including foreign branches, in which there is an interest of any person listed in the Annex to the order or subsequently determined to be subject to the order.

18. E.O. 13224 delegates to the Secretary of State the power to designate “foreign persons” who are found “to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States.” E.O. 13224, § 1(b). E.O. 13224 authorizes the Secretary of the Treasury to designate those persons, whether foreign persons or U.S. persons, who are “owned or controlled by,” or that “act for or on behalf of,” designated persons; those who “assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of . . . acts of terrorism or” designated persons; and those who are “otherwise associated with” designated persons. E.O. 13224, §§ 1 (c)-(d); *see also* 31 C.F.R. § 594.316 (2007) (defining “otherwise associated with”).

¹ E.O. 13224, “Blocking Property and Prohibiting Transactions with Persons who Commit, Threaten to Commit, or Support Terrorism,” 66 Fed. Reg. 49079 (Sept. 25, 2001).

19. I have been authorized to take any action that the Secretary of the Treasury is authorized to take pursuant to E.O. 13224. *See* 31 C.F.R. § 594.802.

Blocking Pending Investigation

20. Under IEEPA, OFAC also has the authority to effectuate blockings “during the pendency of an investigation.” *See* 50 U.S.C. § 1702(a)(1)(B). As discussed below, there are some distinguishing characteristics between designating a party and blocking its property during the pendency of an investigation. First, a designation occurs when OFAC has reason to believe that a party meets the criteria set forth in an Executive order for posing a specified threat to U.S. interests; when OFAC blocks the property of a designation target during the pendency of an investigation, it is in the process of determining whether a party meets the test and should be designated. Accordingly, in order to block pending investigation, OFAC must be pursuing an investigation based upon a reasonable basis to suspect that the individual or entity meets the E.O. criteria. Second, a blocking during the pendency of an investigation is a tool used to address some exigency or risk relating to a party under investigation and therefore the scope of property affected can vary on a case-by-case basis. Finally, a blocking during the pendency of an investigation may be of a shorter duration, although it will depend on the amount of time required to complete a particular designation investigation.

21. One obstacle to OFAC and other U.S. government investigations is the ability of complex networks to shift assets to avoid detection, whether by formal transactions to offshore financial institutions or less formal methods. The flexibility of the power to block during the pendency of an investigation is especially important when OFAC has reason to believe that an entity under investigation has or will attempt to hide or divert account funds or to shield or destroy records before the conclusion of the investigation. In deciding the degree to which an entity under

investigation should be blocked during the pendency of the investigation, OFAC weighs the need to minimize disruption to the entity with the need to ensure that no harm results from that entity's operations. In appropriate circumstances, OFAC also must take steps to preserve documents and materials necessary to the investigation. Accordingly, the blocking during the pendency of an investigation is usually tailored to meet the immediate needs of the situation, which may involve unusual risk or exigency.

22. A blocking during the pendency of an investigation is meant to be a temporary measure, intended to last for the period of time necessary to determine whether sufficient information exists to designate. Such an investigation may result in a range of action, from a formal designation to the lifting of the blocking order.

23. When OFAC determines to designate a person whose assets have previously been blocked pending investigation, the risks of asset flight and destruction of records are mitigated by the blocking pending investigation, so OFAC generally provides the blocked person with an opportunity to be heard before the potential designation is effected. If the party wishes to take advantage of that opportunity, the party is provided with the unclassified and non-privileged portion of the record upon which OFAC is relying, and invited to submit a written response and any evidence or other information it wishes OFAC to consider in making a final determination as to whether designation is appropriate. OFAC considers such submissions and may ask follow-up questions. If OFAC decides to go forward with designation, written notice is provided.

Treasury's Designation Process

24. OFAC's process of designating individuals or entities appropriate for sanctions begins with an extensive investigation. Such investigations draw on a broad range of information, including both publicly available and non-publicly available information (such as privileged or

classified information), and involve consideration of both inculpatory and exculpatory information. In cases where the assets of the target of the designation investigation have been blocked pending investigation, OFAC will also consider any additional information submitted by the target following the blocking action.

25. Once the evidence is collected, Treasury staff draft an evidentiary memorandum summarizing the information acquired through their investigation. After an evidentiary package has been reviewed within OFAC, it is then reviewed for legal sufficiency by Treasury's attorneys. Based on that legal review, the analyst or investigator may engage in further investigation and revise the package to address any legal concerns. The Department of Justice also provides legal review of evidentiary packages under E.O. 13224.

26. Certain Executive orders, such as E.O. 13224, direct that designations by the Departments of the Treasury and State be undertaken in consultation with one another, as well as in consultation with the Department of Justice and other relevant agencies.² This interagency process helps to ensure that Treasury's and State's proposed designations are consistent with the operational and policy interests of other agencies, as well as with the strategic national security and foreign policy goals of the United States. Once this interagency process has been completed, the final evidentiary package is presented for signature by the Director of OFAC pursuant to authority delegated from the Secretary of the Treasury.

