

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

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DAVID M. ROEDER, <u>et al.</u> ,	)	
	)	
Plaintiffs,	)	Civil Action No.
	)	00-3110 (EGS)
v.	)	
	)	
THE ISLAMIC REPUBLIC	)	
OF IRAN, <u>et al.</u> ,	)	
	)	
Defendants.	)	
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**REPLY MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION  
TO VACATE DEFAULT JUDGMENT AND DISMISS PLAINTIFFS' CLAIMS**

**INTRODUCTION**

In its motion papers filed on October 12, 2001, the United States presented three independent reasons for vacating the default judgment entered on August 17. First, where no exception to sovereign immunity applies, a default judgment against a foreign state is void for lack of subject matter jurisdiction, and must be vacated as a matter of law under Federal Rule of Civil Procedure 60(b)(4). Memorandum of Points and Authorities in Support of the United States' Motion To Vacate Default Judgment and Dismiss Plaintiffs' Claims, dated October 12, 2001 ("Gov't Dismiss Mem.") at 9-13. Second, this case presents "extraordinary circumstances" justifying relief from the judgment under Rule 60(b)(6): matters that are "central to the litigation" -- the Algiers Accords, and their implementing federal regulations which prohibit the prosecution of this case -- were not previously brought to the Court's attention. Gov't Dismiss Mem. at 13-14. Third, the default judgment should be vacated under Rule 60(b)(6), because of the foreign policy

ramifications of allowing this case to proceed in default of our nation's legal duties under a binding international agreement. Id. at 14-16.

The United States also showed that, once the default judgment is vacated, plaintiffs' claims must be dismissed. Apart from the question of jurisdiction, the statute to which plaintiffs have looked for a cause of action, the Flatow Amendment, does not apply to foreign states, only to the officials, employees or agents of foreign states. Furthermore, the Flatow Amendment reflects no intention on the part of Congress to overturn the legal prohibitions against the maintenance of this action that were set in place pursuant to the Algiers Accords. Gov't Dismiss Mem. at 17-23.

Plaintiffs' opposition casts no doubt on the government's analysis. They deny the legal obstacles to their claims, of course, but devote far greater effort to arguing that the United States may not even assert these barriers to relief. For example, plaintiffs maintain at length (and erroneously) that the United States is not a proper party even to seek vacatur of the default judgment, and that it is likewise not entitled to assert foreign sovereign immunity as a jurisdictional defect. They say little, by contrast, to support their position that the Antiterrorism Act of 1996 conferred jurisdiction to decide their claims, or to explain why the default judgment should not be vacated for extraordinary foreign policy reasons. So far as the merits are concerned, plaintiffs' central contention, that the Algiers Accords cannot "trump" the Antiterrorism Act of 1996, simply misses the point: a statute granting jurisdiction over a claim, and the substantive law governing the disposition of that claim, are of categorically different kinds and, therefore, by definition, cannot come into conflict in the first place. Plaintiffs made no attempt to argue that the Flatow Amendment creates a cause of action that supersedes the legal prohibitions against the maintenance of this action.

Where the plaintiffs failed, Congress has succeeded, however, in altering the legal analysis that must be applied to this case. Still, the outcome remains the same. Earlier this month Congress passed, and today the President has signed into law, H.R. 2500, 107th Cong., 2d Sess., the fiscal year 2002 appropriations bill for the Commerce, Justice and Treasury Departments. Section 626(c) of this legislation reads, in full:

Amend 28 U.S.C. Section 1605(a)(7)(A) by inserting at the end, and before the semicolon, the following: "or the act is related to Case Number 1:00CV03110 (ESG) [sic] in the United States District Court for the District of Columbia."

Gov't Exh. 27 at 2. The effect of this amendment is to create a new exception to foreign sovereign immunity for the acts underlying the claims asserted in this, and only this, case. As a result, the Court now has subject matter jurisdiction to adjudicate the merits of plaintiffs' claims, but the necessary outcome of this case has not changed.

Prior to the enactment of section 626(c), the Court lacked jurisdiction over plaintiffs' claims, and the default judgment entered on August 17 was void ab initio. The question thus becomes whether section 626(c) retrospectively confers the jurisdiction required to support what would otherwise be a void judgment. The question appears to implicate the analysis prescribed by the Supreme Court in Landgraf v. USI Film Prod., Inc., 511 U.S. 244, 280 (1994), which holds that legislation will not be applied retroactively without the sort of express legislative command that is absent from section 626(c). Of course, the Court need not come to terms with this issue of retroactive jurisdiction, because whether or not the default judgment must be vacated as void under Rule 60(b)(4), it should still be vacated, under Rule 60(b)(6), to avoid the adverse foreign policy consequences of breaching the nation's commitments under the Algiers Accords.

So far as the merits are concerned, in light of section 626(c) it is perfectly clear that, once the default judgment is vacated, the Court may now consider the merits of plaintiffs' claims, and should not rely on foreign sovereign immunity as a basis for dismissing those claims. That said, plaintiffs' claims remain barred pursuant to the terms of the Algiers Accords, Executive Order No. 12283, and their implementing regulations. Neither a grant of jurisdiction, standing alone, nor even the enormous sympathy that is owed to the hostages for the suffering they have endured, can overcome the legal prohibitions against the maintenance of this action that were adopted in exchange for the hostages' freedom in 1981.

## **ARGUMENT**

### **I. THE DEFAULT JUDGMENT MUST BE VACATED.**

#### **A. The United States Is Entitled To Seek Vacatur of the August 17 Default Judgment Under Rule 60(b).**

Plaintiffs assert several reasons why the United States may not seek to vacate the default judgment under Rule 60(b)(4) or (b)(6). Plaintiffs' Memorandum of Points and Authorities in Opposition to the United States Motion To Vacate the Default Judgment Against Iran and To Dismiss the Claims Against Iran, dated November 14, 2001 ("Pl. Dismiss Opp.") at 2-5. But the reasons given lack merit. First, plaintiffs argue that relief from the judgment is unwarranted in light of the factors cited in Whelan v. Abell, 48 F.3d 1247, 1258 (D.C. Cir. 1995). Pl. Dismiss Opp. at 2-3. Whelan, however, is not on point.

Whelan dealt with the "good cause" standard for vacating a default *order* under Federal Rule of Civil Procedure 55(c). But if the Court rules that the default judgment is void for lack of subject matter jurisdiction, then it is required as a matter of law to vacate the judgment, and the discretionary factors considered under Rule 55(c) -- whether the default was willful, whether the defendant has presented a meritorious defense, and prejudice to the plaintiffs, Whelan, 48 F.3d at 1259 -- simply do not enter into the

analysis. See Gov't Dismiss Mem. at 9, citing Robinson Eng'g Co. Pension Plan and Trust v. George, 223 F.3d 445, 448 (7th Cir. 2000) (if the underlying judgment is void, it is a per se abuse of discretion to deny a motion to vacate under Rule 60(b)(4)); United States v. Forma, 42 F.3d 759, 762 (2d Cir. 1994) ("if there was no subject matter jurisdiction . . . then the default judgment . . . is void and must be vacated"); Von Dardel v. U.S.S.R., 736 F. Supp. 1, 8 (D.D.C. 1990) ("no alternative" but to vacate a default judgment entered without subject matter jurisdiction).

