No. _____

In the Supreme Court of the United States

OUSSAMA EL OMARI,

Petitioner,

v.

RAS AL KHAIMAH FREE TRADE ZONE AUTHORITY, a/k/a R.A.K. FREE TRADE ZONE AUTHORITY, a/k/a RAKFTZA, a corporation organized under the laws of Ras Al Khaimah, United Arab Emirates; KREAB (USA) INC., a corporation organized under the laws of the State of New York; SHEIKH SAUD BIN SAQR AL QASIMI, an individual and United Arab Emirates Citizen, residing in the United Arab Emirates, and Emir of Ras Al Khaimah, United Arab Emirates, sued in his individual, and official capacity; and THE ARKIN GROUP LLC, a limited liability company organized under the laws of the State of New York,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

Scott Michael Moore
Counsel of Record
Moore International Law PLLC
45 Rockefeller Plaza, 20th Floor
New York, NY 10111
(212) 332-3474
smm@milopc.com

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

I. Whether the commercial activity exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2), applies to an otherwise immune foreign government instrumentality, when alleged acts involve breach of contract and participation with a foreign ruler's fraudulent smear scheme, firing, and retaliation against a U.S. citizen employed by the instrumentality?

II. Whether federal common law immunizes a foreign ruler alleged to have organized a fraudulent smear report by New York consultants against a U.S. citizen?

III. Whether leave to amend the complaint should have been granted under Fed. R. Civ. P. 15(a)(2)?

PARTIES TO THE PROCEEDINGS

Petitioner is Oussama El Omari, the appellant in the court below. Respondents, Ras Al Khaimah Free Trade Zone Authority, Kreab (USA) Inc., Sheikh Saud Bin Saqr Al Qasimi, and The Arkin Group LLC were the appellees in the court below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

INTERNATIONAL MATERIALS

PETITION FOR WRIT OF CERTIORARI

Petitioner, Oussama El Omari respectfully petitions this Court for a Writ of Certiorari to review the judgment in this case by the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Second Circuit is reproduced in the appendix hereto ("App.") at 2. The opinion of the District Court for the Southern District of New York is reproduced at App. 7.

JURISDICTION

The judgment of the Second Circuit Court of Appeals was entered on August 23, 2018. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1603(d) of the FSIA, provides:

> 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.

Section 1605(a)(2) of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602, *et seq.,* ("FSIA"), provides:

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

Fed. R. Civ. P. 15(a)(2) provides:

> In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

INTRODUCTION

This case sounds a warning-bell concerning the immunity of activities of authoritarian foreign governments and officials, possessing and controlling trillion-dollar wealth, unconstrained by the rule of law, with activities touching the United States. *Rex non potest peccare* ("the King can do no wrong") is the ancient maxim underpinning the doctrine of sovereign immunity for acts of foreign states codified as the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602, *et seq.*, ("the FSIA"). Separately, for acts of foreign government officials, application of the maxim is a matter of federal common law under *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010).

In this case, Petitioner, Oussama El Omari, an American citizen, worked for 14 years of his life, beginning in 1997, as a founding Project and Marketing Manager, later becoming the CEO and Director, of a free trade zone, Respondent, Ras Al Khaimah Free Trade Zone Authority, ("RAKFTZA"), in Ras Al Khaimah, an emirate of the United Arab Emirates ("the UAE"). El Omari was terminated and became collateral damage in 2012 by a new ruler, Respondent, Sheikh Saud Bin Saqr Al Qasimi, ("Sh. Saud"), exercising absolute power in a royal family powerplay against the ruler's brother who was El Omari's boss and Chairman of RAKFTZA. El Omari suffered, and continues to suffer, retaliation since first contesting his termination in the UAE and then in the United States. To justify the termination, El Omari alleges Sh. Saud fraudulently engaged two New York consulting businesses to concoct a false smear report reviewing operations of the free zone which El Omari and the

ruler's brother headed. In the courts below, El Omari's complaint was dismissed in its entirety, with prejudice, in the Southern District of New York, upheld by the Second Circuit. Among other things, the courts below immunized the actions of the ruler and the complicity of El Omari's former employer, and refused to permit El Omari to amend his pleadings. This case seeks review of requirements for piercing the sovereign immunity veil of foreign governments and their foreign government officials, and amendment of pleadings in a complex international case. Presently, El Omari's career in his field has been ruined and he is unable to travel outside of the United States due to a retaliatory INTERPOL Red Notice issued at the behest of Sh. Saud.

