No.

IN THE

Supreme Court of the United States

SHAHROKH MIRESKANDARI,

Petitioner,

v.

BARRINGTON MAYNE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case arises from tortious and criminal conduct that two self-funded and self-governing foreign organizations—the Law Society of England and Wales ("LSE") and the U.K. Solicitors Regulation Authority ("SRA")—and individuals purporting to act on their behalf perpetrated against a U.S. citizen on U.S. soil. The Ninth Circuit held that the organizations were immune from jurisdiction and suit under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§1603 *et seq.*, as organs of the U.K., even though the U.K. itself does not consider them governmental entities. It further held the individual defendants were entitled to common law immunity because they purported to be acting on behalf of those organizations, even though they never registered as foreign agents; no suggestion of immunity was sought from or issued by the U.S. State Department; and there is no indication the U.K. ratified or approved the relevant conduct. The questions presented are:

1. Whether the LSE and SRA are entitled to sovereign immunity as "organs" of a foreign government under the FSIA and the relevant test for such determinations.

2. Whether the individual defendants were entitled to common law immunity for their tortious and illegal conduct because they purported to be acting for the benefit of the LSE or SRA with minimal discovery on the issue being permitted.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Shahrokh Mireskandari and Respondent Paul Baxendale-Walker were plaintiffs in the district court and appellants in the court of appeals.

Respondents Richard Hegarty, Malcolm Lees, Barrington Mayne, David Middleton, Antony Townsend, and Mansur Rahnema were defendants in the district court and appellees in the court of appeals in the first and second appeals.

Respondents Patrick Rohrbach, the Law Society of England and Wales, the Solicitors Regulation Authority, David Gardner, and Associated Newspapers, Ltd. were defendants in the district court, and appellees in the court of appeals in the first appeal, but did not participate in the second appeal.

STATEMENT OF RELATED PROCEEDINGS

The proceedings directly related to this petition within the meaning of Rule 14.1(b)(iii) are:

- *Mireskandari et al.* v. *Mayne et al.*, No. 2:12-cv-3861-JGB-MRW (C.D. Cal.); judgment of dismissal entered as to Law Society of England and Wales and Solicitors Regulation Authority on May 14, 2013; judgment of dismissal entered as to remaining individual defendants on March 23, 2016, following partial remand discussed below;
- *Mireskandari et al.* v. *Mayne et al.*, No. 13-55945 (9th Cir.); affirmance as to dismissal of Law Society of England and Wales and Solicitors Regulation Authority, and partial remand as to remaining individual defendants only on limited issue of foreign common law immunity issued on March 17, 2015;
- *Mireskandari et al* v. *Mayne et al.*, Nos. 16-55547 and 17-55540 (9th Cir.); judgment of dismissal as to remaining individual defendants on foreign common law immunity ground issued on April 6, 2020;
- *Mireskandari* v. *Associated Newspapers Limited*, No. 2:12-cv-02493-MMM-SS (C.D. Cal); judgment of voluntary dismissal entered by Mr. Mireskandari on February 14, 2014; attempted transfer of Barrington Mayne case refused by Judge Morrow.

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Shahrokh Mireskandari respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-5a) is not reported. The district court's opinion (App., *infra*, 34a-87a), and its order denying a motion for an indicative ruling (App., *infra*, 6a-33a), are not reported. The earlier opinion of the court of appeals addressing the immunity of other defendants (App., *infra*, 88a-91a) is not reported. The district court's opinion addressing the immunity of those defendants (App., *infra*, 92a-124a) is also not reported.

STATEMENT OF JURISDICTION

The court of appeals entered its order on April 6, 2020. App., *infra*, 1a. On March 19, 2020, by general order, the Court extended the time to file all petitions to 150 days, in this case to and including September 3, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1603-1605, are reproduced at App., *infra*, 125a-130a.

INTRODUCTION

The Ninth Circuit's decision below lies at the extreme end of an open and acknowledged circuit conflict on a critical issue under the Foreign Sovereign Immunities Act—the circumstances under which a foreign entity qualifies as an "organ" of a foreign government so that it may claim immunity. In the Ninth Circuit's view, foreign entities may claim such immunity even when the foreign government itself does not treat the entity as governmental and affords it no immunity under its own laws. It thus licenses foreign entities to perpetrate torts and crimes against U.S. citizens in the U.S. with impunity even though that conduct would not be tolerated and would result in liability in their home states.

The courts of appeals are in similar disarray over how to determine when individuals who purport to act on behalf of a foreign state are entitled to common law immunity. This Court has made clear that such individuals are not covered by the FSIA. But the Ninth Circuit's approach has the effect of allowing individuals to claim immunity for heinous crimes—if they purport to act on behalf of an entity that carries out a "public function." Here, the Ninth Circuit granted individuals common-law

immunity for bribery, threats, and witness tampering even though the foreign sovereign never claimed their conduct as its own and never sought immunity on their behalf; even though the State Department made no suggestion of immunity; and even though the individuals, while claiming they acted as foreign agents, never registered with the Department of State as required by 18 U.S.C. § 951.

Now, more than ever, the resolution of these divisions of authority is critical. The availability of immunity—and redress to U.S. citizens—should not depend on the happenstance of the circuit in which the case arises. And foreign entities and actors should not be permitted to commit crimes against U.S citizens in the U.S., with no possibility of redress, where the principles of comity that underlie foreign immunity in no way support those results.

STATEMENT

Petitioner Shahrokh Mireskandari, a successful solicitor in the U.K., was renowned for his successful efforts to expose and eradicate rampant systemic racial discrimination within the U.K. legal system. This case arises from a campaign, waged by two non-governmental entities in the U.K. and various U.K. individuals operating on their behalf, against him to prevent him from continuing those efforts and to drive him from the ranks of U.K. solicitors. That campaign included a supposed "investigation" that reached into the U.S., through which defendants repeatedly and falsely told Mr. Mireskandari's U.S. colleagues that he was under criminal investigation, and made efforts to bribe U.S. counsel and even a retired judge into making false accusations against him. The courts below, however, dismissed the relevant claims, holding that the

U.K. entities and individuals were entitled to sovereign immunity.

I. STATUTORY FRAMEWORK

A. The Foreign Sovereign Immunities Act of 1976

For much of the Nation's history, the immunity of foreign states and their officials was governed by principles adopted by the Executive Branch. See *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 34-36 (1945). For more than a century, the courts followed a two-step procedure for resolving immunity issues (often asserted on behalf of seized vessels). *Samantar* v. *Yousuf*, 560 U.S. 305, 311 (2010). First, a diplomatic representative of the sovereign could request a "suggestion of immunity" from the State Department; if the State Department made such a suggestion, the district court would deem the foreign state immune and surrender jurisdiction. *Ibid.* Absent such a "recognition of the immunity by the Department of State, a district court had authority to decide for itself whether all the requisites for such immunity existed." *Ibid.* (internal quotation marks omitted). In making those decisions, district courts would ask whether immunity was appropriate under established State Department policy. *Id.* at 320 n.13.

In 1976, Congress enacted the Foreign Sovereign Immunities Act or FSIA. The FSIA now provides the sole basis for obtaining jurisdiction over a foreign state in a civil case brought in a United States court. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-435 (1989). By enacting the FSIA, Congress transferred primary responsibility for deciding "claims of foreign states to immunity" from the State Department to the courts. *Samantar*, 560 U.S. at 313. Under the FSIA, foreign states and their agencies and instrumentalities are "presumptively immune" unless a claim falls within

one of the statute's enumerated exceptions. *Permanent Mission of India to the U.N.* v. *City of N.Y.*, 551 U.S. 193, 197 (2007) ("*Permanent Mission*"); see 28 U.S.C. § 1604.

The FSIA makes not just the sovereign, but also its agencies and instrumentalities, presumptively immune from suit and jurisdiction. 28 U.S.C. § 1603(a) (defining foreign state as including the state's agencies and instrumentalities). A foreign entity can qualify as an "agency or instrumentality" if it "is a separate legal person, corporate or otherwise" and "is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. § 1603(b). Thus, a foreign entity can be a sovereign's agency or instrumentality if it is wholly owned by the foreign state *or* if it is an "organ of a foreign state."

This Court has addressed how to determine whether the sovereign owns the entity. *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003). "The lower courts, however, have struggled to create a definition of 'organ' that evaluates the relationship between the entity in question and the sovereign * * * ." Michael Granne, *Defining "Organ of a Foreign State" Under the Foreign Sovereign Immunities Act of 1976*, 42 U.C. Davis L. Rev. 1, 4 (2008). The various resulting "tests lead to unpredictable and, occasionally, arbitrary results." *Ibid.*

B. Common Law Immunity for Official Conduct by Individual Officials

While the FSIA sets forth a general rule of immunity for a "foreign state," 28 U.S.C. § 1604, it does not mention immunity for individual foreign officials. Consistent with that, this Court held, in *Samantar*, that the FSIA does not govern such determinations or displace Executive Branch principles governing the immunity of current and

former officials. 560 U.S. at 310-312. Instead, the same two-step procedure that prevailed before the FSIA's enactment remains applicable. *Id.* at 312. The Court saw no reason to "believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity." *Id.* at 323. As explained in greater detail below, the courts of appeals have diverged on the proper standard for determining whether an individual is entitled to common law immunity in the absence of a suggestion of immunity from the State Department.

II. PROCEEDINGS BELOW

A. Factual Background

Born in Iran, Mr. Mireskandari spent his childhood in the United Kingdom before immigrating to the United States in 1981. C.A.E.R. 111, 122.[1] A citizen of the United States, he completed his undergraduate and graduate education here. *Ibid.* He then returned to the U.K. where he attended London Guildhall University Law School, completed his solicitor's apprenticeship, and qualified as a solicitor. C.A.E.R. 123. Mr. Mireskandari is considered a minority in the U.K. and, in 2002, began working for the British law firm of Dean & Dean, which is noted for its commitment to minority rights. *Ibid.* By 2006, he had been promoted to managing partner, overseeing more than 40 solicitors and staff, largely of what the British term "black, minority, and ethnic" (or "BME") origin. *Ibid.*

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[1] Because the case was resolved at the pleading stage, the well-pleaded factual allegations of the operative complaint (the Third Amended Complaint, C.A.E.R. 106-172) must be taken as true for present purposes.

1. Mr. Mireskandari's Campaign To Eradicate Discrimination in the U.K. Legal System

Mr. Mireskandari became painfully aware of discrimination against minority solicitors by the Law Society of England and Wales ("LSE"), a non-governmental organization founded to promote the interests of solicitors, as well as the U.K. Solicitors Regulation Authority ("SRA"), which operates as the organization's enforcement arm. The LSE was formed in 1825 by private individuals in the British legal profession, and was given a charter by the Crown—an honorific also held by the Australian Boy Scouts, for example—some 20 years later. C.A. E.R. 138-139. The U.K. government does not operate or manage the LSE or have anything to do with its employment policies and procedures. Rather, the LSE/SRA are self-funded by solicitor assessments, are governed by their own independent by-laws, and select their management through an independent internal process. *Ibid.* They do not enjoy sovereign immunity under the law of the U.K. or E.U. *X* v. *United Kingdom*, 4 E.H.R.R. 350 (1981) ("The [U.K.] Law Society was not an organ or part of the state.").

Mr. Mireskandari was not going to let that discrimination slide. C.A. E.R. 123. In August 2007, he wrote to Keith Vaz, a member of the British Parliament, describing the LSE's racist campaign targeting minority solicitors. *Ibid.* A parliamentary inquiry ensued, generating a report from Lord Ouseley that largely supported Mr. Mireskandari's position and was extremely critical of the LSE. C.A. E.R. 124.

Meanwhile, Mr. Mireskandari took on the high-profile representation of Tarique Ghaffur, then the most senior black, minority, or ethnic officer in the London Metropolitan Police (commonly known as "Scotland Yard") in a

racial discrimination case against his employer and the head of the organization, Police Commissioner Sir Ian Blair. C.A. E.R. 124. Mr. Mireskandari won his client a landmark settlement, and Ian Blair resigned. *Ibid.* That representation was just one of many victories that led Mr. Mireskandari to become widely known for his exposure of racial discrimination. *Ibid.*

2. Mr. Mireskandari's Actions Against the LSE/SRA and Their Retaliation in the U.S.

In May 2008, Mr. Mireskandari filed his own racial discrimination claim against the LSE/SRA. C.A. E.R. 124. Rather than change its treatment of minority solicitors, the LSE/SRA retaliated by instigating a racist, sham investigation into Mr. Mireskandari's law practice with the help of the tabloid newspaper, the Daily Mail. C.A. E.R. 123-125. Respondent David Middleton was the SRA's Executive Director, while respondent Antony Townsend was its chief investigative officer. C.A. E.R. 112. According to the complaint, they directed respondents Barrington Mayne and Malcolm Lees—both former U.K. police officers who served at relevant times as lead investigators in the SRA—to perform assorted "investigatory" acts in the U.S. to destroy Mr. Mireskandari's career and livelihood. C.A. E.R. 111, 123-125.

In 2008, Mayne (or someone purporting to be him) and Lees traveled to the United States at least three times on the pretext of performing an investigation. C.A. E.R. 125. Lees apparently traveled on an A-2 police visa, despite not being a police officer at relevant times. App., *infra*, 26a. The person purporting to be Mayne did not travel on Mayne's passport and his identity is unknown. App., *infra*, 21a-22a, 24a-28a. Neither individual registered as a foreign agent as required by 18 U.S.C. § 951.

Multiple times, Lees and an individual purporting to be Mayne met with William O'Bryan, a California attorney and former employer of Mr. Mireskandari; falsely claimed to be closely associated with U.K criminal prosecution authorities; and implied that Mr. Mireskandari would soon go to prison for unspecified reasons. C.A. E.R. 125-130; see also C.A. E.R. 279, 292-296, 298-300. They pressured O'Bryan to make statements that would help their "investigation" and offered him money in exchange. *Ibid.* Despite initially complying, O'Bryan later disavowed the statements as having been obtained through coercion and other improper means. *Ibid.*

Lees and the individual holding himself out as Mayne engaged in similar behavior everywhere they went in the U.S. They met with Mr. Mireskandari's former attorney and employer, Howard Schechter, at the latter's Malibu home. They again falsely claimed to be part of a nonexistent criminal prosecution in the U.K. C.A. E.R. 128-129; see also 292-296. They attempted to bribe Schechter with first-class airline tickets to London and free hotel accommodations if he would disclose attorney-client privileged information. C.A. E.R. 128-129; see also 292-296. Schechter refused. C.A. E.R. 129.

The two "investigators" attempted to meet with another of Mr. Mireskandari's former employers, attorney Lawrence Greenbaum, and were turned away by his assistant, Anthony Baron, after again falsely representing that they were part of a nonexistent criminal investigation. C.A. E.R. 125-127; see also C.A. E.R. 298-300. They waved a wad of cash in front of Baron's face and explained that they would be "willing to pay a considerable amount of money" for Greenbaum's time. C.A. E.R. 127. Greenbaum refused, citing attorney-client privilege, among other bases. *Ibid.* He was later faxed a statement

from Lees, which described itself as a statement authored by Greenbaum. *Ibid.* Greenbaum informed Lees that the statement was full of appalling lies. *Ibid.*

While under the direction of Middleton and Townsend, Messrs. Lees and "Mayne" fraudulently obtained Mr. Mireskandari's confidential educational information. Travelling to Hawaii, they met with attorney Jeffrey Brunton, then the head of Hawaii's Office of Consumer Protection, which had investigated and sued various unaccredited colleges and graduate schools there, including the American University of Hawaii, which Mr. Mireskandari attended for a time. C.A.E.R. 129-130. They falsely told Brunton they were working with British prosecutors in a criminal case against Mr. Mireskandari and, through those misrepresentations, obtained confidential educational records. C.A.E.R. 130. When those records proved unhelpful in the scheme to destroy Mr. Mireskandari's law practice, they (through the LSE/SRA and others) devised a plot to obtain Mr. Mireskandari's educational information through computer fraud, setting up a false account on the National Student Clearinghouse website. C.A.E.R. 129.

In December 2008, the LSE/SRA formally "intervened" in Mr. Mireskandari's law practice (*i.e.*, they shut it down), publicizing the event on camera and publishing it through the Daily Mail. C.A.E.R. 132. Mr. Mireskandari nominally retained his place on the U.K. Roll of Solicitors nonetheless, there being an insufficient basis to revoke Mr. Mireskandari's right to practice law entirely. Accordingly, the sham "investigation" in the U.S. continued. For example, in July 2009, Mayne phoned another one of Mr. Mireskandari's co-workers in California; falsely stated that he worked with the prosecutor's office in England; and falsely asserted that Mr. Mireskandari was

about to be arrested for bribing judges and stealing clients' money. C.A.E.R. 138-139; see also C.A.E.R. 286-287. Mayne threatened "serious repercussions" if this former co-worker attempted to come to England to testify on Mr. Mireskandari's behalf; at the same time, noting that the U.K. government would "appreciate her cooperation," he offered her a bribe of $5,000 to change her story. C.A.E.R. 128; see also C.A.E.R. 286. She refused. C.A.E.R. 128; see also C.A.E.R. 286-287. The LSE/SRA also availed themselves of the federal courts to obtain *ex parte* subpoenas for Mr. Mireskandari's educational records, using the false and coerced statements from O'Bryan and Patrick Rohrbach (a former California state bar investigator). C.A.E.R. 133.

The SRA and its operatives did not stop there. They also approached retired California Court of Appeal Justice Elizabeth Baron, and induced her to provide testimony adverse to Mr. Mireskandari. Among other things, they paid her to provide supposed "expert testimony" and offered her a free, extended trip to London. C.A.E.R. 372-373, 408-409, 446. They made similar efforts to induce the participation of a Deputy District Attorney. *Ibid.*; see also C.A.E.R. 355-356.

The stress of the onslaught seriously impaired Mr. Mireskandari's health, C.A.E.R. 138-139, an event respondents exploited. They told a delinquent former client (co-defendant Mansur Rahnema) not to pay Mr. Mireskandari's overdue fees and induced him to threaten and intimidate Mr. Mireskandari's personal physician from giving evidence on his behalf. C.A.E.R. 130. Rahnema also told Mr. Mireskandari's then-attorney, Hayes Michel, that Mr. Mireskandari was a "crook" and "evil," and threatened that, "If I see your client, I will shoot him." C.A.E.R. 152, 158. They then hired a supposedly

"independent" medical expert in California, Dr. Joseph Scoma—who had several DUIs, had been arrested for threatening to kill his wife, and was the subject of numerous malpractice judgments—who forwarded Mr. Mireskandari's confidential medical records to the SRA and provided them a medical opinion they had dictated to him. C.A.E.R. 133-138. Ailing in Los Angeles, Mr. Mireskandari found himself too sick to attend the most important proceedings of his career, much less to participate in his own defense. The SRA struck him from the Roll of Solicitors, permanently ending the career to which he had dedicated his life. C.A.E.R. 170.

B. Initial Proceedings in the District Court

In February 2012, Mr. Mireskandari filed a complaint in the Los Angeles Superior Court, which was removed to U.S. District Court for the Central District of California in May 2012. The operative Third Amended Complaint (the "Complaint") was filed on December 18, 2012, asserting claims under the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, state-law claims for defamation and intentional interference with contractual relations, as well causes of action under RICO, 18 U.S.C. § 1961 *et seq*.

Setting forth the facts recited above, the Complaint identified, among others, two "corporate" U.K. defendants: The Law Society of England and Wales ("LSE") and the U.K. Solicitors Regulation Authority ("SRA"). It identified five individual U.K. defendants, including Malcolm Lees and Barrington Mayne (the two "investigators" who operated in the U.S.), as well as the SRA's Executive Director, David Middleton, and its chief investigative officer, Antony Townsend, who directed the "investigators'" unlawful activities.

As relevant here, on May 14, 2013, the district court granted Defendants' motions to dismiss. App., *infra*,

92a-124a. It ruled that all of the U.K. defendants—corporate and individual—were entitled to immunity under the FSIA. The court reasoned that the LSE and SRA constitute "organ[s]" of a foreign state under Ninth Circuit precedent, and thus are entitled to assert sovereign immunity under the FSIA, because they are "engaged in a public activity to carry out a national policy of promoting a fair and well-regulated justice system that serves the public interest." App., *infra*, 116a. The court conceded that neither was created by the U.K. government in the first instance, that neither was accorded sovereign immunity under U.K. or European Union law, and that they are formally independent of the U.K. government. App., *infra*, 114-116a. But it was persuaded that they constitute "organs" of the U.K. government because U.K. statutes charged them with promoting the interests of the U.K.'s justice system. App., *infra*, 116a.

C. The Ninth Circuit Affirms in Part and Reverses in Part

On March 27, 2015, the Ninth Circuit affirmed in part and reversed in part. App., *infra*, 88a-91a. First, it affirmed dismissal of the SRA and LSE (the corporate U.K. defendants), holding that they were entitled to sovereign immunity under the FSIA. App., *infra*, 89a. The Ninth Circuit did not address how those entities were formed, how they were funded, or whether the U.K. itself recognized them as part of the U.K. government or otherwise accorded them immunity from suit. Nor did it suggest that any official of the U.K. government had come forward to suggest that the LSE and SRA are somehow arms of the sovereign. Indeed, the court of appeals conceded that both "the LSE and SRA are formally independent from the government." *Ibid.* But it found that both are "accountable" to a statutorily-created Legal

Services Board, which is in turn "accountable" to Parliament. *Ibid.* The Legal Services Board is required to follow eight objectives, it ruled, and the "LSE and SRA must act in a manner compatible with these objectives." *Ibid.* Because the LSE and SRA engage "in a public activity on behalf of the foreign government," it ruled, they are entitled to sovereign immunity. *Ibid.*

The Ninth Circuit reversed the dismissal of the individual U.K. defendants (including Lees, Maynes, Middleton, Townsend, and one other individual), ruling that the district court had erred by according them sovereign immunity. Under *Samantar* v. *Yousuf*, 560 U.S. 305, 319 (2010), it held, "the FSIA does not provide immunity to" individual "officials acting on behalf of a foreign state." App., *infra*, 89a. The Ninth Circuit did not inquire whether the individual U.K. defendants had preserved any claim of common-law immunity. Nonetheless, the court declared that "the district court may consider whether dismissal of these defendants is required under common law immunity" on remand. *Ibid.*

D. Remand Proceedings Before the District Court

On remand, the district court granted Mr. Mireskandari limited discovery. C.A. E.R. 5-8. He was permitted to serve one set of written interrogatories and one set of written requests for the production of documents to each remaining defendant. C.A. E.R. 7. When defendants did not respond satisfactorily, the magistrate judge denied the motions to compel, which the district court upheld. App., *infra*, 35a. The court's prior discovery order, the court ruled, did not allow discovery into the asserted common-law immunity of the individual U.K. defendants, even though the Ninth Circuit had expressly raised that issue in its remand order. App., *infra*, 73a-86a.

The court ruled that, where foreign officials engage in conduct on behalf of the sovereign, they are entitled to "common-law immunity." App., *infra*, 80a-85a. Such immunity extends only to "official acts performed within the scope of his duty, but not for private acts," and thus excludes violations of *jus cogens* norms and other "private acts that are not arguably attributable to the state, such as drug possession or fraud." App., *infra*, 77a. Applying that standard, the district court held that the conduct at issue—even though it violated U.S. criminal laws—was properly attributable to the sovereign. App., *infra*, 80a-85a. "It is only those acts which are so heinous that they violate *jus cogens* norms of international law—such as prohibitions against torture, genocide, indiscriminate executions, and prolonged arbitrary imprisonment—that operate to deprive a foreign official of common law immunity." App., *infra*, 79a, 81a. It found no evidence that the individual U.K. defendants were acting in their individual capacities. App., *infra*, 80a-85a. While much of the alleged conduct was tortious and unlawful, the court held, it did not amount to a violation of *jus cogens* norms. *Ibid.*

E. The Ninth Circuit Affirms

Mr. Mireskandari appealed to the Ninth Circuit. While that appeal, Ninth Circuit No. 16-55547, was pending, information from the U.S. State Department revealed that Barrington Mayne in fact had not been in the U.S. at the relevant times, meaning that someone else had undertaken the acts attributed to Mayne. Plaintiffs moved in the district court for an indicative ruling under Fed. R. Civ. P. 62.1 with respect to a motion to set aside the judgment under Rule 60(b)(2) or 60(b)(3) based on the newly discovered evidence regarding the "Mayne Impostor." That motion was denied. App., *infra*, 6a-34a.

The appeal of that ruling, No. 17-55540, was considered together with the original appeal, No. 16-55547.

After the appeals had been briefed, the Ninth Circuit deferred submission pending resolution of *Doğan* v. *Barak*, No. 16-56704, which also presented common-law immunity questions. See Mar. 22, 2018 Order, *Mireskandari* v. *Mayne*, Nos. 16-55547 & 17-55540 (9th Cir. issued Mar. 22, 2018). On August 2, 2019, the Ninth Circuit issued a sweeping ruling in that case, *Doğan* v. *Barak*, 932 F.3d 888 (9th Cir. 2019). Such immunity, the court ruled, is available to anyone acting on behalf of the state, even in cases of torture or other *jus cogens* violations. See *Doğan*, 932 F.3d at 893-896.

The Ninth Circuit then proceeded with Mr. Mireskandari's appeals and ultimately issued the decision in this case, affirming. The individual U.K. defendants, the court held, "were entitled to common-law foreign sovereign immunity" because the complaint alleged that they had "acted to further the objectives of foreign government entities, the Law Society of England and Wales ('LSE') and the Solicitors Regulation Authority ('SRA')." App., *infra*, 2a. "Because the defendants performed the alleged conduct in their official capacities, they are entitled to common-law foreign sovereign immunity." *Ibid.* The court cited *Doğan*, 932 F.3d at 893-894, for the proposition that "common-law foreign immunity shields foreign officials from liability for 'acts performed in their official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state.'" *Ibid.* Although there was no testimony or evidence from any part of the U.K. government suggesting that it was ratifying or accepting their conduct as governmental, the court upheld the denial of discovery. Because the "complaint alleges that defendants Mayne, Lees," *et al.* "were

working within their official capacities to advance the goals of the LSE/SRA," any "additional discovery would not have affected their eligibility for common-law sovereign immunity." App., *infra*, 4a.[2]

REASONS FOR GRANTING THE PETITION

Foreign sovereign immunity has never been as important as it is now. In case after case, sovereigns, as well as private entities, are embroiled in controversies outside their borders. Yet the courts of appeals are divided, and lack sufficient guidance, on the application of sovereign immunity on two critical issues. First, while the FSIA defines "agency and instrumentality" of a foreign state to include separate legal entities that are "organs" of the foreign state, 28 U.S.C. §1603(b)(2), the courts of appeals are divided on how to determine whether an entity qualifies as an "organ" of a foreign government. The Ninth Circuit has adopted a particularly sweeping and unworkable approach. It affords immunity even to entities the foreign government itself deems nongovernmental and to whom it denies immunity. That approach allows entities to abuse U.S. citizens with impunity here where the same conduct would not be tolerated—and would subject them to suits for redress—in their home jurisdictions. Sovereign immunity, however, is founded in *respect* for the choices made by foreign sovereigns. It is ill-served by an approach that disregards the choices foreign sovereigns make under their own laws.

