

06-2228-cv

In The
United States Court of Appeals
FOR THE SECOND CIRCUIT

RACHEL EHRENFELD,

Plaintiff-Appellant,

-against-

KHALID SALIM A BIN MAHFOUZ,

Defendant-Appellee.

*On Appeal From a Judgment of the United States
District Court for the Southern District of New York*

**BRIEF ON BEHALF OF PLAINTIFF-APPELLANT
RACHEL EHRENFELD**

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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RACHEL EHRENFELD, :
 :
 Plaintiff-Appellant, : Docket No. 06-2228-cv
 :
 - against - :
 :
 KHALID SALIM A BIN MAHFOUZ, :
 :
 Defendant-Appellee. :

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Preliminary Statement

While ostensibly about personal jurisdiction, this appeal really concerns the ability of New York authors and publishers to obtain effective relief from foreign libel judgments designed to target and restrict their speech in the United States. Plaintiff-Appellant Dr. Rachel Ehrenfeld is a prominent New York scholar and the author of a book about the financing of global terrorism. Joint Appendix (“JA”) 11, 13, 52-53. Her ability to research and write freely about international terrorism has been impeded by the new and pernicious phenomenon of libel tourism. Libel tourists sue American authors and publishers in foreign countries whose laws differ fundamentally from United States law to circumvent First Amendment protections and silence speech in the United States. The ready worldwide access of publications via the internet facilitates libel tourism by exposing American authors

and publishers to potential liability for what they write in virtually any jurisdiction in the world.

Defendant-Appellee Khalid Salim A Bin Mahfouz, a wealthy Saudi financier, is a serial libel tourist. In a systematic effort to silence critics, he has filed or threatened to file numerous libel actions in England to prevent authors from discussing his alleged links to various terrorist organizations. JA 12, 60-63. Dr. Ehrenfeld is one of his victims. Mahfouz sued Dr. Ehrenfeld in England based on constitutionally protected statements in her book -- published only in the U.S. -- discussing his financial support of terrorist organizations. JA 53. He alleged that 23 copies of the book leaked into the jurisdiction through internet sales and a chapter had been made accessible on the internet. JA 40-54. The sole purpose and effect of Mahfouz's action was to chill Dr. Ehrenfeld's speech in New York, the only place she lives and works. JA 12, 53, 55.

The English court issued a default judgment that awarded Mahfouz substantial damages, as well as injunctive relief ordering Dr. Ehrenfeld to change her conduct and abridge her speech in New York. JA 7-8, 33-36. Unlike prior libel tourists, Mahfouz strategically delayed bringing enforcement proceedings against Dr. Ehrenfeld. He did so in order to avoid triggering the jurisdiction of the New York courts and to deprive Dr. Ehrenfeld of an opportunity to challenge the foreign default judgment in her home forum.

Dr. Ehrenfeld filed a declaratory judgment action in the Southern District of New York to seek timely relief from the chilling effect of the UK judgment. JA 11-32. The District Court (Richard C. Casey, J.) erroneously dismissed her claims for lack of personal jurisdiction. Ehrenfeld v. Bin Mahfouz, 04-Civ.-9641, 2006 WL 1096816 (S.D.N.Y. April 26, 2006). Special Appendix (“SPA”) 3-16. The District Court’s denial of relief was based on an overly restrictive reading of New York’s long-arm statute, CPLR 302, which failed to account for the new phenomenon of libel tourism or the state’s strong public policy favoring the protection of free speech, not to mention the need to expose terrorism.

On this appeal, Dr. Ehrenfeld asks the Court to tailor the jurisdictional inquiry to the unique facts presented so that a foreign plaintiff may not evade jurisdiction after obtaining a foreign libel judgment against a New York author by simply declining to take any formal steps to enforce the judgment here. A contrary holding would give Mahfouz and other libel tourists a powerful new tool to chill the protected speech of New York citizens, as well as decrease our ability to combat international terrorism.

Jurisdiction

The District Court had subject matter jurisdiction over plaintiff's declaratory judgment suit under 28 U.S.C. § 1332(a)(2). Plaintiff is a citizen of New York, and defendant is a citizen of a foreign state. JA 12. The amount in controversy, which involves a dispute over the enforceability of an English default judgment for £10,000 in damages and payment of defendants' costs allegedly running to £81,261 (equivalent to \$165,962.58 at the current exchange rate of \$1.8185 per £1) exceeds \$75,000. JA 33-36, 54-55. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. The District Court issued a final judgment on April 26, 2006, dismissing plaintiff's claims for lack of personal jurisdiction. JA 159. Plaintiff filed a notice of appeal on May 5, 2006. JA 160-161.

Issues Presented

1. Whether the District Court erred in finding no basis for personal jurisdiction under CPLR 302, despite defendant's transaction of business in New York and commission of an intentional tortious act causing injury in New York?

2. Whether defendant consented to jurisdiction in New York by obtaining a foreign libel judgment that directly targeted plaintiff's speech in New York and could only be meaningfully enforced through a New York enforcement proceeding?

3. Whether the District Court prematurely denied jurisdictional discovery where plaintiff established an arguable basis for personal jurisdiction over defendant?

4. Whether the application of CPLR 301 and 302 to the novel problem of libel tourism should be certified to the New York Court of Appeals given the important policy issues at stake?

Statement of the Case

Dr. Ehrenfeld filed this declaratory judgment action on December 8, 2004 after Mahfouz sought a default judgment in a defamation suit he filed against Dr. Ehrenfeld in England. JA 7-8, 11-32. The English court issued the default judgment after Dr. Ehrenfeld refused to accede to Mahfouz's demands that she defend her statements in a distant forum where she would not receive the protection of the First Amendment. JA 53-55.

Dr. Ehrenfeld seeks a declaration that: (1) Mahfouz could not prevail on his libel claims under federal or New York law, and (2) regardless, the English default judgment is not enforceable in the United States on constitutional and public policy grounds. JA 12, 30-31.

The District Court granted Mahfouz's motion to dismiss for lack of personal jurisdiction, concluding that Dr. Ehrenfeld failed to allege a sufficient basis for jurisdiction under New York's long-arm statute, CPLR 302.¹ SPA 9-12. The District Court also denied Dr. Ehrenfeld's request for jurisdictional discovery because she had not alleged a prima facie case for personal jurisdiction over Mahfouz. SPA 15. This appeal followed.

Statement of Facts

Most of the facts relevant to this appeal come from the complaint. Because no jurisdictional discovery has occurred, the facts alleged by Dr. Ehrenfeld must be assumed to be true and all supplemental affidavits read in her favor. In re Magnetic Audiotape Antitrust Litig., 334 F.3d 204, 206 (2d Cir. 2003).

Libel tourism is a new and troubling phenomenon that involves the strategic use of foreign lawsuits to circumvent the First Amendment and chill speech in the United States. The typical libel tourist is a prominent person (like Mahfouz) who receives bad press in a publication distributed primarily in the United States, but who chooses to file a libel action in England, despite that person and publication

¹ Mahfouz also moved to dismiss Dr. Erenfeld's claims for lack of subject matter jurisdiction under the Declaratory Judgment Act, 28 U.S.C. § 2201, and on the grounds that the exercise of personal jurisdiction would violate due process. Because the district court rested its decision on the absence of any statutory basis for personal jurisdiction under the CPLR, it refused to reach these alternate grounds. SPA 9, 15.

having little connection to England. Rodney A. Smolla, The Law of Defamation, § 1.9 (2d ed. 2004).

With the advent of the Internet and Internet commerce, including websites such as Amazon.com, it has become easier for foreign plaintiffs to allege that a publication written and distributed primarily in the United States was also “sold” or “published” in a foreign jurisdiction, such as England, even when the author and publisher took no actions to market or distribute the publication there. Ironically, while the Internet has expanded access to information in many repressive regimes, it has also, by facilitating libel tourism, expanded the potential for chilling speech in the United States.

This action arises from Mahfouz’s libel tourism. Dr. Ehrenfeld is an American citizen and New York resident, and her book was written and published in the United States. JA 12, 53, 65. Mahfouz sued Dr. Ehrenfeld in England (even though her book was never published there) on the alleged grounds that 23 copies were bought by English readers via websites and that one chapter was accessible on the Internet. JA 40, 54. Mahfouz is a citizen or subject of Saudi Arabia, and nowhere in his filings with the English court does he disclose a residence address in England. JA 12, 38.

The Book

Dr. Ehrenfeld's book Funding Evil: How Terrorism is Financed and How to Stop It is about the financing of international terrorism. JA 52, 65. Provoked by the terrorist attacks of 9/11, Dr. Ehrenfeld, a recognized terrorism expert and "meticulous" scholar,² spent years researching her book and drew upon many credible sources, including government sources such as the CIA, the Department of Defense and reports from Congressional hearings, as well as investigative reporting in such leading and widely respected publications as the Wall Street Journal, The Washington Post, The London Times, The Financial Times, Newsweek and The Economist, to name a few, to reach her conclusions. JA 65. Based on such sources, the book identifies Mahfouz as a hugely wealthy financial supporter of various terrorist organizations, including Al Qaeda. JA 17-22.