The same is true where a party seeks to vacate a default judgment under Rule 60(b)(6). As the D.C. Circuit explained in Computer Prof'ls for Soc. Responsibility v. U.S. Secret Serv., 72 F.3d 897, 903 (D.C. Cir. 1996), when (as here) a party presents a previously undisclosed fact that is "central to the litigation," then reconsideration of a judgment under Rule 60(b)(6) is proper even if (contrary to the situation here) the moving party itself is responsible for the failure to present that information earlier. In Practical Concepts, Inc. v. Republic of Bolivia, 811 F.2d 1543, 1547-48, 1551-52 (D.C. Cir. 1987), the D.C. Circuit vacated the default judgment against Bolivia under Rule 60(b)(6) because of the adverse consequences for U.S. foreign policy (as noted by the government), even though it concluded that Bolivia had "under[taken] the risks" of failing to appear.

Second, plaintiffs argue that relief is unavailable to the United States under Rule 60(b), because the rule specifies that "the court may relieve a party . . . from a final judgment, order, or proceeding," whereas the United States is not a "party" to this case. Pl. Dismiss Opp. at 3-4. This argument simply disregards the fact that once the United States' motion to intervene is granted, it will have become a party to this action entitled to seek relief from the default judgment under Rule 60(b). Dillard v. Baldwin County Comm'rs, 225 F.3d 1271, 1282 (11th Cir. 2000) (Rule 60 provides "proper procedural tool" for intervenor to seek relief

from prior judgment); U.S. v. Kentucky Util. Co., 927 F.2d 252, 255 (6th Cir. 1991) (one who qualifies as an intervenor may seek relief under Rule 60(b)); Williams & Humbert, Ltd. v. W & H Trade Marks (Jersey) Ltd., No. 83-1905, 1988 WL 66213 (D.D.C. June 17, 1988) (granting intervenor's Rule 60(b) motion to vacate final judgment).

Third, plaintiffs recite the principle that one party may not invoke the claims or defenses of another, Pl. Dismiss Opp. at 4, citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 804 (1985), the other party presumably being Iran. But as was in fact held in Phillips Petroleum, a litigant will have standing “to vindicate its own interests,” 472 U.S. at 805, and that is the case here. By seeking dismissal of plaintiffs’ claims, the United States is not asserting Iran’s interests. Rather, it is attempting to vindicate its own foreign policy interest in observing the United States’ legal duties under a binding international agreement, and its ever-present interest in the enforcement of its own laws, 31 C.F.R. §535.216(a), promulgated in furtherance of those duties.

**B. The Court Cannot Ignore Its Responsibility To Determine Its Jurisdiction To Enter the Default Judgment.**

**1. Foreign sovereign immunity is a question of subject matter jurisdiction that a federal court has an independent obligation to examine.**

A court may not refuse to vacate a judgment under Rule 60(b)(4) once it is shown that the court entering the judgment acted without jurisdiction, see supra at 4, and plaintiffs cite no authority to the contrary. Instead, plaintiffs again challenge the government’s right to seek vacatur of the default judgment, on the theory that "sovereign immunity is an affirmative defense that the foreign sovereign must invoke, not the State Department." Pl. Dismiss Opp. at 12, 15-16.

The idea that foreign sovereign immunity is merely a waivable defense was laid to rest in Verlinden, B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983). There the Supreme Court held that, although passages in the legislative history of the FSIA referred to sovereign immunity as an affirmative defense, “subject matter jurisdiction under the Act turns on the existence of an exception to foreign sovereign immunity.” Id. at 494 n. 20, citing 28 U.S.C. § 1330(a). See also id. at 489 (if a “claim does not fall within one of the [FSIA’s] exceptions . . . , federal courts lack subject matter jurisdiction”). The D.C. Circuit has also consistently held that “if none of the exceptions sovereign immunity applies, district courts lack jurisdiction in suits against a foreign state.” Foremost-McKesson v. Islamic Republic of Iran, 905 F.2d 438, 442 (D.C. Cir. 1990). See also Practical Concepts, 811 F.2d at 1544-45; Persinger v. Islamic Republic of Iran, 729 F.2d 835, 838 (D.C. Cir. 1984).

The Supreme Court has reiterated on countless occasions that “federal courts are under an independent obligation to examine their own jurisdiction,” and therefore they “are required to address the issue . . . even if the parties fail to raise [it].” FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 230-31 (1990); Floyd v. District of Columbia, 129 F.3d 152, 155 (D.C. Cir. 1997) (same). Deciding the merits of a case without jurisdiction “carries the courts beyond the bounds of authorized judicial action” and “is, by very definition, for a court to act ultra vires.” Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94-95, 101-02 (1998). See also NAACP v. State of New York, 413 U.S. 345, 353 (1973) (courts must determine for themselves the scope of their jurisdiction, because jurisdiction, the power to adjudicate, is a grant of authority from Congress beyond the scope of litigants to confer). In Verlinden, the Court left no doubt that the federal courts’ obligation to assure themselves of their own jurisdiction applies with equal vigor to cases against foreign nations, explaining that “even if the foreign state does not enter an appearance

to assert an immunity defense, a [court] still must determine that immunity is unavailable under the Act.” 461 U.S. at 494 n. 20.

In accordance with these principles, the federal courts have consistently held that the immunity of foreign sovereigns must be determined even where they fail to raise the issue in their own defense.<sup>1/</sup> The D.C. Circuit set the most relevant example in Persinger where, at the government’s behest, not Iran’s, the Court of Appeals agreed to reconsider the question of jurisdiction under the FSIA and, concluding that Iran’s immunity had not been lifted, vacated its earlier ruling on the merits. 729 F.2d at 837, 838. Now that the government has brought attention to the question of subject matter jurisdiction in this case, the Court may not avert its eyes from the question on the ground that it was raised by a litigant other than Iran.