Second, the courts of appeals are in hopeless disarray over how to determine when individuals (*i.e.*, natural per-

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[2] The original action included claims against other defendants, including U.S. individuals and the parent company of the *Daily Mail*. Those claims against those defendants were dismissed on other grounds and are not at issue here.

sons) who claim to have acted on behalf of a foreign state are entitled to immunity. In *Samantar* v. *Yousuf*, 560 U.S. 305 (2010), this Court held that the FSIA does not govern the immunity of such individuals; instead, their immunity is governed by common-law principles that are not necessarily coextensive with the FSIA. In the wake of *Samantar*, the courts of appeals have struggled to arrive at a workable approach. The result has been disagreement and disarray, with the Ninth Circuit—again—taking an extreme view. Whether immunity is available—and whether aggrieved individuals are denied redress as a result—should not depend on the happenstance of the circuit in which the case arises. The issues are important, recurring, and well-presented here. Review is warranted.

I. THE CIRCUITS ARE HOPELESSLY DIVIDED AND REQUIRE GUIDANCE ON THE SCOPE OF SOVEREIGN IMMUNITY FOR ORGANS AND INDIVIDUALS

A. The Courts of Appeals Are in Hopeless Disarray on the Proper Standard for Evaluating the FSIA's "Organ" Requirement

Only the foreign state itself and its agencies and instrumentalities can assert immunity under the FSIA. See 28 U.S.C. §1603(a); *Samantar*, 560 U.S. at 314-315. In some instances, determining whether an entity qualifies as an "agency or instrumentality" of the foreign state, so as to be able to assert immunity, is relatively straightforward. The FSIA generally defines "agency or instrumentality" to include foreign entities that constitute "a separate legal person" ("corporate or otherwise") that are "majority * * * owned by a foreign state or political subdivision thereof." 28 U.S.C. §1603(b). But the FSIA also defines "agency or instrumentality" to include separate legal entities that are not majority owned by the

foreign state if they constitute "an organ of the state." *Ibid.*

1. The lower courts are in disarray over how to determine whether a foreign entity is "an organ of the state." See *Janvey* v. *Libyan Inv. Auth.*, 840 F.3d 248, 259 (5th Cir. 2016) ("there is no clear test for determining whether an entity is an organ of a state" under the FSIA). As one commentator has explained, "[t]he lower courts have struggled to create a definition of 'organ' that evaluates the relationship between the entity in question and the sovereign in a way that addresses the wide variety of structures and political and economic systems that spawn them." Michael Granne, *Defining "Organ of a Foreign State" Under the Foreign Sovereign Immunities Act of 1976*, 42 U.C. Davis L. Rev. 1, 4 (2008). The various resulting multi-factor "tests lead to unpredictable and, occasionally, arbitrary results." *Ibid.*

The Ninth Circuit, for example, has adopted a six-factor test that "examin[es]"

(1) "the circumstances surrounding the entity's creation";

(2) "the purpose of its activities";

(3) "its independence from the government";

(4) "the level of government financial support";

(5) "its employment policies"; and

(6) "its obligations and privileges under state law."

California Dep't of Water Res. v. *Powerex Corp.*, 533 F.3d 1087, 1098 (9th Cir. 2008).

While the Ninth Circuit has identified that highly general list of factors, it applies a further gloss. Whether or not an entity will be considered an "organ" of the foreign state, the Ninth Circuit has announced, depends on

whether it engages "in a public activity on behalf of the foreign government." *Powerex*, 533 F.3d 1098. "The Ninth Circuit has followed a different path in the organ inquiry" by "focus[ing] on the question of whether an entity performs 'a public activity on behalf of the foreign government' as a proxy for organ status." Granne, *supra*, at 25; see also *ibid.* (criticizing that gloss as having produced "wildly divergent results" that approach judicial "schizophrenia"). While this Court granted review in *Powerex* to address the Ninth Circuit's test, see *Powerex Corp.* v. *Reliant Energy Servs.*, 127 S. Ct. 1144 (2007), jurisdictional issues prevented the Court from addressing the issue, *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224, 239 (2007); but see *id.* at 245 (Breyer, J., dissenting) (reaching sovereign immunity and "part[ing] company with the Ninth Circuit on the merits").

The Fifth Circuit's approach is different. It identifies five relatively more specific factors as "useful":

(1) "whether the foreign state created the entity for a national purpose";

(2) "whether the foreign state actively supervises the entity";

(3) "whether the foreign state requires the hiring of public employees and pays their salaries";

(4) "whether the entity holds exclusive rights to some right in the [foreign] country"; and

(5) "how the entity is treated under foreign state law."

Janvey, 840 F.3d at 259 (citation omitted). The Second Circuit considers the same five factors "relevant." See *Filler* v. *Hanvit Bank*, 378 F.3d 213, 217 (2d Cir. 2004). Adding to the confusion, the Third Circuit employs six

factors that overlap with the other circuits' considerations, but adds a seventh "additional factor"—the entity's "ownership structure." *USX Corp.* v. *Adriatic Ins. Co.*, 345 F.3d 190, 209, 214 (3d Cir. 2003). The effect of that additional factor is itself unclear.[3]

The tests do not merely differ in specificity, content, and emphasis; they produce different results. For example, while the Fifth and Second Circuits ask specifically "whether the foreign state created the entity for a national purpose," *Janvey*, 840 F.3d at 259; *Filler*, 378 F.3d at 217, the Ninth Circuit ignores whether the entity is a product of state action. Instead, it breaks apart that specific inquiry into two highly generalized factors, the "circumstances" of the entity's creation and its "purpose." *Powerex Corp.*, 533 F.3d at 1098. The Fifth Circuit's approach conversely identifies as two separate factors the entity's "exclusive rights" and "treat[ment] under foreign law," *Janvey*, 840 F.3d at 259, but the Ninth Circuit looks to "obligations and privileges under state law" generally. And the "Ninth Circuit has followed a different path" by superimposing a gloss that asks "whether an entity performs 'a public activity on behalf of the foreign government' as a proxy for organ status." Granne, *supra*, at 25.

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[3] The Third Circuit has urged that, "under the organ prong, as opposed to the majority ownership prong of section 1603(b)(2), a foreign state might own only 10% of an entity; it might own directly 50% of the entity; or it might own even 100% of a holding company that owns 100% of the entity." 345 F.3d at 209. "On the other hand it is possible that a foreign state might not own any portion of any entity that nevertheless is its organ as section 1603(b)(2) does not require a foreign state to have any ownership interest in an entity for it to be its organ." *Ibid.* "Courts should consider," the Third Circuit directs, "how these different ownership structures might influence the degree to which an entity is performing a function 'on behalf of the foreign government.'" *Ibid.*

Those different approaches produce different outcomes—as this case amply illustrates. Applying its "public activity" gloss, the Ninth Circuit did not bother to address four of the five considerations identified by the Fifth and Second Circuits. The Ninth Circuit thus did not ask whether the U.K. government itself created the LSE or SRA to serve a public purpose (it did not). The court identified no evidence the U.K. government "actively supervises" those entities. Nor did the Ninth Circuit examine whether the U.K. pays their employees, whether it accords them exclusive rights, or whether they are treated as part of the sovereign under U.K. law. *Janvey*, 840 F.3d at 259; *Filler*, 378 F.3d at 217. Instead, the Ninth Circuit found it sufficient that, by statute, the LSE and SRA are required to pursue eight identified goals and are "accountable" to another entity that is, in turn, "accountable" to Parliament. App., *infra*, 89a. Based on that, the Ninth Circuit announced, the LSE and SRA engage "in a public activity on behalf of the foreign government" and are immune from suit. *Ibid.*

The approach employed by the Second and Fifth Circuits leads to the precise opposite outcome. Indeed, each of the five factors they consider points against immunity. As to the first, the LSE/SRA were *not* "created" by the U.K. government for any purpose (national or not). *Janvey*, 840 F.3d at 259. The LSE was formed in 1825 by a group of private individuals working in the British legal profession. C.A. E.R. 138. The Crown had nothing to do with it until 20 years later, and then it merely bestowed the organization with a charter, an honorific that primarily increases prestige. For instance, the Australian Boy Scouts Organization was given a similar charter. On the second factor, there was no evidence the U.K. government "actively supervises" the LSE. *Janvey*, 840 F.3d at

259. The Ninth Circuit conceded the LSE and SRA were formally "independent." App., *infra*, 89a. The third factor weighs against immunity too. The U.K. government does not pay the LSE/SRA's employees or control its employment policies and procedures. C.A. E.R. 138. The LSE/SRA are governed by their own independent bylaws and select their management through an independent internal process; they are self-funded, largely from solicitors' fees. C.A. E.R. 139. Indeed, they pay income taxes; they do not remit profits or excess revenues to the U.K. government; and the U.K. government has no ownership interest in them. *Ibid.*

Finally, in terms of exclusive rights and treatment under foreign law, *Janvey*, 840 F.3d at 259, the LSE and SRA do not enjoy sovereign immunity under the law of the U.K. or E.U. C.A. E.R. 138; see also *X* v. *United Kingdom*, 4 E.H.R.R. 350 (1981) ("The [U.K.] Law Society was not an organ or part of the state."). That final factor should have particular weight. Sovereign immunity reflects principles of comity—the recognition each nation shows to the legislative, executive or judicial acts of another. Nowhere did the Ninth Circuit explain how comity is served by treating the LSE and SRA as part of the U.K. government where the U.K. government itself does not.

Neither the Ninth Circuit's analysis nor its result can be reconciled with the standards applied in other circuits. Whether injured individuals can bring suit, and whether foreign entities are treated as part of a foreign sovereign, should not depend on the happenstance of the circuit in which the case arises. To the contrary, one of the reasons Congress enacted the FSIA in 1976, and gave federal courts exclusive jurisdiction, was to ensure uniformity.

Verlinden B.V. v. *Cent. Bank of Nigeria*, 461 U.S. 480, 487-488, 497 (1983). Review is warranted.

2. The Ninth Circuit's vague "public purpose" approach has serious policy consequences. Under it, that the LSE and SRA are statutorily regulated in the U.K., and have a general function to further the public good by licensing and regulating solicitors, was sufficient to render them immune. But the same argument could render virtually any not-for-profit organization immune, so long as it has some public purpose and is in some sense regulated by (and thus "accountable to") a foreign government. Moreover, the Ninth Circuit has never defined what it means by a "public activity." The standard is, as a result, wholly indeterminate, producing results that align more closely to the intuitions of particular panel members than proper application of a rule of law. The results under that test are so "wildly divergent" that one author has characterized them as evidence of appellate "schizophrenia." Granne, *supra*, 25.

The FSIA was not intended to be a "get out of jail free" card, but rather to "assur[e] litigants that * * * decisions are made on purely legal grounds and under procedures that insure due process." *Verlinden*, 461 U.S. at 488 (citation omitted). The Ninth Circuit's test, and the lack of clarity among the circuits generally, defies Congress's effort to ensure that foreign entities that violate the legal rights of Americans would be held accountable except where immunity was warranted under judicially administrable criteria. This Court's intervention, to restore predictability and clarity in the FSIA's application, is warranted.

B. The Ninth Circuit Has Adopted an Unworkable Standard for Determining the Common Law Immunity of Individual Foreign Officials

1. Ten years ago, this Court held that the common law, not the FSIA, governs the sovereign immunity of individual foreign officials, and that the two bases for immunity are not necessarily coextensive. *Samantar*, 560 U.S. at 321-322. Both before the FSIA's enactment and after *Samantar*, courts have employed "a two-step procedure developed for resolving" whether an individual foreign official is entitled to claim sovereign immunity for his conduct. First, typically the foreign sovereign itself requests a suggestion of immunity from the U.S. State Department. *Samantar*, 560 U.S. at 305; see also *Ex parte Peru*, 378 U.S. 578, 581 (1943). If the request is granted, that is the end of the matter. The district court "surrender[s]" its jurisdiction. 560 U.S. at 305. If no suggestion is made, the courts must determine the matter for themselves, employing the standards the political branches would ordinarily employ. *Ibid.*

The effort to do so has yielded conflict and incoherence. For example, even where an individual purports to act on behalf of a sovereign, conduct that goes beyond the scope of his authority is not protected by immunity principles. *Phaneuf* v. *Republic of Indonesia*, 106 F.3d 302, 308 (9th Cir. 1997) ("Where a[ ] [foreign] officer's powers are limited * * * his actions beyond those limitations are considered individual and not sovereign actions." (citation omitted)). Here, Mayne and Lees acted beyond any scope of authority. They conceded in their supplemental briefing (9th Cir. CR 62 at 2) that the U.K. never ratified any of their challenged actions, and conceded at oral argument that their alleged acts constituted "investigatory misconduct." The decision below granted them common

law immunity nonetheless, holding that it was sufficient that they were in a general sense working "on behalf of" an entity previously found (erroneously) to be an organ of a foreign state. App., *infra*, 15a.

To support that result, the Ninth Circuit relied upon its opinion in *Doğan* v. *Barak*, 932 F.3d 888 (9th Cir. 2019). In *Doğan*, the Ninth Circuit held that foreign officials are entitled to immunity for acts of torture notwithstanding the Torture Victim Protection Act, 28 U.S.C. § 1350. It further ruled that such immunity is available even for conduct, like torture, that violates international *jus cogens* norms, where the conduct is ratified by the foreign sovereign. *Doğan*, 932 F.3d at 895-896. That result is sweeping: Under it, a foreign official may violate *jus cogens* norms and even engage in torture, with no recourse for victims, so long as his or her government acknowledges and approves of the action—even if the U.S. State Department does nothing of the kind. *Id.* at 896-898.

The Ninth Circuit's decision in this case extends *Doğan*, dropping even the requirement that the foreign state ratify the conduct of the purported foreign official. Under the decision below, it made no difference that the U.K. government never owned the LSE or SRA as an arm of the government, never accepted the individuals as "foreign officials" that can act for it, and never ratified or approved of those individuals' conduct in any respect. Nor did it matter that neither the U.K. government nor the U.S. government had asked for immunity for the individuals. Instead, the Ninth Circuit ruled, because the individuals "acted to further the objectives of foreign government entities, the Law Society of England and Wales ('LSE') and the Solicitors Regulation Authority ('SRA')" in "their official capacities," they were entitled

to common law immunity. App., *infra*, 2a. But foreign official common law immunity should not simply follow from the fact that the defendant worked for, and purported to advance the goals of, a putatively governmental entity. That makes individual, common law official immunity duplicate immunity under the FSIA, an approach *Samantar* rejects. Instead, official immunity must look to whether the *conduct* of the individual was in effect *conduct* of the foreign state itself. Here it was not.[4]

2. The Ninth Circuit's approach to foreign official common law immunity is in tension with the decisions of other circuits and reflects broader disagreement about the governing standard. Following remand in *Samantar*, for example, the Fourth Circuit followed this Court's direction and held that "officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity." *Yousuf* v. *Samantar*, 699 F.3d 763, 777 (4th Cir. 2012). In *Lewis* v. *Mutond*, 918 F.3d 142, 145 (D.C. Cir. 2019), the D.C. Circuit adopted an entirely different test. Absent a suggestion of foreign immunity from the State Department, the court addressed conduct-based immunity under § 66 of the Restatement 2d of Foreign Relations Law, as both parties urged. *Lewis*, 918 F.3d at 146. This Court has expressed no view on the applicability of § 66, see *Samantar*, 560 U.S. at 321 n.15, and the *Lewis* court's shaky reliance on it was harshly criticized in concurrences. *Lewis*, 918 F.3d

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[4] For the reasons given above, neither the LSE nor the SRA are organs of the U.K. government. See pp. 22-23, *supra*. Insofar as the court of appeals erred in holding otherwise, the individual U.K. defendants are not entitled to common law immunity either. Conduct on behalf of a non-governmental entity that is not the sovereign is not properly treated as conduct of the sovereign.

at 148 (Srinivasan, C.J.); *id.* at 148-150 (Randolph, J.). Diverging from *Doğan*, the D.C. Circuit's opinion ruled that common law conduct-based immunity for foreign officials may be unavailable for conduct that violates *jus cogens* norms. *Lewis*, 918 F.3d at 146-147. The disagreement was sufficiently clear—and the absence of guidance from this Court sufficiently problematic—that the United States urged this Court to grant review. See Br. of the U.S., *Mutond et al.* v. *Lewis*, No. 19-185, at 8-14, 20-21 (urging deference to executive's decision not to file a suggestion of immunity and expressly noting the conflict with *Doğan*).

The D.C. Circuit's analysis in *Lewis* is impossible to reconcile with the Ninth Circuit's analysis here. In *Lewis*, the foreign sovereign had asked the State Department to issue a suggestion of immunity for the individuals, but the State Department did not do so. 918 F.3d at 146. Under those circumstances, the D.C. Circuit ruled, the individuals were not entitled to immunity for their conduct unless "the effect of exercising jurisdiction would be to enforce a rule against the foreign state." *Ibid.* The D.C. Circuit found that requirement not satisfied absent some showing that the plaintiffs sought to "draw on the" foreign sovereign's "treasury or force the state to take specific action, as would be the case if the judgment were enforceable against the state." *Id.* at 147. To the contrary, the suit did not seek "compensation out of state funds." *Ibid.* For those reasons, the D.C. Circuit denied the individuals immunity.

That should make this an *a fortiori* case. In this case, the foreign government did not even *seek* a suggestion of immunity for the challenged conduct, much less claim the individual defendants as government officials. And any judgment would be payable not by the sovereign but the

defendants themselves. Yet the Ninth Circuit held immunity was appropriate. Under its approach, conduct by foreign individuals with even the flimsiest of ties to a recognized state can grievously wrong (even torture) Americans without having to answer for their wrongful acts in U.S. courts when their own sovereign claims neither them nor their conduct as its own. Those irreconcilable results underscore the need for this Court's intervention.

3. The Ninth Circuit's unprecedented approach to foreign official common law immunity leads to absurd and dangerous results. It allows for unbounded immunity for criminal conduct, even torture, committed by foreign agents in the United States against United States citizens. If U.S. citizens had engaged in the same despicable conduct that the foreign individuals allegedly committed here, there is no question they would not enjoy immunity for their conduct.[5]

More troubling still, the individual defendants themselves did not, before undertaking misconduct against U.S. citizens on U.S. soil, identify themselves to the federal government as foreign government officials. Under 18 U.S.C. § 951, it is a federal crime—punishable by up to 10 years' imprisonment—for anyone other than a diplomatic or consular official to "act[ ] in the United States as the agent of a foreign government without prior notice to the Attorney General." 18 U.S.C. § 951(a). Here, the individual U.K. defendants undisputedly failed to register

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[5] Indeed, neither the parties nor the courts even considered that co-defendant Rahnema, a U.S. citizen, could have common law immunity, as it is obvious he could not. Yet the foreign defendants are given carte blanche to victimize U.S. citizens. The only possible justification for that disparate outcome is comity—the national interest of respecting and preserving relationships with foreign governments. Yet no such interest was ever asserted here by the U.S. or the U.K.

as foreign agents under § 951 when they entered the U.S. to "investigate" Mr. Mireskandari. None of the individual U.K. defendants have ever claimed to be diplomatic or consular officials or attachés such that registration under § 951 was not required. Nor would any such claim be remotely plausible.

Yet the Ninth Circuit's expansive reading of common law immunity gives carte blanche to foreigners to perform gross investigatory misconduct—including tortious and criminal acts—in the U.S. directed at U.S. citizens, without bothering to register as a foreign agent. If someone is a foreign official performing any investigative activities in the U.S., he should not be able to cloak his misconduct in common law immunity reserved for foreign officials while simultaneously refusing to acknowledge to the federal government that he is a foreign agent at all. Such a result certainly should not be tolerated where the individual's own sovereign does not even acknowledge him or his conduct as its own. Once again, the Ninth Circuit has gone too far. This Court needs to intervene to bring consistency to circuit precedent and establish a coherent framework for individual common law immunity decisions.

II. THE ISSUES ARE IMPORTANT

Few issues present a more urgent need for the courts of the United States to speak with one voice. The doctrines of sovereign immunity, and individual common law foreign immunity, are founded on principles of "grace and comity." See *Verlinden*, 461 U.S. at 486. Decisions under these doctrines go to the very heart of whether U.S. courts will exercise jurisdiction. See *Ibid.* These decisions need to be made nationally and in deference to the Executive Branch. See *ibid.* It simply will not do to have different lower courts in different parts of the coun-

try determining differently an issue that so fundamentally affects the United States' relations with foreign sovereigns and their agents.

Our increasingly connected global world highlights the need for national unanimity. As the recent COVID-19 pandemic demonstrates, the actions of governments, organizations, and individuals can all have grave impact across national borders. Because injured U.S. citizens will seek recourse against entities and individuals that claim associations with foreign sovereigns, it is imperative that federal courts have a uniform approach. The availability of jurisdiction and redress cannot turn on the circuit in which the lawsuit was filed.

The Ninth Circuit's approach threatens dire consequences. Under that approach, foreign entities that the foreign sovereign does not even treat as part of the state, and individuals the foreign sovereign nowhere recognizes as officials, can perpetrate tortious or criminal acts with impunity—victimizing U.S. citizens—through conduct the foreign government never accepts as its own. In this case, for example, an organization the U.K. government does not itself treat as governmental (and an impostor pretending to be working on its behalf) engaged in a raft of illegal acts in the U.S., including bribery and defamation. And they got away with it, not merely without going to trial, but without even so much as a single deposition being taken. There is a powerful role for comity to ensure that our system of justice does not interfere with foreign relations. But the Ninth Circuit's approach undermines our system of justice without any legitimate comity or international-relations rationale for doing so. That outcome virtually invites the sort of lawless conduct, on U.S. soil against U.S. citizens, that occurred here.

III. THIS CASE PROVIDES AN EXCELLENT VEHICLE

The procedural posture of this case, its facts, and its timing, make it an ideal vehicle for further review. The issues of sovereign immunity under the FSIA and foreign official common law immunity were cleanly and clearly decided in the lower courts. Mr. Mireskandari fully preserved his arguments both in the district court and the Ninth Circuit.[6] The Ninth Circuit reached the merits of both issues, reviewing the dismissals *de novo*. And, because the case was decided at the pleadings stage, the facts are static and well-defined.

The case, moreover, presents the questions for review in the starkest possible way. The entities and individuals in this case are alleged to have engaged in improper and even criminal conduct, to the detriment of Mr. Mireskandari, a U.S. citizen. No suggestion of immunity was ever sought from, or received by, the U.S. State Department. The U.K. never identified the LSE or SRA as part of the U.K. government entitled to sovereign immunity in its own courts. Nor did the U.K. adopt or ratify the conduct of the individual U.K. defendants as undertaken on behalf of the U.K. government. The Ninth Circuit invoked published circuit precedent to grant immunity nonetheless. And that precedent was likely outcome determina-

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[6] That is more than can be said for respondents. Their affirmative defense of common law immunity was raised in the district court in a single line in a motion to dismiss based expressly and solely on the FSIA, under a heading specifically devoted to FSIA immunity. CR 77; No. 13-55945 E.R. 155-56. Yet the Ninth Circuit directed the parties and the district court to address foreign common law immunity on its own, once again violating this Court's directive to confine itself to the issues and arguments raised by the parties. See *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020).

tive. Under the precedent of other circuits, the outcome would likely have been different. See pp. 22-23, *supra*.

Finally, this case is timely. The issues of sovereign immunity and foreign official common law immunity are arising with increasing frequency as lawsuits against entities and individuals claiming to be associated with foreign governments crop up around the country. This Court's guidance is desperately needed. The time for that review is now.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2020

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHAHROKH MIRESKANDARI; PAUL BAXENDALE-WALKER, Plaintiffs-Appellants, v. BARRINGTON MAYNE; et al., Defendants-Appellees.	No. 16-55547 17-55540 D.C. No. 2:12-cv-03861-JGB-MRW MEMORANDUM* (Filed Apr. 6, 2020)

Appeal from the United States District Court
for the Central District of California
Jesus G. Bernal, District Judge, Presiding

Argued and Submitted February 4, 2020
San Francisco, California

Before: PAEZ and BEA, Circuit Judges, and JACK,** District Judge.

Shahrokh Mireskandari and Paul Baxendale-Walker appeal the district court's judgment dismissing their action with prejudice. They also appeal the denial of their motion for an indicative ruling, made under

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Janis Graham Jack, United States District Judge for the Southern District of Texas, sitting by designation.

Federal Rule of Civil Procedure 62.1, that the district court would likely grant relief from the judgment under Federal Rule of Civil Procedure 60(b)(2) or (b)(3). We have jurisdiction under 28 U.S.C. § 1291. We review the dismissal of the appellants' complaint de novo. *DB Healthcare, LLC v. Blue Cross Blue Shield of Ariz., Inc.*, 852 F.3d 868, 873, n.5 (9th Cir. 2017). We review the district court's denial of the Rule 62.1 motion, which served as a denial of the Rule 60(b) motion on the merits, for an abuse of discretion. *See* Fed. R. Civ. P. 62.1(a)(2); *United States v. Asarco, Inc.*, 430 F.3d 972, 978 (9th Cir. 2005). We affirm.

The district court properly dismissed appellants' claims against Barrington Mayne, Malcolm Lees, David Middleton, Antony Townsend, and Richard Hegarty because these defendants were entitled to common-law foreign sovereign immunity. The allegations as to these defendants consistently stated that they acted to further the objectives of foreign government entities, the Law Society of England and Wales ("LSE") and the Solicitors Regulation Authority ("SRA"). Because the defendants performed the alleged conduct in their official capacities, they are entitled to common-law foreign sovereign immunity. *See Dogan v. Barak*, 932 F.3d 888, 893-94 (9th Cir. 2019) (common-law foreign immunity shields foreign officials from liability for "acts performed in their official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state." (alteration, citation, and internal quotation marks omitted)). The record does not support the appellants' contention that these

defendants waived common-law foreign sovereign immunity as a defense by failing to raise it in their motion to dismiss.