The UK Case

Rather than challenging Dr. Ehrenfeld's statements in the United States, where she lives and works, and which is the only place where Funding Evil has ever been published or marketed, Mahfouz and two of his sons sued her and the book's publisher, Bonus Books, for libel in England. JA 53-54. The reason

² In his Foreward to Funding Evil, former CIA Director R. James Woolsey called the book "meticulous" and "solid." See also David Brooks, "Rumsfeld's Blinkers," N.Y. Times, Mar. 16, 2006, at A27 (referring to Dr. Ehrenfeld as a "terrorism expert").

Mahfouz chose to sue Dr. Ehrenfeld in England is simple: He wanted to obtain an easy judgment against her there that he could then use to try to stop her research and publication -- and the research and publication by others -- in the United States on any connections he may have to international terrorism. JA 22-26, 98-101.

English libel law provides substantially less protection for speech than does U.S. law. JA 22-26. American law is “totally different from English defamation law in virtually every significant respect,” and those “differences are rooted in historic and fundamental policy differences concerning freedom of the press and speech.” Telnikoff v. Matusевич, 347 Md. 561, 598, 702 A.2d 230, 248 (1997). Among other things, English libel law, unlike American libel law: (1) presumes defamatory statements to be false, placing the burden of proof on the defendant, (2) deems defamation a strict liability tort for which liability is imposed despite the defendant’s good faith belief in the truth of the statement and the absence of any negligence or malice; and (3) offers no special protection for defamation actions arising from critiques of public figures or public officials. Rodney A. Smolla, The Law of Defamation, supra, at § 1.9. This is why England is the favorite destination for wealthy libel tourists such as Mahfouz, who himself has sued or threatened to sue for libel in England dozens of other times in an attempt to intimidate and silence those who would criticize his alleged role in the financing of terrorism. JA

61-63, 98-101. Mahfouz has improperly exploited the difference between English and American libel law in an effort to launder his reputation. JA 61.

The UK Judgment

Dr. Ehrenfeld did not appear in the UK case because she disagreed in principle with Mahfouz's tactic of forcing her to defend a libel suit in a country with which she has no contacts, where she never published or marketed her book, and whose free speech protections fall far short of those of the First Amendment. JA 54. She also did not have the financial resources to defend the action and was daunted by the procedural and substantive burdens on a libel defendant under UK law. JA 54.

Because Dr. Ehrenfeld refused to agree to Mahfouz's blatant forum-shopping, the English court granted a default judgment. On May 3, 2005, the English Court awarded Mahfouz and his sons damages of £30,000 and an interim payment of £30,000 toward costs, which Mahfouz's English lawyers claim to have been at least £81,261 as of February 2005 (equivalent in total to \$ 202,333.56 at the current exchange rate, plus mounting post-judgment interest). JA 54, 33-36.

New York Conduct Enjoined

Most significantly, the English court also granted Mahfouz an expression-chilling injunction that would operate against Dr. Ehrenfeld in New York. That

injunction restrains her from “publishing, or causing or authorizing the further publication” of the disputed statements about Mahfouz in Funding Evil or any similar statements anywhere within the English court’s jurisdiction. JA 8. In a letter transmitting the default judgment to Dr. Ehrenfeld in New York, Mahfouz’s attorneys further instructed: “We are aware that there is a tendency for books to ‘leak’ into the jurisdiction, primarily through US online retail websites. You are under a duty to ensure that you take every measure to prevent the Book from leaking into the jurisdiction, otherwise you may be held in contempt of court.” JA 72. Finally, the English court ordered Dr. Ehrenfeld to issue a correction and an apology to Mahfouz. JA 34-35.

Mahfouz’s New York Contacts

Mahfouz has had numerous intentional contacts with New York through his business dealings³ and in connection with the UK action. First, although Mahfouz sued Dr. Ehrenfeld in England, the lawsuit itself was designed to chill Dr. Ehrenfeld’s research and writing in New York, as well as to force her to take certain affirmative actions in New York, such as not making such statements in the

³ Mahfouz owned two condominium apartments in Manhattan, which he sold only in 2004, after the initial filings in his libel action against Dr. Ehrenfeld in England. William Neuman, “Big Deal: Buyers Shrug Off Terror Alert to Snap Wall St. Condos,” N.Y Times, Aug. 29, 2004, sec. 11, at 2 (“Sheik Kalid bin Mahfouz, member of powerful Saudi family, sells two apartments in Olympic Tower condominium for total of \$ 3.57 million.”). JA 71, 94-97.

future and issuing a correction and apology and preventing the publication or “leakage” of Funding Evil into England and Wales. JA 8, 72.

In addition, on four different occasions between October 2004 and May 2005, Mahfouz sent private agents to Dr. Ehrenfeld’s Manhattan apartment, and on one such visit, Mahfouz’s agent spoke to Dr. Ehrenfeld in a menacing tone. JA 55-56. On four other separate occasions between January 2004 (nine months before he sold his two Manhattan condos) and May 2005, Mahfouz caused letters and packages, some of which demanded immediate specific action, to be delivered to Dr. Ehrenfeld’s Manhattan apartment. JA 56-58, 70 . He has also caused at least five e-mail messages to be sent, in a highly intrusive manner, to Dr. Ehrenfeld’s home computer in Manhattan. JA 56-58.

Mahfouz has also made clear to Dr. Ehrenfeld in New York that he is monitoring her conduct in New York. Mahfouz has a website, (www.binmahfouz.info/en_index.html), on which he has posted information about Dr. Ehrenfeld and the UK action, which can be accessed by New York residents and the rest of the world. JA 58-59, 69. Mahfouz’s attorneys have also shown in their filings in the UK action that they are scrutinizing Dr. Ehrenfeld’s work in New York. JA 88-93.

Mahfouz's Chilling Effect

As a direct result of Mahfouz's campaign of intimidation, Dr. Ehrenfeld's speech in New York has in fact been chilled. JA 61-62. Following Mahfouz's postings on his website about the UK judgment, two publications that had regularly published Dr. Ehrenfeld's work declined to publish a well-researched and referenced article she sent them about a Saudi-owned company. JA 61. Dr. Ehrenfeld also finds herself increasingly concerned about the need to conform her writing to the standards of English law, lest what she writes will somehow "leak" into the UK and make her subject to another libel suit. JA 61-62. Anything she writes can be picked up on the internet and made immediately available in the UK and elsewhere. That is, of course, how the English action came about - - the leaking of 23 copies of the book into the UK. As a result, she has not published everything her research has revealed. JA 62.

Dr. Ehrenfeld brought this declaratory judgment action to obtain relief from the chilling effect of the UK judgment and to protect her freedom of speech and to maintain her ability (and that of others) as a scholar to investigate the funding of international terrorism, including the events of 9/11. Dr. Ehrenfeld needs the relief sought in this action in order to feel confident that she can continue to work with the full benefit of the free speech protections afforded by U.S. and New York law.

JA 60-63. If she does not receive the relief sought in this action, Mahfouz's chilling effect could continue for decades.

Summary of Argument

The decision below should be reversed because:

1. The District Court had personal jurisdiction over Mahfouz under CPLR 302(a)(1) and (a)(3). Mahfouz's actions in connection with the UK case and judgment constitute the transaction of business within New York and his deliberate scheme to chill Dr. Ehrenfeld's speech in New York was a tortious act that caused injury within New York.
2. Mahfouz consented to jurisdiction in New York by targeting the speech of a New York author and obtaining a judgment that could only be enforced in New York.
3. The District Court prematurely dismissed Dr. Ehrenfeld's claims without granting jurisdictional discovery.
4. Dr. Ehrenfeld requests certification to the New York Court of Appeals of any potentially unclear questions about the application of New York's jurisdictional statutes to the unique phenomenon of libel tourism.

Argument

I

SINCE MAHFOUZ TRANSACTED BUSINESS IN NEW YORK AND COMMITTED A TORTIOUS ACT THAT CAUSED INJURY WITHIN NEW YORK, PERSONAL JURISDICTION OVER HIM EXISTED UNDER CPLR 302

The District Court erred in finding that it had no basis for personal jurisdiction over Mahfouz under CPLR 302, SPA 7-12, which governs whether a New York court may exercise personal jurisdiction over a non-domiciliary and must be applied by federal courts sitting in diversity.⁴ See, e.g., PDK Labs, Inc. v. Friedlander, 103 F.3d 1105, 1108 (2d Cir. 1997). The standard of review is de novo. In re Magnetic Audiotape Antitrust Litig., 334 F.3d 204, 206 (2d Cir. 2003).

A. CPLR 302(a)(1): Mahfouz “Transacted Business” in New York

The first error made by the District Court was finding that Mahfouz’s actions with respect to Dr. Ehrenfeld did not fall within the purview of CPLR 302(a)(1). SPA 9-11. Under 302(a)(1), a New York court has personal jurisdiction over a non-domiciliary who “transacts any business within the state,”

⁴ A court must also find that its exercise of jurisdiction would be constitutional. The District Court’s exercise of jurisdiction over Mahfouz would also comport with the constitutional requirements that the defendant have “minimum contacts” with the forum state and that the court’s exercise of jurisdiction be “reasonable.” See, e.g., Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir. 1996); Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme et al., 433 F.3d 1199, 1205-1211 (9th Cir.) (en banc), cert. denied 126 S.Ct. 2332 (2006).

and the cause of action arises out of that transaction of business. See, e.g., PDK Labs, Inc. v. Friedlander, 103 F.3d 1105, 1109 (2d Cir. 1997). The District Court failed to take into account the “totality of the circumstances,” which meet the test of 302(a)(1). SPA 10-11.

