

7/29/04

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

JOHN DOE, in his capacity as the )  
executor of the Estate of Jane Doe, in )  
his personal capacity, and as the personal )  
representative of Jane Doe, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
OSAMA BIN LADEN, et al., )  
 )  
Defendants. )  
\_\_\_\_\_ )

Case No. 01-2516 (RWR)

**PLAINTIFF’S SURREPLY IN SUPPORT OF HIS OPPOSITION TO DEFENDANT  
AFGHANISTAN’S MOTION TO VACATE AND DISMISS**

Plaintiff, John Doe, by counsel, respectfully submits this surreply in support of his opposition to Defendant Afghanistan’s (“Afghanistan”) motion to vacate the default judgment and dismiss all claims against Afghanistan.

**MEMORANDUM OF LAW**

On February 26, 2004, Afghanistan filed a motion to vacate the default entered against it and to dismiss all claims against it. *Motion of the Transitional Islamic State of Afghanistan to Vacate Default Judgment and Dismiss Claims Against Afghanistan (“Vacate Motion”)*. Afghanistan’s motions argued that the Court did not have personal or subject matter jurisdiction over Plaintiff’s claims. *Id.* at 1. Plaintiff’s March 30, 2004 opposition demonstrated how the Court had jurisdiction over his claims and why the default against Afghanistan should stand. *Plaintiff’s Opposition to Defendant Afghanistan’s Motion to Vacate Default and Dismiss Claims Against Afghanistan (“Opposition”)*. On April 8, 2004, Afghanistan filed its reply. *Reply to Opposition to Vacate Default Judgment and Dismiss Claims Against Afghanistan (“Reply”)*.

Afghanistan's reply contains an argument not made in previous pleadings, misapplies case law and misstates essential material facts and rules of law.

**I. Afghanistan's New "Discretionary Function" Claim Does Not Support Its Motion to Vacate and Dismiss All Claims Against It.**

28 U.S.C. § 1605(a)(5) is an exception to the "jurisdictional immunity of a foreign state." *Letelier v. Republic of Chile*, 499 F.Supp. 665, 669 (D.D.C. 1980). The exception does not apply to "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...." 28 U.S.C. § 1605(a)(5)(A). In its reply, Afghanistan states that Plaintiff's complaint "fails to allege facts sufficient to remove his claims from the requirement imposed by the 'discretionary function' language in the noncommercial tort exception." *Reply* at 7. In addition to being raised for the first time in its reply brief, the argument is incorrect. In *Letelier*, the Court considered the applicability of 28 U.S.C. § 1605(a)(5)(A) to assassinations and clearly held that the Defendant Republic of Chile could not claim sovereign immunity under the Act [FISA] because, "there is was no discretion to commit illegal acts." *Letelier*, 488 F. Supp. at 665. Later in the opinion, the Court further enunciated this point:

As it has been recognized, there is no discretion to commit, or to have one's agents commit, an illegal act. [Citations omitted]. Whatever policy options may exist for a foreign country, it has no 'discretion' to perpetrate conduct designed to result in the assassination of an individual or individuals, an action that is clearly contrary to the precepts of humanity as recognized in both national and international law. Accordingly there would be no 'discretion' within the meaning of section 1605(a)(5)(A) to order or to aid an assassination and were it to be demonstrated that a foreign state has undertaken such an act in this country, that foreign state could not be accorded sovereign immunity under subsection (A) for any tort claims resulting from its conduct. As a consequence, the Republic of Chile cannot claim sovereign immunity under the Foreign Sovereign Immunities Act for its alleged involvement in the death of Orlando Letelier and Ronni Moffit.

*Id.* at 673.

Afghanistan has been accused of conspiring with the Taliban and Iraq to conduct illegal and unlawful terrorist attacks in the United States, including the September 11, 2001 attacks in which Plaintiff's wife died. *Compl.*, ¶¶ 59-63. Because such acts cannot, by their very definition, be considered discretionary, Afghanistan cannot claim immunity under the discretion exception to 28 U.S.C. § 1605(a)(5).