Plaintiffs attempt to flavor their arguments by describing the purpose of the FSIA as “prohibit[ing] the State Department . . . from selectively using immunity to derail private lawsuits against foreign sovereigns.” Pl. Dismiss Opp. at 13. According to plaintiffs, the FSIA “was enacted against the backdrop of increasing Congressional frustration with the manner in which the State Department attempted to control the liability of foreign governments in federal courts.” Id. Supposedly, following a “struggle between the

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<sup>1/</sup> See, e.g., Jones v. Petty-Ray Geophysical Geosource, Inc., 954 F.2d 1061, 1065 & n. 5 (5th Cir. 1992) (determining foreign sovereigns’ immunity even though they had not appeared, because federal jurisdiction does not attach until it is determined that the foreign sovereign lacks immunity pursuant to the FSIA), citing Sec. Pac. Nat'l Bank v. Derderian, 872 F.2d 281, 283-84 & n. 6 (9th Cir. 1989); Frolova v. U.S.S.R., 761 F.2d 370, 372-73 (7th Cir. 1985) (same). See also Schlumberger Indus., Inc. v. Nat'l Sur. Corp., 36 F.3d 1274, 1279-80 n. 10 (4th Cir. 1994); Siderman de Blake v. Republic of Argentina, 965

State Department and Congress for control over the development of sovereign immunity doctrine,” Congress enacted the FSIA to “oust the State Department from the process of making [sovereign immunity] determinations,” intending “that foreign states be the only parties raising the defense of sovereign immunity.” Id. at 14, 15.

This tale makes for colorful reading, but as legal history it leaves much to be desired. In short, prior to 1952 it had been the practice for almost 150 years for the State Department to request immunity in cases against friendly foreign nations, filing “suggestions of immunity” to which the courts normally deferred. See Verlinden, 461 U.S. at 486; Chas T. Main, Int’l v. Khuzestan Water & Power Auth., 651 F.2d 800, 813 (1st Cir. 1981); H.R. Rep. No. 1487, 94th Cong., 2d Sess. 8 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6606-07. In 1952, however, the State Department adopted the so-called “restrictive” theory of foreign sovereign immunity, under which immunity is confined to suits involving the foreign sovereign’s “public acts,” and does not extend to its strictly commercial acts. This situation posed a number of difficulties, however, as foreign governments exerted diplomatic pressure on the State Department to make findings of immunity under circumstances that did not always so warrant. Verlinden, 461 U.S. at 487; H.R. Rep. No. 94-1487 at 7, 8.

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F.2d 699, 706 (9th Cir. 1992).

In response, Congress enacted the FSIA, not to “oust” the State Department from making immunity determinations, but “to free the Government from the case-by-case diplomatic pressure” by codifying the governing standards, and transferring the responsibility for making sovereign immunity determinations to the courts. Verlinden, 461 U.S. at 488; H.R. Rep. No. 94-1487 at 7. Contrary to plaintiffs’ suggestion that the Executive Branch opposed the FSIA, the Departments of State and Justice *drafted* the legislation, and “heartily endorsed” its enactment by the Congress. Am. Int’l Group, Inc. v. Islamic Republic of Iran, 657 F.2d 430, 444 (D.C. Cir. 1981); Chas T. Main International, 651 F.2d at 813 & n. 22; H.R. Rep. No. 94-1487 at 6, 7, 9. Nor does the government usurp the Court’s role, as plaintiffs argue, merely by bringing questions of sovereign immunity to the Court’s attention. Responsibility for deciding the issue still remains with the Court. Plaintiffs’ attempt to reveal the purposes of the FSIA through historical analysis is in all material respects a failed effort.<sup>1/</sup>

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<sup>2/</sup> Plaintiffs also cite several cases for the proposition that “courts have barred attempts by defendants to raise the sovereign immunity defense of another party in private litigation,” Pl. Dismiss Opp. at 13, 15-16, but these precedents do not support the plaintiffs’ argument. In Wilmington Trust v. United States Dist. Court, 934 F.2d 1026 (9th Cir. 1991), the issue was whether plaintiffs’ case could be tried to a jury, not whether the district court had jurisdiction to hear the case. Id. at 1032 & n. 9. Likewise, Southway v. Central Bank of Nigeria, 198 F.3d 1210 (11th Cir. 1999) did not involve a question of subject

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matter jurisdiction. The court there merely cited legislative history as support for its conclusion that the FSIA does not confer "criminal" sovereign immunity on foreign states that would proscribe reliance on their "indictable acts" to support a cause of action under RICO. *Id.* at 1215-16. Republic of the Phillipines v. Marcos, 806 F.2d 344 (2d Cir. 1986), in holding that the appellant could not raise the sovereign immunity of its co-defendants, relied summarily on the Restatement (Second) of Foreign Relations Law, § 71 (1965), *id.* at 360, without considering the jurisdictional dimension of the question presented, as required under Verlinden and other precedents that are controlling in this case.

**2. The record establishes that Iran was not designated as a state sponsor of terrorism due to the seizure and detention of the hostages.**

Once the Court discharges its "independent obligation" to examine the basis of its jurisdiction, FW/PBS, Inc., 493 U.S. at 230-31, it will discover that, at least prior to the enactment of section 626(c), the exception to sovereign immunity that plaintiffs have invoked, 28 U.S.C. § 1605(a)(7), did not apply to the circumstances of this case. As enacted by the Antiterrorism Act of 1996, section 1605(a)(7) withdrew the immunity of a foreign state in a case seeking money damages for acts of terrorism, but *only* if the foreign state had been designated a state sponsor of terrorism either at the time, or because, of the terrorist acts forming the basis of the plaintiff's claims. 28 U.S.C. § 1605(a)(7)(A); Elahi v. Islamic Republic of Iran, 124 F. Supp. 2d 97, 107 (D.D.C. 2000).

The government has already shown that Iran was first designated as a terrorist state in January 1984, long after the hostages' release, and for reasons unrelated to their seizure and detention from 1979 to 1981. See Gov't Dismiss Mem. at 12-13. As explained contemporaneously in the March 1984 edition of the State Department Bulletin, the "official record of U.S. foreign policy," Gov't Exh. 8, at 3, the designation of Iran as a state sponsor of terrorism was "based on convincing evidence o[f] a broad Iranian policy furthering terrorism beyond its borders," id. at 4 (January 23 entry) (emphasis added), conduct that necessarily excludes the seizure and detention of the hostages at the American Embassy in Tehran. The Cumulative Digest of United States Practice in International Law 1981-1988, prepared by the State Department's Office of the Legal Adviser, also reflects that Iran was designated a terrorist state "[a]s a result of [its] actions . . . occurring subsequent to the Algiers Accords." Gov't Exh. 8 at 1-2 (emphasis added).