1. Courts Must Look at the “Totality of the Circumstances.” No magic formula exists for determining whether certain acts constitute the transaction of business under 302(a)(1). Rather, courts must look at the “totality of the circumstances.” See, e.g., Sterling Nat’l Bank and Trust Co. of New York v. Fidelity Mortgage Investors, 510 F.2d 870 (2d Cir. 1975) (citations omitted).

In examining the “totality of circumstances,” the central question is whether the non-domiciliary at issue “has engaged in some purposeful activity in New York in connection with the matter in controversy.” Citigroup Inc. v. City Holding Co., 97 F. Supp. 2d 549, 564 (S.D.N.Y. 2000). Electronic and telephonic communications into New York from outside New York can -- as the New York Court of Appeals reiterated just last month -- give rise to personal jurisdiction if, through those communications, the non-domiciliary “projected” itself into New York. Deutsche Bank Sec., Inc. v. Montana Bd. of Investments, ___ N.Y.2d ___, ___ N.Y.S.2d ___, 2006 WL 1525924 (N.Y. June 6, 2006) (citations omitted).

A finding of personal jurisdiction is appropriate even in the absence of precedent directly addressing the unique circumstances in this case. CPLR

302(a)(1) should be interpreted flexibly to take into account new technology and methods of communication. See, e.g., Citigroup Inc., 97 F. Supp. 2d at 565 (“It has long been observed that technological advances affecting the nature of commerce require the doctrine of personal jurisdiction to adapt and evolve along with those advances”). See also Deutsche Bank Sec., Inc. v. Montana Bd. of Investments, supra.

2. The Totality of the Circumstances Show That Mahfouz Transacted Business in New York. The District Court failed to look at the totality of the circumstances and instead took an overly narrow view of the facts. By citing Fiedler v. First City Nat’l Bank of Houston, 807 F.2d 315 (2d Cir. 1986), Beacon Enterprises, Inc. v. Menzies, 715 F.2d 757 (2d Cir. 1983), and Fort Knox Music, Inc. v. Baptiste, 139 F. Supp. 2d 505 (S.D.N.Y. 2001), the District Court implied that Mahfouz’s contacts were equivalent only to a few cease and desist letters, a few phone calls, and a mailing into New York.⁵ SPA 10-11. But Mahfouz’s

⁵ These cases are further distinguishable in that their disputes had nothing to do with New York, whereas here, Mahfouz’s complaint is with how Dr. Ehrenfeld conducts her business in New York. In Fiedler, the guaranties at issue “were part of an underlying Texas transaction, involving Texas property, with Texas law governing.” 807 F.2d at 317. In Fort Knox Music, Inc., all original parties to the agreement at issue were located in Louisiana when that agreement was signed. 139 F. Supp. 2d at 507. And in Beacon, the cease and desist letter at issue alleged infringement only “in an unspecified locale,” not New York. 715 F.2d at 766.

contacts with New York were qualitatively and quantitatively different than the contacts at issue in those cases.

Mahfouz did not simply cause a handful of communications to be made into New York. He implemented a wide-ranging scheme designed to chill, and that has chilled, Dr. Ehrenfeld's research and writing in New York. JA 61-63. As part of his scheme aimed at New York, Mahfouz went so far as to obtain an actual judgment against Dr. Ehrenfeld, which included injunctive relief ordering her not only to change her behavior in New York, but also to take affirmative steps in New York. JA 7-8, 33-36.

Such a judgment differs fundamentally from one or even multiple cease and desist letters, and it alone constitutes a basis for personal jurisdiction over Mahfouz. The judgment required Dr. Ehrenfeld to both issue a correction of the challenged statements and take affirmative steps to prevent further publication of the statements in the English court's jurisdiction. JA 8, 34-35. Of course, the only publication of Dr. Ehrenfeld's book in the UK was the result of a handful of online sales over the Internet, JA 40, and as Mahfouz's UK counsel admonished Dr. Ehrenfeld in transmitting the English court's judgment to her, "you are under a duty to ensure that you take every measure to prevent the Book from leaking into the jurisdiction otherwise you may be held in contempt of court." JA 72.

In a recent case, Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme et al., 433 F.3d 1199, 1208-1211 (9th Cir.) (en banc), cert. denied 126 S.Ct. 2332 (2006), the Ninth Circuit underscored that foreign court orders -- even those that a party has not yet attempted to enforce -- tilt the balance in favor of personal jurisdiction in the U.S. over the party that obtained the orders. In that case, Yahoo! argued that the U.S. court should have personal jurisdiction in a declaratory judgment action over a French defendant that had sent a cease and desist letter to, served process on, and obtained French court orders against it. Id. The Ninth Circuit analyzed each of these contacts separately and held that the existence of the French court orders, which the French defendant, like Mahfouz, had not yet attempted to enforce against Yahoo!, but which required Yahoo! to take certain actions in California, warranted the exercise of personal jurisdiction over it. Id. at 1211. The Ninth Circuit observed that the mere existence of the French court orders “cast a shadow” over Yahoo!. Id. Mahfouz’s judgment, which would require Dr. Ehrenfeld to take certain actions in New York, casts the same shadow on her. JA 8, 34-35.

And when Mahfouz’s judgment is viewed in the context of Mahfouz’s other intimidating contacts with Dr. Ehrenfeld in New York -- the menacing agent, the intrusive e-mails, the multiple packages, and the monitoring of her work, JA 55-59 -- it is even more clear that they differ in number and kind from the contacts in the

cases cited by the District Court. Those contacts did not constitute discrete communications or actions that Dr. Ehrenfeld could easily ignore, but instead were all part of Mahfouz's successful scheme to chill her in New York. The District Court erred in narrowly viewing Mahfouz's contacts with New York as insufficient to give it personal jurisdiction over him, and its decision should be reversed.

3. Overly Narrow View of the Law. In perfunctorily concluding that Mahfouz's contacts, even if persistent and vexing, were not made in furtherance of a business objective, the District Court interpreted the law in an overly narrow and incorrect manner.

The District Court unduly limited its reading of "transaction of business" under CPLR 302(a)(1) to "traditional" concepts of business. SPA 10-11. It ignored the basic principle that CPLR 302(a)(1) should be read flexibly to take into account new phenomena. See, e.g., Citigroup Inc., supra, 97 F. Supp. 2d at 565. This was a mistake. The District Court should have examined the broader question of whether, through the use of the relatively new tactic of libel tourism, which has burgeoned since the development of the Internet, Mahfouz projected himself into New York business. See, e.g., Deutsche Bank Sec., Inc. v. Montana Bd. of Investments, supra, ___ N.Y.2d ___, ___ N.Y.S.2d ___, 2006 WL 1525924 (N.Y. June 6, 2006); Parke-Bernet Galleries, Inc. v. Franklyn, 26 N.Y.2d 13, 18, 308 N.Y.S.2d 337, 340-41 (1970).

Had the District Court addressed this question, it would have answered it in the affirmative. Mahfouz has in fact projected himself into New York business because the purpose and effect of his contacts with Dr. Ehrenfeld in New York were to prevent her from going about the business of researching and publishing, in New York, on terrorism. JA 61-63. As a direct result of Mahfouz's contacts with New York, Dr. Ehrenfeld has refrained from putting new research on the market. JA 61-62. This has resulted not only in fewer works by Dr. Ehrenfeld being available for sale, but also in preventing her from further raising her profile, which in turn could have increased both sales of her existing work and, in the form of grants and donations, funding for her New York-based employer, the American Center for Democracy. JA 53, 61-62.

B. CPLR 302(a)(3): Mahfouz Committed a Tortious Act

Equally incorrect was the District Court's alternative holding that Mahfouz's actions fell outside CPLR 302(a)(3). SPA 11-12. The relevant part of 302(a)(3) gives a New York court personal jurisdiction over a non-domiciliary who "commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising

from the act. . . .”⁶ The District Court’s decision was erroneous for several reasons.

1. Not Required to Plead a Tort. Contrary to the District Court’s assertion, nothing requires Dr. Ehrenfeld to have “pleaded a tort” for the District Court to have jurisdiction over Mahfouz under 302(a)(3). SPA 12. Rather, the plain language of the statute and the case law requires only that the cause of action at issue arise from a “tortious act.” See, e.g., Garbellotto v. Montelindo Compagnie Navegacion, 294 F. Supp. 487, 488 (S.D.N.Y. 1969) (“To begin with, § 302(a)(3) does not say that its coverage is confined to ‘tort actions * * *.’ Literally, it refers to any ‘cause of action arising’ from ‘a tortious act without the state causing injury to person or property within the state * * *.’”).

2. Asking the Right Question. The question the District Court should have asked was whether, assuming the facts in the complaint are true, Dr. Ehrenfeld’s declaratory judgment action arose from a “tortious act” committed by

⁶ The statute also provides in relevant part that the non-domiciliary: (i) “regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state” or (ii) “expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.” The District Court did not address this part of the statute, but Mahfouz would meet the second test because his entire scheme was aimed at affecting Dr. Ehrenfeld in New York, and as a wealthy financier, he derives substantial revenue from interstate or international commerce.

