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May 31, 1995

The Editor
New York Newsday
235 Pinelawn Road
Melville, NY 11747-4250

Dear Sir or Madam:

We are writing on behalf of our client, Alavi Foundation, to object in the strongest possible terms to the article about the Foundation which appeared on pages A5 and A39 of the May 26, 1995 edition of your newspaper. The article, authored by Messrs. Knut Royce and Kevin McCoy, is filled with inaccuracies, and much of it is libelous as to the Foundation.

We shall not attempt, in this letter, to address the myriad of accusatory comments which are contained in the article and which are ascribed, in typically self-serving fashion, to "government specialists," "knowledgeable Iranians" and others whose identity is predictably obscured by the authors. Proving negatives is difficult enough, and we do not propose, at this time, to undertake such an endeavor, especially where the great majority of the reporters' alleged sources are not even identified.

There is, however, one aspect of the report that we should address at this time – the authors' attempt to link Alavi Foundation in some way or other with The Mostazafan Foundation of Iran. The purported affiliation is based on a statement reportedly made by an individual identified as Vincent Cannistraro, who is quoted as saying "The Mostazafan Foundation [of Iran] and the Alavi Foundation are the same, under different names." Nothing could be further from the truth. Indeed, a close

reading of the rest of the article reveals that there are no substantive facts that even these overly zealous reporters can point to as corroboration for this falsification. The best they can do is to insinuate that one of the Foundation's former officers may also have served as a representative of some German corporation which, according to the reporters, is owned by the Iranian foundation. Not only is the allegation of affiliation inaccurate, but it coincides conveniently with similar, equally irresponsible allegations currently being made by a claimant in a federal lawsuit in the Southern District of New York. The Foundation has taken pains to establish in this lawsuit that the plaintiff's allegations, which are repeated by your reporters in their article, are demonstrably false and that there have not been and never were any ties of this kind between Alavi Foundation and The Mostazafan Foundation of Iran. To make such statements in a published article at this time, without anything of a factual nature on which to base them, constitutes an inappropriate and possibly improper attempt by *New York Newsday* to affect the course of a private litigation.

The article in question is an unfortunate example of the printed media's disregarding its reportorial responsibilities and pursuing, instead, a policy of sensationalism in order to increase readership. We had hoped that a publication such as *New York Newsday* would have shown somewhat more class than this.

Very truly yours,

Robert H. M. Ferguson

bcc: Dr. Mohammad Geramian
Husain I. Mirza
John D. Winter, Esq.

RECORD NO. 99-2409

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

STEPHEN M. FLATOW,
Plaintiff-Appellant,

v.

THE ALAVI FOUNDATION,
Movant-Appellee,

v.

THE ISLAMIC REPUBLIC OF IRAN;
THE IRANIAN MINISTRY OF INFORMATION AND SECURITY;
AYATOLLAH ALI HOSEINI KHAMENEI;
ALI AKBAR HASHEMI-RAFSANJANI;
ALI FALLAHIAN-KUZESTANI; and JOHN DOES, 1-99,
Defendants.

JOINT APPENDIX - VOLUME THREE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
GREENBELT DIVISION

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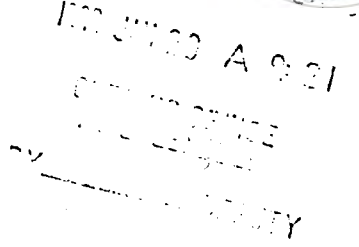

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

----------x

STEPHEN M. FLATOW,

Plaintiff,

v.

THE ISLAMIC REPUBLIC OF IRAN, et al.,

Defendants.

Civil Action No. AW-98-4152
United States District Court
For the District of Columbia
Civil Action # 97-3964RCL

----------x

THE ALAVI FOUNDATION'S
REPLY TO OPPOSITION TO MOTION
TO RELEASE PROPERTIES FROM LEVY,
TO QUASH WRITS OF EXECUTION AND
TO ENJOIN PLAINTIFF FROM ISSUING FUTURE
WRITS AGAINST THE FOUNDATION'S PROPERTY

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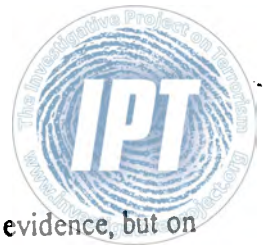
PRELIMINARY STATEMENT

The Alavi Foundation ("the Foundation"), a non-party to this litigation, submits this Reply Memorandum in further support of its motion to vacate the writs of execution issued by plaintiff upon three parcels of real property located in Montgomery County, Maryland ("the Properties"). In its moving brief, without the benefit of any indication as to why plaintiff was seeking to attach the Foundation's assets, the Foundation argued that the writs were improperly issued and should be vacated because the Foundation is not an agency, instrumentality, alter ego or a garnishee of the Islamic Republic of Iran (hereinafter "the Iranian Government"). Now, with the benefit of plaintiff's Memorandum of Points and Authorities in Opposition to the Alavi Foundation's Motion to Quash the Writs of Execution and For Injunction ("Plaintiff's Opposition Brief"), the Foundation can respond to the specific bases on which plaintiff seeks execution.

The facts underlying this litigation have been recited previously and need not be repeated here. The death of Alisa Flatow, as well as the others who died in the bombing that took her life, was a terrible tragedy. Insofar as Congress has created a cause of action designed to compensate victims of such reprehensible acts and punish the perpetrators, plaintiff is justified in seeking to collect his judgment. Sadly, in his zeal to make the Iranian Government pay, plaintiff and his attorneys are willing to blame all Muslims and all Iranians for actions attributable to the Iranian Government. Thus, plaintiff supports his attachments on the Foundation's property with rhetoric, malicious innuendo, rumor and false accusations, not evidence that the Foundation is controlled, owned by, or even associated with the Iranian Government.

While the writs initially issued here claim that the Foundation was "a New York corporation which is an instrumentality" of the Iranian Government, plaintiff abandons this position in his opposition brief because he realizes that this statement is simply not true. Instead, plaintiff invites this Court to do what Congress plainly did not--create a new legal standard under the Foreign Sovereign Immunities Act ("FSIA) and hold that an independent New York charitable corporation need not be an agency or instrumentality owned or controlled by a foreign sovereign to be liable for its debts. Plaintiff asserts his new standard merely requires him to say that the Iranian Government owns an unsubstantiated "contingent" future interest or "covert" ownership interest in the Foundation and, therefore, in the Properties at issue here to make them attachable. Plaintiff tries to support his new legal standard in three sections of Plaintiff's Opposition Brief.

First, plaintiff details his largely unsuccessful efforts to attach various assets belonging to the Iranian Government, including several diplomatic properties, a credit owing to the Iranian Government, and an arbitration award in favor of the Iranian Government. (Plaintiff's Opposition Br. at 6-8.) Because his ability to collect on these assets is hindered by their "frozen" status and because diplomatic property is inviolable pursuant to the United States' international treaty obligations, plaintiff asserts he has no choice but to attack any assets in this country that look Iranian. Clearly, the Foundation is a convenient target because it received a substantial gift from the Shah of Iran more than twenty-five years ago and does not seek to hide its Islamic orientation. The fact that the Foundation seeks to promote a better understanding of Islamic and Muslim culture does not, however, make it, as plaintiff claims, a supporter of terrorists or a "front" for the Iranian Government or an entity owned or controlled by the Iranian Government. To make the claim that plaintiff does



throughout his brief by implication—that all Muslims are terrorists—based not on evidence, but on innuendo and coincidence, is the worst kind of prejudice.

Second, to compensate for the complete lack of evidence of any connection between the Foundation and the Iranian Government and to avoid the fact that the same issue has already been decided in federal court, plaintiff resorts to the strategy of "the Big Lie:" if you say something often enough, it becomes true, no matter how false it may be. Thus, plaintiff asserts no fewer than fourteen times that the Foundation is a "front" for, or owned in part by, or otherwise controlled by the Iranian Government. (Plaintiff's Opposition Brief at 9, 15, 18, 20, 22, 27-29, 34). Tellingly, virtually all of plaintiff's accusations, including the most hideous ones allegedly linking the Foundation to terrorist attacks, are contained in the unsupported, hearsay statements of plaintiff's purported experts, Kenneth Timmerman and Patrick Clawson. The accusations made by Messrs. Timmerman and Clawson are classic hearsay and neither plaintiff nor his experts make even a pretense of supporting them. Moreover, as explained below, Messrs. Timmerman and Clawson's assertions are just not true.

Third, in his most far-fetched argument, plaintiff claims that a recently-enacted amendment to the FSIA authorizing seizure of frozen assets to satisfy judgments against foreign sovereigns on the basis of extraterritorial terrorist acts applies to this case. (Plaintiff's Opposition Brief at 33-39). Significantly, plaintiff concedes that President Clinton waived the applicability of this section pursuant to a waiver provision incorporated into the statute in the interest of national security. Moreover, even assuming its applicability, reliance on this section of the FSIA does not aid plaintiff. The Foundation's assets are not and never have been frozen or blocked pursuant to Executive Order No. 12170, or any other proclamation, order, or regulation under the International Emergency

Economic Powers Act, 50 U.S.C. § 1701 *et seq.*, the Iranian Asset Control Regulations, 31 C.F.R. Part 535, or any other provision of law and plaintiff offers no evidence—save for his lawyer's conclusory assertions—to the contrary. (Plaintiff's Opposition Brief at 34-35). Plaintiff's own proof demonstrates, however, that the Treasury Department does not consider the Foundation's assets frozen or blocked. (Plaintiff's Opposition Brief, Exhibit 17 at 27). Nevertheless, plaintiff argues that the new FSIA section on frozen assets, applies because his lawyers say the Foundation's assets ought to be frozen. (Plaintiff's Opposition Brief at 26-27, 34-35). This argument is completely circular because it assumes the conclusion plaintiff seeks to prove.

This motion is not simply about plaintiff's right to collect on his default judgment. The Foundation's First Amendment rights of free speech, religion and association and its Fifth Amendment rights to property and due process are significantly threatened by plaintiff's efforts. If plaintiff is granted an evidentiary hearing here based on malicious rumors and false accusations, it will have a chilling effect on the willingness of American citizens—both individuals and organizations such as the Foundation—to exercise their First Amendment rights, insofar as it will punish those who are perceived as being, or actually are, supporters of unpopular causes. Likewise, such a result will violate the Foundation's right to be secure in its property and will encourage other plaintiffs to target representatives of unpopular segments of society solely on the basis of their nationalities, religious beliefs or associations.

STATEMENT OF FACTS

Plaintiff's "evidence" that the Iranian Government has a "covert ownership interest" in the Foundation falls into four categories: (I) rumors masquerading as sworn "expert" testimony;

(ii) a report apparently prepared by one of the purported experts based almost entirely on "anonymous" interviews; (iii) coincidences in the timing of changes in the composition of the Foundation's Board of Directors and changes in its name; (iv) statements in "newsletters" that by an Iranian Foundation at one time bore a similar name as the Alavi Foundation; and (v) confiscation of the Foundation by the Iranian Government.

Before discussing his "proof," it is worth noting that plaintiff concedes that (1) the Iranian Government has not even attempted to exercise direct control over the Foundation (Plaintiff's Opposition Brief at 23), and (2) the Foundation "takes scrupulous care to observe the formalities of the corporate form under United States law." (Plaintiff's Opposition Brief at 29). Thus, plaintiff does not dispute that: (a) appropriate authorizations from the Foundation's board of directors are obtained for those actions for which the law suggests director approval should be obtained (Affidavits of Mohammad Geramian, ¶ 14 (dated November 5, 1992); Husain Mirza, ¶ 14) (dated March 22, 1996) attached as Exhibit E to the Moving Affidavit of John D. Winter (hereinafter "Geramian" and "Mirza I" Affidavits)); (b) the Foundation has never jointly owned any real or personal property with the Iranian Government, the Mostazafan Foundation of Iran or the Alavi Foundation in Iran (Mirza Affidavit I, ¶ 6); (c) no current officer, director or employee of the Foundation has ever been an officer, director or employee of the Mostazafan Foundation of Iran or the Alavi Foundation in Iran and no past officer, director or employee of the Foundation has ever been an officer, director or employee of the Mostazafan Foundation of Iran or the Alavi Foundation in Iran (Mirza Affidavit I, ¶ 17; Affidavit of Husain Mirza, ¶ 2 (dated Jan. 15, 1999) (hereinafter "Mirza Affidavit III")); (d) the Foundation has never filed a joint or consolidated tax return or had a joint bank account with the

Iranian Government, the Mostazafan Foundation of Iran or the Alavi Foundation in Iran (Mirza Affidavit I, ¶ 17); (e) the Foundation always has maintained its own bank accounts, filed its own tax returns and employed its own auditors (Mirza Affidavit I, ¶ 2); (f) the Foundation is neither undercapitalized nor insolvent and always has hired its own employees and contractors and paid the salaries of its employees and its other expenses from its own funds (Mirza Affidavit I, ¶ 6); and (g) the Foundation has rejected requests from entities affiliated with the Iranian Government (Mirza Affidavit I, ¶ 23).

Against this backdrop of undisputed proof showing no day-to-day control by the Iranian Government over it, the Foundation will addresses the "evidence" submitted by plaintiff.

1. **Terrorist Rumors Masquerading as Expert Testimony**

Mr. Timmerman, plaintiff's "expert," repeats a number of heinous accusations and rumors, none of which are supported by even a modicum of proof. Their use here is intended only to defame the Foundation and to prejudice this Court against it.

First, the Foundation does not support terrorism and has not contributed to the mosques Mr. Timmerman claims have been linked to various terrorist bombings. While the Foundation made contributions to Brooklyn Mosque, Inc. and the Islamic Seminary, Inc. N.J. (which actually is headquartered on Long Island, New York), neither of these organizations had anything to do with the World Trade Center bombing. (Mirza Affidavit III, ¶ 4).

Second, plaintiff's Exhibit 8 that purports to be a terrorist, anti-American and anti-Semitic propaganda piece allegedly distributed by the Islamic Education Center ("IEC"), an organization that the Foundation supports, is a fraud. The IEC did not prepare or distribute the

document. (Affidavit of Bahman Kheradmand-Hajibashi, ¶.4 (hereinafter "Kheradmand-Hajibashi Affidavit")). Indeed, none of the officers, directors or employees of the IEC saw Exhibit 8 prior to it being used by the plaintiff in Gabay. Id., ¶ 6. Consistent with this proof, Mr. Clawson, plaintiff's expert said he could not recall ever seeing this type of literature being disseminated by the IEC. (Plaintiff's Opposition Brief, Exhibit 12 at 11-12).

Third, the IEC which makes use of the Properties at issue here, is not a terrorist training camp as plaintiff asserts. Rather, the IEC is a not-for-profit organization organized pursuant to the laws of the State of Maryland. On an annual basis, the IEC makes appropriate filings with the Internal Revenue Service ("IRS") and the State of Maryland. (Kheradmand-Hajibashi Affidavit, ¶ 2). The IEC is not related to the Mostazafan Foundation of Iran, the Alavi Foundation located in Iran nor the Iranian Government) and none of the officers, directors or employees of the IEC are officers, directors or employees of the Mostazafan Foundation of Iran, the Alavi Foundation located in Iran nor the Iranian Government. (Id.,¶ 7). The IEC acts through its directors in the United States and does not take direction or orders from any entity or person affiliated with the Iranian Government. (Id.,¶ 8). While the Foundation has made grants to the IEC over the years, these grants were used to pay for utilities, maintenance, landscaping, repairs, telephones, educational supplies and employee salaries. In addition, while the IEC communicates with officers and directors of the Foundation from time-to-time, the IEC acts independently of the Foundation. In this regard, none of the officers, directors or employees of the IEC are officers, directors or employees of the Foundation. The IEC supports cultural and religious activities in its community. These activities include a weekend Farsi school as well as a religious Sunday school. In addition, a state-accredited school for children from

pre-kindergarten through tenth grade, the Muslim Community School ("MCS"), operates at the property used by the IEC. (Id.,¶ 3). The MCS was certified by the Maryland Department of Education as a not-for-profit school in 1988 and has maintained its certification ever since. (Affidavit of Salahuddeen Abdul Kareem, ¶ 3, sworn to January 18, 1999 (hereinafter "Kareem Affidavit")). The MCS is a Maryland not-for-profit organization that makes annual filings with the IRS and appropriate state offices and departments in Maryland, Virginia and the District of Columbia. (Id., ¶ 3).

Fourth, the MCS currently has 176 students from pre-kindergarten through the tenth grade and is the largest Muslim school in Montgomery County. About 90% of MCS's students are American citizens with about one-third of the students being of Iranian descent and with another twenty percent being African-Americans. Id., ¶ 4. The MCS runs a lunch program for its students that is, in part, subsidized by the State of Maryland. The MCS had to apply to the Maryland Department of Education for this subsidy in 1996 which was granted. The MCS is regulated and inspected by state and county officials. (Id., ¶ 4).

Fifth, none of the funding for the MCS comes from the Iranian Government or any organization known to be affiliated with that government. Aside from student tuition and monies received from the families affiliated with the MCS, the only significant donations made to the MCS were in 1994 and they came from the Sacramento Kings professional basketball team and the professional basketball player Mahmoud Abdul-Rauf. (Id., ¶ 6).

Sixth, students from MCS compete against students from other public and private schools in Montgomery County in scholastics and sports. Students from MCS consistently finish as

top performers in county-wide science fairs, spelling bees and other academic competitions. (Id., ¶ 7).

Seventh, neither the IEC nor the MCS promotes anti-Semitism. To the contrary, the MCS regularly invites and welcomes rabbis, along with priests and Protestant ministers, to come to the school to address the students. (Id., ¶ 8). Moreover, in conjunction with Catholic University's Religious Studies Department, the IEC is and has been sponsoring a series of public forums entitled "Dialogue Among Religions." These forums, held at Catholic University, have brought together Muslim, Jewish, Catholic and Protestant leaders to discuss important topics affecting people of every religion. Proceedings from these forums have been published. (Kheradmand-Hajibashi Affidavit, ¶ 10).

2. **Mr. Timmerman's Report**

Plaintiff's Exhibit 17 is an unpublished report by the "Middle East Data Project" which evidently was authored by Mr. Timmerman. This report is simply a repackaging of Mr. Timmerman's accusations and rumors, as evidenced by a quick perusal of its endnote citations, which largely cite anonymous interviews and "confidential" informants. Many of the rumors and accusations are so paranoid and unsupported as to not even merit a response (e.g. accusations of Iranian control over the Foundation by unnamed FBI sources), as the Foundation should not have to prove a negative. Nevertheless, some of the rumors and misinformation, not specifically addressed in Mr. Timmerman's statement, but allegedly "documented" in this report is demonstrably false and deserves a response.

First, the report purports to link a founder of the IEC, and by implication the Foundation, to the 1980 murder of Ali Tabatabai in Washington, D.C. This association is a good

example of Mr. Timmerman's "creative" but maliciously false writing. Bahram Nahidian, the former IEC director targeted by Mr. Timmerman, has lived in this country for almost forty years and has been a respected member of his community. He never "sheltered" the accused murderer of Mr. Tabatabai, never converted him to Islam and did not know he had been jailed until being so advised in conjunction with this proceeding. (Affidavit of Bahram Nahidian, ¶ 9 dated January 18, 1999 (hereinafter "Nahidian Affidavit")). The testimony of Mr. Nahidian that Mr. Timmerman quotes in his report in no way supports his spurious accusations.

Second, the report allegedly links the Foundation and the Iranian Government by claiming that the IEC's receptionist is the wife of Ali Agah, who for a period of time was Iran's charge d'affairs in this country. (Plaintiff's Opposition Brief, Exhibit 17 at 21). Mr. Timmerman's assertion is incorrect. For more than twelve years the IEC's receptionist was Georgina Torki Torki who is married to Nuradin Torki Torki, a delivery driver. Ms. Torki Torki was called Miriam by almost everyone at the IEC. The "Miriam" to whom Mr. Timmerman probably was referring is Mariam Agah, a special education teacher in the Prince William County School District. Ms. Agah, a former nun, did teach first and second graders at the MCS for one year. Kheradmand-Hajibashi Affidavit, ¶ 11.

Third, the report cites an 1988 IRS determination that disallowed a deduction on interest taken by the Foundation on the grounds that the loan at issue was not an arms-length transaction because the bank making the loan and the Foundation allegedly were linked to the Iranian Government. This interim ruling was reversed almost two years ago-- a fact Mr. Timmerman learned

in Gabay. Moreover, to the extent plaintiff wants additional proof of the IRS final ruling, it is attached to these papers. Mirza Affidavit III, Exhibits A & B.

3. **The Timing of Changes In the Foundation's Board And Name**

a. The 1979 Board Changes

Plaintiff argues, without support, that after the Iranian Revolution in 1979, the Mostazafan Foundation of Iran seized control of the Pahlavi Foundation in Iran (a separate entity from the Foundation), and that "[s]oon thereafter, developments indicated that the Islamic Republic of Iran exerted total control over the Pahlavi Foundation of New York." These "developments" included turnover on the Foundation's Board of Directors, which plaintiff claims was insidious because of the "terse" nature of the resignation letters submitted. (Plaintiff's Opposition Brief at 22). Plaintiff then states, without even the illusion of factual support or citation, that New York regulators became "alarmed" and sought assistance from the Iranian Mission to the United Nations.(Plaintiff's Opposition Brief at 22). Plaintiff further argues without any support that the new directors of the Board were "pro-Revolution minded" and that they met in Tehran whereupon the name of the Foundation was changed to the Mostazafan Foundation of New York. Finally, plaintiff makes the blatantly incorrect assertion that the Foundation's articles of incorporation were then amended to permit religious and educational contributions. In fact, the original 1973 certificate of incorporation of the Foundation permitted such contributions. (Affidavit of John D. Winter, Exhibit A dated January 18, 1999 hereinafter ("Winter Reply Affidavit")).

While it is true that directors of the Foundation changed in 1979, there were good and legitimate reasons for the changes. For example, the resignation letter of William Rogers, the former Secretary of State, gives his reason for retiring:

> I think it is an appropriate time for you to consider a change in the composition of the Board of Directors. You may recall that I agreed to serve as a Director to meet the formal legal requirements until the building was completed. It was understood from the beginning that I would resign as a Director when the Foundation started to produce income. Since the New York Foundation is beginning to receive rental income now for the first time, it is important for the Board to meet on a more regular basis to select its officers and management and consider the business programs of the enterprise. For this reason I respectfully tender my resignation as a member of the Board of Directors of The Pahlavi Foundation of New York.

(Mirza Affidavit III, Exhibit C). Secretary Rogers' reasons for resignation, far from being suspicious, were wholly justified. And any assertion that the Iranian Government somehow controlled Mr. Rogers' decision is not only unreasonable, but truly preposterous.

Similarly, the testimony of Dr. Houshang Ahmadi, an educator who has lived in this country since 1962 and a member of the Foundation's board since 1980, completely debunks the inference plaintiff wants the Court to draw. In Gabay Dr. Ahmadi unequivocally testified that his decision to join the board was an independent one which was in no way influenced by a third-party. (Winter Reply Affidavit, Exhibit B at 17-18) The Gabay testimony from Manoucher Shafie, the Foundation's president 1979 until 1983, further supports the conclusion that the Foundation's change in directions in 1979 was not controlled by the Iranian Government. (Winter Reply Affidavit, Exhibit C at 72-73). There is no basis then, for drawing the negative inference from the resignations that

plaintiff asks the Court to draw. See Gabay v. Mostazafan Foundation of Iran, 968 F. Supp. 895, 899 (S.D.N.Y. 1997), aff'd, 152 F.3d 918 (2d Cir.), cert. denied, 119 S.Ct. 591 (1998)..

b. Name Changes

Plaintiff also would have the Court find that the Foundation is owned by the Iranian Government because its name was changed shortly following the Iranian Revolution. (Plaintiff's Opposition Brief at 22). The name change, however, was not nefarious. One, the 1980 change of the Foundation's name was approved by a Justice of New York's Supreme Court and New York's Attorney General (Mirza Affidavit I, ¶ 12; Restated Certificate of Incorporation, Winter Reply Affidavit, Exhibit E). Two, the change in name from Pahlavi to the Mostazafan Foundation of New York was made at the request of the Foundation's then president Mr. Shafie, who suggested that as the term meant "helping needy people," it would fit the purpose of the Foundation. (Winter Reply Affidavit, Exhibit C at 72-73). Three, the Mostazafan Foundation of Iran had nothing to do with this change. Rather, as Mr. Shafie testified in Gabay, he suggested the change because the name-- Pahlavi Foundation-- had become controversial. (Winter Reply Affidavit, Exhibit C at 70-74) Mr. Shafie also testified that the directors chose the name Mostazafan "independent from anybody" because it "fit the Foundation's Charter, to assist needy people in need, destitute." (Winter Reply Affidavit, Exhibit C at 73).

As was established in Gabay, the Foundation's decision to change its name in 1992 was made for a similar reason --"Mostazafan" had become controversial, and the Foundation wished to reinforce its separate and distinct status. (Mirza Affidavit I, ¶ 24; Geramian Dep. at 71).

4. **The Newsletter Statements**

The Mostazafan Foundation of Iran's Newsletters

Plaintiff argues that the Iranian Government, through Mostazafan Foundation of Iran, owned, dictated or controlled the Foundation through newsletter pronouncements. (Plaintiff's Opposition Brief at 29; Exhibit 13 at 21, 25). A brief history of some of the Foundation's activities, however, debunks this theory because the goals listed by the Mostazafan Foundation of Iran in its newsletter for the Foundation -- and plaintiff's alleged proof of control -- were all being carried out prior to the Iranian Revolution and the formation of the Mostazafan Foundation of Iran.

First, the Foundation's scholarship program was contemplated back to 1974 and, therefore, predates the formation of the Mostazafan Foundation of Iran by almost five years. (Winter Reply Affidavit, Exhibit A). Moreover, the resignation letter of Mr. Rogers makes explicit reference to a student scholarship program already in place. (Mirza Affidavit I, Exhibit C). Finally, the Foundation's scholarship program was approved by the IRS before 1979. (Mirza Affidavit III, Exhibit D).

Second, the Foundation's Student Selection Committee was in place prior to the formation of the Mostazafan Foundation of Iran. (Winter Affidavit, Exhibit E Hatemi Dep. at 70, 73, 75-76).

Third, the Foundation has not helped institutions of the Iranian Government. To the contrary, the Foundation has rejected requests from agencies of the Iranian Government for assistance. (Mirza Affidavit I, ¶ 23).

Fourth, while a Student Counseling Center was created not long after the American embassy takeover in November 1979, it was disbanded less than two years later because it was no longer needed and for budgetary reasons. (Winter Reply Affidavit, Exh. C at 165).

Fifth, the newsletters state that the Foundation employs its own accountants, makes payments to vendors after obtaining approval of the Foundation's managing director and treasurer and administers its scholarship program in accordance with New York law. Hence, if anything the newsletters showed that the Foundation acts independently and is not controlled by a third-party.

From the foregoing, it should be clear that the Foundation is *not* hiding behind a corporate fiction or taking advantage of its presumptive independence from *any* other entity as plaintiff asserts. (Plaintiff's Opposition Brief at 16). It also should be clear from the foregoing that the Iranian Government did not "confiscate" the Foundation as plaintiff claims. Rather, as forcefully argued in its initial papers and this submission, the Foundation is simply not owned by, controlled by, or in any way connected to the Iranian Government.

ARGUMENT

POINT I

NEITHER THE 1996 NOR THE 1998 AMENDMENTS TO THE FSIA CHANGED THE STANDARDS FOR ATTACHING A THIRD PARTY'S ASSETS

A. The Day-To-Day Control Test is the Standard That the Court Must Apply to Hold an Independent Entity Liable in Lieu of a Foreign Sovereign

The leading statement on the standards for considering whether an independent, juridically separate entity may be held responsible as though it were a foreign sovereign itself is found in the Supreme Court's decision in First National City Bank v. Banco Nacional Para El Commercio

Exterior de Cuba, 462 U.S. 611 (1983)("Bancec"). In Bancec, the Supreme Court held that separately-incorporated entities are entitled to a presumption of juridical independence from the foreign sovereign to which they are allegedly connected. Bancec, 462 U.S. at 626-27; see also Foremost-McKesson v. Islamic Republic of Iran, 905 F.2d 438, 440 (D.C. Cir. 1990). This presumption of independence only may be overcome by showing that the foreign entity so controls the third-party that a relationship of principal and agent is created such that regarding the third-party as a separate instrumentality would "work a fraud or injustice" against the plaintiff. See Bancec, 462 U.S. at 629; Baglab Ltd. v. Johnson Matthey Bankers Ltd., 665 F. Supp. 289, 294 (S.D.N.Y. 1987). To satisfy the second Bancec prong, case law has required a showing that the foreign parent exercises day-to-day control over the subsidiary or third-party against whom enforcement of the judgment is sought. See McKesson Corp. v. Islamic Republic of Iran, 52 F.3d 346, 351-52 (D.C. Cir. 1995), cert. denied, 516 U.S. 1045 (1996) (jurisdiction found when foreign government exercised day-to-day control because it appointed six of seven corporate directors); Hester Int'l Corp. v. Federal Rep. of Nigeria, 879 F.2d 170 (5th Cir. 1989); Minpeco, S.A. v. Hunt, 686 F. Supp. 427, 428 (S.D.N.Y. 1988) (day-to-day control over instrumentality's operations is more significant than broader control such as appointing directors and officers); Baglab Ltd., 665 F. Supp. at 296-97 (no jurisdiction when foreign state bank ceased to exercise day-to-day control by replacing and restructuring the management of the alleged alter ego).

Plaintiff does not allege and cannot prove a principal/agent relationship between the Iranian Government and the Foundation. To the contrary, plaintiff effectively concedes that he cannot prove day-to-day control by the Iranian Government over the Foundation. (Plaintiff's

Opposition Brief at 10 ("There is no need to determine the precise nature of the legal relationship [between the Foundation and the Iranian Government); 17 (arguing that applying the day-to-day control test to the Foundation "would simply empower an international outlaw to abuse the American legal system"); 29 ("[t]he Alavi Foundation takes scrupulous care to observe the formalities of corporate form")). Thus, plaintiff provides no basis for this Court to ignore the presumption of independence and, therefore, his argument that the presumption of separateness mandated by Bancec not applying to this case must be rejected. Recognizing that the application of existing FSIA case law is fatal to his case, plaintiff argues that none of these adverse precedents apply because the FSIA section that plaintiff invoked in their underlying case is new and different from the "commercial activity exception" and from the "expropriation exception" at issue in most of the FSIA enforcement cases. (Plaintiff's Opposition Brief at 10-18).

Both the "commercial activity" and the "state-sponsored terrorism" exceptions of the FSIA address issues of jurisdiction, not execution. Assuming arguendo, that there is a legitimate rationale for applying different tests under those provisions for evaluating efforts to assert *jurisdiction* over entities alleged to be agencies and instrumentalities and hold them liable for the acts of the sovereign, such a rationale would not address the issue here -- whether a third-party's property can be *attached* to satisfy the debt of a foreign sovereign. This is so because all of the justifications for observing juridical separateness—respect for creditors' rights, ensuring commercial predictability and confidence, and deterring similar actions by foreign states against American interests abroad -- equally apply in all cases dealing with attachment of the property of a judicially separate entity to satisfy the debt of another party. See Bancec, 462 U.S. at 626; Letelier v. Republic of Chile, 748 F.2d 790, 793-

4 (2d Cir. 1984); H.R. Rep. No. 94-1487, at 29-30 (reprinted at 1976 U.S.C.C.A.N. 6604, at 6628, 6629.) This point was aptly made in Letelier, supra.

In Letelier, the underlying judgment was based on section 1605(a)(5), the non-commercial tort exception to foreign sovereign immunity -- rather than section 1605(a)(7) the section at issue here -- but the acts complained of were virtually the same: both cases involved acts of political terrorism carried out by the state. See Letelier, 748 F.2d at 791-92; Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 7 (D.D.C. 1998). Letelier rejected the argument that judgments based on acts of political terrorism stand on a different footing from other FSIA judgments and refused to allow the attachment of a third-party's property absent proof of day-to-day control. Because Congress is presumed to have been aware of the Letelier decision when it amended the FSIA in 1996, but took no steps to overrule that case, as a matter of statutory construction plaintiff's arguments about settled rules not applying to section 1605(a)(7) judgments must be rejected. See United States v. Langley, 62 F.3d 602, 605 (4th Cir. 1995) ("Congress is presumed to enact legislation with knowledge of the law; that is with the knowledge of the interpretation that courts have given the statute.").

While plaintiff acknowledges (Plaintiff's Opposition Brief at 32) that Letelier could have been brought under section 1605(a)(7) if it had been in effect at the time -- and therefore implicitly acknowledges that Letelier is relevant judicial construction of section 1605(a)(7) -- he points to nothing that indicates Congress intended to overrule or alter Letelier's holding when it amended the FSIA. Because this Court must assume that "Congress acts with knowledge of existing law, and that 'absent a clear manifestation of contrary intent, a newly-enacted or revised statute is

presumed to be harmonious with existing law and its judicial construction,'" Langley, 62 F.3d at 605 (quoting Estate of Wood v. C.I.R. 909 F.2d 1155, 1160 (8th Cir. 1990) (quoting Johnson v. First Nat'l Bank of Montevideo, 719 F.2d 270, 277 (8th Cir. 1983)), plaintiff's argument has to be rejected.

There is simply no basis to hold that section 1605(a)(7) contemplates any change in the application of the Bancec standard to plaintiff's effort to execute against the property of a third-party to satisfy his default judgment. Whatever the underlying basis for the debt, allowing a FSIA plaintiff to satisfy a debt from the assets of juridically separate entities contravenes constitutional principles, settled FSIA precedents and the policies set forth by Congress in the FSIA. See Letelier, 748 F.2d at 793-94.

B. Congress Did Not Abolish the Day-to-Day Control Test For Enforcing FSIA Judgments

Aware that he cannot satisfy the day-to-day control standard (Plaintiff's Opposition Brief at 10, 17, 29), plaintiff urges this Court to adopt a new, unprecedented standard of liability under the FSIA, one which would hold a third-party liable for the debts of a foreign sovereign on a mere assertion by plaintiff that the foreign sovereign has some undefined ownership interest in the third-party. Such a theory is inapplicable to this case, was not contemplated by Congress, would not serve the purposes of the FSIA, and would be patently unconstitutional. Even if plaintiff's novel and unsupportable theory is adopted, it would not help him here because the Iranian Government does not, and by law cannot, have any ownership interest in the Foundation.

While it is true that in the Antiterrorism and Effective Death Penalty Act of 1996, Congress amended the FSIA to permit civil suits against foreign states for state-sponsored terrorist

acts committed outside the United States that injured American citizens, nothing in this amendment allows courts to ignore fifteen years worth of precedent and apply a different standard to analyze the separate status of an agency, alter ego, or instrumentality that has no connection to the act of terrorism. Plaintiff can point to no language in either the statute or the legislative history that says Congress intended to alter the presumption of independence or the need to show day-to-day control to enforce a judgment against a third-party when the FSIA was amended in 1996. Indeed, the Joint Explanatory Statement of the Committee of Conference for the 1996 FSIA amendment indicates only that the provision created new jurisdiction to permit United States courts to hear claims for terrorists against designated terrorist states. See House Conference Reg. No. 104-518, 1996 U.S.C.C.A.N. 924, 945. Notably, the Conference Committee Report is generally considered to be the most authoritative source of legislative intent. See Garcia v. United States, 489 U.S. 70, 76 (1984).

Not only is there no support for plaintiff's argument that the day-to-day control test should not be applied to separate entities or third-parties in cases when jurisdiction is based on section 1605(a)(7), but by abrogating the immunity of agencies and instrumentalities from attachment in limited situations not applicable here, Congress implicitly approved the application of existing standards to third-parties (e.g., agencies and instrumentalities) in situations like the one here. Thus, to uphold plaintiff's theory this Court must find that Congress, while maintaining the distinction between foreign sovereigns and their agencies and instrumentalities within the text of a statute, nevertheless intended to overrule fifteen years of case law that upheld the same distinction. Such an interpretation would defy common sense and, therefore, rules of statutory construction. See First

United Methodist Church of Hyattsville v. U.S. Gypsum Co., 882 F.2d 862, 869 (4th Cir. 1989), ("the most fundamental guide to statutory construction [is] common sense.").

Congress, of course, is presumed to revise a statute in light of an existing judicial interpretation. See Langley, 62 F.3d at 605. Accordingly, the only reasonable conclusion that can be drawn that is consistent with general canons of statutory interpretation, is that in the 1996 amendments to the FSIA, Congress added a new basis for jurisdiction over foreign states for acts of state-sponsored terrorism, but did not purport to overrule fifteen years' worth of FSIA case law upholding the distinctions between agencies and instrumentalities, and foreign governments, not to mention American corporations.

It is not surprising that plaintiff's counsel argues here that judgments entered pursuant to section 1605(a)(7) are entitled to a different standard for enforcement because he unsuccessfully made a similar argument in Gabay. In that case, plaintiff's counsel argued to the Supreme Court that judgments entered pursuant to section 1603(a)(3), the expropriation exception to foreign sovereign immunity, should not be subject to the day-to-day control test for jurisdictional purposes. See Petition of Norman Gabay for a Writ of Certiorari to the United States Supreme Court, filed October 2, 1998, (Winter Reply Affidavit, Exhibit D). Indeed, pages 10 through 18 of Plaintiff's Opposition Brief here closely track the argument advanced by plaintiff's counsel at pages 9 through 22 of his certiorari petition in Gabay.

Plaintiff's argument was rejected by the Supreme Court in Gabay and should be rejected here because Congress when it amended the FSIA in 1996, clearly had no intention of overruling established Supreme Court precedent that a plaintiff must establish an entity's alter ego

status before holding it liable for a foreign sovereign's acts or debts. Accordingly, to justify his attachment of the Foundation's property, plaintiff has to prove that the Foundation is an alter ego of the Iranian Government. This plaintiff has conceded he cannot do.

C. Plaintiff's Proposed Standard Is Unconstitutional

If, as plaintiff urges, Congress in 1996 somehow overruled Bancec and its progeny *sub silentio*, and decided that owing to the gravity of extraterritorial terrorism, plaintiffs can satisfy section 1605(a)(7) judgments by attaching third-parties' property merely based on a plaintiff's assertion that a foreign state has an undefined and unarticulated contingent, covert or future interest in the third-party's property, such a rule could not be enforced because it violates the Fifth Amendment. See Eastern Enterprises v. Apfel, 118 S.Ct. 2131, 2146 (1998) (citing Calder v. Bull, 3 U.S. 386, 388 (1798) (Chase, J.) (holding that "a law that takes property from A. and gives to B." would exceed the legislative authority)).