The district court properly dismissed the defamation claim against Mansur Rahnema as barred by the litigation privilege. *See Wang v. Heck*, 137 Cal. Rptr. 3d 332, 337 (Ct. App. 2012) (discussing requirements for application of California's litigation privilege). Rahnema's email to Dr. Farzam was covered by the privilege because Rahnema was a witness in the LSE/SRA disciplinary proceedings, and the email sought to convince Dr. Farzam to stop assisting Mireskandari so that the proceedings could go forward. Rhanema's phone call to Mireskandari's attorney, Michael Hayes, was made after this litigation began and was thus covered by the privilege.

The district court properly dismissed the Racketeer Influenced and Corrupt Organizations Act ("RICO") claim against Rahnema because appellants failed to allege facts sufficient to show a predicate act. *See United Bhd. of Carpenters & Joiners of Am. v. Bldg. & Const. Trades Dep't, AFL-CIO*, 770 F.3d 834, 837 (9th Cir. 2014) (stating the elements of a civil RICO claim). To the extent appellants argue that Rahnema engaged in the predicate acts of witness tampering and extortion, they forfeited this argument by failing to raise it in the district court. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

The district court did not abuse its discretion by denying appellants' motion to compel discovery

relating to sovereign immunity because appellants failed to demonstrate actual and substantial prejudice resulting from the denial of the requested discovery. *See Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002) (setting forth standard of review and explaining that a district court's "decision to deny discovery will not be disturbed except upon the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant." (citation and internal quotation marks omitted)) The appellants' operative complaint alleges that defendants Mayne, Lees, Middleton, Townsend, and Hegarty were working within their official capacities to advance the goals of the LSE/SRA, and additional discovery would not have affected their eligibility for common-law sovereign immunity.

The district court did not abuse its discretion in denying appellants' motion for an indicative ruling regarding relief from the judgment because appellants failed to establish any basis for such relief. *See Sch. Dist. No. 1J v. ACandS, Inc*., 5 F.3d 1255, 1262-63 (9th Cir. 1993) (setting forth standard of review and grounds for relief from judgment under Fed. R. Civ. P. 60(b)). The district court's finding that appellants' "newly discovered" evidence either could have been discovered previously with reasonable diligence, or was cumulative of evidence already considered, was not "illogical, implausible, or without support in inferences that may be drawn from the record." *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc). The same is true of the district court's

finding that appellants lacked clear and convincing evidence that the judgment was obtained by fraud.

Appellants' request for "expeditious treatment and/or a limited remand for discovery based on the ages of parities and witnesses" (Docket Entry No. 98 in Appeal No. 16-55547; Docket Entry No. 55 in Appeal No. 17-55540) is denied as moot.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES – GENERAL

Case No.	**CV 12-3861 JGB (MRXx)**	Date	March 22, 2017
Title	***Shahrokh Mireskandari et al. v. Barrington Mayne et al.***		

Present: The Honorable	JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter
Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: Order: DENYING Plaintiffs' Motion for an Indicative Ruling that the Court would likely entertain or grant a motion to set aside the Court's March 23, 2016 Order, for leave to conduct an evidentiary hearing and amend the Third Amended Complaint (Dkt. Nos. 266, 266-1) (IN CHAMBERS)

Before the Court is Plaintiffs' Rule 62.1 motion for an "indicative ruling" that: (1) the Court would grant a Rule 60(b)(2) motion for relief from the March 23, 2016 judgment if the Court of Appeals were to remand for the purpose of hearing newly discovered evidence or (2) under Rule 60(b)(3) that the March 23, 2016 Order was

obtained through Defendants' fraud, which prevented Plaintiffs from fully and fairly presenting their claims.[1] For the reasons set forth below, the motion for an indicative ruling is DENIED.

I. BACKGROUND

A. Procedural History

Plaintiffs Shahrokh Mireskandari and Paul Baxendale-Walker initiated this action in California Superior Court for the County of Los Angeles on February 17, 2012. (Complaint, Dkt. No. 1, Ex A.) On May 3, 2012, the case was removed to this Court. (Notice of Removal, Dkt. No. 1.) Plaintiffs filed their First Amended Complaint on May 22, 2012, (Dkt. No. 9), their Second Amended Complaint on November 2, 2012, (Dkt. No. 60), and their Third Amended Complaint ("TAC") on December 18, 2012. (Dkt. No. 64-1.)[2] The TAC alleges eleven causes of action against various Defendants. Mireskandari alleges claims for:

1. Violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(b), against the following Defendants: the Law Society of England and Wales ("LSE"), the Solicitors Regulation

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[1] All references to "Rule" are to the Federal Rules of Civil Procedure unless otherwise noted.

[2] Plaintiffs' TAC is filed as docket entry 69. However, pages 57, 58, and 62 of the TAC were omitted from the electronic version in docket entry 69. Accordingly, the Court will refer to docket entry 64-1, which is a complete version of the TAC.

Authority ("SRA"), David Middleton, and Anthony Townsend, (TAC ¶¶ 186-190);

2. Violation of RICO, 18 U.S.C. § 1962(c), against Defendants the LSE, the SRA, Middleton, Townsend, Barrington Mayne, Malcolm Lees, the Associated Newspapers, Ltd. ("ANL"), and David Gardner, (Id. ¶¶ 191-195);

3. Violation of RICO, 18 U.S.C. § 1962(d), against Defendants the LSE, the SRA, Middleton, Townsend, Mayne, Lees, Richard Hegarty, Patrick Rohrbach, Mansur Rahnema, the ANL, and Gardner, (Id. ¶¶ 196-203);

4. Violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, against Defendants the LSE, the SRA, Middleton, Townsend, Mayne, and Lees, (Id. ¶¶ 217-221);

5. Defamation against Defendants the LSE, the SRA, Mayne, Lees, Middleton, and Townsend, (Id. ¶¶ 242-255); and

6. Defamation against Rahnema. (Id. ¶¶ 256-264).

Plaintiff Baxendale-Walker alleges separate claims for:

1. Violation of RICO, 18 U.S.C. § 1962(b), against Defendants the LSE, the SRA, and Middleton, (Id. ¶¶ 204-208);

2. Violation of RICO, 18 U.S.C. § 1962(c), against Defendants Middleton and Mayne, (Id. ¶¶ 209-211);

3. Violation of RICO, 18 U.S.C. § 1962(d), against Defendants Middleton, Mayne, and Hegarty, (Id. ¶¶ 212-216);

4. Intentional interference with actual contractual relationships against Defendants the LSE, the SRA, Mayne, and Middleton, (Id. ¶¶ 222-230); and

5. Defamation against Defendants the LSE, the SRA, Mayne, and Middleton, (Id. ¶¶ 231-241).

In January of 2013, Defendants filed four separate Motions to Dismiss the TAC. (Dkt. Nos. 77, 78, 91, 98.) On May 5, 2013, the Court granted the Motions as to all Defendants and dismissed the TAC with prejudice. (May 14, 2013 Order, Dkt. No. 150.) On appeal, the Ninth Circuit affirmed in part and vacated in part the May 14, 2013 Order. (March 27, 2015 Ninth Cir. Order, Dkt. No. 158.) The Ninth Circuit affirmed the dismissal of the LSE, the SRA, the ANL, Rohrbach, and Gardner. (Id. ¶¶ 1,2,4, 5.) The Ninth Circuit vacated the dismissal of Mayne, Lees, Middleton, Townsend, Hegarty, and Rahnema, and remanded the matter for further consideration. (Id. ¶¶ 3, 6.) The Ninth Circuit vacated the dismissal of Mayne, Lees, Middleton, Townsend, and Hegarty (the "UK Defendants") on the grounds that the Foreign Sovereign Immunities Act ("FSIA") does not provide immunity to officials acting on behalf of a foreign state. (Id. at ¶ 3) (citing Samantar v. Yousuf, 560 U.S. 305, 319 (2010)).

On remand, the Court was directed to consider whether dismissal of Mayne, Lees, Middleton,

Townsend, and Hegarty was required under the doctrine of common law immunity. (Id.) On remand, the Court dismissed Rahnema, finding that Mireskandari's defamation claim was barred by the litigation privilege and the TAC failed to state a RICO conspiracy claim against Rahnema. ("Order," Dkt. No. 252.) The Court also found that the UK Defendants were all immune from suit under the doctrine of common law immunity. (Id. at 19.) The Court also concluded that it lacked personal jurisdiction over Hegarty. (Id.) Plaintiffs gave notice of their intent to appeal this Court's Order to the Ninth Circuit on April 13, 2016. (Dkt. No. 255.)

On February 6, 2017, Plaintiffs filed a Motion for Indicative Ruling in this Court, and asked the Ninth Circuit to stay the appeal pending resolution of this Motion. ("Motion," Dkt. Nos. 266, 266-1.) In support of their Motion, Plaintiffs filed the following documents:

- Declaration of Shahrokh Mireskandari (Mireskandari Decl., Dkt. No. 266-2);
- Lees and Mayne Declarations of their California travels in 2008 dated September 24, 2012 as Exhibit 1 (L&M Decl., Dkt. No. 266-3);
- Lees and Mayne Reponses to Interrogatory No. 10 as Exhibits 2 and 3 (Dkt. Nos. 266-4, 266-5);
- Pages of Lees' Visa and Passport as Exhibit 4 (Dkt. No. 266-6);
- Response to Document Request No. 92 as Exhibit 5 (Dkt. No. 266-7);

- Drooks Declaration as Exhibit 6 (Dkt. No. 266-8);
- Green Declaration as Exhibit 7 (Dkt. No. 266-9);
- Hopper Declaration as Exhibit 8 (Dkt. No. 266-10);
- Baron Supplemental Declaration as Exhibit 9 (Dkt. No. 266-11); and
- Livingstone Declaration as Exhibit 10 (Dkt. No. 266-12.)

On February 17, 2017, Defendants filed an Opposition to Plaintiffs' Motion. ("Opposition," Dkt. No. 267.) In support of their Opposition, they filed the Declaration of Ashley D. Bowman, which attaches the Ninth Circuit's Order directing Plaintiffs to file their opening brief as Exhibit A, and the statement of Gordon Livingstone provided by Plaintiffs in a U.K-based SRA disciplinary proceeding against Mireskandari as Exhibit B. (Bowman Decl., Dkt. No. 267-1.)

B. The Present Motion

Due to the pending appeal of the Order and Judgment, Plaintiffs request an indicative order under Rule 62.1 for the purpose of presenting new evidence to the Court so it may reconsider or set aside its March 23, 2016 Order. (Motion at 2.) Plaintiffs seek relief from the Order under Rule 60(b)(2) or Rule 60(b)(3). (Id. at 2, 4.) Plaintiffs maintain that newly discovered evidence undermines the Court's conclusion that Mayne

and Lees came to California in 2008 to interview witnesses as part of an authorized investigation by the Law Society of England and/or the Solicitors Regulation Authority. (Id. at 2.)

Plaintiffs present three items of evidence in support of their Motion: (1) the 2016 Livingstone Declaration; (2) 2017 Anthony Baron Declaration ("Baron Declaration"); and (3) the correspondence between Thomas C. Green and personnel from the State Department ("Bluth Email" or "State Department email"). (Id.) Plaintiffs argue that this evidence establishes that Mayne never actually traveled or entered the United States. (Id.) On that basis, they maintain that a Mayne Imposter, and not Barrington Mayne, questioned witnesses in California with Lees. (Id.) Plaintiffs assert that this newly discovered evidence shows that Defendants engaged in fraud in an effort to hide their improper conduct, "and to prevent this Court from learning the true motive underlying their 'investigation' of Mireskandari." (Id. at 3.) Plaintiffs further maintain that new evidence demonstrates that the SRA solicited and/or accepted funds from defendant Mansur Rahnema as early as 2008 to pay for its "investigation" of Mireskandari. (Id.)

Accordingly, Plaintiffs maintain that Defendants' "investigation" of Misreskandari "was well beyond the scope of any legitimate purpose relating to the LSE or the SRA," was not permitted under English law, and warrants finding that common law immunity does not apply to shield the UK Defendants from liability. (Id. at 7.) In addition, since the newly discovered evidence

suggests Rahnema's participation in this scheme, Plaintiffs maintain that the claims against Rahnema must survive and additional claims now appear to exist. (Id.)

C. The Court's March 23, 2016 Order

The only remaining Defendants after the May 2015 remand were Mansur Rahnema, Middleton, Townsend, Mayne, Lees, and Hegarty. (Order.) The Court concluded that it had personal jurisdiction over Rahnema because his calls to Mireskandari's doctor and counsel in California, as well as his email to the doctor, were intentional acts directed at the California forum. (Id. at 8-9.) However, the Court's dismissed Mireskandari's defamation claim against Rahnema because all of the statements were protected by California's statutory litigation privilege. (Id. at 11.) As to the RICO claims under section 1962(c), the Court found that Rahnema's statements threatening to murder Mireskandari could not serve as predicate acts of racketeering activity because they were unrelated to the alleged racketeering enterprise's asserted goal of destroying Mireskandari's law practice in England by stripping him of his English license. (Id. at 16) (citing 18 U.S.C. § 1962 subd. (d)).

The Court also found that the allegation that the LSE/SRA directed Rahnema to not pay the outstanding £800,000 judgment Mireskandari had against him failed to state a claim because the operative Virginia statute only penalizes giving bribes, not receiving

something of value. (Id.) On that basis, the Court concluded that it could not serve as a predicate act under section 1962(c). (Id.) Finally, the Court rejected the email sent by Rahnema to Dr. Farzam and his refusal to pay the judgment owed to Mireskandari as sufficient to plead wire fraud because there was no indication that Rahnema intended to obtain money or property from the individuals he allegedly deceived: Farzam or Michel. (Id. at 17.) In addition, the Court found that Plaintiffs failed to state a claim for racketeering conspiracy under section 1962(d) because the TAC did not sufficiently allege that Rahnema knew of Lees' and Mayne's Travel Act violations, their witness tampering, or their alleged wire fraud. (Id. at 18.) Since section 1962(d) requires allegations that a defendant agreed to enter into a scheme to facilitate racketeering, and not just an agreement to further the overall goal of the enterprise, failure to adequately allege Rahnema's knowledge of the other defendants' predicate racketeering acts was fatal to Plaintiffs' section 1962(d) claim. (Id.)

As to the UK Defendants, the Court found that all of their alleged acts were within the scope of their duties as employees or agents of either the SRA or the LSE. (Id. at 22-26.) In so doing, the Court rejected the notion that mere unlawful acts arose to violations of *jus cogens* norms to strip the officials of common law immunity under Yousuf v. Samantar, 699 F.3d 763 (4th Cir. 2012). (Id.) Since failure to notify the United States Attorney General of Lees' and Mayne's entry into the United States did not alter the nature of their conduct,

it did not strip them of the common law immunity to which they would otherwise be entitled as police officers acting on behalf of a regulatory arm of a sovereign state, like the LSE/SRA. (Id. at 24.) The Court also observed that the TAC failed to allege that the individual UK Defendants knew Mireskandari or Baxendale-Walker personally to plausibly infer that they may have been acting in their capacities as private citizens. (Id.) Finally, the Court concluded that it lacked personal jurisdiction over defendant Hegarty because there was no allegation in the TAC that Hegarty took any intentional acts expressly aimed at California. (Id. at 25.)

II. LEGAL STANDARD

A. Indicative Ruling

When a Rule 60(b) motion is filed in district court after a notice of appeal has been filed, the district court lacks jurisdiction to entertain the motion. Katzir Floor & Home Designs, Inc. v. M–MLS.com, 394 F.3d 1143, 1148 (9th Cir.2004). "To seek Rule 60(b) relief during the pendency of an appeal, the proper procedure is to ask the district court whether it wishes to entertain the motion, or to grant it, and then move [the court of appeals], if appropriate, for remand of the case." Williams v. Woodford, 384 F.3d 567, 586 (9th Cir.2004).

This procedure is set forth in Rule 62. 1, which provides that: "If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." Fed. R. Civ. P. 62.1.

To determine whether it would grant the motion if the matter is remanded, or that the motion raises a substantial issue, the Court must look at the merits of the motion. Fed. R. Civ. P. 62.1 advisory committee's note to 2009 adoption. If the Court would grant the motion if it could, it should say so clearly. Id. If the district court is persuaded the motion is meritorious but would need to conduct an extensive analysis to make a definitive ruling, it may simply indicate its view that the motion has merit. Id. If the court of appeals remands for the purpose indicated by the district court, the district court can then take the indicated action. Thus, for Plaintiffs to establish they are entitled to an indicative ruling, they must sufficiently persuade the Court that the motion should be granted or raises a substantial issue. Fed. R. Civ. P. 62.1.

B. Rule 60(b): Grounds for Relief from a Final Judgment, Order or Proceeding

A district court has inherent jurisdiction to modify, alter, or revoke a prior order. United States v. Martin, 226 F.3d 1042, 1049 (9th Cir. 2000). Rule 60(b) permits a district court to relieve a party from a final order or judgment on the following applicable grounds: "(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move

for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; . . . or (6) any other reason that justifies relief." Fed. R. Civ. P. 60(b); Sch. Dist. No. 1J, Multnomah Cty., Or. v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993).

Relief under Rule 60(b) is not granted lightly. Reconsideration of a prior order is an extraordinary remedy, to be used sparingly. Kona Enters. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000). "'[A] motion for reconsideration should not be granted, absent highly unusual circumstances . . . " Marlyn Nutraceuticals, Inc. v. Mucos Pharma. GmbH & Co., 571 F.3d 873, 880 (9th Cir. 2009). A final judgment may be vacated or modified only within a reasonable time after entry and only when the interests of justice outweigh the interests in the finality of the judgment. Latshaw v. Trainer Wortham & Co., 452 F.3d 1097, 1103 (9th Cir. 2006).

1. Rule 60(b)(2): Newly Discovered Evidence

To be entitled to reconsideration under Rule 60(b)(2), the moving party must show that the (1) evidence constitutes newly discovered evidence; (2) the party exercised due diligence to discover this evidence; and (3) the newly discovered evidence is of such magnitude that production of it earlier would have been likely to change the outcome of the prior order. See Coastal Transfer Co. v. Toyota Motor Sales, 833 F.2d 208, 211 (9th Cir. 1987). Rule 60(b)(2) thus requires

that the moving party provide a convincing explanation for why the new evidence could not have been proffered earlier in the proceedings. Id.; see 11 Wright & Miller § 2859 (1973) ("Under both rules [59 and 60], if [the evidence] was in the possession of the party before the judgment was rendered it is not newly discovered . . . "). The court may weigh the evidence and make credibility determinations in ruling on a Rule 60(b)(2) motion. Accord Daniels v. Pipefitters' Ass'n Local Union No. 597, 983 F.2d 800 (7th Cir. 1993) (stating that district court may weigh credibility of new evidence in ruling on motion for new trial, even though credibility decisions are usually for finder of fact; contrary rule would require new trial every time party presented new evidence, no matter how incredible that evidence was).

Further, to be entitled to relief under Rule 60(b)(2), a movant must show that the evidence is not only newly discovered and was unavailable at the time of trial despite the movant's due diligence, but must also show that the newly discovered evidence is material. Id. Where the evidence is merely cumulative or impeaching, it is unlikely to have produced a different result if it had been introduced at trial. Id. The Ninth Circuit has held that the mere showing that "newly discovered evidence" would likely have led a movant to prepare and present a different case—i.e., "taking additional depositions, presenting other witnesses, and arguing a different theory of defect to the jury"—is not sufficient to find that it would likely alter the outcome under Rule 60(b)(2). Aero/Chem Corp., 921 F.2d at 878.

Accordingly, Plaintiffs must first establish that the (1) August 19, 2016 email from a State Department Official, (2) January 20, 2017 Declaration of Anthony Baron, and (3) April 8, 2016 Declaration of Gordon Livingstone constitute "newly discovered evidence" under Rule 60(b)(2). Second, Plaintiffs must persuade the Court that despite their "due diligence" they could not discover this evidence prior to March 23, 2016. Third, Plaintiffs must show that the newly discovered evidence is of such magnitude that production of it earlier would have been likely to change the Court's common law immunity, personal jurisdiction or 12(b)(6) analysis underlying its dismissal of Plaintiffs' claims.

2. Rule 60(b)(3): Fraud, Misrepresentation, or Misconduct of an Adverse Party

Under Rule 60 (b) (3), the movant must: (1) prove by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct; and (2) establish that the conduct complained of prevented the losing party from fully and fairly presenting his case or defense. Bunch v. United States, 680 F.2d 1271, 1283 (9th Cir.1982) (citation omitted). Failure to disclose or produce materials requested in discovery can constitute "misconduct" within the purview of this subsection. See Rozier v. Ford Motor Co., 573 F.2d 1332, 1339 (5th Cir.1978).

Courts have found misconduct within the meaning of Rule 60(b)(3) where plaintiffs have demonstrated (1) they exercised due diligence in their discovery

requests, (2) defendant knew, or was charged with knowledge, of the missing document, and had constructive (if not actual) possession of it; and (3) defendant did not divulge the document's existence. Anderson v. Cryovac, Inc., 862 F.2d 910, 928 (1st Cir. 1988).

In the case of intentional misconduct, as where concealment was knowing and purposeful, courts presume that the suppressed evidence would have damaged the nondisclosing party. See Nation–Wide Check Corp. v. Forest Hills Distributors, Inc., 692 F.2d 214, 217–19 (1st Cir.1982). Where discovery material is deliberately suppressed, its absence can be presumed to have inhibited the unearthing of further admissible evidence adverse to the withholder, that is, to have substantially interfered with the aggrieved party's trial preparation. See Alexander v. National Farmers Organization, 687 F.2d 1173, 1205–06 (8th Cir. 1982); National Association of Radiation Survivors v. Turnage, 115 F.R.D. 543, 557 (N.D. Cal. 1987) ("Where one party wrongfully denies another the evidence necessary to establish a fact in dispute, the court must draw the strongest allowable inferences in favor of the aggrieved party."). However, absent deliberate suppression, Plaintiffs must show that the conduct complained of prevented them from fully and fairly presenting their case. Bunch, 680 F.2d at 1283.

III. DISCUSSION

A. Plaintiffs' Contentions

Plaintiffs assert that no reasonable due diligence would have disclosed any of their "new" evidence prior to entry of the Order and Judgment. As to the Livingstone Declaration, Plaintiffs contend that "a chance conversation unrelated to this action with former Scotland Yard Detective Livingstone in April 2016 first revealed the fatal admissions by defendant Rahnema exposing the illegitimacy—and apparent illegality—of the entire scheme." (Mot. at 6.) As to the State Department inquiry and the January 20, 2017 Baron Declaration, Plaintiffs contend that it was not until counsel for Middleton, Mayne, Lees, Hegarty, and Townsend declared that Mayne's passport for the relevant time period (2008) was destroyed (Drooks Decl. ¶ 5), that they had reason to doubt the truth of Defendants' prior statements, which prompted them to further investigate Mayne's travels into the United States. (Mot. at 6.)

Plaintiffs maintain that "[t]his newly-discovered evidence demonstrates defendants have made fraudulent statements in their declarations and interrogatory responses, and suggests strongly Mayne purposefully refused to produce his 2008-era passport in response to Plaintiffs' document request in order to hide a simple damning truth: Mayne never actually traveled to the United States in 2008." (Mireskandari Decl. ¶ 14.) Plaintiffs argue that the new evidence "demonstrates defendants made fraudulent statements in

declarations and discovery, and demonstrates also someone falsely identified himself as Mayne during the alleged SRA investigation." (Mot. at 8.)

Plaintiffs argue that the "only logical conclusion drawn from the first two items of new evidence is the 'Mayne imposter' had no relationship with the LSE or the SRA," and "[s]uch a violation necessarily constitutes (or results in) a waiver of any available common law immunity." (Mot. at 7.) Second, Plaintiffs maintain that Rahnema's admissions of collusion with the SRA and of providing funds to the SRA to "bring down Mireskandari," show ultra vires conduct which strips the UK Defendants of the protections of common law immunity. (Id.)

B. Analysis

1. The Livingstone Declaration is Not Newly Discovered Evidence

The April 6, 2016 Declaration of Gordon Livingstone states that on November 28, 2013, Mr. Rahnema told him that "[t]he SRA needed [his] help, they needed funds [Rahnema] met them in Northern Virginia in 2008 and paid them to bring Mireskandari down." (Livingstone Decl., ¶ 8., Dkt. No. 266-12, Ex. 10.) Attached to Ashley D. Bowman's Declaration, is a Declaration by Gordon Livingstone dated March 18, 2011, that was submitted on Mireskandari's behalf in a disciplinary proceeding brought by the SRA. (Bowman Decl., Ex. B.) Livingstone's 2011 statement mirrors his April 2016 statement exactly, except it curiously omits any

reference to Rahnema admitting he actually paid the SRA to bring Mireskandari down. (Id.)

Since this Declaration does not bear on whether the litigation privilege applies, it cannot resuscitate the defamation claim. As to Plaintiffs' RICO claims against Rahnema, the Livingstone Declaration gets Plaintiffs no closer to alleging two predicate acts so it does not affect the bases on which the Court dismissed the section 1962(c) claim. The only RICO claim that could conceivably be viable is a conspiracy claim under section 1962(d). It is inferable that Rahnema knew the objective of the scheme if Rahnema actually paid the SRA to bring Mireskandari down. Rahnema's alleged payment to the SRA would constitute an overt act in furtherance of that scheme.

The Court does not find the April 2016 Livingstone Declaration to be particularly credible, however. The 2016 Livingstone Declaration is indistinguishable from the 2011 Livingstone Declaration except that the latter Declaration includes Rahnema's admission that he paid the LSE/SRA to "bring Mireskandari down." Plaintiffs' failure to state a RICO claim against Rahnema was based in part on the fact that Rahnema was not alleged to have given a bribe, only to have received something of value. The addition of this missing element now is suspiciously convenient. Moreover, the Court is not persuaded Plaintiffs exercised reasonable diligence because they had access to Livingstone in 2011 and provide no explanation for why this testimony—that Rahnema admitted to paying LSE/SRA—could not have been obtained prior to March 23, 2016.