Since the government filed its motion to dismiss, the State Department has succeeded in locating, from its microfilm archives, further official and contemporaneous documentation of the basis for Iran's designation as a state sponsor of terrorism in January 1984.<sup>1/</sup> By letters dated January 19, 1984, the Assistant Secretary of State for Legislative and Intergovernmental Affairs transmitted to the Speaker of the House of Representatives, the Senate Majority Leader, and other senior members of Congress, the formal determination of the Secretary of State "that Iran should be added to the list of countries which have repeatedly supported acts of international terrorism." Gov't Exh. 28. The Assistant Secretary's letter explains that "[a] careful review of the facts and statements by the Government of Iran over the last two years shows convincing evidence of broad Iranian policy furthering terrorism beyond its borders." *Id.* (emphasis added). Thus, the Assistant Secretary's letter, which makes no reference to the seizure or detention of the hostages, provides additional confirmation of the fact that the designation of Iran as a terrorist nation was not based on the seizure and detention of the hostages within Iran from 1979 to 1981. For that reason, plaintiffs' claims do not fall within the exception made to sovereign immunity under section 1605(a)(7) as originally enacted by the Antiterrorism Act in 1996.

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<sup>3/</sup> At the October 15, 2001 hearing of this matter, the government reserved the right to respond to plaintiffs' submissions in opposition to the government's motions to intervene and to dismiss. Transcript of Trial Proceedings, dated October 15, 2001 ("Trial Tr.") at 37. As discussed in further detail below, plaintiffs have now attempted to controvert the government's original submissions concerning the basis for Iran's designation as a terrorist state, relying on the testimony of Professor William Daugherty.

Only having exhausted all other arguments do plaintiffs attempt to controvert these official and contemporaneous explanations of the reasons for Iran's designation as a terrorist state. Pl. Dismiss Opp. at 18-19. They rely on the trial testimony of Professor William Daugherty, that he had "no doubt" in his mind that the seizure and detention of the hostages was one of the reasons for the Secretary of State's decision to place Iran on the list of terrorist nations. Trial Tr. at 189. However, at the time in question, January 1984, Professor Daugherty was employed by the CIA, not the State Department, and he admitted under questioning by the Court that he did not know what "went across the Secretary's desk," or to what real extent the seizure and detention of the hostages played a role in the Secretary's decisionmaking. *Id.* at 185, 187, 195. He conceded that his "opinion" about this question of fact was based on "speculation." *Id.* at 199, 209-10.

In the absence of evidence that Professor Daugherty has personal knowledge of the matter, his testimony is not competent evidence of the Secretary of State's reasons for designating Iran as a terrorist state. Fed. R. Evid. 602; United States v. Burnett, 890 F.2d 1233, 1240-41 (D.C. Cir. 1989); Kelsch v. Metzler, No. 92-0251, 1997 WL 350030 (D.D.C. June 16, 1997); SEC v. First City Fin. Corp., Ltd., 688 F. Supp. 705, 720 (D.D.C. 1988). Here, far from supporting a finding that Professor Dougherty has such personal knowledge, his own trial testimony establishes that in fact he does not. Butera v. Dist. of Columbia, 83 F. Supp. 2d 25, 35 (D.D.C. 1999), aff'd in part and rev'd in part on other grounds, 235 F.3d 637 (D.C. Cir. 2001); Phillips v. Holladay Property Serv., Inc. 937 F. Supp. 32, 37 (D.D.C. 1996).<sup>4/</sup>

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<sup>4/</sup> Plaintiffs remark that the United States failed to appear at the [October 15] hearing to controvert" Professor Dougherty's testimony, Pl. Dismiss Opp. at 18, ignoring the fact that the Court had already entered a default judgment as to liability, and had set the October 15 hearing down "to determine the amount of [plaintiffs'] damages. . . ." Order and Default Judgment filed August 17, 2001. Plaintiffs' damages are an issue unrelated to sovereign immunity that the government has no interest in disputing.

Even were it deemed competent, little weight, if any, should be given to Professor Dougherty's admittedly speculative and uninformed testimony, compared to the contemporaneous and official documentation of the Secretary of State's decision submitted by the government.

**3. The default judgment remains void, unless section 626(c) may be applied retroactively.**

There is no genuine dispute, therefore, that when this Court entered the default judgment on August 17, 2001, it did not possess subject matter jurisdiction over this action, and the judgment was void in its inception. However, today the President has signed into law H.R. 2500, 107th Cong., 2d Sess. (2001), the fiscal year 2002 appropriations bill for the Departments of Commerce, Justice and State. As noted above, section 626(c) of this legislation amends 28 U.S.C. § 1605(a)(7)(A), which beforehand provided that a court could hear a claim for money damages against a foreign state, for acts of terrorism sponsored by that

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Plaintiffs, for their part, never informed the government of an intent to offer testimony as to why Iran was designated as a terrorist state. See Corair Corp. v. NLRB, 721 F.2d 1355, 1372 & n. 60 (D.C. Cir. 1983) ("[e]ach party is entitled to know what is being tried . . . [n]otice remains a first-reader element of procedural due process, and trial by ambush is not favored") (citation omitted). Plaintiffs' suggestion that the government turned down the opportunity for cross-examination is particularly unsupportable. Far from "ask[ing] the government if [it] w[as] seeking to cross-examine any witnesses," Pl. Dismiss Opp. at 19, the Court flatly informed government counsel that "I'm not going to give you the right to cross-examine the parties." Trial Tr. at 39. Had government counsel been advised that plaintiffs intended to offer testimony on the question of sovereign immunity, counsel would have remained to dispute the competence of such testimony, and would have objected strenuously to the denial of cross-examination.

state, only so long as the foreign state had been designated a state sponsor of terrorism either at the time of, or because of, the acts of terrorism forming the basis of the claim. By adding the language, "or the act is related to Case Number 1:00CV03110 (ESG) [sic] in the United States District Court for the District of Columbia," section 626(c) expands the exception to sovereign immunity under 28 U.S.C. § 1605(a)(7)(A), to include claims for money damages for the acts of terrorism asserted in this very case.

Owing to the amendment made by section 626(c), the Court has subject matter jurisdiction, as of November 28, 2001, to adjudicate plaintiffs' claims on the merits.<sup>5/</sup> The more difficult issue is whether this new legislation retroactively confers subject matter jurisdiction to enter the August 17 default judgment. In its watershed decision in Landgraf v. USI Film Prod., Inc., 511 U.S. 244 (1994), the Supreme Court stressed that "the presumption against retroactive legislation is deeply rooted in our jurisprudence," because of special concerns about the power of retroactive statutes to "sweep away settled expectations," and their use as "means of retribution against unpopular groups or individuals." Id. at 265-66. In light of this presumption, "[a] statute may not be applied retroactively . . . absent a clear indication from Congress that it intended such a result." INS v. St. Cyr, 121 S. Ct. 2271, 2288 (2001). Thus,

[w]hen a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach \* \* \* When . . . the statute contains no such express command, the court must determine whether the new statute would have retroactive effect . . . . If the statute would operate retroactively, [the] traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

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<sup>5/</sup> Section 626(c) does not specify an effective date, and is therefore effective on the date of its enactment. LaFontant v. INS, 135 F.3d 158, 160-61 (D.C. Cir. 1998).