This is not a case of garnishment, where the third-party possesses but does not own the property. Nor is this a case of an arbitration award or judgment, where the foreign sovereign is the owner of the property in the hands of a third-party. Rather, plaintiff here seeks this Court's assistance to seize valuable real property and improvements, lawfully titled to a third-party that is incorporated as a non-profit corporation in the State of New York, owned by none, and whose assets upon dissolution would ultimately flow to the State of New York, on the basis of an alleged future, covert or contingent interest *which he does not even support with any admissible evidence.* Such a rule would eviscerate the protections of the Fifth Amendment by taking the Foundation's property

without due process and just compensation. See Calder v. Bull, supra. It essentially amounts to robbery in the name of what—in plaintiff's eyes—is a noble cause.

To accept plaintiff's invitation to radically change the law and hold the Foundation liable for the Iranian Government's debts would be a clear violation of the Fifth Amendment. Because there is a presumption of constitutionality to acts of Congress and plaintiff's interpretation of the 1996 FSIA amendment is plainly unconstitutional, it must be rejected. See, e.g., Bowen v. Kendrick, 487 U.S. 589, 617 (1988).

POINT II

THE IRANIAN GOVERNMENT NEITHER CONTROLS NOR OWNS THE FOUNDATION

Plaintiff has the burden of proving that the Foundation is subject to his judgment, see Letelier, 748 F.2d at 795 (citing Palmiter v. Action, Inc., 548 F. Supp. 1166, 1172 (N.D. Ind. 1982)) and plaintiff concedes in his brief that he cannot prove, in the traditional sense, that any other entity "owns" or "controls" the Foundation. (Plaintiff's Opposition Brief at 17). Instead, plaintiff advances -- without any authority -- a theory under which he need only prove that the Iranian Government has some undefined "covert property interest" in the Foundation's property or that the "ultimate interest-holder" of the Foundation's property is the Iranian Government. (Plaintiff's Opposition Brief at 10-18).

Plaintiff does not explain what he means by these terms, nor is it clear to which property rights he is referring. The Iranian Government surely does not have the right to profit from the Foundation or the Properties. It does not have the right to exclude, or the right to enjoy the Properties. The Foundation is a not-for-profit corporation and as such is owned by no one.

Assuming that the Foundation did have an owner, it is not clear how one can prove ownership of an asset without ultimately proving control over it. Thus, it is difficult to discern how plaintiff's theory is any different from existing law. To the extent plaintiff is restating existing law as a "new theory" because he knows application of existing law is fatal to his case, his counsel's doublespeak should be summarily rejected.

Pursuant to the Foundation's certificate of incorporation and New York law, if the Foundation ever dissolves, it first must obtain approval from a Justice of the Supreme Court of the State of New York and the Attorney General of New York. N.Y. Not-For-Profit Law, Article 10. Then its assets will be distributed to other charitable institutions for the purposes set forth in the Foundation's Certificate of Incorporation. See N.Y. Not-For-Profit Corp. Law § 1005. Here, if it is dissolved, the Foundation's assets (net of liabilities) will be distributed as follows:

> no distribution of any of the property or assets of the Corporation shall be made to any member, director, officer or employee of the Corporation, but all of such property shall be applied to accomplish the public charitable, scientific, literary, and educational purposes for which this Corporation is organized.

(Winter Reply Affidavit, Exhibit E).

It is just not possible for another entity to "own" a charitable corporation in New York. The contingent ownership interest that plaintiff imagines not only does not exist, it could not exist in a not-for-profit corporation under New York State law. In reality, plaintiff's claim of ownership is actually a claim of control, an assertion plaintiff knows he cannot prove.

A. Plaintiff's Expert Testimony is Inadmissible

The bulk of plaintiff's "evidence" of a "covert future interest" of the Iranian Government in the Foundation are two *ex parte* statements. Even the most cursory reading of these statements, however, reveals that they are rank hearsay, based almost entirely on malicious rumor and innuendo.

Mr. Timmerman, whose credentials include a degree in "creative writing," says the Foundation is controlled by the Iranian Government because the Foundation and the IEC support Islamic and Muslim values as well as terrorism and anti-Semitism. Because Mr. Timmerman says these are the same goals and values of the Iranian Government, the Foundation must be covertly controlled by the Iranian Government. Mr. Timmerman is entitled to his ipse dixit opinion that all Muslims in Iran are terrorists, but this Court cannot accept it and must reject it because it is premised on bigotry.

Not only must the Court reject Mr. Timmerman's opinion because of its discriminatory, stereotyping or profiling, but it must reject Mr. Timmerman's opinion because there is no evidence to support his inflammatory rhetoric.

Mr. Timmerman's accusation that the Foundation is connected to certain mosques connected to terrorist bombings is false. Publicly available documents give the address of the mosques linked to Sheik Omar Abdul Rahman (Winter Reply Affidavit, Exhibit H), and neither one of these mosques have received support from the Foundation (Mirza Affidavit III, ¶ 4). His assertion that the MCS is a training ground for terrorists and anti-Semites is false. (Kheradmand-Hajibashi Affidavit ¶ 10; Kareem Affidavit, ¶ 8). His claim that the Foundation changed its certificate of

incorporation is erroneous. (Winter Reply Affidavit, Exhibits A, E). His allegation that the IRS determined that the Foundation was an alter ego of the Iranian Government is erroneous. (Mirza Affidavit III, Exhibit A and B; Affidavit of Howard Muchnick, ¶¶ 3, 4). Likewise, his claims about IEC employees and past directors are erroneous. (Kheradmand-Hajibashi Affidavit, ¶ 7; Nahidian Affidavit, ¶ 8). In short, none of the assertions that allegedly support Mr. Timmerman's opinions are true and when a purported expert's opinions are based on false and erroneous assumptions, they cannot be considered. See Tyger Construction Co., Inc. v. Pensacola Construction Co., 29 F.3d 137, 142 (4th Cir. 1994) ("An expert's opinion should be excluded when it is based on assumptions which are speculative and are not based in the record."); see also Minasian v. Standard Charter Bank, PLC, 109 F.3d 1212, 1216 (7th Cir. 1997) ("expert's report that does nothing to substantiate [the expert's] opinion is worthless, and therefore inadmissible.").

On the other hand, Mr. Clawson prefaces his opinions about the Foundation with a stunning admission:

> Now, with the Alavi Foundation in New York, I am not as familiar with its activities. It is not reported on or discussed in the Iranian press. So I lack that kind of direct information from Iranian sources about its activities.
>
> But certainly from the information that I have seen about how that foundation operates, whether it be from Iranian sources or whether it be from sources here in the United States, it would certainly seem consistent with Iranian behavior. I can't prove that's the same pattern, but I just simply say it's [sic] consistent.

(Plaintiff's Opposition Brief, Exhibit 12 at 9). This passage makes clear that Mr. Clawson's opinions: (a) are formed on the basis of unspecified information he has seen and heard from unidentified sources; and (b) do not provide any direct evidence about the Iranian Government's alleged

"ownership" or control of the Foundation; and (c) merely show a coincidence or "pattern" consistent with "Iranian behavior."

To be considered by a court an expert's testimony must be reliable and based on an accepted and verifiable methodology. When a purported expert admits he: (i) is not familiar with the subject matter of his opinion (the activities of the Foundation) (Plaintiff's Opposition Brief, Exhibit 12 at 9); (ii) cannot substantiate or "prove" his opinion (id. at 9); and (iii) has not kept up on facts and information regarding the subject matter of his opinion (id. at 9, 12), the purported expert is not qualified to render an opinion in the case. See Tyger Constr., supra. Moreover, simply saying that a pattern of conduct by one party is "consistent" with the conduct of another party does not help plaintiff prove anything. Cf. United States v. Harris, 942 F.2d 1125, 1129 (7th Cir. 1991)("[w]here the evidence as to an element of a crime is equally consistent with a theory of innocence as a theory of guilt, that evidence necessarily fails to establish guilt beyond a reasonable doubt.")(internal citation and quotations omitted). Finally, the only document Mr. Clawson talks about in his statement -- a piece of hateful propaganda supposedly distributed by the IEC -- is a fraud which Mr. Clawson did not associate with the IEC. (Plaintiff's Opposition Brief, Exhibit 12 at 11-12). Thus, the only fact Mr. Clawson specifically addresses supports the Foundation's position.

In an ironic McCarthyite reference, plaintiff boldly states that if the Court will indulge him with an evidentiary hearing, he "is prepared to present at least one dozen additional witnesses to testify about the Alavi Foundation's ties with the Islamic Republic of Iran." (Plaintiff's Opposition Brief. at 19). Plaintiff does not describe who these secret witnesses are or whether their testimony will be any different than that of Messrs. Timmerman and Clawson. Similarly, the 3500 pages of

Claiming that Messrs. Timmerman and Clawson's statements are admissible based on their alleged status as Iranian experts on the question of whether the Foundation is an "instrumentality of and controlled by the government of Iran" does not help plaintiff. Aside from being completely circular, saying that a person is an expert because he can state a legal conclusion does not make his assertions admissible. See Burkhart v. Washington Metropolitan Area Transit Authority, 112 F.3d 1207 (D.C. Cir. 1997) (expert testimony that merely tracks language of a statute properly excluded) (citing cases). Accordingly, the statements of plaintiff's experts should be rejected.

B. Plaintiff's Evidence is Identical to the Evidence Submitted and Rejected In Gabay and Offers No Proof of Ownership or Control

Absent the accusations and innuendo of Messrs. Timmerman and Clawson, plaintiff's "evidence" of any control by the Iranian Government over the Foundation is the very same evidence submitted -- and rejected -- in Gabay.

Plaintiff's counsel's assertion that his investigation uncovered evidence regarding the Foundation "which previous counsel in Gabay had not discovered through depositions or document requests" (Plaintiff's Opposition Brief at 25) is not accurate. For example, plaintiff's Exhibit 11 bears Bates numbers 3802 through 3820 on the lower corner of each page. Those Bates numbers were placed on that document by counsel for the Foundation when it was produced in the Gabay litigation. (Winter Reply Affidavit, ¶ 10). Similarly, plaintiff's Exhibits 1, 3, 4, 8, 9, 10, 15 and 16 were used by the Gabay plaintiff in his unsuccessful effort to avoid dismissal of his case. The only "new" materials here are Messrs. Timmerman and Clawson's statements and Mr. Timmerman's report. Mr. Timmerman assisted, however, the Gabay plaintiff. At that time, Mr. Timmerman said whether "the Foundation [is] legally 'under the control' of the Tehran Government will be a matter decided by the

courts." (Plaintiff's Opposition Brief, Exhibit 17 at 27) The Court in Gabay decided the matter almost two years ago. See Gabay, supra. It is obvious that Mr. Timmerman disagrees with the rulings in Gabay and is simply trying again here with the same evidence that was unsuccessful in the Gabay litigation.

Regardless of its source and its rejection in Gabay, none of plaintiff's "evidence" provides sufficient justification for a hearing, much less proves any sort of connection between the Foundation and the Iranian Government.

1. The Change in Composition in the Board of Directors Occurred For Legitimate Reasons unrelated to the Revolution in Iran

While it is true that directors of the Foundation changed in 1979, the evidence shows that there were good and legitimate reasons for the changes. For example, Secretary Rogers' reasons for resignation, far from being suspicious, were wholly justified. An inference that the Iranian Government somehow controlled Mr. Rogers' decision is not only unreasonable, but truly preposterous. Moreover, all of the changes were made in accordance with New York law. Thus, there is no basis then, for drawing the negative inference from the resignations that plaintiff asks the Court to draw. See Gabay, 968 F. Supp. at 899.

2. Control Through Newsletters

Plaintiff's argument that the Iranian Government, through Mostazafan Foundation of Iran, owned, dictated or controlled the activities of the Foundation through newsletter pronouncements rests on the assertion that the Foundation "carried out" the Mostazafan Foundation of Iran's plan. The goals for the Foundation listed by the Mostazafan Foundation of Iran in its newsletters, however, were all being carried out prior to the Iranian Revolution. Hence, no adverse

inference can be drawn which helps explain why the "control" through newsletter argument was rejected in Gabay. See Gabay, 996 F. Supp. at 899.

Aside from the inability to temporarily link the newsletters to an action by the Foundation, the documents upon which plaintiff relies, expressly acknowledge that the Foundation is bound by New York state law that "it is not possible to send directly to Iran the incomes of the Foundation." (Plaintiff's Opposition Brief, Exhibit 15). Instead, "the only possible way is to spend the net income of the Foundation to promote the ideals of the Islamic Republic in America." Even if true—which it is not—this statement, which is really the gravamen of plaintiff's entire ownership argument, the newsletter establishes that the only *possible* means of control and/or benefit that the Iranian Government could have in the Foundation is in the "ideals" that it promotes--classic expressive activity protected by the First Amendment. See Boos v. Barry, 485 U.S. 312 (1988) (prohibition against display of signs bringing foreign government into disrepute within 500 feet of embassy was subject to strict scrutiny as it targeted political speech); see also Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995) (upholding Ku Klux Klan members' rights to erect cross and grounds of state capitol). This document then goes on to describe the methods by which the Foundation achieves those goals and it is worth noting here that none of the goals include funding terrorist activities.

Most significantly, however, the newsletters are inadmissible hearsay. Although Fed. R.Evid. 803(8) permits the consideration of "records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency ... unless the sources of information or other circumstances indicate lack of trustworthiness," newsletters from a

private or even a governmental agency are not the sort of records contemplated by this rule. See Marsee v. United States Tobacco Co., 866 F.2d 319, 325 (10th Cir. 1989).

Even if the Mostazafan Foundation of Iran newsletters are "public reports," they must have indicia of trustworthiness before they can be used as evidence. To make this trustworthiness determination, the following factors must be examined: (1) the timeliness of the investigation which led to the report; (2) the special skill or experience of the official making the report; (3) whether a hearing was held and the level at which it was conducted; and (4) possible motivation or biases problems that have influenced the official preparing the report. See In re Air Disaster, 37 F.3d 804, 828 (2d Cir. 1994), cert. denied sub nom, Pan American World Airways, Inc. v. Pagnucco, 513 U.S. 1126 (1995). Moreover, the public report must be based on the writer's first-hand knowledge. See, e.g., United States v. Chu Kong Yin, 935 F.2d 990, 999 (9th Cir. 1991) (not admitting Hong Kong criminal records without proof that the person signing the record had personal knowledge of its contents).

The newsletters fail all of these tests. One, the Mostazafan Foundation of Iran is an alleged instrumentality, not a government agency. (Plaintiff's Opposition Brief at 2). Therefore, the public office or agency requirement of Rule 803(8) cannot be met. Two, the newsletters do not have indicia of trustworthiness. As was established in Gabay, the newsletters only are internal publications and they are not reviewed by an editorial or legal staff and are not reviewed for accuracy (Winter Reply Affidavit, Exhibit F at 51, 52, 75). Moreover, the difficulties encountered translating these documents undermine their trustworthiness. Even the Gabay deposition translator noticed that these documents are confusing. (Winter Reply Affidavit, Exhibit F at 69-70). Three, there was no

procedure to verify the accuracy of the stories; thus, these newsletters lack the presumptive trustworthiness of a government agency's investigative report. See Bradford Trust Co. v. Merrill Lynch, Inc., 805 F.2d 49, 54 (2d Cir. 1986). Four, no showing has been made regarding the skill or experience of the individuals preparing the newsletters. To the contrary, with respect to the one English newsletter -- Exhibit 15 to Plaintiff's Opposition Brief -- the evidence in Gabay established that the person who signed the newsletter cannot read or write English. (Winter Reply Affidavit, Exhibit F at 96). Five, if considered by the Court, the newsletters actually reflect the control the Foundation had over its own activities. In this regard, the newsletters state the Foundation: (I) employed its own outside accountants; (ii) made payments to vendors based on approvals, not from the Mostazafan Foundation of Iran, but by "the managing director and treasurer" of the Foundation in New York; and (iii) administered its Student Scholarship program in accordance with New York law. (Winter Reply Affidavit, Exhibit C at 125-26, G at 5). Thus, if anything, the newsletters defeat plaintiff's alter ego assertions. Six, boastful statements -- like those referenced in the Mostazafan Foundation of Iran's newsletters -- made for public relations reasons are not evidence of the true relationship between two entities. Fletcher v. Atex, Inc., 68 F.3d 1451, 1460-61 (2d Cir. 1995).

3. Name Confusion

Plaintiff also would have the Court find that the Foundation is owned by the Iranian Government because its name was changed shortly following the Iranian Revolution. (Plaintiff's Opposition Brief at 22). The name change, however, was not nefarious. The 1980 change of the Alavi Foundation's name was approved by a Justice of New York's Supreme Court and New York's Attorney General. Because judicial and regulatory approval was obtained for the name change, as

a matter of New York law no negative inference concerning it can be drawn. See N.Y. Not-For-Profit Corporation's Law § 804(a).

The change in name from Pahlavi to the Mostazafan Foundation of New York was made at the request of Mr. Shafie, who suggested that as the term meant "helping needy people," it would fit the purpose of the Foundation. (Winter Reply Affidavit, Exhibit C at 70-71). In addition, Mr. Shafie testified that he suggested the change because the name, Pahlavi Foundation, had become controversial and neither the Mostazafan Foundation of Iran nor the Iranian Government had nothing to do with this change. Thus, Mr. Shafie testified that the directors chose the name Mostazafan "independent from anybody" because it "fit the Foundation's Charter, to assist needy people in need, destitute." (Winter Reply Affidavit, Exhibit C at 70-74.) Similarly, the Foundation's 1992 name change occurred because 'Mostazafan' had become controversial. (Mirza Affidavit I, ¶ 24; Geramian Dep. at 71 (Winter Affidavit, Exhibit E). Again, the assertions about the Foundation's name change was rejected for good reasons in Gabay and this Court should do the same here.

POINT III

SECTION 1610(F)(1)(A) OF THE FSIA DOES NOT APPLY TO THIS CASE

Plaintiff advances the curiously circular argument that a 1998 amendment to the FSIA warrants the seizure of the Foundation's assets. Thus, plaintiff argues that new section 1610(f)(1)(a), of the FSIA, which authorizes execution on frozen or blocked property of a foreign state to satisfy a section 1605(a)(7) judgment, sanctions this seizure. It applies, plaintiff argues, because the Foundation's assets are frozen or blocked. Although the Foundation has engaged in many

transactions since 1979 and the IRS and Treasury Department has been fully aware of the alleged links between the Foundation and Iran and has never indicated that the Foundation's property is subject to any blocking regulation, plaintiff insists that the Foundation's property is blocked because it an asset of the Iranian Government. The only evidence of this, of course, is plaintiff's counsel says so.

If the Foundation's assets were "property of" the Iranian Government, it would have been frozen or blocked long ago pursuant to Executive Order 12170 and the Iranian Asset Controls Regulations, 31 C.F.R. Part 535. No property of the Foundation has ever been frozen, however, nor has any transaction involving such property been blocked pursuant to the aforementioned regulations. Plaintiff claims that "government regulators . . . have frequently investigated the Alavi Foundation . . ." (Plaintiff's Opposition Brief at 20) and in his report Mr. Timmerman purportedly quotes a Treasury Department official in the Office of Foreign Assets Control [OFAC] as stating that "'*if* we can establish that Alavi is a branch of the Mostazafan Foundation in Tehran, *then it becomes* a blocked entity'." Mr. Timmerman's report goes on to say that "Treasury will require the foundation to apply for a license every time it spends a dime." (Plaintiff's Opposition Brief, Exhibit 17 at 27 (emphasis added)). Obviously, this has not happened and no agency of the United States, including the Treasury Department or OFAC, has ever indicated that the Foundation is such a blocked entity, or *required* the Foundation to apply for any license. Plaintiff's claims that the Foundation is nevertheless subject to these controls is completely meritless.[1]

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[1] Plaintiff has also argues that the Foundation's property is "commercial property." Because the Foundation is not an alter ego or an agency or instrumentality of any foreign state, its property is not used for governmental purposes. Plaintiff's attempt to resolve the legal status of the Foundation's property before this Court resolves the Foundation's status itself puts the cart

With respect to President Clinton's waiver of the application of section 1610(f)(1)(a), the Foundation respectfully refers the Court to the submission recently filed by the United States in the underlying action on this issue. The United State's brief is attached hereto as Exhibit A.

CONCLUSION

Because plaintiff has failed to offer any evidence to even suggest that the Foundation is owned or controlled by the Iranian Government, the Foundation's motion to quash the writs of execution should be summarily granted, the writs should be dissolved, and an injunction preventing plaintiff from any further attempts to execute on the Foundation's property in satisfaction of his judgment against the Iranian Government should issue.

Respectfully submitted,

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before the horse. Accordingly, the Foundation respectfully requests that it be given further opportunity to address the nature of the Properties in the event that this Court denies its motion to quash the writs of attachment.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply to Opposition to Motion to Release Properties from Levy and to Quash Writs of Execution , Memorandum of Points & Authorities and proposed Order was mailed postage prepaid this 19th day of January, 1999 to:

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Stephen M. Flatow,

Plaintiff

v.

Civil No. 97-396 (RCL)
Hon. Royce C. Lamberth

The Islamic Republic of Iran, et al.

Defendants

RESPONSE OF THE UNITED STATES TO PLAINTIFF'S SUPPLEMENTAL MEMORANDUM

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PRELIMINARY STATEMENT

This case presents an issue of substantial importance to the United States. At issue is whether diplomatic property of a foreign state, property which remains blocked under an Executive Order and which is subject to the Vienna Convention on Diplomatic Relations ("VCDR"), may be used to satisfy a judgment entered pursuant to 28 U.S.C. § 1605(a)(7). The importance of this issue transcends the legitimate desire of the plaintiff in this case to locate attachable assets with which to satisfy his judgment. It implicates the very ability of the United States to abide by its international commitments and treaty obligations, as well as the authority of the President to manage foreign affairs consistent with the interests of national security. The resolution of this issue now turns upon whether the President was authorized, under the terms of a recently enacted statute, to waive a provision that otherwise requires that certain property of a foreign state "shall" be subject to attachment and execution in aid of a judgment entered pursuant to 28 U.S.C. § 1605(a)(7).

Plaintiff now challenges the President's waiver as beyond the scope of his authority. The linchpin of plaintiff's argument is that the waiver authority in Section 117(d) is limited in scope and does not reach the part of the statute that authorizes the attachment of blocked and/or diplomatic property. In support of his position, plaintiff relies principally upon what he claims

is the legislative history.

As explained below, plaintiff's argument is flawed for a number of reasons. First, his interpretation of Section 117(d), as limited in its scope, conflicts with the plain language of the waiver provision, which, on its face, contains no such limitation. Plaintiff's reliance upon statements made by certain members of Congress, as indicative of legislative history, is misplaced and, in this case, a particularly hazardous basis for discerning the intent of Congress. Plaintiff's narrow interpretation of the waiver provision is also inconsistent with U.S. treaty obligations and raises serious constitutional questions. Under well-accepted canons of statutory construction, plaintiff's interpretation should be rejected in favor of an interpretation that avoids these infirmities. Finally, plaintiff's construction ignores the wide latitude traditionally accorded the Executive in the area of foreign affairs and disregards the broad deference owed to the Executive's construction of a statute he is charged with administering.

For the foregoing reasons, as elaborated below, the United States respectfully urges the Court to reject plaintiff's contention that the President's exercise of his waiver authority was ultra vires and grant the motion of the United States to quash the writs of attachment.

BACKGROUND

The events leading up to plaintiff's attempted attachment of the diplomatic properties and blocked bank accounts now at issue have been recounted in detail in prior legal memoranda and need not be repeated here. In those memoranda, the United States has consistently maintained that blocked mission property of a foreign state, including diplomatic property, cannot be used to satisfy a judgment. Not only do the provisions in the Foreign Missions Act ("FMA") and the Foreign Sovereign Immunities Act ("FSIA") explicitly prohibit the attachment of such property, but permitting attachment and/or execution would interfere with the ability of the United States to abide by its treaty obligations and could adversely affect our foreign policy.

On October 21, 1998, Congress enacted Public Law No. 105-277 (the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999). That law contains a provision, Section 117, which amends 28 U.S.C. § 1610 (part of the Foreign Sovereign Immunities Act) to add a new subsection (f). See Pub. L. No. 105-277, Division A, § 101(h), Title I, § 117 ("Section 117"). (Attached as Exhibit A). In pertinent part, subsection (1)(A) of that new subsection (f) states that,

> [n]otwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)) . . . , any property with respect to which financial transactions are prohibited or regulated pursuant to . . . sections 202 and 203 of the International Emergency Economic Powers

> Act (50 U.S.C. 1701-1702). . . shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state . . . claiming such property is not immune under [28 U.S.C. §] 1605(a)(7).

Id. § 117(a). Absent a waiver, this new provision specifies that certain property, including blocked mission property of a foreign state, "shall be subject to execution or attachment" in cases where a foreign state has been found liable for certain actions, such as those at issue in the present case.

In a signing statement addressing the entire Omnibus Appropriations Bill, the President explained that, by allowing attachment and execution against foreign diplomatic and consular property,

> section 117 would place the United States in breach of its international treaty obligations. It would put at risk the protection we enjoy at every embassy and consulate throughout the world by eroding the principle that diplomatic property must be protected regardless of bilateral relations. Absent my authority to waive section 117's attachment provision, it would also effectively eliminate use of blocked assets of terrorist states in the national security interests of the United States, including denying an important source of leverage. In addition, section 117 could seriously affect our ability to enter into global claims settlements that are fair to all U.S. claimants, and could result in U.S. taxpayer liability in the event of a contrary claims tribunal judgment.

Statement by the President on Omnibus Appropriations Act, at 6 (Oct. 24, 1998) (Attached as Exhibit B.), reprinted at 1998 WL 743759.

Section 117 also contains a waiver provision. Subsection

(d) of Section 117 provides that "[t]he President may waive the requirements of this section in the interest of national security." See Exhibit A. On the same date he signed Public Law No. 105-277 into law, the President executed a waiver pursuant to Section 117(d). The Presidential Determination, 99-1, waived the requirement of Section 117 that certain property described by the statute "shall be subject to execution or attachment in aid of execution of any judgment" entered pursuant to 28 U.S.C. § 1605(a)(7). Presidential Determination No. 99-1, 63 Fed. Reg. 59,201 (1998)(Attached as Exhibit C). The President's waiver was based upon his determination that allowing the attachment and execution of blocked property, including diplomatic property, "would impede the ability of the President to conduct foreign policy in the interest of national security and would, in particular, impede the effectiveness of such prohibitions and regulations upon financial transactions." See id. In a statement by the Administration, it was further noted that, if not waived, Subsection (f)(1)(A)

> would permit individuals who win court judgments against nations on the State Department's terrorist list to attach embassies and certain other properties of foreign nations, despite U.S. laws and treaty obligations barring such attachment. . . . If the U.S. permitted attachment of diplomatic properties, then other countries could retaliate, placing our embassies and citizens overseas at grave risk. Our ability to use foreign properties as leverage in foreign policy disputes would also be undermined.

Statement by the White House Press Secretary (Oct. 21, 1998)

(Attached as Exhibit D), reprinted at 1998 WL 735804.

ARGUMENT

Because the President has waived the requirement of Section 1610(f)(1)(A) that certain property of a foreign state "shall be subject to attachment and execution," plaintiff has now challenged the validity of the President's waiver, as beyond the scope of his authority. Plaintiff argues that the waiver authority granted by Section 117(d) is limited to 28 U.S.C. § 1610(f)(2) and does not extend to Section 117 in its entirety. In particular, plaintiff contends that the relevant portion of Section 117(a) is merely an amendment to existing law, but does not "invoke any 'requirements.'" See Pl. Supp. Mem. at 10. Plaintiff further argues that the waiver provision in Section 117(d) refers only to a portion of Section 117(a) requiring the Secretaries of State and Treasury to assist Section 1605(a)(7) judgment creditors in locating attachable assets. See id.

As explained below, plaintiff's argument is inconsistent with the plain language of the statute and unsupported by the legislative history.

A. **The Plain Language of Section 117 is Unambiguous and Does Not Limit the Scope of the Waiver Authority to 28 U.S.C. 1610(f)(2)**

The starting point for statutory interpretation is the language of the statute itself. See Bailey v. United States, 116 S. Ct. 501, 506 (1995); Brotherhood of Locomotive Engineers v.

Atchison, Topeka & Santa Fe Ry. Co., 116 S. Ct. 595, 597 (1996). The Court's inquiry "must cease if 'the statutory language is unambiguous and the statutory scheme is coherent and consistent.'" Robinson v. Shell Oil Co., 117 S. Ct. 843, 846 (1997) (quoting United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 240 (1989)).

A cursory examination of the statutory text reveals that the reach of Section 117(d) is not limited to Section 1610(f)(2), as plaintiff contends. By its very terms, Section 117(d) clearly and unambiguously authorizes the President to "waive the requirements of this section . . . ." Significantly, by authorizing the President to waive the "requirements **of this section**", the waiver authority in Section 117(d) is not confined to any specific portion or part of Section 117. Rather, the waiver authority of Section 117 extends, without limitation, to any and all requirements contained in Section 117.

The portion of Section 117(a) to be codified at 28 U.S.C. § 1610(f)(1)(A), plainly creates a "requirement" for purposes of Section 117(d). It requires, in pertinent part, that certain property identified by the statute[1] "**shall** be subject to

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[1] The property described by Section 117(a) consists of "any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading With the Enemy Act . . . section 620(a) of the Foreign Assistance Act of 1961 . . ., sections 202 of the International Emergency Economic Powers Act . . . or any other proclamation, order, regulation, or license issued pursuant thereto[.]"

execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state . . . claiming such property is not immune under section 1605(a)(7)." The existence of a requirement is denoted by the use of the word "shall," which generally refers to a mandatory, as opposed to permissive, obligation. See Lexecon, Inc. v. Milberg Weis Bershad Hynes & Lerach, 118 S. Ct. 956, 962 (1998) (noting that the use of the word "shall. . . normally creates an obligation impervious to judicial discretion"); Gutierrez de Martinez v. Lamagno, 115 S. Ct. 2227, 2236 n.9 (1995) ("[t]hough 'shall generally means 'must,' legal writers sometimes use, or misuse, 'shall' to mean 'should,' 'will,' or even 'may'"); Association of American Railroads v. Costle, 562 F.2d 1310, 1312 (D.C. Cir. 1977) ("shall" is the language of command in statutes); Mallory v. Harkness, 895 F. Supp. 1556, 1564 (S.D. Fla. 1995) (noting that the term "must" means "compulsion, obligation, requirement. . . ."). In other words, the use of such mandatory language gives rise to a requirement that certain property, previously immune, "shall be subject to attachment and execution" to satisfy a Section 1605(a)(7) judgment. It is this requirement that falls squarely within the plain language and scope of Section 117(d). It is noteworthy that plaintiff has made no effort to explain why Section 117(a) does not create a "requirement" when, in fact, it uses mandatory language that requires certain property of a

foreign state to be subject to attachment and execution to satisfy a judgment entered pursuant to 28 U.S.C. § 1605(a)(7).

Plaintiff's argument also rests upon internally inconsistent premises. On the one hand, plaintiff takes the position that Section 1610(f)(1)(A) does not create any requirements; hence, under plaintiff's theory, 28 U.S.C. § 1610(f)(1)(A) cannot be read as requiring that certain assets of a foreign state be subject to attachment and execution; at the same time, however, plaintiff insists that such assets must, as a matter of law, be made available for attachment and execution to satisfy his judgment. Plaintiff cannot have it both ways. Either Section 1610(f)(1)(A) requires, as a matter of law, that certain foreign government assets be subject to attachment and execution — a requirement, which may be waived by the President under Section 117(d); or Section 117(a) contains no such requirement, in which case, the subjection of certain assets of a foreign state to attachment and execution is discretionary and up to the Executive.[2] In any event, plaintiff cannot insist upon a construction of 28 U.S.C. § 1610(f)(1)(A) that would result in the simultaneous acceptance of both inconsistent premises.

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[2] This latter interpretation appears unlikely given the statute's use of mandatory language such as "shall be subject to attachment and execution" instead of permissive language such as "may be subject to attachment and execution." In sum, Section 117(a) creates a mandatory requirement, rather than a discretionary authority.

In sum, Section 117(a) by its terms requires that certain assets of a foreign state be subject to attachment and execution to satisfy a judgment entered pursuant to 28 U.S.C. § 1605(a)(7). This requirement falls within the scope of Section 117(d). Because the statute is clear and unambiguous, the Court's inquiry should end. See Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n, 481 U.S. 454, 461 (1987); United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989).[3]

B. **The Legislative History Does Not Support Plaintiff's Narrow Interpretation of the President's Waiver Authority**

Plaintiff relies, to a large extent, upon what he claims to be the legislative history of Section 117. As explained below, the difficulty with plaintiff's reliance upon the so-called legislative history is that what little legislative history does exist on Section 117 is sparse, inconclusive and lacking in authority.

As noted by plaintiff, the waiver provision was added in conference, after the Administration expressed serious concerns about Section 117. The principal concerns with Section 117 were that it would:

result in seizures of property in direct contravention

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[3] Moreover, "[g]iven the straightforward statutory command, there is no reason to resort to legislative history," especially where, as here, "the legislative history only muddies the waters." See United States v. Gonzalez, 117 S. Ct. 1032, 1035 (1997).

> of other U.S. statutes and treaties to which the United States is a party, violating the sanctity of diplomatic property which has been honored for centuries. Moreover it would give priority over long-standing legitimate claims by other U.S. citizens and could eliminate blocking as an important foreign policy tool. It could also lead to judgments against the United States in existing international tribunals, for which the U.S. taxpayer would be responsible; retaliation against U.S. diplomatic properties abroad; and seizure of property where the United States is claiming its own interest in ownership of property.

See Eizenstat letter (Attached as Exhibit E). It was in response to these concerns that a waiver provision was added. A waiver provision limited to Section 1610(f)(2), as plaintiff now suggests, would do nothing to address these concerns.

Moreover, the Conference Committee Report, which is generally considered to be the most authoritative source of legislative intent, see Garcia v. United States, 469 U.S. 70, 76 (1984), contains no indication that the President's waiver authority was to be limited to 28 U.S.C. § 1610(f)(2), as plaintiff suggests. Instead, the Conference Report, H.R. Rep. No. 105-789 (Oct. 7, 1998), reiterates that the waiver extends to "the requirements of this provision," without in any way suggesting that it is limited to certain subsections of the provision:

> The conferees have agreed to the provision contained in Section 117 of the Senate bill regarding the execution of property upon judgements [sic] against foreign state violators of international law. The conferees have included additional language giving the President the authority to waive the requirements of this provision in the interest of national security.

See 144 Cong. Rec. H11044-03, H11513 (daily ed. October 19, 1998), reprinted in, 1998 WL 732765 (Attached as Exhibit F).

Thus, the Conference Report provides no support for plaintiff's restrictive interpretation of the President's waiver authority. Finding no support in the Conference Report, plaintiff attempts to infer support for his position from two other sources. First, plaintiff contends that certain legislative proposals by the Administration constitute substantial evidence that the Administration itself recognized "legislative intent to create a waiver limited to 28 U.S.C. § 1610(f)(2)." See Pl. Supp. Mem. at 16. Next, plaintiff attempts to draw support for his position from a series of statements by individual legislators in floor debates and colloquies, or statements made by individual Congresspersons after passage of the statute. As explained below, both arguments are meritless.

Plaintiff's first argument is entirely circular, because it assumes the very conclusion he attempts to prove. In attempting to demonstrate that the waiver provision is limited to Section 1610(f)(2), plaintiff assumes as a starting premise that the scope of the waiver provision was indeed limited to Section 1610(f)(2). Accordingly, plaintiff now argues that any proposal by the Administration, regardless of content, represents "an attempt to extend the application of the waiver from §1610(f)(2) to the entirety of §117(a), so as to preclude the application of

§ 1610(f)(1)." See Pl. Supp. Mem. at 17. Plaintiff then cites the fact that these proposals were not incorporated into the final version of the waiver provision as proof of Congress' intent to keep the scope of the waiver provision limited to Section 1610(f)(2).

Not only does plaintiff's argument fail of its own circularity, but it is entirely incorrect for plaintiff to suggest that waiver language proposed by the Administration reflected attempts to broaden an otherwise narrow waiver provision. The fallacy of plaintiff's position is exposed by plaintiff's misplaced reliance upon the October 1, 1998 letter of Under Secretary of State Stuart Eizenstat to Senator Ben Nighthorse Campbell. The Eizenstat letter clearly expressed the Administration's concerns about the effect of Section 117, but also acknowledged "efforts to accommodate our concerns by including a provision **that would allow Section 117 to be waived.**" See Eizenstat letter at 2 (emphasis added). Thus, alternative waiver language was not proposed out of some implicit realization that the waiver was indeed limited to Section 1610(f)(2), and needed to be broadened. On the contrary, the Eizenstat letter assumed that the waiver provision "would allow Section 117 to be waived." Rather, as plaintiff himself concedes, the alternative language was proposed in order to change the standard for invoking the waiver, from "in the interest of national security"

to "in the national interest." Thus, the inferences as to Congressional intent that plaintiff attempts to draw from the fact that the waiver was not altered in favor of language proposed by the Administration, are unwarranted at best.[3] See Regan v. Wald, 468 U.S. at 236-37 & n.20 (noting that significance of language deleted from draft was "ambiguous"); Guaranty Fin. Servs. Inc. v. Ryan, 928 F.2d 994, 1005 (11th Cir. 1991) (drawing no inferences from failure of amendments).

Plaintiff's attempt to divine support for his narrow construction of Section 117(d) from comments made by certain individual members of Congress during last minute debate on the appropriations bill, is equally unavailing. See 144 Cong. Rec. H11647 (daily ed. Oct. 20, 1998); id. at S12705-06; 144 Cong. Rec. E2305 (daily ed. Oct. 21, 1998). Such comments are of limited, if any, probative value. See West Virginia Univ. Hosps. v. Casey, 499 U.S. 83, 98-99 (1991) ("Where [the statutory language] contains a phrase that is unambiguous . . . we do not permit it to be expanded or contracted by the statements of individual legislators during the course of the enactment process."). Moreover, the D.C. Circuit has repeatedly cautioned courts to

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[3] Similarly, the fact that the final version of Section 117(d) was not changed in favor of other language preferred by the Administration, does not, without wholly unjustified leaps of logic, establish that the waiver was limited to Section 1610(f)(2).

> exercise extreme caution before concluding that a statement made in floor debate, or at a hearing, or printed in a committee document may be taken as statutory gospel . . . especially . . . when . . . it appears that a colloquy was a direct result of a single member . . . attempting to reassure his own constituency or even to create legislative history for citation by the courts.

Texas Mun. Power Agency v. EPA, 89 F.3d 858, 875 (D.C. Cir. 1996) (quotation marks and citations omitted); Gersman v. Group Health Ass'n, 975 F.2d 886, 892 (D.C. Cir. 1992), cert. denied, 511 U.S. 1068 (1994); Antolok v. United States, 873 F.2d 369, 377 (D.C. Cir. 1989). Even comments by the sponsor of legislation are "not controlling in analyzing legislative history." See Weinberger v. Rossi, 456 U.S. 25, 35 n.15 (1982). Accordingly, the comments of individual legislators are of almost no value in interpreting the statute.

