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November 22, 2006

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U.S. COURT OF APPEALS

BY HAND & REGULAR MAIL

Hon. Jose A. Cabranes
Hon. Wilfred Feinberg
Hon. Pierre Leval
U.S. Court of Appeals for the Second Circuit
Daniel P. Moynihan U.S. Courthouse
500 Pearl Street
New York, New York 10007

Re: Ehrenfeld v. Mahfouz, 06-2228-CV

Dear Judges Cabranes, Feinberg and Leval:

Appellee's November 16, 2006 letter-brief only demonstrates further why personal jurisdiction over him is proper in this action.

I. THE SWORD STILL DANGLES

Mahfouz continues to refuse to waive enforcement of the UK judgment in New York. The only way to explain Mahfouz's motivation is "he wants to continue the threat, to maintain the raised sword of Damocles, and thereby further chill Dr. Ehrenfeld's speech -- as well as the speech of others who dare write and publish about his alleged ties to terrorism." Raymond

November 22, 2006

Page 2

W. Beauchamp, "England's Chilling Forecast: The Case for Granting Declaratory Relief to Prevent English Defamation Actions from Chilling American Speech," 74 Fordham L. Rev. 3073, 3135 (2006).

Mahfouz's calculated delay of enforcement intensifies the chilling effect of the UK judgment because Dr. Ehrenfeld's potential liability grows with time. While Mahfouz claims the UK damages award is "fixed," interest (at 8%) and attorneys' fees continue to accrue, subjecting Dr. Ehrenfeld to increasing future liability. And if Dr. Ehrenfeld should violate the UK injunction, she risks punishment for contempt.

Dr. Ehrenfeld's continued distribution of her book in the U.S. does not mean she is not chilled. The pressure on Dr. Ehrenfeld to "tone down her rhetoric" or otherwise "refrain" from writing freely about Mahfouz is precisely the type of impermissible chill that warrants relief -- even if Mahfouz has not totally succeeded, thus far, in blocking all her work. United States v. Vazquez, 145 F.3d 74, 81 (2d Cir. 1998) (defendant's willingness to risk liability by continuing to demonstrate outside clinic despite government's efforts to enjoin her protesting activities "hardly shows that her speech was not 'chilled'").

II. NEW YORK CONDUCT AFFECTED

Mahfouz's ongoing threat of enforcement is especially sharp because of the invasive nature of the injunctive relief Mahfouz

November 22, 2006

Page 3

sought and obtained in the UK action and the affirmative steps he has repeatedly demanded Dr. Ehrenfeld take in New York:

- Withdrawal and Destruction of Books. Mahfouz has demanded that Dr. Ehrenfeld take "immediate action" to withdraw Funding Evil from circulation and either destroy or deliver to him all unsold copies of the book. JA76.
- Preventing Leakage into UK. After the UK court issued an interim order enjoining Dr. Ehrenfeld from "publishing, or causing or authorizing the further publication of" the disputed statements about Mahfouz "within the jurisdiction of this court," JA8, Mahfouz's counsel wrote to Dr. Ehrenfeld in New York to tell her she had a duty to take all necessary steps to prevent copies of Funding Evil from "leak[ing]" into the UK through "US online retail websites." JA72.
- Future Statements. The UK court's injunction, which was continued in the May 3, 2005 final order, also prohibits Dr. Ehrenfeld from publishing or causing the publication of "any similar defamatory words of or concerning" Mahfouz. JA8, 35. Although the injunction is limited to publication within the jurisdiction of the UK court, according to the interpretation advanced by Mahfouz's own counsel, Dr. Ehrenfeld must also take steps in New York to prevent her future work from leaking into the UK.
- Apology and Correction. The UK court also ordered Dr. Ehrenfeld to participate in a complicated procedure leading to publication of a "suitable correction and apology" or summary of judgment. JA34-35. In a letter to Dr. Ehrenfeld in New York, Mahfouz also demanded "a letter of apology." JA70. His November 16, 2006 letter to this Court again seeks a "correction and apology."

It is impossible to understand how Dr. Ehrenfeld could comply with the UK injunction and Mahfouz's demands without

November 22, 2006

Page 4

personally taking affirmative steps and restricting her conduct in New York. Because Dr. Ehrenfeld lives and works solely in New York, any direction that she do something -- be it an apology, instructions to online retailers, or efforts to control the circulation of her book -- necessarily involves action in this forum.