STATEMENT OF THE CASE

A. FOREIGN STATE IMMUNITY UNDER THE FSIA

El Omari invoked jurisdiction as to RAKFTZA under all three clauses of the commercial activity exception to sovereign immunity under 28 U.S.C. § 1605(a)(2). The district court found the commercial activity exception did not apply and dismissed RAKFTZA. (App. 30) The Second Circuit affirmed, relying on *Kato v. Ishihara*, 360 F.3d 106, 112 (2d Cir. 2004) (App. 6)

The commercial activity exception to state sovereign immunity under section 1605(a)(2) provides, in pertinent part, "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case **...** 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*." [emphasis added]

"Commercial activity" is defined under Section 1603(d) as "either a regular course of commercial conduct or a particular commercial transaction or act … determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

This "nature not purpose" criterion is fundamental to the exception. In *Republic of Argentina v. Weltover*, 504 U.S. 607, 614 (1992), this Court stated:

> [W]hen a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA. Moreover, because the Act provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose," 28 U.S.C.§ 1603(d), the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in "trade and traffic or commerce."

A state is not immune with respect to its acts that are private or commercial in character. *Saudi Arabia v. Nelson,* 507 U.S. 349, 360 (1993), *Mortimer Off-Shore Services, Ltd v. Federal Republic of Germany,* 615 F.3d 97 (2d Cir. 2010), *cert. denied,* 131 S. Ct. 1502 (2011). Just as asserted by El Omari in this case, the Sixth Circuit has held acts such as *fraud* in the course of business can constitute commercial activity, conduct in which private parties can engage. *Keller v. Cent. Bank of Nigeria,* 277 F.3d 811, 816 (6th Cir. 2002).

The district court did not appropriately apply the *Weltover* private party test to the acts of RAKFTZA, even though El Omari alleged various acts of RAKFTZA which are in the nature of a private commercial party. E.g., RAKFTZA created and dissolved a New York LLC. RAKFTZA opened and closed New York bank accounts. RAKFTZA hired New York employees. Through the directives of Respondent, Sh. Saud impacting RAKFTZA, Plaintiff alleges was drawn into the setup of the fraudulent smear TAG White Paper scheme involving New York businesses and individuals. (App. 123-125, 135-140)

In a proposed Third Amended Complaint, submitted before the district court's decision due to expiring statute of limitations, El Omari additionally alleged RAKFTZA acts after his termination involved preparation of fraudulent documents, and the hacking of El Omari's website. (App. 197-199) These further acts are also in the nature of a commercial private party. Like earlier amendments, these additional claims were based on new evidence and new document disclosures by RAKFTZA during the district court

litigation below. No amendment was in response to any lower court's indication of a pleading deficiency.

The Second Circuit's application of *Kato* shows a conflict with the Sixth Circuit's holding in *Keller* where fraud supports a commercial activity finding. *Kato's* holding was fact dependent ("Specifically, we hold that an agency of a foreign government is not involved in "commercial activity" under the FSIA when it provides general business development assistance, including product promotion, to business enterprises of that country seeking to engage in commerce in the United States."). *Kato* addressed only the *first* clause of 1605(a)(2), and El Omari invoked *all three* clauses.

In further illustration of circuit division, in *El-Hadad v. United Arab Emirates,* 496 F.3d 658, 661 (D.C. Cir. 2007), also an employment discharge case involving the UAE, the D.C. Circuit relied on the Second Circuit's *Kato,* but reached an opposite result in *favor* of a UAE Embassy employee and finding *no immunity* as to the UAE's D.C. Embassy. ("The chief question in this appeal is whether the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.,* shields the United Arab Emirates from the wrongful termination and defamation suit of its former employee, Mohamed Salem El-Hadad, once an accountant in the U.A.E.'s embassy here in Washington, D.C. The case turns on an application of the Act's commercial activity exception. *Id.* § 1605(a)(2). Since we conclude El-Hadad was not a civil servant under the Act, and his work did not involve the exercise of distinctively governmental powers, we affirm the district court in applying the commercial activity exception and denying immunity.