Landgraf, 511 U.S. at 280. "The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment \* \* \* takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to past transactions." St. Cyr., 121 S. Ct. at 2290-91. Importantly for purposes here, the Supreme Court has removed any possible doubt that jurisdictional statutes such as section 626(c) are "as much subject to [the] presumption against retroactivity as any other." Hughes Aircraft Co. v. United States, 520 U.S. 939, 951 (1997). Thus, "in determining retroactivity, jurisdictional statutes are to be evaluated in the same manner as any other statute." LaFontant, 135 F.2d at 162-63. Applying the Landgraf analysis to section 626(c), "it is readily apparent that Congress has [not] prescribed the statute's proper reach," 511 U.S. at 280, for nothing is said therein regarding its application to events completed before its enactment. Therefore, the Court must determine whether the statute's application here would have retroactive effect. Here, as in Hughes Aircraft, section 626(c) "creates jurisdiction where none previously existed," thus arguably affecting "substantive rights" by eliminating a pre-existing legal defense to a cause of action. 520 U.S. at 951-52. If that is so, then the "traditional presumption against retroactivity teaches that it does not govern absent a clear congressional intent favoring such a result." Landgraf, 511 U.S. at 280. In that event, the default judgment still would have to be vacated for lack of subject matter jurisdiction.<sup>1/</sup>

**C. Plaintiffs Offer No Valid Reason Why the Default Judgment Should Not Be Vacated Under Rule 60(b)(6), Given the Extraordinary Circumstances of This Case.**

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<sup>1/</sup> The retroactivity provision of the Antiterrorism Act of 1996, Pub. L. 104-132, §221(c), does not resolve this issue, because by its own terms it applies only to amendments made by that Act.

In the final analysis, the Court need not resolve the potentially difficult issues of retroactivity implicated by section 626(c). Apart from the matter of jurisdiction, the United States has shown that the default judgment should be vacated, under Rule 60(b)(6), due to the extraordinary circumstances of this litigation. First, prior to the government's intervention, matters that are "central to the litigation" were not disclosed to the Court, to wit, the United States' commitment under the Algiers Accords to bar and preclude the prosecution of cases such as this one, and the federal regulations giving effect to that commitment by prohibiting plaintiffs from pressing their claims against Iran. Gov't Dismiss Mem. at 13-14, citing Computer Professionals, 72 F.3d at 903. Plaintiffs do not dispute that the Algiers Accords were not previously brought to the Court's attention, and attempt no argument that these prohibitions on the very maintenance of this action could be viewed as anything but "central to the litigation." Thus, the default judgment should be vacated on this ground alone.

Second, the foreign policy ramifications of allowing these proceedings to culminate in a money judgment against Iran, in derogation of a binding international legal agreement to which the United States is a party, and due regard for the judgment of the Executive Branch in foreign affairs, also require that the default judgment be set aside. Gov't Dismiss Mem. at 14-16, citing, *inter alia*, Practical Concepts, 811 F.2d at 1548, 1551-52 & n. 19. In the face of this argument, plaintiffs again find themselves at a virtual loss for words. Their sole argument for denying relief on this ground is that vacating the default judgment will not advance the specific foreign policy objective identified by the government in Practical Concepts, that of encouraging foreign nations to appear in our courts in cases brought under the FSIA. *Id.* at 1552. See Pl. Dismiss Opp. at 6.

Whether or not that is so, plaintiffs' argument still fails, because Practical Concepts nowhere seizes on that single interest as the sole foreign policy justification for vacating a default judgment. Rather, the Court of Appeals observed generally that "[i]ntolerant adherence to default judgments against foreign states could adversely affect this nation's relations with other nations," *in addition to* "undermin[ing] the State Department's continuing efforts to encourage . . . foreign sovereigns generally to resolve disputes within the United States' legal framework." 811 F.2d at 1551 n. 19. Refusing to consider other foreign policy interests that the government identifies as grounds for vacating a default judgment would not be in keeping with the deference owed to the Executive Branch in the realm of foreign affairs. See Regan v. Wald, 468 U.S. 222, 242-43 (1984); United States v. Pink, 315 U.S. 203, 230 (1942); Belk v. United States, 858 F.2d 706, 710 (Fed. Cir. 1988). Accordingly, the default judgment should be vacated under Rule 60(b)(6), as well as Rule 60(b)(4).

## **II. THIS CASE SHOULD BE DISMISSED, BECAUSE PLAINTIFFS CANNOT PREVAIL ON THE CLAIMS THEY SEEK TO LITIGATE IN THIS COURT.**

### **A. The Flatow Amendment Gives Plaintiffs No Cause of Action Against Iran That They May Press in Derogation of the Algiers Accords.**

The United States reiterates that, in light of H.R. 2500, § 626(c), the government no longer relies on foreign sovereign immunity as a basis for dismissing plaintiffs' claims. At the very least, as of section 626(c)'s enactment on November 28, this Court has been vested with subject matter jurisdiction to adjudicate plaintiffs' claims. That said, plaintiffs' claims still must be dismissed, for they are barred by the legal prohibitions enacted pursuant to the Algiers Accords.

In keeping with the United States' obligations under the Algiers Accords, federal law (Executive Order No. 12283, and its implementing regulations, 31 C.F.R. § 535.216(a)), prohibits plaintiffs "from

prosecuting . . . any claim against the Government of Iran arising out of events . . . relating to: (1) [t]he seizure of the hostages on November 4, 1979; [or] (2) [their] subsequent detention . . . ." Plaintiffs nonetheless maintain that the so-called Flatow Amendment supplies a cause of action that they may pursue, notwithstanding these prohibitions. Pl. Dismiss Opp. at 11-12. However, as the United States observed previously, the plain language of the Flatow Amendment provides the victims of terrorist acts a cause of action against the "official[s], employee[s] or agent[s] of a foreign state" who commit such acts, not against the foreign state itself. See Gov't Dismiss Mem. at 20-21. Statutory analysis begins in all cases with the language of the statute, and if the meaning is clear, then the analysis ends there as well, and the court's sole function is to enforce the statute according to its terms. Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000); Harbor Gateway Comm'l Property v. EPA, 167 F.3d 602, 606 (D.C. Cir. 1999).