27. At the time of designation, OFAC makes a good faith effort to provide the designated party with an explanation of the effect of the designation, as well as information on procedures to seek a license or challenge the designation. A designated party may seek to have its designation or blocking rescinded by filing a petition pursuant to 31 C.F.R. § 501.807. A party seeking to

² E.O. 13224, as amended by Executive Order 13284, requires consultation among the Secretaries of the Treasury, State, and Homeland Security, as well as the Attorney General.

challenge a designation or blocking may submit to OFAC in writing arguments and evidence showing why an insufficient basis exists for the designation or why the circumstances resulting in the designation no longer apply. After OFAC has conducted a review of the request for reconsideration, it will provide a written decision to the designated person. In addition to this procedure, as noted in paragraph 23, above, OFAC provides a person or entity whose property has been blocked pending investigation with an opportunity to be heard before the potential designation is finalized, and may determine not to go forward with a designation on the basis of the blocked person's response.

U.S. Government Strategy vis-à-vis Terrorist Financing

28. Since the events of September 11, 2001, the U.S. Government has launched an intensive campaign to track and target terrorist financing, drawing on a wide range of agencies, authorities, and resources. Studying these asset flows is valuable in its own right, as financial data provides a rich source of information as to the identities, operations, methodologies, and locations of terrorist operatives and networks. The U.S. Government draws upon a range of tools to disrupt terrorist financing channels and networks, including diplomatic action, sanctions, law enforcement, and covert activities. Past efforts have yielded concrete gains, straining terrorist organizations, forcing covert cells to adopt riskier tactics, and, in some instances, rendering terrorists unable to proceed with potentially deadly attack plans.

29. Terrorist groups raise, move, and store their monies using a range of opaque and sometimes complex techniques and methods. One method, which has been relied upon in particular by al Qaida-related groups and Hamas,³ is the abuse of charities. Charities have

³ Hamas was designated as a Specially Designated Global Terrorist by the Secretary of State on October 31, 2001. See Designations of Terrorists and Terrorist Organizations Pursuant to Executive Order 13224 of September 23, 2001, 67 Fed. Reg. 12,633 (March 19, 2002).

proven to be an attractive conduit for terrorist groups for a number of reasons. Among these are the following:

- The guise of international charitable work provides excellent “cover” for the movement of funds, personnel, and even military supplies to and from high-risk or conflict areas in which terrorists operate.
- Charitable donations are the rare money transfers that move without a corresponding return of value; accordingly, large transfers can move in a single direction without necessarily arousing suspicion.
- Corrupted charities can attract large numbers of unwitting donors along with the witting, thus increasing the funds available to terrorists.
- To the extent that funds of these charities reach bona fide recipients, the charities benefit from public support and an attendant disinclination by many governments to take enforcement action against them.
- The “legitimate” activities of these charities, such as the operation of schools, religious institutions, and hospitals, can allow terrorists to generate support for their causes and to propagate extremist ideologies.

See Testimony of Stuart Levey, Under Secretary of the Treasury, Senate Committee on Banking, Housing, and Urban Affairs, July 13, 2005, available at <http://www.treas.gov/press/releases/js2629.htm>.

30. The U.S. Government has deployed a number of tools to stem terrorist abuse of charities. It has conducted extensive outreach to the charitable sector and issued best practices and other guidance to raise public awareness of the ongoing threat that terrorist organizations present to the charitable sector and to help both charities and donors protect themselves against terrorist abuse. When it has discovered charities that are acting on behalf of or supporting terrorist organizations, the U.S. Government has pursued a range of actions, including domestic designation under E.O. 13224, submission for worldwide designation before the United Nations, and law enforcement action. To date, the United States has publicly designated more than thirty charitable organizations for their support to terrorist organizations, in the service of terrorist

groups including al Qaida, Hizballah, Hamas, and Palestinian Islamic Jihad. *See* “Protecting Charitable Organizations,” available at <http://www.treas.gov/offices/enforcement/key-issues/protecting/index.shtml>.