**II. *Burnett v. Al Baraka Investment and Development Corp. Does Not Lead To The Legal Conclusion That Plaintiff's 28 U.S.C. § 1605(a)(5) Claim Is Incorrect.***

In *Burnett*, a group of plaintiffs, victims, and representatives of victims of the terrorist attacks of September 11, 2001 filed suit against a number of defendants, including two Saudi Arabian princes. *Burnett*, 292 F. Supp.2d 9 (D.D.C. 2003). Included in the lawsuit were claims brought under 28 U.S.C. § 1605 (a)(5). *Id.* at 18-21. The princes asserted sovereign immunity under FISA. *Id.* at 13. The princes argued that the plaintiffs' mere allegation that they had materially supported the September 11, 2001 terrorists could not "possibly establish the causal links that would be necessary to bring the noncommercial tort exception into play." *Id.* at 18.

The Court found that

[I]n the FISA context, plaintiff's allegations...would stretch the causation requirement of the noncommercial tort exception not only to 'the farthest reaches of the common law,' but beyond, to terra incoginta. I find, accordingly, that the noncommercial tort exception afforded by § 1605(a)(5) is not applicable.

*Id.* at 20.

Afghanistan's reply argues that *Burnett's* holding demonstrates "the noncommercial tort exception does not apply to Doe's claims related to 9/11 which are predicated on 'material

support' that Afghanistan [sic]<sup>1</sup> allegedly provided to Al Qaeda." *Reply* at 5. However, this statement misapplies *Burnett*. *Burnett* would foreclose Plaintiff's use of 28 U.S.C. § 1605(a)(5) only if the chain of causation linking Afghanistan was too remote. This is not the case.

Plaintiff's complaint clearly establishes a close nexus between Afghanistan and the terrorist attacks of September 11, 2001. In his complaint, Plaintiff alleges that Afghanistan: (1) materially supported Al Qaeda cells within its borders; (2) trained at least four of the September 11, 2001 terrorists in training camps located in Afghanistan, and supported by Afghanistan; (3) provided safe haven and a base of operations for Defendants Bin Laden and Al Qaeda; and (4) hosted meetings between Iraqi intelligence officers and Defendant Bin Laden. *Compl.*, ¶¶ 12, 21, 22, 30.

This is not the case of princes who "funded...those, who funded...those, who carried out the September 11<sup>th</sup> attacks." *Burnett* at 20. This is a case of Afghanistan hosting, training and materially supporting terrorists directly responsible for the planning and carrying out of the attacks. Plaintiff's complaint clearly establishes a reasonable and unambiguous chain of causation between Afghanistan's actions and the death of Plaintiff's wife.<sup>2</sup> *Burnett* does not create a presumption that 28 U.S.C. § 1605(a)(5) cannot be utilized in the circumstances that give rise to this lawsuit. Rather, under *Burnett*, the allegations against the foreign actor must present a

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<sup>1</sup>As it did in its motion to vacate and dismiss, Afghanistan once again uses Afghanistan and the Taliban interchangeably. Plaintiff sued Afghanistan and the Taliban as separate Defendants.

<sup>2</sup>For the purpose of the motion to dismiss, the allegations in Plaintiff's complaint must be accepted as true and all inferences construed in Plaintiff's favor. *Burnett*, 292 F.Supp.2d at 14.

chain of causation that is not too remote.<sup>3</sup> As demonstrated above, Plaintiff's complaint satisfies the *Burnett* holding.