The 2016 Livingstone Declaration, therefore, does not provide grounds for relief under either Rule 60(b)(2) or (3).

2. The State Department Email and the Baron Declaration are Merely Cumulative and Thus, Unlikely to Have Altered the Court's Dismissal of the TAC

Again, Plaintiffs argue that it was not until Defendants' counsel's December 2015 Declaration that they had any notice that the individual who traveled to California in 2008 was not Barrington Mayne. For purposes of common law immunity, however, the Court finds that both the State Department email and the Bluth Declaration are either cumulative of other evidence or only corroborate allegations already contained in the TAC. In any event, the Court is not convinced that this new evidence would have altered its common law immunity analysis.

The Court is not persuaded that Plaintiffs have made an adequate showing that the Baron Declaration is newly discovered evidence. The January 20, 2017 Baron Declaration states that neither of the men in the photograph taken in 2014, "is the man who identified himself to [him] as Barrie Mayne in April of 2008." (Baron Decl., ¶ 4.) Yet, Plaintiffs previously submitted a Declaration from Anthony Baron dated August 8, 2011 and fail to explain why they did not present the photograph to Baron for his identification prior to the entry of judgment. The August 8, 2011 Baron

Declaration states that Lees and Mayne came into the Law Offices of Lawrence Greenbaum on behalf of the prosecutor's office in England. (Baron Decl. ¶ 7.) Baron further declared that when Mr. Greenbaum refused to speak with Lees and Mayne about his former client, Mr. Mireskandari, Mayne stated "they would be willing to pay Mr. Greenbaum if Mr. Greenbaum were to agree to meet with them." (Id. at ¶ 10.) Since the 2011 Baron Declaration suggests Lees and Maynes engaged in intimidation, Plaintiffs had notice that Lees and Mayne potentially engaged in ultra vires acts. The 2011 Baron Declaration, therefore, should have prompted Plaintiffs to ask Baron to identify the man displayed in the 2014 photograph. Plaintiffs failure to do so cannot constitute reasonable diligence.

Additionally, the Court cannot conclude that the 2016 Baron Declaration is of such magnitude that Plaintiffs' inability to present it earlier undermines the Court's March 23, 2016 Order. For one thing, the 2016 Baron Declaration merely corroborates Mireskandari's Declaration, which is contradicted by more reliable admissible evidence. The Hopper Declaration, dated January 20th, 2017, states that he recognized the man in the same photo "as the person known to me as Barrie Mayne." (Hopper Decl. at ¶ 8.) The second Baron Declaration is hardly a smoking gun, therefore, and the Court cannot conclude that it is of such magnitude that production of it earlier would have been likely to change the outcome of the March 23, 2016 Order.

For one thing, it is unlikely that the Baron Declaration would be sufficient to infer that the officers involved in the SRA investigation of Mireskandari were acting outside the scope of their official duties. Since common law immunity is "conduct-based immunity," the Court is not persuaded that the alleged existence of a "Mayne Imposter" purporting to act on behalf of the LSE/SRA in a purely investigative capacity necessarily changes the nature of the acts that the Court deemed sovereign and therefore immune from suit. Plaintiffs presented voluminous documents and witness testimony to support their allegation that Mayne and Lees acted outside of the scope of their authority prior to the Court's March 23, 2016 Order. As such, the "newly discovered evidence" is merely cumulative of evidence already considered.

As to the State Department correspondence, the Court is not convinced Plaintiffs exercised reasonable diligence or that it would have altered the Court's dismissal of the TAC on common law immunity grounds. The Declaration of Thomas C. Green, executed on November 22, 2016, attached as Exhibit 7, states that "[i]n late February 2016, Mr. Sharokh Mireskandari asked [him] to write to the U.S. Departments of State and Justice describing evidence of potential violations of U.S. civil and criminal law related to the improper use of an A-2 diplomatic visa and improper investigative activities in the U.S. by Malcolm S. Lees ("Lees") and Barrington Mayne ("Mayne")." (Green Decl.) The letter and supporting exhibits were submitted by email with a hard copy on March 3, 2016 to Mary E.

McLeod, Principal Deputy Legal Advisor, Office of Legal Advisor, and Gregory B. Starr, Assistant Secretary, Bureau of Diplomatic Security at the Department of State, and Leslie R. Caldwell, Assistant Attorney General, Criminal Division at the Department of Justice. (Green Decl., ¶ 2.) Green explains that he received a letter on August 19, 2016 from Adam Bluth, an investigator in the Department of State Bureau of Diplomatic Security, stating that "based on my investigation we could not find and [sic] evidence or indication that a Barrington Mayne ever traveled to or entered into the United States." (Green Decl. ¶ 4.) The Bluth Email also states that "[d]epartmental record checks had confirmed that Lees traveled to the U.S. in 2007 a total of four times under the Visa Waiver Program, and in 2008 to the present traveled to the U.S. a total of six times, using his issued A-2 visa four times and the Visa Waiver program two times." (Green Decl., ¶ 5.) While this Declaration undermines Mayne and Lees' testimony to some extent, Plaintiffs advance no compelling reason for not exploring this lead prior to December 2015.

Lees' alleged misrepresentations were already inferable from evidence available prior to the Court's entry of judgment. For example, the Declaration of Lawrence Greenbaum dated April 3, 2011 states that Lees' letter sent on November 6, 2008 "is not only inaccurate and misleading," but was "also a complete fabrication in parts." (Greenbaum Decl. ¶ 13.) It also states that he had never met with Mayne. (Id. at ¶ 12.) The Melody Norris Declaration, dated August 21, 2011,

states that Mayne used intimidation to coerce her to withdraw her statement in support of Mireskandari in the SRA proceeding. (Id.) Norris declares that Mayne told her there would be "serious repercussions" if she went to England to give evidence on behalf of Mireskandari. (Norris Decl. ¶ 6.) When she refused, she declares that Mayne offered her $5,000.00 to withdraw her statement. (Id. at ¶ 11.) Her undated declaration regarding the incident on December 6, 2014 states that Lees threatened her again by stating that while no one wanted her hurt, he was aware that she lived alone and was an elderly woman with limited means. (Dec. 6, 2014 Norris Decl. at ¶ 3.) She states Lees offered her $10,000 to disappear. (Id.) All of these Declarations were available to Plaintiffs prior to the Court's March 23, 2016 Order. Moreover, these statements should have put Plaintiffs' on notice that Lees, Mayne, and possibly their supervisors had engaged in ultra vires acts and therefore no longer entitled to common law immunity. Plaintiffs do not explain why they did not consult with the State Department or even the Department of Justice earlier to investigate whether Mayne actually entered the United States. Accordingly, Plaintiffs did not exercise reasonable diligence and cannot seek relief under Rule 60(b)(2).

3 Plaintiffs Fail to Prove By Clear and Convincing Evidence that the Order was Obtained by Fraud

Plaintiffs fail to prove by clear and convincing evidence that Defendants engaged in fraud or intentional

misconduct. The Bluth Email does not refute the unavailability of Mayne's 2008 passport, so it does not support an inference that Defendants engaged in misconduct by withholding information called for by discovery. In fact, there is no evidence of deliberate misconduct. In a letter dated December 21, 2015 from Defendants' counsel to the Head of Human Resources for the SRA, Defendants' counsel states "any documents of this nature responsive to the plaintiffs' discovery requests would be in the possession of the Law Society of England and Wales and/or the Solicitors Regulation Authority." (Drooks Decl. at Ex. 6.) The documents to which he referred are "official records of the Law Society of England and Wales and Solicitors Regulation Authority relating to the investigations of Shahrokh Mireskandari and/or Paul Baxendale-Walker, including, without limitation, all email and telephonic communications relating to the investigations, all travel records of Messrs. Mayne and Lees reflecting their trips to the United States to conduct any such investigations, Messrs. Mayne's and Lees' notes concerning witness interviews, and many other materials that none of the individual defendants maintains in his personal possession." (Id.) This letter from Defendants' counsel to the SRA indicates that Defendants were not in possession of the documents they are alleged to have concealed. Given that Defendants' counsel attempted to procure the documents Plaintiffs requested in 2015 and was unsuccessful, the Court cannot conclude that discovery material was deliberately suppressed. Plaintiffs must therefore show that they were deprived of

fully presenting the merits of their claims. Bunch v. United States, 680 F.2d 1271, 1283 (9th Cir.1982).

The Court is not persuaded that any of the evidence Plaintiffs put forth shows that Defendants' misconduct prevented them from fairly presenting their case. Plaintiffs relied on the O'Brien, Moulin, and Baron declarations to argue that this Court had personal jurisdiction over the individual defendants in opposition to Defendants' first motion to dismiss. (Dkt. No. 190, 13.) Since there would be no personal jurisdiction over Mayne had he never entered California, all of the claims against Mayne in his individual capacity are unaffected. Preventing Plaintiffs from demonstrating that Mayne never entered California, therefore, gets Plaintiffs no closer to fully presenting the merits of their claims against Mayne.

Neither the 2017 Baron Declaration nor the Bluth Email convince the Court that a "Mayne Imposter" traveled to California. Moreover, it is unlikely the Court would have altered its analysis even if it were convinced of the existence of a Mayne Imposter. Without any evidence from which to infer Mayne was motivated by personal or private interests, the Court is unable to discern why his physical presence in California is necessary to find that he was acting in his official capacity when the weight of the evidence suggests he was.

Many of the witness declarations attached in support of the Motion refer to either meetings or telephone calls with Lees and Mayne that were related to their

official duties as LSE/SRA investigators. The Declaration of William L. O'Brien, attached as Exhibit 7, states that he was contacted in April of 2008 by Mayne and Lees regarding the conduct of certain English solicitors. (O'Brien Decl., ¶ 5.) O'Brien understood from Lees and Mayne that Mireskandari was being investigated in England on suspicion of serious criminal activity, including the possible bribing of a judge. (Id. at ¶ 7.) Lees and Mayne also told O'Brien that they suspected that Mireskandari had a criminal record in California. (Id. at ¶ 10.) O'Brien states that Lees and Mayne took one statement from him in April 2008 and two more statements in July of 2008. (Id. at ¶¶ 12, 15.) O'Brien also recalled "that Mr. Mayne took notes of our conversations in a notebook that he had." (Id. at ¶ 21.)

The Declaration of John Moulin, a Deputy District Attorney in Los Angeles County, dated September 1, 2011, states that "[i]n 2008, [he] met with Mr. Barrie Mayne and Mr. Malcolm Lees." (Moulin Decl. at ¶ 1.) Moulin describes that Lees and Mayne met with him to determine whether Mireskandari had been convicted of certain crimes as part of their investigation for the SRA. (Id. at ¶ 2.) Mayne and Lees also stated that when they attempted to obtain court records for Mireskandari's suspected convictions, they were told that "the official court file had been destroyed." (Id.) These declarations indicate that Lees and Mayne (or the "Mayne Imposter") sought information on Mireskandari as part of their investigation on behalf of the LSE/SRA. The Court is, therefore, not persuaded that the new evidence would have changed the Court's

determination that the individual UK Defendants were entitled to common law immunity. Yousuf v. Samantar, 699 F.3d 763, 775 (4th Cir. 2012) ("[A] foreign official may assert immunity for official acts performed within the scope of his duty, but not for private acts where 'the officer purports to act as an individual and not as an official, [such that] a suit directed against that action is not a suit against the sovereign.'").

In dismissing Plaintiffs' claims, the Court found that the individual UK Defendants were all entitled to common law immunity because none of the allegations of fraud, witness tampering, or misconduct amounted to violations of *jus cogens* norms. The Bluth Email does not suggest that any of the UK Defendants violated *jus cogens* norms. That the LSE/SRA may have sent a private individual to aid Lees in his investigation of Plaintiffs does not arise to the types of acts found violative of *jus cogens* norms. Id. at 775 ("A *jus cogens* norm, also known as a 'peremptory norm of general international law,' can be defined as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'"). The alleged existence of a "Mayne Imposter" is insufficient to strip the UK Defendants of common law immunity because this type of immunity stands on the foreign official's actions, not his or her status, and therefore applies whether or not the individual is currently a government official. Id. Given that the acts of the imposter appear official in nature—as

they sought information related to criminal convictions for purposes of an LSE/SRA disciplinary proceeding—and Plaintiffs fail to adduce any information bearing on the imposter's true identity, the Bluth Email is unlikely to have changed the Court's common law immunity analysis.

IV. CONCLUSION

Since Plaintiffs fail to show that any of the evidence they present is "newly discovered" or would have altered the Court's March 23, 2016 Order, the Court DENIES Plaintiffs' Motion for an Indicative Ruling that it would likely entertain or grant a motion to reconsider under Rule 60(b)(2). In addition, the Court DENIES Plaintiffs' Motion for an Indicative Ruling that it would likely set aside its March 23, 2016 Order under Rule 60(b)(3) because Plaintiffs fail to prove by clear and convincing evidence that Defendants engaged in fraud or engaged in misconduct bearing on the Court's dismissal of the TAC. Finally, Rule 60(b)(6)'s catch-all provision is unavailable. This rule "has been used sparingly as an equitable remedy to prevent manifest injustice" and "is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." United States v. Alpine Land & Reservoir Co., 984 F.2d 1047, 1049 (9th Cir.1993). Plaintiffs have not satisfied that standard.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**CV 12-3861 JGB (MRWx)**	Date	March 23, 2016
Title	***Shahrokh Mireskandari et al. v. Barrington Mayne et al.***		

Present: The Honorable	JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter
Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: **Order (1) OVERRULING Plaintiffs' Objections to Magistrate Judge Wilner's Order Denying Plaintiffs' Motions to Compel (Doc. No. 232); (2) GRANTING Defendant Mansur Rahnema's Motion to Dismiss (Doc. No. 78); and (3) GRANTING the Motion to Dismiss filed by Defendants Mayne, Lees, Middleton, Townsend, and Hegarty (Doc. No. 77) (IN CHAMBERS)**

Before the Court are three matters: Plaintiffs' Objections to Magistrate Judge Wilner's Order Denying Plaintiffs' Motions to Compel, (Doc. No. 232); Defendant Mansur Rahnema's Motion to Dismiss the Third Amended Complaint ("TAC"), (Doc. No. 78); and the Motion to Dismiss the TAC filed by Defendants Barrington Mayne, Malcolm Lees, David Middleton, Anthony Townsend, and Richard Hegarty ("UK Defendants"), (Doc. No. 77). After consideration of the papers filed in support of and in opposition to the Objections and the Motions, and the arguments advanced by counsel at the March 2, 2016 hearing, the Court OVERRULES Plaintiffs' Objections, GRANTS Rahnema's Motion, and GRANTS the UK Defendants' Motion.

I. BACKGROUND

A. Plaintiffs' Claims

Plaintiffs Shahrokh Mireskandari and Paul Baxendale-Walker initiated this action in California Superior Court for the County of Los Angeles on February 17, 2012. (Complaint, Doc. No. 1, Ex A.) On May 3, 2012, the case was removed to this Court. (Notice of Removal, Doc. No. 1.) Plaintiffs filed their First Amended Complaint on May 22, 2012, (Doc. No. 9), their Second Amended Complaint on November 2, 2012, (Doc. No. 60), and their Third Amended Complaint ("TAC") on December 18, 2012, (Doc. No. 64-1[1]).

The TAC alleges eleven causes of action against various Defendants. Plaintiff Mireskandari alleges claims for:

1. Violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(b), against the following Defendants: the Law Society of England and Wales ("LSE"), the Solicitors Regulation Authority ("SRA"), David Middleton, and Anthony Townsend, (TAC ¶¶ 186-190);

2. Violation of RICO, 18 U.S.C. § 1962(c), against Defendants the LSE, the SRA, Middleton, Townsend, Barrington Mayne, Malcolm Lees,

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[1] Plaintiffs' TAC is filed as docket entry 69. However, pages 57, 58, and 62 of the TAC were omitted from the electronic version in docket entry 69. Accordingly, the Court will refer to docket entry 64-1, which is a complete version of the TAC.

the Associated Newspapers, Ltd. ("ANL"), and David Gardner, (id. ¶¶ 191-195);

3. Violation of RICO, 18 U.S.C. § 1962(d), against Defendants the LSE, the SRA, Middleton, Townsend, Mayne, Lees, Richard Hegarty, Patrick Rohrbach, Mansur Rahnema, the ANL, and Gardner, (id. ¶¶ 196-203);

4. Violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, against Defendants the LSE, the SRA, Middleton, Townsend, Mayne, and Lees, (id. ¶¶ 217-221);

5. Defamation against Defendants the LSE, the SRA, Mayne, Lees, Middleton, and Townsend, (id. ¶¶ 242-255); and

6. Defamation against Rahnema, (id. ¶¶ 256-264).

Plaintiff Baxendale-Walker alleges separate claims for:

1. Violation of RICO, 18 U.S.C. § 1962(b), against Defendants the LSE, the SRA, and Middleton, (id. ¶¶ 204-208);

2. Violation of RICO, 18 U.S.C. § 1962(c), against Defendants Middleton and Mayne, (id. ¶¶ 209-211);

3. Violation of RICO, 18 U.S.C. § 1962(d), against Defendants Middleton, Mayne, and Hegarty, (id. ¶¶ 212-216);

4. Intentional interference with actual contractual relationships against Defendants the

LSE, the SRA, Mayne, and Middleton, (id. ¶¶ 222-230); and

5. Defamation against Defendants the LSE, the SRA, Mayne, and Middleton, (id. ¶¶ 231-241).

B. Defendants' Motions to Dismiss

In January of 2013, Defendants filed four separate Motions to Dismiss the TAC. (Doc. Nos. 77, 78, 91, 98.) On May 5, 2013, the Court granted the Motions as to all Defendants and dismissed the TAC with prejudice. (May 14, 2013 Order, Doc. No. 150.) On appeal, the Ninth Circuit affirmed in part and vacated in part the May 14, 2013 Order. (March 27, 2015 Ninth Cir. Order, Doc. No. 158.) The Ninth Circuit affirmed the dismissal of Defendants the LSE, the SRA, the ANL, Rohrbach, and Gardner. (Id. ¶¶ 1,2,4, 5.) The Ninth Circuit vacated the dismissal of Mayne, Lees, Middleton, Townsend, Hegarty, and Rahnema, and remanded the matter for further consideration. (Id. ¶¶ 3, 6.)

As to Defendant Mansur Rahnema, this Court initially found that it did not have personal jurisdiction over the only claim against him, violation of RICO, 18 U.S.C. § 1692(d), and dismissed Rahnema from the case. (May 14, 2013 Order at 14-17.) The Ninth Circuit vacated that finding on the grounds that this Court failed to consider Mireskandari's claim for defamation against Rahnema.[2] (March 27, 2015 Ninth Cir. Order

[2] This is because the electronic version of the TAC upon which the Court relied was missing several pages, including the page containing Mireskandari's defamation claim against

¶ 6.) On remand, the Ninth Circuit has directed the Court to consider whether Mireskandari's defamation claim supports a finding of personal jurisdiction. (Id.) The Court may also consider Rahnema's other arguments for dismissal that were not addressed in the May 14, 20913 Order. (Id.) Accordingly, Rahnema has the following grounds for dismissal remaining:

- Whether Mireskandari's claim for defamation supports a finding of personal jurisdiction;
- Forum non conveniens;
- Litigation privilege;
- Improper joinder; and
- Failure to state a RICO cause of action.

("Rahnema MTD," Doc. No. 78.)

As to Defendants Mayne, Lees, Middleton, Townsend, and Hegarty (the "UK Defendants"), the Court initially found that these Defendants are immune from suit pursuant to the Foreign Sovereign Immunities Act ("FSIA"). (May 14, 2013 Order at 10-14.) The Ninth Circuit reversed on the grounds that the FSIA does not provide immunity to officials acting on behalf of a foreign state. (March 27, 2015 Ninth Cir. Order ¶ 3 (citing Samantar v. Yousuf, 560 U.S. 305, 319 (2010).) On remand, the Ninth Circuit suggested that the Court consider whether dismissal of these Defendants is required under the doctrine of common law immunity.

Rahnema. (March 27, 2015 Ninth Cir. Order at ¶ 6.) The Court now relies on a complete version of the TAC. (See Doc. No. 64-1.)

(Id.) In addition to the issue of common law immunity, the UK Defendants have the following grounds for dismissal remaining:

- Lack of personal jurisdiction;
- Forum non conveniens;
- Litigation privilege;
- Improper joinder; and
- Failure to state a RICO cause of action.

("LSE/SRA MTD," Doc. No. 77.)

C. Plaintiffs' General Factual Allegations

Because the factual allegations pertaining to Rahnema and the UK Defendants differ in substantial respects, the Court will discuss Plaintiffs' specific allegations in more detail below.

Generally, however, Plaintiffs allege that the LSE is a legal entity charged with the supervision and regulation of solicitors in England and Wales, and the SRA, which is part of the LSE, regulates and investigates solicitors who earn their fees exclusively from private clients (as opposed to receiving fees from the Crown). (TAC ¶¶ 12, 13.) The LSE and the SRA bring disciplinary complaints against solicitors to the Solicitors Disciplinary Tribunal, an independent board in England. (Id. ¶ 21.) Plaintiffs, former solicitors in England, allege that the LSE/SRA and its agents unfairly targeted them with disciplinary investigations and proceedings. (Id. ¶¶ 109, 110, 199-203, 215.)

Ultimately, Plaintiffs were each found to be ineligible to practice law in England by the Solicitors Disciplinary Tribunal. (Id. ¶¶ 22, 110.)

Plaintiffs allege that Defendants Mayne, Lees, Middleton, Townsend, and Hegarty – all citizens of the United Kingdom – were affiliated with the LSE or the SRA during the relevant period in either an investigative or supervisory capacity and that they conspired against Plaintiffs to disbar them and defame them. (Id. ¶¶ 14-18.) Plaintiffs allege the reason Defendants engaged in this illegal pattern of racketeering is because Plaintiffs are "outspoken minority solicitors" who "challeng[ed] power entities such as those sued in this case." (Id. ¶ 1.) Defendants allegedly retaliated against Plaintiffs by "attack[ing] Plaintiffs' solicitor licenses as well as coordinating efforts" with the Daily Mail, a British tabloid, to discredit and defame Plaintiffs. (Id.)

Plaintiffs also allege Rahnema, who is a Virginia resident and former client of Mireskandari, acted as an agent of the LSE/SRA and conspired with the UK Defendants against Mireskandari, specifically. (Id. ¶ 20.)

II. PLAINTIFFS' OBJECTIONS TO JUDGE WILNER'S ORDER

Following the Ninth Circuit's Order, Plaintiffs filed an ex parte application requesting: (1) leave to supplement their oppositions to the remaining Defendants' motions with evidence; (2) leave to conduct jurisdictional discovery on the issues of personal jurisdiction and forum non conveniens; and (3)

permission to consolidate the issues presented in the motions to include the issue of common law immunity. (Doc. No. 177.) On September 30, 2015, the Court granted Plaintiffs' ex parte application. (Sept. 30, 2015 Order, Doc. No. 184.) The Court permitted Plaintiffs to serve one set of written interrogatories and one set of written requests for production of documents to each remaining Defendant regarding the issues of personal jurisdiction and forum non conveniens. (Id. at 3.) The Court also directed the parties to submit supplemental briefing on the issue of common law immunity. (Id. at 4.)

On November 11, 2015, Plaintiffs filed another ex parte application, this time to continue the hearing on the motions to dismiss to allow time for Plaintiffs to bring motions to compel further responses. (Doc. No. 185.) The Court granted this request on November 17, 2015. (Doc. No. 194.) Plaintiffs promptly filed over a dozen motions to compel, and a hearing was held before Magistrate Judge Michael R. Wilner on January 12, 2016. (Doc. No. 223.)

After a lengthy hearing on the motions, Judge Wilner denied all of Plaintiffs' motions to compel, holding that, "on their face, the discovery requests violate basic provisions of the Federal Rules of Civil Procedure and Judge Bernal's order regarding discovery." (Jan. 12, 2016 MJ Order at 1, Doc. No. 224.) He reasoned that this Court's Order permitting jurisdictional discovery was limited to the issues of forum non conveniens and personal jurisdiction, yet Plaintiffs' discovery requests admittedly sought extensive information

regarding the issue of common law immunity. (Id.; see also Transcript of Jan. 12, 2016 Hearing at 14:19-15:1, Doc. No. 233-37.) Moreover, Judge Wilner found that "the scope and nature of the requests were almost uniformly extraordinarily broad." (Jan. 12, 2016 Order at 1.) The requests were not proportional to the needs of the case, but were "so patently overbroad, unfocused, ill-conceived, and abusive that they reek of illicit gamesmanship." (Id. at 2.) As such, Judge Wilner exercised his discretion to not compel further responses to the disproportionate requests. (Id.)

Alternatively, Judge Wilner reasoned that, "[e]ven if the requests did not represent the height of abusive litigation," he would still have no basis to award relief because Plaintiffs failed to convincingly demonstrate that any of the individual Defendants had possession, custody, or control of the records maintained by LSE and SRA. (Id.) "In the end, Plaintiffs received relatively clear answers from the Defendants regarding the documents they have and the information they remember. The Court has no factual basis to compel anything further." (Id.)

Following Judge Wilner's Order, on January 26, 2016, Plaintiffs filed objections to his denial of their motions to compel. (Objections, Doc. No. 232.) The UK Defendants filed a response to Plaintiffs' objections on February 1, 2016. (Doc. No. 236.)

Pursuant to Federal Rule of Civil Procedure 72(a), when a non-dispositive pretrial matter is referred to a magistrate judge, a party may serve and file objections

to the magistrate judge's order within fourteen days of being served with the order.[3] Fed. R. Civ. P. 72(a). The district judge must then "consider timely objections and modify or set aside any part of the order that is clearly erroneous or contrary to law." Id.

The Court has reviewed Judge Wilner's Order and Plaintiffs' objections thereto and finds that Judge Wilner's Order is not clearly erroneous or contrary to law. Plaintiffs' objections are largely premised on the contention that this Court's September 30, 2015 Order permitted Plaintiffs to take discovery on the issue of common law immunity. (Objections at 10-11.) It did not. The Order specifically limited Plaintiffs to supplementing their briefs "with evidence regarding the issues of personal jurisdiction and forum non conveniens." (Sept. 30, 2015 Order at 3.) Plaintiffs argue because they attached to their ex parte application proposed discovery requests that "were clearly directed at common law immunity," this necessarily means that the Court approved of those requests. (Objections at 4-5.) Plaintiffs are mistaken. The Order explicitly stated, "The parties shall not interpret this Order as an order compelling responses by Defendants' to Plaintiffs' discovery requests. The Court makes no determination as

[3] In violation of Local Rule 72-2.1, the objections filed by Plaintiffs were not filed as a properly-noticed motion. See L.R. 72-2.1 ("Any party objecting under F. R. Civ. P. 72(a) to a Magistrate Judge's ruling on a pretrial matter not dispositive of a claim or defense must file a motion for review by the assigned District Judge . . . "). The Court will nonetheless rule on Plaintiffs' objections.

to the propriety of any discovery requests drafted by Plaintiffs." (Sept. 30, 2015 Order at 3, fn. 4.)