Mahfouz that caused injury within New York. The correct answer to this question is “yes.”

a. Mahfouz Deprived Dr. Ehrenfeld of Constitutional Free Speech Protections

By bringing the UK lawsuit against Dr. Ehrenfeld, obtaining an actual judgment against her, but taking no formal steps to enforce that judgment,⁷ Mahfouz has deliberately deprived Dr. Ehrenfeld of the free speech protections to which she is entitled under the Constitutions of both the United States and New York, which is the only place where she lives and works. From a common sense point of view, this can only be described as tortious. In obtaining the judgment against Dr. Ehrenfeld, Mahfouz has effectively chased her to the precipice, but in refusing to attempt to enforce it, he has refrained from actually shoving her off. The end result is that Dr. Ehrenfeld lives in a state of limbo and must constantly think about whether her work would pass muster under British law because, if it would not, there is a substantial, clear and present danger that Mahfouz would try to enforce his judgment or sue her again. JA 61-62.

While Mahfouz’s actions in particular and libel tourism in general might not yet be recognized by courts as tortious conduct, the dearth of case law on the issue

⁷ Mahfouz has, in fact, taken affirmative, albeit informal, steps toward the enforcing the UK judgment by demanding that Dr. Ehrenfeld, on pain of being held in contempt, “take every measure to prevent [her] Book from leaking into the jurisdiction.” JA 72.

is not dispositive. Where, as here, the act in question is a new phenomenon that could not have been anticipated by the legislature and has not yet been addressed by the courts, courts should evaluate public policy considerations in deciding whether the act was tortious, rather than deciding the issue based on whether there is any authority directly on point. See Garbellotto, supra, 294 F. Supp. at 488 (considering the “substantive interests with which the New York legislature was concerned in enacting § 302(a)(3)” as opposed to the “traditional categories” of tort and contract).

b. Jurisdiction over Mahfouz Comports with the Foreign Libel Exception in 302(a)(3)

In this case, characterizing Mahfouz’s libel tourism as tortious conduct would also further the free speech policies undergirding 302(a)(3). The legislature expressly excluded actions for defamation from 302(a)(3) (and also from 302(a)(2)). It did so in order to “avoid . . . situations in which national publications in distant states are haled into New York courts on a libel or defamation claim simply because the publication (and accordingly the defamatory statement) is available on a New York newsstand.” Vardinoyannis v. Encyclopaedia Britannica, Inc., No. 89 Civ. 2475, 1990 WL 124338, at *6, n. 3 (S.D.N.Y. Aug. 20, 1990).

In essence, the legislature attempted to prevent New York plaintiffs from doing what Mahfouz did to Ehrenfeld: bring a defamation suit against a writer in a

jurisdiction where that writer neither lives nor works. Given the protection that New York affords non-New York writers from New York defamation lawsuits, it would be equitable, sensible, symmetrical, reciprocal, and mutual for a court to hold that Mahfouz's conduct subjects him to jurisdiction under 302(a)(3) in this action. New York should, at the least, enable New York writers to obtain rulings that New York courts will not enforce defamation judgments from countries whose free speech protections fall far short of those of the United States and New York.

While the legislature did not provide a laundry list of acts that can be considered tortious under CPLR 302(a)(3), by specifically excluding defamation from its purview it made clear that courts should construe the statute to advance free speech.

c. Appellant Need Not Show She Would Have
Prevailed in the UK Case

The District Court's suggestion that Dr. Ehrenfeld would not be able to prevail on a malicious prosecution claim in New York because she could not show that she prevailed in the UK action misses the point. SPA 12. The requirement that a plaintiff in a malicious prosecution case be able to prove that he or she would have prevailed on the allegedly malicious prosecution assumes that the laws applied in that prosecution were constitutional. But the whole point of Dr. Ehrenfeld's declaratory judgment action is to obtain a ruling that the UK judgment

is unenforceable in the New York because UK law affords far less protection to writers than do the U.S. and New York Constitutions. JA 23-25. It therefore would be illogical to require Dr. Ehrenfeld to prove that she prevailed under the very laws she is contesting.

The common-law requirement of favorable termination, to the extent that it even applies, does not require Dr. Ehrenfeld to prevail in the UK libel action. In Pinsky v. Duncan, 79 F.3d 306 (1996), for example, this Court recognized that a plaintiff could state a malicious prosecution claim based on defendant's illegal attachment of his property under an unconstitutional state statute. The plaintiff obtained a favorable outcome when the attachment statute was later declared unconstitutional. Id. at 312. Just as Pinsky refused to bar recovery on a malicious prosecution theory because defendant won damages in the underlying negligence action, the UK default judgment should not prevent not this Court from exercising jurisdiction over Mahfouz if his actions in obtaining the judgment were wrongful and enforcement in the United States would be unconstitutional.

II

SINCE THE ENGLISH LIBEL ACTION TARGETED SPEECH IN NEW YORK AND COULD ONLY BE MEANINGFULLY ENFORCED THROUGH A NEW YORK ENFORCEMENT PROCEEDING, MAHFOUZ IMPLIEDLY CONSENTED TO JURISDICTION

Regardless of whether Mahfouz’s actions trigger specific jurisdiction under CPLR 302, his pursuit of monetary damages and injunctive relief against Dr. Ehrenfeld -- with full knowledge that any resulting judgment could only be meaningfully enforced in New York -- constitutes consent to personal jurisdiction under CPLR 301.

A. Consent as Basis for Personal Jurisdiction

Consent, both express and implied, has long been recognized as an independent basis for personal jurisdiction.⁸ Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 704-05 (1982); Transaero, Inc. v. La Fuerza Aerea Boliviana, 162 F.3d 724, 729 (2d Cir. 1998). New York codifies consent as a basis for jurisdiction in CPLR 301, which provides that “[a] court may exercise jurisdiction over persons, property, or status as might have been exercised before.” Shakour v. Federal Republic of Germany, 199 F. Supp. 2d 8, 15 (E.D.N.Y. 2002). By enacting 301, the legislature “intended to make clear that the

⁸ Foreign defendants are not exempt from a finding of jurisdiction by consent. Ins. Corp. of Ireland, Ltd v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 704-07 (1982); Restatement (Third) of Foreign Relations Law § 421 (1987).

advent of ‘long-arm’ jurisdiction in CPLR 302 did not supersede or limit any then-existing bases of jurisdiction recognized by statute or caselaw,” including jurisdiction by consent. Vincent C. Alexander, “Practice Commentaries to CPLR 301,” cmt. C301:1 at 8, McKinney’s Consol. Laws of N.Y. Ann., Book 7B, CPLR 301-306-b (2001) (quoting N.Y. Adv. Comm. on Prac. & Proc., Second Prelim. Rep., Legis. Doc. No. 13, p. 38 (1958)).

Although developed as a common-law principle, the concept of consent-based jurisdiction is inherently flexible and fully applicable to new phenomena such as libel tourism:

The reference in CPLR 301 to jurisdiction “that might have been exercised hereto” has been construed to cover the principles applicable to any line of New York cases, even if no prior court had previously dealt with the precise situation at hand. It permits the courts to develop prior concepts used in New York without the limitations of statutory language.

2 Wright-Korn-Miller, New York Civil Practice ¶ 301.10 (2005); Alexander, supra, cmt. C301:6 at 18 (“consent can take many forms and can occur before or after the litigation has commenced”).

B. Use of New York Courts as Basis of Implied Consent

“Use of the New York courts is a traditional justification for the exercise of personal jurisdiction over a nonresident.”⁹ Matter of Sayeh H., 91 N.Y.2d 306, 319, 670 N.Y.S.2d 377, 383 (1997). A party may not seek affirmative relief by invoking New York legal procedures while simultaneously immunizing himself from the reach of this state’s courts. Id. In Adam v. Saenger, the Supreme Court explained why states may treat an affirmative request for judicial relief as an implied submission to personal jurisdiction:

The plaintiff having, by his voluntary act in demanding justice from defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence. It is the price which the state may exact as the condition of opening its courts to the plaintiff.

303 U.S. 59, 67-68 (1938).

Consent to jurisdiction can also be based on the foreseeability of later enforcement proceedings in this state. Mahfouz incorrectly argues that he is exempt from personal jurisdiction because he has not yet filed an action against Dr. Ehrenfeld in New York. But implied consent does not depend on a defendant’s unilateral decision about when to file suit. For example, this Court has long

⁹ CPLR 303 embodies this common-law rule by requiring non-resident plaintiffs to consent to jurisdiction over counterclaims if they commence an action in New York.

recognized that a party who agrees to arbitrate claims in New York also “consent[s] to the jurisdiction of the court that could compel the arbitration proceeding [here] . . . Implicit in the agreement to arbitrate is consent to enforcement of the agreement.” Victory Trans. Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 363-64 (2d Cir. 1964). The critical factor is whether the defendant has “invoked the aid and protection of our courts,” not whether the defendant has formally commenced an action in this state. Matter of Sayeh H., 91 N.Y. 2d at 319, 670 N.Y.S.2d at 383 (Florida respondent’s efforts to enforce child visitation rights in New York subjected her to general long-arm jurisdiction).

C. Mahfouz Consented to Jurisdiction in New York

The traditional principles underlying jurisdiction by implied consent, applied pragmatically to the unique facts of this case, compel a finding of jurisdiction over Mahfouz. Although Mahfouz has not yet initiated any action against Dr. Ehrenfeld in New York, the UK action -- if brought to seek compensation for Dr. Ehrenfeld’s alleged defamation -- necessarily contemplates a New York enforcement proceeding.