31. Among these designated organizations are the Hamas-affiliated Holy Land Foundation for Relief and Development (“HLF”) and the al Qaida-affiliated Global Relief Foundation (“GRF”). GRF’s assets were blocked pending investigation on December 14, 2001, and it was designated as an SDGT on October 18, 2002. At the time of its designation, OFAC determined that GRF had connections to, had provided support for, and had provided assistance to Usama Bin Ladin, the al Qaida Network, and other known terrorist groups. *See* GRF Press Release available at <http://www.treas.gov/press/releases/docs/gurule.pdf>. HLF was designated as an SDGT on December 4, 2001. Headquartered in Richardson, Texas, HLF raised millions of dollars annually for use by Hamas and supported Hamas activities through direct fund transfers to HLF offices in the West Bank and Gaza that are affiliated with Hamas and transfers of funds to Islamic charity committees (“zakat committees”) and other charitable organizations that are part of Hamas or controlled by Hamas members. *See* HLF Press Release available at <http://www.treas.gov/press/releases/po841.htm>. The HLF and GRF designations were upheld by the U.S. Court of Appeals for the D.C. Circuit and U.S. District Court for the Northern District of Illinois, respectively.

OFAC’s Blocking of KindHearts’ Assets Pending Investigation and Investigation of KindHearts

32. On February 19, 2006, OFAC issued an order blocking all property and interests in property of KindHearts, including its U.S. representative office and all offices worldwide, pending investigation into whether KindHearts was subject to designation pursuant to Executive Order 13224 for “being controlled by, acting for or on behalf of, assisting in or providing

financial or material support to, and/or otherwise being associated with Hamas.” *See* Blocking Notice, AR1. The blocking of KindHearts’ property pending investigation was intended to prevent asset flight and the destruction of documents during the pendency of OFAC’s investigation. These risks were expected to intensify in light of other overt law enforcement actions against KindHearts that also took place on that date.

33. Unclassified evidence available to the Director of OFAC at the time of the blocking action established a reasonable basis to believe the following:

KindHearts Was the Successor to HLF and GRF

a. Following the December 2001 law enforcement and asset freeze actions against GRF and HLF, former GRF official Khaled Smaili established KindHearts from his residence in January 2002. Smaili founded KindHearts with the intent to continue fundraising efforts of both HLF and GRF, aiming for the new organization to fill a void caused by the closures. A number of KindHearts’ leaders and fundraisers previously held leadership or other positions with HLF and GRF.

KindHearts Provided Support to Hamas in Lebanon

b. KindHearts officials and fundraisers have coordinated with Hamas leaders and made contributions to Hamas-affiliated organizations. Specially Designated Global Terrorist (SDGT) Usama Hamdan, a leader of Hamas in Lebanon, reportedly phoned a top fundraiser for KindHearts during a September 2003 KindHearts fundraiser. During the call, Hamas leader Hamdan reportedly communicated to the fundraiser his gratitude for KindHearts’ support. The KindHearts fundraiser reportedly also provided advice to Hamdan, telling him not to trust the United Nations.

c. Information developed from abroad corroborates connections between KindHearts and Hamas in Lebanon. As of late December 2003, KindHearts was supporting Hamas and other Salafi groups in the Palestinian refugee camps in Lebanon. Haytham Fawri was identified as a KindHearts official who reportedly collected funds and sent them to Hamas and other Salafi groups. Haytham Fawri is believed to be a reference to Haytham Maghawri, who has served as KindHearts' manager in Lebanon, and was one of a number of HLF officials indicted by a federal grand jury in Dallas, Texas, on charges of providing material support to Hamas.⁴ From 1998 -2000, during his tenure as Social Services Director for the HLF, Maghawri approved fifty wire transfers by the HLF in the amount of \$407,512, to nine zakat committees owned, controlled, or directed by Hamas.

d. According to information available to the U.S. government, KindHearts began working secretly and independently in the camps in Lebanon after the closure of the offices of the Sanabil Association for Relief and Development (Sanabil), a Hamas-affiliated entity in Lebanon that was designated an SDGT by OFAC in August 2003. KindHearts reportedly attempted to maintain distance from Hamas to avoid drawing attention to its support for the terrorist organization. In early 2003, KindHearts president Smaili complained that scrutiny by U.S. law enforcement and intelligence officials was making it almost impossible for KindHearts to assist Hamas.

e. Between July and December 2002, KindHearts sent more than \$100,000 to the Lebanon-based Sanabil, according to information available to the U.S. government. Financial

⁴ The first criminal trial of various HLF officials ended in the acquittal of el-Mezain on most counts and a mistrial on all other counts. The re-trial resulted in the conviction of HLF officials Ghassan Elashi, Shukri Abu-Baker, Mufid Abdulqader, Abdulrahman Odeh and Mohammad el-Mezain on all remaining counts. Mr. Maghawri remains a fugitive.

investigation revealed that between February 2003 and July 2003, KindHearts transferred over \$150,000 to Sanabil. KindHearts deposited the funds into the same account used by HLF when it was providing funds to the Hamas-affiliated Sanabil, according to FBI analysis.