Even if these comments were somehow probative, however, they are of no help in this case because they are contradictory and inconclusive. Compare 144 Cong. Rec. at H11647 (remarks of Rep. Kolbe that it was the "**understanding of the conferees** that the waiver provision in subsection (d) of section 117 applies to the entire section 117"), with id. at S12705-06 (remarks of Sen. Faircloth that it was **his understanding** that subsection (d) "does not allow the President to waive the section as a whole, but only those part [sic] that related to 'requirements' on the Secretaries of Treasury and State"). See also id. (remarks of Sen. Lautenberg, author of the original version of Section 117,

declining to opine on the interpretation of the waiver provision added by the conferees).[5/] In an analogous situation, where the House commentators disagreed with the Senate commentators, the Eighth Circuit held in favor of the President's views, stating that the President's intent "must be considered relevant to determining the meaning of a law in close cases." United States v. Tharp, 892 F.2d 691, 695 (8th Cir. 1989).

Plaintiff also relies heavily upon remarks made **subsequent** to passage of the appropriations bill. Such postpassage remarks, however, are completely irrelevant. See Blanchette v. Connecticut Gen. Ins. Corps., 419 U.S. 102, 132 (1974) ("[P]ost-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage. . . . Such statements 'represent only the personal views of these legislators . . .'").[6/]

[5/] In extensions of remarks, not spoken on the floor, Rep. Saxton took the position that subsection (d) did not allow the waiver of Subsection (f)(1)(A). 144 Cong. Rec. at E2305. However, these written remarks carry no weight since they were unlikely to have informed the voting of the other legislators.

[6/] Plaintiff also contends that in a recent status conference, Judge King of the Southern District of Florida, has indicated his acceptance of plaintiff's interpretation of Section 117 in Alejandre v. Republic of Cuba, 996 F. Supp. 1239 (S.D. Fla. 1997). In point of fact, on December 9, 1998, the United States filed a Statement of Interest in that case setting forth its views on Section 117, in the context of efforts to attach property blocked under the Cuban Assets Control Regulations. To date, Judge King has not issued a ruling on the propriety of the attachments in light of the waiver issued by the President pursuant to Section 117(d).

In sum, the most persuasive evidence of Congressional intent here is the plain language of the statute. See United States v. American Trucking Ass'ns, 310 U.S. 534, 542 (1940). That wording unambiguously allows the President to waive the "requirement" that certain blocked property "be subject to attachment or execution." The President has done so here, thereby preserving the immunity of the diplomatic property and bank accounts at issue from the attachment, execution, or garnishment.

C. **The Waiver Must be Upheld to Avoid a Conflict with Our Treaty Obligations**

To the extent that any room for "statutory construction" remains, the Court must construe Section 117 so as to avoid a conflict with international law and treaties. As declared by the Supreme Court in Weinberger v. Rossi, "[i]t has been a maxim of statutory construction since the decision in Murray v. The Charming Betsy, 2 Cranch 64, 118 (1804), that 'an action of [C]ongress ought never to be construed to violate the law of nations, if any other possible construction remains . . . .'" 456 U.S. at 32. See also Trans World Airlines v. Franklin Mint, 466 U.S. 243, 252 (1984) (citing "a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action"); Restatement (Third) of The Foreign Relations Law of the United States, §§ 114, 115 (1987); United States v. Palestine Liberation Org., 695 F. Supp. 1456, 1465 (S.D.N.Y. 1988).

Absent a waiver, Section 117 would, as the President noted in his signing statement, allow for the attachment and execution of diplomatic and consular property of a foreign state, including its embassy.[1] See Exh. B, at 6. As the United States has explained in its previous filings in this case, such actions would violate the Vienna Conventions on Diplomatic and Consular Relations. See T.I.A.S. 7502, 23 U.S.T. 3227 (1961); T.I.A.S. 6820, 21 U.S.T. 77 (1967). Both treaties obligate the United States, as well as the other parties, to protect foreign embassies and other diplomatic and consular property even if diplomatic relations between the sending and receiving states are broken off, and indeed even in time of war between them. See T.I.A.S. 7502, art. 45(a); T.I.A.S. 6820, art. 27.

The International Court of Justice has described the obligations codified by these treaties as "vital for the security and well-being of the complex international community" and held

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[1] Subsection (f)(1)(A) specifically states that its requirements apply "notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f))." Exh. A, at 1199. Section 208(f) of the Foreign Missions Act protects diplomatic or consular property in the custody of the State Department (for example, after diplomatic relations with the foreign state have been severed), providing that "[a]ssets of or under the control of the Department of State, wherever situated, which are used by or held for the use of a foreign mission shall not be subject to attachment, execution, injunction, or similar process, whether intermediate or final." 22 U.S.C. § 4308(f). Section 117 would remove this protection and subject such property to attachment, execution, or similar process.

that "scrupulous[]" respect for these obligations is "essential" to the ordered progress of international relations. Case Concerning U.S. Diplomatic and Consular Staff in Tehran (Judgment), 1980 I.C.J. 3, 43, reprinted in 61 I.L.R. 530, 569 (1981).

If applied to foreign diplomatic and consular property, Section 117 "would place the United States in breach of its international treaty obligations" and would also "put at risk the protection we enjoy at every embassy and consulate throughout the world." Exh. B, at 6; see also Statement by the White House Press Secretary (Exh. D) ("[i]f the U.S. permitted attachment of diplomatic properties, then other countries could retaliate, placing our embassies and citizens overseas at grave risk"). The President explained in his signing statement that he shall, "[t]o the extent possible, . . . construe section 117 in a manner consistent with my constitutional authority and with U.S. international legal obligations." He concluded by stating that he has exercised Section 117's waiver authority in the national security interest of the United States. Exh. B, at 6. In order to avoid a breach of our international obligations and prevent serious risk to national security interests, the Court should adopt the same construction of Section 117(d).

D. Section 117 Must be Construed to Avoid Infringing on the President's Constitutional Powers

"Federal courts, when confronting a challenge to the

constitutionality of a federal statute, follow a 'cardinal principle': They 'will first ascertain whether a construction . . . is fairly possible' that will contain the statute within constitutional bounds." Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1074 (1997) (quoting Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring)). As explained by the Supreme Court, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." United States v. Winstar Corp., 116 S. Ct. 2432, 2455 (1996) (plurality opinion) (quoting Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575 (1988), and citing Ashwander, 297 U.S at 348). Applying this rule, Section 117(d) should be construed as reaching 28 U.S.C. § 1610(f)(1)(A), in order to avoid infringing upon the President's constitutional authority to receive "Ambassadors and other public Ministers," as well as his general constitutional powers in the area of foreign policy.

The Constitution explicitly refers to the role of foreign ambassadors in various places. Significantly, the Constitution states that the President "shall receive Ambassadors and other public Ministers." See U.S. Const. Art. II, § 3. It further provides that the "judicial Power shall extend . . . to all Cas

affecting Ambassadors," and that "[i]n all Cases affecting Ambassadors, . . . the Supreme Court shall have original Jurisdiction." See U.S. Const. Art. III, § 2.

The Framers' decision to accord ambassadors constitutional privileges reflected their view of the importance of maintaining peaceful diplomatic intercourse between the United States and other nations: "[p]ublic ministers of every class are the immediate representatives of their sovereigns," and "[a]ll questions in which they are concerned are . . . directly connected with the public peace." The Federalist No. 81 at 416 (A. Hamilton) (Max Beloff ed., 1987). See also Ex parte Gruber, 269 U.S. 302, 303 (1925) (provision was introduced "in view of the important and sometimes delicate nature of our relations and intercourse with foreign governments"); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 814 (D.C. Cir. 1984) (Bork, J., concurring) ("The Constitution . . . gave particular attention to . . . the rights of ambassadors."), cert. denied, 470 U.S. 1007 (1985).

Without a waiver, Section 117 would, as the President stated upon signing the bill, "encroach on [his] authority under the Constitution to 'receive Ambassadors and other public Ministers.'" Exh. B at 6. Absent a waiver, embassy and other mission property of certain states would be subject to attachment and execution. This could seriously inhibit a foreign state with

which the President seeks to establish diplomatic relations from maintaining a diplomatic presence in the United States. If diplomatic properties were not accorded the immunities customary under principles of international law, the ability of the President to receive Ambassadors and other public ministers would thus be seriously undermined.

Moreover, the failure of the United States to adhere strictly to principles of diplomatic law, upon which the interchange of Ambassadors and foreign missions is based, will cast doubt upon the commitment of the United States to abide by other obligations and hamper the President's ability to establish and maintain relations generally. This would be especially true with regard to those countries with which relations are difficult, but with which continued communication is essential to reduce tensions that threaten peace and achieve other important foreign policy objectives. Therefore, Section 117 should be construed to avoid any encroachment upon the President's authority under the Constitution to "receive Ambassadors and other public Ministers."

Moreover, statutes granting the President authority to act in matters touching on foreign affairs are to be broadly construed. B-West Imports, Inc. v. United States, 75 F.3d 633, 636 (Fed. Cir. 1996) (rejecting narrow construction of statutor term "control"); Florsheim Shoe Co. v. United States, 744 F.2d

787, 793 (Fed. Cir. 1984) (in the foreign policy area, the Court is bound to give "congressional authorizations of presidential power . . . a broad construction and not hemmed in or cabined, cribbed, confined by anxious judicial blinders"). In the area of foreign affairs, broad grants of discretion by Congress to the Executive are quite common. See Florsheim Shoe, 744 F.2d at 795; Curtiss-Wright, 299 U.S. at 324 (noting that practically every volume of the United States Statutes contains laws relating to foreign policy "which either leave the exercise of the power to [the President's] unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs"). It is evident that Congress intended for the President to have wide authority to block property of a foreign state. See Dames & Moore, 453 U.S. at 672 ("the legislative history and cases interpreting the TWEA fully sustain the broad authority of the Executive when acting under this congressional grant of power"); see also id. at 677 ("the [International Emergency Economic Powers Act] delegates broad authority to the President to act in times of national emergency with respect to property of a foreign country"). As explained by the Supreme Court,

> the congressional purpose in authorizing blocking orders is "to put control of foreign assets in the hands of the President . . . ." . . . Such orders permit the President to maintain the foreign assets at his disposal for use in negotiating the resolution of a declared national emergency.

453 U.S. at 673.

Given Congress' original intent behind the blocking statutes, and the authority explicitly conferred upon the President by the Constitution to "receive Ambassadors and other public Ministers," any move by Congress to limit the President's ultimate control over the use of this important tool should be unambiguous. See South Puerto Rico Sugar Co. Trading Corp. v. United States, 334 F.2d 622, 634 (Ct. Cl. 1964) (upholding broad interpretation of presidential authority where "legislative history fails to show that Congress actually intended to forbid the President from taking such action"), cert. denied, 379 U.S. 964 (1965). Neither the plain language nor the legislative history evidences any such unambiguous intent on the part of Congress here. Therefore, to the extent any ambiguity exists in Section 117(d), it should be construed to grant the President the broadest possible authority, which in this case would be the authority to waive 28 U.S.C. § 1610(f)(1)(A).

Finally, in determining the amount of deference to accord the President's interpretation of Section 117(d)'s waiver authority, the Court should consider the principles enunciated in Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-44 (1984). Under Chevron, if a statute is ambiguous, the Court must defer to the interpretation of the Executive Branch agency charged with administering the statute, as long as

that interpretation is based on a permissible construction of the statute. Id. The President's interpretation of his own statutory authority is entitled to a deference at least as great as that accorded agencies, if not greater. See Conoco, Inc. v. U.S. Foreign-Trade Zones Bd., 18 F.3d 1581, 1585 n.11 (Fed. Cir. 1994) (actions by the President "are entitled to great deference by the judiciary"). Although the United States contends there is no ambiguity here, if the Court does conclude there is, the analysis above demonstrates that the President's interpretation is at least a reasonable one, and hence entitled to deference.[9/]

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court grant its motion to quash the writs of attachment levied upon the diplomatic properties and bank accounts now at issue.

Dated: December 11, 1998.

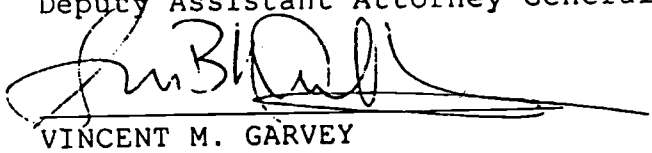
Respectfully Submitted,

FRANK W. HUNGER
Assistant Attorney General

[9/] In addressing whether the two NationsBank accounts are subject to attachment and/or garnishment even if the President's waiver is upheld, plaintiff inaccurately describes the "First Account." Pl. Supp. Mem. at 30. He describes this account as "contain[ing] only the proceeds of the OFM's former Iranian diplomatic properties leasing program." In fact, the First Account contains amounts constituting repayment of the original Iranian diplomatic and consular funds as well as additional proceeds from the leasing of OFM's former Iranian diplomatic properties (to the extent that such proceeds are not retained in the Second Account), plus any interest earned. See Carpenter Declaration ¶ 11.

WILMA A. LEWIS
United States Attorney

PHILIP D. BARTZ
Deputy Assistant Attorney General



VINCENT M. GARVEY
SANJAY BHAMBHANI
Attorneys, Department of Justice
Civil Division
Federal Programs Branch - Room 802
901 E Street, N.W.
Washington, D.C. 20530
Telephone No.: (202)514-3367

Attorneys for the United States

SALAHUDDEEN ABDUL KAREEM AFFIDAVIT
DATED JANUARY 18, 1999

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

---x

STEPHEN M. FLATOW,

Plaintiff,

v.

THE ISLAMIC REPUBLIC OF IRAN, et al.,

Defendants.

AW-98-4152
CA No. ~~98-MC-285~~

United States District Court
For the District of Columbia
Civil Action # 97-3964RCL

AFFIDAVIT OF SALAHUDDEEN ABDUL KAREEM

---x

STATE OF MARYLAND)
:
COUNTY OF MONTGOMERY)

SALAHUDDEEN ABDUL KAREEM, being duly sworn, deposes and says:

1. I was born and raised in Washington, D.C. and am Afro-American. I have a bachelor's degree in Management and have lectured at Loyola University to graduate students on education issues. I am currently the principal of the Muslim Community School ("MCS") located at the Islamic Education Center ("IEC") at Montrose Road and Seven Locks Road in Montgomery County and have been the principal of MCS since January 1994. Prior to being appointed as principal, I served as the Assistant Principal of the MCS for four years. In addition to being its principal, I am a director of the MCS.

2. To give the Court a better understanding of the MCS, it is important to trace its origins. In 1979 two African-American Muslim women in Washington, D.C. started a home-based day-care center. One of these women is my sister. In 1980, these women formed the

Islamic Community School ("ICS") which provided day-care to Washington, D.C. children. Over the next four years, the ICS periodically moved its location to different private homes, including my sister's home. In 1984, the ICS changed its name and became the MCS. Not only did the organization change its name in 1984, but it changed its mission. Because a growing number of local Muslim families wanted to provide a full-time Muslim education to their children, in 1984 the MCS became a school and not just a day-care center. When the MCS first began to accept elementary school students, the vast majority of the student body were Afro-Americans from the Washington, D.C. area.

3. The MCS was certified by the Maryland Department of Education as a not-for-profit in 1988 and has maintained its certification ever since. The MCS is a Maryland not-for-profit organization that makes annual filings with the Internal Revenue Service and appropriate state offices and departments in Maryland, Virginia and the District of Columbia. Consistent with its not-for-profit status, the MCS was granted an exemption from state sales tax from the State of Maryland in September 1997.

4. MCS currently has 176 students from pre-kindergarten through the tenth grade and is the largest Muslim school in Montgomery County. More than 90% of our students are American citizens by birth. Although exact statistics are difficult to maintain because many students have parents of two nationalities, I can say MCS students currently come from fifteen different countries with about one-third of the students being of Iranian descent and with another twenty percent being Afro-Americans.

5. The MCS runs a lunch program for its students that is, in part, subsidized by the State of Maryland. The MCS had to apply to the Maryland Department of Education for

this subsidy, which was granted in 1996. To obtain this subsidy, the MCS had to show that there were student families that met certain income requirements and demonstrate that the MCS's facilities met state health guidelines and regulations. MCS's facilities are regularly inspected by state and county officials.

6. None of the funding for the MCS comes from the Government of the Islamic Republic of Iran or any organization I know to be affiliated with that government. Aside from monies received from student tuitions and families affiliated with the MCS, the only significant donations I can remember being made to the MCS were in 1994 and were from the Sacramento Kings professional basketball team and Mahmoud Abdul Rauf.

7. Students from MCS regularly compete against students from other public and private schools in Montgomery County in scholastics and sports. Students from MCS consistently finish as top performers in county-wide science fairs, spelling bees and other academic competitions.

8. At MCS we welcome people of all denominations to learn about Islam. Moreover, we educate our students to communicate with other groups to promote dialogue and better understanding between religions. In this regard, MCS invites Jewish and Christian clergy to speak to its students and these clergymen have been welcomed on their many visits to our school.

Salahuddeen Abdul Kareem

Sworn to before me this
18 day of January, 1999

Barbara S Small
Notary Public
Montgomery County
Maryland
notary Expiration
12/01/00

368700.1

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Affidavit of Salahuddeen Abdul Kareem was mailed postage prepaid this 19th day of January, 1999 to:

Thomas Fortune Fay, Esq.
THOMAS FORTUNE FAY, P.C.
601 Pennsylvania Avenue, NW
#900 - South Building
Washington, D.C. 20004

Steven R. Perles, Esq.
Anne-Marie Lund Kagy, Esq.
STEVEN R. PERLES, P.C.
1666 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20009

Patrick James Attridge

BAHRAM NAHIDIAN AFFIDAVIT
DATED JANUARY 19, 1999

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

----------x

STEPHEN M. FLATOW,

Plaintiff,

v.

THE ISLAMIC REPUBLIC OF IRAN, et al.,

Defendants.

AW-98-4152
CA No. ~~98-MC-285~~

United States District Court
For the District of Columbia
Civil Action # 97-3964RCL

AFFIDAVIT OF
BAHRAM NAHIDIAN

----------x

STATE OF VIRGINIA)
:
COUNTY OF PRINCE WILLIAM)

BAHRAM NAHIDIAN, being duly sworn, deposes and says:

1. I am a citizen of the United States and have resided here for almost forty years. My nine children and three grandchildren all were born and raised in this community. I have been self-employed for more than thirty years and am currently the Imam of the Manassas Mosque.

2. In 1980, along with several individuals including myself approached a Unitarian Church that owned property at Montrose Road and Seven Locks Road in Rockville seeking to buy it (hereinafter the "Montgomery County property"). It was our understanding that the Unitarian Church wanted to sell this property because it was the subject of a foreclosure proceeding and the members of the church could not resolve their differences.

3. Along with approximately fifteen other people, we used our own funds to form the Islamic Education Center of Maryland ("IEC") and put a down payment on the Montgomery County property in the fall of 1981. When we could not obtain bank financing to complete the purchase, we turned to the Alavi Foundation in New York, then known as the Mostazafan Foundation of New York, (hereinafter the "Alavi Foundation") with a request for assistance.

4. The Alavi Foundation agreed to help us and, thereafter, purchased the Montgomery County property in its own name and leased it to the IEC on a rent-free basis.

5. Subsequent to its purchase, the Alvai Foundation made grants to the IEC to pay for utilities and other expenses relating to the upkeep of the Montgomery County property.

6. While all of the founders of the IEC are Muslim, we all are United States citizens and not all of us are of Iranian descent. Indeed, many of the IEC's founders are Arabs and Pakistanis.

7. None of the money used to form the IEC or for the down payment on Montgomery County property came from the Government of the Islamic Republic of Iran ("Iranian Government") or anyone in Iran.

8. Counsel for the Alavi Foundation informs me that plaintiffs in this matter assert that the IEC is or was somehow controlled by the Iranian Government. This assertion is false. While I was involved with the operations of the IEC, all decisions regarding the IEC's activities were made by its directors here in the United States without any input or instructions from anyone directly or indirectly involved with the Iranian Government. Moreover, while I was

involved with the IEC, it did not receive any funds from the Iranian Government or an individual or entity in Iran.

9. Counsel for the Alvai Foundation also informs me that plaintiffs in this matter have attached to their papers alleged excerpts from an interview I allegedly gave to law enforcement officials investigating the death of Ali Tabatabai. All of the allegations made about me are false. For example, I did not convert David Belfield to Islam, nor has Mr. Belfield ever spent a night at my home. Indeed, I never knew Mr. Belfield had been in prison until I was advised of this fact by the Alavi Foundation's counsel.

Bahram Nahidian

Sworn to before me this
19 day of January, 1999

Diana Reilly
Notary Public

My Commission Expires December 31, 2002

368543.1

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Affidavit of Bahram Nahidian was mailed postage prepaid this 19th day of January, 1999 to:

Thomas Fortune Fay, Esq.
THOMAS FORTUNE FAY, P.C.
601 Pennsylvania Avenue, NW
#900 - South Building
Washington, D.C. 20004

Steven R. Perles, Esq.
Anne-Marie Lund Kagy, Esq.
STEVEN R. PERLES, P.C.
1666 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20009

Patrick James Attridge

JOHN D. WINTER AFFIDAVIT
DATED JANUARY 19, 1999

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

STEPHEN M. FLATOW, Plaintiff, v. THE ISLAMIC REPUBLIC OF IRAN, et al., Defendants.	AW-98-4152 Civil Action No. ~~98-MC-285~~ United States District Court For the District of Columbia Civil Action # 97-3964RCL REPLY AFFIDAVIT OF JOHN D. WINTER

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOHN D. WINTER, being duly sworn, deposes and says:

1. I am an attorney admitted to practice in the state and federal courts of New York and the United States Court of Appeals for the Second, Fourth, Fifth and Ninth Circuits, and am a member of the firm of Patterson, Belknap, Webb & Tyler LLP, counsel for movant Alavi Foundation ("the Foundation"). I submit this reply affidavit in further support of the Foundation's Motion to Release the Writs of Execution and Order to Show Cause.

2. Annexed hereto as Exhibit A the Certificate of Incorporation of the Pahlavi Foundation dated December 5, 1973.

3. Annexed hereto as Exhibit B are excerpts from the deposition of Houshang Ahmadi taken in Gabay v. Mostazafan Foundation of Iran, et al. on January 23, 1996.

4. Annexed hereto as Exhibit C are excerpts from the deposition of Manoucher Shafie taken in Gabay v. Mostazafan Foundation of Iran, et al. on December 1, 1995.

5. Annexed hereto as Exhibit D is the Petition for Writ of Certiorari filed on October 2, 1998 in Gabay v. Mostazafan Foundation of Iran, et al.

6. Annexed hereto as Exhibit E is the Restated Certificate of Incorporation of the Pahlavi Foundation dated July 2, 1980.

7. Annexed hereto as Exhibit F are excerpts from the deposition of Abass Khadjeh-Piri taken in Gabay v. Mostazafan Foundation of Iran, et al. on December 21, 1995.

8. Annexed hereto as Exhibit G is the Bonyad Local Publication 21st Issue dated March 21-April 20, 1981.

9. Attached hereto as Exhibit H are publicly available documents demonstrating that the mosques affiliated with Sheik Omar Abdel-Rahman and the World Trade Center bombing are located on Foster Avenue, Brooklyn, New York and 2824 Kennedy Boulevard, Jersey City, New Jersey.

10. Exhibit 11 attached to Plaintiff's Opposition Brief bears the "Bates" stamp numbers given tro those documents by the Foundation's counsel when they were produced to the plaintiff in Gabay v. Mostazafan Foundation of Iran, et al.

John Waite
JOHN D. WINTER

Sworn to before me this
19th day of January, 1999

Erik
Notary Public

ERIK HAAS
Notary Public, State of New York
No. 31-5030493
Qualified in New York County
Commission Expires Sept. 16, 2000

EXHIBIT A

CERTIFICATE OF INCORPORATION

OF

THE PAHLAVI FOUNDATION

UNDER SECTION 402 OF THE NOT-FOR-PROFIT CORPORATION LAW

The undersigned, desiring to form a charitable corporation under and by virtue of the provisions of the Not-For-Profit Corporation Law of the State of New York, does hereby make, subscribe and acknowledge this Certificate as follows:

1. The name of this Corporation is: THE PAHLAVI FOUNDATION.

2. The Corporation is a corporation as defined in subparagraph (a)(5) of Section 102 of the Not-For-Profit Corporation Law in that it is not formed for pecuniary profit or financial gain, and no part of the assets, income or profit of the Corporation is distributable to, or inures to the benefit of its members, directors or officers or any private person except to the extent permissible under the Not-For-Profit Corporation Law.

3. The purposes for which the Corporation is formed shall be purely charitable, philanthropic, educational and civic, without regard to race, color or creed as follows:

(a) To render voluntary support and assistance by means of contributions and grants to exempt organizations established to benefit the aged, sick, infirm, indigent, and destitute;

(b) To render support and assistance for the study and promotion of the arts and sciences by means of contributions and grants; to establish scholarships, fellowships, prizes, research awards, and similar rewards to induce intellectual attainments;

/

(c) To contribute to religious instructions regardless of creed for the purpose of promoting understanding and harmony among persons of all faiths;

(d) To render support to the relief of humanity from hardship and privation caused by war, disaster, and act of God; to contribute to organizations established for such purposes;

(e) To render support to established charitable, philanthropic, educational and civic endeavors of all kinds and descriptions; to contribute to community chests and social welfare funds and generally to support activities of a charitable, benevolent, philanthropic, educational and civic nature;

(f) To provide and pursue ways and means not prohibited by law, to solicit and receive money and property for the foregoing purposes and to receive and accept for charitable purposes gifts, donations, bequests and devises of money and property;

(g) To do all and everything necessary, suitable, useful or proper for the accomplishment of any of the purposes in the attainment of any objects or appurtenances of any of the powers hereinbefore set forth;

(h) Nothing herein shall authorize this corporation, directly or indirectly, to engage in or include among its purposes, any of the activities mentioned in Not-For-Profit Corporations Law, Section 404 (b) - (p) or Executive Law, Section 757.

4. No part of the net earnings of this Corporation shall inure to the benefit of any member, director, officer or employee of the Corporation; no member, director, officer or employee of the Corporation shall receive or be lawfully entitled to receive any pecuniary benefit of any kind, except reasonable compensation for services in effecting one or more purposes of the Corporation. No

substantial part of the activities of this Corporation shall consist in carrying on propaganda or otherwise attempting to influence legislation. This Corporation shall not participate in, or intervene in (including the publishing or distributing of statements) any political campaign on behalf of any candidate for public office.

5. In case of the dissolution of the Corporation, subject to the approval of the Supreme Court of the State of New York, no distribution of any of the property or assets of the Corporation shall be made to any member, director, officer or employee of the Corporation, but all of such property and assets shall be applied to accomplish the public charitable, scientific, literary and educational purposes for which this Corporation is organized.

6. The Corporation is a Type B corporation under Section 201 of the Not-For-Profit Corporation Law.

7. The territory in which its operations are principally to be conducted is the United States of America.

8. The office of the Corporation is to be located in the City, County and State of New York.

9. The number of directors of the Corporation shall not be less than three (3) nor more than seven (7).

10. The names and addresses of the persons who shall be directors of the Corporation until its first

annual meeting, each of whom is at least 18 years of age, are as follows:

NAME	ADDRESS
William P. Rogers	7007 Glenbrook Road Bethesda, Maryland
Frederick P. Glick	45 Sutton Place South New York, New York
Charles A. Simmons	16 Eastwoods Lane Scarsdale, New York

11. The post office address to which the Secretary of State shall mail a copy of any notice required by law is:

c/o Rogers & Wells
200 Park Avenue
New York, New York 10017

Attention: Charles A. Simmons, Esq.

12. Prior to the delivery of this Certificate of Incorporation to the Department of State for filing, all approvals or consents required by the Not-For-Profit Corporation Law or by any other statute of the State of New York will be endorsed upon or annexed hereto.

13. In the event that in any year the Corporation shall be a "private foundation", as that term is defined in Section 509 of the Internal Revenue Code of 1954, as amended,

A. The Corporation shall distribute its income for each taxable year at such time and in

such manner as not to subject it to tax under Section 4942 of said Code, and

B. The Corporation shall not

a. engage in any act of self-dealing as defined in Section 4941(d) of the Code;

b. retain any excess business holdings as defined in Section 4943(c) of the Code;

c. make any investments in such manner as to subject the Corporation to tax under Section 4944 of the Code; and

d. make any taxable expenditures as defined in Section 4945(d) of the Code.

14. The subscriber is of the age of nineteen years or over.

IN WITNESS WHEREOF, I have made, subscribed and acknowledged this Certificate this 5th day of December, 1973.

Walter R. Bailey
445 East 80th Street
New York, New York

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On this 5th day of December, 1973, before me personally came WALTER R. BAILEY, to me known and known to me to be the individual who executed the foregoing Certificate and he acknowledged to me that he executed the same.

Notary Public

PETER R. [illegible]

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

WALTER R. BAILEY, being duly sworn, deposes and says that he is an attorney associated with the law firm of Rogers & Wells, attorneys for the subscriber to the foregoing Certificate of Incorporation and that no previous application for the approval of the said Certificate by any Justice of the Supreme Court has ever been made.

Walter R. Bailey

Sworn to before me this

day of December, 1973.

Notary Public

PETER H. [illegible]
NOTARY PUBLIC, State of New York
No. 30-[illegible]
Qualified in [illegible] County
Certificate filed in New York County
Commission expires March [illegible], 1974

6

Notice of Application Waived (This is not to be deemed an approval on behalf of any Department or Agency of the State of New York, nor an authorization of activities otherwise limited by law.)

Dated: , 1973.

Louis J. Lefkowitz
Attorney General

By
Assistant Attorney General

7

I, Honorable [redacted], a Justice of the Supreme Court of the State of New York, First Judicial District, do hereby approve the foregoing Certificate of Incorporation of THE PAHLAVI FOUNDATION, and consent that the same be filed.

Dated: New York, New York
December 4, 1973

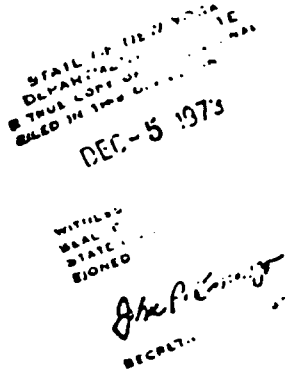
SUPREME COURT, NEW YORK COUNTY
SPECIAL TERM, PART 7
NEW YORK, NEW YORK

Justice of the Supreme Court
of the State of New York
First Judicial District

12/7/73

205713

8



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CERTIFICATE OF INCORPORATION

OF

THE PAHLAVI FOUNDATION

UNDER SECTION 402 OF THE NOT-FOR-PROFIT CORPORATION LAW

STATE OF NEW YORK
DEPARTMENT OF STATE
TAX $ None
FILING FEE $ 5.00
FILED DEC 5 - 1973
John P. Lomenzo
Secretary of State
By [illegible]

ROGERS & WELLS
200 PARK AVENUE
BOROUGH OF MANHATTAN, NEW YORK, N. Y. 10017
Tel. No. 972 7000

723

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

NORMAN GABAY,

Plaintiff,

-against- 92 Civ. 6954 (SHS)

MOSTAZAFAN FOUNDATION OF IRAN, a/k/a THE FOUNDATION FOR THE OPPRESSED, an agency or instrumentality of the Government of the Islamic Republic of Iran, MOSTAZAFAN FOUNDATION OF NEW YORK, as alter ego of Mostazafan Foundation of Iran,

Defendants.

----------x

January 23, 1996
11:00 a.m.

Deposition of HOUSHANG AHMADI, taken by the Plaintiff, pursuant to Notice, at the offices of Patterson Belknap Webb & Tyler, LLP, 1133 Avenue of the Americas, New York, New York, before Richard Jennings, a Certified Shorthand Reporter and Notary Public within and for the State of New York.

GREENHOUSE REPORTING, INC.
363 Seventh Avenue - 20th Floor
New York, New York 10001
(212) 279-5108

Ahmadi

Q. A vacation?

A. Pardon?

Q. It was a vacation?

A. Vacation, right.

Q. Was I correct when I said before that you became a director for the New York foundation in April of 1980?

A. I think it was during that time, but I don't exactly recall the date, but it was early 1980.

Q. How did you get that position?

A. That position, Mr. Shafie who was -- at that time I think he was the director of the foundation, and he gave me a call and indicated to me that there is a vacancy on the board and he likes me to join.

Q. And what were you doing at that point?

A. At that point I was teaching.

Q. At Long Island University?

A. No, Mount Saint Vincent and Manhattan College.

Q. Had you met Mr. Shafie before he telephoned you?

A. Yes.

Q. How did you come to know Mr. Shafie?

A. Mr. Shafie, I met him in some cultural festival, Iranian Cultural Festival in New York, the New Year's time, and it's called Newrooz. So I met him there and then after that we became acquainted and he told me that he had some kind of real estate office in Middletown, New York.

When he mentioned Middletown, New York, I said, "Oh, you're my neighbor, because I also live in Washingtonville." We had property in Washingtonville so we became acquainted with each other.

Q. And when he called you to ask you to take this position, did you accept?

A. He asked me to go to the meeting. He asked me for my resume. I mailed my resume to him. Then he invited me to one of the meetings and I did go to the meeting.

Q. And what happened at the meeting?

A. At that meeting the board members voted after they read my resume and asked me several questions about my educational

EXHIBIT C

ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

NORMAN GABAY,

Plaintiff,

-against- 92 Civ. 6954 (SHS)

MOSTAZAFAN FOUNDATION OF IRAN, a/k/a THE FOUNDATION FOR THE OPPRESSED, an agency or instrumentality of the Government of the Islamic Republic of Iran, MOSTAZAFAN FOUNDATION OF NEW YORK, as alter ego of Mostazafan Foundation of Iran,

Defendants.

----------x

December 1, 1995
9:30 a.m.

Deposition of MANOUCHER SHAFIE, taken by the Plaintiff, pursuant to Subpoena, at the offices of Patterson Belknap Webb & Tyler, LLP, 1133 Avenue of the Americas, New York, New York, before Richard Jennings, a Certified Shorthand Reporter and Notary Public within and for the State of New York.

GREENHOUSE REPORTING, INC.
363 Seventh Avenue - 20th Floor
New York, New York 10001
(212) 279-5108

MR. WINTER: I'm just pointing out to you it goes from page 1 to page 17.

THE WITNESS: I know it is missing 16 pages.

MR. ROVINE: Also introduced as Geramian 11, that's the full document. I'm only going to ask you questions about one page, page 17.

Mr. Shafie, this is entitled "Minutes Of The Annual Meeting Of The Board Of Directors Of The Mostazafan Foundation Of New York."

Could you tell us, sir, who chose the name for the Foundation in New York?

A. What's your question, sir?

Q. Who chose the name the Mostazafan Foundation of New York?

A. It was the board of directors in the early days of the Foundation after I got into the office.

Q. Did you have any role in selecting that name?

A. Yes, we did.

Q. And why did you choose that name?

A. We were receiving a lot of threatening telephone calls from different groups. They were threatening us about retaliation of using the Pahlavi Foundation as the name of the Foundation, and I did have a difficult time on those days to rent the building because a lot of prospective tenants were influenced by the media and they were hesitant to come forth to negotiate a lease on the 650 building.

Q. Why were they hesitant?

A. I just told you because there was a lot of newspaper talks, cheap talks, and terrorizing threat to the Foundation and to the tenant or to the office, it was quite common.

Q. Do you know who was making those threats?

A. I don't know, different groups every time. Newspaper was the one that they were looking for a subject and they would write anything they just found against us. In those days they were writing in the newspaper.

Q. You're not suggesting the newspapers were making the threats, are you?

A. Newspapers were quoting from people, groups, possibilities and how the American firms are worried about the demonstration, threat to the building, to the tenancy in that building, and we also were receiving telephone calls, anonymous call and used to call and terrorize us.

Q. What did they want you to do, the callers?

A. To surrender, to give us the building. A lot of unreasonable demand because we just were Pahlavi Foundation.

Q. Surrender to whom?

A. To them, to whoever they were. They were a factional group among the students in the United States.

They were opposing the Shah at the time and his family. They were under the illusion this was an asset of the Shah, this is part of the Shah's assets. They didn't know what the status of the building was, and they were saying hundreds of millions of dollars involved, which wasn't true. We knew that the building was in those days, may have cost the

Foundation somewhere around 35, 36 million dollars, but they were going into hundreds of million of dollars, so based on this kind of terrorizing telephone messages or letters that we used to receive, we tried to change the name and at least give some assurance to the American business that we are now a U.S. company, we are not anything to do with the Iranian or the Foundation in Iran or the Pahlavi or anybody.

Independently, we decided to put the name, we chose the name collectively.

The reason we chose Mostazafan was because the name was very, fit the Foundation's Charter, to assist needy people in need, destitute. That was the name-choosing process that the board of directors in those days, independent from anybody, we chose it ourselves.

Q. Did you know at the time that you chose it that it was the same name as the Mostazafan Foundation in Iran?

A. That was just -- it is a common word, mostazafan, it is a very common and meaningful word. We didn't concern ourselves

with Iran or whether they have the name or didn't have the name.

Q. My question was did you know it was the same name as the Mostazafan Foundation of Iran?

A. I don't recall. That was independently done quietly from the Foundation in Iran or the government in Iran, per se.

Q. Was it coincidence that you chose the same?

A. It could be a coincidence but it was a meeting of the mind of the board of directors.

Q. You were in favor of this name?

A. Of course I am. I am still against why they changed it.

Q. Why are you against it?

A. Because the name is a beautiful name.

Q. Alavi not a beautiful name?

A. Alavi is religious, not religious, but it more goes toward -- it has religious background, the word, where as mostazafan doesn't have religious background.

Q. Did it come from any other source?

A. No, sir.

Q. That was the sole source of the funding?

A. Or it come from the asset too, doesn't have to be an income. When you're a nonprofit organization, certain percentage of your asset has to be spent by law, so we were spending that money in that fashion.

Q. Do you recall what that percentage was that you have to by law spend?

A. No, not exactly.

Q. Does the number 6 percent ring any --

A. Could be in that neighborhood, yes.

Q. -- any bells?

I'm just looking for a document which I thought I might be able to -- this is Geramian number 5, it is in that set of exhibits, it is Bonyad Local Publication, 21st issue, the one that's called "Let Us Get Acquainted With The Foundation For The Oppressed in New York." We went through that in part.

If I may direct your attention to

the fifth page of that document, which is entitled "Bonyad Local Publication, 21st issue." You see that?

A. Yes.

Q. Page 17, "According to New York law, the Foundation must spend all its net income on loan or charities, and in case the net income is less than 6 percent of the net assets of the Foundation, an amount equal to 6 percent should be spent on welfare activities."

A. Yes, that's what it says, I see it.

Q. That sounds right to you?

A. Yes.

Q. If you look at the very next two sentences, "Under these circumstances, it is not possible to send directly to Iran the incomes of the Foundation. Therefore, the only possible way is to spend the net income of the Foundation to promote the ideals of the Islamic Republic in America." You see those sentences?