A relatively minor issue the district court's failure to discount El-Hadad's future lost earnings to present value compels us to reverse in part and remand the case solely for correction of that aspect of the damages award.")

El Omari alleged acts by RAKFTZA far more than general business development assistance, because the alleged acts involve the creation of a New York company, the opening of New York bank accounts, the hiring of New York staff, the purported hiring of the New York Respondents without his knowledge or understanding, the commissioning, drafting, and delivery of the false smear TAG White Paper between New York and the UAE, the firing of El Omari, and the retaliation. This case involves far more than "general business development assistance." Or looking at Petitioner and putting it the way the D.C. Circuit applied the rule, the alleged facts show El Omari in this situation was not a civil servant under the Act, and his work did not involve the exercise of distinctively governmental powers.

B. FOREIGN GOVERNMENT OFFICIAL IMMUNITY

The FSIA does not protect foreign government officials sued in U.S. courts, and this Court left it to the lower courts to develop federal common law on foreign government official immunity. *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010)

El Omari amended his pleadings in the district court under Fed. R. Civ. P. 15, without requiring leave of court, based upon new evidence and new occurrences, to sue Sh. Saud in his individual and official capacities for fraud relating to the TAG White

Paper, and for the intentional infliction of emotional distress relating to use of an INTERPOL Red Notice in retaliation against El Omari. The district court found that foreign government immunity applied to Sh. Saud and dismissed this defendant. (App. 33) The Second Circuit did not address this issue. (App. 6)

The post *Samantar* Executive Branch position looks to a State Department determination of foreign government official immunity for the courts. *See*, "Five Tenets of Official Immunity Practice," *Foreign Official Immunity After Samantar: A United States Government Perspective,* Vanderbilt Journal of Transnational Law, Vol. 44, November 2011, No. 5, p. 1152[1] The State Department determination rests on 1) Deference to the State Department, 2) Absent a treaty or statute, general principles regarding immunity as articulated by the State Department, 3) Immunities of foreign officials belong to the foreign state, and these immunities may be waived, 4) distinguish between immunities that are based on a person's status and those based on a person's claimed official acts. *Id*., pp. 1152-1154.

Sh. Saud was sued in his personal and official capacity for fraud and intentional infliction of emotional distress, common of a private party and not acts sanctioned and within the scope of official duties. This suit did not seek to compel a government agency to pay a judgment for these claims.

There was absolutely no suggestion of foreign official immunity for Sh. Saud by the State Department

[1] By Harold Hongju Koh, Legal Advisor, United States Department of State.

or even the UAE, even though Sh. Saud long ago asserted he would seek a stay of proceedings in a pre-motion letter while he sought to obtain a suggestion of immunity. This stay request was abandoned by Sh. Saud, and it would appear his request to the State Department was unsuccessful, otherwise a suggestion of immunity would have been submitted to the court. In effect, the lower court gave Sh. Saud the immunity he sought but could not obtain from the Executive Branch. Sh. Saud contended in the Second Circuit he never did seek a suggestion of immunity from the State Department.

The district court did not consider the unrebutted testimony of El Omari's expert witness, Radha Stirling, that in particular the conduct of Sh. Saud in using INTERPOL Red Notices, and indeed the UAE in general, is part of an established pattern of misuse of INTERPOL's criminal resources for political and civil leverage by the UAE.

El Omari alleged in his pleadings that Sh. Saud unsuccessfully tried to invoke immunity from the Department of State before. ("Sh. Saud was arrested for sexual assault of a hotel maid … in Rochester, Minnesota, on June 10, 2005…. According to the Rochester police report, Sh. Saqr (sic) claimed Diplomatic Immunity at the time of his arrest, but the arresting officer reported contacting the U.S. Department of State and was advised Sh. Saud was not on a list of foreign individuals with Diplomatic Immunity.") (App. 122-123) Like the alleged criminal sexual acts in Rochester, Minnesota in 2005, the instant alleged acts of fraud and intentional infliction

of emotional distress are outside the scope of duties of any foreign government official.