KindHearts Provided Support to Hamas in the West Bank

f. In addition to providing support to Hamas in Lebanon, KindHearts reportedly provided support to Hamas in the West Bank. An individual identified as integral to assisting KindHearts to deliver aid to Palestinians in the West Bank, also reportedly was responsible for dividing money raised by KindHearts in the United States to ensure that some funds went to Hamas. KindHearts founder and president Smaili told a Texas-based associate that his organization was raising funds to support the Palestinian Intifada.

KindHearts Cooperated with a U.S.-Based Hamas Leader

g. Mohammed el-Mezain, who coordinated KindHearts' fundraising, is a former HLF official convicted by a federal jury in Dallas, Texas, on charges of providing material support to Hamas.⁵ Information indicates that Hamas' top leader worldwide, Khalid Mishaal, identified el-Mezain as the Hamas leader for the United States. At the time, Mishaal advised that all financial contributions to Hamas from individuals in the United States should be channeled through el-Mezain.

h. Following the closure of HLF, U.S.-based Hamas leader el-Mezain transferred his fundraising skills to Kindhearts. El-Mezain assisted other KindHearts senior leaders in coordinating KindHearts' fundraising strategy. During a 2003 conference, KindHearts leaders, including Smaili, met with el-Mezain to discuss KindHearts fundraisers. The leaders

⁵ At the time of the blocking action, Mr. el-Mezain had been indicted on these charges. He was acquitted of several charges at the first trial but was convicted of one count on November 24, 2008. *See supra* n. 4.

concluded that there would be only two fundraising dinners for KindHearts in September 2003 and, thereafter, all fundraising efforts would target Friday prayers at mosques and Islamic centers throughout the U.S.

i. At a September 2003 KindHearts fundraising event, a KindHearts fundraiser spoke and encouraged the crowd to appreciate the efforts of the terrorist group Hizballah in supporting Hamas. The fundraiser then encouraged the crowd to give money and manpower as support against Israel. El-Mezain also spoke at this KindHearts fundraiser, encouraging people to donate to KindHearts.

j. In October 2003, el-Mezain spoke at an event held in Baton Rouge, Louisiana, where \$500,000 was pledged. Though el-Mezain's speech reportedly focused almost entirely on raising funds for a new mosque in Baton Rouge, information available to the U.S. government demonstrates that only a small amount was to be retained locally and the vast majority was to be sent to Hamas overseas.

See Summary of Unclassified Information Supporting the Blocking Pending Investigation of KindHearts, AR1280-82⁶ The Treasury Department also included this information, in substantially similar form, in the press release announcing the blocking action. *See* <http://www.treas.gov/press/releases/js4058.htm>. OFAC also relied upon other unclassified and non-privileged information, as well as classified and privileged information, in determining to block KindHearts' assets pending investigation.

34. The February 19, 2006 blocking notice that OFAC served upon KindHearts indicated that OFAC had blocked pending investigation any and all property in which Kindhearts has an

⁶ This document was included in the non-privileged, unclassified administrative record provided to KindHearts in support of OFAC's provisional determination to designate KindHearts as an SDGT. *See* ¶ 36, *infra*.

interest, direct or indirect, that is in or hereafter comes within the United States or that is or hereafter comes within the possession or control of United States persons. *See* AR1-4. The notice explained that, pursuant to E.O. 13224 and IEEPA, any transfer, withdrawal, export, payment, or other dealing in KindHearts' blocked financial assets was prohibited without OFAC's prior authorization. *Id.* The notice further explained to Kindhearts the applicable procedures should the organization believe that the blocking action was taken in error, as well as procedures to apply for a specific license from OFAC authorizing specific transactions in blocked property. *Id.*

35. Following the February 19, 2006 blocking action, OFAC and other agencies within the United States Government continued to work diligently to review (1) additional unclassified material; (2) additional classified information; and (3) correspondence between OFAC and Kindhearts, in determining whether to designate KindHearts as an SDGT pursuant to E.O. 13224 and IEEPA. Since the blocking action, OFAC has been in regular communication with KindHearts and its counsel regarding licensing and other issues related to the blocking.

36. On May 25, 2007, OFAC informed KindHearts, through its counsel, that it had completed its investigation into whether KindHearts should be designated as an SDGT and had provisionally determined that designation was appropriate. *See* AR1557-58. OFAC provided KindHearts with the unclassified, non-privileged documents upon which OFAC relied in making this provisional determination. OFAC also informed KindHearts that OFAC had additionally relied upon other classified and privileged documents that were not authorized for disclosure to Kindhearts, including material obtained or derived pursuant to the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 *et seq.* The notice informed KindHearts that it could present to OFAC any evidence or other information that KindHearts wished OFAC to consider in

making the final determination as to whether to designate KindHearts. KindHearts was provided 30 days in which to submit any such information. The notice also informed KindHearts that, should OFAC decide to consider any additional unclassified, non-privileged information in making the final determination, it would so advise KindHearts, provide KindHearts with copies of the documents, and give KindHearts an opportunity to respond to them.