The Court is persuaded by Judge Wilner's reasoning that the 566 discovery requests Plaintiffs served on Defendants were extraordinarily broad. The requests went far beyond the scope of this Court's Order and were not proportional to the needs of the case. See Fed. R. Civ. P. 26(b)(1). Moreover, the Court agrees that Plaintiffs received sufficient answers from Defendants as to the relatively few requests propounded that were relevant to the issues of personal jurisdiction and forum non conveniens.

Accordingly, Plaintiffs' objections are OVERRULED.

III. RAHNEMA MOTION TO DISMISS

Mireskandari alleges two claims against Rahnema: a RICO violation, 18 U.S.C. § 1692(d), and defamation. (TAC ¶¶ 201, 256.) Rahnema seeks dismissal of these claims due to lack of personal jurisdiction, failure to state a claim for the RICO violation, litigation privilege, forum non conveniens, and improper joinder. (Rahnema MTD at 5-19.) As explained below, the Court finds that it has personal jurisdiction over Mireskandari's claims, but Mireskandari's defamation claim is barred by the litigation privilege and the TAC fails to state a claim against Rahnema for conspiracy to violate RICO.

A. Allegations in the TAC

Mireskandari claims that Rahnema is his former client, and that, in 2008, an English court entered judgment against Rahnema in the amount of £800,000. (Id. ¶ 100.) Subsequently, a representative of the SRA allegedly instructed Rahnema not to pay the judgment, because if he complied, the SRA could justify an intervention into Mireskandari's affairs by alleging that Mireskandari was under financial pressure. (Id.) Mireskandari alleges that Rahnema agreed not to pay the judgment "knowing that the LSE/SRA could use the lack of monies in [Mireskandari's] firm to support the allegation that the firm was financially insecure in order to achieve the overall goal of the illegal scheme to destroy [Mireskandari's] law practice and disbar him." (Id. ¶ 201.)

Mireskandari also alleges that, in 2012, Rahnema, at the direction of the LSE/SRA, communicated with Mireskandari's doctor in California, Dr. Farzam, by email and telephone. (Id. ¶ 101.) The email, which described Mireskandari as "***THE*** biggest con artist ***ANYBODY*** ever encountered,"[4] threatened that if the doctor did not stop providing assistance to Mireskandari, Rahnema would file a complaint against the doctor with the California Medical Society. (Id. ¶ 173(k).) Rahnema also allegedly contacted Mireskandari's counsel in California, Hayes Michel, and told him that Mireskandari was a "crook" and

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[4] Emphasis in original. (TAC ¶ 173(k); see also April 18, 2012 E-mail, Doc. No. 237-4 at 53.)

"evil" and that Mireskandari "deserved to suffer." (Id. ¶ 173(l).) During this conversation, Rahnema allegedly stated that if he ever saw Mireskandari, he would shoot him. (Id. ¶ 185.)

B. Personal Jurisdiction

1. Legal Standard

"The general rule is that personal jurisdiction over a defendant is proper if it is permitted by a long-arm statute and if the exercise of that jurisdiction does not violate federal due process." Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1154-55 (9th Cir. 2006) (citing Fireman's Fund Ins. Co. v. Nat. Bank of Coops., 103 F.3d 888, 893 (9th Cir. 1996)). Because California authorizes jurisdiction to the fullest extent permitted by the Constitution, see Cal. Code Civ. P. § 410.10, the question the Court must ask in this case is whether the exercise of jurisdiction over Rahnema would be consistent with due process. Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1129 (9th Cir. 2003).

The Fourteenth Amendment's Due Process Clause permits courts to exercise personal jurisdiction over any defendant who has sufficient "minimum contacts" with the forum such that the "maintenance of the suit does not offend traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). Such contacts do not require a defendant to physically enter the forum state. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985). There

are two recognized bases for exercising personal jurisdiction over a non-resident defendant: (1) "general jurisdiction," which arises where defendant's activities in the forum state are sufficiently "substantial" or "continuous and systematic" to justify the exercise of jurisdiction over him in all matters; and (2) "specific jurisdiction," which arises when a defendant's specific contacts with the forum give rise to the claim in question. See Helicopteros Nacionales de Colombia S.A. v. Hall, 466 U.S. 408, 414–16 (1984). Only specific jurisdiction is raised here. (Opp. to Rahnema MTD at 3, Doc. No. 103.)

The Ninth Circuit has established a three-prong test for analyzing a claim of specific personal jurisdiction: (1) the non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof, or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, meaning it must be reasonable. Lake v. Lake, 817 F.2d 1416, 1421 (9th Cir. 1987). The plaintiff bears the burden of satisfying the first two prongs of the test. Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 803 (9th Cir. 2004). If the plaintiff fails to satisfy either of these prongs, personal jurisdiction is not established. Id. If the plaintiff succeeds in satisfying both of the first two prongs, the burden then shifts

to the defendant to "present a compelling case" that the exercise of jurisdiction would not be reasonable. Burger King, 471 U.S. at 476-78.

Under the first prong of the test, Mireskandari must establish either that Rahnema "purposefully availed" himself of the privilege of conducting activities in California, or "purposefully directed" his activities toward California. Schwarzenegger, 374 F.3d at 802. The purposeful availment analysis "is most often used in suits sounding in contract." Id. By contrast, the purposeful direction analysis "is most often used in suits sounding in tort." Id. Both parties agree that the purposeful direction test is appropriate here. (Rahnema MTD at 7; Rahnema MTD Opp. at 3-4.)

To establish specific personal jurisdiction though "purposeful direction," the Ninth Circuit uses the "effects" test, which was first articulated in Calder v. Jones, 465 U.S. 783 (1984). See Schwarzenegger, 374 F.3d at 803. The "effects" test requires plaintiffs to sufficiently allege that the defendant "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." Dole Food Co. v. Watts, 303 F.3d 1104, 1111 (9th Cir. 2002); see also Walden v. Fiore, 134 S. Ct. 1115, 1123 (2014) ("A forum State's exercise of jurisdiction over an out-of-state intentional tortfeasor must be based on intentional conduct by the defendant that creates the necessary contacts with the forum.")

2. Analysis

Mireskandari has sufficiently alleged that Rahnema committed an intentional act. "Intent" in the context of the "intentional act" test is "an intent to perform an actual, physical act in the real world, rather than an intent to accomplish a result or consequence of that act." Schwarzenegger, 374 F.3d at 806. Calling and sending an email to Mireskandari's doctor in California and calling Mireskandari's counsel in California are intentional acts. (TAC ¶¶ 101, 185.) Rahnema does not dispute this. (Rahnema MTD at 8; Supp. Reply to Rahnema MTD at 3, Doc. No. 239.) Accordingly, this element is satisfied.

With regard to the second and third elements of the test, the Ninth Circuit has warned against focusing too narrowly on the test's third prong, the effects prong. Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1156 (9th Cir. 2006). Rather, "something more" is needed than merely foreseeing an effect in the forum state. Id. (citing Bancroft & Masters, Inc. v. Augusta National, Inc., 223 F.3d 1082, 1087 (9th Cir. 2000)). The "something more" is conduct expressly aimed at the forum state. Id. "Express aiming . . . is satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state." Bancroft, 223 F.3d at 1087. Here, Plaintiff has satisfied both elements. As explained below, Rahnema is alleged to have targeted Mireskandari when he defamed Mireskandari to Dr. Farzam and Michel in California, and he knew his

conduct would cause Plaintiff harm in California because he knew Plaintiff was a resident of the forum state.

"In judging minimum contacts, a court properly focuses on the relationship among the defendant, the forum, and the litigation." Calder, 465 U.S. at 788 (internal quotations omitted). In Calder, a news publication was alleged to have printed a libelous story regarding a California resident. Id. at 784. The Supreme Court found the following contacts with California sufficient to support personal jurisdiction over the out-of-state tortfeasor: phone calls to "California sources" for information for the story; details in the article regarding the plaintiff's activities in California; causing reputational injury in California by circulating the article within the State; and the "brunt" of the injury was suffered by the plaintiff in that state. Id. at 788-789; see also Walden, 134 S. Ct. at 1123 (discussing Calder's findings with approval).

Here, the TAC alleges that in 2012, Rahnema contacted two residents of California, Dr. Farzam and Hayes Michel, wherein he defamed Mireskandari by calling him a con artist, a crook, and evil. (TAC ¶¶ 258-264.) Moreover, in the email Rahnema sent Dr. Farzam – a copy of which was submitted in support of Mireskandari's opposition to this motion – Rahnema states Mireskandari "was jailed for fraud in Ventura, CA." (April 18, 2012 Email, Doc. No. 237-4 at 53.) These contacts – phone calls to persons in California and details of the plaintiff's forum state activities in

publications – are equivalent to at least two of the contacts in Calder, 465 U.S. at 788-789.

Further, there is sufficient evidence to establish that Rahnema knew that Mireskandari resided in California during the relevant time period and, as such, that his actions were likely to cause Mireskandari harm in California. In a related case, Rahnema testified that in 2012, he knew Mireskandari was allegedly "too ill" to travel to London. (Deposition of Mansur Rahnema, Feb. 18, 2014 ("Rahnema Dep."), at 115:1-5, Ex. C to Declaration of Mark Reusch ("Reusch Decl."), Doc. No. 237-1.) He knew this because Mireskandari's physician, Dr. Farzam, authored the report recommending Mireskandari not travel due to his illness. (Id.) Dr. Farzam was located in California. (Rahnema Dep. at 111:13-16.) In the April 18, 2012 e-mail Rahnema sent to Dr. Farzam – at the e-mail address "info@houseCallDoctorLA.com" – he stated, "I hope you do not force me to complain against you to the [California] Medical Society." (See April 18, 2012 Email, Doc. No. 237-4 at 53; see also Rahnema Dep. at 111:13-15.) Rahnema also wrote in a separate letter, "My investigations of this Iranian physician house-call doctor have shown that he does not have a good reputation in the community." (Rahnema Dep. at 115:9-16.) In support of this statement – written about Dr. Farzam – Rahnema testified that he called physicians in California to ascertain Farzam's reputation. (Id. at 115:15-116:7.) All of this leads to only one reasonable conclusion: Rahnema knew Mireskandari was residing in California in 2012 because he was being treated by a

doctor there – the same doctor who recommended that Mireskandari not travel to London because he was too ill to do so.

Further, Rahnema knew that, in 2005, the Daily Mail and the LSE sent detectives to California to investigate Mireskandari's education, indicating that Rahnema was aware of Mireskandari's prior ties to the forum state. (Rahnema Dep. at 50:16-20.) Further, Linda Groberg, a court employee in Ventura County, testified that, in 2009, Rahnema contacted the Ventura County courthouse "looking for some help locating Sean or something to do with Sean Mireskandari." (Deposition of Linda Groberg, Oct. 8, 2014, at 83:4-23, Ex. F to Reusch Decl.) This is further support for the conclusion that Rahnema was aware that Mireskandari was residing in California during the relevant time period.

Because the Court finds that Rahnema knew Mireskandari was a California resident, it follows that he knew his contacts with California would cause Mireskandari harm here. "The action for defamation is to protect the personal reputation of the injured party." Polygram Records, Inc. v. Superior Court, 170 Cal. App. 3d 543, 549 (1985); see also Paul v. Davis, 424 U.S. 693, 721 (1976) (recognizing that individuals have a "personal interest" in their reputations). By defaming Mireskandari to his doctor and his lawyer, Rahnema was causing injury to Mireskandari's character, an injury which was personally felt by Mireskandari in California, where he resided. This is supported by the TAC, which alleges that the defamatory statements,

"denigrated [Mireskandari's] integrity, casting his character and credibility in a negative light." (TAC ¶ 260.)

It is immaterial that another alleged result of Rahnema's acts was harm to Mireskandari's law practice in England. "[T]he 'brunt' of the harm need not be suffered in the forum state. If a jurisdictionally sufficient amount of harm is suffered in the forum state, it does not matter that even more harm might have been suffered in another state." Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1207 (9th Cir. 2006). Mireskandari alleges a jurisdictionally sufficient measure of harm. The alleged harm to Mireskandari's reputation and character in California is equal to the harm alleged by the plaintiff in Calder. Therefore, any claim that Mireskandari suffered more harm in England is irrelevant under Yahoo!.

Accordingly, the Court finds that Rahnema's contacts with the forum state and the resulting harm suffered therein suffice to justify the exercise of personal jurisdiction in this case.

C. Forum Non Conveniens

Rahnema argues that this suit must be dismissed because this is an inconvenient forum. (Rahnema MTD at 11.) "A federal court has discretion to dismiss a case on the ground of forum non conveniens when an alternative forum has jurisdiction to hear the case, and trial in the chosen forum would establish oppressiveness and vexation to a defendant out of all proportion to

plaintiff's convenience, or the chosen forum is inappropriate because of considerations affecting the court's own administrative and legal problems." Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 429 (2007) (internal quotations omitted). A defendant invoking forum non conveniens bears a "heavy burden" opposing the plaintiff's chosen forum. Id. at 430.

The threshold requirement for a forum non conveniens dismissal is that an adequate alternative forum is available to the plaintiff. Lueck v. Sundstrand Corp., 236 F.3d 1137, 1143 (9th Cir. 2001). The Supreme Court has held that an alternative forum ordinarily exists when the defendant is amenable to service of process in the foreign forum. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n. 22 (1981); Contact Lumber Co. v. P.T. Moges Shipping Co., 918 F.2d 1446, 1449 (9th Cir. 1990). Rahnema does not meet this threshold requirement because he does not indicate in any of his moving papers that he is amenable to service of process in England. For this reason alone, Rahnema's request for dismissal on forum non conveniens grounds fails.

Also of significance, Rahnema does not contend England has jurisdiction to hear Mireskandari's defamation claim. This is of particular concern because the alleged defamatory acts occurred within the United States, between U.S. residents, concerning another U.S. resident. Rather, Rahnema baldy asserts, "this case plainly involves English law," without specifying how, precisely, Mireskandari could proceed

against Rahnema in an English court of law. Accordingly, the Court finds that Rahnema has not met his "heavy burden" of establishing that an alternative forum exists to adjudicate this dispute, and the Court denies his motion to dismiss on forum non convienens grounds.

D. Litigation Privilege

Rahnema next contends that California's statutory litigation privilege bars Mireskandari's defamation claim. (Rahnema MTD at 16-18.) For the following reasons, the Court agrees.

In California, the litigation privilege applies to "any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." Silberg v. Anderson, 50 Cal. 3d 205, 212 (1990); see also Cal. Civ. Code § 47(b). "Although originally enacted with reference to defamation, the privilege is now held applicable to any communication, whether or not it amounts to a publication, and all torts except malicious prosecution." Id. at 212 (citations omitted). The privilege applies to pre-litigation communications as well as those occurring during the course of actual litigation. Nguyen v. Proton Tech. Corp., 69 Cal. App. 4th 140, 147 (1999). "It is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards." Rusheen v. Cohen, 37 Cal. 4th 1048,

1057 (2006) (extending the litigation privilege to post-judgment collection activities, including the fabrication of a service of process document). It "protects attorneys, judges, jurors, witnesses, and other court personnel." Mattco Forge, Inc. v. Arthur Young & Co., 5 Cal. App. 4th 392, 402 (1992); see also Kimes v. Stone, 84 F.3d 1121, 1126-27 (9th Cir. 1996).

Mireskandari alleges the following statements by Rahnema defamed him: (1) Rahnema's statements to attorney Hayes Michel during a telephone conversation on July 12, 2012 wherein Rahnema referred to Mireskandari as a "crook" and an "evil" person who "deserved to suffer," (TAC ¶ 259); and (2) Rahnema's telephone call and e-mail to Dr. Farzam on April 18, 2012 wherein he called Mireskandari a "con artist" and accused Mireskandari of being jailed for fraud in 1998, (id. ¶ 258). The Court addresses each statement in turn.

1. Rahnema's Statements to Hayes Michel

On July 12, 2012, Rahnema telephoned Hayes Michel and, in the course of that conversation, referred to Mireskandari as a "crook" and an "evil" person who "deserved to suffer." (TAC ¶ 259.) Rahnema's statements to Hayes Michel fall squarely within the litigation privilege. At the time the statements were made, Plaintiffs were represented in this proceeding by Michel and had already filed the First Amended Complaint in this matter naming Rahnema as a Defendant. (See Doc. Nos. 9, 13.) The TAC alleges that "Rahnema

made these statements with the specific intent to discourage Michel from representing [Mireskandari] in his legal proceedings against Defendants." (TAC ¶ 173(l).) At the hearing on this matter, counsel for Mireskandari conceded that these statements are barred by the litigation privilege. (Transcript from March 2, 2016 Hearing at 11:8-21, Doc. No. 249.) The Court agrees and finds that the statements were (1) made in a legal proceeding—this one, (2) by a litigant—Defendant Rahnema, (3) to achieve the objects of the litigation—namely, to get Plaintiffs' counsel to stop representing Plaintiffs so that the case would resolve. The litigation privilege therefore applies, and these statements cannot form the basis of a defamation claim against Rahnema.

2 Rahnema's Statements to Dr. Farzam

On April 18, 2012, Rahnema sent the following e-mail to Dr. Farzam, Mireskandari's doctor:[5]

> **Subject:** Emailing: Letter to whom it may concern about Mireskandari's excuses not to appear in London's court

[5] Neither party disputes the authenticity of this e-mail, which was submitted as evidence in support of Mireskandari's opposition to Rahnema's Motion. (See Ex. K to Reusch Decl., Doc. No. 237-4 at 53.) Thus, the Court will consider the entire contents of the allegedly defamatory e-mail in analyzing whether the litigation privilege applies.

> Dear Dr. Farzam,
>
> We just spoke, and I told you that you should ***NOT*** protect ***THE*** biggest con artists ***ANYBODY*** ever encountered—Shahrokh Mirskandari!!!
>
> Please investigate his past, the least, he was jailed for fraud in Ventura, CA in (?) 1998.
>
> He has damaged soooo many innocent clients, incl. I, in ***THE*** most devastating manner.
>
> Please, correct your absolutely wrong report. I hope you do not force me to complain against you to the Cal. Medical Society.
>
> Thank you,
>
> Mansur Rahnema, M.D., Fellow of American and The International College of Surgeons.
>
> P.S. I already gave you my ph.#
>
> Please go to Google and look at his name! I hope you have the stomach for what you are reading!!!???

(Apr. 18, 2012 E-mail, Doc. No. 237-4 at 53.)[6]

Mireskandari disputes that these were made in a judicial or quasi-judicial proceeding then in progress and that Rahnema was an "authorized participant"

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[6] The TAC also alleges that a phone call to Dr. Farzam was also placed around this time, but the TAC is silent as to the statements allegedly made during that phone call. (TAC ¶ 258.) Accordingly, the Court analyzes only the statements made in the e-mail.

covered by the privilege. (Opp. to Rahnema MTD at 20.) These contentions are without merit. Mireskandari's disbarment proceedings had not concluded at the time this e-mail was sent, which is evident from the subject line of the email itself. (See TAC ¶ 117, "In April, 2012 [Mireskandari] was seriously ill and sought an adjournment of the proceedings before the SDT. He submitted compelling medical evidence of his illness, inability to travel to England, and inability to participate in the proceedings . . . ") At the hearing on this matter, counsel for Mireskandari conceded that the disbarment proceedings had not concluded, but had been adjourned for a medical recess pending Mireskandari's medical treatment in California. (Transcript from March 2, 2016 Hearing at 13:14-14:4; see also TAC ¶¶ 117, 126-137.) Dr. Farzam wrote a medical report to the SDT in support of Mireskandari's request for a medical recess. Rahnema's telephone call and email to Farzam requested that Farzam retract the report regarding Mireskandari's illness so that the SDT proceedings could go forward. Accordingly, the statements were made while a judicial or quasi-judicial proceeding was then in progress, namely, Mireskandari's disbarment proceedings.[7]

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[7] The parties do not dispute that disbarment proceedings are judicial in nature. The SDT is a tribunal which hears complaints brought by the LSE/SRA against solicitors. (TAC ¶ 21.) It has the capacity to conduct hearings, appoint independent experts, and issue a final decision as to disbarment or suspensions of solicitors. (Id. ¶¶ 64, 65, 118.) At a minimum, the SDT is quasi-judicial in nature, and thus falls within the scope of the litigation privilege.

Further, Rahnema is an "authorized participant" covered by the privilege. The TAC alleges that Rahnema was a witness in the SDT proceedings against Mireskandari: "In exchange for providing Rahnema with confidential information that the LSE/SRA planned to shut down SM's law practice, Mayne obtained Rahnema's cooperation to provide false witness statements against SM . . . " (TAC ¶ 173(j).) Witnesses are covered by the privilege. Mattco Forge, Inc. v. Arthur Young & Co., 5 Cal. App. 4th at 402.

At the hearing on this matter, counsel for Mireskandari reversed course, claiming that Rahnema was not actually a witness in the SDT proceeding. Rather, he argued, Rahnema only "assisted the LSE in obtaining evidence" for the disbarment proceedings.[8] (Transcript from March 2, 2016 Hearing at 14:16-18.) However, this is an immaterial distinction because, even if Rahnema was not called to testify during the SDT proceeding, he nonetheless had a substantial interest in the outcome of the SDT proceedings. Rahnema allegedly "sought to interfere in those ongoing proceedings for his own economic benefit" in order to avoid paying the judgment against him. (Id. at 14-19-22; see also TAC ¶¶ 100, 101.)

California appellate courts have recognized that the scope of the litigation privilege includes "nonparties with a substantial interest in the proceeding."

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[8] Neither counsel for Rahnema nor Mireskandari could confirm whether Rahnema actually provided testimony in the SDT proceeding. (Transcript of the March 2, 2016 Hearing at 12:16-13:9, 14:12-18.)

GetFugu, Inc. v. Patton Boggs LLP, 220 Cal. App. 4th 141, 152 (2013) (citing Costa v. Superior Court, 157 Cal.App.3d 673, 678 (1984) (applying the privilege to members of a fraternal lodge organization where those members had written letters regarding pending litigation against the lodge)); see also Doctors' Co. Ins. Servs. v. Superior Court, 225 Cal. App. 3d 1284, 1295 (1990) (applying the litigation privilege to an insurer providing a defense to a party, noting "the privilege should not be confined to the types of persons (judges, lawyers, witnesses, jurors) identified in the Restatement of Torts as qualified to assert the privilege at common law"); ITT Telecom Products Corp. v. Dooley, 214 Cal. App. 3d 307, 316 (1989) (applying the litigation privilege to non-witness expert consultants to litigants); Ingrid & Isabel, LLC v. Baby Be Mine, LLC, 70 F. Supp. 3d 1105, 1141 (N.D. Cal. 2014 (applying the privilege to third party sellers of a patented product). Accordingly, the litigation privilege extends to Rahnema because he had a substantial interest in the outcome of the SDT proceedings—specifically, an interest in not paying the legal fees he owed to Mireskandari.

Finally, these statements satisfy the third and fourth prongs of litigation privilege because they are logically related to the proceedings. Silberg, 50 Cal. 3d at 219-220 ("The requirement that the communication be in furtherance of the objects of the litigation is, in essence, simply part of the requirement that the communication be connected with, or have some logical relation to, the action, i.e., that it not be extraneous to the action"). Rahnema allegedly made these

statements "with the specific intent that Farzam would not testify in [Mireskandari's] favor." (TAC ¶ 173(k)). This ostensibly would have forced the disbarment proceedings to go forward, which ultimately would have finalized Mireskandari's disbarment. In concluding that the "interests of justice" test must be rejected, Silberg noted that "[t]he 'furtherance' requirement was never intended as a test of a participant's motives, morals, ethics or intent[,]" and the "interests of justice" test is "wholly inconsistent with the numerous cases in which fraudulent communications or perjured testimony have nevertheless been held privileged." 50 Cal. 3d at 218. As such, it is irrelevant whether the objects of Rahnema's statements may have been morally repugnant. It only matters that the statements are "logically related" to the subject matter of the action, which they are.

The litigation privilege therefore applies to Rahnema's statements to Dr. Farzam because they were made by an authorized participant with a substantial interest in the outcome of a judicial or quasi-judicial proceeding – namely, a disbarment matter before a tribunal – in furtherance of the objects of the litigation. These statements cannot then form the basis of a defamation claim against Rahnema, and Mireskandari's defamation claim is DISMISSED WITH PREJUDICE.

E. RICO Conspiracy Claim

The RICO statute provides a civil remedy for acts involving racketeering or the collection of debt. See 18

U.S.C. § 1692. Only those acts described in § 1961(1) may form the basis for a racketeering claim. See 18 U.S.C. § 1961(1). In addition to outlawing substantive offenses, § 1962(d) prohibits conspiracies which violate any of RICO's substantive provisions. Section 1962(d) provides, in full, that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." In order to sustain a conspiracy claim, plaintiffs must allege either that the defendant agreed to violate one of RICO's substantive provisions, or that the defendant himself committed two predicate acts of racketeering. Howard v. Am. Online Inc., 208 F.3d 741, 751 (9th Cir. 2000).

1. Predicate Acts

Mireskandari does not sufficiently allege that Rahnema committed any predicate acts. The TAC alleges Rahnema was involved in three predicate acts: (1) his refusal to pay a judgment he owed Mireskandari at the direction of the LSE/SRA because he knew that if Mireskandari was insolvent, that would justify the LSE/SRA's intervention into Mireskandari's practice and provide grounds for disbarment, (TAC ¶¶ 100, 201); (2) the e-mail Rahnema sent to Dr. Farzam threatening to report Farzam to the California Medical Society if Farzam did not "correct" his report opining that Mireskandari was too ill to travel to London, (id. ¶ 173(k)); and (3) his threat to Hayes Michel that he would shoot Mireskandari if he saw him, (id.

¶¶ 184-185).[9] As explained below, none of these acts constitute acts of racketeering related to the RICO conspiracy alleged in the TAC.