A. Yes.

Q. Do you have any reaction to those sentences, do they mean anything to you?

A. It doesn't mean anything to me, no,

A. I don't recall. That also could not be very heavy, but it was a program. I did not quantify the programs by the money we spent on them, by the importance of them. I rated them.

Q. Now, that hostage crisis began in November of '79. So when did that program begin?

A. Not long after the crisis.

Q. And how long did it last?

A. It lasted for almost a year and a half to two years. Then after the drama was over and we didn't need to have the student counseling anymore, so things went back to normal for the students and for us as well.

Q. Who were the counselors?

A. There were a few people involved. One of them was Noshiviram Hatemi, one was Mr. Yeganeh.

Q. And what was the nature of the counseling, what kind of counseling was given?

A. Go around, even have legal assistance to some of the students who were in trouble. Some of these students independent from the Foundation, they were directly

EXHIBIT D

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NORMAN GABAY,
Petitioner,

v.

MOSTAZAFAN FOUNDATION OF IRAN,
a/k/a The Foundation for the Oppressed,
an agency or instrumentality of the Islamic Republic of Iran,

and

MOSTAZAFAN FOUNDATION OF NEW YORK,
n/k/a The Alavi Foundation,
an alter ego of the Mostazafan Foundation of Iran,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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2 October 1998

QUESTION PRESENTED

Did the courts below misconstrue the Foreign Sovereign Immunities Act, 28 U.S.C. §1605(a)(3), and misapply *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ["*Bancec*"], by extending sovereign immunity for jurisdictional purposes to a violator of international law solely on the ground that the violator did not exercise "day-to-day control" over its agent's commercial activities in the United States?

PARTIES

Petitioner Norman Gabay, a California resident, is a naturalized United States citizen who is considered a "fugitive Jew" by the Islamic Republic of Iran. Petitioner owns and operates a privately held commercial entity doing business in California as The Charles Company. Petitioner brings this action in his individual capacity.

Respondent Mostazafan Foundation of Iran is an entity founded by order of the Ayatollah Khomeini on 1 March 1979. The Mostazafan Foundation of Iran, which was established and now exists under the laws of the Islamic Republic of Iran, is a successor organization to the Pahlavi Foundation of Iran, founded as a nonprofit charitable organization in 1958 by the late Shah of Iran.

Respondent Mostazafan Foundation of New York, n/k/a The Alavi Foundation, is a nonprofit entity incorporated under the laws of New York. It was originally established in New York in 1973 as the Pahlavi Foundation, a branch of the Pahlavi Foundation of Iran, to administer the Shah's charitable activities in the United States. Shortly after Iran's Islamic Revolution in 1979, Respondent's name changed to the Mostazafan Foundation of New York. Respondent's name changed again in 1992 to the Alavi Foundation.

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IN THE
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner Norman Gabay respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on 5 May 1998.

OPINIONS BELOW

The Summary Order of the Court of Appeals for the Second Circuit (Graafeiland, Meskill, Cabranes, *per curiam*) is reported at 152 F.3d 918 (table). The text is available at

1998 WL 385909 and is reprinted in the appendix hereto at 1A – 3A.

The Memorandum Opinion of the United States District Court for the Southern District of New York (Sidney H. Stein) is reported at 968 F. Supp. 895, and is reprinted in the appendix hereto at 4A – 13A.

The Memorandum Opinion of the United States District Court for the Southern District of New York (Kimba M. Wood) is reported at 151 F.R.D. 250, and is reprinted in the appendix hereto at 14A – 30A.

JURISDICTION

Invoking federal subject-matter jurisdiction under 28 U.S.C. §1330(a) and 28 U.S.C. §1605(a)(3) as to Respondent Mostazafan Foundation of Iran, and under 28 U.S.C. §1332 as to Respondent Mostazafan Foundation of New York/Alavi Foundation, Petitioner filed suit in the United States District Court for the Southern District of New York on 22 September 1992. On 15 October 1993, the District Court denied Respondents' Motions to Dismiss and ordered limited jurisdictional discovery. *See* 151 F.R.D. 250, *reprinted infra* at 14A. Following the conclusion of discovery, Respondent Mostazafan Foundation of Iran renewed its Motion to Dismiss, or in the alternative, moved for summary judgment. Respondent Mostazafan Foundation of New York/Alavi Foundation moved only for summary judgment. On 4 June 1997, the Southern District of New York granted Respondents' Motions and dismissed the case. *See* 968 F. Supp. 895, *reprinted infra* at 4A.

On Petitioner's *pro se* appeal, considered without benefit of oral argument, the United States Court of Appeals for the Second Circuit issued a Summary Order affirming the District Court's dismissal on 5 May 1998. 152 F.3d 918 (table), *available* at 1998 WL 385909 *and reprinted infra* at 1A. No petition for rehearing was sought.

On 30 July 1998, Justice Ruth Bader Ginsburg ordered that the time for filing this petition for writ of certiorari be extended to and including 2 October 1998.

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. §1254(l).

STATUTE INVOLVED

28 U.S.C. §1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case –

. . .

(3) In which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for that property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

. . .

STATEMENT OF THE CASE

Petitioner Norman Gabay, a naturalized American citizen who was born in Iran, is regarded by the Iranian courts as a "fugitive Jew."[1] While Iran was ruled by the Pahlavi

[1] "Whereas the stockholders of the above named company are fugitive Jews, and are outside of Islamic Government protection (withdrawing their citizenship), therefore verdict has been issued for the expropriation of their assets." Judgment of the Supreme Court of the Islamic Revolution, File No. 79/62 (23 May 1983), *translation*

Dynasty, Gabay enjoyed significant prosperity in his business affairs, which focused on carpet and textile manufacturing and wholesaling. Gabay's business holdings included factories and real estate; he also owned substantial real and personal property apart from these business holdings. Gabay immigrated to the United States in 1971, settling in California, where he founded The Charles Company to import carpets and export raw materials and machinery. He continued to own and operate his carpet and textile concerns in Iran, and frequently traveled to Iran to meet with the managers of his businesses.

In 1979, Shah Mohammed Reza Pahlavi was swept from power. The new government, led by the Ayatollah Khomeini, embraced Islamic fundamentalism and exhibited a deep hatred for the United States. Because he was an Iranian Jew residing in the United States, Gabay ceased his formerly regular business trips to Iran out of concern for his personal safety. He continued to operate his carpet and textile businesses from the United States through his managers in Iran, and he became a naturalized United States citizen on 25 April 1980.

Respondent Mostazafan Foundation of Iran was created on 1 March 1979 by order of the Ayatollah Khomeini, the Supreme Leader of the Islamic Republic of Iran. Its constitutive document, the "Statutory Bill Regarding the Articles of Association of Bonyad Mostazafan", *translation reprinted infra* at 50A, empowered the Mostazafan

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reprinted infra at 47A. That Court has declared that as "in fact they have left the country and in fact have escaped ... it is obvious that they are outside of Islamic Protection withdrawing their citizenship, and confiscation of their assets in favor of the Islamic Republic of Government is in line with the principles, and thus is being confirmed." *Id.* Norman Gabay and his family have also been described by Islamic Revolutionary Courts to be "runaway Jews for whom Aman (protection) of the Islamic Republic was withdrawn." Judgment of the Supreme Court of the Islamic Revolution, Case No. 79/62 (13 May 1983), *translation reprinted infra* at 48A.

Foundation to take, centralize, and manage the properties of the former Shah and his associates. *Id.* at Art. 2, ¶1, *translation reprinted infra* at 50A. Upon its formation, the Mostazafan Foundation of Iran immediately took control of the Pahlavi Foundation in Iran, which was a non-profit charitable organization established by the Shah. *See* 151 F.R.D. at 251, *reprinted infra* at 16A.

In 1973, the Pahlavi Foundation in Iran had established a branch office in Manhattan, incorporated under the laws of the State of New York as the Pahlavi Foundation. *See* 968 F. Supp. at 896, *reprinted infra* at 5A. At approximately the same time that the Mostazafan Foundation of Iran assumed control of the Pahlavi Foundation in Iran, *see* 151 F.R.D. at 251-52, *reprinted infra* at 16A, the directors of the Pahlavi Foundation in New York met in Tehran and changed the Foundation's name to the Mostazafan Foundation of New York. Minutes of the Special Meeting of the Board of Directors [of the Pahlavi Foundation of New York] held on the 27th day of December, 1979, at Tehran, Iran, *reprinted infra* at 54A. In 1992, the Mostazafan Foundation of New York changed its name to the Alavi Foundation. *See* 151 F.R.D. at 251, *reprinted infra* at 16A.

At some time between the beginning of 1981 and the end of 1983, Respondent Mostazafan Foundation of Iran seized Gabay's carpet and textile businesses, as well as all of Gabay's other real and personal property in Iran. *Id* at 252, 16A. In its May 1983 decision, the Supreme Court of the Islamic Revolution stated that the basis for the uncompensated taking of Gabay's property was his status as a "fugitive Jew." Judgment of the Supreme Court of the Islamic Revolution, File No. 79/62 (23 May 1983), *translation reprinted infra* at 47A.

On 21 December 1981, Gabay filed a pseudonymous action in the United States District Court for the Central District of California seeking compensation for the unlawful and uncompensated taking of his property. *Bernard G.*

Martin, a pseudonym v. *Government of the Islamic Republic of Iran, et al.*, 81 Civ. 6501 (RJK). The purpose of that action was to toll the statute of limitations while Gabay's expropriation claim was pending before the Iran-United States Claims Tribunal, which had been created by the Algiers Accords as part of the comprehensive resolution of the 1979-1981 Iranian hostage crisis. Under President Reagan's Executive Order 12294 (24 Feb. 1981), 31 C.F.R. §535.222, all claims filed in United States courts against the Islamic Republic of Iran, which came within the scope of the Claims Tribunal's jurisdiction, were to be suspended pending consideration by the Tribunal.

Gabay filed his claim with the Iran-United States Claims Tribunal on 19 January 1982, and the following month Gabay's action in the Central District of California was dismissed without prejudice. *Martin* v. *Government of the Islamic Republic of Iran,* 81 Civ. 6501 (RJK) (Minutes Form 11, 22 February 1982), *reprinted infra* at 45A-46A. Before the Claims Tribunal, the Islamic Republic of Iran did not deny having expropriated Gabay's property, but merely challenged the date on which Gabay alleged the taking had occurred. *Gabay* v. *Iran*, Award No. 515-771-2, 27 IRAN-U.S. C.T.R. 40, 41 *reprinted infra* at 37A. Nearly a decade later, on 10 July 1991, the Claims Tribunal dismissed Gabay's claim as beyond its competence for failure of proof that the taking of his property had occurred prior to 19 January 1981, the effective date of the Algiers Accords and the jurisdictional cut-off date for expropriation claims. *Gabay* v. *Iran*, Award No. 515-771-2, 27 IRAN-U.S. C.T.R. 40, 41 *reprinted infra* at 35A. On 12 August 1991, Gabay requested an interpretation of the Tribunal's decision, which was denied on 24 September 1991. *Gabay* v. *Iran*, Decision No. 99-771-2, 27 IRAN-U.S. C.T.R. 194, 195 *reprinted infra* at 31A-33A.

On 22 September 1992, Gabay filed this action in the United States District Court for the Southern District of New

York. Gabay's complaint alleged subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976, as amended, 28 U.S.C. §§1330, 1602-1611, as to Respondent Mostazafan Foundation of Iran, and under 28 U.S.C. §1332 as to Respondent Mostazafan/Alavi (New York) Foundation.

Both Respondents filed motions to dismiss on a variety of grounds, which were denied without prejudice by Judge Kimba M. Wood. *Gabay* v. *Mostazafan Foundation of Iran*, 151 F.R.D. 250 (S.D.N.Y. 1993), *reprinted infra* at 14A. In her opinion, Judge Wood focused exclusively on the threshold question of subject-matter jurisdiction under the Foreign Sovereign Immunities Act. Judge Wood found that jurisdiction would be proper under 28 U.S.C. §1605(a)(3), the "expropriation exception," if Gabay could establish that Respondent Mostazafan Foundation of Iran exercised "general control over the day-to-day activities" of its alleged agent, the Mostazafan/Alavi (New York) Foundation. *Id.* at 254, *reprinted infra* at 21A (quoting *Baglab Ltd.* v. *Johnson Matthey Bankers Ltd.*, 665 F. Supp. 289, 297 (S.D.N.Y. 1987)).[2] Accordingly, the court ordered limited jurisdictional discovery.

Two years later, upon the completion of discovery and following administrative reassignment of the case to Judge Sidney H. Stein, both Respondents renewed their motions to dismiss. On 4 June 1997, Judge Stein granted the motions solely on the basis that he found "insufficient evidence of the day to day control between the foundations to establish subject matter jurisdiction within the purview of the FSIA." *Gabay v. Mostazafan Foundation of Iran*, 968 F. Supp. 895, 899-900 (S.D.N.Y. 1997), *reprinted infra* at 11A.

Following Gabay's *pro se* appeal, considered without the benefit of oral argument, the United States Court of Appeals

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[2] Judge Wood also concluded that Gabay could not establish jurisdiction under 28 U.S.C. §1605(a)(2), the "commercial activities exception" to foreign sovereign immunity. *See* 151 F.R.D. at 255 n.8, *reprinted infra* at 23A-25A n.8.

for the Second Circuit affirmed the decision of the District Court by Summary Order. *See Gabay* v. *Mostazafan Foundation of Iran*, 152 F.3d 918 (2d Cir. 1988) (table), *available* at 1998 WL 385909, *reprinted infra* at 1A.

After retaining counsel, Gabay sought an extension of time in which to file this petition for certiorari. Justice Ruth Bader Ginsburg granted his application on 30 July 1998.

SUMMARY OF THE ARGUMENT

Stated narrowly, the question raised by this petition is whether the courts below erred by declining to exercise subject-matter jurisdiction over the Mostazafan Foundation of Iran pursuant to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1605(a)(3). This seemingly narrow question of statutory construction, however, raises large and vital issues of national policy and international relations. Contrary to congressional intent, the courts below have created a safe harbor for international outlaws seeking to preserve their immunity from the jurisdiction of American courts while simultaneously participating in the American marketplace and in the American legal system through their agents in this country.

Congress did not intend such a result, which is also inconsistent with the clear and emphatic guidance of this Court in the closely related context of substantive liability arising from expropriations that violate international law. The Court should grant this petition for certiorari in order to prevent a further evisceration of important national policies adopted by Congress and of fundamental principles of justice recognized by this Court.

REASONS FOR GRANTING THE WRIT

I. By mechanically applying a "day-to-day control" test in deciding whether to attribute the commercial activities of the Mostazafan/Alavi (New York) Foundation to the Mostazafan Foundation of Iran, the courts below rejected this Court's clear teaching in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ["*Bancec*"].

The question presented by this petition concerns the proper interpretation of the Foreign Sovereign Immunities Act ["FSIA"], and the legal test to be used when deciding whether a foreign perpetrator of an illegal expropriation has subjected itself to the jurisdiction of our courts by conducting commercial activities in the United States through an agent in this country.[3] Although this Court's decision in *Bancec* is not technically controlling, it is an appropriate source of general guidance and was so treated by the courts below. Unfortunately, those courts seriously misunderstood the guidance offered by *Bancec*. By adopting and mechanically applying a stringent test that denies jurisdiction except when the foreign expropriator exercises "day-to-day control" over its agent in America, the courts below ignored the flexible principles of equity emphatically endorsed and relied upon by this Court in *Bancec*.

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[3] In order to avoid the possibility of confusion, it is worth emphasizing two important issues that are *not* presented by this petition. First, there is no issue here as to jurisdiction over the Mostazafan/Alavi (New York) foundation, a matter determined by diversity of citizenship rather than by the FSIA. 151 F.R.D. at 257-58, *reprinted infra* at 28A. Second, there is no issue here about the substantive rules allocating liability among the parties to this action. As Judge Wood correctly noted below, *id.* at 255, 23A, that issue has not been addressed because it will arise, if at all, only after the jurisdictional questions have been resolved.

A. Although *Bancec* does not technically control this case, the courts below properly regarded that decision as an appropriate source of guidance.

Bancec is the leading case for issues involving the responsibility of foreign sovereigns for the commercial activities of juridically separate entities. In that case, the Court permitted the American victim of an expropriation by the Cuban government to apply a setoff for the value of the seized property against a debt that the American company owed to a juridically separate commercial entity created by the Cuban government. While noting that duly created instrumentalities of a foreign state are ordinarily entitled to a presumption of independent status, the Court allowed that presumption to be overcome. 462 U.S. at 627-33. This was necessary to prevent the real beneficiary of the claim (the Cuban government) from obtaining relief in our courts that it could not obtain in its own right without waiving its sovereign immunity and answering for its seizure of the American company's property in violation of international law. *Id.* at 631-32.

Technically, *Bancec* resolved only a substantive issue of liability, without construing the FSIA, which is a jurisdictional statute. *See id.* at 619-21. The question presented in this petition for certiorari is one of jurisdiction, and it arises solely under the FSIA. Nevertheless, the courts below looked to *Bancec* for guidance in interpreting that statute, as other courts before them had previously done.[4] We believe this is appropriate, in part because the *Bancec* Court itself noted that it was "guided by the policies articulated by

[4] *See, e.g., Arriba Ltd.* v. *Petroleos Mexicanos*, 962 F.2d 528, 533-34 (5th Cir. 1992); *Foremost-McKesson, Inc.* v. *Islamic Republic of Iran*, 905 F.2d 438, 446 (D.C. Cir. 1990); *Hester International Corp.* v. *Federal Republic of Nigeria*, 879 F.2d 170, 177-78 (5th Cir. 1989); *Baglab Ltd.* v. *Johnson Matthey Brothers*, 665 F. Supp. 289, 294 (S.D.N.Y.1987).

Congress in enacting the FSIA." 462 U.S. at 621. These congressional policies are not dissimilar from the equitable principles, common to international law and federal common law, upon which the *Bancec* Court primarily relied. *Id.* at 623-34.

B. *Bancec* clearly and emphatically rejects adherence to the corporate form where doing so would cause a serious injustice.

Although we agree that *Bancec* is an appropriate source of general guidance for resolving the FSIA issue in the present case, the courts below seriously misconstrued the *Bancec* analysis. The guiding precept of that decision was the broad "equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice." 432 U.S. at 629 (quoting *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322 (1939)). This concern for avoiding injustice, and particularly for avoiding the ugly prospect of foreign sovereigns gaining indirect access to the American legal system while simultaneously preserving their immunity from the just claims of American citizens, is exactly why the *Bancec* Court disregarded the corporate form in the case before it. *See* 462 U.S. at 632 (citing *Bangor Punta Operations, Inc. v. Bangor & Aroostook Railroad Co.*, 417 U.S. 703, 713 (1974)).

Bancec took note of several prior decisions, which arose from a variety of factual circumstances and which contained a variety of verbal formulations. What *Bancec* extracted from these decisions was not a simple test or a hard rule, but an equitable principle that aims above all at avoiding injustice. Indeed, the *Bancec* Court specifically cautioned:

> Our decision today announces no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded. Instead, it is the product of the application of internationally recognized equitable principles to avoid the injustice that would result from permitting a foreign state to reap the benefits of our courts while avoiding the obligations of international law.

432 U.S. at 633-34 (footnotes omitted). Ignoring this strongly and clearly worded cautionary statement, the courts below mechanically applied an inflexible "day-to-day control" test that will produce exactly the sort of injustice that *Bancec* properly sought to prevent.

Just as the Cuban government in *Bancec* sought to obtain relief in our courts through a juridically separate entity, while asserting sovereign immunity against the just claim of an American victim of illegal expropriation, so too the Mostazafan Foundation of Iran seeks access to the American legal system through its New York agent while asserting sovereign immunity for itself.

C. The "day-to-day control" test employed by the courts below allows international outlaws like the Mostazafan Foundation of Iran to avail themselves of the American legal system through their agents while preserving their own immunity from jurisdiction in American courts.

The courts below purported to rely on two principles recognized by this Court in *Bancec*: (1) that foreign sovereigns are presumed to be separate from juridically independent entities that they control; and (2) that this

presumption can be overcome.[5] The *Bancec* Court stressed that there could be no "mechanical formula" for deciding when the presumption should be overcome. 462 U.S. at 633-34. The courts below ignored *Bancec*'s central teaching when they ruled that Petitioner can overcome the presumption of independence in this case *only* by demonstrating that Respondent Mostazafan Foundation of Iran "exercised control over *the day-to-day activities* of the New York Foundation." 968 F. Supp. at 899, *reprinted infra* at 11A (emphasis added).

This mechanical formula creates a safe harbor for international outlaws like the Mostazafan Foundation of Iran, enabling them to pursue commercial activities in the United States through entities that they thoroughly control, so long as they refrain from taking the final step of directing the "day-to-day activities" of their agents. Thus, for example, Respondent Mostazafan Foundation of Iran is free to set, and to alter at will, the goals of its (tax exempt) New York agent; to place Iranian government officials on the New York agent's board of directors and to hold meetings of that board in Tehran; and to reap the benefits of (and, indeed, claim credit for) ideologically driven "charitable" activities undertaken by that agent. According to the decisions below, the Mostazafan Foundation of Iran can do all this, and more, without in any way jeopardizing its own immunity from jurisdiction in American courts.

The mechanical rule that produced this result turns *Bancec* on its head. If that rule had been dictated by Congress, it would be shocking and regrettable, but we would have to abide by it. As we show in the next section, however, no such rule has been dictated or even suggested by Congress. Rather, the result below was reached only because

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[5] *See* 152 F.3d 918 (table), *text available* at 1998 WL 385909 *2, *reprinted infra* at 2A; 968 F.2d at 898-99, *reprinted infra* at 8A-11A; 151 F.R.D. at 253-54, *reprinted infra* at 19A-21A.

of the unfortunate phenomenon that this Court noted in *Bancec*:

> The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor. Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.

462 U.S. at 623 (quoting *Berkey v. Third Avenue Railway Co.*, 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926) (Cardozo, J.)).

This mistake by the courts below threatens to undermine important congressional purposes, as explained in the following section, and should be corrected by this Court before further serious injustice results.

II. The structure and history of the Foreign Sovereign Immunities Act show that the "expropriation exception" to foreign sovereign immunity, 28 U.S.C. §1605(a)(3), requires a different attribution analysis than that underlying the rule commonly employed by courts applying the "commercial activities exception," 28 U.S.C. §1605(a)(2).

The statutory provision that governs this case creates an exception from the usual practice of holding foreign sovereigns immune from suit in American courts. The exception applies, *inter alia*, in any case in which

> [1] rights in property taken in violation of international law are in issue and . . . [2] that property or any property exchanged for that property is owned or operated by an agency or instrumentality of the foreign state and [3] that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. §1605(a)(3).

Two of the three requirements set out in this "expropriation exception" are not seriously disputed in this case. First, Respondents have not disputed that Petitioner's property was taken in violation of international law, and that he is seeking to recover the value of that property. *See* 151 F.R.D. at 252, *reprinted infra* at 18A; *see also Gabay* v. *Iran*, Award No. 551-771-2, 27 U.S.-Iran C.T.R. 40, 42-43, *reprinted infra* at 37A. Second, Respondents have not disputed that the expropriated property (or property exchanged for it) is owned or operated by Respondent Mostazafan Foundation of Iran, which is an agency or instrumentality of the Islamic Republic of Iran. *See* 968 F. Supp. at 897-98 n.2, *reprinted infra* at 7A-8A; *see also Gabay* v. *Iran*, Award No. 551-771-2, 27 U.S.-Iran C.T.R. at 43, *reprinted infra* at 37A; Judgment of the Islamic Revolutionary Court stationed at Bonyad-e-Mostazafan (12 May 1983*) translation reprinted infra* at 49A. Thus, the only question at issue has been whether Respondent Mostazafan Foundation of Iran is "engaged in a commercial activity in the United States."

In addressing this question, the courts below adopted a legal test developed by other courts under the rubric of a *different* statutory provision: the FSIA's "commercial activities exception," 28 U.S.C. §1605(a)(2). This was a serious mistake because the history and purposes of the two exceptions are quite different. Although there is much to be said for the "day-to-day control" test, or something like it, in the context where it was first developed, such a test is completely incongruous when applying the "expropriation exception," 28 U.S.C. §1605(a)(3), at issue in this case. In order to effectuate Congress' purpose in creating this latter exception, and to avoid becoming enslaved by metaphors, courts must refrain from mechanically extending the rigidities of the "day-to-day control" test into areas where they produce serious injustice and create a safe harbor for international outlaws.

A. The nature, history, and purpose of the "expropriation exception," 28 U.S.C. §1605(a)(3), are fundamentally different from those of the "commercial activities exception."

From early on, federal common law generally provided foreign states with absolute immunity from suit. *See, e.g., The Schooner Exchange* v. *M'Faddon*, 11 U.S. (7 Cranch) 116 (1812). With the rise of state trading companies in the twentieth century, exceptions began to be made under a theory of "restrictive immunity," which was formally adopted as United States policy by the Department of State in the so-called Tate Letter of May 1952.[6] *See Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486-87 (1983). Under this theory, immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts. *Id.* at 487.

Administration of the restrictive-immunity theory proved problematic. Courts deferred to State Department recommendations on immunity questions, which forced this executive agency to assume a judicial function that often conflicted with its primary mission of conducting American foreign policy: foreign nations frequently pressured the State Department to recommend immunity, and political considerations sometimes led to recommendations of immunity in cases where immunity would not have been available under the restrictive theory. *Id.* The State Department, moreover, did not participate in every case, which left the courts to make their own decisions in that class of cases. As a result, "the governing standards were

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[6] Letter from Jack B. Tate, Acting Legal Advisor, Department of State to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 DEPARTMENT OF STATE BULLETIN 984-85 (1952) *and in Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682, 711 (1976) (Appendix 2 to opinion of White, J.)

neither clear nor uniformly applied." *Id.* at 488 (citations omitted).

In 1976, Congress responded to these problems by enacting the Foreign Sovereign Immunities Act, 28 U.S.C. §§1330, 1602-1611, which specified seven exceptions to the general rule of immunity for foreign states and assigned the interpretation of those exceptions to the courts.[7] Subsequent amendments added two additional exceptions to the general rule.[8]

The frequently litigated "commercial activities exception," 28 U.S.C. §1605(a)(2), has its origin in the theory of restrictive immunity, with its distinction between sovereign acts and strictly commercial acts. H.R. Rep. No. 94-1487, at 6-7, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605-06. The fundamental principle, which had been recognized in the Tate Letter, is that when a foreign state enters the American market as a commercial actor, it should to that extent be treated like other commercial entities. Accordingly, the statute deprives a foreign sovereign of immunity in any case

> in which the action is based upon a commercial activity carried on in the United States by the

---

[7] The originally enacted exceptions to immunity of foreign states from the courts of the United States were waiver, commercial activity, expropriation, gifts in immovable property in the United States, torts occurring within the United States, 28 U.S.C. §1605(a)(1)-(5), suits in admiralty to enforce maritime liens, 28 U.S.C. §1605(b), and counterclaims against foreign state plaintiffs. 28 U.S.C. §1607.

[8] In 1988, Congress added an exception to immunity for actions to enforce arbitration agreements and awards. 28 U.S.C. §1605(a)(6). In 1996, Congress added a new exception to immunity for actions arising from a foreign state's acts of torture, extrajudicial killing, hostage-taking, aircraft sabotage or material support for such an act which results in the injury or death of United States nationals. 28 U.S.C. §1605(a)(7).

> foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. §1605(a)(2).

In applying this provision to cases in which the commercial activity was carried on by an entity juridically separate from the foreign state, courts have understandably been respectful of the corporate form and correspondingly reluctant to attribute to foreign sovereigns the activities of commercial entities created by those sovereigns. As this Court explained in *Bancec*, it is increasingly common and perfectly legitimate for governments to establish separate governmental corporations designed to pursue a variety of commercial activities. 462 U.S. at 624-27. Unless the principle of limited liability were adhered to, and creditors of government corporations protected from the risk of having their debtors' assets diverted to satisfy unrelated claims against the sovereign, governments would be placed in a worse position than private incorporators. *See id.* at 626-27. As both Congress and the *Bancec* Court recognized, an appropriate respect for the corporate form is also necessary to avoid encouraging other nations "to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary." *Id.* at 627-28 (discussing legislative history of the FSIA).

While it is clearly important to avoid treating foreign sovereigns worse than private incorporators, Congress also recognized that foreign sovereigns should not be free to abuse the corporate form. The FSIA's "commercial activities exception" to the general rule of foreign sovereign immunity strikes this balance by subjecting foreign states to U.S. jurisdiction for their own commercial activities, but not for

those of genuinely independent government corporations. In deciding whether a juridically separate entity is in fact the state itself, the lower courts have sometimes applied a test that asks whether the foreign state exercised "day-to-day control" over the activities of the juridically separate entity.[9]

This test, which is broadly consistent with analogous rules in American corporate law, *see, e.g., Hester Int'l Corp.* v. *Federal Republic of Nigeria*, 879 F.2d 170, 177-78 (5th Cir. 1989) has an obvious appeal in light of the purpose and history of the "commercial activities exception." In establishing a separate corporation to pursue specific commercial activities, a foreign government is making trade-offs similar to those that an American corporation makes when it establishes an independent subsidiary. There being no obvious reason for applying different rules of attribution in these two highly analogous situations, courts have been inclined to treat them alike.

Whatever justification there is for the "day-to-day control" test under the FSIA's "commercial activities exception," it has no justification whatsoever under the "expropriation exception" at issue here.[10] Unlike the "commercial activities exception," the statutory provision at issue in this case cannot be regarded as a device for facilitating legitimate commercial intercourse by and among the community of nations. Nor is its intent to give foreign states approximately the same access to the advantages of the

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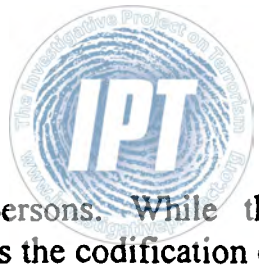
[9] *See, e.g., Hester Int'l Corp.* v. *Federal Republic of Nigeria*, 879 F.2d 170, 178 (5th Cir. 1989); *Baglab Ltd.* v. *Johnson Matthey Brothers*, 665 F. Supp. 289, 297 (S.D.N.Y. 1987).

[10] We do not necessarily endorse the "day-to-day control" test for all cases arising under the "commercial activities exception." The proper interpretation of that statutory provision is not raised by this petition for certiorari, and our point here is that the test is clearly *not* appropriate under the "expropriation exception," whatever its merits may be elsewhere.



corporate form enjoyed by private persons. While the commercial activities exception represents the codification of the restrictive doctrine of immunity, the expropriation exception "is not based on the restrictive theory and instead denies immunity for the indisputably 'sovereign' act of expropriation." GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 533 (2d ed. 1992). The purpose of the "expropriation exception," quite unlike that of the "commercial activities exception," is to prevent agencies of foreign states that practice thievery in violation of international law from participating in American commercial life while remaining cloaked with sovereign immunity. In effectuating this purpose, it is wholly inappropriate to treat the foreign agency in question as though it were a legitimate commercial enterprise that should have the same benefits and burdens under American law that are enjoyed by legitimate private businesses. Indeed, the reason for requiring a commercial nexus with the United States in this class of cases is only to provide a justification for asserting jurisdiction over an agency of a foreign sovereign. That justification exists whenever the foreign agency enters our marketplace and avails itself of our legal system, whether or not the agency exercises "day-to-day control" over the entity that it uses to penetrate the United States.

B. In order to effectuate the congressional purpose served by the "expropriation exception," and to prevent abuse of the corporate form, courts must use a more flexible analysis than the "day-to-day control" test allows.

The "day-to-day control" test adopted by the courts below is useful primarily in establishing a fair allocation of responsibilities among entities whose separate juridical status is presumptively the result of legitimate commercial and

governmental purposes. Thus, for example, when the Bank of England (an arm of the British government) seized a failing private bank and replaced its management, while preserving the bank's separate juridical status, American courts were understandably hesitant to attribute the actions of the failing bank to the sovereign without evidence that the government was itself operating the bank on a day-to-day basis. *See Baglab Ltd.* v. *Johnson Matthey Bankers Ltd.*, 665 F. Supp. 289 (S.D.N.Y. 1987). Similarly, when Nigeria created a government corporation to support the development of agricultural projects in that nation, American courts demanded evidence that the government was actually operating the corporation as a precondition to exercising jurisdiction over Nigeria itself in an ordinary breach-of-contract action against the government corporation. *See Hester*, 879 F.2d 170.

Unlike such cases, actions arising under the "expropriation exception" are aimed at foreign government agencies that are accused of violating international law. These are exactly the kind of entities that are most likely to abuse the corporate form and most likely to take illegitimate advantage of any safe harbor that American courts naïvely import from the realm of ordinary business law. The present case is a striking example because it is uncontested that Respondent Mostazafan Foundation of Iran is responsible for property expropriated from "fugitive Jew" Norman Gabay in violation of international law. This Respondent is not an entity like the Bank of England in *Baglab* or like the Nigerian agricultural-development agency in *Hester*, and Gabay's claim in no way resembles the ordinary commercial disputes that gave rise to those cases. If the cases were treated under the same principles, such treatment would simply empower an international outlaw to abuse the American legal system.

Congress recognized this obvious fact when it included the "expropriation exception" as a separate and distinct

element in the FSIA. *See* H.R. REP. NO. 94-1487, 19-20 & n.1, *reprinted in* 1976 U.S.C.C.A.N. at 6618. Similarly, this Court has recognized the propensity of international outlaws to abuse the corporate form:

> [Bancec] contends, however, that the transfer of Bancec's assets from the Ministry of Foreign Trade or Banco Nacional to Empresa and Cuba Zucar effectively insulates it from Citibank's counterclaim. We disagree. Having dissolved Bancec and transferred its assets to entities that may be held liable on Citibank's counterclaim, Cuba cannot escape liability for acts in violation of international law simply by retransferring the assets to separate juridical entities. To hold otherwise would permit governments to avoid international law simply by creating juridical entities whenever the need arises.

462 U.S. at 632-33 (citations omitted). The same open-eyed approach that this Court adopted in *Bancec* should be used here. Rather than create a safe harbor for outlaws, which is the effect of the "day-to-day control" test used by the courts below, American courts should exert jurisdiction under the FSIA's "expropriation exception" when there is evidence that entities like the Mostazafan Foundation of Iran are covertly taking advantage of the American legal system through agents over which they exercise general control and supervision. Jurisdiction over such international outlaws should not be denied merely because they refrain from dictating the day-to-day decisions of their agents in America. Any other result, and in particular the result reached below in this case, would make a mockery of Congress' intent. It would also make a fool of the American legal system. In *Bancec*, this Court refused to allow that to happen in circumstances analogous to those present here. It should do so again.

CONCLUSION

This case raises fundamental questions about the proper balance between two of the central goals of our legal system: promoting legitimate commercial intercourse and preventing outlaws from manipulating rules that are designed to facilitate legitimate transactions. Reconciling the tension between these two goals is a particularly delicate and vital task when it involves adjustments in our domestic law to accommodate the need to give foreign sovereigns the respect they are due.

As is often the case under Article III of our Constitution, these basic issues arise here in the form of questions about subject-matter jurisdiction. Having become dissatisfied with the central role previously played by the Department of State in determining when foreign sovereigns should lose the immunity they ordinarily enjoy from the jurisdiction of our courts, Congress enacted a detailed and comprehensive set of standards in the Foreign Sovereign Immunities Act of 1976. The proper interpretation of that statute, a matter that Congress deliberately assigned to the courts, implicates profound issues of national policy.

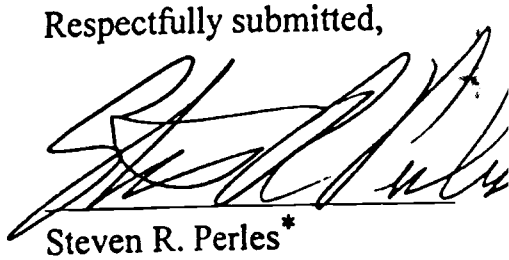
Ignoring the clear and emphatic guidance offered by this Court in the *Bancec* case, the courts below misinterpreted the statute that Congress wrote. By mechanically transporting a test developed for cases ordinarily involving commercial disputes into a very different context, the courts below ignored the distinctions Congress made when it distinguished between ordinary commercial cases and cases involving the rights of people victimized by violations of international law. This misinterpretation of the statute creates a safe harbor for international outlaws who seek to preserve their immunity from jurisdiction while simultaneously participating in American commerce and the American legal system through the agents that they control.

The creation of this safe harbor for international outlaws threatens to undermine extremely important policies reflected

in the Foreign Sovereign Immunities Act. It also threatens to make a mockery of the principles of justice articulated by this Court in *Bancec*. The Court should grant a writ of certiorari in this case to stop this dangerous trend before it does further damage to those policies and principles.

WHEREFORE, Petitioner respectfully requests that this Honorable Court grant this petition for certiorari.

Respectfully submitted,



Steven R. Perles*
STEVEN R. PERLES, P.C.
1666 Connecticut Ave., NW
Suite 500
Washington, DC 20009
(202) 745-1300

*Counsel of Record

Of Counsel:
Professor Nelson Lund
3401 N. Fairfax Drive
Arlington, VA 22201
(703) 993-8045

2 October 1998

EXHIBIT E

RESTATED
~~RESTATED~~ CERTIFICATE OF INCORPORATION
OF THE CERTIFICATE OF INCORPORATION
OF

THE PAHLAVI FOUNDATION

UNDER SECTION 805 OF THE NOT-FOR-PROFIT

CORPORATION LAW

We, MANOUCHER SHAFIE, and HOUSPANG AHMADI, being respectively the President and the Secretary of THE PAHLAVI FOUNDATION, in accordance with Section 805 of the Not-For-Profit Corporation Law, do hereby certify:

1. That the name of the Corporation is: THE PAHLAVI FOUNDATION.

2. That the Certificate of Incorporation of THE PAHLAVI FOUNDATION was filed by the Department of State on the 5th day of December, 1973. A Certificate of Amendment of the Certificate of Incorporation was thereafter filed by the Department of State on the 14th day of January, 1974, and a Restated Certificate of Incorporation was also filed by the Department of State on the 14th day of January, 1974.

3. That the Corporation was formed under the Not-For-Profit Corporation Law of the State of New York, and is a Corporation as defined in subparagraph (a) (5) of Section 102 of the Not-For-Profit Corporation Law and is a Type B corporation under Section 201 of said law.

4. That the Restated Certificate of Incorporation is hereby amended to affect the following amendments authorized by the Not-For-Profit Corporation Law:

(a) Paragraph 1 of the Restated Certificate of Incorporation is hereby amended as follows:

"1. That the name of the Corporation is: THE MOSTAZAFAN FOUNDATION OF NEW YORK."

(b) Paragraph 9 of the Restated Certificate of Incorporation is hereby amended as follows:

"9. That the number of directors of the Corporation shall not be less than three (3) nor more than eleven (11)."