Even if her letter of apology and correction were ultimately only published in the UK, for example, the letter would have to be prepared and issued by the Dr. Ehrenfeld in New York. Similarly, to prevent further publication of her book in the UK, Mahfouz counsel demanded that Dr. Ehrenfeld contact "U.S. online retail sites" to limit the availability of her work. JA72. Mahfouz's attorney also complained to the UK court that Funding Evil "is available for purchase in this jurisdiction and the Claimants' solicitors have purchased and received copies of the Book from Amazon.com and BarnesandNoble.com." JA89. Restricting the availability of Dr. Ehrenfeld's book on U.S. based Internet sites necessarily requires conduct by Dr. Ehrenfeld in New York.

The UK injunction may require Dr. Ehrenfeld to do even more in New York than contact U.S. based on-line retailers. If she must prevent leakage of the book into England, she may -- in New York -- have to contact U.S. book distributors and ensure that they do not sell copies of Funding Evil to English bookshops. She may also -- in New York -- have to contact U.S. bookshops and

November 22, 2006

Page 5

libraries and ask them to tell customers and borrowers not to bring copies of Funding Evil into England. She may also -- in New York -- have to ensure the destruction of the unsold copies of Funding Evil so as to minimize the possibility that any copies "leak" into England. She may -- in New York -- have to contact the U.S. Postal Service and private courier services to prevent leakage.

Mahfouz tries in vain to mitigate the extraterritorial scope of his demands and the UK injunction by belatedly arguing that only the publisher, not Dr. Ehrenfeld, would have to take action in New York. But the UK injunction on its face applies to both Dr. Ehrenfeld and Bonus Books:

IT IS ORDERED THAT . . . an injunction be granted against the Defendants restraining each of them, whether by themselves, their servants or agents or otherwise howsoever from publishing, or causing or authorising the further publication of, within the jurisdiction of the court, the words complained of in this action or any similar defamatory words of or concerning the Claimants.

JA8 (emphasis added). Nothing in the final order, JA35 ¶ 4, continuing the interim injunction, JA8 ¶ 2, limits the injunction in any way to Bonus Books, and no agreement between Dr. Ehrenfeld and Bonus Books would relieve Dr. Ehrenfeld of liability vis-a-vis the UK judgment.

Confirming that both author and publisher are subject to the December 7, 2004 injunction, Mahfouz's UK counsel sent

November 22, 2006

Page 6

separate letters on December 9, 2004 to both Dr. Ehrenfeld and Bonus Books. In their letter to Dr. Ehrenfeld, Mahfouz's lawyers stated, "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." JA72. This plain language in his UK lawyers' letter refutes Mahfouz's American lawyers' new argument that the December 9, 2004 letter to Dr. Ehrenfeld cannot "be construed to impose on Dr. Ehrenfeld a duty, under penalty of contempt, to do what only her publisher can do." Nov. 16, 2006 Ltr. at 8.

Whether or not UK law required Mahfouz to send Dr. Ehrenfeld a demand letter before filing suit or to inform her of the later court orders, as Mahfouz has argued, UK law certainly did not require that he request and receive injunctive relief requiring New York conduct. Mahfouz cannot avoid jurisdiction by blaming the content of his communications on the UK judicial process.

III. MAHFOUZ'S INTENT SUPPORTS PERSONAL JURISDICTION

Mahfouz rests his arguments against personal jurisdiction on the illusion that the UK action was intended only to affect conduct outside New York. The record and, most tellingly, Mahfouz's continuing strategic refusal to give up any enforcement rights, show the opposite. Here, the key facts

November 22, 2006

Page 7

confirm that Mahfouz's goal in pursuing the UK lawsuit was to restrict Dr. Ehrenfeld's conduct in New York:

- New York plays a central role in the subject of the UK libel suit, which targets a book written in New York by a New York author,
- Mahfouz was fully aware of Dr. Ehrenfeld's non-presence in and lack of connection to the UK,
- Mahfouz pursued UK injunctive relief with foreseeable and unavoidable New York consequences, and
- Mahfouz has strategically refrained from enforcing the UK judgment to maximize its chilling effect in New York.

In applying the highly fact-specific test for personal jurisdiction, the Court should not ignore Mahfouz's intent. Rather than the number or nature of Mahfouz's contacts alone, his intent to chill speech in New York provides a basis for personal jurisdiction. The Court should treat each New York contact by Mahfouz in connection with the UK judgment for exactly what it is -- a direct threat aimed at Dr. Ehrenfeld and other New York writers who may dare to follow her example.