El Omari contends these allegations indicate Sh. Saud is a rogue foreign official with a pattern of committing harmful private acts outside the scope of official duties, made possible by a belief in an invincible cloak of immunity to protect his acts in and touching the United States.

C. LEAVE TO AMEND WAS NOT FREELY GIVEN

In the district court, El Omari requested an opportunity to amend the Second Amended Complaint to address any pleading deficiency, in the event the lower court granted the Respondents' motions to dismiss. The district court dismissed El Omari's Second Amended Complaint in its entirely, with prejudice. (App. 42) The Second Circuit did not address this issue. (App. 6) The proposed Third Amended Complaint was submitted for leave to file with an explanation of expiring statute of limitations as to other claims–Not to cure any pleading deficiency.

This Court has declared "this mandate [of Rule 15(a)(2)] is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962) "[I]f the underlying facts or circumstances relied upon by a plaintiff may be a proper source of relief, he ought to be afforded an opportunity to test his claim on the merits." *Id.*

The record below is devoid of any claim that there was any undue delay, bad faith or dilatory motive, or undue prejudice to any non-moving party by Plaintiff's request, or that El Omari previously sought leave of court to amend or amended his pleadings to cure any

deficiencies. Upon stipulation, the two prior pleading amendments added new defendants and claims on the basis of a new alleged retaliation incident by Sh. Saud (the request of a "Red Notice" by INTERPOL) and new fraud supporting documents obtained from RAKFTZA's penchant for filing a multitude documents in support of their Rule 12(b) motion, even though documents are generally not reviewable under said rule.

The district court stated that El Omari was already granted leave of court to amend the complaint two times and further amendment would be futile. (SPA-32) There is nothing in the record to support that statement.

REASONS FOR GRANTING THE WRIT

I. THE UAE CONTROLS OVER $1 TRILLION IN OIL DRIVEN SOVEREIGN WEALTH FUND INVESTMENT, AND THE IMMUNITY OF STATE ACTORS IN INTERNATIONAL BUSINESS RELATIONS TOUCHING THE U.S. IS OF PRESSING PUBLIC CONCERN

The U.S. Department of State[2] and the United Nations[3] critiques the UAE as NOT having an independent judiciary and lacking in rule of law. Juxtapose this against the fact that today the Abu Dhabi Investment Authority, an oil revenue driven

---

[2] *Report of the Special Rapporteur on the independence of judges and lawyers on her mission to the United Arab Emirates*, par. 48, United Nations, Office of the High Commissioner for Human Rights, 5 May 2015, A_HRC_29_26_Add_2_ENG

[3] "United Arab Emirates 2016 Human Rights Report", *Country Reports on Human Rights Practices for 2016,* U.S. Department of State, Bureau of Democracy, Human Rights & Labor

Sovereign Wealth Fund ("SWF") of the UAE, with its inception in 1976, is presently ranked third worldwide at $683 billion, behind Norway and China.[4] The UAE has two more SWFs in the worlds largest top fifteen: Investment Corporation of Dubai ($250 billion) and Mubadala Investment Company ($226 billion).[5] Together just these three SWFs of the UAE government control over $1 trillion dollars of investment, an amount almost 20% of the size of the U.S. economy.[6] To show how close to home SWF investment occurs, last year the National Pension Service of Korea, a SWF of the government of South Korea, reportedly became a controlling 27% stakeholder in One Vanderbilt Place, a skyscraper presently under construction across the street from Grand Central Station in New York City.[7]

RAKFTZA mixes private and public sectors, by regulating, doing business, and investing, in and outside of the RAK Free Trade Zone. The related RAK Investment Authority was considered a SWF until last year.[8] Sh. Saud, by virtue of being the absolute ruler of

---

[4] "Sovereign Wealth Fund Rankings", Sovereign Wealth Fund Institute, swfinstitute.org.

[5] *Id*.