37. On June 14, 2007, counsel for KindHearts requested an extension of time to August 15, 2007, to respond to OFAC's May 25, 2007 letter. AR1559-61. OFAC granted that extension on June 25, 2007. On that same date, counsel for KindHearts provided OFAC with a preliminary response to OFAC's May 25, 2007 letter. As discussed below, KindHearts requested that the U.S. government perform declassification review of all classified information in the administrative record supporting OFAC's provisional determination to designate KindHearts. As a result, OFAC orally granted KindHearts a further extension of time to provide a final response to OFAC's May 25, 2007 letter until 30 days following release of any declassified documents as a result of the declassification review requested by KindHearts.

KindHearts' Request for Access to Classified Information and Declassification Review

38. KindHearts' June 14, 2007 letter also requested that OFAC provide counsel to KindHearts with the entire classified and unclassified administrative record supporting OFAC's provisional determination to designate KindHearts as an SDGT. AR1559-61. Counsel to KindHearts reiterated this request in a letter dated June 27, 2007, and further requested that (1) OFAC grant counsel to KindHearts security clearances so that they could review the classified administrative record; and (2) OFAC submit all classified information in the administrative record for declassification review.

39. On August 10, 2007, OFAC responded to KindHearts' requests for access to classified information and for a declassification review of the classified portions of the administrative record supporting OFAC's provisional determination to designate KindHearts as an SDGT. AR1614-15. OFAC denied KindHearts' request that its counsel be permitted access to the classified portion of the administrative record, explaining that KindHearts had no legal basis for obtaining or acquiring access to classified information in this matter. *Id.* OFAC granted KindHearts' request for a declassification review and stated that it would notify KindHearts' counsel when the review was completed and provide Kindhearts with any information that was declassified pursuant to the review. *Id.* Because such a review required OFAC to refer all classified documents in the administrative record to the originating agencies for line-by-line review, to include obtaining approval from any foreign liaison partners whose information may have been included, OFAC anticipated that the review requested by KindHearts could be lengthy and explained to KindHearts that it was not possible for OFAC to provide a date certain for completion of the review. *Id.*

40. OFAC subsequently granted KindHearts an extension of time to respond to OFAC's March 25, 2007, letter until 30 days after the results of the pending declassification review were provided to KindHearts. This extension was provided in order to grant KindHearts the opportunity to respond to any newly declassified material that may be provided to it as a result of the review.

41. On June 25, 2007, KindHearts submitted a "preliminary" response to the provisional determination to OFAC by facsimile. OFAC will consider KindHearts' submission, as well as any additional timely submission(s) KindHearts makes in the future. OFAC, however, has been unable to locate the attachments referenced in KindHearts' submission (supposedly stamped KH

1-1369). On December 12, 2008, OFAC received a CD-ROM containing documents stamped KH 1-1369. OFAC is in the process of reviewing this submission and plans to consider these materials as part of the administrative record for the designation proceeding.

42. In December 2007, the Treasury Department referred all classified documents in the administrative record supporting the provisional determination to designate KindHearts to their originating agencies for declassification review. Such review requires a line-by-line consideration of voluminous information by the particular individuals familiar with each of the relevant documents and facts, and can thus be a time-consuming process. In addition, declassification review may also require consultation with other agencies – in the U.S. government or beyond – whose information is included in the document. In order to narrow and thus expedite the declassification review process, Treasury analysts reviewed the documents at issue and identified the portions of the documents considered by OFAC in reaching its provisional determination to designate KindHearts. This information included document identifying information, information regarding the source of the information set forth in the documents, and the substantive information which OFAC was considering. All non-pertinent portions of the documents at issue were excluded from OFAC's request so as to expedite the declassification review process and redacted from the documents sent to the originating agencies. The originating agencies were requested to review the un-redacted information to determine whether that information remained properly classified.

43. The final interagency response to OFAC's request for declassification review was received by OFAC on September 8, 2008. The review resulted in the declassification of certain relevant information. Upon receipt of the final response, the Treasury Department reviewed the newly declassified information to assemble a releasable version of the exhibits at issue for

provision to KindHearts. The Treasury Department also reviewed the information to determine whether portions of the classified evidentiary memorandum supporting the provisional determination to designate KindHearts that reference the newly declassified documents might now be released. This process required line-by-line review by the Treasury analyst that prepared the evidentiary memorandum, and painstaking care to ensure that classified information is not inadvertently disclosed. As a result of this review, additional declassified material, as well as a redacted copy of the evidentiary memorandum, was provided to KindHearts on December 12, 2008.