First, the TAC alleges that Rahnema threatened to murder Mireskandari, a predicate act under the RICO statute, when he told Hayes Michel – Mireskandari's California attorney – that if he saw Mireskandari, he would "shoot him." (TAC ¶¶ 184-185.) Although this may be a predicate act under § 1961(1), it is unrelated to the RICO conspiracy alleged in the TAC. The asserted goal of the RICO enterprise was to destroy Mireskandari's law practice in England and strip him of his English law license. (Id. ¶¶ 199-203.) By contrast, Rahnema's alleged conversation with Michel in 2012 related to Michel's representation of Mireskandari in this proceeding. (Id. ¶ 173(l); see also Caption of the TAC listing Michel as attorney of record for Rahnema in this proceeding, Cal. Bar Number 141841.) There is no alleged RICO conspiracy related to this case, and there is no allegation that those statements were made in furtherance of any conspiracy to disbar Mireskandari. At the hearing on this matter, counsel for Mireskandari conceded that

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[9] At the hearing on this matter, counsel for Mireskandari argued that Rahnema's statement to Dr. Farzam that he would report Farzam to the California Medical Society was also a predicate act in furtherance of the RICO conspiracy. (Transcript from March 2, 2016 Hearing at 18:23-24, 20:16-20.) This argument fails for at least two reasons. First, the TAC does not allege this as a predicate act. Second, counsel did not identify which state or federal law this conduct violates such that it is included in § 1961(1). Accordingly, the Court does not consider it.

Rahnema's statements to Michel were not related to Mireskandari's disbarment proceedings in England. (Transcript from March 2, 2016 Hearing at 18:4-19.) Accordingly, this conversation does serve as a predicate act to the RICO enterprise alleged in the TAC.

Second, the TAC alleges that, in 2008, "the LSE/SRA contacted Rahnema and told him that he should not pay an outstanding £800,000 judgment [Mireskandari] had against Rahnema because the LSE/SRA planned to imminently shut down [Mireskandari's] law practice." (TAC ¶ 183(a).) Mireskandari alleges that this violates the Virginia state law against witness bribery, Virginia Code § 18.2-441.1, which provides: "If any person give[s], offer[s], or promise[s] to give any money or other thing of value to anyone with intent to prevent such person from testifying as a witness in any civil or criminal proceeding or with intent to cause that person to testify falsely, he shall be guilty of a Class 6 felony." The TAC alleges that the instruction to Rahnema not to pay the £800,000 "was a means of bribing him to obtain his cooperation in the investigation" and "was intended to get Rahnema to provide false statements and falsely testify against [Mireskandari]." (TAC ¶¶ 100, 183 (a).) This allegation fails to state a claim against Rahnema under the Virginia statute. It does not accuse Rahnema of violating this statute; rather it accuses the LSE/SRA of the violation. There is nothing in the Virginia statute that penalizes recipients of "thing[s] of value." Accordingly, this allegation cannot serve as a predicate act as to Rahnema. At most, this allegation establishes

knowledge by Rahnema of one predicate act committed by the LSE/SRA in furtherance of the enterprise. The Court discusses Rahnema's knowledge of this act in further detail below.

Third, Mireskandari alleges that Rahnema's email to Dr. Farzam and his refusal to pay the judgment owed to Mireskandari constitute wire fraud. (Opp. to Rahnema MTD at 15.) "Wire or mail fraud consists of the following elements: (1) formation of a scheme or artifice to defraud; (2) use of the United States mails or wires, or causing such a use, in furtherance of the scheme; and (3) specific intent to deceive or defraud." Sanford v. MemberWorks, Inc., 625 F.3d 550, 557 (9th Cir. 2010). Both wire and mail fraud require an intent to obtain money or property: "the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property."[10] McNally v. United State, 483 U.S. 350, 360 (1987).

Upon review of the history of the mail fraud statute, the Supreme Court in McNally concluded that the statute was limited to those schemes which are aimed at "wronging one in his property rights." Id. at 358-359.

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[10] Even though McNally discusses mail fraud, the analysis applies with equal weight to its successor, wire fraud. As the Supreme Court stated, "[a]lthough the mail fraud and wire fraud statutes contain different jurisdictional elements (§ 1341 requires use of the mails while § 1343 requires use of interstate wire facilities), they both prohibit, in pertinent part, 'any scheme or artifice to defraud' or to obtain money or property 'by means of false or fraudulent pretenses, representations, or promises.' " Neder v. United States, 527 U.S. 1, 20, 119 (1999).

Soon after McNally, the Supreme Court reaffirmed McNally and held that both the mail and wire fraud statutes protect property rights only. Carpenter v. United States, 484 U.S. 19, 25-27 (1987) ("Sections 1341 and 1343 reach any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises"); see also Pasquantino v. United States, 544 U.S. 349 at 355 (2005) (the elements of wire fraud at issue included "the object of the fraud be money or property in the victim's hands"); Cleveland v. United States, 531 U.S. 12, 18-20 (2000). The Ninth Circuit has followed this precedent. See United States v. Ali, 620 F.3d 1062, 1070 (9th Cir. 2010) (holding that in wire and mail fraud cases, "the intent must be to obtain money or property from the one who is deceived"); see also United States v. Lew, 875 F.2d 219, 221 (9th Cir. 1989).

Here, there is no allegation that Rahnema intended to obtain money or property from Farzam or Michel. Plaintiffs cite Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 257 (1994) for the proposition that predicate acts need not be accompanied by an underlying economic motive to sustain a substantive claim under RICO. (Opp. to Rahnema MTD at 15-16.) This argument lacks merit. Nat'l Org. for Women involved predicate acts of extortion, not fraud. 510 U.S. at 253. Where the predicate act is mail or wire fraud, plaintiffs must plead all elements, which includes the intent to obtain money or property from the one who is

deceived.[11] Ali, 620 F.3d at 1070. Accordingly, these allegations do not sufficiently allege the predicate act of wire fraud.

2. Agreement to Facilitate the Scheme

If a plaintiff does not allege, or fails to sufficiently allege, that the defendant committed two racketeering acts, he may still state a claim under § 1962(d) for conspiracy so long as the conspirator is alleged to have "intend[ed] to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense." Salinas v. United States, 522 U.S. 52, 65 (1997). "[I]t suffices that he adopt the goal of furthering or facilitating the criminal endeavor." Id. A plaintiff must allege that one participant in the enterprise committed at least two acts of racketeering and that the defendant in question "knew about and agreed to facilitate the scheme." Id. at 66. The defendant must be aware of "the essential nature and scope of the enterprise and intend[ ] to participate in it." U.S. v. Fiander,

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[11] The only exception to the requirement that wire fraud include an intent to obtain money or property is found in 18 U.S.C. § 1346, where Congress included in the definition of "scheme or artifice to defraud" a "scheme or artifice to deprive another of the intangible right of honest services." This is known as the "honest services doctrine," and it involves an offender who, in violation of a fiduciary duty, participated in bribery or kickback schemes. Skilling v. United States, 561 U.S. 358, 407 (9th Cir. 2010). The Ninth Circuit has limited § 1346 to bribery and kickback schemes. Id. at 409. There is no allegation here that Rahnema communicated with Farzam or Michel in furtherance of a bribery or kickback scheme. Accordingly, this exception does not apply.

547 F.3d 1036, 1042 (9th Cir. 2008); see also United States v. Christensen, 801 F.3d 970, 985 (9th Cir. 2015).

As pleaded, the "enterprise" here is the history of the LSE/SRA to racially discriminate against solicitors and "engage[ ] in illegal activity to destroy those solicitors in its way." (TAC ¶ 152.) Specifically, as to Mireskandari, the alleged goal of the enterprise was to disbar and destroy his law practice in England. (Id. ¶¶ 196-203.) The TAC alleges that "Rahnema joined in the conspiracy because he believed that debarring [Mireskandari] and destroying his practice would enable him to avoid paying the judgment entered against him." (Id. ¶ 201.) Although this allegation likely suffices to establish that Rahnema was aware of and agreed to the overall goal of the enterprise – to disbar Mireskandari – it is insufficient to establish that he was aware of "the essential nature and scope of the enterprise," to the extent that enterprise involved unlawful acts of racketeering.

All three substantive violations of RICO, § 1962(a), (b), and (c), explicitly proscribe a "pattern of racketeering," which requires at least two acts of racketeering activity. 18 U.S.C. § 1691(5). Accordingly, a RICO conspiracy claim must allege an agreement to facilitate a scheme of *racketeering*, not just an agreement to further the overall goal of an enterprise, particularly where, as here, the goal of that enterprise is attainable without committing unlawful acts of racketeering. See United States v. Driver, 535 F.3d 424, 432 (6th Cir. 2008) (a RICO conspiracy conviction could be sustained, even if there was not sufficient evidence

that the defendant committed two predicate acts himself or agreed to commit two predicate acts himself, as long as there was sufficient evidence that he "agreed that *someone* would commit two predicate acts"); United States v. Browne, 505 F.3d 1229, 1274 (11th Cir. 2007) ("Agreement to commit two predicate acts, and not the actual commission of two predicate acts, is the key issue in a RICO conspiracy charge.").

The TAC does not allege that Rahnema was aware of two predicate acts of racketeering taken in furtherance of the scheme to disbar Mireskandari. Rahnema is not alleged to have known about the alleged Travel Act violations, (TAC ¶¶ 168-169), or Mayne's and Lees' witness tampering, (id. ¶¶ 174-175), or the alleged wire fraud committed by Mayne and Lees. (TAC ¶ 173.) The only acts Rahnema is alleged to be aware of are his own, and the only act which arguably qualifies as a predicate act is the allegation that the LSE/SRA "bribed" Rahnema to cooperate in the investigation by telling him not to pay the £800,000.[12] (Id. ¶ 100.)

[12] The Court doubts whether this is a predicate act. Virginia Code § 18.2–441.1 prohibits only two specific forms of conduct: it "prohibits an individual from: 1) offering money or another object of value to a person with the intent to prevent that person from 'testifying as a witness' in a matter; and 2) offering money or another object of value to a person with the intent to influence that person to testify falsely." Law v. Commonwealth of Virginia, 39 Va. App. 154, 159 (2002). Here, Mireskandari alleges that the "instruction" is the "thing of value" which was intended to influence Rahnema to testify falsely. (TAC ¶ 183.) This is dubious. First, an "instruction," or information, is not an "object of value," as defined by the Virginia Appellate Court. See Law, 39 Ca. App. at 159. Second, there is no allegation that the destruction of

Because Rahnema is not alleged to have known that anyone in the enterprise committed or attempted to commit two acts of racketeering, it cannot be alleged that he "agreed to facilitate the scheme" of a pattern of racketeering. See Fiander, 547 F.3d at 1041. Even if it is reasonable to infer from Rahnema's alleged agreement to further the goal of the enterprise that he assumed his contacts in the LSE or the SRA were committing their own "acts" in furtherance of that goal, there is no allegation that Rahnema knew or understood that those acts would be acts of racketeering.

Accordingly, the Court finds that Mireskandari has failed to state a claim of conspiracy under RICO § 1962(d) against Rahnema, and GRANTS Rahnema's motion to dismiss that claim against him. Mireskandari has not sought leave to amend his complaint for a fourth time, nor has he demonstrated an ability to cure any of the deficiencies identified herein. Accordingly, this claim is DISMISSED WITH PREJUDICE.

Mireskandari's law practice would vacate the alleged judgment against Rahnema. Moreover, there is no allegation that the LSE/SRA told Rahnema that they had the power to dissolve the judgment. The TAC alleges only that the information regarding the LSE/SRA's imminent intervention into Mireskandari's practice was "highly confidential" and was intended to persuade Rahnema to provide false testimony against Mireskdandari. (TAC ¶¶ 100, 183.) On its face, this would appear not to violate the Virginia witness bribery statute. However, because this information is arguably "valuable" to Rahnema, and because it was given to him by the LSE/SRA, the Court will assume it is a predicate act for purposes of this motion.

IV. UK DEFENDANTS' MOTION TO DISMISS

The UK Defendants assert the following grounds for dismissal of Mirekandari's and Baxendale-Walker's claims: common law immunity, lack of personal jurisdiction, forum non conveniens, litigation privilege, improper joinder; and failure to state a RICO cause of action. (LSE/SRA MTD at 9-25; Supp. Reply to LSE/SRA MTD at 4-11, Doc. No. 240.) As explained below, the Court finds that the UK Defendants are all immune from suit in this matter pursuant to the doctrine of common law immunity. Alternatively, as to Defendant Hegarty, the Court lacks personal jurisdiction.

A. Common Law Immunity

In 2010, the Supreme Court in Samantar v. Yousuf, 560 U.S. 305, 325-26 (2010) ("Samantar"), ruled that the Foreign Sovereign Immunities Act ("FSIA") does not extend sovereign immunity to foreign officials. The Supreme Court reserved ruling on the issue of whether and to what extent foreign officials may assert common law sovereign immunity. Id. at 326. The Court remanded the matter so that the district court could determine in the first instance whether the foreign official in that case, Mohamed Ali Samantar, was entitled to common law sovereign immunity. Id. On remand, the district court found that Samantar was not entitled to common law immunity. Yousuf v. Samantar, No. 1:04cv1360 (LMB/JFA), 2011 WL 7445583 (E.D. Va. Feb. 15, 2011). On appeal, the Fourth Circuit affirmed, and in so doing, outlined the contours of

common law immunity for foreign officials post-Samantar. Yousuf v. Samantar, 699 F.3d 763 (4th Cir. 2012) ("Yousuf"), cert. denied, 134 S. Ct. 897 (2014). Yousuf concluded that there are two common law immunity doctrines available to foreign officials: head-of-state immunity and conduct-based immunity. Yousuf, 699 F.3d at 774. Only conduct-based immunity is asserted here. (Supp. Reply to LSE/SRA MTD at 4-11.)

The Fourth Circuit described conduct-based immunity as follows:

> [F]oreign officials are immune from "claims arising out of their official acts while in office." Restatement (Third) of Foreign Relations Law § 464, reprt. note 14; Matar, [v. Dichter, 563 F.3d 9, 14 (2d Cir. 2009)] ("An immunity based on acts—rather than status—does not depend on tenure in office."). This type of immunity stands on the foreign official's actions, not his or her status, and therefore applies whether the individual is currently a government official or not. See Chimene I. Keitner, *Officially Immune? A Response to Bradley and Goldsmith*, 3 6 Yale J. Int'l L. Online 1, *9 (2010) ("Conduct-based immunity is both narrower and broader than status-based immunity: it is narrower, because it only provides immunity for specific acts . . . but it is also broader, because it endures even after an individual has left office."). This conduct-based immunity for a foreign official derives from the immunity of the State: "The doctrine of the imputability of the acts of the individual to the State . . . in classical law . . . imputes the act solely to the

> state, who alone is responsible for its consequence. In consequence any act performed by the individual as an act of the State enjoys the immunity which the State enjoys." Hazel Fox, The Law of State Immunity at 455 (2d ed. 2008).

Yousuf, 699 F.3d at 774.

Yousuf went on to note that prior to the enactment of the FSIA, the Supreme Court had embraced the international law principle that sovereign immunity extends to an individual official acting on behalf of the foreign state. See Underhill v. Hernandez, 168 U.S. 250, 252 (1897). The Restatement (Second) of Foreign Relations Law subsequently codified the doctrine: "[t]he immunity of a foreign state . . . extends to . . . any . . . public minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state." Restatement (Second) of Foreign Relations Law § 66(f); see Yousuf, 699 F.3d at 774.

In determining the contours of conduct-based common law immunity after Samantar, the Fourth Circuit relied upon pre-Samantar circuit court cases which, although almost all involved the erroneous application of the FSIA to foreign officials, were nonetheless instructive for post-Samantar questions of common law immunity. Id.; see Belhas v. Ya'alon, 515 F.3d 1279, 1285 (D.C. Cir. 2008) (observing that the FSIA had incorporated the well-settled principle of international law that former officials could still claim immunity for acts performed on behalf of the government); Chuidian

v. Philippine Nat'l Bank, 912 F.2d 1095, 1106 (9th Cir. 1990) (recognizing that an individual is not "entitled to sovereign immunity for acts not committed in his official capacity" and explaining that where "the officer purports to act as an individual and not as an official, a suit directed against that action is not a suit against the sovereign") (internal citations omitted); Hilao v. Estate of Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation), 25 F.3d 1467, 1472 (9th Cir. 1994) (stating that "[i]mmunity is extended to an individual only when acting on behalf of the state because actions against those individuals are the practical equivalent of a suit against the sovereign directly" and that "[a] lawsuit against a foreign official acting outside the scope of his authority does not implicate any of the foreign diplomatic concerns involved in bringing suit against another government in United States courts") (internal quotation marks omitted); Matar, 563 F.3d at 14 (concluding that even if the foreign official defendant was not entitled to statutory immunity under the FSIA, he was "nevertheless immune from suit under common-law principles [i.e., conduct-based foreign official immunity] that pre-date, and survive, the enactment of that statute").

Drawing from these cases, the Fourth Circuit concluded that "a foreign official may assert immunity for official acts performed within the scope of his duty, but not for private acts where 'the officer purports to act as an individual and not as an official, [such that] a suit directed against that action is not a suit against the sovereign.' A foreign official will therefore not be able

to assert this immunity for private acts that are not arguably attributable to the state, such as drug possession or fraud." Yousuf, 699 F.3d at 775 (citing Chuidian, 912 F.2d at 1106).

Ultimately, even though Samantar was a foreign official acting within the scope of his duties, the Fourth Circuit concluded that he was nonetheless not entitled to common law sovereign immunity because the acts of which he was accused – torture, extrajudicial killings, and other human rights violations – violated *jus cogens norms*, or the norms of international law. Yousuf, 699 F.3d at 776.

Prior to Samantar, the Ninth Circuit had extended sovereign immunity under the FSIA to foreign officials when those officials acted in their official capacities. See Chuidian, 912 F.2d at 1106-07. The Ninth Circuit has yet to address the issue of common law immunity for foreign officials post-Samantar. The Court finds the reasoning of the Fourth Circuit in Yousuf detailed and persuasive, and as such, will apply it to the facts of this case. See Richardson v. Attorney Gen. of the British Virgin Islands, No. CV 2008-144, 2013 WL 4494975, at *15-17 (D.V.I. Aug. 20, 2013) (applying Yousuf to the question of common law immunity for a foreign official post-Samantar where the Third Circuit had yet to comment on the issue).

1. Defendant Middleton

The TAC alleges that, from 2000 to 2007, Defendant Middleton was the Head of Investigation and

Enforcement for the Office for Supervision of Solicitors ("OSS"), a division of the LSE. (TAC ¶¶ 12, 16.) Since March 2007, Middleton has been the Executive Director of the SRA. (Id. ¶ 16.) As an official for the LSE and SRA, entities which the Ninth Circuit found "engage in a public activity on behalf of the foreign government,"[13] Middleton is alleged to have directed his employees to conduct the investigations of Plaintiffs complained of in the TAC. (Id. ¶¶ 14-16, 35, 44, 46, 80, 153, 158.) More specifically, Plaintiffs allege Middleton directed an accounting firm to prepare a misleading report that smeared Baxendale-Walker, (id. ¶ 35); controlled the outcome of an adjudication panel in the discipline of Baxendale-Walker, (id. ¶¶ 38, 44-45, 67); and directed Mayne and Lees to travel to California to investigate Mireskandari and intimidate witnesses from testifying on his behalf, (id. ¶ 80).

Although Plaintiffs allege that Middleton acted improperly while carrying out his duties in his capacity as an official for the SRA, there is no allegation that Middleton purported to act in any capacity other than in his official capacity. Indeed, directing employees to conduct investigations and communicating with accounting firms and adjudication panels is precisely the kind of conduct the Head of Investigations and the Executive Director of a solicitors' regulatory body would be expected to perform. This is true even though Plaintiffs allege Middleton undertook these duties in violation of U.S. law. (See Supp. Opp. to LSE/SRA MTD

[13] March 27, 2015 Order ¶ 1.

at 18-20.) Common law immunity functions to protect foreign officials from standing accused of violating American laws when those acts are performed within the scope of his official duty. Yousuf, 699 F.3d at 775. Common law immunity would be an entirely superfluous legal doctrine if it only protected officials who were not accused of any wrongdoing. Therefore, the fact that Middleton's actions may or may not have violated U.S. law is not controlling for purposes of this analysis. Rather, it is only those acts which are so heinous that they violate *jus cogens norms* of international law – such as prohibitions against torture, genocide, indiscriminate executions, and prolonged arbitrary imprisonment – that operate to deprive a foreign official of common law immunity. Id. No such acts are alleged to have occurred here.

Plaintiffs rely on Richardson for the proposition that criminal acts in violation of American law preclude officials from asserting common law sovereign immunity. (Supp. Opp. to MTD at 18.) The Court is not persuaded. In Richardson, a customs officer of the British Virgin Islands stood accused of negligently operating a government vessel after he arrested private citizens suspected of violating the law. 2013 WL 4494975 at *1. The analysis in Richardson turned on whether the acts the officer undertook "comport[ed] with that of a customs officer undertaking his official duties," not whether the acts were tortious. Id. *16. This is consistent with the precedent set by Yousuf. The official in Richardson was not accused of violating any U.S. criminal statute, which is perhaps the

impetus for the court's reasoning that, "[t]here is no indication that Donovon undertook private or criminal acts in violation of American law." 2013 WL 4494975 at *16. To the extent Richardson stands for the proposition that violations of U.S. criminal law – as opposed to *jus cogens norms* of international law – operate to deprive a foreign official of common law sovereign immunity, this Court does not follow it. Yousuf held that only violations of *jus cogens norms*, not criminal laws generally, operate as a bar to common law immunity. 669 F.3d at 775.

Accordingly, the Court finds that the acts allegedly undertaken by Middleton were within the scope of his duties as the Executive Director of the SRA and the Head of Investigation and Enforcement for the OSS. Middleton is therefore immune from suit in this matter, and the Court may not properly exercise subject matter jurisdiction over the claims asserted against him.

2. Defendant Townsend

Defendant Townsend was the Chief Executive Officer of the SRA "at all relevant times." (TAC ¶ 17.) He is accused of directing Defendants Mayne and Lees to travel to California on three separate occasions to investigate Mireskandari. (Id. ¶ 80.) The TAC also alleges that Townsend was summoned to the House of Parliament to answer accusations of racism at the LSE/SRA. (Id. ¶ 74.) Townsend also allegedly received an email in 2008 which purportedly demonstrates

that the LSE/SRA planned to retaliate against Mireskandari. (Id. ¶¶ 78-79.) Other than generally "directing" and "orchestrating" the acts of Defendants Mayne, Lees, and Rahnema, the TAC is silent as to any specific acts Townsend allegedly committed.

As with Middleton, there is no allegation that Townsend purported to act in any capacity other than in his official capacity. There is no claim that Townsend knew Mireskandari personally or that he committed any acts in his capacity as a private citizen. Receiving LSA/SRA internal emails, responding to parliament to answer for the LSE/SRA, and directing the activities of SRA employees are certainly the kinds of activities the Chief Executive Officer of the SRA is expected to perform. For the same reasons stated above, it is immaterial that any actions allegedly taken by Townsend violate U.S. law. There is no allegation that Townsend committed any acts so heinous that they violate *jus cogens norms*.

The Court finds that the acts allegedly taken by Townsend were within the course and scope of his duties as the Chief Executive Officer of the SRA. Townsend is therefore immune from suit in this matter, and the Court may not properly exercise subject matter jurisdiction over the claims asserted against him.

3. Defendants Mayne and Lees

Defendants Mayne and Lees are both "former police officer[s] who served as [] lead investigator[s] for the LSE/SRA." (TAC ¶¶ 14, 15.) Plaintiffs allege both

Defendants "acted at the direction" of Defendants Middleton and Townsend "at all relevant times." (Id. ¶¶ 14, 15.) As to Baxendale-Walker, Mayne is accused of corresponding with the Attorney General of the Isle of Man requesting documents related to a criminal investigation which accused Baxendale-Walker of tax fraud. (Id. ¶ 45.) Mayne and Lees, at the direction of the LSE/SRA, are also accused of pressuring clients of solicitors to disassociate from their solicitors and not pay outstanding bills with the intent to deplete the solicitors' revenue and "ultimately destroy their law practices." (Id. ¶ 47.) The conduct allegedly undertaken by Mayne and Lees "was orchestrated and implemented by Defendant Middleton." (Id.) As to Mireskandari, Mayne and Lees are accused of acting "under the direction and orders of Defendants Middleton and Townsend," when they traveled to California on at least three occasions to investigate Mireskandari's past. (Id. ¶ 80.) While there, Mayne and Lees are accused of intimidating and attempting to bribe witnesses to prevent them from testifying or submitting evidence on Mireskandari's behalf in his proceedings before the Solicitors Disciplinary Tribunal. (Id. ¶¶ 81 – 87, 93, 95.)

Notwithstanding the corrupt and dishonest nature of some of these allegations, the conduct described in the TAC as undertaken by Defendants Mayne and Lees comports with that of police officers performing their official duties in investigating crimes. All of the allegations against Mayne and Lees relate to their jobs as police officers investigating cases at the request of

their supervisors, Middleton and Townsend.[14] As with Middleton and Townsend, there is no allegation that Mayne or Lees knew Mireskandari or Baxendale-Walker personally or that they were acting in their capacities as private citizens. Moreover, there is no allegation that Mayne or Lees committed any acts in violation of *jus cogens norms*.

Accordingly, the Court finds that the acts allegedly taken by Mayne and Lees were within the course and scope of their duties as police officers for the LSE/SRA. Mayne and Lees are therefore immune from suit in this matter, and the Court may not properly exercise subject matter jurisdiction over the claims asserted against them.

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[14] Plaintiffs contend that Mayne and Lees could not have been acting in an "official" capacity because they failed to notify the U.S. Attorney General prior to entering the U.S. (Supp. Opp. to LSE/SRA MTD at 18-19.) This argument fails for several reasons. First, there is no evidence that any Defendant "failed to register" with the U.S. because no discovery was permitted on the issue of common law immunity. Second, and more importantly, it does not matter for purposes of common law immunity whether agents of a foreign government notify the Attorney General prior to entering the United States. Notification does not change the nature of the actions undertaken by the foreign officials. The determinative factor is whether the individuals were acting in their capacity as foreign officials, not whether the United States government approved of their actions. See Yousuf, 699 F.3d at 775 (holding that "a foreign official may assert immunity for official acts performed within the scope of his duty, but not for private acts"). Plaintiffs cite no case law in support of their position on this point.