[6] 2017 U.S. Q4 GDP was $19,831.8 billion, according to the U.S. Bureau of Economic Analysis, Table 1.1.5, Q4, apps.bea.gov

[7] "National Pension Service Acquires Controlling State in "One Vanderbilt" In NYC", The Korea Economic Daily, January 31, 2017, English.hankyung.com

[8] In 2017 the Sovereign Wealth Fund Institute removed RAK Investment Authority from classification as a SWF. See Note 4, supra.

the emirate of RAK, has absolute ruling power over both entities.

The immunity of SWFs has been of growing public concern. "State-controlled investors - such as sovereign wealth funds and public pension funds – have greatly expanded their foreign investments in recent years. … the doctrine of foreign state immunity … may make it difficult for private parties to pursue legitimate claims against them…." "Foreign State Immunity and Foreign Government Controlled Investors", Gaukrodger, D. (2010), *OECD Working Papers on International Investment*, 2010/02, OECD Publishing. www.oecd.org/daf/investment/workingpapers.

Although this case is an employment discharge case and not an investment matter, the sovereign immunity rules are the same. This case is similar to the mixed public/private party immunity concern expressed by the OECD, and El Omari and the public needs this Court's review.

II. THE DECISION BELOW SHOWS A SPLIT BETWEEN THE SECOND/NINTH/TENTH AND D.C./FIFTH/SIXTH COURTS OF APPEAL

Even though El Omari plead all three clauses of section 1605(a)(2), the outcome and decision by the Second Circuit in this case relied on *Kato,* which applied only the first clause of section 1605(a)(2), and conflicts with the Fifth and Sixth Circuits which applied the third clause of section 1605(a)(2) under a similar fraud-based fact situation. The Second Circuit here and the D.C. Circuit came to different outcomes in an employment discharge case applying *Kato*.

The Sixth Circuit's *Keller* held that allegations of fraud could come within the third clause of the FSIA's commercial activity exception of section 1605(a)(2).[9] *Keller*, at 814. The *Keller* analysis applied this Court's "nature not purpose" *Weltover* test, but rejected the Second Circuit's additional requirement of a showing of a "legally significant act" occurred in the United States as part of the "direct effect" element of the third clause, see *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 931 (2d Cir.1998), as exceeding this Court's test in *Weltover*.

The Sixth Circuit sided with the Fifth Circuit in *Voest-Alpine Trading USA Corp. v. Bank of China,* 142 F.3d 887, 894 (5th Cir.1998). "According to the *Voest-Alpine* court, when the Supreme Court rejected "the suggestion that § 1605(a)(2) contains any unexpressed requirement of 'substantiality' or 'foreseeability,'" *Weltover*, 504 U.S. at 618, 112 S.Ct. 2160, this holding was an admonishment to courts not to add any unexpressed requirements to the language of the statute. *Voest-Alpine*, 142 F.3d at 894. We agree that the addition of unexpressed requirements to the statute is unnecessary, and we decline to adopt the 'legally significant acts' test." *Keller*, at 818.

In conflict, as pointed out in *Keller*, the Second Circuit's added requirement of legally significant acts has been adopted in the Ninth and Tenth Circuits in *Adler v. Federal Republic of Nigeria*, 107 F.3d 720, 727 (9th Cir.1997); *United World Trade, Inc. v.*

---

[9] "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."

Mangyshlakneft Oil Prod. Ass'n, 33 F.3d 1232, 1239 (10th Cir.1994). *Keller*, at 817.

By looking to the purpose of RAKFTZA, not the acts alleged which included alleged fraudulent acts touching New York, the lower courts did not follow *Weltover*. The lack of the lower court's recognition of El Omari's pleading of fraudulent acts implies the courts applied the additional legally significant acts requirement, rejected by the Fifth and Six Circuits.

Finally, the D.C. Circuit in *El-Hadad* is split with the Second Circuit on employment discharge facts in application of the same rule in *Kato*.

CONCLUSION

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

Respectfully submitted,

Scott Michael Moore
Counsel of Record
Moore International Law PLLC
45 Rockefeller Plaza, 20th Floor
New York, NY 10111
(212) 332-3474
smm@milopc.com

Counsel for Petitioner

November 16, 2018