**III. Afghanistan's Misstatement Of Facts And Law Lends Weight To Plaintiff's Opposition.**

In its reply, Afghanistan dedicates an entire page to reiterating the difference between Rule 60(b) and Rule 55(c) of the Federal Rules of Civil Procedure. *Reply* at 2. Afghanistan continues to insist that Rule 60(b) governing default judgments is the proper vehicle for its motion. *Id.* Afghanistan concludes, it "has demonstrated that considerations of justice dictate that any default judgment granted against Afghanistan should be vacated and Doe's claim dismissed for lack of personal and subject matter jurisdiction." *Id.* However, as demonstrated in Plaintiff's opposition, the Court has not yet entered a default judgment against Afghanistan. The Clerk issued a default against Afghanistan on January 29, 2003, but no default judgment has been issued. *See Exhibit A.* As such, Afghanistan must proceed under Rule 55(c). And, as stated in Plaintiff's opposition, Afghanistan has not satisfied the Rule 55(c) standard. *Opposition* at 2-3.

For these compelling reasons, and the reasons set forth in Plaintiff's opposition, the Court should deny Afghanistan's motion to vacate and dismiss all claims against it.

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<sup>3</sup>Interestingly, Afghanistan relies on *Burnett* in one section of its reply, but states later that the portion of *Burnett* used by Plaintiff in its opposition is "out of step with the overwhelming authority in this jurisdiction and elsewhere." *Reply* at 6.

Respectfully submitted,

JUDICIAL WATCH, INC.

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# EXHIBIT A

**U.S. District Court  
District of Columbia (Washington, DC)  
CIVIL DOCKET FOR CASE #: 1:01-cv-02516-RWR**

DOE v. BIN-LADEN et al

Assigned to: Judge Richard W. Roberts

Referred to:

Demand: \$30000000

Lead Docket: None

Related Cases: 1:03-cv-00602-RWR

Case in other court: None

Cause: 28:1330 Breach of Contract

Date Filed: 12/04/01

Jury Demand: Plaintiff

Nature of Suit: 890 Other Statutory  
Actions

Jurisdiction: Federal Question

**Plaintiff**  
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**JOHN DOE, in his capacity as the  
executor of the Estate of JANE DOE,  
in his personal capacity, and as the  
personal representative of JANE DOE,**

represented by **Larry Klayman**  
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V.

**Defendant**

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**SHEIKH USAMA BIN-  
 MUHAMMAD BIN-LADEN**

*aka*  
**OSAMA BIN LADEN**  
**AL QAEDA**

*aka*  
**ISLAMIC ARMY**

**THE TALIBAN**

**THE ISLAMIC EMIRATE OF  
 AFGHANISTAN**

*aka*  
**THE ISLAMIC STATE OF  
 AFGHANISTAN**

**REPUBLIC OF IRAQ**

**Movant**  
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**TRANSITIONAL ISLAMIC STATE  
 OF AFGHANISTAN**

represented by **R. Michael Smith**  
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<b>Filing Date</b>	<b>#</b>	<b>Docket Text</b>
12/04/2001	<u>3</u>	MOTION for Leave to File <i>Action Under Pseudonym</i> by JOHN DOE. (nmr, ) (Entered: 01/14/2002)
12/04/2001	<u>4</u>	ORDER granting Motion for Leave to File <u>3</u> action under pseudonym; directing that the affidavit in support of the motion be filed under seal. (jeb, ) (Entered: 01/18/2002)
01/04/2002	<u>1</u>	NOTICE <i>of Suit</i> by JOHN DOE (Orfanedes, Paul) (Entered:

		01/04/2002)
01/04/2002	<u>2</u>	COMPLAINT against SHEIKH USAMA BIN-MUHAMMAD BIN-LADEN, AL QAEDA, THE ISLAMIC EMIRATE OF AFGHANISTAN, THE REPUBLIC OF IRAQ, THE TALIBAN ( Filing fee \$150 ). Filed by JOHN DOE. (aet, ) (Entered: 01/12/2002)
06/11/2002	<u>5</u>	ORDER for plaintiff to file written status report by 6/25/2002. If plaintiff does not have proof of proper service on defendants by that date, the case will be stayed and administratively closed pending service. Signed by Judge Richard W. Roberts on 6/11/02. (TDR) (Entered: 06/11/2002)
06/25/2002	<u>6</u>	STATUS REPORT by JOHN DOE. (Orfanedes, Paul) (Entered: 06/25/2002)
07/03/2002	<u>7</u>	ORDER STAYING AND ADMINISTRATIVELY CLOSING CASE pending service. Signed by Judge Richard W. Roberts on 7/2/02. (TDR) (Entered: 07/03/2002)
08/20/2002	<u>11</u>	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. THE ISLAMIC EMIRATE OF AFGHANISTAN served on 7/31/2002, answer due 8/20/2002 (nmr, ) (Entered: 08/29/2002)
08/22/2002	<u>8</u>	ENTERED IN ERROR.....First MOTION for Default Judgment as to <i>Defendant the Republic of Iraq</i> by JOHN DOE. (Attachments: # <u>1</u> Exhibit 1)(Orfanedes, Paul) Modified on 8/23/2002 (nmr, ). (Entered: 08/22/2002)
08/22/2002	<u>9</u>	ENTERED IN ERROR.....MOTION to Reopen Case <i>Reinstate case on the Court's active docket</i> by JOHN DOE. (Attachments: # <u>1</u> Exhibit 1)(Orfanedes, Paul) Modified on 8/23/2002 (nmr, ). (Entered: 08/22/2002)
08/23/2002	<u>10</u>	MOTION to Reopen Case by JOHN DOE. (Attachments: # <u>1</u> Exhibit) (Orfanedes, Paul) (Entered: 08/23/2002)
09/04/2002	<u>12</u>	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. REPUBLIC OF IRAQ served on 8/1/2002 , answer due 8/21/2002 (nmr, ) Modified on 1/29/2003 (mpt, )(6/17/02). (Entered: 09/05/2002)
10/11/2002		Minute Entry: Motion to Reinstate <u>10</u> granted and terminated. Case reopened. (TDR) (Entered: 10/11/2002)
01/24/2003	<u>13</u>	AFFIDAVIT IN SUPPORT OF DEFAULT <i>FOR DEFENDANT</i>

		<i>REPUBLIC OF IRAQ</i> by JOHN DOE. (Orfanedes, Paul) Modified on 1/28/2003 (mpt, ). (Entered: 01/24/2003)
01/24/2003	<u>14</u>	AFFIDAVIT IN SUPPORT OF DEFAULT <i>FOR DEFENDANT AFGHANISTAN</i> by JOHN DOE. (Orfanedes, Paul) Modified on 1/28/2003 (mpt, ). (Entered: 01/24/2003)
01/29/2003	<u>15</u>	Clerk's ENTRY OF DEFAULT as to REPUBLIC OF IRAG (mpt, ) Modified on 1/29/2003 (mpt, ). (Entered: 01/29/2003)
01/29/2003	<u>16</u>	Clerk's ENTRY OF DEFAULT as to THE ISLAMIC EMIRATE OF AFGHANISTAN (mpt, ) (Entered: 01/29/2003)
05/08/2003	<u>17</u>	MOTION for Service by Publication on certain defendants by JOHN DOE. (Attachments: # <u>1</u> Exhibit 1# <u>2</u> Exhibit 2# <u>3</u> Exhibit 3)(nmw, ) (Entered: 05/09/2003)
05/28/2003	<u>18</u>	ENTERED IN ERROR.....First MOTION for Service by Publication ( <i>Amended Order and Notice Only</i> ) by JOHN DOE. (Orfanedes, Paul) Modified on 5/29/2003 (nmw, ). (Entered: 05/28/2003)
05/29/2003		NOTICE OF CORRECTED DOCKET ENTRY. Document No. 18 was entered in error and counsel was instructed to refile said pleading. (nmw, ) (Entered: 05/29/2003)
05/30/2003	<u>19</u>	ORDER granting <u>17</u> Motion for Service by Publication . Signed by Judge Richard W. Roberts on 5/27/03. (lin, ) (Entered: 05/30/2003)
07/16/2003	<u>20</u>	NOTICE of Appearance by James F. Peterson on behalf of JOHN DOE (Peterson, James) (Entered: 07/16/2003)
07/16/2003	<u>21</u>	SERVICE by Publication filed by JOHN DOE. Last publication date June 24, 2003. (Attachments: # <u>1</u> Exhibit Newspapers with Legal Notice# <u>2</u> Exhibit Website with Legal Notice)(Peterson, James) (Entered: 07/16/2003)
09/03/2003	<u>22</u>	AFFIDAVIT FOR DEFAULT <i>AGAINST CERTAIN DEFENDANTS (with draft 55a form)</i> by JOHN DOE. (Peterson, James) (Entered: 09/03/2003)
11/25/2003	<u>23</u>	NOTICE of Appearance by James F. Peterson on behalf of JOHN DOE (Peterson, James) (Entered: 11/25/2003)
11/25/2003	<u>24</u>	NOTICE of Appearance by Paul J. Orfanedes on behalf of JOHN DOE (Orfanedes, Paul) (Entered: 11/25/2003)