4. Defendant Hegarty

Defendant Hegarty "is a private solicitor who served as the 'independent' member of the 'Adjudication Panel.'" (TAC ¶ 18.) Adjudication Panels determine whether matters should be referred to the Solicitors Disciplinary Tribunal for further proceedings. (Id. ¶ 38.) These panels ostensibly provide independent reviews of LSE/OSS reports as a means of protecting solicitors from unsubstantiated allegations and investigations. (Id. ¶ 37.) Hegarty was on the Adjudication Panel in 2003 when the panel met and concluded that there were grounds to refer Baxendale-Walker's matter to the SDT, (id. ¶ 38), and again in 2008 when the panel referred Mireskandari's matter to the SDT, (id. ¶ 107). Plaintiffs allege that Hegarty and other members of the panel were "mere rubber stamps," approving anything and everything referred to them by the LSE/SRA. (Id. ¶¶ 38, 69, 107, 199, 215.) Plaintiffs allege Hegarty, the "head" of the panel, was "a loyal soldier and prepared to only cursorily review the materials and rubber stamp almost anything requested by the LSE/SRA." (Id. ¶¶ 107, 108.)

The TAC does not describe the organizational structure of Adjudication Panels or whether such panels are subdivisions of a larger entity. It only states that Adjudication Panels serve as an intermediary between the LSE/SRA and the SDT. (Id. ¶ 38.) As the TAC is pleaded, the Adjudication Panel reviews reports submitted to them by the LSE/SRA and then determines whether refer those matters to a disciplinary tribunal. The Ninth Circuit found the LSE and SRA

are entities of the United Kingdom. (March 27, 2015 Ninth Cir. Order at ¶ 1.) It only follows that the Adjudication Panel, which is responsible for independently reviewing the work of the LSE and the SRA, is also engaged "in a public activity on behalf of the foreign government," and therefore, is an organ of a foreign state or subdivision thereof.[15] See California Dept. of Water Resources v. Powerex Corp., 533 F.3d 1087, 1098 (9th Cir. 2008). Therefore, for the purpose of common law immunity, the Court finds that the Adjudication Panel is an organ of a foreign state – namely the United Kingdom – and that when acting in his capacity as a member of the Adjudication Panel, Hegarty was a foreign official.

Although the TAC states that Hegarty is a "private solicitor," none of the allegations purport to allege that Hegarty took any action in his capacity as a private citizen. All of the allegations against Hegarty in the TAC pertain to his role as the "head" or "member" of this Adjudication Panel. (See TAC ¶¶ 38, 69, 107, 199, 215.) There is no allegation that Hegarty knew either Mireskandari or Baxendale-Walker personally. Moreover, there is no allegation that Hegarty took any action in violation of *jus cogens norms*. The Court therefore determines that all of the acts allegedly taken by Hegarty in relation to the instant litigation were undertaken within the course and scope of his duties as the "head" of the Adjudication Panel. Hegarty

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[15] Notably, Plaintiffs do not argue that the Adjudication Panel is not an organ of a foreign state. (See Supp. Opp. to LSE/SRA MTD at 16-25.)

is therefore immune from suit in this matter pursuant to conduct-based common law immunity, and the Court may not properly exercise subject matter jurisdiction over the claims asserted against them.

B. Personal Jurisdiction

Alternatively, the Court does not have personal jurisdiction over Hegarty. The "effects" test of specific personal jurisdiction requires plaintiffs to sufficiently allege that the defendant "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." Dole Food Co., 303 F.3d at 1111. There is no allegation in the TAC that Hegarty took any intentional acts expressly aimed at California. There is no allegation nor any evidence to support the contention that Hegarty knew Mireskandari lived in California or ever made any communication directed toward any person within California. In Plaintiffs' supplemental briefing on this issue, they argue only that Hegarty "ratified the actions" that Mayne and Lees took in California. (Supp. Opp. to LSE/SRA MTD at 12.) This is insufficient to confer personal jurisdiction on this Court. Accordingly, the claims against Hegarty must be dismissed for the alternative reason that the Court may not properly exercise personal jurisdiction over him.

V. CONCLUSION

For the foregoing reasons, the Court GRANTS Rahnema's Motion to Dismiss, (Doc. No. 78), and GRANTS the UK Defendants' Motions to Dismiss, (Doc. No. 77).

Plaintiffs' TAC is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHAHROKH MIRESKANDARI and PAUL BAXENDALE-WALKER, Plaintiffs - Appellants, v. BARRINGTON MAYNE, et al., Defendants - Appellees.	No. 13-55945 D.C. No. 2:12-cv-03861-JGB-MAN MEMORANDUM* (Filed Mar. 27, 2015)

Appeal from the United States District Court
for the Central District of California
Jesus G. Bernal, District Judge, Presiding

Argued and Submitted February 13, 2015
Pasadena, California

Before: CHRISTEN and HURWITZ, Circuit Judges, and BURGESS, District Judge.**

Shahrokh Mireskandari and Paul Baxendale-Walker appeal the district court's May 14, 2013 order dismissing all pending claims with prejudice.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Timothy M. Burgess, District Judge for the U.S. District Court for the District of Alaska, sitting by designation.

1. We affirm the district court's dismissal of the claims against the Law Society of England and Wales ("LSE") and the Solicitors Regulation Authority ("SRA") pursuant to the Foreign Sovereign Immunities Act ("FSIA"). The SRA has no legal existence separate from the LSE. Though the LSE and SRA are formally independent from the government, both are accountable to the statutorily-created Legal Services Board ("LSB"), which is itself accountable to Parliament through the Lord Chancellor. The LSB is responsible for eight regulatory objectives defined by statute, and the LSE and SRA must act in a manner compatible with these objectives, *see* Legal Services Act 2007, c. 29, § 28, 2(a). Thus, the LSE and SRA engage "in a public activity on behalf of the foreign government." *Cal. Dep't of Water Res. v. Powerex Corp.*, 533 F.3d 1087, 1098 (9th Cir. 2008) (internal quotation mark omitted).

2. The district court did not abuse its discretion in dismissing the claims against the LSE and SRA with prejudice, refusing to allow Appellants to amend their complaint for a fourth time. *See McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 809-10 (9th Cir. 1988) ("Repeated failure to cure deficiencies by amendments previously allowed is another valid reason for a district court to deny a party leave to amend.").

3. We vacate the district court's dismissal of the claims against Barrington Mayne, Malcolm Lees, David Middleton, Antony Townsend, and Richard Hegarty, because the FSIA does not provide immunity to officials acting on behalf of a foreign state. *See Samantar v. Yousuf*, 560 U.S. 305, 319 (2010). On remand, the

district court may consider whether dismissal of these defendants is required under common law immunity.

4. We affirm the district court's dismissal of the claims against Associated Newspapers, Ltd. and David Gardner ("ANL Defendants") pursuant to the doctrine of claim splitting. Appellants argue that claim splitting should not apply because an order from another judge, denying transfer of this case to that judge's calendar, reserved Appellants' right to pursue their claims against the ANL Defendants in a separate lawsuit. The order, however, did not reserve any such right.

5. We affirm the district court's dismissal of the claim against Patrick Rohrbach, but on the ground that the complaint fails to state a claim under Federal Rule of Civil Procedure 12(b)(6). *See Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004) ("We may affirm the district court's dismissal on any ground supported by the record."). Rohrbach's written witness statements, which Mireskandari agreed could be considered on the motion to dismiss, are not actionable. The statements never directly assert that Mireskandari did anything wrong. The only factual assertions contained in the statements are that Mireskandari is not a California attorney and has not passed the California Bar examination. Mireskandari does not challenge the accuracy of these statements.

6. We vacate the district court's order dismissing the claims against Mansur Rahnema for lack of personal jurisdiction. On remand, the district court should consider whether the eleventh claim for relief – a

defamation claim against Rahnema that was missing from the electronic version of the third amended complaint and not addressed in the district court's order – supports a finding of personal jurisdiction. The district court may also consider Rahnema's other arguments for dismissal of Mireskandari's claims.[1]

7. Each party shall bear its own costs.

AFFIRMED in part; VACATED in part; and REMANDED.

[1] Appellants also filed a motion to supplement the record on appeal. In light of our decision to remand parts of this case, we deny the motion and leave the augmentation of the record to the district court's discretion.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES – GENERAL

Case No.	**CV 12-03861 JGB (MANx)**	Date	May 14, 2013
Title	***Shahrokh Mireskandari; Paul Baxendale-Walker v. Barrington Mayne, et al.***		

Present: The Honorable	JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter
Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: Order DISMISSING the Third Amended Complaint WITH PREJUDICE (IN CHAMBERS)

Before the Court are four Motions to Dismiss the Third Amended Complaint filed by four sets of Defendants against Plaintiffs Shahrokh Mireskandari and Paul Baxendale-Walker. The Motions to Dismiss are filed by Defendants (1) Patrick Rohrbach (Doc. No. 76); (2) Richard Hegarty, Malcolm Lees, Barrington Mayne, David Middleton, Anthony Townsend, the Law Society of England and Wales, and the Solicitors Regulation

Authority (Doc. No. 77); (3) Mansur Rahnema (Doc. No. 78); and (4) David Gardner and Associated Newspapers, Ltd. (Doc. No. 91). After considering the papers filed in support of and in opposition to the Motions, and the arguments advanced by counsel at the May 6, 2013 hearing, the Court GRANTS all Defendants' Motions to Dismiss and DISMISSES THE THIRD AMENDED COMPLAINT, WITHOUT LEAVE TO AMEND.

I. BACKGROUND

A. Procedural Background

Plaintiffs Shahrokh Mireskandari ("SM")[1] and Paul Baxendale-Walker ("PBW") (collectively, "Plaintiffs") filed their original Complaint in the California Superior Court for the County of Los Angeles on February 17, 2012. (Not. of Removal ("Not."), Ex. A (Doc. No. 1).) This action was removed to this Court on May 3, 2012. (Not.) Plaintiffs filed their First Amended Complaint ("FAC") on May 22, 2012 (Doc. No. 9), their Second Amended Complaint ("SAC") on November 2, 2012 (Doc. No. 60), and their Third Amended Complaint ("TAC") on December 18, 2012 (Doc. No. 69).

Both Plaintiffs allege different claims against different Defendants in the TAC. SM alleges claims for,

1. Violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO") (18 U.S.C. § 1962(b))

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[1] The Court refers to Plaintiffs individually by their initials to remain consistent with how Plaintiffs identify themselves in the TAC and in their Oppositions.

against the Law Society of England and Wales ("LSE"), the Solicitors Regulation Authority ("SRA"), Middleton, and Townsend (TAC ¶¶ 186-190);

2. Violation of RICO (18 U.S.C. § 1962(c)) against Middleton, Townsend, Mayne, Lees, LSE, and SRA; and against Associated Newspapers, Ltd. ("ANL") and Gardner (collectively, "ANL Defendants") (id. ¶¶ 191-195);

3. Violation of RICO (18 U.S.C. § 1962(d)) against LSE, SRA, Middleton, Townsend, Mayne, Lees, and Hegarty (collectively, "LSE/SRA Defendants"), Rohrbach, Rahnema, and the ANL Defendants (id. ¶¶ 196-203);

4. Violation of the Computer Fraud and Abuse Act (18 U.S.C. § 1030) against LSE, SRA, Middleton, Townsend, Mayne, and Lees (id. ¶¶ 217-221); and

5. Defamation against LSE, SRA, Mayne, Lees, Middleton, and Townsend (id. ¶¶ 242-264).

PBW alleges claims for,

1. Violation of RICO (18 U.S.C. § 1962(b)) against LSE, SRA, and Middleton (id. ¶¶ 204-208);

2. Violation of RICO (18 U.S.C. § 1962(c)) against Middleton and Mayne (id. ¶¶ 209-211);

3. Violation of RICO (18 U.S.C. § 1962(d)) against Middleton, Mayne, and Hegarty (id. ¶¶ 212-216);[2]

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[2] The Court notes that the electronic version of the TAC is missing pages 57 and 58. The Court thus refers to the original

4. Intentional Interference with Actual Contractual Relationships against LSE, SRA, Mayne, and Middleton (id. ¶¶ 222-230); and

5. Defamation against LSE, SRA, Mayne, and Middleton (id. ¶¶ 231-241).

Plaintiffs each seek general and special damages in excess of $5 million, statutory trebling of damages under RICO, prejudgment interest, and attorneys' fees and costs under RICO. (Id. at 63.)

On January 7, 2013, Defendant Rohrbach filed his Motion to Dismiss on the grounds of (1) absolute witness immunity; and (2) Federal Rule of Civil Procedure[3] 12(b)(6). (Doc. No. 76.) Plaintiffs opposed the Motion on February 11, 2013 (Doc. No. 98), and Rohrbach filed his Reply on February 22, 2013 (Doc. No. 106).

On January 7, 2013, the LSE/SRA Defendants filed their Motion to Dismiss on the grounds of (1) lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act; lack of personal jurisdiction; (2) the doctrine of *forum non conveniens*; (3) litigation privilege; (4) Rule 12(b)(6); and (5) improper joinder. (Doc. No. 77.) Plaintiffs opposed the Motion on February 11, 2013 (Doc. No. 97), and the LSE/SRA Defendants filed their Reply on February 25, 2013 (Doc. No. 107).

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version manually filed with the Court, which includes these pages.

[3] Unless otherwise noted, all mentions of "Rule" refer to the Federal Rules of Civil Procedure.

On January 7, 2013, Defendant Rahnema filed his Motion to Dismiss on the grounds of (1) lack of personal jurisdiction; (2) *forum non conveniens*; (3) Rule 12(b)(6); (4) litigation privilege; and (5) improper joinder. (Doc. No. 78). Plaintiffs opposed the Motion on February 11, 2013 (Doc. No. 103), and Rahnema filed his Reply on February 25, 2013 (Doc. No. 108).

On January 25, 2013, the ANL Defendants filed their Motion to Dismiss on the grounds of (1) Rule 12(b)(6); (2) the doctrine against claim-splitting; and (3) protection under the First Amendment to the U.S. Constitution. (Doc. No. 91.) Plaintiffs opposed the Motion on February 20, 2013 (Doc. No. 105), and the ANL Defendants filed their Reply on March 4, 2013 (Doc. No. 109).

B. Plaintiffs' General Allegations

As the four sets of Defendants rely on different grounds for dismissal in their motions, the Court will discuss Plaintiffs' allegations regarding the specific defendants in greater detail below. Plaintiffs' generally allege that they are former English solicitors and that, beginning in 2004, Defendants engaged in an illegal pattern of racketeering to retaliate against Plaintiffs, who are "outspoken minority solicitors . . . , for challenging powerful entities such as those sued in this case." (TAC ¶ 1.) The alleged retaliation includes "attacks on Plaintiffs' solicitor licenses as well as coordinating efforts" with the *Daily Mail*, the tabloid owned by the ANL Defendants. (Id.) The TAC is divided

between PBW's factual allegations (id. ¶¶ 31-69) and SM's factual allegations (id. ¶¶ 70-138), none of which appear to arise from the same alleged events or conduct.

The LSE is a legal entity that is charged with the supervision and regulation of solicitors in England and Wales. (Id. ¶ 12.) The SRA is a part of the LSE and regulates and investigates solicitors whose funding is derived from solicitors' fees. (Id. ¶ 13.) Mayne, Lees, Middleton, Townsend, and Hegarty were affiliated with the LSE or SRA during the relevant period in either an investigative or supervisory capacity. (Id. ¶¶ 14-18.) Defendant Middleton, whose Declaration and attached exhibits are submitted by LSE/SRA (Doc. Nos. 77-3, 77-4), is the Executive Director of SRA and allegedly "directed . . . the actions by which Plaintiffs' legal practices were destroyed." (Id. ¶ 16). All LSE/SRA Defendants are citizens of the United Kingdom. (See id. ¶¶ 12-18.)

Defendant Rohrbach is a California resident alleged to have provided false witness statements to the LSE/SRA in exchange for bribes, and to have then lied to cover up his participation in the conspiracy. (Id. ¶ 19. Defendant Rahnema is a Virginia resident and former client of SM's alleged to have acted as an agent of LSE/SRA. (Id. ¶ 20.) Finally, Defendant Gardner is a resident of California alleged to have been an agent of the *Daily Mail* and ANL and to have participated in "illegally investigating SM and publishing false materials about him." (Id. ¶ 26.)

II. ROHRBACH MOTION TO DISMISS

SM alleges one claim for RICO violation against Rohrach. The Court considers first Rohrbach's defense of absolute witness immunity as a threshold question before reaching the question of the sufficiency of SM's allegations under Rule 12(b)(6).

A. Plaintiff SM's Allegations

SM alleges that Rohrbach, who supervised the "Moral Character Unit" of the California State Bar, conspired with Mayne and Lees "to provide false witness statements to the LSE/SRA in return, upon information and belief, for bribes." (Id. ¶¶ 19, 88.) Mayne and Lees told Rohrbach that they "were associated with prosecutors in England," and Rohrbach provided them "with three witness statements." (Id. ¶ 88.) SM does not attach the witness statements to the TAC, but Rohrbach attaches them to his Motion to Dismiss. (Rohrbach Mot., Exs. A-C.) SM consents to the Court's consideration of Rohrbach's exhibits (see Rohrbach Mot. Opp'n at 2 n. 1), and the Court finds the exhibits appropriate to consider. See Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006).

SM alleges that one of these statements "falsely and dishonestly attested that SM had violated California law by improperly practicing as an attorney." (Id.) The witness statement at issue states in relevant part, "Had Mireskandari carried out drafting of documents and motions as described, he would have committed criminal offences categorised as misdemeanours under

the Californian Penal Code and would have been prosecuted by the Californian District Attorneys [sic] Office." (Rohrbach Mot., Ex B at 2.)

SM further alleges, "Upon information and belief, Rohrbach was bribed to issue the statements he did because there is no reason that he would have provided these statements in his official capacity, and, further, Rohrbach was apparently under financial pressure, as evidenced by his eventual bankruptcy in 2009 after giving the three statements." (Id. ¶ 89.) SM states that LSE/SRA relied in part on Rohrbach's statements to bring disciplinary proceedings against SM. (Id. ¶¶ 91, 103.) "SM applied to Court and obtained an order staying proceedings. [T]he Court denied the stay motion on false evidence Defendants Mayne and Lee obtained from Rohrbach. . . ." (Id. ¶ 105.) SM alleges that, in part resulting from Rohrbach's witness statements, LSE/SRA "intervened in SM's practice" by physically seizing SM's office and files and subsequently disbarring SM. (Id. ¶ 110.) SM alleges that Rohrbach's witness statements "were obtained in violation of 18 U.S.C. § 1512," (id. ¶ 114) which imposes criminal sanctions for interfering with the "testimony of any person in an official proceeding." 18 U.S.C. § 1512(a). In the TAC, as predicate RICO acts, Plaintiffs list 18 U.S.C. § 1512, under the heading "Witness Tampering" (TAC ¶¶ 174, 175), and Cal. Penal Code § 136.1(a)(2), which the TAC quotes as prohibiting "prevent[ing] or dissuad[ing] any witness from attending or giving testimony at any trial, proceeding, or inquiry authorized by law" (id. ¶¶ 176-79).

Rohrbach's witness statements are on forms titled "WITNESS STATEMENT." (Rohrbach Mot., Exs. A-C.) Under the title are the words, "CJ Act 1967, s.9 MC Act 1980, ss.5A (3)(A) and 5B, MC Rules 1981, r. 70." (Id.) The statement forms require two signatures by the person making the statement and a signature by a witness. The form states, "This statement . . . is true to the best of my knowledge and belief and I make it knowing that, if it is tendered as evidence, I shall be liable to prosecution if I have willfully stated anything in it, which I know to be false, or do not believe to be true." (Id.)

B. Discussion

1. Absolute Witness Immunity

a. Legal Standard

Witnesses are entitled to absolute immunity from liability for their testimony in earlier proceedings. Briscoe v. LaHue, 460 U.S. 325, 345-46 (1983). Witnesses maintain absolute immunity from civil liability even if they committed perjury or conspired to commit perjury. Id.; Paine v. City of Lompoc, 265 F.3d 975, 981 (9th Cir. 2001). Absolute immunity attaches to functions performed that are critical to the judicial process; it does not attach to a person's role or title. Miller v. Gammie, 335 F.3d 889, 892, 897 (9th Cir. 2003). In the Ninth Circuit, absolute witness immunity extends to written statements and pre- and post-trial proceedings. See Burns v. County of King, 883 F.2d 819, 823

(9th Cir. 1989); Holt v. Castaneda, 832 F.2d 123, 124-25 (9th Cir. 1987).

b. Analysis

The Court finds that Rohrbach must be dismissed from Plaintiffs' TAC. Rohrbach is immune from liability resulting from his witness statements based on the doctrine of witness immunity as set forth by the U.S. Supreme Court in Briscoe v. LaHue, 460 U.S. 325 (1983).

i. Whether There Is a RICO Exception to Witness Immunity

Plaintiffs first argue that witness immunity does not apply to RICO or conspiracy to violate RICO claims. (Rohrbach Mot. Opp'n at 4-8.) Plaintiffs ask the Court to infer this rule from several cases, but none of the many cases Plaintiffs cite actually address this issue or state this rule. Absent "a clear statement" from Congress stating that "a common-law immunity has been abrogated" by a statute, the Court will not find a RICO exception for absolute witness immunity. Chappell v. Robbins, 73 F.3d 918, 923 (9th Cir. 1996) (citing Pierson v. Ray, 386 U.S. 547, 552 (1967)).

ii. Whether Rohrbach's Statements Are Protected by Witness Immunity

Plaintiffs next argue that witness immunity does not apply because Rohrbach's witness statements were

made outside the context of judicial or quasi-judicial proceedings. (Rohrbach Mot. Opp'n at 8-10.) The allegations in the TAC, however, clearly establish that the witness statements were provided for and used in proceedings consistent with the rationale for witness immunity and with the term "judicial proceedings" as used by controlling precedents.

SM alleges that: he "applied to Court" to obtain "an order staying the proceedings," and was denied because of the statements; LSE/SRA relied on the witness statements to exercise its official authority to seize SM's records and to disbar SM; and that Defendants violated 18 U.S.C. § 1512, which would require the witness statements to be "testimony . . . in an official proceeding." Rohrbach gave the witness statements to people who allegedly told him they were associated with prosecutors in England; he wrote his statements, along with his signature, on official "witness statement" forms used in English criminal proceedings; and the form stated that he could be criminally prosecuted for writing a false statement on the form.

Therefore, SM's allegations make clear that LSE/SRA took and used Rohrbach's statements "to determine where the truth lies" and, as a result, take official, government-sanctioned action against SM.[1]

[1] The Court further discusses LSE/SRA's government-granted authority in Part IV, *infra*, regarding LSE/SRA's Motion to Dismiss. While Plaintiffs' allegations in the TAC provide a sufficient basis for finding that Rohrbach is entitled to witness immunity, the Court's findings in Part IV further support the

See Briscoe, 460 U.S. at 334. Therefore, Rohrbach, a U.S. citizen facing civil liability in a U.S. court for giving his sworn witness statement for what he was told was an English prosecution, was performing the type of function to which absolute witness immunity attaches.

On this ground, the Court GRANTS Rohrbach's Motion to Dismiss. Because Rohrbach is absolutely immune from civil liability, the Court finds that any amendment to the claims against him would be futile and thus DISMISSES the claims against Rohrbach WITHOUT LEAVE TO AMEND. See Saul v. United States, 928 F.2d 829, 843 (9th Cir. 1991); Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1298 (9th Cir. 1998).

The Court need not consider Rohrbach's other grounds for dismissal.

III. ANL DEFENDANTS' MOTION TO DISMISS

SM alleges two claims for violation of RICO against ANL Defendants. In light of the separate action SM has brought against ANL Defendants in the U.S. Courts for the Central District of California, the Court first considers the threshold question of the claim-splitting doctrine before reaching the merits of SM's claims.

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judicial nature of the proceedings for which Rohrbach provided his witness statements.

A. SM's Allegations

Defendant Associate Newspaper, Ltd. publishes the English newspaper, the *Daily Mail*. (TAC ¶ 24.) Gardner was an agent of ANL and the *Daily Mail* "illegally investigating SM and publishing false materials about him." (Id. ¶ 26.) SM alleges that other Defendants were "coordinating efforts" with ANL Defendants "to destroy [his] reputation." (Id. ¶ 1.) He further alleges that LSE/SRA Defendants and ANL Defendants engaged in a "conspiracy by which ANL/Daily Mail agreed not to publish negative articles about LSE/SRA in return for the LSE/SRA intervening in SM's law practice which, in turn, was designed to destroy any libel claims brought by SM against the Daily Mail and also reward the Daily Mail by giving it the 'scoop' on the intervention so its reporters and photographers could cover it." (Id. ¶ 5.)

B. Background and Related Pending Litigation

The original Complaint in this matter, initiated February 17, 2012, was filed by SM only and alleged 11 claims, including RICO violations, against only LSE and LSE's individual investigators and supervisors. (Not., Ex. A ("Compl.") While not named as a defendant, Associated Newspapers, Ltd./*Daily Mail* were the subject of several of SM's allegations. (See, e.g., Compl. ¶¶ 47-49 (accusing the *Daily Mail* of printing "malicious and defamatory articles about Plaintiff").)

On April 4, 2012, SM filed a separate action against ANL Defendants, which is presently pending

before Judge Morrow in the Central District of California. See Shahrokh Mireskandari v. Daily Mail and General Trust PLC; Assoc. Newspaper LTD; Nat'l Student Clearing House; David Gardner, No. 12-02943-MMM (C.D. Cal April 4, 2012) (alleging 14 claims against defendants).

SM, now adding PBW as a plaintiff, filed a First Amended Complaint in this matter on May 22, 2012, and, the following day, filed a First Amended Complaint in the matter before Judge Morrow. (No. 12-02943, Doc. No. 15.) It was not until Plaintiffs filed their TAC in this Court on December 18, 2012, that they added ANL Defendants as parties. (See Compl. at 1; FAC at 1; SAC at 1; TAC at 1.)