44. As noted above, OFAC had previously agreed to provide KindHearts 30 days from the date of the release of this material to provide its final response to OFAC's May 25, 2007 letter. On October 16, 2008, OFAC extended KindHearts' response date to a date 60 days from the date of release of this material. OFAC will consider granting additional reasonable requests for extensions of time, should KindHearts request them.

45. In light of the recent Holy Land Foundation trial and convictions, OFAC is also considering the inclusion of additional information in the record. KindHearts will either be provided with any unclassified, non-privileged information added to the record, or informed that OFAC is not relying upon any such additional information. At that time, KindHearts will have 60 days to respond to OFAC's May 25, 2007 letter informing KindHearts of OFAC's provisional determination that designation is appropriate..

46. As communicated to KindHearts, OFAC will not proceed with a final designation of KindHearts until OFAC has provided KindHearts with any additional unclassified and non-privileged portions of the administrative record, given KindHearts an opportunity to respond to this information, and considered any additional information or arguments submitted to OFAC by

KindHearts in a timely manner. KindHearts' submissions to this Court will also be considered and incorporated into the administrative record prior to reaching a final decision on designation.

47. On November 6, 2008, after this lawsuit was filed challenging, *inter alia*, the blocking pending investigation, OFAC sought additional declassification review of eight classified documents that are part of the administrative record of the blocking pending investigation, but were not considered by OFAC with respect to the subsequent provisional determination to designate KindHearts. As Treasury analysts developed the record to support the provisional determination, these documents were not used because they were deemed to be redundant or because the information they contained was found to be no longer relevant to the designation determination. Accordingly, these documents were not included in the declassification review of the classified material supporting the provisional designation determination. Because the lawsuit challenges, *inter alia*, the blocking pending investigation, those documents are properly part of the administrative record before the court and have now been submitted for declassification review. The documents are still undergoing declassification review with the originating agency. The classified versions have been submitted to the Court. If additional information is declassified, the unclassified, unprivileged versions of those documents will be filed with the Court as a supplement to the administrative record.

KindHearts' Request for Access to Documents Seized by the U.S. Attorney's Office

48. On February 19, 2006, the same date that KindHearts' assets were blocked pending investigation, the Federal Bureau of Investigation, executing a search warrant obtained by the U.S. Attorney's Office for the Northern District of Ohio, conducted a search of KindHearts' office and the residence of Khaled Smaili in connection with a criminal investigation of KindHearts, and seized documents found in both locations. OFAC did not take possession of

any of the documents seized from those locations. Because of the blocking pending investigation, these documents, which are property in which KindHearts has an interest, are considered blocked property and subject to OFAC licensing jurisdiction. (OFAC issued a license to the Department of Justice to authorize transactions and dealings in the blocked documents.) Blocked documents such as business records of a blocked entity are potentially quite valuable to financiers of terrorism because such documents can include donor lists, fundraiser lists, donee information, including account numbers, procedures for avoiding detection, and other information of value.

49. The documents and other property seized from KindHearts are, to the best of my knowledge, in the custody of the U.S. Attorney's Office for the Northern District of Ohio. They are not in OFAC's custody or control. OFAC informed KindHearts, by letter dated March 23, 2006, to its then-counsel Jihad Smaili, that "[q]uestions regarding any criminal investigations related to KindHearts should be directed to the United States Attorney's Office for the Northern District of Ohio, United States Court House, 801 West Superior Avenue, Suite 400, Cleveland, Ohio 44113-1852." Letter from Acting Director Barbara C. Hammerle, March 23, 2006, attached as AR581-83.

50. Prior to making the provisional determination to designate KindHearts, in the interests of a thorough investigation, Treasury was given access to the paper documents that were seized pursuant to the search for approximately one week.⁷ Copies of eight of these documents were incorporated into the administrative record supporting OFAC's provisional determination to designate KindHearts as an SDGT. Copies of these documents were provided to KindHearts as part of the non-privileged, unclassified administrative record released to KindHearts on May 25,

⁷ Treasury had no opportunity to examine the full search take again until the U.S. Attorney's Office provided Treasury with the same electronic copy of the documents provided to Plaintiff.

2007. OFAC did not knowingly exclude any exculpatory information from the record. KindHearts responded to this release by requesting that OFAC provide counsel to KindHearts with all documents seized pursuant to the warrant. By letter dated August 14, 2007, to KindHearts' current counsel, attached as AR1618-19, OFAC confirmed that all seized records in OFAC's possession had been included in the unclassified, non-privileged administrative record that had been previously provided to KindHearts and reminded KindHearts that its request for access to all seized documents should be directed to the U.S. Attorney's Office. OFAC further noted that "[i]n the event that the United States Attorney's Office accedes to your request, OFAC will consider issuing a specific license to that office authorizing access to or release of copies of the records at issue under terms agreed upon by all parties." *Id.*

51. On December 26, 2007, in response to a request from KindHearts' counsel for authorization to obtain documents from former employees of KindHearts, OFAC issued a specific license authorizing KindHearts' counsel Bernabei & Wachtell, PLLC to receive copies of blocked documents and records of KindHearts, including from former employees and officials of KindHearts, necessary to provide legal services to KindHearts. The license also authorizes Bernabei and Wachtell, PLLC to attach such documents to pleadings.