02/23/2004	<u>25</u>	MOTION for Discovery / <i>PLAINTIFF'S MOTION FOR LEAVE TO ISSUE DOCUMENT SUBPOENA</i> by JOHN DOE. (Attachments: # <u>1</u> Exhibit 1# <u>2</u> Exhibit 2# <u>3</u> Exhibit 3)(Orfanedes, Paul) (Entered: 02/23/2004)
02/27/2004	<u>26</u>	MOTION to Vacate default judgment and dismiss claims against Afghanistan by TRANSITIONAL ISLAMIC STATE OF AFGHANISTAN. (Attachments: # <u>1</u> Text of Proposed Order) (Burgess, Joe) (Entered: 02/27/2004)
03/05/2004	<u>27</u>	MOTION for Extension of Time to <i>File Opposition to Defendant Afghanistan's Motion to Vacate Default and Dismiss Claims Against Afghanistan</i> by JOHN DOE. (Attachments: # <u>1</u> Text of Proposed Order)(Orfanedes, Paul) (Entered: 03/05/2004)
03/08/2004		MINUTE ENTRY ORDER granting <u>27</u> Plaintiff's Unopposed Motion for Extension of Time to 3/30/04 to file opposition to defendant's Motion to Vacate Default and Dismiss Claims against Afghanistan. Issued by Judge Richard W. Roberts on 3/8/04. (AKG) (Entered: 03/08/2004)
03/30/2004	<u>28</u>	Memorandum in opposition to motion re <u>26</u> <i>to vacate and dismiss claims</i> filed by JOHN DOE. (Orfanedes, Paul) (Entered: 03/30/2004)
04/08/2004	<u>29</u>	REPLY to opposition to motion re <u>26</u> filed by TRANSITIONAL ISLAMIC STATE OF AFGHANISTAN. (Smith, R.) (Entered: 04/08/2004)
04/08/2004		MINUTE ENTRY ORDER denying as unnecessary plaintiff's motion for leave to issue a document subpoena <u>25</u> under Federal Rule of Civil Procedure 45 to a non-party since Rule 45 does not require such a motion. Issued by Judge Richard W. Roberts on 4/8/04. (AKG) (Entered: 04/08/2004)

<b>PACER Service Center</b>			
<b>Transaction Receipt</b>			
04/26/2004 16:30:00			
<b>PACER Login:</b>	jw0223	<b>Client Code:</b>	505-mlc
<b>Description:</b>	Docket Report	<b>Case Number:</b>	1:01-cv-02516-RWR
<b>Billable Pages:</b>	3	<b>Cost:</b>	0.21