Mahfouz knew that Dr. Ehrenfeld lived and worked in New York and held no assets in England. When he filed the English libel suit, he served her with papers in New York, repeatedly communicated with her in New York, and made

no attempts to attach or restrain any property in England. JA 55-58, 71. Mahfouz knew that the logical and inevitable end result of the English libel action was an enforcement proceeding in this forum. Mahfouz's actions therefore constitute voluntary submission to jurisdiction in New York for the limited purpose of determining the enforceability of the UK default judgment. Personal jurisdiction in New York is, in short, the price Mahfouz must pay for targeting the free speech rights of a New York author.¹⁰

Although libel tourism is a new phenomenon, the doctrine of implied consent is flexible enough to prevent Mahfouz from invoking the power of the New York courts, and using the threat of future New York enforcement proceedings to silence Dr. Ehrenfeld's speech, while simultaneously denying the power of any court in this state to adjudicate the enforceability of the underlying UK judgment.¹¹ A contrary holding would punish Dr. Ehrenfeld for being a

¹⁰ Mahfouz cannot claim to be surprised by the jurisdictional consequences of his acts. Dr. Ehrenfeld would be entitled to contest the English judgment on public policy grounds in any enforcement proceeding brought by Mahfouz in New York. See CPLR 5304(b). Mahfouz is therefore not being forced to litigate any issues in this action that he would not inevitably face when he attempted enforcement at a later date.

¹¹ Dr. Ehrenfeld's decision not to appear in the English action does not undermine the argument for consent-based jurisdiction. Mahfouz may not compel Dr. Erenfeld to appear in a foreign forum. Ins. Corp. of Ireland, Ltd., 456 U.S. at 706 ("A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge the judgment on jurisdictional grounds in a collateral proceeding."). "[R]elief from a foreign judgment . . . may be offensively pursued

pioneer in defending her rights and perversely reward Mahfouz for inventing a new tactic to chill speech on one of the most important issues of our time.

III

SINCE PLAINTIFF ALLEGED AN ARGUABLE BASIS FOR PERSONAL JURISDICTION, SHE IS ENTITLED TO JURISDICTIONAL DISCOVERY

Whether or not the record establishes sufficient grounds for personal jurisdiction, the District Court should not have dismissed Dr. Ehrenfeld's claims without granting her jurisdictional discovery.¹² "A plaintiff should be provided with 'ample opportunity to secure and present evidence relevant to the existence of jurisdiction' through jurisdictional discovery" before her claims are dismissed. Daventree Ltd. v. Republic of Azerbaijan, 349 F. Supp. 2d 736, 761 (S.D.N.Y. 2004) (quoting APWU v. Potter, 343 F.3d 619, 627 (2d Cir. 2003)). "Issues of personal jurisdiction are as fully deserving of thorough factual exposition as issues related to the merits of a claim, for jurisdictional decisions may also determine

. . . through a suit for declaratory relief" – the appropriate remedy that Dr. Ehrenfeld seeks in this case. Covington Indus., Inc. v. Resintex A.G., 629 F.2d 730, 733 (2d Cir. 1980).

¹² A district court's denial of jurisdictional discovery is typically reviewed for abuse of discretion. See, e.g., Lehigh Valley Indus., Inc. v. Birenbaum, 527 F.2d 87, 93-94 (2d Cir.1975). In this case, however, the District Court denied discovery based on an erroneous legal conclusion about Dr. Ehrenfeld's initial pleading burden -- without exercising its discretion. SPA 15.

substantive rights.” Agrashell, Inc. v. Bernard Sirotta Co., 344 F.2d 583, 589 (2d Cir. 1965).

Here, the District Court improperly required Dr. Ehrenfeld to establish a prima facie case for personal jurisdiction as a prerequisite to receiving jurisdictional discovery. SPA 15. This Circuit has never made such discovery contingent on a prima facie showing at the pleading stage.¹³ See In re Magnetic Audiotape Antitrust Litig., 334 F.3d 204 (2d Cir. 2003). District courts in this Circuit have routinely granted jurisdictional discovery when the plaintiff’s allegations provide an arguable or colorable basis for asserting jurisdiction, which could be developed through further factual investigation. See, e.g., Ayyash v. Bank Al-Madina, No. 04-Civ.-9201 (GEL), 2006 WL 587342, at *6-7 n.7 (S.D.N.Y. Mar. 9, 2006) (citing cases). Such discovery is particularly appropriate when “the facts necessary to establish personal jurisdiction . . . lie exclusively within the defendant’s knowledge.” Winston & Strawn v. Dong Won Sec. Co., Ltd., 02-Civ.-0183, 2002 WL 31444625, at *5 (S.D.N.Y. Nov. 1, 2002).

In this case, Dr. Ehrenfeld has alleged sufficient specific facts to warrant preliminary discovery into Mahfouz’s New York contacts. She alleges that: (1)

¹³ The District Court misplaces its reliance on Jazini v. Nissan Motor Corp., 148 F.3d 181 (2d Cir. 1998) in denying discovery. SPA 15. Jazini upheld a trial court’s discretionary power to deny discovery in the absence of a prima facie showing. It did not make that result mandatory. See Ayyash, 2006 WL 587342, at *7 n.7 (discussing Jazini).

Mahfouz engaged in several million-dollar New York real estate transactions after his initial filing in the UK action, JA 59, 94-97, (2) Mahfouz maintains a website (www.binmahfouz.info/en_index.html), which he has used to trumpet the results of his UK court “victories” against Dr. Ehrenfeld and others, which can be accessed by New York residents, JA 58, and (3) Mahfouz repeatedly contacted her in New York through various agents to intimidate her and to indicate that he is closely monitoring her work here. JA 55-59. Dr. Ehrenfeld is entitled to explore further these forum contacts by Mahfouz, all of which, individually or collectively, would suffice for personal jurisdiction independently from the grounds asserted in this appeal.

IV

SINCE IMPORTANT NEW YORK PUBLIC POLICIES ARE AT STAKE,
ANY DOUBTS ABOUT THE EXISTENCE OF PERSONAL JURISDICTION
SHOULD BE RESOLVED BY CERTIFICATION
TO THE NEW YORK COURT OF APPEALS

If for any reason the Court finds the scope of CPLR 301 and 302 to be ambiguous when applied to the new phenomenon of libel tourism, Dr. Ehrenfeld requests certification to the New York Court of Appeals. See N.Y. Ct. of Appeals Rule 500.27 (accepting certification of “dispositive question of law” where no “controlling precedent of the Court of Appeals exists”).

“This Court has long recognized that state courts should be accorded the first opportunity to decide significant issues of state law through the certification process . . . [P]rinciples of federalism and comity demand that federal courts give a state’s highest court the opportunity to determine state law authoritatively.” Cweklinsky v. Mobil Chemical Co., 297 F.3d 154, 160 (2d Cir. 2002) (citations omitted). Certification is especially appropriate where the Court confronts a jurisdictional question of first impression since “New York . . . has a strong interest in deciding the jurisdictional reach of its courts.” Alexander & Alexander Servs. Inc. v. Lloyd’s Syndicate, 902 F.2d 165, 169 (2d Cir. 1990) (certifying question under CPLR § 301).

This case presents another compelling reason for certification. Beyond the state’s fundamental concern in determining the power of its own courts, the

jurisdictional question raised in this appeal also implicates New York's longstanding policy favoring free speech. As a publishing and media center, New York has traditionally offered enhanced protection for speech, rather than limiting the relief available in its courts. See Immuno AG v. J. Moor-Jankowski, 77 N.Y.2d 235, 249, 566 N.Y.S.2d 906, 913-14 (1991) ("This State, a cultural center for the Nation, has long provided a hospitable climate for the free exchange of ideas. That tradition is embodied in the free speech guarantee of the New York State Constitution . . . [which] is often broader than the minimum required by the Federal Constitution.") (internal quotation omitted).

Libel tourism not only affects New York authors and publishers. New York residents also have a strong First Amendment interest in preserving broad access to speech -- no matter how controversial or inflammatory. See Spargo v. New York State Comm'n on Judicial Conduct, 351 F.3d 65, 83 (2d Cir. 2003) ("it is well established that the First Amendment protects not only the right to engage in protected speech, but also the right to receive such speech"). The harm of libel tourism therefore extends beyond the individual author or publisher who is sued abroad. By promoting self-censorship and by directly curtailing the range of publications available in New York, libel tourism detrimentally abridges the free speech rights of New York residents as a whole.

The District Court’s decision creates an anomalous result at odds with New York’s core policy of fostering free speech. Citizens of other states can obtain defensive declaratory judgments to guard against the enforcement of foreign libel judgments. Cf. Yahoo!, 433 F.3d at 1224. New York residents, however, will be denied similar relief if the foreign plaintiff (like Mahfouz) chooses to avoid jurisdiction by strategically delaying enforcement proceedings. Given this highly undesirable result (which is likely to recur as more New York authors and publishers fall victim to libel tourism) -- any doubts about the viability of jurisdiction should be resolved through certification.

Certification ensures that the relevant state statutes are not construed unduly narrowly to defeat important state policies. The Court of Appeals may well have “more flexibility and broader interpretive power” to apply CPLR 301 and 302 to protect New York citizens from libel tourism, and it should be given that opportunity before denying relief to Dr. Ehrenfeld. Allstate Ins. Co. v. Serio, 261 F.3d 143, 152 (2d Cir. 2001); see also Doctors Council v. New York City Employees' Retirement Sys., 71 N.Y.2d 669, 675, 529 N.Y.S.2d 732, 735 (1988) (statutory language should not be applied “literally or mechanically . . . when, due to significantly changed circumstances, such application would cause an anachronistic or absurd result” contrary to the purpose of the statute); Cf. Deutsche

Bank Sec., Inc. v. Montana Bd. of Investments, __ N.Y.2d __, __ N.Y.S.2d __, 2006 WL 1525924 (N.Y. June 6, 2006) .