Tacitly conceding that they cannot overcome this legal hurdle, plaintiffs try to sidestep it. Rather than offer textual support for their interpretation of the Flatow Amendment (for there is none to be found), they point to Elahi, 124 F. Supp. 2d at 106; Daliberti v. Republic of Iraq, 97 F. Supp. 2d 38, 43 n. 1 (D.D.C. 2000), and Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 12-13 (D.D.C. 1998), as cases where "judges of this Court . . . have imposed judgments against foreign state sponsors of terrorism." Pl. Dismiss Opp. at 11. None of these cases, however, based its analysis on the language of the Flatow Amendment. Both Elahi and Daliberti simply cited the decision in Flatow, 999 F. Supp. at 12-13, as the basis for their conclusions, whereas Flatow itself, rather than examine the plain language of the statute, attempted to glean its meaning from the separate legislative history of the Antiterrorism Act. A court should

not substitute its reading of legislative history for the plain meaning of the language that Congress chose to enact as the law. Eagle-Picher Indus., Inc. v. EPA, 759 F.2d 922, 929 (D.C. Cir. 1985).

Plaintiffs argue further that Iran may be held liable here under a theory of ratification. Pl. Dismiss Opp. at 12. Ratification is a common law doctrine of agency "in which a principal is deemed to adopt the previously unauthorized actions of his or her agent . . ." Schofield v. First Commodity Corp. of Boston, 793 F.2d 28, 36 (1st Cir. 1986); see also Fed. Enter., Inc. v. Greyhound Leasing & Fin. Corp., 849 F.2d 1059, 1062 n. 5 (8th Cir. 1988). But where "the language of [a statute] is phrased so as to limit rather than expand the range of potential violators," thus precluding direct liability against the named defendant, "it is inappropriate to use theories of vicarious liability to accomplish indirectly what the statute directly denies." Schofield, 793 F.2d at 32-33. In other words, where Congress has prescribed in the statute itself the class or classes of persons who may be held liable thereunder, a plaintiff may not invoke common law theories of vicarious liability to extend the law's reach beyond what the statute itself allows.

Thus, in Yellow Bus Lines, Inc. v. Local Union 639, 883 F.2d 132 (D.C. Cir. 1989), the case relied on by plaintiffs, the D.C. Circuit held that the defendant union could be held liable *in tort* for malicious destruction of property, based on evidence that it had ratified the acts of vandalism committed by its striking members. Id. at 136. But, citing Schofield, the Court of Appeals refused to impose vicarious liability on the union under the RICO statute, because doing so would have been "directly at odds" with statutory language that placed limits on who could properly be sued for violating the statute's proscriptions. Id. at 140. In this case, the plain language of the Flatow Amendment limits the "range of potential violators," Schofield, 793 F.2d at 33, to the "officials, employees or agents of a foreign state." As a result, the state of Iran itself

cannot be held liable under the Flatow Amendment, either directly, or indirectly through the doctrine of ratification.

The fact remains, too, that even if the Flatow Amendment could be construed as creating a cause of action against a foreign state, plaintiffs remain barred under the Algiers Accords and their implementing regulations from prosecuting claims against Iran that arise from the events underlying this case. See Gov't Dismiss Mem. at 22-23. Plaintiffs have presented no arguments to the contrary, nor have they pointed to anything in the language or legislative history of the Flatow Amendment that even remotely suggests a congressional purpose to abrogate the Algiers Accords, or any provisions thereof. See Transworld Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984) (“[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed”); Weinberger v. Rossi, 456 U.S. 25, 32 (1982) (applying the same rule of construction to an international executive agreement).<sup>17</sup>

**B. There Is No Conflict Between the Algiers**

**Accords and the Antiterrorism Act of 1996.**

It comes as no surprise, therefore, that instead of championing the Flatow Amendment against the Algiers Accords, plaintiffs attempt to portray the case as a contest between the Algiers Accords and the

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<sup>17</sup> Plaintiffs assert in passing that Iran could also be held liable here under District of Columbia tort law. Pl. Dismiss Opp. at 12. Obviously, federal law implementing the Algiers Accords supersedes D.C. tort law, just as it superseded the contract claims of the complaining parties in Dames & Moore v. Regan, 453 U.S. 654, 663-64 (1981), and Chas. T. Main International, 651 F.2d at 802-03.

Antiterrorism Act of 1996. According to plaintiffs, it is the government's contention that the Algiers Accords "trump" the Antiterrorism Act, Pl. Dismiss Opp. at 6, and they devote much effort to the argument that "the conflict between the Algiers Accords and the Antiterrorism Act . . . must be resolved in favor of Congress." *Id.* at 7. See generally, id. at 6-10. This argument is deeply confused, because it completely fails to appreciate the fundamental distinction between jurisdiction to hear a claim, and the substantive law to be applied in adjudicating the claim.

There is no conflict between the Antiterrorism Act and the Algiers Accords, and the government has not contended otherwise. As relevant here, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 221, 110 Stat. 1214, 1241 (entitled "Jurisdiction for Lawsuits Against Terrorist States") created a new exception to foreign sovereign immunity under the FSIA, codified at 28 U.S.C. § 1605(a)(7). In so doing, it extended the jurisdiction of the federal courts to permit them to hear claims against designated terrorist states for the acts of terrorism that they sponsor. See Elahi, 124 F. Supp. at 106; Flatow, 999 F. Supp. at 12-13. But, as plaintiffs have acknowledged, the Antiterrorism Act did not itself create a cause of action for the victims of terrorist states' offenses, *id.*, and plaintiffs here have looked elsewhere (to the Flatow Amendment) to find one. See Pl. Pretrial Brief at 8 (Gov't Exh. 6).

In complete contrast, both the Supreme Court and the D.C. Circuit have held that the provisions of the Algiers Accords and their implementing regulations that extinguish the claims of American nationals against Iran constitute "substantive law governing" the cases, such as this one, that fall within their reach. Dames & Moore, 453 U.S. at 685; American International Group, 657 F.2d at 441. In so holding, both courts explicitly rejected arguments that the Algiers Accords represent an improper effort by the Executive Branch to define the jurisdiction of the federal courts. Dames & Moore, 453 U.S. at 685-86; American

International Group, 657 F.2d at 444. (Plaintiffs themselves refer repeatedly to the Algiers Accords as a “merits defense.” E.g., Pl. Dismiss Opp. at 6, 13.)

There can be no conflict, then, between the Algiers Accords and the Antiterrorism Act, because each is directed to a separate and independent legal issue not addressed by the other -- the merits of plaintiffs’ claims, on the one hand, and jurisdiction to adjudicate the merits of plaintiffs’ claims, on the other. Whether or not this Court has jurisdiction over plaintiffs’ claims has no bearing on the legal effect of the Algiers Accords on those claims. Whether or not the Algiers Accords extinguish plaintiffs’ claims has no bearing on the jurisdiction of this Court to decide that issue. There is simply no conflict between the Antiterrorism Act and the Algiers Accords to be resolved.