IV. A NARROW RULE

Upholding personal jurisdiction over Mahfouz here requires only the following narrow rule of law drawn from existing precedent under CPLR 301 and 302: Where a non-New Yorker obtains a foreign libel judgment based on a publication published primarily in the United States by a New York resident,

November 22, 2006

Page 8

and that judgment awards monetary damages or imposes injunctive relief requiring any actions to be taken in New York, the person obtaining the foreign judgment is subject to personal jurisdiction in New York in a declaratory judgment action challenging the enforceability of that judgment in New York, even if that person has not yet enforced the foreign judgment in New York.

Our proposed rule is not a new jurisdictional test. When the conditions set forth above are met, the defendant's actions in obtaining the foreign judgment and threatening enforcement constitute implied consent to jurisdiction and qualify as transacting business under the New York long-arm statute. This rule does not expand New York's long-arm statute. Rather, it applies the statute flexibly, as the legislature intended, to the new phenomenon of libel tourism, in which the libel plaintiff's conduct is aimed entirely at the New York forum. The precise facts and circumstances may not have been addressed yet by a New York court, but the applicable principles are long established -- old wine in a new bottle.

The proposed narrow rule would not involve dragging foreign libel plaintiffs into New York courts and subjecting them to monetary damages. Nor would it permit New York courts to enjoin ongoing foreign libel litigations. Instead, it would simply permit New York authors and publishers to obtain judicial

November 22, 2006

Page 9

declarations as to whether they could be subject to liability in New York for foreign libel judgments based on legal principles repugnant to the fundamental public policies of New York.

This rule would also not mean that New York courts have jurisdiction over all foreign litigants who obtain foreign judgments against New York residents. The proposed rule applies only to defamation cases and to authors whose work has been published primarily in the U.S. As a consequence, the rule would not benefit the hypothetical U.S. company discussed at oral argument that ships widgets to Taiwan and finds itself on the wrong end of a Taiwanese money judgment. This is so both because that hypothetical dispute was commercial in nature, and because that hypothetical company, unlike Dr. Ehrenfeld, transacted business outside of the United States. In most commercial cases, moreover, the foreign plaintiff will, unlike Mahfouz, have every incentive to enforce the foreign judgment in the U.S. as soon as possible.

CONCLUSION

It is not the vehicle that Mahfouz chose (i.e., the UK libel suit) that confers jurisdiction, but rather his intent to target speech in New York and continued actions to chill Dr. Ehrenfeld in this forum. Mahfouz's many New York contacts in connection with the UK lawsuit are not the incidental and unavoidable results of an international business dispute -- they

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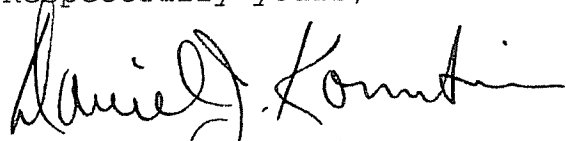
November 22, 2006

Page 10

are the necessary components of his plan to target the in-state expression of a New York author. Given that Mahfouz's entire goal was to affect Dr. Ehrenfeld's conduct in New York, he should at least be subject to an action adjudicating the effect of his UK judgment here. To hold otherwise would signal to libel plaintiffs that they can undermine the First Amendment and successfully chill the speech of New York authors simply by filing suit in foreign jurisdictions.

The decision below should be reversed.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Daniel J. Kornstein". The signature is written in a cursive, flowing style.

Daniel J. Kornstein
Attorney for Appellant

cc: Timothy J. Finn, Esq. (by fax & email)
Jason P. Criss, Esq. (by fax & email)

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

CECELIA CHANG, being duly sworn, deposes and says that I am over 18 years of age; I am not a party to the within action; and I reside in New York County, New York.

On the 22nd day of November, 2006 I served true copies of Plaintiff-Appellant's Supplemental Letter-Brief on:

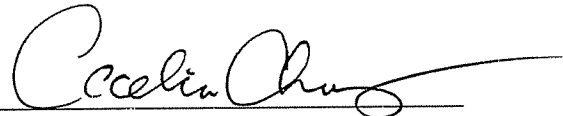
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by faxing copies of the letter-brief and by e-mailing a PDF version of the letter brief to counsel at the e-mail addresses listed above.


CECELIA CHANG

Sworn to before me this
22nd day of November, 2006


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KATHLEEN A. NEWTON
Notary Public, State of New York
No. 01NE6129897
Qualified in Queens County
Commission Expires July 5, 2009