(c) Paragraph 10 of the Restated Certficate of Incorporation is hereby amended as follows:

"10. That the post-office address to which the Secretary of State shall mail a copy of any notice required by law is:

c/o Cline, MacVean, Lewis & Sherwin, P.C.
34 Grove Street, Box 310
Middletown, New York 10940

Attention: V. Frank Cline, Esq."

5. That the text of the Restated Certificate of Incorporation is hereby restated as further amended to read as hereinafter set forth in full:

6. "RESTATED CERTIFICATE OF INCORPORATION

OF

THE MOSTAZAFAN FOUNDATION OF NEW YORK

UNDER SECTION 402 OF THE NOT-FOR-PROFIT CORPORATION LAW

The undersigned, desiring to form a charitable corporation under and by virtue of the provisions of the Not-For-Profit Corporation Law of the State of New York, does hereby make, subscribe and acknowledge this Certificate as follows:

1. That the name of this Corporation is: THE MOSTAZAFAN FOUNDATION OF NEW YORK.

2. That the Corporation is a corporation as defined in subparagraph (a) (5) of Section 102 of the Not-For-Profit Corporation Law

in that it is not formed for pecuniary profit or financial gain, a
no part of the assets, income or profit of the Corporation is dis-
tributable to, or inures to the benefit of its members, directors
officers or any private person except to the extent permissible u
the Not-For-Profit Corporation Law.

3. That the purposes for which the Corporation formed sha
be purely religious, charitable, scientific, literary and educatio
without regard to race, color or creed as follows:

(a) To render voluntary support and assistance by means of contributions and grants to exempt organizations established to benefit the aged, sick, infirm, indigent, and destitute;

(b) To render support and assistance for the study and promotion of the arts and sciences by means of contributions and grants; to establish scholarships, fellowships, prizes, research awards, and similar rewards to induce intellectual attainments;

(c) To contribute to religious instructions regardless of creed for the purpose of promoting understanding and harmony among persons of all faiths;

(d) To render support to the relief of humanity from hardship and privation caused by war, disaster, and act of God; to contribute to organizations established for such purposes;

(e) To render support by means of contributions and grants to established religious, charitable, scientific, literary and educational endeavors of all kinds and descriptions; to contribute to community chests and social welfare funds and generally to support activities of a charitable nature;

(f) To provide and pursue ways and means not prohibited by law, to solicit and receive money and property for the foregoing purposes and to receive and accept for charitable purposes gifts, donations, bequests and devises of money and property;

(g) To do all and everything necessary, suitable, useful or proper for the accomplishment

of any objects or appurtenances of any of the powers hereinbefore set forth;

(h) Nothing herein shall authorize this corporation, directly or indirectly, to engage in or include among its purposes, any of the activities mentioned in Not-For-Profit Corporation Law, Section 404 (b) - (f) ~~or Executive Law, Section 757~~.

4. That no part of the net earnings of this Corporation shall inure to the benefit of any member, director, officer or employee of the Corporation; no member, director, officer or employee of the Corporation shall receive or be lawfully entitled to receive any pecuniary benefit of any kind, except reasonable compensation for services in effecting one or more purposes of the Corporation. No substantial part of the activities of this Corporation shall consist in carrying on propaganda or otherwise attempting to influence legislation. This Corporation shall not participate in, or intervene in (including the publishing or distributing of statements) any politica campaign on behalf of any candidate for public office.

5. That in case of the dissolution of the Corporation, subjec to the approval of the Supreme Court of the State of New York, no distribution of any of the property or assets of the Corporation shal be made to any member, director, officer or employee of the Corporatic but all of such property and assets shall be applied to accomplish th public charitable, scientific, literary and educational purposes for which this Corporation is organized.

6. That the Corporation is a Type B corporation under Section 201 of the Not-For-Profit Corporation Law.

7. That the territory in which its operations are principally to be conducted is the United States of America.

8. That the office of the Corporation is to be located in the City, County and State of New York.

9. That the number of directors of the Corporation shall not be less than three (3) nor more than eleven (11).

10. That the post-office address to which the Secretary of State shall mail a copy of any notice required by law is:

c/o Cline, MacVean, Lewis & Sherwin, P.C.
34 Grove Street, Box 310
Middletown, New York 10940

Attention: V. Frank Cline, Esq.

11. That prior to the delivery of this Restated Certificate of Incorporation to the Department of State for filing, all approvals or consents required by the Not-For-Profit Corporation Law or by any other statute of the State of New York will be endorsed upon or annexed hereto.

12. That in the event in any year the Corporation shall be a "private foundation", as that term is defined in Section 509 of the Internal Revenue Code of 1954, as amended,

A. The Corporation shall distribute its income for each taxable year at such time and in such manner as not to subject it to tax under Section 4942 of said Code, and

B. The Corporation shall not

a. engage in any act of self-dealing as defined in Section 4941 (d) of the Code;

b. retain any excess business holdings as defined in Section 4943(c) of the Code;

c. make any investments in such manner as to subject the Corporation to tax under Section 4944 of the Code; and

d. make any taxable expenditures as defined in Section 4945(d) of the Code."

13. That this Restatement of the Certificate of Incorporation was authorized by an affirmative vote of a majority of all of the directors of the Corporation at a meeting duly called and held on the 22nd day of December, 1979, there being no members entitled to vote thereon.

IN WITNESS WHEREOF, the undersigned have made and subscribed this Certificate this 25th day of February, 1980.

MANOUCHER SHAFIE, President

HOUSHANG AHMADI, Secretary

STATE OF NEW YORK)

SS.:

COUNTY OF NEW YORK)

MANOUCHER SHAFIE, being duly sworn, says that he is one of the subscribers to the foregoing Restated Certificate of Incorporati of THE MOSTAZAFAN FOUNDATION OF NEW YORK, that he has read such Certificate and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters be believe it to be true.

MANOUCHER SHAFIE

Sworn to before me this

25th day of February, 1980.

Barbara A. Newkirk

Notary Public

BARBARA A. NEWKIRK
NOTARY PUBLIC, State of New York
No. 4527072
Qualified in Orange County
Commission Expires March 30, 19[illegible]

STATE OF NEW YORK)

ss.:

COUNTY OF NEW YORK)

HOUSHANG AHMADI , being duly sworn, says that he is one of the subscribers to the foregoing Restated Certficate of Incorporation of THE MOSTAZAFAN FOUNDATION OF NEW YORK, that he has read such Certificate and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believe

it to be true.

Houshang Ahmadi

HOUSHANG AHMADI

Sworn to before me this

25th day of February, 1980.

Barbara A. Newkirk

Notary Public

BARBARA A. NEWKIRK
NOTARY PUBLIC, State of New York
No. 4527072
Qualified in Orange County
Commission Expires March 30, 1982

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

LOUIS H. SHERWIN, being duly sworn, deposes and says that he is an attorney associated with the law firm of Cline, MacVean, Lewis & Sherwin, P.C., the attorneys for the subscribers to the foregoing Restated Certificate of Incorporation, and that no previous application has ever been made for the approval of the said Certificate by any Justice of the Supreme Court.

Louis H. Sherwin
LOUIS H. SHERWIN

Sworn to before me this
21st day of February, 1980.

Marie G. Wilmarth
Notary Public

Notice of Application Waived (This is not to be deemed an approval on behalf of any Department or Agency of the State of New York, nor an authorization of activities otherwise limited by law.)

THE UNDERSIGNED HAS NO OBJECTION TO THE GRANTING OF JUDICIAL APPROVAL HEREON AND WAIVES STATUTORY NOTICE

Dated: June 17, 1980.

ROBERT ABRAMS
Attorney General

By Carole L Weidman
Assistant Attorney General

CAROLE L. WEIDMAN
ASSISTANT ATTORNEY GENERAL

10

I, Honorable MARTIN B. STECHER

Justice of the Supreme Court of the State of New York, First Judic

District, do hereby approve the foregoing Restated Certificate of

Incorporation of THE ~~HOSTAGE~~ PAHLAVI FOUNDATION OF NEW YORK, and conse

that the same be filed.

Dated: New York, New York

~~June 2, 1980~~ July 2, 1980.

SUPREME COURT, NEW YORK COUNTY
SPECIAL TERM, PART 2
NEW YORK, NEW YORK

Justice of the Supreme Court
of the State of New York
First Judicial District

RESTATED CERTIFICATE OF INCORPORATION

OF

THE PAHLAVI FOUNDATION

UNDER SECTION 805 OF THE NOT-FOR-PROFIT

CORPORATION LAW

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6624-73

FILED
AUG 29 1980
TAX $ -0-

CLINE, MacVEAN, LEWIS & SHERWIN, P.C.
Attorneys for

34 GROVE STREET - BOX 310
MIDDLETOWN, NEW YORK 10940
(914) 343-0561

To:

Attorney(s) for

Service of a copy of the within *is hereby admitted.*

Dated:

Attorney(s) for

PLEASE TAKE NOTICE

☐ NOTICE OF ENTRY — *that the within is a (certified) true copy of a entered in the office of the clerk of the within named court on* 19

☐ NOTICE OF SETTLEMENT — *that an Order of which the within is a true copy will be presented for settlement to the Hon. one of the judges of the within named Court, at on* 19 , *at*

STATE OF NEW YORK
DEPARTMENT OF STATE
FILED JUL 10 1980

Dated:

AMT OF CHECK $ 30
FILING FEE $ 30
TAX $
COPY $
CERT $
REFUND $

BY:

CLINE, MacVEAN, LEWIS & SHERWIN, P.C.
Attorneys for

34 GROVE STREET - BOX 310
MIDDLETOWN, NEW YORK 10940

To:

Attorney(s) for

N912 Q

EXHIBIT F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

NORMAN GABAY,

Plaintiff,

-against- 92 Civ. 6954 (SHS)

MOSTAZAFAN FOUNDATION OF IRAN, a/k/a THE FOUNDATION FOR THE OPPRESSED, an agency or instrumentality of the Government of the Islamic Republic of Iran, MOSTAZAFAN FOUNDATION OF NEW YORK, as alter ego of Mostazafan Foundation of Iran,

Defendants.

----------x

December 21, 1995
8:30 a.m.

Deposition of ABASS KHADJEH-PIRI, taken by the Plaintiff, pursuant to Notice, at the offices of Baker & McKenzie, Hirsh Gebouw, Leidseplein 29, Amsterdam, The Netherlands, before Richard M. Jennings, a Certified Shorthand Reporter and Notary Public within and for the State of New York.

GREENHOUSE REPORTING, INC.
363 Seventh Avenue - 20th Floor
New York, New York 10001
(212) 279-5108

Q. Well, going back to Exhibit 5, the Persian text you said is correct. Is it true?

A. Generally speaking this is not incorrect.

Q. Well, does this publication contain the official news of the Bonyad Mostazafan?

A. This publication, not a type of publication, the contents of which could be taken as evidence or grounds for legal matters, and the way this publication is prepared is that news is sent to it from different sections, from divisions and the public relations office takes the items of news and then collect them in a publication.

The legal office or the legal division does not check the news which is received.

Q. So the stories that are published in this publication are generated from within the Bonyad Mostazafan?

A. When you say "stories," what do you mean, news?

Q. Well, whatever is printed.

A. It is all news.

Q. Does the publication have a name, by the way?

A. The publication of the Bonyad, you can see it on the first page of it here.

Q. And in English what is that?

A. It says the publication of the Bonyad Mostazafan. It is an internal publication, and usually all Iranian organizations have an internal publication of their own. The purpose for having such a publication is to convey the items of news to all the members within that organization.

Q. Is it available to the general public?

A. No, no, no, it is an internal publication of the Bonyad.

Q. Just stepping back one second, what is the relationship between the Bonyad Mostazafan and the Government of Iran?

A. When you say what's the relationship, what do you mean?

Q. Well, is Bonyad Mostazafan a division of the Government of Iran?

A. No.

Khadjeh-Piri

Mr. Loomba. What kind of relationship?

MR. LOOMBA: Could you read back my last question, please?

(The record was read.)

MR. RISTAU: If you understand that question you may answer; if you don't understand it you don't have to answer.

A. As I stated before the Foundation For the Oppressed, Bonyad Mostazafan, is not a part of the Government of Iran.

The Bonyad to further its activities has connections and relationships with many legal and natural persons and entities and naturally can have a relationship with the government to further its activities as it would have a relationship with private persons or natural persons.

Q. Are the employees of the Bonyad Mostazafan paid by the Government of Iran?

A. No.

Q. Is the Bonyad Mostazafan funded in any way by the Government of Iran?

A. No, it has its own properties.

Q. So it is self-sustaining?

talking about and I translate for you.

Q. The second sentence which reads, "After the Foundation For The Oppressed took over the management of the building in New York revisions made and all the contracts benefitting American companies, and most of the contracts were cancelled and assigned to companies with good reputations and standard."

Does that not refer to the Bonyad Mostazafan?

MR. RISTAU: Don't answer. I want to ask the interpreter whether what he, Mr. Loomba, just read in English whether it says that in Farsi.

THE INTERPRETER: Actually, if I may, I have to say that this particular paragraph in Persian, not even a paragraph, the rest of the first paragraph, it refers to what has been said further up, and if you read it by itself and you don't know what the rest of it is, it is very difficult to know what it is talking about. If I read only this part of this paragraph, it refers to things

that have been said further up in the rest of this Persian paragraph, so if you have a complete picture, perhaps there should be the translation of the whole of this paragraph.

Q. Mr. Khadjeh-Piri, can I ask you to review --

THE INTERPRETER: Excuse me, can I tell him what I told you?

MR. LOOMBA: Yes.

(Pause in the proceedings.)

Q. What I'm asking you is could you review as much as you feel necessary to respond to my earlier question.

A. I have read it.

Q. And based on that review and based on what you've read, is there a reference to Bonyad Mostazafan in that fourth paragraph?

A. No, it says -- because it says, "After the management of the building was taken over by the Bonyad Mostazafan in New York," it doesn't say Bonyad Mostazafan in Iran. If there is a reference to the Bonyad Mostazafan in Iran that you find, please tell me about it.

A. No.

Q. This is the only one?

A. Yes, this is the only publication by the Foundation.

Q. Is there a board of editors that reviews this internal publication?

A. This is not a technical or scientific publication, it is only a news publication. News is collected and then reflected in this publication. It is nothing that requires a board of editors to check it. It is just news.

Q. So no one is in charge of reading the articles before they're published?

MR. RISTAU: Objection, he didn't testify to that.

A. No, there is no board of editors to check articles which are written. The news items are collected and then in this publication. There is nothing, this is nothing which has any kind of a legal or lawful application.

Q. Who collects the stories?

A. One of the employees of the public

Khadjeh-Piri

Q. At the bottom do you recognize that to be the signature of Mr. Rafighdoost?

A. Yes.

Q. Can you translate for him the last paragraph beginning, "This Foundation has many overseas... "?

(Pause in the proceedings.)

Q. Is that paragraph factually correct?

A. No, it is not correct factually.

Q. What about it is incorrect?

A. Mr. Rafighdoost who has signed this document is not somebody who mastered the English language. If you look at the signature, you will see that the signature is in Persian. I made some research about this document, and I found out that the document has been prepared by the public relations of the commercial section of the Bonyad, and the purpose of preparing this document was to make it familiar with the Foundation as a big organization.

Therefore, not very many legal precision have been observed in these sections. And the fact that it talks about the Foundation

EXHIBIT G

Bonyad Local Publication

21st Issue

Farvardin 1360 (March 21 - April 20, 1981)

LET US GET ACQUAINTED WITH THE FOUNDATION FOR THE OPPRESSED IN NEW YORK

The New York Foundation that consists of a thirty-si story building was formed in the year 1354 (1975) pursuant to the instruction of ex Pahlavi Foundation through interest-fre financing from Bank Melli Iran in the amount of forty-two million Dollars.

Before the Islamic Revolution of Iran, the managemer of this Unit, not unlike other assets of the people, was in t had of a number lackeys and an enormous amount of the Moslem people's wealth was poured in this way into the pocket of imperialist companies.

In the course of the revolution and also after victo of the Islamic Revolution the highest efforts for the follow of the arrogant regime was the plunder of these assets and t refusal to deliver this Unit to the ISLAMIC Republic Governm

through assistance of their bosses [meaning the USA]. Had the Unit remained in the hands of the mercenaries, it would have functioned as a base against the regime of the Islamic Republic.

Therefore, the responsible and committed brothers and also the Islamic Republic Government utilized all possible attempts and methods to reclaim this Unit and despite the obstructions of American Agents, they succeeded in this matter. After the Foundation for the Oppressed [Iran] took over the management of the building in New York, revisions were made in all the contracts benefiting American companies and, most of the contracts were cancelled and were assigned to companies with good reputation and standing. Thus, the Foundation reduced its costs to a considerable extent.

This building that has rentable area of about three hundred twenty seven thousand and four hundred seventy six (327,476) square feet has been erected with an expense equal to thirty six million nine hundred thirty two thousand and four hundred seventy eight Dollars ($36,932,478.00) the amortization period of which has been estimated forty years.

The expenses of service, maintenance and management of the building altogether would cost ten Dollars per square foot. Out of the thirty-six stories in this building twenty

stories have been leased out for periods from ten to fifteen years and the remaining sixteen stories are also available for lease. The ground floor and basement have also been taken in view for creation of a mall. As for thirty fifth floor which was previously leased by National Iranian Oil Company is presently occupied temporarily by the Foundation employees; and as soon as all the floors are leased out, the Foundation will provide a low priced location for accomplishment of its activities.

Prior to the Islamic Revolution of Iran, the rental rate per square foot was from $18.25 to $21.25. But after the Revolution this rate has gone up to the current rate which is $37.62 per sq. ft.; the difference of these figures per square foot is considerable.

The accounting of the Foundation is performed by Valeri Weiner Company and the internal control system is such that the documents of all expenses are signed by the requisitionist and the financial affairs official and after confirmation and receipt of the document instruction for payment is issued by the managing director and treasurer. The auditing is also accomplished by the certified public accountants company (Price Waterhouse) which is one of the eight reputable and important corporations of this country and

the report thereof is submitted to the Public Prosecutor's Office of New York and Income Tax Office.

The members of the Board of Trustees of the Foundation in New York are Messrs. Dr. Houshang Ahmadi, Mir Mohsen Davachi, Hamid Algar and Eng. Manouchehr Shafiee; Eng. Shafiee being managing director, and Mr. Mohsen Davachi treasurer and financial affairs supervisor of the Foundation. Other employees who have been selected from among capable Moslems work in the departments for administrative and student affairs, student counseling, publicity and maintenance and security.

Bonyad Local Publication

21st Issue

Page 17:

According to the New York law, the Foundation must spend all its net income on loan or charities, and in case the net income is less than 6% of the net assets of the Foundation, an amount equal to 6% should be spent on welfare activities. Under these circumstances, it is not possible to send directly to Iran the incomes of the Foundation. Therefore, the only possible way is to spend the net income of the Foundation to promote the ideals of the Islamic Republic in America. There exists three methods in this connection as well and the essential decision in distribution of the financial resources is among the following three cases.

1. Granting loan to [ideologically] committed students who are in financial need and have been successful academically.

2. Helping establishment of Islamic institutions and promotion of Islam.

3. Indirect assistance to development programs and providing for the needs of the oppressed people of the Islamic Republic of Iran.

Generally the activities of the Foundation for the Oppressed of New York consist of the following:

1. Granting loan to the students.

2. Student Selecting Committee that comprises of Moslem and committed Iranian university professors who do voluntary service.

3. Creation of Student Counselling and Guidance Center.

4. Rural industries planning, including compiling scientific and technical knowledge about the said industries.

5. Outlay of Islamic Propaganda.

6. Helping the institutions of the Islamic Republic of Iran.

فعالیتهای خدماتی بنیاد

فعالیتهای آذربایجان شرقی

امور صنایع (واحدهای تولیدی ـ کارخانه‌ها و کارگاهها) ی بنیاد .

ـ کارخانه‌های : کبریت سازی آذر شهر ـ تنوبافی ارومیه و کاشی سازی ـ آرد سازی (شمس آذر ساوه) ۵۰٪ کارخانه جوراب بافی (سرو لاچین ساسنق) ـ سردخانه آذرشهر کارخانه نام سنگ سوسو ـ جزو واحدهای تولیدی مصادره شده از طرف دادگاه انقلاب اسلامی که در اختیار بنیاد میباشند که شرح مختصری از فعالیت آنها به ترتیب زیر بعرض میرسد .

ـ کارخانه کبریت سازی آذر شهر پس از چندین سال متروک و مخروبه بودن اینک به همت والای آنان دستگاههای تهیه و تعمیر کارخانه با حداکثر ظرفیت و امکانات راه اندازی و محصولات آن (کبریت . نرما . رب گوجه فرنگی) بسته بازار عرضه میشود امید آن دارد که طبق برنامه ریزی پیش‌بینی شده و طرحهای توسعه کارخانه و تجدید ماشین آلات این واحد در آینده از نظر محصول در سطح سود دهی قرار گرفته و با تولید بیشتر خدمات ارزنده ای به کشور عزیز ارائه نماید .

ـ کارخانه‌های تنوبافی ـ ارومیه و کاشی سازی

در اثر تلاش شبانه روزی برادران کارگر و مسئولان مسلمان و متعهد پس از در اختیار گرفتن کارخانه‌ها روز بروز بر تلاش خویش افزوده و بهمت والای برادران عزیز در این دو واحد ماشین آلات جدیدی که نیاز به تخصص تکنیکی داشت و برای نصب آنها ماهها وقت لازم بود در هر دو کارخانه با تلاش شبانه روزی برادران و ایمان آنان و تعهد به خواستار [illegible] و کارایی و سطح تولید در هر دو کارخانه را در جهت خدمت به انقلاب افزایش و توسعه داده است .

ـ کارخانه آرد سازی (شمس آذر ساوه) ـ اینک در اثر تلاش و پیکر و به همت برادران کارگر مسئولان متعهد و مسلمان پس از تحویل کارخانه به بنیاد تولید کارخانه بیش از دو برابر افزایش و به کمبودها تنگی‌ها در رابطه با کارفرمای سابق پایان داده شده و این کارخانه نیز در جهت خدمت به خود کفائی و توسعه آن به همت برادران در آینده امید فراوان دارد .

ـ سردخانه آذر شهر که محل انبار مواد غذائی (اعم از سیب زمینی . پیاز و غیره) میباشد این سردخانه که به صورت راکد بوده است در اثر تلاش کارگران و برادران مسئول واحد اداری فعالیت گسترده ای بوده امید اینکه این واحد نیز با تمام توان خویش بتواند به نحو مطلوب ارائه خدمت نماید .

ـ کارخانه جوراب بافی (سرو لاچین ساسنق) که ۵۰٪ آن در اختیار بنیاد است و ۵۰٪ دیگر متعلق به صاحبان ملی که پس از اینکه مدیریت کارخانه در اختیار بنیاد قرار گرفت در اثر تلاش برادران کارگر و مسئولان مسلمان و متعهد و مدیریت کارخانه تولید بیش از ۵۰٪ افزایش داشته و تلاش بر این است که ماشین آلات جدید دیگری در توسعه کارخانه نصب و امید آن دارد که کارخانه مزبور در سطح عالی سود نسبت به قبل از مصادره خدمات تولیدی خویش را ارائه نماید .

ـ کارگاه سنگ سوسو که تولید انواع مصالح

ساختمانی (کاشی ـ سنگهای ساختمانی و ...) میباشد در اثر تلاش شبانه روزی برادران کارگر و مسئولان متعهد و مسلمان کارگاه پس از چند سال رکود فعالیت چشمگیری را آغاز نموده است امید دارد با برنامه ریزیهای پیش‌بینی شده و توسعه دستگاهها کارگاه در افزایش تولید موفق باشد .

ـ معادن بنیاد .

در رابطه با معادن بنیاد .

ـ معادن سنگ مردار آباد ـ دامکش ـ گلوانسو و سایر که سنگهای ساختمانی عرضه مینماید [illegible] تکاب [illegible] معدن ، امیرآباد ، لیوار جان ، معادن پوکه خوالی نسار آباد ، از جمله معادنی است که با همکاری برادران کارگر و مسئولان معادن در اثر تلاش شبانه روزی با تولید بهتر امروز فعالیت چشمگیری را در جهت ارائه خدمت به امت مسلمان ارائه میدهد و پیگیری توسعه این واحد در رابطه با اداره کل صنایع و معادن و اجرای کمیته صنایع در استانداری امید دارد که معادن مسیری دیگری را برای خدمت به مستضعفان مورد بهره برداری قرار دهد .

ـ ابنیای مذهبی ـ در این رابطه بنیاد [illegible] سال آباد را پس از مصادره تبدیل به بهداشتی کردن محیط مطلوب و در اختیار خدمت امت مسلمان قرار دادن تعمیر و در راه خدمت به انقلاب نهاده است همانا بررسی های لازم در ابنیای مذهبی دیگر در سطح استان دارد که با کمک مردم و با همکاری مسئولان مسلمان و متعهد از این خدمت موهبت الهی در مسیر ایجاد کارخانه‌های نوسازی در جهت تولید و خدمت به بهداشت محیط موفق باشد

[illegible]

۱ـ ۲ اشکاف برس به بهبودیهای بیکار جویر کو با همکاری بخشداری منطقه جهت کشاورزی واگذار گردیده است .

۲ـ بیکارگماری ۴۰ هزار بیکاران مستضعف در ساختمان سازی شده .

۳ـ واگذاری زمینهای مصادره شده بدون [illegible] در شمیرانی دشت به ۲۲ نفر کشاورز بیکار .

۴ـ واگذاری املاک [illegible] ساختن [illegible] جهاد سازندگی منطقه برای کشت .

۵ـ احداث یک [illegible] و یک دستگاه [illegible] جهت [illegible] حامل ۴ تن [illegible] .

۶ـ واریز مبلغ ـ/۱/۰۰۰/۰۰۰ ریال بحساب هلال احمر جهت جنگ زدگان .

۷ـ کشت ۲۰۰ هکتار زمین در پائیز ۱۳۵۹ توسط بنیاد منطقه .

۸ـ هدایای ساختمان و زمین به آموزش و پرورش ، ژاندارمری ، سپاه پاسداران ، جهادی ، کمیته انقلاب ، شهرداری و خانواده‌های بی سرپرست در منطقه زیر پوشش واگذار گردیده است .

۹ـ کمکهای مالی به خانواده‌های مستضعف و بی سرپرست [illegible] مستضعفین ، ژاندارمری و افراد نیازمند در منطقه پرداخت گردیده است .

۱۰ـ واگذاری [illegible] به کمیته حمایت از خانواده‌های بی سرپرست .

oooooooooo

زنوز

قبل از هر چیزی بایستی در مورد بنیاد مستضعفان زنوز تذکر داده شود که از نظر امکانات و نیز بودجه جهت برآوردن احتیاجات [illegible] در منطقه [illegible] با توجه به اینکه بارها [illegible] با استان و چه مرکز تماس گرفته شده متاسفانه هیچگونه توجهی نشده است و بنیاد با زحمت فراوان و با تلاش خود توانسته بودجه‌های تهیه و منابع از بین رفتن اموال مخصوص [illegible] نشود همچنین لازم به تذکر است که بنیاد زنوز در بدو شروع

EXHIBIT H

LEVEL 1 - 10 OF 34 ARTICLES

The Record

November 4, 1993; THURSDAY; ALL EDITIONS

SECTION: NEWS; Pg. A03

LENGTH: 664 words

HEADLINE: MOSQUE: BIAS BEHIND EVICTION;
SAYS JERSEY CITY COERCED LANDLORD

SOURCE: Wire services

BYLINE: The Associated Press

DATELINE: JERSEY CITY

BODY:

Worshipers at a mosque where Sheik Omar Abdel-Rahman preached accused the city Wednesday of concocting zoning violations against their landlord as a prejudice-laced pretext for kicking them out.

Lawyers, including William Kunstler, said a judge granted worshipers' request to transfer the landlord-tenant dispute into Superior Court, where they also will seek to prevent the city from fining the landlord, Howard Kim, the owner of Insider Realty.

Attorneys for the worshipers said the city should never have fined the landlord, a point they say they'll raise in Superior Court.

They said the city's focus on the mosque arose after authorities said defendants in the World Trade Center bombing and a second alleged bombing conspiracy prayed there.

"We see this effort by the city of Jersey City as a fundamental violation of the First Amendment," said Michael Deutsch, legal director for the New York-based Center for Constitutional Rights. "Once you begin to violate the constitutional rights of anyone, everyone is in jeopardy."

"In this country, we've had these moments where we put people in the category of pariah, and now the Muslim community is in that category," said Kunstler, who is defending Abdel-Rahman and two other defendants charged in the bombing conspiracy.

Abubakr Ali, 36, of Jersey City, was one of about a dozen Muslims at a news conference with the lawyers.

"We are going to stay in our mosque and we are going to take all legal procedures," Ali said.

Further complicating the battle between the city and the worshipers at the mosque site is a rift within Al-Salam Mosque.

Ahmed Refai, who said that in 1983 he helped found the mosque as a non-profit corporation, swore in an affidavit that the mosque had already left the 2824 Kennedy Blvd. site June 30. The new mosque is about a half-mile away at 984-998 West Side Ave., in an area zoned for religious worship; although the group is temporarily worshiping elsewhere while that property is being renovated.

Refai's affidavit said Abdel-Rahman and a "group of strong men" came to the old site June 12 and sought through "force and coercion" to obtain control of the non-profit corporation and its finances.

Attorney Brian Doherty, representing the group moving to West Side Avenue, said his clients don't care if the other Muslims continue worshiping at the Kennedy Boulevard mosque. He said his clients just want the record clear that they legally leased the original site and left of their own will, not over zoning problems.

The landlord of the storefront Kennedy Boulevard site was fined $ 7,800 in September because the area is zoned for commercial use. Kim said then that he tried to kick out the worshipers, but feared retribution.

Kim's attorney, Philip Feintuch, said Municipal Court Judge Lewis Stephenson McRae suspended the fine Wednesday after Superior Court Judge Patricia Costello transferred the dispute to Superior Court.

City officials said after the September hearing in Municipal Court that the violations were unusual and probably would not have been raised if area residents had not questioned why the third-floor mosque was wedged in a strip of discount stores and fast-food restaurants.

Mayor Bret Schundler did not return telephone calls Wednesday.

Meanwhile, Refai's affidavit said his group ended its one-year lease June 30 at the Kennedy Boulevard mosque after paying $ 460,000 for the West Side Avenue site. He said the move was prompted by the growing membership of the mosque.

"The corporation has no objection to the occupancy of 2824 Kennedy Blvd. by any of our Muslim brothers, nor do we seek to deprive our brothers of a place to worship," Refai said. "However, this affidavit is necessary to protect the corporate name and the legal rights of the Board of Trustees, the Board of Advisers, and other qualified members of the corporation."

GRAPHIC: PHOTO - DANIELLE P. RICHARDS / STAFF PHOTOGRAPHER - Attorney William Kunstler, left, speaking to reporters Wednesday with members of Jersey City's Al-Salam Mosque.

LANGUAGE: English

LOAD-DATE: October 5, 1995

FOCUS - 2 OF 8 STORIES

Newsday

March 6, 1994, Sunday, CITY EDITION

SECTION: NEWS; Pg. 7

LENGTH: 1095 words

HEADLINE: Now Terror Grows With B'klyn's Tree

BYLINE: Ellis Henican

BODY:

A Jewish man wakes up one bright morning on the occupied West Bank. He walks over to the local mosque and sprays the place with machine-gun fire. At least 30 Muslim worshipers are killed. The shooter turns out to be an emergency-room doctor from Brooklyn, who comes out of the Young Israel of Bensonhurst Synagogue.

A bomb goes off at the World Trade Center, and a long trial is held. The explosive potion was mixed in Jersey City, N.J. But the bombing plot - the worst terror attack in the history of the United States - jelled inside the Arab politics of Brooklyn.

A car-service driver from Lebanon, seething with rage over who-knows-what, blasts away at a vanload of yeshiva kids. The cab driver, of course, lives in Brooklyn. And he decides to launch his carnage - where else? - on the Brooklyn Bridge.

What is it about Brooklyn and the Middle East?

It used to be that, to understand the bloody politics of that part of the world, you had to go to places like Jerusalem and Beirut. No more. This stuff can all be learned quite well, thank you, far closer to home.

Over the past couple of years, Brooklyn has become the fertile crescent for big-time international terror, Middle East-style. The past two weeks makes this unmistakably clear. The Trade Center verdict. The mosque massacre in Hebron. The shooting on the bridge. All of it was bloody. All of it had to do with Arabs and Jews. And all of it bubbled up out of Brooklyn.

Sure, there are lots of Jews in Brooklyn. Lots of Arabs, too. That's a big part of the explanation. And in many parts of Brooklyn, Jews and Arabs live down the block from each other or right next door. But the same thing is true in Queens, and in other places, too. And you don't hear about too many bombing plots hatched in Rego Park or Kew Gardens Hills.

Baruch Goldstein could have come from either of those places, I suppose. But he didn't. His family lived in a row house on 81st Street in Brooklyn. He went to school at the Yeshiva of Flatbush. He worshipped at the Young Israel of Bensonhurst on Bay 28th Street. Is all this just coincidence?

In Goldstein's teenage years, back when he was known as "Benji" and played basketball, he fell under the spell of Meir Kahane, the ultra-nationalist rabbi. He joined Kahane's militant Jewish Defense League. Like Goldstein, many JDLers came from Brooklyn. He signed up for a self-defense course with the Hillel Foundation at Brooklyn College.

Later, he went on to medical school. He moved to Israel. And Friday a week ago, when he walked into that crowded mosque, Goldstein was 5,600 miles from Bay 28th Street. But his ghosts are still scattered in Brooklyn.

Indeed, it is possible these days to arrange a Brooklyn tour made up entirely of Middle Eastern political landmarks.

On the Arab side you might want to start with the restaurants on Atlantic Avenue. Arab men have been eating and arguing politics there since the 1930s, and the strip is still going strong. Egyptians, Syrians, Jordanians, Lebanese - you name it - packed elbow to elbow, cafe to cafe, no doubt already discussing what comes after the World Trade Center trial.

The Alkifah Refugee Center used to have one of those storefronts, off Flatbush Avenue. The center raised money so local Muslims could join the fight against Soviet forces in Afghanistan. And the place was run by Mustafa Shalabi, a trusted aide to Sheik Omar Abdel-Rahman, the blind Egyptian-born preacher who is now awaiting trial over the alleged plot to blow up New York landmarks.

The Afghan war is over now. The center is closed, and Shalabi isn't giving interviews. He was stabbed and shot to death in 1991. This happened inside his apartment - in Sea Gate, Brooklyn. Right before his death, Shalabi had a falling out with the sheik. It was a dispute over money.

Depending on whom you believe, the killing was ordered - or maybe it wasn't - by Sheik Rahman. A fatwah, such an order is called. People in the Middle East know all about fatwahs. People in Brooklyn are beginning to learn.

When the FBI was ready to arrest the sheik on immigration charges in July, he negotiated his surrender on familiar Brooklyn turf. That meant the Abu Bakr El Seddique mosque - on Foster Avenue just off McDonald, just down from the F-train el - where the sheik frequently preached.

After a 24-hour standoff, his followers made a human path for him. Out the front door of the mosque, into Foster Avenue and toward the firehouse across the street, where FBI agents slapped the handcuffs on. You could hear the F-train passing by.

Just another day in Brooklyn.

On Thursday of last week, 28-year-old Rashid Baz allegedly shot up that yeshiva van. Since then, the police have tried and failed to connect him to the Egyptian sheik - or to tie Baz' attack to the previous week's mosque t two weeks, and it was unclear from the Bogota p ress account why it had not been made public earlier.

The press account said Orjuela had been charged with illicit enrichment and

illegal firearms possession.

Federal officials say Orjuela fled the city before the cocaine laboratory raid in Brooklyn but has remained in close contact with Cali operatives in the city.

"We have numerous documentation that he was in contact on a regular basis with laboratories and so on here in New York," Dowd said.

Orjuela's brother, Henry, who reportedly served as his assistant in New York, was arrested at a hotel near LaGuardia Airport in February, 1991. Henry Orjuela and his brother, already thought at that time to have left the city, were among 49 alleged cartel members indicted on drug-trafficking charges. Henry Orjuela was convicted in July, 1991, and is now in prison.

Some DEA officials have compared the Cali cartel to fast-food chains, depending on a business acumen unparalleled in the cocaine trade to provide quick, convenient service. Its history is less violent than the infamous Medellin cartel, which tends to operate more on the West Coast of the United States.

Jaime Orjuela, a naturalized U.S. citizen who was born in Colombia, is wanted in New York as well as in other countries for charges related to the possession, production and distribution of cocaine. However, Colombia's constitution prohibits the extradition of native Colombians.

Since May, Prosecutor-General Gustavo de Greiff has been negotiating with the Cali cartel's attorneys for the mass surrender of its reported 150 members. Drug traffickers who surrender are given generous sentence reductions if they confess to at least one crime and help judicial authorities.

GRAPHIC: Newsday Photo by V. Richard Haro - Amar Nasr, Nasser Ahmed and Hossam Elkordy, left to right, at door of the Abu Bakr El Seddique mosque.

LANGUAGE: ENGLISH

LOAD-DATE: March 07, 1994

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Affidavit of John D. Winter was mailed postage prepaid this 19th day of January, 1999 to:

Thomas Fortune Fay, Esq.
THOMAS FORTUNE FAY, P.C.
601 Pennsylvania Avenue, NW
#900 - South Building
Washington, D.C. 20004

Steven R. Perles, Esq.
Anne-Marie Lund Kagy, Esq.
STEVEN R. PERLES, P.C.
1666 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20009

Patrick James Attridge

HUSAIN I. MIRZA AFFIDAVIT
DATED JANUARY 15, 1999

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

STEPHEN M. FLATOW,

Plaintiff,

-v.

THE ISLAMIC REPUBLIC OF IRAN, et al.,

Defendants.

Civil Action No. AW-98-4152
United States District Court
For the District of Columbia
Civil Action # 97-3964RCL

AFFIDAVIT OF
HUSAIN I. MIRZA

STATE OF NEW YORK)
: s.s.:
COUNTY OF NEW YORK)

HUSAIN I. MIRZA, being duly sworn, deposes and says:

1. I am Controller of the Alavi Foundation ("the Foundation"), 500 Fifth Avenue, New York, New York 10110, and have personal knowledge of the matters attested to herein. I submit this affidavit to supplement the affidavit I previously supplied to the Court in this matter

2. The Foundation is not affiliated or connected with an organization known as the Alavi Foundation in Iran. To the best of my knowledge, no current officer, director or employee of the Foundation has ever been an officer, director or employee of the Alavi Foundation in Iran and no past officer, director or employee of the Foundation has ever been an officer, director or employee of the Alavi Foundation in Iran.

3. The Foundation has never received funds from the Alavi Foundation in Iran nor maintained any joint accounts nor jointly owned any property with the Alavi Foundation in Iran.