Conclusion

New York should be the last stop on Sheik Mahfouz's "libel tour." A contrary decision will not only erode the fundamental free speech rights that this nation has strived to ensure from its founding but also jeopardizes New York's status as a leading publishing and media center that has deliberately chosen to offer enhanced protection for free expression.

This is not a case about a celebrity gossip column or an ill-advised comment in an interview. The disputed statements in Dr. Ehrenfeld's book are core political speech. She is an independent, investigative journalist writing about one of the most critical issues this country currently faces -- how to stop the spread of international terrorism. Although couched in the language of personal jurisdiction, Mahfouz's denial of jurisdiction is really an affirmative assertion of power -- his power to silence his critics through strategic libel tourism and the power of foreign courts to regulate American authors and publishers and enjoin their speech in the United States.

Over 190 countries are currently represented in the United Nations. The District Court's decision permits foreign plaintiffs like Mahfouz to target American writers in the foreign forum with the libel laws most hostile to free

speech. Compounding this problem of forum-shopping is the continuing expansion of the Internet and the increasing willingness of foreign courts to exercise jurisdiction over American authors based on nominal online book sales or the availability of the disputed statements on websites accessible to foreign readers.

Until an international treaty or convention adequately resolves these issues, this Court should recognize the ability of Dr. Ehrenfeld and other New York authors and journalists to seek meaningful relief in their home forum from the chilling effect of foreign libel judgments and the continued threat of New York enforcement. The Peter Zenger case, which helped establish the freedom of the press in the United States, was decided in 1735 in a courtroom only a few blocks from here. It would therefore be doubly ironic if this case gave foreign libel plaintiffs a blueprint for evading the free speech protections of this country under the guise of state jurisdictional statutes designed to protect due process and discourage forum-shopping in defamation actions.

The denial of personal jurisdiction would transform libel tourism from a troubling new phenomenon to a dangerous regime of extraterritorial speech regulation -- reinforced by the jurisdictional hurdles established by the District Court. For the reasons given, the District Court's decision should be reversed.

Dated: New York, New York
June 30, 2006

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief was produced in Times New Roman (a proportionately spaced typeface), 14-point type and contains 8,807 words (based on the Microsoft Word processing system word count function).

Cecelia Chang

SPECIAL APPENDIX

McKinney's CPLR § 302

▷

Effective: [See Text Amendments]

→§ 302. Personal jurisdiction by acts of non-domiciliaries

(a) **Acts which are the basis of jurisdiction.** As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
 - (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
 - (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
4. owns, uses or possesses any real property situated within the state.

(b) **Personal jurisdiction over non-resident defendant in matrimonial actions or family court proceedings.** A court in any matrimonial action or family court proceeding involving a demand for support, alimony, maintenance, distributive awards or special relief in matrimonial actions may exercise personal jurisdiction over the respondent or defendant notwithstanding the fact that he or she no longer is a resident or domiciliary of this state, or over his or her executor or administrator, if the party seeking support is a resident of or domiciled in this state at the time such demand is made, provided that this state was the matrimonial domicile of the parties before their separation, or the defendant abandoned the plaintiff in this state, or the claim for support, alimony, maintenance, distributive awards or special relief in matrimonial actions accrued under the laws of this state or under an agreement executed in this state. The family court may exercise personal jurisdiction over a non-resident respondent to the extent provided in sections one hundred fifty-four and one thousand thirty-six of the family court act.

(c) **Effect of appearance.** Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section.

<LAWS 1962, CHAPTER 308>

McKinney's CPLR § 302, NY CPLR § 302

END OF DOCUMENT

McKinney's CPLR § 301

C

Effective: [See Text Amendments]

→ § 301. Jurisdiction over persons, property or status

A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore.

<LAWS 1962, CHAPTER 308>

McKinney's CPLR § 301, NY CPLR § 301

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RACHEL EHRENFELD,

Plaintiff,

- against -

KHALID SALIM A BIN MAHFOUZ,

Defendant.

04 Civ. 9641 (RCC)

MEMORANDUM &
ORDER

RICHARD CONWAY CASEY, United States District Judge:

This declaratory-judgment action arises out of a defamation lawsuit brought in England (“English Case”) by Khalid Salim a Bin Mahfouz (“Bin Mahfouz”) against the author Dr. Rachel Ehrenfeld (“Ehrenfeld”). Ehrenfeld seeks a declaration from this Court that the judgment in the English case is not enforceable in the United States based on the protections of the First Amendment. Bin Mahfouz moves to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject-matter jurisdiction, claiming Ehrenfeld has failed to meet the requirements of the Declaratory Judgment Act, and under Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction. The Court finds that it lacks personal jurisdiction over Bin Mahfouz under New York law and finds that there exists no need for additional jurisdictional discovery. Accordingly, the Court does not reach the issue of subject-matter jurisdiction. The motion to dismiss is GRANTED.

I. BACKGROUND

Ehrenfeld is the author of the book Funding Evil: How Terrorism is Financed and How to Stop It. The book was published in the United States in 2003 by Bonus Books. Bin Mahfouz is

a citizen of Saudi Arabia and was formerly the chairman and general manager of The National Commercial Bank of Saudi Arabia. In her book, Funding Evil, Ehrenfeld alleges that Bin Mahfouz financially supported international terrorism directly and through various charities that the book identifies as terrorist fronts. Bin Mahfouz has had similar accusations made against him in the past and has threatened or actually brought defamation suits in England at least 29 times. (Compl. ¶¶ 23-24.) Many of these defamation suits have led to judgments, settlements, and retractions that favor of Bin Mahfouz. See Bin Mahfouz Information, <http://www.binmahfouz.info> (last visited Mar. 24, 2006).

Bin Mahfouz and his sons brought an action on June 30, 2004 against Ehrenfeld and Bonus Books in the High Court of Justice in London (“English Court”), which granted Bin Mahfouz a default judgment against both Ehrenfeld and Bonus Books on December 7, 2004 (“English Judgment”). Though she was properly served on October 22, 2004, she claims she did not appear in the English Case because she “lacked the financial resources to defend [herself] in the English Courts far from [her] home, because of the formidable procedural burdens a libel defendant faces in the U.K., and because [she] disagree[d] in principle with [Bin Mahfouz’s] tactic.” (Ehrenfeld Aff. ¶ 7.)

In her affidavit, Ehrenfeld documents Bin Mahfouz’s contacts with her on or about the time of the English Case. On January 23, 2004, Bin Mahfouz’s attorneys sent, by e-mail and letter to Ehrenfeld’s home, a document which could be characterized as a cease and desist letter, though it is not so-named. The document contained language insisting Ehrenfeld take “immediate action” to correct the allegedly defamatory statements about Bin Mahfouz and threatening litigation and a “substantial award of damages” if she did not agree to a “final

settlement,” which required Ehrenfeld to: (1) make “an undertaking to the High Court in England not to repeat the same (or similar) offending allegations”; (2) withdraw from circulation and destroy and/or “deliver up” all unsold copies of the Book immediately; (3) issue a letter of apology to Bin Mahfouz and his sons to be published at Ehrenfeld’s cost; (4) donate an unstated amount of money to a charity; and (5) pay Bin Mahfouz’s legal costs. (Ehrenfeld Aff. Ex. A at 5.)

On at least six occasions, Bin Mahfouz’s counsel sent letters and emails to Ehrenfeld’s home pertaining to details of the English Case. (Ehrenfeld Aff. ¶ 14; *id.* Exs. B-H.) Of note is the December 9, 2004 letter that informed Ehrenfeld of the December 7, 2004 English Judgment, which ordered an assessment of damages and costs and an injunction restraining Ehrenfeld and Bonus Books from publishing or causing or authorizing the publication of the allegedly defamatory portions of Funding Evil in the United Kingdom. The letter further stated that Ehrenfeld could be subject to contempt-of-court charges if she failed to take “every measure to prevent [Funding Evil] from leaking into the jurisdiction” through U.S. online retail websites. (*Id.* Ex. C.)

On four occasions—October 22, 2004, December 30, 2004, March 3, 2005, and May 19, 2005—Bin Mahfouz sent representatives to Ehrenfeld’s New York apartment to personally deliver papers relating to the English Case. (Ehrenfeld Aff. ¶ 12.) On the March 3 transaction, Bin Mahfouz’s representative allegedly said to Ehrenfeld, as he handed her papers related to the case, “You had better respond, Sheik [B]in Mahfouz is a very important person, and you ought to take very good care of yourself.” (*Id.* ¶ 13.) Bin Mahfouz denies that this interaction occurred. (Reply at 8.)

In a May 3, 2005 final judgment, the English Court awarded Bin Mahfouz and his two sons the maximum damages allowed in an action on default (UK £10,000 each) as well as attorneys fees and costs; issued a “declaration of falsity” (which discussed and declared false all claims that Bin Mahfouz and his sons supported or assisted terrorism); ordered that Ehrenfeld and Bonus Books publish a correction and apology; and continued the December 7, 2004 injunction restraining Ehrenfeld and Bonus Books from publishing or causing or authorizing the publication of the defamatory portions of Funding Evil in the United Kingdom. (Ehrenfeld Aff. Ex. H.) The judgment is reported on Bin Mahfouz’s web site, which is accessible in New York. See Bin Mahfouz Information, http://www.binmahfouz.info/news_20050503.html (last visited Mar. 24, 2006). On May 9, 2005, Ehrenfeld received an e-mail with a letter attached containing the English Court’s May 3, 2005 Order. (Ehrenfeld Aff. Ex. H.)