52. OFAC's generally applicable blocked property reporting regulation, 31 C.F.R. § 501.603, requires U.S. persons that are in possession or control of blocked property to provide initial and annual reports regarding such property. *Id.* By letter dated December 26, 2007, OFAC confirmed to KindHearts' counsel that this reporting requirement applies to blocked documents in counsel's possession or control, but clarified that the reporting requirement does not require counsel to describe the contents of any blocked documents or records or to produce any of the

same to OFAC, or to identify the source from which counsel obtained copies of blocked documents. *See* AR1647-48.

53. It is my understanding that, on April 11, 2008, the U.S. Attorney's Office for the Northern District of Ohio released a DVD containing electronic copies of paper documents seized pursuant to the 2006 search of KindHearts' Toledo office. The use and handling of these documents is governed by a protective order issued by Magistrate Judge Vernelis T. Armstrong of the U.S. District Court for the Northern District of Ohio on April 9, 2008. The protective order was obtained by the U.S. Attorney's Office for the Northern District of Ohio, and is not based on OFAC's pending designation investigation. June 25, 2008, AUSA Ltr to Bernabei, AR1692. OFAC was not a party to the protective order proceedings.

54. On July 15, 2008, in light of the release of the DVD to Bernabei & Wachtell, PLLC, OFAC issued an amended specific license to Bernabei & Wachtell, PLLC. The amended license and accompanying cover letter clarified that: (1) the authorization contained in the December 26, 2007 license applied to documents received from the U.S. Government as well as those obtained from former employees or officers of KindHearts; (2) the authorization contained in the December 26, 2007 license applied to co-counsel; and (3) the authorization contained in the December 26, 2007 license permitted employees and officers of KindHearts to review blocked documents in connection with the provision of legal services to KindHearts. The amended license also added a condition requiring that any such review of blocked documents by current or former officers of KindHearts be conducted under the supervision of the counsel or their representatives. The cover letter transmitting the amended license made clear that the license does not excuse counsel to KindHearts from compliance with the April 9, 2008 protective order governing use and handling of documents released by the U.S. Attorney's Office for the

Northern District of Ohio, including to the extent that the protective order imposes conditions on the use of the documents that are more restrictive than those imposed by OFAC. The letter further made clear that counsel for KindHearts should address any concerns regarding the protective order to the U.S. Attorney's office or the court that issued the order.

OFAC's Policy Regarding Licenses for Payment of Attorney's Fees

55. OFAC has broadly authorized U.S. persons to provide certain legal services to persons who are designated as SDGTs, or whose assets are blocked pending investigation to determine whether they should be designated as an SDGT. *See* 31 C.F.R. § 594.506. Among the types of legal services authorized by the general license is “[r]epresentation of persons before any federal or state agency with respect to the imposition, administration, or enforcement of U.S. sanctions against such persons.” 31 C.F.R. § 594.506(a)(4). The general license provides, however, that “all receipts of payment of professional fees and reimbursement of incurred expenses must be specifically licensed.” 31 C.F.R. § 594.506(a).

56. Since 2006, OFAC has issued several licenses authorizing counsel to KindHearts to receive payment for the provision of legal services authorized pursuant to 31 C.F.R. 594.506, provided that such payments did not originate from a source within the United States or within the possession or control of a U.S. person, and that the payments were not made from a blocked account or blocked property. These include licenses authorizing the following:

- Authorizing Jihad Smaili, then counsel to KindHearts, to receive payment for legal services, dated March 23, 2006.
- Authorizing The Bernabei Law Firm, PLLC (now Bernabei & Wachtell, PLLC) to receive payment for legal services, dated July 17, 2006.
- An amended license permitting payment to be made to the Bernabei Law Firm PLLC from KindHearts' overseas assets, dated October 20, 2006.

- Renewing and amending the license granted to the Bernabei Law Firm PLLC to permit payment for additional legal services specified by the applicant and to reflect the applicant's change in name to Bernabei & Wachtell, PLLC.
- Authorizing David D. Cole of the Georgetown University Law Center to receive payment for legal services, dated October 20, 2006.
- Renewing authorization for David D. Cole of the Georgetown University Law Center to receive payment for legal services, dated June 4, 2008.
- Authorizing Fritz Byers, Esq., of Toledo, Ohio, to receive payment for legal services, dated June 26, 2008.