It does the plaintiffs no good, then, to assert that federal statutes take precedence over international executive agreements, Pl. Dismiss Opp. at 6, citing Gerling Global Reinsurance Corp. of America v. Low, 240 F.3d 739 (9th Cir. 2001), or to invoke the doctrine of lex posterior, id. at 7, citing Comm. of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929 (D.C. Cir. 1988). Such rules of construction would come into play only as needed to resolve a genuine conflict between a federal statute and an international legal agreement, and here there is none. Gerling, 240 F.3d at 751 (“assum[ing] that a conflict exists between the Holocaust Act and the Swiss-U.S. Joint Statement . . . Congress’ action controls”); Committee of United States Citizens, 859 F.2d at 936 (“inconsistencies” between treaties and statutes must be resolved in favor of the lex posterior).

Likewise, it does not advance the plaintiffs’ cause to observe that their claims involve the “type of conduct” that Congress had in mind when it passed the Antiterrorism Act. Pl. Dismiss Opp. at 8-9. That only goes to show that Congress meant the federal courts to have jurisdiction over causes of action involving

this type of conduct (assuming the other conditions under section 1605(a)(7) have been met), not that Congress *created* such a cause of action when it passed the Antiterrorism Act. It is also of no moment that Congress expressly intended this exception to foreign sovereign immunity to apply retroactively to past acts of terrorism. Pl. Dismiss Opp. at 9-10. Regardless of the statute’s temporal reach, it does not touch upon the merits of plaintiffs’ claims, and therefore creates no conflict with the mandate of the Algiers Accords.

In the same vein, plaintiffs also attempt to portray the case as a contest between the Algiers Accords and the FSIA, as originally enacted in 1976. Without citation, plaintiffs assert that Congress intended the FSIA to function as a “statutory barrier to further encroachments by the State Department upon the doctrine of sovereign immunity,” by superseding “executive agreements with foreign sovereigns to expand the defense of sovereign immunity.” Pl. Dismiss Opp. at 17.

This argument, apparently inspired by plaintiffs’ flawed historical account of the FSIA as a measure enacted to “oust” the State Department from the process of making sovereign immunity determinations, see supra at 8-9, has been heard before and was squarely rejected by both the Supreme Court in Dames & Moore, and the D.C. Circuit in American International Group. In both cases, the complaining parties argued that the Algiers Accords represented an improper attempt by the Executive Branch to circumscribe the jurisdiction of the federal courts to hear their claims, and in both cases the courts disagreed. They concluded instead that the Algiers Accords “simply effected a change in the law governing” those claims. Dames & Moore, 453 U.S. at 685; American International Group, 657 F.2d at 441-42.

Moreover, both Dames & Moore and American International Group explicitly rejected the proffered interpretation of the FSIA as prohibiting the President from settling claims of United States nationals against foreign government, noting that the same Congress that enacted the FSIA had also

“rejected several proposals designed to limit the power of the President to enter into executive agreements, including claims settlement agreements.” Dames & Moore, 453 U.S. at 685-86; American International Group, 657 F.2d at 444. See also Chas T. Main International, 651 F.2d at 813-14 & n. 23. The Algiers Accords are no more in conflict with the jurisdictional provisions of the FSIA than they are in conflict with the jurisdictional provisions of the Antiterrorism Act.

Plaintiffs are right that Iran should accept responsibility for the morally repugnant acts of hostage-taking and torture committed against them. But redress cannot be had in this forum, owing to the legal commitments made by this nation in order to free the hostages from captivity. The Supreme Court’s eloquent observations in Chew Heong v. United States, 112 U.S. 536, 539-40 (1884), remain valid today:

There would no longer be any security . . . no longer any commerce between mankind, if [nations] did not think themselves obliged to keep faith with each other, and to perform their promises \* \* \* Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact that the honor of the government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected [internal quotations and citations omitted].

In consequence of the duties imposed upon this Court by the Constitution, and respect for the legal undertakings of our government with foreign nations, the default judgment must be vacated, and plaintiffs’ claims must be dismissed for failure to state a claim that survives the United States’ commitments made under the Algiers Accords.

### **III. THE OBLIGATION OF PLAINTIFFS’ COUNSEL TO DISCLOSE ADVERSE AUTHORITY IN THE CONTROLLING JURISDICTION.**

In its Order dated October 31, 2001, the Court instructed plaintiffs to address two questions in their opposition to the United States' motion to dismiss: (1) whether plaintiffs' counsel have a heightened duty to disclose to the Court any adverse controlling authority given the ex parte nature of the proceedings in this case; and (2) whether plaintiffs' counsel violated that duty to disclose, and if so, the appropriate action for the Court to take. The Court directed the United States to address the same questions in its reply papers, and to respond to the plaintiffs' arguments. The United States wishes to be clear that it is not seeking sanctions or disciplinary action of any kind against plaintiffs' counsel, but responds as follows to plaintiffs' submissions, as the Court has directed.

The District of Columbia Rules of Professional Conduct are made applicable to counsel appearing before this Court by LCvR 83.12(b) and 83.15. Rule of Professional Conduct 3.3(a)(3) (referred to herein collectively with its counterparts in most U.S. jurisdictions as Rule 3.3) provides:

A lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction not disclosed by opposing counsel and known to the lawyer to be dispositive of a question at issue and directly adverse to the position of the client.

There are precedents holding that counsel's professional responsibility to disclose adverse authority is "correspondingly greater" in an ex parte proceeding. Time Warner Entertainment Co., L.P. v. Does, 876 F. Supp. 407, 415 (E.D.N.Y. 1994); Jorgenson v. County of Lolusia, 625 F. Supp. 1543, 1548 (M.D. Fla. 1986), aff'd after remand, 846 F.2d 1350 (11th Cir. 1988); The Western Co. of N. Am. v. Oil and Gas Comm'n of India, No. 85-9858, 1986 WL 7776, \*1 (S.D.N.Y. July 7, 1986). However, these cases involved ex parte applications for temporary restraining orders, or similar proceedings, where the plaintiffs and their counsel decided on their own to proceed in an ex parte fashion, see Time Warner, 876 F. Supp. at 408; Western Company, 1986 WL 7776, \*1, and, thus, arguably assumed greater responsibility for

disclosing adverse authority. In this case, by contrast, these proceedings took on an ex parte character because of the *defendants'* choice not to appear in the case, despite plaintiffs having repeatedly provided notice to them of the litigation. Under these circumstances, it is not clear that Rule 3.3 places a heightened duty on plaintiffs' counsel to disclose adverse authority (although in cases against foreign states, where litigation sometimes mixes with our nation's foreign affairs, there is all the more reason for courts to remind counsel of their duty, and what is expected of them as a result).

Heightened or not, the duty exists, and Rule 3.3. has been violated if counsel "knowingly" fails to disclose to the court "legal authority" that is (1) "in the controlling jurisdiction," (2) "not disclosed by opposing counsel," and (3) "known to the lawyer to be [a] dispositive of a question at issue and [b] directly adverse to the position of the client."