Bin Mahfouz has other past contacts with New York. In 1991, he was indicted for bank fraud in New York in connection with the collapse of the Bank of Credit and Commerce International, of which he was Chief Operating Officer. (Id. ¶ 17.) He settled those charges and paid fines and restitution totaling \$255 million in 1992. (Id.) In addition, Bin Mahfouz owned two apartments in New York City. (Id.) He sold one on August 25, 2004 and the other on August 29, 2004. (Id.)

Ehrenfeld filed this action for declaratory judgment on December 8, 2004, seeking a declaration that the statements in Funding Evil do not give rise to liability for defamation under the laws of the United States or New York State and that in fact under these laws the default judgment obtained from the English Court is unenforceable in the United States. She claims that Bin Mahfouz is determined to silence authors who report negatively about him or his family.

Ehrenfeld claims that the English Judgment, in particular the English Court’s “declaration of falsity” and injunctive relief, has had a negative impact on her reputation, has hurt her ability to attract publishers and will have a chilling effect on her work as an investigative journalist. Specifically, she claims in her affidavit that at least two publications that have consistently published her work in the past declined to publish a “well-researched” article on a Saudi company and were “uncharacteristically evasive in giving reasons for their refusal.” (Ehrenfeld Aff. ¶ 25.) She claims that she has found herself “increasingly concerned” about liability under English law, claims she has removed information that might subject her to liability, and has found “the pressure toward self-censorship [] formidable.” (*Id.*) Ehrenfeld cites to other authors who have, after completing books on terrorism, removed references to Bin Mahfouz based on their fear of a lawsuit in England, and cites a newspaper article which states that “Mr. Mahfouz’s litigiousness is seen by people familiar with the discussions around [another author’s] book as a chief reason why Seckler & Warberg decided not to publish it” and that this “may be yet another example of how wealthy Saudis are increasingly using British laws to intimidate critics.” (*Id.* Ex. K.) The article also reported that Ehrenfeld had a “British deal” to distribute Funding Evil cancelled because of a legal threat by an unnamed Saudi named her book.¹ (*Id.*)

¹ Amazon.com, American Society of Newspaper Editors, Article 19, Association of Alternative Newsweeklies, Association of American Publishers, Inc., Authors Guild, Inc., Electronic Frontier Foundation, European Publishers Council, John Fairfax Holdings, Ltd., Newspaper Association Of America, Online News Association, NYP Holdings, Inc., Radio-Television News Directors Association, Reporters Committee for Freedom of the Press, Times Newspapers Limited, and World Press Freedom Committee (collectively “Amici”) also argue that the chill reaches U.S. (and other) publishers, based on the fact that liability can attach in courts all over the world based on de minimis availability of the works abroad. They argue that a “chill” on the First Amendment in this case is particularly damaging because our national security relies in part on the “efforts, courage, and credibility of journalists investigating the causes, participants and funding of international terrorism.” (Amici Mem. at 1.)

Bin Mahfouz counters that Ehrenfeld has shown no objective chill, particularly in light of the fact that she flaunted the English case to publicize the revised paperback edition of her book. (Def.'s Mem. at 5.)

Bin Mahfouz now moves to dismiss under Rule 12(b)(1) for lack of subject-matter jurisdiction—arguing that no “actual controversy” exists under the Declaratory Judgment Act—and under Rule 12(b)(2) for lack of personal jurisdiction.

II. DISCUSSION

Generally speaking, when a court is faced with a motion to dismiss that challenges both subject-matter and personal jurisdiction, it addresses the subject matter question first. Dow Jones & Co. v. Harrods, Ltd., 237 F. Supp. 2d 394, 404 (S.D.N.Y. 2002). However, this does not reflect an “unyielding judicial hierarchy.” Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 578 (1999). Indeed, where, as here, a court faces a straightforward personal-jurisdiction issue presenting no complex question of state law and where the alleged defect in subject-matter jurisdiction raises a difficult and novel question, the court may turn directly to personal jurisdiction. Id. at 588.

A. Personal Jurisdiction

Where a motion to dismiss for lack of personal jurisdiction is made prior to discovery, a plaintiff need only establish a prima facie case for personal jurisdiction over a defendant to avoid dismissal under Rule 12(b)(2). Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 171 F.3d 779, 784 (2d Cir. 1999); PDK Labs, Inc. v. Friedlander, 103 F.3d 1105, 1108 (2d Cir. 1997). A plaintiff may rely entirely on factual allegations, Jazini v. Nissan Motor Co., 148 F.3d 181, 184 (2d Cir. 1998), and will prevail even if the defendant makes contrary arguments, A.I.

Trade Fin., Inc. v. Petra Bank, 989 F.2d 76, 79 (2d Cir. 1993). In resolving the motion, the Court reads the complaint and affidavits in a light most favorable to the plaintiff. PDK Labs, 103 F.3d at 1108. It will not, however, accept legally conclusory assertions or draw “argumentative inferences.” Mende v. Milestone Tech., Inc., 269 F. Supp. 2d 246, 251 (S.D.N.Y. 2003) (citing Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 507 (2d Cir. 1994)). _____

_____ A federal court sitting in diversity exercises personal jurisdiction over a foreign defendant to the same extent as courts of general jurisdiction of the state in which it sits pursuant to Rule 4(k)(1)(A) of the Federal Rules of Civil Procedure. Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 305 F.3d 120, 124 (2d Cir. 2002). In such cases, courts must determine if New York law would confer jurisdiction and then decide if the exercise of such jurisdiction comports with the requisites of due process under the Fourteenth Amendment. Id. (citing Bank Brussels, 171 F.3d at 784); Bensusan Rest. Corp. v. King, 126 F.3d 25, 27 (2d Cir. 1997). Because the Court finds no basis for jurisdiction under New York’s long-arm provisions,² the Court does not reach the Due Process analysis.

1. Jurisdiction Under N.Y. C.P.L.R. Section 302(a)(1)

Ehrenfeld argues that Bin Mahfouz is subject to jurisdiction under N.Y. C.P.L.R. section 302(a)(1), which confers jurisdiction over a non-domiciliary defendant who “in person or through an agent . . . transacts any business within the state” so long as the cause of action arises

² To the extent Ehrenfeld, in addition to the English Case–related communications, relies on Bin Mahfouz’s indictment in New York and ownership of real property to find general jurisdiction, the Court finds these contacts do not constitute “doing business” under C.P.L.R. section 301. Further, the Court may only consider a defendant’s contacts with the forum state “at the time the lawsuit was filed” when deciding a motion to dismiss for lack of personal jurisdiction. See Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 570 (2d Cir. 1996). This action was filed on December 8, 2004, nearly a decade after the criminal proceedings and four months after Bin Mahfouz sold his last (known) New York real estate.

out of defendant's New York transactions. Ehrenfeld must make a prima facie showing that (1) Bin Mahfouz is "transacting business" in New York and (2) that this declaratory judgment action arises out of those business transactions. PDK Labs, 103 F.3d at 1109. It is settled that "[p]roof of one transaction in New York is sufficient to invoke jurisdiction under 302(a)(1), even though the defendant never entered New York, so long the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." Id. at 1109 (citing Kreutter v. McFadden Oil Corp., 71 N.Y.2d 460, 527 (1988)). Ehrenfeld argues that the cease-and-desist letter, the e-mails and letters regarding the status of the English Case, the communication informing Ehrenfeld of the judgment in the English Case, and the Bin Mahfouz's New York-accessible website announcing the judgment in the English Case all combine to constitute purposeful transactions of business in New York with substantial relationship to the cause of action here such that personal jurisdiction is proper under C.P.L.R. section 302(a)(1). The Court does not agree.

A nondomicilliary transacts business in New York when he purposefully avails himself of the privilege of conducting activities within New York and thus invokes the benefits and protections of its laws. CutCo Indus., Inc. v. Naughton, 806 F.2d 361, 365 (2d Cir. 1986). Courts in New York have consistently refused to sustain personal jurisdiction under C.P.L.R. section 302(a)(1) solely on the basis of a defendant's communication, by telephone or letter, from outside New York into the jurisdiction. See Beacon, 715 F.2d at 766 (citing cases). For instance, in Beacon, a single cease-and-desist letter sent into New York could not sustain personal jurisdiction, id., nor could the multiple cease-and-desist letters support such jurisdiction in Fort Knox Music, Inc. v. Baptiste, 139 F. Supp. 2d 505, 511 (S.D.N.Y. 2001), nor could the

three telephone calls and one mailing sent by defendant in Fiedler v. First City Nat'l Bank of Houston, 807 F.2d 315, 316-18 (2d Cir. 1986). On the other hand, in PDK Labs, a cease-and-desist letter (and subsequent communication) used not only to seek settlement of legal claims, but to secure further New York investments, was sufficient to show that the defendant “transacted business” and to find personal jurisdiction. PDK Labs stands for the proposition that where “persistent, vexing communications” are used towards non-settlement, business or investment objectives, a defendant is transacting business for the purposes of section 302(a)(1). PDK Labs does not help Ehrenfeld here because Bin Mahfouz’s communications (the cease-and-desist letter, other letters and judgment), however persistent, vexing or otherwise meant to coerce, do not appear to support any business objective. Absent such a showing, Ehrenfeld’s claim to jurisdiction under section 302(a)(1) must fail.³

2. Jurisdiction Under N.Y. C.P.L.R. Section 302(a)(3)

Ehrenfeld also claims jurisdiction under N.Y. C.P.L.R. section 302(a)(3) arguing in essence that Bin Mahfouz committed a tortious act in filing and carrying the English case to judgment. The Court does not so find.