4. I am advised that plaintiff asserts here that the Foundation contributed to two mosques linked to the World Trade Center bombing. This assertion is totally false. In the past the Foundation has made contributions to Brooklyn Mosque, Inc., located at 543 Atlantic Avenue, Brooklyn, New York 11217 and the Islamic Seminary, Inc. N.J., located at 221 Beverly Road, Huntington, New York 11746. I have personally spoken with officials from both these organizations and can say that neither organization: (i) has ever been charged in connection with any terrorist activity; and (ii) has not been associated with the "Brooklyn mosque" and/or the Jersey City mosque" linked to the World Trade Center bombing and/or Sheik Omar Abdul Rahman.

5. Attached as Exhibit A and B are documents concerning the Internal Revenue Service's final determination that interest deductions related to a loan made to the Foundation by Bank Melli are fully deductible.

6. Attached as Exhibit C is William P. Roger's resignation leter as a director of the Foundation.

7. Attached as Exhibit D are the minutes of the June 30, 1978 meeting of the Foundation's Board of Directors.

Husain Mirza
HUSAIN I. MIRZA

Sworn to before me this
15th day of January, 1999

Christina I. Belanger
Notary Public

CHRISTINA I. BELANGER
NOTARY PUBLIC, State of New York
No. 01BE-4845827
Qualified in Suffolk County
Certificate Filed in New York County
Commission Expires Sept. 30, 1999

EXHIBIT A

Internal Revenue Service

Northeast Region

Date: APR 15 1997

Department of the Treasury

Address any reply to:
New England Appeals Office
10 Causeway Street, Room 493
Boston, Ma 02222-1083

In re:
Federal Income Tax Liability

Alavi Foundation
500 5th Avenue
New York, NY 10110

Tax Period Ended:
3/31/83, 3/31/84 & 3/31/85
Person to Contact:
Paul G. Joyce
Contact Telephone Number:
(617) 565-7940
Fax Number:
(617) 565-5472

Dear Gentlemen:

We have closed this case on the basis agreed upon and are sending the case file to the service center.

The service center will adjust the account and compute interest required by law. If an additional amount is due, a bill will be sent. If there is a refund, a check will be mailed.

I have aproved and signed the Closing Agreement you submitted pertaining to income tax liability for the periods shown above. The enclosed copy of the agreement is for your records.

If you have any questions, please contact the person whose name and telephone number are shown above.

Sincerely yours,

Janet R. Santangelo
Associate Chief
New England Appeals Office

cc: Howard Muchnick, Esq.

RECEIVED
APR 21 1997

FORM 906
(Rev. August 1994)

Department of the Treasury-Internal Revenue Service

Closing Agreement on Final Determination Covering Specific Matters

Under Section 7121 of the Internal Revenue Code:(The Code), the Alavi Foundation, formerly the Mostazafan Foundation, (EIN: 23-7345978) of 500 Fifth Avenue, New York, NY 10110 (Taxpayer) and the Commissioner of Internal Revenue make the following closing agreement:

WHEREAS, the Taxpayer timely filed its Form 990-T, Exempt Organization Business Income Tax Return, for the fiscal year ended March 31, 1985, claiming a net operating loss of $3,329,724.00;

WHEREAS, the Taxpayer filed a Form 1139, Corporate Application for Tentative Refund, requesting a carryback, of its 1985 net operating loss to the fiscal years ended March 31, 1982, 1983 and 1984;

WHEREAS, the Taxpayer, as part of its computation of its fiscal year ended March 31, 1985 net operating loss, claimed an interest deduction of $6,929,164.00;

WHEREAS, the Taxpayer, in February, 1985, filed an amended Form 990-T for the fiscal year ended March 31, 1983 pursuant to which it requested that the overpayment of $1,066,864.00 be applied to its fiscal year ended March 31, 1984;

WHEREAS, the Service calculated and collected an addition to tax under the provisions of Section 6651(a) of $50,660.36 and interest of $107,682.68 for the late payment of the tax due for the fiscal year ended March 31, 1984;

WHEREAS, the Service has conducted a detailed examination of the Taxpayer's Forms 990-T for the fiscal years ended March 31, 1979 through 1985 and the Taxpayer's Amended Forms 990-T for the fiscal years ended March 31, 1979 through 1983;

WHEREAS, a dispute has arisen between the Service and the Taxpayer concerning the Taxpayer's computation of its unrelated business taxable income, based upon its debt-financed activities, for the years ended March 31, 1979 through 1985 including the previously proposed disallowance of $6,892,625.00 of the Taxpayer's claimed interest deduction for the fiscal year ended March 31, 1985;

WHEREAS, the Taxpayer has determined that the settlement set forth herein is in its best interests; and

WHEREAS, the Service, through its authorized representative, has determined that said settlement is also in its best interests;

Closing Agreement with Alavi Foundation, formerly the Mostazafan Foundation

NOW IT IS HEREBY DETERMINED AND AGREED that:

1. The allowable interest deduction for the fiscal year ended March 31, 1985 is $5,053,856.00 (subject to the applicable debt-financed percentage).

2. The balance of the fiscal year ended March 31, 1985 interest deduction in dispute of $1,875,308.00 ($6,929,164.00 minus $5,053,856.00 allowed in that year) will be deductible, subject to applicable provisions of the Internal Revenue Code, in fiscal year ended March 31, 1990, in addition to any interest otherwise deductible for such year, the year of payment.

3. The Taxpayer filed a timely claim for refund concerning its Form 990-T for the fiscal year ended March 31, 1990, the Service has never rejected such claim, and the year is still open to refund.

4. The Taxpayer's adjusted basis in its debt-financed property as of March 31, 1985 was $37,462,869.00, consisting of an adjusted basis of $9,413,239.00 in its land and $28,049,630.00 in its buildings and improvements.

5. As of March 31, 1979 the Taxpayer's basis of the base building was $31,774,857.00 which the Taxpayer was entitled to depreciate (using the straight-line method) ratably over 40 years or $794,371.00 of depreciation per year.

6. The total of the Taxpayer's charitable contributions as of March 31, 1985 (including carryovers from prior years) is $756,055.00.

7. The Taxpayer is not subject to the additions to tax imposed under Section 6651 of the Code on its Form 990-T for the year ended March 31, 1984.

Closing Agreement with Alavi Foundation, formerly the Mostazafan Foundati

The agreement is final and conclusive except:

(1) the matter it relates to may be reopened in the event of fraud, malfeasance, or misrepresentation of material fact;

(2) It is subject to the Internal Revenue Code sections that expressly provide that effect be given to their provisions (including any stated exception for Code section 7122) notwithstanding any other law or rule of law; and

(3) If it relates to a tax period ending after the date of this agreement, it is subject to any law, enacted after the agreement date, that applies to that tax period.

By signing, the above parties certify that they have read and agreed to the terms of this document.

Your Signature _____ Date Signed _____

Spouse's signature (if a joint return was filed) _____ Date Signed _____

Taxpayer's representative _____ Date Signed 3/5/97

Taxpayer (other than individual) _____

By _____ Date Signed _____

Title _____

Commissioner of Internal Revenue

By _____ Date Signed 4/7/97

Title Associate Chief, Appeals

INSTRUCTIONS

This agreement must be signed and filed in triplicate. (All copies must have original signatures.)

The original and copies of the agreement must be identical.

The name of the taxpayer must be stated accurately.

The agreement may relate to one or more years.

If an attorney or agent signs the agreement for the taxpayer, the power of attorney (or a copy) authorizing that person to sign must be attached to the agreement. If the agreement is made for a year when a joint income tax return was filed by a husband and wife, it should be signed by or for both spouses. One spouse may sign as agent for the other if the document (or a copy) specifically authorizing that spouse to sign is attached to the agreement.

If the fiduciary signs the agreement for a decedent or an estate, an attested copy of the letters testamentary or the court order authorizing the fiduciary to sign, and a certificate of recent date that the authority remains in full force and effect must be attached to the agreement. If a trustee signs, a certified copy of the trust instrument or a certified copy of extracts from that instrument must be attached showing:

(1) the date of the instrument;
(2) that it is or is not of record in any court;
(3) the names of the beneficiaries;
(4) the appointment of the trustee, the authority granted, and other information necessary to show that the authority extends to Federal tax matters; and
(5) that the trust has not been terminated, and that the trustee appointed is still acting. If a fiduciary is a party, Form 56, Notice Concerning Fiduciary Relationship, is ordinarily required.

If the taxpayer is a corporation, the agreement must be dated and signed with the name of the corporation, the signature and title of an authorized officer or officers, or the signature of an authorized attorney or agent. It is not necessary that a copy of an enabling corporate resolution be attached.

Use additional pages if necessary, and identify them as part of this agreement.

Please see Revenue Procedures 68-16, C.B. 1968-1, page 770, for a detailed description of practices and procedures applicable to most closing agreements.

I have examined the specific matters involved and recommend the acceptance of the proposed agreement.

Paul J Joyce 3/25/97
(Receiving Officer) (Date)

Appeals Officer
(Title)

I have reviewed the specific matters involved and recommend approval of the proposed agreement

(Reviewing Officer) (Date)

(Title)

Form 2848 (Rev. December 1990)

Department of the Treasury
Internal Revenue Service

Power of Attorney and Declaration of Representative

▶ For Paperwork Reduction and Privacy Act Notice, see the instructions.

CAF No. 1345-015R
For IRS Use Only
Received by:
Name
Telephone ( )
Function
Date / /

Part I Power of Attorney (Please type or print.)

1 Taxpayer Information (Taxpayer(s) must sign and date this form on page 2, line 9.)

Taxpayer name(s) and address	Social security number(s)	Employer identification number
ALAVI FOUNDATION 500 FIFTH AVENUE 39TH FL NEW YORK , NY 10110		23-7345978
	Daytime telephone number (212) 944-8333	Plan number (if applicable)

hereby appoint(s) the following representative(s) as attorney(s)-in-fact:

2 Representative(s) (Representative(s) must sign and date this form on page 2, Part II.)

Name and address	CAF No. / Telephone No. / Fax No. / Check if new Address / Telephone No.
HOWARD W. MUCHNICK 630 FIFTH AVENUE NEW YORK , NY 10111	CAF No. 2005-00671R Telephone No. (212) 315-5575 Fax No. (212) 977-5133 Check if new Address ☐ Telephone No. ☐
Name and address	CAF No. Telephone No. Fax No. Check if new Address ☐ Telephone No. ☐
Name and address	CAF No. Telephone No. Fax No. Check if new Address ☐ Telephone No. ☐

to represent the taxpayer(s) before the Internal Revenue Service for the following tax matters:

3 Tax Matters

Type of Tax (Income, Employment, Excise, etc.)	Tax Form Number (1040, 941, 720, etc.)	Year(s) or Period(s)
INCOME	990T	3/31/1974 THROUGH
		3/31/1990

4 Specific Use Not Recorded on Centralized Authorization File (CAF). – If the power of attorney is for a specific use not recorded on CAF, please check this box. (See Line 4–Specific Uses Not Recorded on CAF on page 3.) . . . . . ▶ ☐

5 Acts Authorized. – The representatives are authorized to receive and inspect confidential tax information and to perform any and all acts that I (we) can perform with respect to the tax matters described on line 3, for example, the authority to sign any agreements, consents, or other documents. The authority does not include the power to receive refund checks (see line 6 below), the power to substitute another representative unless specifically added below, or the power to sign certain returns (see Line 5–Acts authorized on page 4).

List any specific additions or deletions to the acts otherwise authorized in this power of attorney: . . . . . .

Note: In general, an unenrolled preparer of tax returns cannot sign any document for a taxpayer. See Revenue Procedure 81-38, printed as Pub. 470, for more information.

Note: The tax matters partner/person of a partnership or S corporation is not permitted to authorize representatives to perform certain acts. See the instructions for more information.

6 Receipt of Refund Checks. – If you want to authorize a representative named in line 2 to receive, BUT NOT TO ENDORSE OR CASH, refund checks, initial here _____ and list the name of that representative below.

Name of representative to receive refund check(s) ▶

Form 2848 (Rev. 12-95) ALAVI FOUNDATION

7 **Notices and Communications.**—Original notices and other written communications will be sent to you and a copy to the first representative on line 2 unless you check one or more of the boxes below.

a If you want the first representative listed on line 2 to receive the original, and yourself a copy, of such notices or communications, check this box . . .

b If you also want the second representative listed to receive a copy of such notices and communications, check this box . . .

c If you do not want any notices or communications sent to your representative, check this box . . .

8 **Retention/Revocation of Prior Power(s) of Attorney.**—The filing of this power of attorney automatically revokes all earlier power(s) of attorney on file with the Internal Revenue Service for the same tax matters and years or periods covered by this document. If you do not want to revoke a prior power of attorney, check here . . .

YOU MUST ATTACH A COPY OF ANY POWER OF ATTORNEY YOU WANT TO REMAIN IN EFFECT.

9 **Signature of Taxpayer(s).**—If a tax matter concerns a joint return, both husband and wife must sign if joint representation is requested, otherwise, see the instructions. If signed by a corporate officer, partner, guardian, tax matters partner/person, executor, receiver, administrator, or trustee on behalf of the taxpayer, I certify that I have the authority to execute this form on behalf of the taxpayer.

▶ IF THIS POWER OF ATTORNEY IS NOT SIGNED AND DATED, IT WILL BE RETURNED.

M. Geramian — 3/17/97 — PRESIDENT

Signature — Date — Title (if applicable)

M. GERAMIAN

Print Name

Signature — Date — Title (if applicable)

Print Name

Part II Declaration of Representative

Under penalties of perjury, I declare that:

- I am not currently under suspension or disbarment from practice before the Internal Revenue Service;
- I am aware of regulations contained in Treasury Department Circular No. 230 (31 CFR, Part 10), as amended, concerning the practice of attorneys, certified public accountants, enrolled agents, enrolled actuaries, and others;
- I am authorized to represent the taxpayer(s) identified in Part I for the tax matter(s) specified there; and
- I am one of the following:
  - a Attorney—a member in good standing of the bar of the highest court of the jurisdiction shown below.
  - b Certified Public Accountant—duly qualified to practice as a certified public accountant in the jurisdiction shown below.
  - c Enrolled Agent—enrolled as an agent under the requirements of Treasury Department Circular No. 230.
  - d Officer—a bona fide officer of the taxpayer organization.
  - e Full-Time Employee—a full-time employee of the taxpayer.
  - f Family Member—a member of the taxpayer's immediate family (i.e., spouse, parent, child, brother, or sister).
  - g Enrolled Actuary—enrolled as an actuary by the Joint Board for the Enrollment of Actuaries under 29 U.S.C. 1242 (the authority to practice before the Service is limited by section 10.3(d)(1) of Treasury Department Circular No. 230).
  - h Unenrolled Return Preparer—an unenrolled return preparer under section 10.7(a)(7) of Treasury Department Circular No. 230.

▶ If this declaration of representative is not signed and dated, the power of attorney will be returned.

Designation—Insert above letter (a–h)	Jurisdiction (state) or Enrollment Card No.	Signature	Date
A a	NY		3/17/97

DXA

EXHIBIT B

Internal Revenue Service

Department of the Treasury

District Director

10 MetroTech Center
625 Fulton St., Brooklyn, NY 11201

Alavi Foundation
500 Fifth Avenue - 39th Floor
New York, NY 10110

Date: JAN 08 1999

Gentlemen:

Based on the information you have submitted, and in accordance with the Closing Agreement previously entered into with the Internal Revenue Service, we have determined that you are due a refund of tax in the amount of $664,092 and previously assessed penalties in the amount of $158,138, plus the applicable interest, for the tax period ending March 31, 1990.

If you have any questions, please call me at (718) 488-2350.

Peter Lorenzetti
Chief, EP/EO Branch III

cc: Howard W. Muchnick

EXHIBIT C

Rogers & Wells
Two Hundred Park Avenue
New York, N.Y. 10017
TELEPHONE (212) 972-7000
INTERNATIONAL TELEX
RCA 224493
ITT 424493

February 14, 1979

His Excellency
Seyyed Ahmad Emami
The Pahlavi Foundation
178 Pahlavi Avenue
Tehran, Iran

EX. NO. 2
DATE 3-13-96 WT. ROGERS
SARAH SANDELLER, CSR #9471

Your Excellency:

Since the inception of The Pahlavi Foundation of New York in 1973, I have been pleased to serve as a member of its Board of Directors. During that time the Foundation has achieved its goal of creating a charitable organization which can provide income to assist the needs of qualified Iranian students who are pursuing courses of study in the United States. The New York Foundation now has an approved scholarship program with over 165 students presently receiving benefits. In addition, the Foundation has purchased property and has successfully completed an outstanding office building on one of the most prestigious sites in this country and revenues from the building will shortly become the main source of student scholarship funds.

Thus, I think it is an appropriate time for you to consider a change in the composition of the Board of Directors. You may recall that I agreed to serve as a Director to meet the formal legal requirements until the building was completed. It was understood from the beginning that I would resign as a Director when the Foundation started to produce income. Since the New York Foundation is beginning to receive rental income now for the first time, it is important for the Board to meet on a more regular basis to select its

officers and management and consider the business programs of the enterprise. For this reason I respectfully tender my resignation as a member of the Board of Directors of The Pahlavi Foundation of New York.

I will, of course, continue to be actively involved as legal counsel and my personal interest in the work of the Foundation will in no way be lessened or affected.

With best regards.

Sincerely,

William P. Rogers

EXHIBIT D

MINUTES OF ANNUAL MEETING OF THE

BOARD OF DIRECTORS OF

THE PAHLAVI FOUNDATION

The annual meeting of the Board of Directors of THE PAHLAVI FOUNDATION was held at 178 Pahlavi Avenue, Tehran, Iran, on June 30, 1978, commencing at 10:30 A.M.

There were present the following directors:

JAFAR SHARIF-EMAMI
NASSER SAYYAH
MAJID MONTAKHEB
TAHER ZIAI

constituting a quorum of the Board pursuant to Article II, section 9 of the By-Laws. Mr. Alan M. Berman of the law firm of Rogers & Wells, counsel to the Foundation, was present by invitation. His Excellency Jafar Sharif-Emami presided over the meeting and Mr. Nasser Sayyah acted as Secretary thereof. The Chairman stated that this was an annual meeting of the Board of Directors of the Foundation, called pursuant to Waiver of Notice dated June 30, 1978 and signed by Jafar Sharif-Emami, Nasser Sayyah, Majid Montakheb, Taher Ziai and William P. Rogers. Written notice of this annual meeting of the Board of Directors of the Foundation was sent to Honorable John M. Murphy by certified mail on June 15, 1978. The Chairman ordered that the Waiver of Notice and a copy of the letter to Mr. Murphy be filed with these minutes.

The Chairman advised that since this was an annual meeting of the Board, election of directors for the ensuing

year was in order. After full discussion, the following names were placed in nomination for directors of the Foundation:

JAFAR SHARIF-EMAMI
NASSER SAYYAH
MAJID MONTAKHEB
TAHER ZIAI
WILLIAM P. ROGERS

There being no further nominations, the nominations for directors were closed. Thereupon, on motion duly made, seconded and unanimously carried, it was

RESOLVED, that Jafar Sharif-Emami, Nasser Sayyah, Majid Montakheb, Taher Ziai and William P. Rogers be, and they hereby are, elected directors until the next annual meeting of directors of the Foundation and until their successors shall have been elected and qualified.

The Chairman stated that since this was an annual meeting of the Board, election of officers for the ensuing year was in order. After full discussion, the names of the following persons were placed in nomination for the offices set forth after their names:

Jafar Sharif-Emami	-	President
Parviz Nezami	-	Managing Director
Majid Montakheb	-	Treasurer
Nasser Sayyah	-	Secretary

There being no further nominations, the nominations for officers were closed. Thereupon, on motion duly made, seconded and unanimously carried, it was

RESOLVED, that Jafar Sharif-Emami be, and he hereby is, elected President of the Foundation, and Parviz Nezami be, and he hereby is, elected Managing Director of the Foundation, and Majid Montakheb be, and he hereby is, elected Treasurer of the Foundation, and Nasser Sayyah be, and he hereby is, elected Secretary of the Foundation, these four persons to hold their respective offices until the next annual meeting of directors of the Foundation and until their successors shall have been elected and qualified.

The Chairman stated that the next order of business was to ratify the opening of a checking account in the name of The Pahlavi Foundation at Bank Melli Iran, New York Agency, New York, New York. The Chairman presented to the directors a copy of the corporate resolutions required by Bank Melli Iran as executed on November 28, 1975 by Honorable Jafar Sharif-Emami, as President of The Pahlavi Foundation, and Nasser Sayyah, as Secretary thereof. Pursuant to these resolutions, the Managing Director of the Foundation is authorized to draw checks upon the account jointly with any one of the four Iranian Members of the Board of Directors of the Foundation. The Chairman recommended that it would be proper to ratify the action of the President and the Secretary in executing said resolutions and opening the checking account at Bank Melli Iran on behalf of the Foundation. After full discussion, and upon motion duly made, seconded and unanimously carried, it was

> RESOLVED, that the execution of the Bank Melli Iran, New York Agency corporate resolutions by the President and Secretary of the Foundation on November 28, 1975 be, and it hereby is, ratified, approved and confirmed; and it is further
>
> RESOLVED, that the actions of the President and the Secretary of the Foundation in opening the said checking account at Bank Melli Iran, New York Agency be, and it hereby is, ratified, approved and confirmed; and it is further

RESOLVED, that a copy of the foregoing form of Bank Melli Iran corporate resolutions be filed with these minutes.

The Chairman stated that the next order of business was to discuss and consider ratification of two loan agreements executed with Bank Melli Iran on behalf of the Foundation in connection with the construction of the building at 650 Fifth Avenue, New York, New York. The Chairman explained that pursuant to a loan agreement executed on July 28, 1975 by Bank Melli Iran and by the Foundation, Bank Melli Iran agreed to advance to the Foundation a maximum of $30,000,000 in installments upon the request of the Foundation to finance construction of the office building at 650 Fifth Avenue. This loan bears no interest charge, and the principal of the loan is to be repaid in annual installments of $2,000,000 beginning on December 30, 1978 and continuing until December 30, 1992. The Chairman explained that this loan was secured by a first mortgage covering the Foundation's property located at 650 Fifth Avenue, New York, New York and all improvements on that property.

The Chairman stated further that a second loan of $12,000,000 was made to the Foundation by Bank Melli Iran pursuant to a loan agreement dated October 2, 1975. The Chairman explained that the proceeds of this loan were used

to satisfy an outstanding note to the First National City Bank which had been assumed by the Foundation in connection with the transfer of the property at 650 Fifth Avenue in New York City from the Pahlavi Endowment to the Foundation. This second loan from Bank Melli Iran bears no interest and is repayable in annual installments of $800,000 beginning December 29, 1978 and continuing until December 29, 1992. The Chairman added that this second loan is secured by a second mortgage covering the Foundation's property and all improvements on that property located at 650 Fifth Avenue, New York, New York and that this second mortgage was subordinate to the mortgage covering the aforementioned $30,000,000 loan.

The Chairman stated that it would be advisable to ratify all actions of the directors of the Foundation and the officers of the Foundation taken on behalf of the Foundation in connection with the negotiation and execution of these loan agreements. After full discussion, and upon motion duly made, seconded and unanimously carried, it was

> RESOLVED, that all actions heretofore taken by members of the Board of Directors of the Foundation and officers of the Foundation in connection with the negotiation and execution of the loan agreement dated July 28, 1975 between Bank Melli Iran and the Foundation providing a loan in the maximum sum of $30,000,000 to the Foundation be, and they hereby are, ratified, approved and confirmed; and it is further

RESOLVED, that all actions heretofore taken by members of the Board of Directors of the Foundation and by officers of the Foundation in connection with the negotiation and execution of a loan agreement dated October 2, 1975 between Bank Melli Iran and the Foundation providing a maximum loan of $12,000,000 to the Foundation, and in using such loan proceeds to satisfy the outstanding debt of the Foundation to First National City Bank be, and they hereby are, ratified, approved and confirmed.

The Chairman stated that the next order of business was to consider ratification of an Exclusive Renting Agency Agreement between the Foundation and Minskoff Realty Management Corporation executed on April 15, 1976 by Honorable Jafar Sharif-Emami, as President, on behalf of the Foundation. The Chairman presented a copy of this agreement to the directors. The Chairman then explained that pursuant to this agreement Minskoff Realty Management Corporation was appointed the sole and exclusive rental agent until March 30, 1979 for renting space in the Foundation's building at 650 Fifth Avenue, New York, New York. The primary duty of Minskoff under this agreement is to secure satisfactory tenants for the Foundation's building. The Chairman stated that it would now be advisable to ratify the execution of this document by the Foundation.

After full discussion, and upon motion duly made, seconded and unanimously carried, it was

RESOLVED, that the Exclusive Renting Agency Agreement dated April 15, 1976 between the Pahlavi Foundation and the Minskoff Realty Management Corporation relating to the appointment of Minskoff Realty Management Corporation as the sole and exclusive rental agent for the Foundation's building located at 650 Fifth Avenue, New York, New York, be, and the same hereby is, ratified, approved and confirmed in all respects; and it is further

RESOLVED, that a copy of the foregoing Building Management Agreement be filed with these minutes.

The Chairman then stated that the next order of business before the meeting was to consider ratification of a Building Management Agreement executed on December 22, 1977 between The Pahlavi Foundation and Sutton & Towne, Inc. This agreement was executed on behalf of the Foundation by Mr. Parviz Nezami, the Managing Director of the Foundation. Pursuant to the agreement Sutton & Towne, Inc. is appointed the exclusive agent to manage the operations of the building being constructed by the Foundation at 650 Fifth Avenue, New York, New York. The Chairman presented to the directors a copy of this management agreement for their information.

After full discussion, and upon motion duly made, seconded and unanimously carried, it was

RESOLVED, that the Building Management Agreement dated December 22, 1977 between The Pahlavi Foundation and Sutton & Towne, Inc., under which Sutton & Towne,

Inc. is appointed the exclusive agent to manage the Foundation's building at 650 Fifth Avenue, New York, New York be, and the same is hereby, ratified, approved and confirmed; and it is further

RESOLVED, that all of the actions taken on behalf of this Foundation by Parviz Nezami in connection with negotiation and execution of the aforementioned building management agreement be, and they hereby are, ratified, approved and confirmed; and it is further

RESOLVED, that a copy of the foregoing Building Management Agreement be filed with these minutes.

The Chairman stated that the next order of business before the meeting was a discussion of the formal scholarship procedure that has been adopted by the Foundation. " Chairman reminded the directors that the Foundation's rmal procedure for granting scholarships to individuals id previously been discussed by the Board at its June 10, 76 annual meeting. He advised that since that meeting e proposed scholarship program had been approved by the ternal Revenue Service. The Chairman presented to the ectors a copy of the operating policies and the procedure the award of scholarships, fellowships, grants and ent loans that have been adopted by the Foundation. The rman noted that pursuant to such procedure five prominent iduals had been selected as members of the Scholastic tion Committee. This committee has held three meetings

to date, in which they have reviewed applications for loans made to the Foundation by students. The Chairman explained that under the existing program the Foundation will make loans pursuant to loan agreements to individuals approved by the Selection Committee, such loans to be repaid by the recipient students upon completion of their education and commencement of gainful employment. The Chairman stated that it would be advisable for the Board to now ratify the appointment of the members of the Selection Committee and the adoption of the selection procedure.

After full discussion, and upon motion duly made, seconded and unanimously carried, it was

> RESOLVED, that the adoption by the Foundation of its formal procedure for the awarding of scholarships, fellowships, grants, and student loans be, and the same hereby is, approved, confirmed and ratified; and it is further
>
> RESOLVED that the appointment of members of the Selection Committee thereunder empowered to review applications requesting financial assistance from The Pahlavi Foundation and to grant student loans pursuant to the aforementioned formal procedure be, and the same hereby is, ratified, confirmed and approved.

The Chairman stated that the next order of business was a discussion of the current status of solicitation by the Foundation of bids with regard to building standard

tenant work and special tenant work to be performed at the Foundation's building located at 650 Fifth Avenue. The Chairman reported that, while negotiations are proceeding with a number of contractors, to date no contract had been executed by the Foundation for the performance of such construction work. The Chairman stated that it would be advisable to now authorize the Managing Director of the Foundation and any of the officers of the Foundation to continue negotiations with regard to such building standard tenant work and special tenant work and to authorize such persons to execute on behalf of the Foundation any and all contracts or other documents relating to such work to be performed at 650 Fifth Avenue.

After full discussion, and upon motion duly made, seconded and unanimously carried, it was

> RESOLVED, that the Managing Director and any of the officers of this Foundation be, and they hereby are, authorized and directed to execute, on behalf of this Foundation, any and all contracts or other documents relating to the employment of contractors, engineers and other consultants by the Foundation in connection with the performance of building standard tenant work and special tenant work to be performed at 650 Fifth Avenue, New York, New York.

The Chairman stated that the last order of business to come before the meeting was to discuss the advisability of the purchase of director and officer liability insurance

by the Foundation. The Chairman stated that such insurance could be obtained to provide protection for the directors and officers of the Foundation with regard to actions taken by them in their capacities as directors and officers on behalf of the Foundation. The Chairman noted that the Managing Director of the Foundation had contacted a number of insurance companies to obtain quotes as to the cost of such insurance coverage. The Chairman stated that it would be proper and advisable to authorize the Managing Director to continue to study and review the feasibility of obtaining such insurance coverage, and to authorize him to execute on behalf of the Foundation contracts and other documents relating to the obtaining of such insurance coverage for the directors and officers of the Foundation if the cost of premiums for such coverage is reasonable.

After full discussion and upon motion duly made, seconded and unanimously carried, it was

> RESOLVED, that the Managing Director of the Foundation be, and he hereby is, authorized and directed to execute, on behalf of the Foundation, any and all contracts or other documents relating to the obtaining of director and officer liability insurance coverage pertaining to any and all actions of the directors and the officers of the Foundation undertaken on behalf of the Foundation.

There being no further business to come before the meeting, it was, upon motion duly made, seconded and unanimously carried, ADJOURNED.

Nasser Sayyah
Secretary of the Meeting

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Affidavit of Husain I. Mirza was mailed postage prepaid this 19th day of January, 1999 to:

Thomas Fortune Fay, Esq.
THOMAS FORTUNE FAY, P.C.
601 Pennsylvania Avenue, NW
#900 - South Building
Washington, D.C. 20004

Steven R. Perles, Esq.
Anne-Marie Lund Kagy, Esq.
STEVEN R. PERLES, P.C.
1666 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20009

Patrick James Attridge

BAHMAN KHERADMAND-HAJIBASHI AFFIDAVIT DATED JANUARY 18, 1999

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

----------x

STEPHEN M. FLATOW,

Plaintiff,

v.

THE ISLAMIC REPUBLIC OF IRAN, et al.,

Defendants.

----------x

Amd 98-4152
CA No. ~~98-MC-285~~

United States District Court
For the District of Columbia
Civil Action # 97-3964RCL

AFFIDAVIT OF BAHRAM KHERADMAND-HAJIBASHI

STATE OF VIRGINIA)
:
COUNTY OF FAIRFAX)

BAHMAN KHERADMAND-HAJIBASHI being duly sworn, deposes and says:

1. I currently serve as the Treasurer and as a Director of the Islamic Education Center located in Potomac, Maryland (hereinafter "IEC"). I have served as a director of the IEC since 1986 and have been actively involved with the IEC's activities since 1981. In addition to serving as an officer and director of the IEC, since 1980 I have been a Professor of Accounting at the Northern Virginia Community College and am currently the head of the Accounting Program at the college.

2. The IEC is a not-for-profit organization organized pursuant to the laws of the State of Maryland. On an annual basis, the IEC makes appropriate filings with the Internal Revenue Service and the State of Maryland.

3. The IEC supports cultural and religious activities in its community. These activities include a weekend Farsi school as well as a religious Sunday school. In addition, a state-accredited, not for profit school for children from pre-kindergarten through tenth grade operates at the property also used by the IEC. I submit this affidavit to correct the record currently before the Court with respect to assertions made regarding the IEC and to a document attached to plaintiff's opposition to the Alavi Foundation's motion to vacate a writ of attachment.

4. To the extent plaintiffs and their counsel claim that Exhibit 8 attached to the plaintiff's opposition papers (hereinafter "Exhibit 8") is a document prepared by the IEC or distributed by the IEC, such a claim is totally false. Exhibit 8 was not prepared by any officer, director, employee or agent of the IEC. Nor did any officer, director, employee or agent of the IEC authorized its preparation and/or distribution.

5. The address given at the top of Exhibit 8 is one which the IEC ceased using in 1986.

6. When Exhibit 8 was forwarded to me on April 15, 1996 by counsel for the Alavi Foundation in conjunction with a lawsuit, Gabay v. Mostazanfan Foundation of Iran, it was the first time I saw this document. I showed Exhibit 8 to other officers and directors as well as employees of the IEC at that time and they too never had seen it.

7. The IEC is not related to the Mostazafan Foundation of Iran, the Alavi Foundation located in Iran nor the Government of Iran. None of the officers, directors or employees of the IEC are officers, directors or employees of the Mostazafan Foundation of Iran, the Alavi Foundation located in Iran or the Iranian Government.

8. The IEC acts through its directors here in the United States and does not take direction or orders from anyone affiliated with the Mostozafan Foundation of Iran, the Alavi Foundation located in Iran or the Iranian Government.

9. Over the years the Alavi Foundation in New York has made grants to the IEC. These grants were used to pay for utilities, maintenance, landscaping, repairs, telephones, educational supplies and employee salaries. While the IEC communicates with officers and directors of the Alavi Foundation in New York from time-to-time, the IEC acts independently of this Foundation. None of the officers, directors or employees of the IEC are officers, directors or employees of the Alavi Foundation in New York.

10. I am advised by counsel for the Alavi Foundation that plaintiffs in this matter are asserting that the IEC promotes anti-semitism. This claim is completely untrue. In conjunction with Catholic University's Religious Studies Department, the IEC is and has been sponsoring a series of public forums entitled "Dialogue Among Religions." These forums, held at Catholic University, have brought together Muslim, Jewish, Catholic and Protestant leaders to discuss important topics affecting people of every religion. Documents relating to proceedings from these forums have been published and are attached as Exhibits A through C.

11. I also am advised by counsel to the Alavi Foundation that a document attached to plaintiffs' oppositon papers asserts that the receptionist for the IEC is the wife of Ali Agah, who for a period of time was Iran's charge d'affairs in this country. This assertion is incorrect. For more than twelve years the IEC's receptionist was Georgina Torki Torki who is married to Nuradin Torki Torki a delivery driver. Ms. Torki Torki was called Miriam by almost everyone at the IEC. The "Miriam" to whom I believe plaintiffs are referring Mariam Agah, is a

special education teacher in the Prince Williams County School District. Ms. Agah, a former nun, did teach first and second grade at the MSC for one year.

BAHMAN KHERADMAND-HAJIBASHI

Sworn to before me this
18th day of January, 1999

Notary Public
c/1/00

368642.1

EXHIBIT A

An Invitation to...

A Symposium of Scholars:

JEWISH ↔ **CHRISTIAN** ↔ **ISLAMI**

on...

Family:
Cultivating Value[illegible] Life Together

Ec[illegible]

- Religio[illegible]
- Caree[illegible]. Famil[illegible]

Scholars Include:

Rabbi Barry Freundel
Rabbi Rosalind Gold
Rabbi Toby M[illegible]ewith

Prof. Raymond Collins[illegible] Agah
Prof. Christine E. Gudorf [illegible]laziz Sache
Prof. Michael G. Lawler[illegible]ammad Sa

Sunday, November 15, 1998

7:00 - 9:00 pm

Caldwell Auditorium
The Catholic University of America

Sponsors:

The Catholic University of America
School of Religious Studies

The Islamic Center
Potomac, Maryland

851

For More Information: 202-319-5700

EXHIBIT B

An Invitation

A Symposium of Scholars

Jewish — Christian — Islamic

Rights and Responsibilities Within the Family

Separation/Divorce

Sexual Violence

Scholars include

Sunday, November 16, 199

7:00 pm - 9:00 pm

Caldwell Auditorium

The Catholic University of America

Sponsors

The School of Religious Studies
The Catholic University of America

The Islamic Education Center
Potomac, MD

For information: 202-319-5700

EXHIBIT C

TRILATERAL SYMPOSIUM OF SCHOLARS FOR 1998

Rabbi Barry Freundel
3026 O Street, NW
Washington, DC 20007
Off: 202-333-3579

Rabbi Rosalind A. Gold
Northern Virginia Hebrew Congregation
1441 Wiehle Avenue
Reston, VA 20190
Off: 703-437-7733

Rabbi Toby Manewith
Hillel, Kay Center
The American University
4400 Massachusetts Ave., NW
Washington, DC 20016-8010
Off: 202-885-3322

Dean Raymond F. Collins
School of Religious Studies
The Catholic University of America
Washington, DC 20064

Professor Michael G. Lawler
Dept. of Theology
2500 California Plaza
Creighton University
Omaha, Nebraska 68178
Off: 402-280-2501 (Fax:2502)

Dr. Christine E. Gudorf
Dept. of Philosophy & Religion
College of Arts & Sciences
Florida International University
University Park
Miami, Florida 33199
H:: 305-348-3729 (fax: 3605)
Off: 305-348-2186

Prof. Abdulaziz A. Sachedina
Dept. of Religious Studies
Cocke Hall
University of Virginia
Charlottesville, VA 22903

Prof. Seyyed Hossein Nasr
Dept. of Religion
George Washington University
Washington, DC 20052

Prof. Mahmoud Ayoub
Dept. of Religion
Temple University
Philadelphia, PA 19122

PLANNING COMMITTEE FOR THE TRILATERAL SCHOLARS SYMPOSIUM

ORGANIZING COMMITTEE

Rabbi Rosalind A. Gold
Northern Virginia Hebrew Congregation
1441 Wiehle Avenue
Reston, VA 20190
Off: 703- 437-7733

Prof. William Cenkner
Dept. of Religion & Religious Education
The Catholic University of America
Washington, DC 20064
Off: 202-319-5700
H: 202-863-0444

Imam Sayyed M. Reza Hejazi
8100 Jeb Stuart Road
Potomac, MD 20854
301-251-8941

CONSULTANTS

Prof. William Barbieri
The Catholic University of America

Dr. John Borelli
Nathional Conference of Catholic Bishops

Prof. Stephen Happel
The Catholic University of Americad

Ms Bahar Davary
Islamic Scholar

Dr. Parviz Izadjoo
Islamic Education Center

Dr. Akbar Mohammadpour
Islamic Education Center

Trilateral Symposium of Scholars for 1998

Rabbi Barry Freundel
3026 O Street NW
Washington, DC 20007

Rabbi Rosalind A. Gold
Northern Virginia Hebrew Congregation
1441 Wiehle Avenue
Reston, VA 20190

Rabbi Toby Manewith
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Washington, DC 20064

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College of Arts & Sciences
Florida International University
University Park
Miami, Florida 33199

Prof. Abdulaziz A. Sachedina
Dept. of Religious Studies
Cocke Hall, Univ. of Virgina
Charlottesville, VA 22903

Sr. Marian Agah
1725 Melbourne Drive
McLean, VA 22101

Imam Muhammad Sarwar
221 Beverly Rd.
Huntington, New York 11746

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Affidavit of Bahman Kheradmand-Hajibashi was mailed postage prepaid this 19th day of January, 1999 to:

Thomas Fortune Fay, Esq.
THOMAS FORTUNE FAY, P.C.
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Anne-Marie Lund Kagy, Esq.
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Suite 500
Washington, D.C. 20009

Patrick James Attridge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

STEPHEN M. FLATOW,	.	Civil Action No. AW-98-4152
Plaintiff,	.	
v.	.	Greenbelt, Maryland
THE ISLAMIC REPUBLIC OF IRAN, et al.,	.	
Defendants.	.	Monday, May 10, 1999
. . . . .	.	8:40 a.m.