As a threshold matter, "legal authority" that must be disclosed under Rule 3.3 includes not only prior judicial precedent, but statutory authority as well. Time Warner, 876 F. Supp. at 415; Hale v. Sklodowski, No. 87-8817, 1988 WL 61184, \*3 (N.D. Ill. June 2, 1988); Western Company, 1986 WL 7776, \*1. See also Baker v. Barbo, 177 F.3d 149, 155 (3d Cir. 1999). Accordingly, there seems no reason why the duty of disclosure should not also encompass an international legal agreement such as the Algiers Accords, or its implementing federal regulations, 31 C.F.R. § 535.216(a). Because federal law is controlling here, these authorities lie "in the controlling jurisdiction."

As to whether plaintiffs' counsel failed to disclose these authorities, plaintiffs correctly observe that they have several times cited Persinger in their submissions to this Court as a prior D.C. Circuit decision holding that sovereign immunity barred the hostages' claims against Iran. See Plaintiffs' Memorandum of Points and Authorities in Support of Motion for an Order Striking the Government's Filings [etc.], dated

November 5, 2001 ("Pl. Strike Mem."), at 16. Undeniably, Persinger makes reference to the Algiers Accords and to the fact that they "extinguished [the hostages'] claims against Iran." 729 F.2d at 837. But so far as the government is familiar with the record of this action, plaintiffs themselves did not previously disclose to the Court either the provisions of the Algiers Accords, or their implementing federal regulations, that prohibit plaintiffs from litigating their claims against Iran. Plaintiffs do not appear to maintain otherwise. See Pl. Strike Mem. at 16; Pl. Dismiss Opp. at 20.

Obviously, the United States regards the Algiers Accords and their implementing federal regulations as legal authority that is "directly adverse" to plaintiffs' position that they are entitled to maintain their claims against Iran, as well as authority that is "dispositive of [the] question." The issue then becomes whether the failure to disclose this authority was "knowing" within the meaning of Rule 3.3. See Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1540 (9th Cir. 1986). It is here, as one distinguished commentator has observed, that Rule 3.3 "bristle[s] with interpretive issues." Charles W. Wolfram, Modern Legal Ethics, § 12.8, at 682 (1986).

It may fairly be asked whether legal authority is "known" to counsel to be "directly adverse" and "dispositive" if a nonfrivolous argument can be made to distinguish it, or that later authority has superseded it. See id. at 682. Some courts have taken a broad view of counsel's obligation. E.g., Smith v. Scripto-Tokai Corp., --- F. Supp. ---, 2001 WL 1359760, \*4 (W.D. Pa. 2001); Massey v. Prince George's County, 918 F. Supp. 905, 908 (D. Md. 1996) ("[e]ven if one assumes for the sake of argument that [a controlling precedent] could be factually distinguished \* \* \* whenever [a controlling case] comes anywhere close to being relevant to a disputed issue, the better part of wisdom is to cite it and attempt to distinguish it").

Other courts, together with legal commentators, have adopted a narrower outlook, observing that the duty to disclose adverse authority under Rule 3.3 should not be interpreted so as to create a conflict with the duty of counsel to represent their clients zealously. Golden Eagle, 801 F.2d at 1541, 1542 (while a lawyer may not feign ignorance of authorities that render his argument meritless, no rule requires that the lawyer, in addition to advocating the cause of his client, step into the shoes of his opposing counsel to find all potentially contrary authority, and then into the robes of the judge to decide whether the authority is distinguishable); Wolfram, Modern Legal Ethics, § 12.8 at 681.

For their part, plaintiffs argue that the Algiers Accords are not dispositive of their claims on the ground that the Algiers Accords are a "merits defense" that Iran waived once it fell into default. Pl. Strike Mem. at 21; Pl. Dismiss Opp. at 20. The government disagrees, of course, at least in the sense that the United States as intervenor is entitled to raise the Algiers Accords as grounds for dismissal of plaintiffs' claims, and that, as such, they are dispositive here. But the question remains whether, *prior* to the United States' intervention, the Algiers Accords were "known" to plaintiffs' counsel to be dispositive, given counsel's view that Iran, the only party entitled at that time to raise the Algiers Accords as a defense to the action, had instead waived that defense. The answer will turn in part on how broadly the Court interprets the duty of disclosure under Rule 3.3. Compare Golden Eagle, 801 F.2d at 1542 to Massey, 918 F. Supp. at 908.

Regarding the action the Court should take if it finds that plaintiffs' counsel violated Rule 3.3, "courts have approved disciplinary action against attorneys who knowingly fail to disclose controlling authority." Continental Lab. Prod., Inc. v. Medax Int'l, Inc., No. 97-359, 1999 WL 33116499, \*15 (S.D. Cal. Aug. 12, 1999) (citing cases). On frequent occasion, however, courts have also apparently concluded that the

purposes of Rule 3.3 are served simply by registering their dissatisfaction with counsel's omissions, and their expectation of more careful compliance in the future. See Smith, 2001 WL 1359760, \* 4-5; United States v. Crumpton, 23 F. Supp. 2d 1218, 1219 (D. Colo. 1998); Massey, 918 F. Supp. at 909-10; Martin v. Nationsbank of Georgia, 1993 WL 345606, \*6-7 (N.D. Ga. Apr. 6, 1993); Hale, 1988 WL 61184, \*3.

Because the government is not seeking sanctions or other disciplinary action against plaintiffs' counsel, and is less than perfectly acquainted with the prior proceedings in this matter, it is difficult for the United States to express a view as to what action by the Court is called for, if any. However, it seems fair to observe that the Court should take into account whether a truly "knowing" failure to disclose adverse controlling authority has occurred, Golden Eagle, 801 F.2d at 1541, or whether, less egregiously, the case is one where attorneys seeking the best outcome for their clients simply failed to follow "the better part of wisdom" in bringing pertinent authority to the Court's attention. Massey, 918 F. Supp. at 908.

### **CONCLUSION**

For the foregoing reasons, the August 17, 2001 default judgment should be vacated, and plaintiffs' claims should be dismissed, with prejudice.

Dated: January 7, 2003

Respectfully submitted,

ROBERT D. McCALLUM, JR.  
Assistant Attorney General

ROSCOE C. HOWARD, JR.  
United States Attorney

Of Counsel:

LISA GROSH  
Attorney-Adviser

JACOB K. COGAN  
Attorney-Adviser

Office of the Legal Adviser  
U.S. Department of State  
Suite 203, South Building  
2430 E Street, NW  
Washington, D.C. 20037-2800

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DAVID J. ANDERSON  
VINCENT M. GARVEY  
JAMES J. GILLIGAN  
Attorneys  
U.S. Department of Justice  
Civil Division  
Federal Programs Branch  
P.O. Box 883  
Washington, D.C. 20044  
(202) 514-3358

Counsel for Intervenor-Defendant  
United States of America