Plaintiffs concede that this action and the one pending before Judge Morrow "arise from the same transactional nucleus of facts." (ANL Mot. Opp'n at 4.) In Plaintiffs' Opposition, SM clarifies the reasons for adding ANL Defendants to the TAC several months after filing a separate lawsuit against the same defendants in the same District. First, the matter before Judge Morrow "was filed on April 4, 2012, by attorneys who apparently lacked RICO experience." (Id. at 5.) Second, Plaintiff missed the deadline in that matter to filed a second amended complaint. (Id.)

The Court also notes that ANL Defendants had recently defended a similar action brought against it by SM in the English courts. On July 13, 2011, SM filed an action, Shahrokh Mireskandari v. Associated Newspapers LTD., in England's Royal Courts of Justice,

alleging claims for libel against ANL Defendants. (See ANL Defendants' Request for Judicial Notice, Ex. E (Doc. No. 92).)[4] The English court entered a judgment against SM, which the appellate court upheld. (Id., Exs. E, F.)

C. Claim-Splitting Doctrine

ANL Defendants argue that the Court should dismiss with prejudice SM's claims against them under the claim-splitting doctrine. (ANL Mot. at 5-8.) For the following reasons, the Court agrees and grants ANL Defndants' Motion.

1. Legal Standard

Plaintiffs have "no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant." Adams v. California Dep't of Health Servs., 487 F.3d 684, 688 (9th Cir. 2007), cert. denied 552 U.S. 1076 (internal quotation marks omitted). "After weighing the equities of the case, the district court may exercise its discretion to dismiss a duplicative later-filed action, to stay that action pending resolution of the previously filed action, to enjoin the parties from proceeding with it, or to consolidate both actions." (Id.) Courts apply an

[4] The Court grants ANL Defendants' Request for Judicial Notice, as foreign laws and judgments are judicially noticeable. See Henriquez-Rivas v. Holder, 707 F.3d 1081, 1092 (9th Cir. 2013); Luxpro Corp. v. Apple Inc., No. 10-03058-JSW, 2011 WL 1086027 (N.D. Cal. Mar. 24, 2011).

analysis similar to a claim preclusion analysis and thus "must assess whether the second suit raises issues that should have been brought in the first." Id. at 689 (internal quotation marks omitted). The most important criterion in determining whether the two actions are the "same" is "'whether the two suits arise out of the same transactional nucleus of facts.'" Id. at 689 (quoting Costantini v. Trans World Airlines, 681 F.2d 1199, 1201–02 (9th Cir.1982).)

2. Analysis

First, it is clear that the parties are the same. While the action in this Court is brought by SM and PBW, PBW does not allege claims against ANL. Second, SM agrees that the two actions "arise from the same transactional nucleus of facts." (ANL Mot. Opp'n at 4.) As the Court finds the two suits to be duplicative,[5] the Court must "weigh the equities of the case" and determine whether, in its exercise of "broad discretion," to dismiss the duplicative, later-filed action, stay the action, enjoin the parties from proceeding with it, or consolidate both actions. Adams, 487 F.3d at 688.

In Adams, the Ninth Circuit affirmed the district court's decision to dismiss the duplicative action with prejudice, finding that "[d]ismissal, more so than the issuance of a stay or the enjoinment of proceedings, promotes judicial economy and the comprehensive disposition of litigation. In dismissing the duplicative suit

[5] "Suit" or "Action" here refers to the TAC, prior to which ANL Defendants were not a party.

with prejudice, the district court acted to protect the parties from vexatious and expensive litigation and to serve the societal interest in bringing an end to disputes." Id. at 692-93. The Adams's court affirmed the dismissal with prejudice largely because plaintiff "had a full and fair opportunity to raise and litigate in her first action the claims she now asserts in this action." Id. at 693.

Here, SM asks the Court to take a new course by first deciding ANL Defendants' Motion on the merits, and then either consolidating the two actions, somehow allowing SM to add RICO claims in the action before Judge Morrow, or allowing ANL Defendants to remain in this action while they also defend SM's separate action. (ANL Defendants Mot. Opp'n at 4-5.) This proposed course of action, in addition to lacking any authority to support it, would be wholly contrary to the principles of "promot[ing] judicial economy" and protecting the parties "from vexation and expensive litigation." Adams, 487 F.3d at 692-93. In the separate action SM originally filed against ANL Defendants, he could have alleged RICO claims against ANL Defendants in his complaint, but chose not to. SM then had another opportunity to allege RICO claims in his amended complaint, but again chose not to. By the time the TAC was filed, SM had made the same allegations against ANL Defendants in the English courts and before a different judge in this District. The Court finds that the equities of the case weigh strongly against making ANL Defendants defend SM's claims

for the third time in front of this Court.[6] Therefore, the Court DISMISSES WITH PREJUDICE ANL Defendants from the TAC.

The Court need not consider ANL Defendants' other grounds for dismissal.

IV. LSE/SRA DEFENDANTS' MOTION TO DISMISS

All of SM and PBW's allegations are against LSE/SRA Defendants or a subset of LSE/SRA Defendants. The Court first considers LSE/SRA Defendants' contention that they should be dismissed with prejudice from the TAC for lack of jurisdiction.

A. Jurisdiction

LSE/SRA Defendants assert that this Court lacks both subject matter jurisdiction and personal jurisdiction to constitutionally adjudicate Plaintiffs' claims against them. A federal court may not rule on the

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[6] SM's argument that the "law of the case precludes dismissal" because Judge Morrow denied intradistrict transfer has no merit. (ANL Defendants Mot. Opp'n at 6-7.) The "law of the case" doctrine is "discretionary" and, if applied, "preludes a court from reconsidering an issue decided previously by the same court or by a higher court in the identical case." Hall v. City of Los Angeles, 697 F.3d 1059, 1067 (9th Cir. 2012). The issue must have been decided "explicitly." Id. The doctrine clearly does not apply here, where no legal ruling on the merits was issued and where this action adds a separate plaintiff with no apparent ties to SM alleging entirely separate claims, none of which are against ANL Defendants.

merits of a case absent a finding that it has jurisdiction over the cause (subject matter jurisdiction) and the parties (personal jurisdiction). Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 423 (2007); Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 93-102 (1998). The Court first analyzes whether it has subject matter jurisdiction in light of LSE/SRA Defendants' contention that they are immune from liability under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, *et seq*. See Republic of Austria v. Altmann, 541 U.S. 677, 691 (2004).

1. Foreign Sovereign Immunities Act

a. Legal Standard

"The Foreign Sovereign Immunities Act provides the exclusive source of subject matter jurisdiction over suits involving foreign states" or an "agency or instrumentality" of a foreign state. EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd., 322 F.3d 635, 639 (9th Cir. 2003); 28 U.S.C. § 1603(a). To trigger the "'statutory presumption that a foreign state is immune from suit,' . . . the defendant must make a prima facie case that it is a foreign state" or an entity with a sufficient relationship to a foreign states, or it must "be apparent from the pleadings." Peterson v. Islamic Republic Of Iran, 627 F.3d 1117, 1124 (9th Cir. 2010) (quoting Randolph v. Budget Rent–A–Car, 97 F.3d 319, 324 (9th Cir.1996)); Cal. Dep't of Water Res. v. Powerex Corp., 533 F.3d 1087, 1097 (9th Cir. 2008). Once the

defendant makes this showing, the burden of production shifts to the plaintiff to show that one of the exceptions to immunity applies. See id., Phaneuf v. Republic of Indonesia, 106 F.3d 302, 306-07 (9th Cir. 1997). An "agency or instrumentality" is "any entity (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States." 28 U.S.C. 1603(b); Powerex, 533 F.3d at 1097.

Regarding the second prong, "an entity is an organ of a foreign state (or political subdivision thereof) if it 'engages in a public activity on behalf of the foreign government.' " Powerex, 533 F.3d at 1098 (quoting Patrickson v. Dole Food Co., 251 F.3d 795, 807 (9th Cir. 2001). FSIA's "legislative history suggests that Congress intended the terms 'organ' and 'agency or instrumentality' to be read broadly." Gates v. Victor Fine Foods, 54 F.3d 1457, 1460 (9th Cir. 1995). Congress stated that these terms could "assume a variety of forms," listing examples such as a mining enterprise, a central bank, or "a department or ministry which acts and is suable in its own name." Id. (quoting H.R.Rep. No. 94-1487, 94th Cong. 2nd Sess. (1976), *reprinted at* 1976 U.S.C.C.A.N. 6604, 6614). Factors establishing that an entity is an "organ" under FSIA include " 'the circumstances surrounding the entity's creation, the purpose of its activities, its independence from the government, the level of government financial support, its

employment policies, and its obligations and privileges under state law. An entity may be an organ of a foreign state even if it has some autonomy from the foreign government.'" Powerex, 533 F.3d at 1098 (quoting EIE Guam Corp., 322 F.3d at 640.) The key consideration is whether the entity engages in a public activity to carry out national policy. See Patrickson, 251 F.3d at 807; EIE Guam Corp., 322 F.3d at 641.)

b. Analysis

Both parties submit facts and evidence to resolve the central question before the Court of whether LSE (and, by extension, SRA) is an "organ" entitled to immunity under FSIA, 28 U.S.C. 1603(b). LSE/SRA Defendants submit the Declaration of David Middleton, the SRA Executive Director (Doc. No. 77-3), attaching as exhibits four English cases discussing the authority and legal status and privileges of LSE and SRA (Exs. A-D) (Doc. No. 77-4). Plaintiffs submit (1) the Expert Report of Philip Riches, who offers his opinion that LSE is not subject to Crown immunity in England and attaches exhibits in support of that opinion (Doc. No. 99); and (2) the Expert Report of Andrew Hopper, former advisor to LSE and currently editor of a textbook on the law related to solicitors (Doc. No. 100), attaching as exhibits LSE/SRA documents and legal, historical, and legislative texts related to the formation, regulation, or processes of LSE/SRA (Doc. Nos. 100-1–100-4). The Court finds the following factors and facts relevant to its analysis:

i. Whether LSE/SRA is Subject to Crown Immunity

Plaintiffs argue that LSE/SRA Defendants are not covered by FSIA immunity because they are not an organ of a foreign state. (LSE/SRA Mot. Opp'n at 2-6.) In support of this claim, Plaintiff's rely heavily on the European Commission of Human Rights case of X v. United Kingdom, 4 E.H.R.R. 350 (1982), in which the court found that the "Law Society had none of the immunities or privileges of the Crown: its servants were not civil servants, and its property was not Crown property. The Law Society was not an organ or part of the State." (See LSE/SRA Mot. Opp'n at 2-3.) Plaintiffs also submit the Riches Expert Report, which offers the opinion that LSE is not subject to Crown immunity in England. Plaintiffs argue that this is the "most important[]" factor and that "it would stand the FSIA on its head to confer sovereignty on foreign entities that enjoy no immunity in their own country." (LSE/SRA Mot. Opp'n at 2-3, 4.)

Conversely, LSE/SRA Defendants argue that the Court should disregard this issue entirely, citing a case in which the Third Circuit found that the issue of an alleged organ's lack of immunity within its country "should not be considered part of the organ analysis, because an entity *must* be a separate legal person to fall within the FSIA, and Congress intended that the right to sue and be sued be one factor to consider in deciding whether an entity is a separate legal person." USX Corp. v. Adriatic Ins. Co., 345 F.3d 190, 214 (3d Cir. 2003) (emphasis in original).

The Court finds the European Commission of Human Rights language useful in its analysis, but agrees that the fact itself—LSE not having Crown immunity––is not relevant to a determination that LSE is not an "organ" under FSIA. Overall, this factor carries little weight, as the Plaintiffs do not explain the context of the European Commission of Human Rights' decision, what definition it employed for "organ" or "part of the state," and what the rationale was in making such a determination. Thus, particularly in light of the broad meaning intended by Congress in applying the term, the Court finds the issue of Crown immunity unpersuasive.

ii. Creation of LSE/SRA

LSE was created as a professional organization by solicitors in 1825; it was not formed by the government. (Hopper Rep. ¶¶ 13-15, Ex. A (LSE Webpage); Middleton Decl. ¶ 3.) LSE's first Royal Charter was granted in 1831, and its principal Charter was granted in 1845. (Hopper Rep. ¶¶ 16-18, Ex. D (1845 Royal Charter); Middleton Decl. ¶ 3.) SRA was created in 2007 as an independent, but not legally distinct, entity of LSE and is charged with carrying out LSE's regulatory functions. (Hopper Rep. ¶¶ 23-25, Ex. A; Middleton Decl. ¶ 5.)

iii. Purpose of LSE/SRA's Activities

The purposes of LSE, in its representative role, include maintaining and improving professional standards, securing practicing rights internationally, and

generally regulating solicitors. (Hopper Rep. at 8-9.) LSE's regulatory powers are statutorily granted by the Solicitors Act 1974, the Courts and Legal Services Act 1990, the Access to Justice Act 1999 and the Legal Services Act 2007. The SRA is a "public-interest regulator" whose purpose is "setting, promoting and securing in the public interest standards of behaviour and professional performance necessary to ensure that consumers receive a good standard of service and that the rule of law is upheld." (Hopper Rep., Ex. H at 115-16.) The United Kingdom's Legal Services Act of 2007 regulates the SRA granted the SRA certain powers, including "to impose fines and issue rebukes." (Id. at 124; Middletown Decl. ¶ 7.) The stated "regulatory objectives" of the Legal Services Act of 2007 are "(a) protecting and promoting the public interest; (b) supporting the constitutional principle of the rule of law; (c) improving access to justice; (d) protecting and promoting the interests of consumers; (e) promoting competition in the provision of services . . . ; (f) encouraging an independent, strong, diverse and effective legal profession; (g) increasing public understanding of the citizen's legal rights and duties; [and] (h) promoting and maintaining adherence to the professional principles." Legal Services Act of 2007, Ch. 1, Part 1, §1(1) (2007).

iv. Independence from Government

LSE and SRA are formally independent from the Government, but they are accountable in their regulatory role to the statutorily created Legal Services Board, which in turn is accountable to Parliament

through the Lord Chancellor. (Hopper Rep. ¶¶ 41, 42; Middleton Decl. ¶ 2.) SRA prosecutes certain cases against solicitors before the Solicitors Disciplinary Tribunal, an independent statutory tribunal. (Middleton Decl. ¶ 8.) The Government has some direct control over LSE/SRA, including the Lord Chancellor's power "to cancel LSE/SRA's designation as an approved regulator by order." (Id. ¶ 18.) SRA is authorized to impose direct fines on solicitors and "all such penalties are forfeited to the Crown." (Id. ¶ 20.)

v. Government Financial Support

LSE/SRA is funded by its solicitor members' fees, which are regulated by statute. (See Middleton Decl ¶ 19; Hopper Rep., Ex. F (LSE/SRA's Application for the Approval of Practicing Fees Under Section 51 of the Legal Services Act of 2007).) The manner in which LSE/SRA uses the fees is controlled by statute. (Middleton Decl. ¶ 19.)

Based on the foregoing considerations, the evidence as well as the TAC's allegations establish that LSE/SRA is engaged in a public activity to carry out a national policy of promoting a fair and well-regulated justice system that serves the public interest. Cf. Patrickson, 251 F.3d at 807; EIE Guam Corp., 322 F.3d at 641. Further, LSE/SRA is not just "engaged in" those activities, but is specifically charged with those activities by various statutes. The evidence establishes that LSE/SRA meets the "organ" criteria for FSIA immunity under Ninth Circuit precedent and congressional

intent. Furthermore, the Court finds that immunity under FSIA is particularly warranted in a matter such as this one, where solicitors in England, after being disbarred in England, bring claims in a United States court against the legal regulatory agencies in England based on allegations and alleged injuries that occurred almost exclusively in England.

Therefore, as the Court finds that LSE/SRA Defendants are entitled to immunity under FSIA and as Plaintiffs do not aver that they meet any of the exceptions to immunity under FSIA, LSE/SRA Defendants are DISMISSED WITH PREJUDICE from the TAC.

The Court need not consider LSE/SRA Defendants' other grounds for dismissal.

V. RAHNEMA MOTION TO DISMISS

SM alleges one claim for RICO violation against Rahnema. The Court considers first Rahnema's argument that this court lacks personal jurisdiction over him.

A. Personal Jurisdiction

Rahnema argues that he must be dismissed from the TAC because the Court does not have personal jurisdiction over him. Before reaching the merits of Plaintiffs' claims against Rehnema, the Court must first determine that it has jurisdiction over the defendant under the Due Process Clause of the Fifth Amendment.

1. Legal Standard

Federal Rule of Civil Procedure 12(b)(2) governs dismissal for lack of personal jurisdiction. In order to exercise personal jurisdiction over a nonresident defendant, a district court must determine that asserting jurisdiction does not offend the principles of Fifth Amendment due process. Doe I v. Unocal Corp., 248 F.3d 915, 922-23 (9th Cir. 2001) (citing Go-Video, Inc. v. Akai Elec. Co., Ltd., 885 F.2d 1406, 1413 (9th Cir. 1989)). "In addition, the state long-arm statute must be applied to determine the defendant's amenability to suit in the forum." Pac. Atl. Trading Co. v. M/W Main Express, 758 F.2d 1325, 1327 (9th Cir. 1985) (citations omitted).

The applicable California jurisdictional statute, California Code of Civil Procedure Section 410.10, states that "[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." The jurisdiction of California courts has been construed to be "coextensive with the outer limits of due process" as defined by the United States Supreme Court. Data Disc v. Sys. Tech. Assoc., 557 F.2d 1280, 1286 (9th Cir. 1977); 3D Sys., Inc. v. Aarotech Labs., Inc., 160 F.3d 1373, 1377 (Fed. Cir. 1998). "As a result, jurisdictional inquiries under the state statute and due process principles can be conducted as a single analysis." Pac. Atl. Trading Co., 758 F.2d at 1327 (citations omitted).

Due process requires that nonresident defendants have certain "minimum contacts" with the forum state

so that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. Int'l Shoe v. Washington, 326 U.S. 310 (1945). "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its law." Hanson v. Denckla, 357 U.S. 235, 253 (1958).

A court may exercise personal jurisdiction over a nonresident defendant generally or specifically. Doe v. Am. Nat'l Red Cross, 112 F.3d 1048, 1050 (9th Cir. 1997). Specific jurisdiction exists when the cause of action arises out of the defendant's activities within the forum. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 476-77 (1985). Alternatively, a court has general jurisdiction when the defendant's activities within a state are substantial, continuous and systematic." Unocal, 248 F.3d at 923. See also 3d Sys., Inc., 160 F.3d at 1378 n.3. However, these contacts must be "so substantial and of such a nature as to justify suit against [the defendant] on causes of action arising from dealings entirely different from those activities." Int'l Shoe, 326 U.S. at 318.

A plaintiff bears the burden to establish a court's personal jurisdiction over a defendant. Cubbage v. Merchent, 744 F.2d 665, 667 (9th Cir. 1984). If the court acts on a motion to dismiss for lack of personal jurisdiction without holding an evidentiary hearing, "the plaintiff need only make a prima facie showing of jurisdiction." Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1129 (9th Cir. 2003);

Trintec Indus., Inc. v. Pedre Promotional Prods., Inc., 395 F.3d 1275, 1283 (Fed. Cir. 2005) (citations omitted). To establish a prima facie showing of personal jurisdiction, a plaintiff must set forth some evidentiary basis to support the allegations offered in the complaint. Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995). A defendant may not simply contest the factual allegations made by the plaintiff, but instead must demonstrate additional considerations which undermine the court's personal jurisdiction over the defendant to overcome the plaintiff's prima facie showing. Burger King, 471 U.S. at 476.

To show specific personal jurisdiction under the "effects" test, as is appropriate here, the plaintiff must sufficiently allege that the defendant (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that he knew was likely to be suffered in the forum state. See Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 803 (9th Cir. 2004).

2. Analysis

a. Alleged Intentional Act

The TAC alleges that Rahnema, a Virginia resident, was formerly SM's client and owed SM £800,000 pursuant to an English judgment. (TAC ¶¶ 20, 100.) In 2008, LSE/SRA agents told Rahnema not to pay the judgment, as they "planned to close down SM's law practice shortly." (Id. ¶ 100.) In 2012, Rahnema sent an email and made a telephone call to SM's doctor (Dr. Farzam), who was located in California and serving as

a "medical witness for SM." (Id. ¶ 173(k).) Rahnema made allegedly defamatory statements about SM in the email and telephone calls and threatened Dr. Farzam "if he did not cease to assist SM in the English proceedings." (Id. ¶¶ 173(k), 201.) Finally, Plaintiffs allege that when Hayes Michel, SM's counsel, spoke with Rahnema by telephone while Michel was in California, Rahnema said, "If I see your client, I will shoot him." (Id. ¶ 185.)

The Court finds that SM has sufficiently alleged the intentional acts of sending an email and participating in a telephone call with Farzam and a telephone call with Michel while they were in California.

b. Expressly Aimed at the Forum State

Plaintiffs argue that Rahnema expressly aimed his acts at California because he "'individually targeted' the plaintiff in the forum state.'" (Rahnema Mot. Opp'n at 4-5 (citing Bancroft & Masters, Inc. v. Augusta Nat. Inc., 223 F.3d 1082, 1087 (9th Cir. 2000).) The Court finds that Plaintiffs fail to make a prima facie showing that Rahnema committed any acts that were expressly aimed at California.

In Bancroft & Masters, Inc., the court found that a letter that "individually targeted" the defendant satisfied the "expressly aimed" requirement because "[t]he harm was felt by Bancroft & Masters [a California corporation] in California." See Schwarzenegger, 374 F.3d at 805 (citing Bancroft & Masters, Inc., 223 F.3d at 1088). In Schwarzenegger, the Ninth Circuit found

that the defendant's intentional act (creating and publishing an advertisement) was expressly aimed at Ohio, where the advertisement was circulated, not expressly aimed at California, and thus found that the Court did not have personal jurisdiction over the defendant. Id. at 807. The Court stated, "It may be true that Fred Martin's intentional act eventually caused harm to Schwarzenegger in California, and Fred Martin may have known that Schwarzenegger lived in California. But this does not confer jurisdiction, for Fred Martin's express aim was local." Id.

Here, the TAC does not allege that Rahnema knew SM was residing in California or that Dr. Farzam was in California at the time of the alleged telephone call and email. Most importantly, every alleged act that Rahnema committed was done for the alleged purposes of helping LSE/SRA shut down SM's legal practice in England or avoiding the alleged monetary judgment against him in England. The only inferences that can be drawn from the TAC is that Rahnema "individually targeted" SM either as a solicitor with a law practice in England or as someone to whom he owed a judgment pursuant to activity and litigation that occurred in England. Thus, the Court finds that Plaintiffs have not sufficiently plead allegations establishing a prima facie case that Rahnema expressly aimed an intentional act at the forum state.

c. Causing Harm He Knew Was Likely to be Suffered in California

For similar reasons, Plaintiffs fail to satisfy the third requirement under the "effects" test. The Complaint does not sufficiently allege that Rahnema's intentional acts caused any harm that was suffered in California. In Plaintiffs' third claim, the only claim plead against Rahnema, the TAC states that Rahnema conspired with LSE/SRA Defendants "to achieve the overall goal of the illegal scheme to destroy SM's law practice and disbar him" and that he conspired with LSE/SRA Defendants so that Dr. Farzam would "cease to assist SM in the English proceedings." (TAC ¶ 201.) The TAC only describes harm to Plaintiffs in England and the TAC alleges no facts from which the inference can be drawn that Rahnema knew his acts were likely to cause harm to SM in California. Thus, the TAC does not make a prima facie case that (1) any act by Rahnema actually caused harm in California, or (2) that Rahnema committed any act that he knew was likely to cause harm to SM in California.

B. RICO Jurisdiction

RICO in some circumstances can provide a district court jurisdiction over a defendant who otherwise would be outside the Court's personal jurisdiction. See 18 U.S.C. § 1965(b) (stating that in a RICO action, "in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the

court, the court may cause such parties to be summoned"). The Court has thus far found that all Defendants but Rahnema must be dismissed from Plaintiffs' TAC with prejudice. The Court finds that it does not have jurisdiction over Rahnema pursuant to 18 U.S.C. § 1965(b).

Therefore, the Court finds that it does not have jurisdiction over Rahnema and thus DISMISSES WITH PREJUDICE Rahnema from the TAC.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' Motions to Dismiss and DISMISSES WITH PREJUDICE the Third Amended Complaint as to all Defendants.

IT IS SO ORDERED.

Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1603-1605

28 U.S.C. § 1603

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature

of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1604

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605(a)-(d)

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

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the 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;

(2) 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 such 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;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his

agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time

notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

18 U.S.C. § 951 Agents of foreign governments

(a) Whoever, other than a diplomatic or consular officer or attaché, in the United States as an agent of a foreign government without prior notification to the Attorney General if required in subsection (b) shall be fined under this title or imprisoned not more than ten years, or both.

(b) The Attorney General shall promulgate rules and regulations establishing requirements for notification.

(c) The Attorney General shall, upon receipt, promptly transmit one copy of each notification statement filed under this section to the Secretary of State for such comment and use as the Secretary of State may determine to be appropriate from the point of view of the foreign relations of the United States. Failure of the Attorney General to do so shall not be a bar to prosecution under this section.

(d) For purposes of this section, the term "agent of a foreign government" means an individual who agrees to operate within the United States subject to the direction or control of a foreign government or official, except that such term does not include—

> **(1)** a duly accredited diplomatic or consular officer of a foreign government, who is so recognized by the Department of State;
>
> **(2)** any officially and publicly acknowledged and sponsored official or representative of a foreign government;

(3) any officially and publicly acknowledged and sponsored member of the staff of, or employee of, an officer, official, or representative described in paragraph (1) or (2), who is not a United States citizen; or

(4) any person engaged in a legal commercial transaction.

(e) Notwithstanding paragraph (d)(4), any person engaged in a legal commercial transaction shall be considered to be an agent of a foreign government for purposes of this section if—

(1) such person agrees to operate within the United States subject to the direction or control of a foreign government or official; and

(2) such person—

(A) is an agent of Cuba or any other country that the President determines (so reports to the Congress) poses a threat to the national security interest of the United States for purposes of this section, unless the Attorney General, after consultation with the Secretary of State, determines and so reports to the Congress that the national security or foreign policy interests of the United States require that the provisions of this section do not apply in specific circumstances to agents of such country; or

(B) has been convicted of, or has entered a plea of nolo contendere with respect to, any offense under section 792 through 799, 831, or 2381 of this title or under section 11 of the

Export Administration Act of 1979, except that the provisions of this subsection shall not apply to a person described in this clause for a period of more than five years beginning on the date of the conviction or the date of entry of the plea of nolo contendere, as the case may be.