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE ALEXANDER WILLIAMS, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: THOMAS F. FAY, ESQ.
STEVEN R. PERLES, ESQ.
ANNE MARIE KAGY, ESQ.

FOR THE DEFENDANTS: PATRICK J. ATTRIDGE, ESQ.
JOHN D. WINTER, ESQ.

OFFICIAL COURT REPORTER: GLORIA I. WILLIAMS
Room 240, U.S. Courthouse
6500 Cherrywood Lane
Greenbelt, Maryland 20770
(301) 345-4069

COMPUTER-AIDED TRANSCRIPTION OF STENOTYPE NOTES

P R O C E E D I N G S

THE DEPUTY CLERK: The matter now pending before this Court is civil docket No. AW-98-4152, Stephen M. Flatow v. The Islamic Republic of Iran, et al. The matter now comes before the Court for motions hearing. Counsel please identify yourself for the record.

MR. FAY: Good morning, Your Honor. Thomas Fortune Fay representing the plaintiff, Stephen M. Flatow. I would like to introduce to the Court as well Steven Perles, who will also conduct mainly the argument this morning. I have a motion here for admission pro hac vice and I'm satisfied that Mr. Perles has all of the requisite qualifications by way of training, experience, and character to be admitted pro hac vice to the bar of this court. With Your Honor's permission, I will pass forward the --

THE COURT: Yes. If you can give that to the clerk. Mr. Perles, nice to have you here this morning.

MR. PERLES: It's a pleasure to be here.

THE COURT: I will grant the motion.

MR. FAY: Your Honor, I would also like to introduce to the Court Ann Marie Kagy, who is a member of the bar in the District of Columbia --

MS. KAGY: And Virginia.

MR. FAY: -- and Virginia, and she will be assisting. She will not be arguing before the Court. We therefore have not

filed a motion for admission. However, I have no question she would satisfy all of the requirements of this court.

THE COURT: All right, Ms. Kagy, nice to see you.

MR. FAY: Thank you.

THE COURT: All right. And for the defendants?

MR. ATTRIDGE: Good morning, Your Honor. Patrick James Attridge for the Alavi Foundation, which is a nonparty to the main action. To my left is Mr. John Winter. We also have a motion pro hac vice which has been filed with the Court.

THE COURT: All right. Have I granted it yet?

MR. ATTRIDGE: I don't know. It was filed last Thursday or so.

THE COURT: All right. I probably haven't seen it yet. Mr. Winter, nice to have you with us. You are from New York?

MR. WINTER: Yes, Your Honor. Thank you very much.

THE COURT: Nice to have you here.

I know that this case emanated out of the District of Columbia, the federal court there. I think Judge Royce, I believe -- what is his last name?

MR. FAY: Lamberth.

THE COURT: Yes, Lamberth. I know that you obtained a fairly significant default judgment in that court and you are now seeking to attach certain properties located here in Montgomery County.

I've had a chance to look at the briefs. I'm not sure

how we are going to proceed today other than to get some feel from both sides as to whether we need any evidence or we need an evidentiary hearing or whether I can and should decide this matter on the pleadings or where we are to go from here.

I have reviewed the respective positions of the parties and I'm certainly going to give each side 30 or so minutes to make whatever presentation that you can. I probably will not make a decision today. I will take this matter further under advisement and address it in turn.

This matter originally came to this Court under what we call a miscellaneous docket, which meant that whoever was in chambers that day was to receive it, but I kept it and decided to have this matter kept on my docket because it was a little more involved than the normal routine matters that come in. I believe it came in by the nonparty seeking to dismiss the levy that has been filed on those three properties.

So, as I said, it's an interesting case. We don't get a lot of these here, but it's always good to get something so interesting.

All right. So, let's see. I guess it's your motion, Mr. Attridge. You filed the motion.

MR. ATTRIDGE: Yes, Your Honor. Mr. Winter will argue.

THE COURT: All right, Mr. Winter, yes.

MR. WINTER: Thank you.

May it please the Court. Recognizing Your Honor has

reviewed the voluminous papers which the parties have submitted, I'll try to be brief. And in answer to your question why we do not believe you need an evidentiary hearing, Your Honor, there are assertions made by the plaintiff as to a theory that you should apply, and the theory is if the government of Iran owns somehow the Alavi Foundation, they would have a right to proceed forward with their attachment, forward with an evidentiary hearing.

Your Honor, it is undisputed here that the Alavi Foundation is a New York not for profit corporation. It has no shareholders as a matter of law. It has no owner as a matter of law. It is just like John D. Rockefeller when he made his gift to create the Rockefeller Foundation. Once he made the gift, he no longer owned whatever consideration, whatever assets he gave the foundation.

So, when the Shah of Iran in 1973 made a gift to create a foundation in New York, ownership of that foundation ceased to exist in any individual and ownership rested, if in anyone, with the state of New York, because, as the papers, Your Honor, you have in front of you clearly establish, no one can take anything out of the Alavi Foundation. If that entity is dissolved or goes out of existence, the Attorney General of the state of New York will decide how the money goes. It can only go to charities within the state of New York.

So, if this is an evidentiary hearing about ownership,

as a matter of law there can be no owner. Therefore, no need for a hearing. But, in essence, Your Honor, I started at the end. That's assuming that every one of the other legal arguments that the plaintiff makes is accepted by you. We do not believe that you should do that here.

Your Honor, if you look at Section 1603(b)(3) of the Foreign Sovereign Immunities Act, you will see a definition of an instrumentality of a foreign state. A corporation or entity that has a citizenship for the purposes of 28 U.S.C. Section 1332 -- I believe I cited the diversity statute, but if I didn't, I apologize, Your Honor -- if it has a citizenship, it cannot be an instrumentality of a foreign state.

In the first Gabay case, which we've cited to you many times, Your Honor, that in fact is what the court said. So, again, Your Honor, if the question is is a New York corporation for profit or not for profit an instrumentality of a foreign state, by statute it can't be.

So, another approach that the plaintiff has here as a matter of law fails, and that already was ruled upon in the Gabay case.

Now, what we come into from our perspective, Your Honor, is several red herrings and that's why I think our papers are voluminous, responding to arguments which we think are off point. One of the off point arguments is jurisdiction. The Alavi Foundation owns property in this District. They are in rem.

They are present here. Much of plaintiff's papers go into an argument about jurisdiction over assets of the government of Iran. Well, that may be important in another case, but they're completely irrelevant to this case.

If Your Honor looks at the legislative history, when the Foreign Sovereign Immunities Act was adopted approximately 25 years ago, you will see an explanation as to what the definition of an instrumentality of a foreign state could or could not be, and the example given for something that could not be an instrumentality of a foreign state is a corporation organized under New York law, and they cite an old Second Circuit case for that proposition. That is just another example, Your Honor, of the, in our estimation, improper leaps which the plaintiff asks you to take, ignoring case law, legislative history to say that today because a judgment has been obtained under a 1996 amendment to the Foreign Sovereign Immunities Act, every rule of law, every pronouncement no longer applies.

Yes, when Congress amended the Foreign Sovereign Immunities Act in 1996, they did expand jurisdiction. If you look at the legislative history, it expressly says we are expanding jurisdiction. Expanding jurisdiction has nothing to do with the motion that's before your Court. If you look at the 1998 amendments also cited by the plaintiff, that talks about reaching blocked assets.

Now, our assets, the Alavi Foundation's assets, have

never been blocked. If they were blocked, Your Honor, in 1984 the Alavi Foundation could not have purchased the property at issue in this matter or in 1981. The properties were purchased -- there's three properties. They were purchased at different points in time after the regulations went into effect freezing Iranian assets. These facts are not disputed. There's no need for an evidentiary hearing.

It is the plaintiff's burden of proof throughout this case to prove that a third party's assets should be seized to satisfy the debts of another, whether we proceed under basic Maryland law or the Foreign Sovereign Immunities Act. It was the plaintiff's burden to show that the Alavi Foundation's assets were blocked. They cannot.

Your Honor, if you look and you have looked at the voluminous papers, you'll see that the Internal Revenue Service, organizations of the federal government, for all I know, the FBI, the CIA and any intelligence agency that this government has, since 1979 has investigated, watched, looked at the Alavi Foundation. The foundation scrupulously -- and I think that's a word from the plaintiff's brief -- scrupulously adheres to corporate formalities, does everything by the book, has been a good citizen.

It is not controlled. As the case law says, this Court would have to investigate the issue to determine whether it is controlled by the Iranian government. It is uncontroverted, Your

Honor, and that's why there's no need for a hearing. There's no officers and directors that are officials of the Iranian government. There's no property that is jointly held with the Iranian government. There's no bank accounts jointly held with the Iranian government. There's no joint employees or dual employees. The Iranian government owns no shares in the Alavi Foundation.

All of the traditional tests which the cases we have cited to you say need to be looked at do not apply here. Again, that's why we do not need a hearing and it's undisputed as to those points. Plaintiff raises peripheral points which we believe are completely tangential to the analysis which the Court must employ and those points do not raise the level of inquiry to day-to-day control which would require an evidentiary hearing.

I'm looking at my notes, Your Honor, because I said to myself I should be brief and I'm going to try to adhere to that.

We said in our papers, Your Honor, and it is something we believe, what happened to Ms. Flatow is a tragedy. The assertions and allegations made about the foundation here in New York and its activities in Maryland, Your Honor, we've laid out to you what goes on at this Muslim community school, how it came into being, and what it does in conjunction with institutions like Catholic University in Washington and other local groups. We think it is completely wrong to assert, to claim as is made in the papers filed by the plaintiffs that it is akin to a terrorist

training camp. To make the assertions that bring out Adolph Hitler and Auschwitz -- there's a footnote in their brief that talks about that -- to try to equate what goes on at that school with those horrific acts is wrong, Your Honor.

Plaintiffs say they want an evidentiary hearing because there are people at that Muslim community school who happen to be of Iranian descent. The people that run the Alavi Foundation for the most part are of Iranian descent. The concept that anyone who is a Muslim, who is Iranian by descent, by relation, by birth, by whatever is an extension of the Iranian government is not what our laws say should happen.

I said it before. What happened to Ms. Flatow was wrong, but to sanction the witch hunt which the plaintiffs here want to engage in would be equally wrong. They have enforcement mechanisms available to them in the District of Columbia with respect to the Iranian government.

The Alavi Foundation has existed for more than 25 years. It is a New York corporation. It is not a foreign instrumentality. To take its property away, to take the school away from the children here in this district would be a tragedy, Your Honor, and it would not be in accordance with any law, any statute.

Thank you very much.

THE COURT: What is the significance of the levy now? Is it time is of the essence or --

MR. WINTER: No, Your Honor. The foundation has no intention of selling that property. So time is not of the essence. We have a cloud on our title and we want it cleared, but it is not a matter of imminent concern, Your Honor.

THE COURT: All right. Okay, all right, Mr. Perles.

MR. FAY: Your Honor, if Your Honor please, I would like to -- Thomas Fortune Fay. I would like to spell out just very briefly the facts and then turn the oral argument over to Mr. Perles.

If Your Honor, please, the Alavi Foundation started its life as the Pahlavi Foundation. The money in that foundation came from the Iranian government, and should this matter go to hearing, we will introduce testimony from the lawyer who represented the shah and did much of the legal work in setting up the foundation to testify to that.

In addition, at the time of the Iranian revolution, the Islamic Republic of Iran filed a lawsuit in New York state in which it contended in the lawsuit that all of the assets of the Pahlavi Foundation, the same foundation we're speaking about now, were the property of the government and people of the Islamic Republic of Iran. That lawsuit was ultimately dismissed when the Islamic Republic of Iran took control of the foundation. But those were their allegations.

In 1979 the then board of directors of the Pahlavi Foundation were forced to resign. The former secretary of state,

Mr. Rogers, resigned before a meeting. Two other members had families in Iran. They were forced -- and we have testimony from the attorney for the shah, having had conversations with these gentleman. They were required to sign over and nominate three people who were hooked in with the Bonyad-e-Mostazafan. The Bonyad-e-Mostazafan is a vast organization in Iran. As we noted in our pleadings, under the decree of 28 February 1979 all properties of the Pahlavi family and all properties held by the government are the property of the Islamic Republic of Iran.

Following that, the organization has functioned for many years not as an educational institution primarily but using that only as a front but, instead, it has functioned as part of the Iranian Ministry of Security and Information.

Should this matter go to hearing, and we believe it certainly should, we would introduce testimony from three different experts to that effect. Two of them have sworn statements that are included among our papers and what those statements essentially state is that this organization cannot be compared to a subsidiary of the Dupont Company or U.S. Steel or any regular commercial enterprise. It has to be compared to organizations which are in the area of racketeering, which are in the area of criminal ventures.

As we put in our pleadings, Your Honor, one of the people from this group is currently in Iran, a fugitive from American justice because of a murder of an Iranian dissident in

Potomac, Maryland.

But even more revealing, in addition to the testimony from the experts, from Mr. Timmerman, from Mr. Clawson, and we will also have testimony from Mr. Harry Brandon, retired assistant deputy director of the Federal Bureau of Investigation in charge of antiterrorism.

Even more persuasive than their opinions based on years of experience in this would be an examination of what the Alavi Foundation actually does in their work as shown by their tax return. We have subpoenaed from the New York Charities Bureau the tax returns. Now, the fact is that all they have done in New York is file reports. There isn't day-to-day supervision as it sounds from the argument of the Alavi Foundation.

Let me draw this to the Court's attention, and this would be shown in a number of things. It's just for one year, the last year that we got their records. In 1993 the foundation had total income of $5,396,374. All of that income was from investments that were put in by the shah and the government of Iran and then were seized at the time of the revolution by the takeover of the Pahlavi Foundation. What's interesting is that that amount, $129,195 or 2.4 percent was paid out in scholarships. Interestingly enough, that was just a little bit more than the amount paid to the counsel for the Alavi Foundation, Patterson, Belknap, which was a little more than $80,000.

By contrast, the Brooklyn Mosque, which assistant director of the FBI Mr. Brandon will testify to, was the place where the World Trade Center bombing was set up and planned and the Islamic Educational Center which we have attached here received $830,000 or 15.5 percent. More than that, an additional $544,835 went to officers and employees of Alavi Foundation.

If Your Honor please, zeroing in on the Islamic Educational Center with regard to what we can show there, the allegation that the Alavi Foundation has a total clean bill of health from the U.S. government, frankly, is incorrect. There have been investigations.

We, if this matter goes to hearing, have videotapes of Mr. Al-Asi, the Imam or prayer leader, minister essentially of the Islamic Educational Center in Potomac which we have attached. Those videotapes show that Mr. Al-Asi met with the Ayatollah Khomeini and the heads of Hizbollah and Hamas, two other terrorist organizations.

In addition, we have videotapes of him speaking at fund raising activities of Hamas, Hizbollah, and the Palestinian Islamic Jihad, three terrorist organizations. The Palestinian Islamic Jihad was the organization found as a fact by Judge Lamberth in his opinion to have been the organizations which murdered Alisa Flatow, among others.

There have been about 25 Americans murdered by terrorist activities by this organization. Mr. Al-Asi met in Tampa,

Florida with Fathi Shikaki, the then head of the Palestinian Islamic Jihad, in a movement of money back and forth. He gave a speech in support of Mr. Shikaki. Mr. Shikaki was later assassinated in Malta.

However, also present at that meeting was Ramadan Abdullah Shallah, who is currently the secretary general of the Palestinian Islamic Jihad. In 1996 he fled the country in order to take over leadership, outright leadership of the Palestinian Islamic Jihad after the assassination of Mr. Shikaki, and he is currently in Damascus, Syria as the secretary general of the Palestinian Islamic Jihad. Those videotapes also show among his other companions was Mazen Al-Najjr, N-A-J-J-R, who is currently in an immigration detention facility in Bradenton, Florida where he is being held without bail with an outstanding order of deportation.

In addition to that, Basheer Naffi, another terrorist, was deported, currently resides in London, England. Another terrorist, Sheikh Abdul Aziz Odeh currently is in Dubayy, United Arab Republic, having fled the United States. Now, all of these people were present at this fund raising activity.

The statement was made that this has to do with an attack against Iranians and Muslims. That is totally, absolutely incorrect. Should this matter go to hearing, we will have testimony from heads of the legitimate Muslim congregations in not only this area but across the United States who reject

terrorism and, in fact, Muhammad Al-Asi was rejected from the Muslim Center on Wisconsin Avenue after the Metropolitan Police had to be called to throw him out of the place when he tried to take control of it -- I'm sorry -- Massachusetts Avenue, Your Honor. Some of Mr. Al-Asi's statement at this time was he categorized himself as an elected leader, which he was not, and said merely, quote -- this is his quote as reported on the Iranian radio news bureau -- "Some Negros masquerading as Muslims pushed him out of the scene."

Your Honor, his statements in addition showed no question that he tows the line for the present Iranian government. Should this matter go to hearing, we will have literature from the Independent where he urges holy war and says if we are not going to consider holy war now in these circumstances, when will we ever consider it. That was in 1993.

In 1998, just last year, he talked about the annihilation of the Jews and holy war and that being the cause of Iran.

If Your Honor please, we also will be able to present testimony from persons who have had intimate knowledge of the Islamic Republic of Iran and of the Alavi Foundation. What it will show is that the real ownership of the Alavi Foundation is in Iran, that the real control, the day-to-day control of it is through the Iranian United Nations delegation. And what it will show as a bottom line is that the Alavi Foundation is owned by

the Islamic Republic of Iran in every real way.

Your Honor, I would like to defer to Mr. Perles to review the law on this subject. And thank you.

THE COURT: All right.

MR. PERLES: Thank you, Your Honor. With Your Honor's permission, may I use a couple of aids here?

THE COURT: Yes.

MR. PERLES: Can Your Honor see this?

THE COURT: Yes.

MR. PERLES: Thank you. Let me start by distributing a copy of -- with Your Honor's permission, if I might start by distributing a copy of this chart. I'd also add that this statute has been amended several times. It's a little difficult to follow the statutes because the amendments appear in different places in the United States Code. For the convenience of the Court, we have taken all of these extraneous sections and put them into one document so that the statute may be followed on a reasonably coherent basis. I'll try and be brief.

What I have tried to do in this chart is to create an overview of the history of immunity practice in the United States. In the first half of the twentieth century governments that came to the United States, for whatever reason, enjoyed absolute immunity from litigation in this country. That matter changed in 1952 administratively with the issuance of a document by the Department of State called the Tate Letter. The Tate

Letter was, for all practical purposes, a creature of the Cold War. The Department of State determined that state owned corporations conducting commercial activities in the United States should be placed on the same litigation or immunity footing with domestic corporations or nonparastatal corporations in this country. That practice remained in effect from 1952 to 1976 when the Foreign Sovereign Immunities Act was enacted by Congress.

The problem with the Tate Letter from a congressional perspective was that the immunity determinations were made by the Department of State and by 1976 they had become highly politicized. The purpose of the Foreign Sovereign Immunities Act was to create a de-politicized framework in which foreign parastatal corporations would be subject to restrictive immunity in this country. In elementary terms, immunity determinations were taken away from the Department of State and given to the judiciary and the purpose of the '76 statute was purely commercial in nature.

Several practitioners in the United States, including myself, in a series of cases dating back from 1984 to 1994 attempted to expand the jurisdiction of the federal court systems over the commission of outlaw conduct by foreign states against U.S. nationals. Principally, what we tried to do was to use the implied waiver provisions of the Foreign Sovereign Immunities Act to expand the scope of subject matter jurisdiction over foreign

states whose conduct resulted in activities such as the murder of U.S. nationals abroad, the enslavement of U.S. nationals abroad, hostage taking of U.S. nationals abroad, murder through aircraft sabotage as in the Pan Am 103 case.

Most of these efforts came to a crashing halt in 1994 with a case called Princz v. The Federal Republic of Germany, which I litigated. That case ultimately successfully settled, but during the course of the litigation the D.C. Circuit put an end to any notions that implied waiver could be used to obtain subject matter jurisdiction over outlaw conduct of foreign states.

That D.C. Circuit ruling was used in the matter of Smith v. The Libyan Arab Republic, which was the first of the cases against Libya for the downing of Pan Am 103, and jurisdiction was also denied in that case, at which point Congress interceded in 1996 with the effective death penalty and Antiterrorism Act which created Section 28 U.S.C. 1605(a)(7).

I would take exception to Mr. Winter's characterization that the 1996 amendments merely expanded subject matter jurisdiction. They did considerably more than that. Every exception to immunity -- and perhaps we should take a step back and say that the Foreign Sovereign Immunities Act from a historical perspective has been a particularly nasty piece of work. It has confounded jurists, legal scholars, and practitioners alike for some 25 years now. One of the reasons

that that has happened is this statute attempts to incorporate subject matter jurisdiction, in personam jurisdiction, and enforcement into a single mechanism.

I'd like to put up a second chart. The way the Foreign Sovereign Immunities Act works is all foreign states are immune from litigation unless their conduct falls within one of seven statutory exceptions to the grant of immunity, and these are the seven statutory exceptions. They're found at 28 U.S.C. 1605(a)(1) through (7) and it is Section 28 U.S.C. 1605 which creates immunity from -- creates an exception for immunity from acts of terrorism, or extrajudicial killing, or aircraft sabotage.

If we then go to Section 1610 of the statute, we see that each of these exceptions has a different enforcement mechanism, and these are Sections 1610 (1) through (7).

Now, Mr. Winters' pleadings have made reference to cases such as Bancec. He makes reference to Gabay, but the Court needs to watch closely here. In Bancec we were dealing with a counterclaim in a commercial case, 1605(a)(2). It has its own enforcement mechanism.

The Gabay case was 1605(a)(3). That's expropriation of property which has a commercial nexus to the United States. It has its own enforcement mechanism. When Congress enacted 28 U.S.C. 1605(a)(7), creating subject matter jurisdiction in this case, it enacted a new enforcement mechanism, Section 1610(a)(7).

One of the cases that has become seminal in this area is the 1984 case Letelier v. Chile. In the Letelier case a Chilean national and former Chilean diplomats and U.S. nationals were killed in a bombing in Dupont Circle. At that time there was no antiterrorism mechanism in this statute. Instead, the plaintiffs in that case proceeded under what is called the torts in the United States section. That section self-describes itself. It was intended to include torts but really nonintentional torts committed in the United States. Frankly, it was intended to deal specifically with the matter of official foreign vehicles, the ambassador's car, official embassy cars hitting pedestrians in or around the greater Washington, D.C. area and then having the foreign states assert immunity from tort litigation in the United States for vehicular accidents.

Along comes this bombing and these people have no redress. They went to the U.S. District Court for the District of Columbia seeking redress under this torts in the United States provision. And, frankly, their pleading met the test but not the spirit of what Congress had enacted. Nonetheless, without a remedy, in the absence of the torts exception they were entitled to proceed.

We then come to the enforcement mechanism. Well, if you look at the enforcement mechanism in Letelier, it's clearly intended to deal with insurance policies which foreign embassies are required under the U.S. Code to maintain for embassy

vehicles. There was no effective enforcement mechanism.

The plaintiffs in Letelier attempted to seize an Air Chile aircraft in New York. That attachment was ultimately denied because the court could find no nexus between the seized asset and the underlying act of a bombing in Washington, D.C.

If Your Honor looks at the change that occurred in the enforcement provisions in the 1996 amendments, you will see the scope of the enforcement provision has been significantly expanded. It now includes basically any plaintiffs may attach any commercial -- and "commercial" for purposes of this statute means any non-diplomatic or military asset, and when we mean non-diplomatic or military asset, we mean assets subject to the Foreign Missions Act or military ships or aircraft.

The effect of the 1996 amendment is to make moot much of the law which the Alavi Foundation has cited in its proceedings. This matter is the first time that a plaintiff has obtained a judgment in a terrorist act and has sought enforcement in the United States. It is not the first time that enforcement has been sought under 28 U.S.C. 1610(a)(7).

There is another case which is proceeding in Florida. That case involves the downing of brothers to the rescue aircraft by elements of the Cuban Air Force. Subject matter jurisdiction was obtained in that case under the so-called extrajudicial killing provisions of 28 U.S.C. 1605(a)(7).

With Your Honor's permission, subsequent to the briefing

in this case a decision was rendered in the attachments in those cases which deal largely with telecommunications funds paid by U.S. corporations to the Cuban government for terminating long distance service there. I think Your Honor will find the analysis that Judge King used helpful here, although I must say that I don't agree with the entirety of Judge King's opinion.

I'm going to sum up the briefly and then sit down. I have already taken much too much of Your Honor's time.

Mr. Fay alludes to the notion that this is not an attachment in the normal commercial sense and I think that's an appropriate way to describe it. If we look at the totality of the circumstance here, we have an organization which started in Egypt and now exists in Gaza, which is known as Palestinian Islamic Jihad, PIJ. PIJ is a small terrorist organization that has but one purpose and one major source of funding. It carries out the Islamic Republic of Iran's military type -- perhaps military is the wrong word. It carries out the Islamic Republic of Iran's terrorist bidding to thwart the U.S. sponsored peace process in the Middle East.

There is no question that the bombing that killed Alisa Flatow took place at the behest of the Islamic Republic of Iran, was executed by PIJ, and it was executed for the purpose of thwarting the peace process or driving the Israeli body politic to the right so that Israelis could not engage in the peace process. It was targeted at Americans so that Americans would

not engage in that peace process.

The bus that was targeted here was going to the beach. It was known to carry American students. On the day when this bombing occurred, there were three girls, all American students in Jerusalem, on this bus. One of these girls was killed. One is psychologically scared for life. And one, fortunately, has escaped with relatively minor injuries.

I'm bringing another one of these cases to trial in September. An engaged couple -- one of these children was from Connecticut and one from New Jersey -- was killed in another bus bombing. And where were they going? They were on a bus known to be frequented by Americans going to Petra. This is an archeological ruin in Jordan and under the peace process many American students studying in Israel go to see this tremendous archeological site in Jordan.

A third well-known bombing occurred on Ben Yehuda Street. There are more Westerners on an evening on Ben Yehuda Street in Jerusalem than there are Israelis. It's a very fashionable district which attracts a lot of foreign students.

These bombings are political in nature and they are intended to achieve Iran's political ends. They are intended to destroy the U.S. peace process.

While that is going on you have the gentleman who Mr. Fay alludes to that runs this Islamic center out here sitting in a subsidized activity and, indeed, the Islamic Republic of

Iran through the Alavi Foundation subsidizes that activity to the tune of some $400,000 a year. And what does he do? He meets with the -- I have seen the video footage that was obtained by the FBI under search warrant. He has met with the leaders of PIJ and he goes around the United States. He has gone around the United States and he has collected funds. I can put him with the leaders of PIJ in Chicago, fund raising for Palestine Islamic Jihad six months before Alisa Flatow's death.

President Clinton has taken singular exception to the notion that anyone in this country ought to be allowed to travel around the country and raise money in support of known terrorist groups, and subsequent to the video footage that we have, the President and Congress have interceded and has made that kind of fund raising activity unlawful in this country.

THE COURT: Counsel, I'm trying to determine here now what is the bases for you to reach these three properties that we're talking about. I think I understand your point about this gentleman and whatever activities he's doing, but what is the bases upon which you wish this Court to hold that you can levy on these properties? Just give me your legal bases. Is there something I need to be looking at on this chart? Are you moving under 28 U.S.C. 1610(a)(7)?

MR. PERLES: We need to proceed under 28 U.S.C. 1610(a)(7).

THE COURT: That's where you are?

MR. PERLES: That is where we are and we would like an evidentiary hearing so that we may make out all necessary facts to meet our burden under that statutory provision.

THE COURT: What are you attempting to meet? What is this burden? What do you believe you need to meet to tie in these schools or these assets as "assets of Iran"? What do you need to show me, to prove to me?

MR. PERLES: I think we need to show that this property is simply an asset of the Islamic Republic of Iran. Prior to this amendment, under the Letelier decision we would have had to have shown that the asset was actually used in the commission of the terrorist act. That is no longer the case under this statutory change.

THE COURT: How will you show it's an asset of Iran in light of the -- I guess the New York legal and statutory authority under the Internal Revenue -- I guess they recognize it as an independent entity that they recognize. How are you going to show that regardless of those factors or considerations, what Internal Revenue has done, what New York City has done, and under the affidavit set forth that it's being operated pursuant to the charitable organizations?

MR. PERLES: We will show by expert witness that the leadership of this organizational -- and I consider it to be a front for the Ministry of Information and Security, which is Iran's intelligence arm, that they have abused the corporate

forum in the United States by using this private nonprofit corporation as a vehicle for funding Iranian activities in this country such as using the fact that we are an open democracy for the purposes of conducting fund raising, for using the fact that we are an open democracy for the purpose of organizing terrorist events overseas.

THE COURT: So he's going to opine that? These experts, that's their opinion?

MR. PERLES: That is correct, Your Honor.

THE COURT: Again, I guess the initial question before me is if that's going on, if it's a front, why is our government recognizing it as a legitimate business or entity? Why don't they forfeit it and seize the assets? How can you render an opinion -- how can you opine an opinion that's out there by itself when, in fact, this country who is supposed to be supervising and doing this has not so moved in that direction?

MR. PERLES: May I approach the bench, Your Honor?

THE COURT: You want to approach the bench?

MR. PERLES: Yes, please, Your Honor.

THE COURT: With other counsel?

MR. PERLES: That's fine, Your Honor.

(At the bench:)

THE COURT: All right.

MR. PERLES: Your Honor, I don't feel comfortable discussing this in open court, but I have had meetings with the

Federal Bureau of Investigation at their behest looking for evidence that we have discovered in the course of our investigation here and in the furtherance of efforts on their part to prosecute various people that are in this what I would describe as circle of conspirators, of which this institution or the leadership of this institution is part. But, again, I think it would be -- given that they involve ongoing criminal investigations, I'm not -- I don't want to touch upon that.

THE COURT: Of course, that's speculative. Obviously there's nothing there, and if people are in fact investigated, indicted, and prosecuted, that's a horse of a different color and some other things can flow, but right now that's -- I may be investigated. Any of us can be investigated. All right, counsel, I understand.

MR. PERLES: Thank you, Your Honor.

(In open court:)

THE COURT: All right. So, Mr. Perles, you are essentially telling me through experts you will be able to establish that, in fact, these three schools in Montgomery County or these properties run by the foundation essentially are properties of the Republic of Iran? That's what you're telling me?

MR. PERLES: What we will show is that the Alavi Foundation has been taken over by the current government in Iran, when the shah fell, that the foundation is used for these

purposes, kinds of fronts to advance Iran's terrorist agenda, and that it uses properties throughout the country, all of which we have attached, in the furtherance of that conspiracy. These represent just a small cross-section of the properties that we have attached around the country, Your Honor.

THE COURT: All right. And essentially you are going to establish this through experts who are going to opine? That's what they believe? And you have some footage of what, the principal of the school? Is that what you're saying?

MR. FAY: Well, not the principal. The man who runs the whole thing, the entire Islamic educational center, Mr. Al-Asi, Muhammad Al-Asi.

We also have direct testimony of persons who have obtained literature from there who have heard him testify. We will have direct testimony showing that all the assets of the Alavi Foundation came from Iran, that the directors were approved by Iran. We will have direct testimony from persons actively in intelligence who have reviewed Iranian documents showing that the Bonyad-Mostazafan and the Islamic Republic of Iran and its Ministry of Security and Information controls the association, because all of the people -- there are only three directors. They're all Iranian nationals under their control and that their activities over the 20 years since they took over the Alavi Foundation have always been in conjunction with the Islamic Republic of Iran.

So we will have direct testimony as well as expert testimony from supervisors in the FBI, Mr. Brandon, who is the assistant deputy director.

I might add, too, that one of the things that Mr. Al-Asi did which we brought to the Court's attention in some detail is he has conducted a spirited defense of the persons who carried out the World Trade Center bombing, are serving life sentences for it, all of whom were being financed at the Brooklyn Mosque, which in turn was financed by the Alavi Foundation. His defense of that is that somehow Mr. Brandon and the FBI people conspired with Israeli security to blow up the World Trade Center and then blame it on Muslims to try and make Muslims look bad.

Let me add, too, Your Honor, I want to emphasize again, this is not a matter with regard to the -- it's not an anti-Islamic thing. Mr. Al-Asi in his speeches which we have on videotape, tapes that were seized by the Federal Bureau of Investigation pursuant to search warrant, refers to all Muslim countries other than Iran as essentially being countries that are under the control of U.S. and Israeli intelligence and countries which essentially are anti-Muslim. He regards himself and Iran as the only true Muslims.

And I would add finally that the -- we do not point at Iranian people by any means any more than during the Cold War we would have pointed at the citizens of the Soviet Union and said they were responsible for the actions undertaken by the

totalitarian regime which was running their lives.

That's what takes place in Iran now and we'll have a full description of that, both direct testimony and I really don't -- I can't reveal all of the names of persons that we will bring in, but both direct testimony and testimony from experts, and this is not -- let me point out this is not going to be an opinion from out around the moon somewhere. It will be expert testimony based on facts, in addition to the opinion. The opinions are based upon an extensive reading of documents, Iranian documents.

Mr. Clawson, one of our experts, in fact, translated the entire Iranian budget for a couple of years and identified as of 1995 the sections in the Iranian budget which appropriated $75 million to support terrorism.

I might add, too, Your Honor, that the actions of the Palestinian Islamic Jihad in killing Alisa Flatow are not just our assertion. This was found as a fact in the opinion of Judge Lamberth, which was a default only in the sense that Iran didn't show up. His opinion was 62 pages long. It's included, I believe, as one of the documents that we submitted here.

THE COURT: All right, Mr. Fay. I've got to cut you off now. I have another matter.

MR. FAY: I understand.

THE COURT: I'll take a look at this. I'll give you two minutes, Mr. Winter, to respond.

MR. WINTER: Appreciate it, Your Honor, and I'll speak quickly.

Your Honor, they just mentioned one of their experts, Mr. Clawson Dr. Clawson. If you look at page 26 of our reply brief, we block quote his introductory statement. It starts with "The Alavi Foundation in New York, I am not familiar with its activities." And then he goes on into detail. "I really don't know a lot about them, but they must be Iranian. Therefore, Iranians work this way." We laid out in our papers to Your Honor that filling a void with this type of expert opinion cannot work.

Our firm has represented the Alavi Foundation for 15 years, Your Honor. I've heard this before. It just doesn't ring true. If the Internal Revenue Service really believed this was a bad foundation, as bad and as heinous as they describe it, they would not have given that foundation the substantial refund which they did in 1997, and that's been documented for Your Honor.

Your Honor, if you look at one of the attachments given to you by Mr. Perles, it quotes, "1603 of the Foreign Sovereign Immunities Act defines an agent or instrumentality as not being a citizen of a state." So, for the purposes of the Foreign Sovereign Immunities Act, the Alavi Foundation being a New York corporation cannot as a matter of law be an instrumentality of a foreign state, which is what that enforcement provision 1610 says. It says executing against an instrumentality of a foreign state.

So, if you read the Foreign Sovereign Immunities Act, we can't be a foreign instrumentality. There's no answer to the question on ownership, Your Honor. Once the gift was made, that ended it. There's no more ownership.

THE COURT: All right.

MR. WINTER: One last point, Your Honor. On that case that was handed up to you from Florida which applied the new Foreign Sovereign Immunities Act, which is the one at issue in this case, the judge followed Bancec. He applied the veil piercing day-to-day control analysis which we say Your Honor should apply. So the judge that has looked at this issue has followed the law as we articulated it to you. If you follow the law, Your Honor, as we believe you should, you'll grant our motion. Thank you very much.

MR. FAY: Your Honor, let me just put in one other point of fact that we will bring out if this matter goes to hearing. We met with Under Secretary of State Stewart Eizenstat, who, with his staff, with his legal staff, represented to us that the Department of State considers the Alavi Foundation to be an instrumentality of and controlled by the Islamic Republic of Iran and, therefore, subject -- its assets subject to attachment. And in pursuit of that, Mr. Eizenstat at that meeting, which I attended and Mr. Perles and Ms. Kagy attended, turned over to us over 2,000 pages of documents, which is part of the enormous amount and volume of material we have hooking Alavi Foundation to

Iran.

The representation that the U.S. government considers that this is an independent organization having no connection with Iran we can rebut and will rebut with those documents and with people from the Department of State.

THE COURT: They speak for the Department State?

MR. FAY: Secretary Eizenstat represented -- he's the Under Secretary of State. He represented that he was speaking for the administration.

THE COURT: Well, why hasn't he moved on these properties? Why hasn't he taken steps to cancel or annul the charter of this New York nonprofit entity?

MR. FAY: I don't believe that the U.S. Department of State or the U.S. government has jurisdiction to do that. I think it's a matter for New York state. Once --

THE COURT: Based on what Internal Revenue recognizes. Counsel, the problem I have here -- and I'll look at all your papers. The problem I have is that we have before us what appears to be a legitimate nonprofit organization following whatever, adhering to New York law and Internal Revenue regulations, and what you are saying basically are speculative things that may change this entity or the legal significance of this agency, but right now it appears to be a legitimate business.

MR. FAY: What we are saying, Your Honor, is we ask the

Court to give us the opportunity to prove that that is not so, that this is not a legitimate organization, and we ask the Court to give us the opportunity in an evidentiary hearing to show to the Court that the Alavi Foundation is an instrumentality of Iran, owned by Iran, and that we should be able, therefore, to levy upon its assets. All we ask the Court to do today is give us the opportunity to show that to a trier of fact.

Let me just add one other thing, not on the -- not on any argument or anything. We would estimate -- I have spoken to Mr. Attridge about this. We would estimate the property we would be talking about, three weeks or maybe even more of testimony with all of the witnesses in this case.

I believe the Court on a motion situation, without the consent of the parties even, has jurisdiction to send this to one of the magistrate judges. I would state we have no objection to that whatsoever. I recognize that Your Honor's time is very limited and that you have a long docket. As Your Honor knows, this is not the only case I have before this Court. Thank you for your patience.

THE COURT: All right. Well, Mr. Fay, I will look at this entire document again and the pleadings and I'll make a determination, first of all, whether I should grant the motion or, secondly, whether I believe that this matter is entitled to some evidentiary hearing to establish the things that you claim are relevant and pertinent. But I'll study this a little while.

All right. Thank you.

(Proceedings adjourned at 9:45 a.m.)

CERTIFICATE OF REPORTER

This record is certified by the undersigned reporter to be the official transcript of proceedings in the above-entitled matter.