Section 302(a)(3) has been interpreted to allow the exercise of personal jurisdiction over a non-domicilliary when (1) a defendant commits a tortious act outside of New York state; (2) the plaintiff’s cause of action arises from that act; (3) the act caused injury to a person or property within New York state; (4) the defendant expected or reasonably could have expected

³ Under the second prong of the 302(a)(1) test, courts require the cause of action to be “sufficiently related” to the defendant’s transactions, Hoffritz Cutlery, Inc. v. Amajac Ltd., 763 F.2d 55, 59 (2d Cir. 1985), or, put differently, that a “substantial nexus,” Agency Rent A Car Sys., Inc. v. Grand Rent A Car Corp., 98 F.3d 25, 31 (2d Cir. 1996), or a “strong nexus,” Beacon Enters., Inc. v. Menzies, 715 F.2d 757, 764 (2d Cir. 1983), exist between the cause of action and defendant’s contacts. The Court need not reach the second prong.

the act to have consequences in New York state; and (5) the defendant derived substantial revenue from interstate or international commerce. This argument fails under the first prong. Ehrenfeld has not pleaded a tort and it is unlikely that she could. Though she contends that the English case is “akin to malicious prosecution or prima facie tort, that is, the intentional infliction of harm by superficially lawful means,” she does not allege the commission of either tort (this suit is exclusively for declaratory judgment) nor does she assert that the elements of either tort have been satisfied, see Kulas v. Adachi, No. 90 Civ. 6674 (MBM), 1997 WL 256957, at *8 (S.D.N.Y. 1997) (finding that section 302(a)(3) requires defendant commit a tort), and Bin Mahfouz makes a strong argument that such tort claims, if asserted, would not succeed (see, e.g., Reply at 8-9 (noting that malicious prosecution requires the action have terminated in favor of the plaintiff)); see also Modern Computer Corp. v. Ma, 862 F. Supp. 938, 944-45 (E.D.N.Y. 1994) (finding that plaintiff established prima facie case for personal jurisdiction over nondomicilliary under C.P.L.R. section 302(a)(3) in an action for declaratory judgment and tortious interference where a cease and desist letter allegedly caused, in part, the claimed tort); PDK Labs, 103 F.3d at 1109-10 (finding certain “vexing” communications employed to garner investments within New York satisfied section 302(a)(1), but declining to decide whether such conduct should be characterized as “tortious” for 302(a)(3) purposes). Ehrenfeld cites no authority that Bin Mahfouz’s conduct constitutes a tort as defined under section 302(a)(3). As such, Ehrenfeld’s claim to jurisdiction over Bin Mahfouz under section 302(a)(3) cannot be sustained.

3. The Ninth Circuit Opinion in Yahoo!

With little New York law on her side, Ehrenfeld points to a recently decided Ninth Circuit case with facts quite similar to those here. In Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006) (en banc), the Ninth Circuit sitting en banc found personal jurisdiction over two defendant French organizations in a California declaratory-judgment action where the defendants' only contacts with California were in connection with their French suit against Yahoo!, the plaintiff in the California case. In Yahoo!, the defendants' contacts included "sending a cease and desist letter to Yahoo! at its headquarters in Santa Clara, California; serving process on Yahoo! in Santa Clara to commence the French suit; obtaining two interim orders from the French court; and serving the two orders on Yahoo! in Santa Clara." Id. at 1205. The French orders required Yahoo! to limit French citizens' access to certain material prohibited in France, and Yahoo! alleged that compliance with the orders would require it to make changes to its servers in France and California. In addition to the cease-and-desist letter and the service of process, the mailing of the French court orders into California was the key to finding jurisdiction for the Yahoo! court; while the effect desired by the French court would be felt only in France, it did not change the fact that, to comply with the order, Yahoo! would have to perform significant acts in California. Id. at 1209. This California impact was sufficient even though the French organizations stated that they had no intention to enforce the judgment in the United States. Id. at 1210. Just as Yahoo! would have to make changes to its servers in California if it wished to comply with the French orders, so too Ehrenfeld claims she would have to take actions in New York to satisfy the English Judgment, which was sent into New York. She would have to make payments to Bin Mahfouz and his sons

from New York, issue a correction and apology from New York, and take actions to prevent Funding Evil from be published or otherwise entering the United Kingdom. In addition, Ehrenfeld claims the English Judgment (and its advertisement on Bin Mahfouz’s website) had a real and continuing impact on Ehrenfeld in New York, even if she chose not to obey the judgment on its terms. Under Yahoo!, Ehrenfeld argues, the Court should assert jurisdiction over Bin Mahfouz.

This argument, however, overlooks the fundamental differences between the New York and the California long-arm statutes. It is generally recognized that, in enacting N.Y. C.P.L.R. section 302, the New York legislature did not seek to exercise all of the jurisdictional power constitutionally available under the Supreme Court’s due process jurisprudence, Mayes v. Leipziger, 674 F.2d 178, 183 (2d Cir. 1982), whereas the Yahoo! court expressly notes that California long-arm jurisdiction is coextensive with Federal Due Process, Yahoo!, 433 F.3d at 1205. Ehrenfeld claims the California test is somewhat similar. It requires (1) the non-resident to have purposefully directed his activities or consummated his transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim to arise out of the defendant’s forum-related activities; and (3) the exercise of jurisdiction to be reasonable. Id. at 1205-06. But in California, the first prong can be satisfied by “purposeful availment of the privilege of doing business in the forum; by purposeful direction of activities at the forum; or by some combination thereof.” Id. at 1206. This language—which tracks the federal Due Process standards—allowed the Ninth Circuit to conclude that in “purposeful direction” cases the court need not only consider “wrongful” or tortious acts, but all

contacts that cause harm within the jurisdiction. Id. at 1207-08. The language and compartmentalization of C.P.L.R. section 302 allows no such conclusion; section 302(a)(1) deals only with purposeful transactions of business that invoke the benefits and protections of New York laws, CutCo, 806 F.2d at 365, whereas section 302(a)(3) deals only with conduct that is actually tortious, Kulas, 1997 WL 256957 at *8. These differences are fatal to Ehrenfeld's claim.

B. Request for Jurisdictional Discovery

Ehrenfeld has given no valid reason to allow for jurisdictional discovery here. The Second Circuit has disallowed jurisdictional discovery where a plaintiff has failed to establish a prima facie case and where there is a foreign defendant because such logic would require all foreign defendants to submit to discovery on this issue. See Jazini, 148 F.3d at 185-86 (denying jurisdictional discovery over Japanese company where plaintiff had not established a prima facie case). Ehrenfeld's request for additional jurisdictional discovery is therefore denied.

C. Subject-Matter Jurisdiction

Having concluded that the Court lacks personal jurisdiction over Bin Mahfouz, it need not reach the close and somewhat novel question of whether subject-matter jurisdiction exists here under the Declaratory Judgment Act.

III. CONCLUSION

Because Ehrenfeld has not established a prima facie case for personal jurisdiction over Bin Mahfouz the motion to dismiss is **GRANTED**. The Clerk of the Court is ordered to close this case and remove it from the Court's active docket.

So Ordered: New York, New York
April 25, 2006



Richard Conway Casey, U.S.D.J.

STATE OF NEW JERSEY)
)

ss.: **AFFIDAVIT OF SERVICE**
By UPS OVERNIGHT
NEXT DAY DELIVERY

COUNTY OF HUDSON)

I, Darwin Bohorquez, being duly sworn, deposes and says that deponent not a party to the action, is over 18 years of age and resides at 6611 Park Avenue, West New York, New Jersey 07093.

On July 5, 2006

deponent served:

one copy of Joint Appendix
two copies of Appellant's Brief with Special Appendix

Upon:

Timothy J. Finn
Jones Day
51 Louisiana Avenue, N.W.
Washington, D.C. 20001

the Attorney(s) in this action at the address designated by said attorney(s) for that purpose by depositing the same enclosed in a properly addressed wrapper in a depository under the exclusive care, custody and control of United Parcel Service within the State of New Jersey for overnight, next day delivery.

Darwin Bohorquez

(*Re: Ehrenfeld v. Mahfouz*)
A.D. Docket No.: 2006-2228-cv

Sworn to before me on
July 5, 2006

YESENIA RIVERA-REVERON
Notary Public, State of New Jersey
No. 2323638
Qualified in Hudson County
Commission Expires January 7, 2010

ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Local Rule 32(a)(1)(E)

CASE NAME: Ehrenfeld v. Mahfouz

DOCKET NUMBER: 06-2228-cv

I, Mikaela A. McDermott, certify that I have scanned for viruses the PDF version of the Appellant's Brief with Special Appendix that was submitted in this case as an email attachment to briefs@ca2.uscourts.gov and that no viruses were detected.

I have used Norton Antivirus 2005.

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