57. OFAC informed Mr. Smaili by letter dated March 23, 2006 that, upon receipt of the appropriate request and supporting information, it would consider authorizing KindHearts to establish a legal defense fund or funds to enable the channeling of non-blocked funds from U.S. persons for the purpose of supporting legal representation. OFAC similarly advised Bernabei & Wachtell PLLC and Professor David Cole of this option. To date, KindHearts and its counsel have not elected to avail themselves of this option.

58. Between March 2006 and June 2008, OFAC denied several requests from counsel to KindHearts for authorization to receive payment from KindHearts' blocked funds in the United States. At the time OFAC made these decisions regarding KindHearts' request to use blocked funds to pay attorneys' fees, it was OFAC policy not to permit the payment of attorneys' fees from blocked funds. That policy has recently been amended to provide for the payment of attorneys' fees from blocked accounts in limited amounts under specific circumstances.

59. The new policy provides for the issuance of specific licenses, on a case-by-case basis, to authorize the release of a limited amount of blocked funds for the payment of certain legal fees and costs incurred in seeking administrative reconsideration or judicial review of the designation of a U.S. person or the blocking of the property and interests in property of a U.S. person under the authority of Executive orders and regulations administered by OFAC *where alternative*

funding sources are unavailable. The specific elements of this policy are set forth in full at AR1704-06.

60. Among other elements, the policy establishes monetary limitations, patterned after the attorney compensation provisions of the Criminal Justice Act (CJA) and the Equal Access to Justice Act (EAJA), on the total amount of blocked funds that may be released at each stage of an administrative or judicial proceeding challenging a designation. OFAC may authorize the release of blocked funds for the payment of legal fees at a rate not to exceed \$125 per hour, up to a cap set for each stage of the administrative proceedings or litigation — \$7,000 per attorney, for up to two attorneys, for administrative proceedings; \$7,000 per attorney, for up to two attorneys, for district court litigation; and \$5,000 per attorney, for up to two attorneys, for appellate court litigation. The cap may be doubled in extraordinary cases. The policy does not impose any limit on the number of attorneys that may provide legal services to a designated person, or any limit on the number of attorneys that may be paid from blocked funds released under the policy. The policy merely calculates fee caps based on a maximum of two attorneys.

61. This policy is not intended to ensure complete compensation to counsel; instead, the policy is aimed at enhancing the ability of a designated person who lacks alternative access to funds to acquire legal representation in connection with his designation or the blocking of his property or interests in property. Limitations on the amount of funds released are necessary to preserve the President's authority and leverage in the conduct of foreign policy. Accordingly, in processing applications for specific licenses authorizing the release of blocked funds, OFAC will reduce the applicable caps on legal fees and costs payable from blocked funds by any amounts previously received from either fresh funds or a legal defense fund. Should additional fresh funds or legal defense funds be received after blocked funds are released and used for payment

of legal fees and/or costs, then such additional funds must first be deposited into a blocked account until the amount previously unblocked is restored.

62. On June 4, 2008, OFAC advised counsel to KindHearts of this policy and requested that counsel provide the information and certifications required by the policy in order for OFAC to make a determination on their request to receive payment from blocked funds. *See* AR1681-83. OFAC will promptly act on any request by KindHearts for use of blocked funds to pay attorneys' fees upon receipt of the required information.

U.S. Persons' Compliance

63. OFAC employs a number of methods to educate and inform the public about the sanctions programs that it administers. The OFAC website, which has over 15,000 e-mail subscribers, offers answers to questions frequently asked by the public about OFAC and its programs, as well as guidelines designed for different industries and explanations of specific sanctions. OFAC has a telephone hotline that provides specific guidance on in-process transactions. OFAC also offers sanctions workshops around the country that are aimed at encouraging companies to enhance their own sanctions compliance programs, including through the use of software to scan and interdict transactions involving sanctions targets.

64. If U.S. persons have questions about whether an intended activity, such as the provision of consultation services to a designated person, constitutes a sanctions violation, they have a number of ways of seeking advice from OFAC. They can call OFAC's compliance hotline and speak to an operations officer, send an e-mail to OFAC's e-hotline mailbox, call OFAC's licensing division to inquire whether a proposed transaction requires OFAC authorization, speak with an attorney in the Office of the Chief Counsel (Foreign Assets Control), or submit a written

request to OFAC for a written interpretation addressing whether the activity in which they wish to engage would constitute a violation.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: December 12, 2008.

A handwritten signature in black ink, appearing to read 'Adam J. Szubin', is written over a horizontal line.

ADAM J. SZUBIN
Director
Office of Foreign Assets Control
Department of the Treasury