Gloria I. Williams
Official Court Reporter

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

STEPHEN M. FLATOW, Plaintiff, v. THE ISLAMIC REPUBLIC OF IRAN, *et al.*, Defendants.	CA No. AW-98-4152 United States District Court for the District of Columbia CA No. 97-396 RCL

PLAINTIFF'S POST-HEARING MEMORANDUM

During the hearing held on this matter the morning of 10 May 1999, Counsel for Plaintiff informed the Court of statements made to them by Under Secretary of State Stuart E. Eizenstat to the effect that the Alavi Foundation, a nonparty to the underlying *Flatow* litigation, *see* 999 F. Supp. 1 (D.D.C. 1998) and the movant here, is controlled by and is an instrumentality of the Islamic Republic of Iran. The Court inquired whether Under Secretary Eizenstat made these statements in his official capacity. In the interests of clarity, the context and circumstances of these statements are set forth herein.

On 21 October 1998, the White House issued a Statement by the Press Secretary (Joe Lockhart) stating that although President Clinton had elected to exercise a national security waiver purporting to void a new mechanism to enforce judgements for state sponsored terrorism against assets within the custodial control of the United States government, the United States would provide assistance to the Flatow family in enforcing its judgment for state sponsored terrorism. Subsequently, Under Secretary of State Eizenstat requested a meeting with Plintiff and his counsel, which was also attended by representatives from the Department of Justice's Federal Programs Branch, the Department of State's Office of the Legal Advisor and Office of Foreign

Missions, the Department of the Treasury's Office of Foreign Assets Control, and the Office of Senator Frank Lautenberg, in addition to members of Under Secretary Eizenstat's personal staff. Under Secretary Eizenstat hosted this meeting on 2 November 1998 at the Department of State's main building.

The primary agenda for that meeting was to discuss how the federal government might assist counsel for plaintiff in locating assets of the Islamic Republic of Iran within the United States which were outside the custodial control of the federal government, and were therefore available for execution against the *Flatow* judgment. During that meeting, Under Secretary Eizenstat expressly stated that the Alavi Foundation was an instrumentality of the Islamic Republic of Iran, that it was controlled by the Islamic Republic of Iran, and suggested that Plaintiff seek enforcement of his judgment against the assets of the Alavi Foundation in the United States. Also during this meeting, Under Secretary Eizenstat tendered more than 2000 pages of documents relating to assets of the Islamic Republic of Iran in the United States; included within these documents were repeated references to the Alavi Foundation and its assets, including the properties which are subject to the levy in this proceeding.

Respectfully submitted,

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10 May 1999

Counsel for Plaintiff Stephen M. Flatow

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

----------x

STEPHEN M. FLATOW,

Plaintiff,

v. Civil Action No. AW-98-4152

THE ISLAMIC REPUBLIC OF IRAN, et al.,

Defendants.

----------x

RESPONSE TO PLAINTIFF'S POST-HEARING MEMORANDUM

The Alavi Foundation submits the following Response to the Plaintiff's Post-Hearing Memorandum:

1. The Plaintiff's Post-Hearing Memorandum does not provide the court with any new or material information. The alleged substance of the Plaintiff's meeting with Under Secretary Eizenstat was previously described in Plaintiff's December 23, 1998 Opposition to the Motion to Quash (See, Exhibit 14 to Opposition: Affidavit of Thomas Fortune Fay, Esq.)[1] More importantly, the official acts of the United States Government are not proven by a self-serving summary of a private conversation with a government employee. Indeed, counsel's account of the meeting is barred

[1] In the Affidavit, counsel for the Plaintiff stated that the Under Secretary's "personnel" made the alleged statements. Counsel now asserts that the comments were made by the Under Secretary.

Page numbers 898 through 904 were intentionally omitted.

by the rule against hearsay. The Plaintiff has not produced any executive order, agency finding or other written document to substantiate the position that he ascribes to the United States Government.

2. In the underlying action, the Plaintiff advised Judge Royce Lamberth in the United States District Court for the District of Columbia on November 10, 1998 that at the meeting referenced in Plaintiff's post-hearing memorandum, the State Department: (a) refused to provide a list of unblocked Iranian assets in the United States; (b) said that no Iranian assets had been blocked after 1981; and (c) informed plaintiff that since 1981, Iranian economic activity in the United States has been "extremely limited." Plaintiff also told Judge Lamberth that the documents his counsel received from the State Department on November 2, 1998 were "public record material" that proved "no new information" and were "outdated." See Plaintiffs Supplemental Brief Addressing Change in Applicable Law at 8 n.2 (Attached hereto as Exhibit A). On March 23, 1999, the Plaintiff further advised Judge Lamberth that "the Administration continues to refuse to divulge any information on terrorist assets in the United States . . ." See Memorandum in Opposition To Request For Expedited Consideration (Attached hereto as Exhibit B). The Plaintiff's representations to Judge Lamberth are in sharp contrast to his contention in this Court that substantive government action was taken at the November 2, 1998 meeting.

3. The documents allegedly provided to the Plaintiff by the State Department were documents produced by the Alavi Foundation in the Gabay litigation. See Affidavit of John D. Winter, Paragraph 11 (dated January 19, 1999). The fact that these documents make reference to The Alavi Foundation and its property is, therefore, not surprising and given the outcome of Gabay not supportive of Plaintiff's position.

Respectfully submitted,

KING & ATTRIDGE

By _____
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301-279-0780
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Of Counsel:

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **Response to Plaintiff's Post-Hearing Memorandum** was mailed postage prepaid this 13th day of May, 1999 to:

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_____
Patrick James Attridge

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN M. FLATOW,
Plaintiff,

v.

THE ISLAMIC REPUBLIC OF IRAN,
THE IRANIAN MINISTRY OF INFORMATION AND SECURITY,
AYATOLLAH ALI HOSEINI KHAMENEI,
ALI AKBAR HASHEMI-RAFSANJANI,
ALI FALLAHIAN-KHUZESTANI, and
JOHN DOES 1-99
Defendants.

CA No. 97-396 RCL

PLAINTIFF'S SUPPLEMENTAL BRIEF ADDRESSING CHANGE IN APPLICABLE LAW AND MEMORANDUM IN REPLY TO THE RESPONSE OF THE UNITED STATES IN OPPOSITION TO HIS MOTION FOR JUDGMENT OF CONDEMNATION AS TO ATTACHED BANK ACCOUNTS OF THE JUDGMENT DEBTOR

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Counsel of Record

9 November 1998

Contemporaneous with signing the Omnibus Appropriations bill into law on 21 October 1998, President Clinton issued a §117(d) national security waiver, which states:

> By the authority vested in me as President by the Constitution and laws of the United States of America, including section 117 of the Treasury and General Government Appropriations Act, 1999, as contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999 (approved October 21, 1998), I hereby determine that the requirements of section 117, *including the requirement that any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), and proclamations, orders, regulations, and licenses issued pursuant thereto, be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state claiming such property is not immune from the jurisdiction of courts of the United States or of the States under section 1605(a)(7) of title 28, United States Code*, would impede the ability of the President to conduct foreign policy in the interest of national security and would, in particular, impede the effectiveness of such prohibitions and regulations upon financial transactions, and, therefore, pursuant to section 117(d), I hereby waive the requirements of section 117 in the interest of national security.

Presidential Determination No. 99-I, Determination to Waive Requirements Relating to Blocked Property of Terrorist-List States, (21 October 1998) (emphasis added),[2] 63 FR 59201 (2 November 1998).

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[2] White House Press Secretary Joe Lockhart offered the following statement upon the President's issuance of the waiver:

> The United States has been unrelenting in the fight against terrorism. We have taken strong measures against nations, including Iran, that have sponsored terrorist efforts. We have also supported efforts to obtain justice on behalf of victims of terrorism, including Alisa Flatow, an American student killed by a 1995 terrorist attack in Israel. However, the struggle to defeat terrorism would be weakened, not strengthened, by putting into effect a provision of the Omnibus Appropriations Act for FY 1999. It would permit individuals who win court judgments against nations on the State Department's terrorist list to attach embassies and certain other properties of foreign nations, despite U.S. laws and treaty obligations barring such attachment. The new law allows the President to waive the provision in the national security interest of the United States. President Clinton has signed the bill and, in the interests of protecting America's security, has exercised the waiver authority. If the U.S. permitted attachment of diplomatic properties, then other countries could retaliate, placing our embassies and citizens overseas at grave risk. Our ability to use foreign properties as leverage in foreign policy disputes would also be undermined. *The Administration stands ready to work with the Flatow family*, which won a U.S. court judgment against Iran, *in identifying Iranian commercial assets*

Plaintiff challenges the scope of Presidential Determination 99-I as exceeding the §117(d) waiver authority granted by Congress.[3] Presidential Determination 99-I purports to waive the entirety of section §117(a); however, the President's statutory waiver authority does not extend so far as to block the application of 28 U.S.C. §1610(f)(1).[4] The United States presents the waiver as a Presidential *fait accompli* beyond the reach of judicial review. *See* United States 27

> *that may be available for attachment. We will work to achieve justice for Alisa Flatow* and other victims without undermining our ability to protect our interests and conduct foreign relations, including the fight against terrorism, around the world.

White House Press Release (21 October 1998) (emphasis added). The Administration has only this week offered an explanation for the longstanding apparent discrepancy between its public position on rendering assistance to the Flatow family in enforcing its judgment against the Islamic Republic of Iran, its responses to Congressional inquiries, *see, e.g.*, letter of 8 October 1998 from Samuel Berger, National Security Advisor to Congressman Jim Saxton (attached as Appendix 4), and the position it has suggested to this Court both during the 9 July 1998 hearing, Tr. at 14(22) – 16(4), and in subsequent pleadings, Statement of Interest at 15-16; United States' 27 October Response at 11-14, that there are *no* Iranian assets within the United States which are susceptible to attachment in aid of execution upon the *Flatow* judgment because *all* such assets are immune as blocked property. During a 2 November 1998 meeting with Plaintiff, however, the Department of State: (1) expressed its view that the Flatow family could attach unblocked Iranian assets; (2) conceded that it could not furnish a list of unblocked Iranian assets in the United States; (3) stated that no new assets had been blocked after 1981, and that Iranian economic activity in the United States since the Hostage Crisis has been extremely limited; and (4) tendered 3-5000 pages of public record material which on even a preliminary review appear to provide Plaintiff with no new information, and which are also outdated. This notwithstanding, Plaintiff remains willing to cooperate with the Administration in locating unblocked assets of the Islamic Republic of Iran in the United States, to the extent such assets may actually exist.

[3] Plaintiff notes that Presidential Determination 99-I is an extraordinary action which blindly emasculates the benefits of 28 U.S.C. §1610(f) for every scenario past, present and future. Of the seven states currently on the terrorist list, all but one are subject to some form of blocking regulations; thus Presidential Determination 99-I, if upheld, would have the perverse effect of removing pressure imposed by Congress' amendments to the FSIA to modify behavior from The Islamic Republic of Iran, Libya, Cuba, Iraq, North Korea and the Sudan. Plaintiff also disputes that the President's issuance of a blanket waiver for all states on the terrorism list, and all current and future judgment creditors of those states, can constitute an informed and considered finding that any waiver of the requirements set forth in 28 U.S.C. §1610(f) under §117(d) is required in the interests of national security.

[4] The United States suggests, based upon a newspaper report, that Mr. Flatow has conceded that Presidential Determination 99-I precludes his attempts to execute against Iran's assets in the United States. *See* United States' 27 October Response at 16 and Exhibit G. A close reading of that article, however, demonstrates that Mr. Flatow has only expressed his mounting frustration with the Clinton Administration's unexplained reversal of support for his efforts to seek justice.

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Stephen M. Flatow,
Plaintiff

v. Civil# 97-396(RCL)
Judge Lamberth

FILED
MAR 23 1999
NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

The Islamic Republic Of Iran, et al.
Defendants

MEMORANDUM IN OPPOSITION TO REQUEST FOR EXPEDITED CONSIDERATION OF MOTION TO QUASH ATTACHMENT OF AMOUNTS OWED BY THE UNITED STATES TO JUDGMENT DEBTOR

Plaintiff, Stephen M. Flatow, by and through his attorneys, Thomas Fortune Fay and Steven R. Perles, states his opposition to the Renewed Request Of The United States For Expedited Consideration Of Motion Tu Quash, as set forth in the filing dated March 17, 1999. Plaintiff first notes that the United States has taken every measure possible to delay consideration of this matter and to prevent enforcement of the judgment entered in this action against the Islamic Republic Of Iran as a consequence of the campaign of terrorism waged against American citizens. To date, despite promises made by President Clinton, the Administration continues to refuse to divulge any information on terrorist assets in the United States and refuses to even to reveal the balances in bank accounts holding terrorist assets although it admits that no privilege applies to prevent disclosure. Once more the Department of Justice shows itself to be remarkably solicitous of the well being of the nation which the Department Of State describes in its own publication as "the premier state sponsor of terrorism" (Plaintiff's Exhibit #12, at page 24) and totally hostile to the attempts of its own citizens to obtain justice. In support of its position it presents

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the Declaration of Mark A. Clodfelter. The Declaration is totally barren of any indication that the Clinton Administration has at any point asserted that the judgment entered in this case should be paid by the Islamic Republic as a condition precedent to collection by that terrorist nation of judgments entered in its favor. Within the last week President Clinton has put forth his own remedy for terrorist activity, to wit, increased spending for ambulances and EMT units to care for the casualties of terrorism. This is truly an amazing suggestion.

The Department Of Justice now seeks to convince all concerned that the international position of the United States will be detrimentally affected if this Court does not immediately act to assist the Islamic Republic Of Iran by ignoring the statutory rights of American citizens. The reasons set forth by the Department Of Justice are consistent with its policy of pandering to "the premier state sponsor of terrorism".

The footnote notation citing Department Of The Army v. Blue Fox, Inc. Supreme Court Of The United States, No. 97-1642 (1/20/99) is not on point. The issue in Blue Fox was whether the United States was liable on a mechanics lien basis for the default of its general contractor to a subcontractor. As previously noted in its Memorandum filed in this Court, the waiver language in 28 United States Code Section 1610 providing that "Notwithstanding [redacted] provision of law... any property...shall be subject to execution or attachment [redacted] is the same as that which has been held to properly create a waiver in 42 United States Code Section 659 relating to child support and alimony providing that "Notwithstanding any other provision of law... moneys...shall be subject...to withholding...."

The Plaintiff does have a strong interest in the speedy determination of all issues before the Court. To that end, the Plaintiff suggests that this matter be set down for hearing on all issues before the Court on the earliest date acceptable to the Court and counsel or in the alternative that the Court determine all of the issues before it on an expedited basis without hearing.

March 23, 1999

THOMAS FORTUNE FAY, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed first class, postage prepaid on this 23rd day of , 1999, to:

Sanjay M. Bhambhani, Esq.
DOJ/Federal Programs Branch
901 E Street, NW
Washington, DC 20530.

_____
Thomas Fortune Fay

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

STEPHEN M. FLATOW	:	
	:	
Plaintiff,	:	
v.	:	**Civil Action No. AW-98-4152**
	:	**Misc. No. 98-285**
ISLAMIC REPUBLIC OF IRAN, ET AL.,	:	
	:	
Defendants.	:	

ORDER

In accordance with the Memorandum Opinion, it is this 7th day of September, 1999, hereby ORDERED:

1. That Movant's Motion to Release Properties From Levy [17-1] BE, and the same hereby IS, **GRANTED**;

2. That Movant's Motions to Quash Writs of Execution [17-2] BE, and the same hereby IS, **GRANTED**,

3. That Movant's Motions to Enjoin Plaintiff from Issuing Future Writs Against the Alavi Foundation's Property [17-3] BE, and the same hereby IS, **GRANTED**;

4. That the following properties of the Alavi Foundation are hereby released from a levy: (1) 8100 Jeb Stuart Road, Rockville, Montgomery County, Md. 20854, (2) 7917 Montrose Road, Rockville, Montgomery County, Md. 20850 and (3) 12010 Seven Locks Road, Potomac, Montgomery County, Md. 20854;

5. That the Writs of Execution issued by this Court with respect to the property of the Alavi Foundation are hereby quashed;

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6. That the Plaintiff is hereby enjoined from issuing future writs against the property of the Alavi Foundation;

7. That Plaintiff's Motion for Hearing [22-1] BE, and the same hereby IS, **DENIED as moot;**

8. That the Clerk of the Court **CLOSE** these cases; and

9. That the Clerk of the Court mail copies of this order to all counsel of record.

Alexander Williams, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

STEPHEN M. FLATOW	:	
	:	
Plaintiff,	:	
v.	:	**Civil Action No. AW-98-4152**
	:	**Misc. No. 98-285**
THE ISLAMIC REPUBLIC OF IRAN, ET AL.,	:	
	:	
Defendants.	:	

MEMORANDUM OPINION

I

Currently pending before the Court are Movant Alavi Foundation's Motions to Release Properties From Levy, to Quash Writs of Execution, and to Enjoin Plaintiff from Issuing Future Writs Against the Foundation's Property. A hearing was held on these motions. In ruling on the motions, the Court has considered the briefs of the parties, the arguments of counsel at the hearing in open court, and the entire record. For the reasons that will follow, the Court will grant the motions.

II

Plaintiff, Stephen M. Flatow, has initiated numerous proceedings to attach and execute a judgment against the assets of the Islamic Republic of Iran ("Iranian Government") pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C.A. Section 1610(a)(7) and (f) (West Supp. 1999) ("FSIA"). This judgment was entered in the United States District Court for the District of Columbia and was registered in this District on July 16, 1998.

Plaintiff's daughter, Alisa Flatow, was killed on April 9, 1995 in the Gaza Strip when a terrorist bomb exploded. On April 24, 1996, Congress enacted amendments to the FSIA as part

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of the Antiterrorism and Effective Death Penalty Act, which granted subject matter jurisdiction over a claim brought against a foreign state:

> for personal injury or death that caused by an act or torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act if such act or provision of material support is engaged in by an official, employee or agent of such foreign state while acting within the scope of his or her office, employment, or agency . . .

Pub.L. No. 104-132, § 221, 110 Stat. 1214. (codified at 28 U.S.C. § 1605 (a)(7)). Relying on these amendments, Plaintiff filed a Complaint for wrongful death and other related causes of action against the Iranian Government, the Iranian Ministry of Information and Security, Ayatollah Ali Hoseini Khamenei, then-President Ali Akbar Hashemi-Rafsanjani, and then-Intelligence Minister Ali Fallahian Khuzestani. On March 3, 1998, Plaintiff obtained a default judgment against the Defendants, and United States District Judge Royce C. Lamberth entered judgment in favor of the Plaintiff in an amount exceeding $247,000,000.[1]

Plaintiff then began to initiate enforcement proceedings throughout the country against assets that he claims are owned by the Iranian Government. The instant proceeding includes property located at (1) 8100 Jeb Stuart Road, Rockville, Montgomery County, Md. 20854, (2) 7917 Montrose Road, Rockville, Montgomery County, Md. 20850 and (3) 12010 Seven Locks Road, Potomac, Montgomery County, Md. 20854.[2] Plaintiff served writs of execution upon these properties on November 9, 1998.

The Movant, the Alavi Foundation ("Foundation"), which was not named as a party to

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[1]For a more detailed discussion of the factual background in the underlying case, see Flatlow v. Islamic Republic of Iran, et. al, 999 F. Supp 1 (D.D.C. 1998).

[2]In the Montgomery County tax records, the parcels located at 12010 Seven Locks Road and 7917 Montrose Road are combined as one property.

the underlying litigation, is the owner of record of these properties. The Foundation now moves pursuant to Md. Rule 2-643 (1999) to release the property in question from the levy, to quash the writs of execution issued on the property, and to enjoin the Plaintiff from issuing future writs against the Foundation's property.

III

Under Maryland law, as a general rule, a judgment creditor may not levy against a third-party's property in order to satisfy a money judgment against a judgment debtor. See Eastern Shore Bldg & Loan Corp. v. Bank of Somerset, 253 A. 2d 367, 369 (Md. 1969) ("[T]he lien of the judgment only attaches to the interest in land owned or held by the judgment debtor, himself, and is subject to the limitations, legal or equitable, to which that interest is subject at the time of the entry of the judgment.") In order to levy against a third-party's property, the judgment creditor must prove that the property of a third-party can be seized because: (1) the third-party is an agent, alter ego, or instrumentality of the judgment debtor; (2) the third-party is a garnishee of the judgment debtor; or (3) there was a conveyance of property between the judgment debtor and the third-party which was motivated by the intent to defrauding creditors. See First Nat'l City Bank v. Banco Nacional Para El Commercio Exterior de Cuba, 462 U.S. 611 (1983) ("Bancec"); Parkville Fed. Sav. Bank v. Maryland Nat'l Bank, 681 A.2d 521 (Md. 1996); Frain v. Perry, 609 A.2d 379 (Md. 1992). Plaintiff, the judgment creditor in this case, cannot meet any of these narrowly defined bases for levying a third-party's property.[3]

Plaintiff maintains that the property of the Foundation may be levied because the

[3]Plaintiff has not fully addressed the latter two exceptions, but relies on his position that the Foundation is a "front" for the Iranian Government.

Foundation "and its assets are property in the United States of [the Iranian Government] and the [FSIA] authorizes the execution against certain assets of foreign state sponsors of terrorism, including those at issue in this proceeding, in order to satisfy judgments for which they are not immune from suit under 28 U.S.C. §1605(a)(7)." Memorandum in Opposition at 9.

However, the Alavi Foundation is a nonprofit foundation, which was duly organized under the Not- For- Profit Corporation Law of New York State. As such, it is a citizen of the State of New York. See 28 U.S.C. § 1332(c)(1) (1994) ("[A] corporation shall be deemed to be a citizen of any State by which it has been incorporated. . . ."). Section 1603 (b) of the FSIA, the law that governs the underlying case, provides that an "'agency or instrumentality of a foreign state' means any entity . . . which is neither a citizen of a State of the United states as defined in section 1332(c) . . . of this title . . ." 28 U.S.C. § 1603(b)(3) (1994). Therefore, pursuant to the FSIA, the Foundation by definition cannot be an agent, alter ego, or instrumentality of the Iranian Government.

Even if the Foundation was not a citizen of the State of New York, pursuant to the FSIA, a separately incorporated entity is entitled to a presumption of independence from a foreign sovereign. See Bancec, 462 U.S. at 629. In order to overcome this presumption of independence, Plaintiff must show either that the Foundation is "so extensively controlled by" the Iranian Government "that a relationship of principal and agent is created" or that regarding the Foundation as a separate instrumentality would "'work fraud or injustice" against him. Id.

The case law in this area generally holds that a principal-agent relationship has been created for the purposes of the FSIA when the foreign sovereign exercises day-to-day control over its activities. See McKesson Corp. v. Islamic Republic of Iran, 52 F.3d 346, 351-52 (D.C.

Cir. 1995); see also Hester Int'l Corp. v. Federal Republic of Nigeria, 879 F. 2d 170, 178-80 (5th Cir. 1989) (holding that an entity in which Nigeria held 100% of its stock was not an agent because there was no showing of day-to-day control); Baglab Ltd. v. Johnson Matthey Bankers Ltd., 665 F. Supp. 289, 297 (S.D.N.Y. 1987) (holding that the plaintiff failed to overcome the presumption of separateness because it failed to prove that the Bank of England exercised "general control over the day-to-day activities" of an entity so that the entity could be deemed an agent). Plaintiff concedes that this is the general rule, but argues that the Court should apply a more lenient rule in the instant case. Plaintiff argues that the "courts have developed that standard under the rubric of a different provision of the FSIA-- the commercial activities exception to foreign sovereign immunity-- the history and purpose of which are not comparable to 28 U.S.C. § 1605 (a)(7)." Memorandum in Opposition at 12.

Plaintiff contends that the purpose of the commercial activities exception is to facilitate "legitimate commercial intercourse by and among the community of nations," and to allow foreign governments the same type of access to the advantages of the corporate form that a private person would have. Id. at 14. According to Plaintiff, 28 U.S.C. Section 1605 (a)(7) was "designed to prevent foreign state sponsors of terrorism from enjoying surreptitious participation in the American marketplace and legal system, the benefits of which could eventually be turned against American interests." Memorandum in Opposition at 15. Plaintiff argues that cases arising under this exception should be treated differently than those cases which arise out of commercial disputes. Plaintiff states that:

> Rather than perpetuate a safe harbor for outlaws, which would be the result of a "day-to-day control" test, American courts should permit enforcement of 28 U.S.C. §1605(a)(7) judgments against non-parties to the underlying litigation

when there is evidence that a judgment debtor owns covert property interests in the United States which have been sheltered in an outwardly independent third party.

Memorandum in Opposition at 18.

The Court is not persuaded that Plaintiff's more lenient standard, which would find that an entity is an instrumentality if there is proof that the foreign sovereign has any interest in that entity, is applicable. "Congress is presumed to enact legislation with knowledge of the law, that is with the knowledge of the interpretation that courts have given the statute." United States v. Langley, 62 F.3d 602, 605 (4th Cir.1995). There is nothing in the language of the provision itself, or the legislative history that indicates that Congress intended 28 U.S.C. Section 1605(a)(7) to be interpreted differently than the other provisions of the statute. See H.R. Conf. Rep. No. 104-518, reprinted in 1996 U.S.C.C.A.N. 924. "[A]bsent a clear manifestation of contrary intent, a newly-enacted or revised statute is presumed to be harmonious with existing law and its judicial construction." Langley, 62 F.3d at 605. Therefore, the Court finds that the day-to-day control rule is applicable[4] to Section 1605(a)(7) as well.[5]

Plaintiff has the burden of proving that the Foundation is not entitled to separate recognition. See De Letelier v. Republic of Chile, 748 F.2d 790, 795 (citing Palmiter v. Action, Inc., 548 F. Supp. 1166, 1172 (N.D. Ind. 1982) ("A creditor seeking execution against an

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[4]As the Court has found that the day-to-day control test applies, it need not address Movant's argument that applying the lesser standard would violate the Fifth Amendment to the Constitution.

[5]It should be noted that the Eleventh Circuit recently applied the day-to-day control test in a case that was brought under 28 U.S.C. §1605(a)(7). See Alejandre v. Telefonica Larga Distancia De Puerto Rico, Inc., ___ F.3d ___, No. 99-10225, 1999 WL 604043 (11th Cir. August 11, 1999).

apparently separate entity must prove 'the property to be attached is subject to execution.'"). Most of the evidence that Plaintiff produced in this case to establish that the Iranian Governme exercises control over the Foundation was presented in Gabay v. Mostazafan Foundation of Ir 968 F. Supp. 895 (S.D.N.Y. 1997), aff'd 152 F.3d 918 (2d Cir. 1998), cert. denied, 119 S.Ct. 5 (1998). This Court finds, as the Gabay court found, that this evidence does not establish that Iranian Government exercised such control.

Plaintiff claims that the Foundation was originally established as the Pahlavi Foundati of New York in 1973 by Shah Mohammed Reza Pahlavi as a branch of the Pahlavi Foundatic an Iranian nonprofit charitable organization founded in 1958. Plaintiff further claims that the fact that the Iranian Government controlled, and continues to control the Foundation is demonstrated by the changes in the name of the Foundation, which, in Plaintiff's view, coinci with political changes in Iran. Plaintiff notes that in March of 1979, following the Islamic Revolution in which Ayatollah Khomeini assumed power over the country, the Mostazafan Foundation of Iran was created. Plaintiff asserts that the Mostazafan Foundation of Iran then took control of the Pahlavi Foundation of Iran. Plaintiff claims that the fact that the Iranian Government confiscated the Pahlavi Foundation of New York, as well, is demonstrated by th fact that there was a turnover of the Foundation's Board of Directors, and a change of the nam from Pahlavi Foundation of New York to Mostazafan Foundation of New York. Plaintiff sta that the evidence "strongly suggest[s] that [the Foundation] is a *de facto* instrumentality of th Islamic Republic of Iran." Memorandum in Opposition at 20. Moreover, Plaintiff asserts tha the Foundation has been used by the Iranian Government as part of its "ongoing fraudulent scheme to disguise its participation in the United States legal system and avoid its obligation

under United States laws, in flagrant abuse of the corporate form." Memorandum in Opposition at 28.

The Alavi Foundation has shown that there were legitimate reasons for the changes in composition of the Board in 1979. Former Secretary of State William Rogers stated, in both his resignation letter and in deposition testimony in the Gabay case, that he had agreed to serve as a Board member "only until the Pahlavi Foundation began to produce income and the Foundation's subsequent achievement of that goal constituted his reason for retiring from the Board." Gabay, 968 F. Supp. at 899. Further, Dr. Houshang Ahmadi testified in the Gabay case that he became a Board member at the invitation of the president of the Foundation at the time, Manoucher Shafie ("Shafie"), and that his decision to become a member was not influenced by a third party. See id. at 900. Therefore, the Court cannot find that the Iranian Government exercised control of the change in the composition of the Foundation's Board.

Movant has also provided a legitimate reason for the changes in the name of the Foundation. Shafie testified in Gabay that the name change from Pahlavi to Mostazafan was his idea because the name Pahlavi had become controversial, and the name Mostazafan, which means "helping needy people" fit the Foundation's purpose. Id. Moreover, the name changes were subject to regulatory and judicial approval under New York law. Therefore, the fact that the name changes coincided with changes in the name of the foundation in Iran is not proof of day-to-day control of the Foundation by the Iranian Government.

Plaintiff has also produced certain issues of a newsletter entitled the Bonyad Local Publication, which he claims demonstrates that the Foundation was controlled by the Mostazafan Foundation of Iran, and thus the Iranian Government. Although the newspapers do demonstrate

some similarities between the activities of the Alavi Foundation and the activities alleged to be the goals of the Iranian Government for the Foundation, the existence of these similarities "does not show a causal connection between the listing of the goals in the newsletters and the actual activities" of the Foundation. Gabay, 968 F. Supp at 900. Moreover, in Hester Int'l Corp., the court also was provided with documents, which were not authored by the Nigerian Government itself, which proclaimed that the entity involved was the representative of Nigeria. 879 F.2d at 179-80. In that case, the court found that the entity, a corporation that was created and owned by the Nigerian Government, could not be considered a mere alter ego or agent of the government in spite of these documents. Id. The Court similarly finds that the newsletters in the present case are not proof of day-to-day control.

Plaintiff has also produced documents from the Internal Revenue Service ("IRS"), which he claims indicates that the Iranian Government exercises control over the Foundation. The record shows that after ten years of debate over the subject, the IRS changed its position about whether a loan the Foundation received from a bank affiliated with the Iranian Government was deductible. The IRS had maintained that the loan was not deductible because the parties to it were not dealing at "arms-length." The Foundation asserted, as it does here, that it was independent of the Iranian Government, and thus the loan should be deductible. In 1997, the IRS gave the Foundation a substantial refund. Therefore, the documents produced by Plaintiff do not establish that the Foundation was subject to day-to-day control by the Iranian Government.

In addition to the evidence that was provided in Gabay, Plaintiff has also provided sworn statements from Dr. Patrick L. Clawson ("Clawson"), the Director for Research at the Washington Institute for NearEast Policy, and Kenneth R. Timmerman ("Timmerman"), a

journalist to support his theory that the Foundation is controlled by the Iranian Government. Plaintiff states that if the Court held an evidentiary hearing in this matter, he is prepared to present these witnesses and at least a dozen others that would testify about a connection between the Foundation and the Iranian Government.

However, after reviewing the statements of Dr. Clawson and Mr. Timmerman, the Court does not believe that an evidentiary hearing is necessary. The Timmerman report is replete with allegations connecting the Foundation with terrorism. However, it is based upon the newsletters, anonymous interviews, and confidential informants, and generally lacks the reliability and "equivalent circumstantial guarantee of trustworthiness" to meet any of the hearsay exceptions. See Fed. R. Evid. 803 (24). Dr. Clawson has expressed an opinion that the Foundation's activities "seem consistent with Iranian behavior." Memorandum in Opposition, Exhibit 12 at 9. He has stated that he "can't prove that's the same pattern, but I just simply say it's consistent." Id. As such, his opinion is based on speculation. "An expert's opinion should be excluded when it is based on assumptions which are speculative and are not based in the record." Tyger Constr. Co., Inc. V. Pensacola Constr. Co., 29 F.3d 137, 142 (4th Cir. 1994). The Court believes, and Plaintiff has not submitted any affidavits for the other witnesses to the contrary, that any testimony at the evidentiary hearing would be of the same ilk. Thus, Plaintiff is not entitled to an evidentiary hearing.

Finally, Plaintiff maintains that during a November 2, 1998 meeting, he and his counsel met with Under Secretary of State Stuart E. Eizenstat ("Secretary Eizenstat") and with representatives of the Departments of State, Treasury and Justice. As a result of this meeting, the Plaintiff maintains that he received more than three thousand pages of documents related to the

assets of the Iranian Government. Plaintiff notes that within these pages were numerous references to the Foundation and its assets. Plaintiff also asserts that members of the Secretary Eizenstat's staff[6] "expressly stated that the Alavi Foundation is an agency or instrumentality of the Islamic Republic of Iran controlled through the Mostazafan Foundation of Iran. . . ." Memorandum in Opposition at 2. Plaintiff, however, has not provided an affidavit or any other documentary evidence to support the argument that the United States Government itself has taken the official stance that the Foundation is an instrumentality of the Iranian Government. The evidence in the record supports the position that the United States Government and the State of New York have always considered the Foundation to be a separate and distinct entity from the Iranian Government. Moreover, the IRS has determined the Foundation to be a charitable organization within the meaning of the Internal Revenue Code.

The evidence in the record supports a finding that the Iranian Government does not exercise day-to-day control over the Foundation. Movant maintains, and Plaintiff has not demonstrated to the contrary, that the Foundation has been in compliance with all federal and state registration and reporting requirements since its organization, including the required annual filings with the New York's Secretary of State. Further, Movant contends, and Plaintiff concedes, it scrupulously adheres to all corporate formalities. Movant has submitted proof by affidavit that the Directors are elected by the Foundation itself, and they have regular meetings. Further, the Foundation files its own tax returns, and is in good standing with the Attorney General of New York. Plaintiff has not provided any proof that the Foundation is

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[6]In his Supplemental Memorandum, Plaintiff asserted that it was the Secretary Eizenstat himself who made this comment.

undercapitalized. Instead, Movant has submitted proof by affidavit that it is funded through the rental income that it receives from the interest it has in its building located in New York City. Moreover, the Foundation has its own bank accounts, and there is no proof of any commingling of funds between the Foundation and the Iranian Government, or any of its agents or instrumentalities. Movant has submitted proof by affidavit that it hires its own employees and that none of these employees are agents, officers, or employees of the Iranian Government as well. There is no evidence in the record that the Foundation shares any office space with any agent or instrumentality of the Iranian Government. Finally, Movant has submitted proof by affidavit that the Foundation has rejected requests for funding from entities affiliated with the Iranian Government. In light of these facts, the Iranian Government cannot be seen as exercising day-to-day control over the Foundation's activities.

Furthermore, in order to be liable as an agent, alter ego, or instrumentality, the entity generally must have some connection with the underlying dispute. See Hercaire Int'l Inc. v. Argentina, 821 F.2d 559, 563 (11th Cir. 1987) ("Having had no connection whatsoever with the underlying transaction which gives rises to Argentina's liability it would be manifestly unfair to subject [the entity's] assets to such attachment."); Banco Nacional de Cuba v. Chemical Bank New York Trust Co., 782 F.2d 377, 378 (2d Cir. 1986). Although Plaintiff again argues that this rule should not be applied to Section 1605(a)(7), for the reasons previously explained, the Court is not persuaded. Plaintiff has not established that the Foundation has any connection with the underlying case. Nor has the Plaintiff established that regarding the Foundation as a separate instrumentality would "'work fraud or injustice" against him. Therefore, the Foundation cannot

be held liable for the judgment against the Iranian Government. [7]

IV

As Plaintiff cannot establish that the Foundation was an agent, alter ego, or instrumentality of the Iranian Government, has not proceeded by writ of garnishment, and has not argued that there was a conveyance between the Foundation and the Iranian Government that was made with the intent to defraud a judgment creditor[8], Plaintiff was not entitled to a levy on these properties. Therefore, the Court will release the properties from the levy, and quash the writs of execution against them. Further, pursuant to Md. Code Ann., Real Prop. §14-108 (1998)[9], as a levy is a cloud on a property's title, the Foundation is entitled to an injunction

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[7]As the Court has found that the Foundation is not an agent, alter ego, or instrumentality, the Court will not address Plaintiff's argument that the Foundation's assets are subject to attachment pursuant to 28 U.S.C. Section 1610 (a) (7) and (f).

[8] Even if Plaintiff had made this argument it would fail. The record shows that the properties were purchased by the Foundation itself and were never directly owned by the Iranian government. Furthermore, there is no proof that the Iranian Government is insolvent. Finally, the properties were purchased long before the facts giving rise to the underlying litigation occurred, and thus were not purchased with the intent to defraud the Iranian Government's creditors. See Frain, 609 A.2d 379.

[9]This section provides:
Any person in actual peaceable possession of property, or, if the property is vacant and unoccupied, in constructive and peaceable possession of it, either under color of title or claim of right by reason of his or his predecessor's adverse possession for the statutory period, when his title to the property is denied or disputed, or when any other person claims, of record or otherwise to own the property, or any part of it, or to hold any lien encumbrance on it, regardless of whether or not the hostile outstanding claim is being actively asserted, and if an action at law or proceeding in equity is not pending to enforce or test the validity of the title, lien, encumbrance, or other adverse claim, the person may maintain a

against Plaintiff to prevent any future writs on the properties of the Foundation. Accordingly, the Court will grant the Movant's motions.

A separate Order consistent with this Opinion will follow.

9-7-99
Date

Alexander Williams, Jr.
United States District Judge

suit in equity in the county where the property lies to quiet or remove any cloud from the title, or determine any adverse claim.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

STEPHEN M. FLATOW
Plaintiff

v.

Civil Action No.AW-98-4152
Misc. No. 98 MC 285

THE ISLAMIC REPUBLIC OF IRAN, et al.
Defendants

NOTICE OF APPEAL

Notice is herewith given that Stephen M. Flatow, Plaintiff in the above titled case, herewith appeals to the United States Court Of Appeals For The Fourth Circuit from the Memorandum Opinion of United States District Judge Alexander Williams, Jr., dated September 7, 1999, granting the Alavi Foundation 's Motion to Release Properties From Levy, granting Alavi Foundation's Motion to Quash Writs of Execution, enjoining Plaintiff from Issuing Future Writs Against the Alavi Foundation's Property, releasing from levy 8100 Jeb Stuart Road, Rockville, Maryland 20854, 7917 Montrose Road, Rockville, Maryland 20850 and 12010 Seven Locks Road, Potomac, Maryland 20854, denying the Plaintiff's Motion for Hearing and instructing the Clerk of the Court to Close the cases.

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Date: September 30, 1999

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FEDERAL APPELLATE RULE 3(d)(1) SERVICE LIST

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