

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

CERTAIN UNDERWRITERS AT  
LLOYDS LONDON, *et al.*,

Plaintiffs,

v.

GREAT SOCIALIST PEOPLE'S  
LIBYAN ARAB JAMAHIRIYA, *et al.*

Defendants.

Civil Action No. 06-731 (GK)

CERTAIN UNDERWRITERS AT  
LLOYDS LONDON, *et al.*

Plaintiffs,

v.

GREAT SOCIALIST PEOPLE'S  
LIBYAN ARAB JAMAHIRIYA, *et al.*

Defendants.

Civil Action No. 08-504 (GK)

**THE LIBYAN DEFENDANTS' SUPPLEMENTAL MOTION TO DISMISS**

The Great Socialist People's Libyan Arab Jamahiriya, Libyan Internal Security, Libyan External Security, Mu'Ammar Al-Qadhafi, Abdallah Al-Sanusi, and Ibrahim Al-Bishari (collectively the "Libyan Defendants") respectfully move this Court for an order dismissing Plaintiffs' Second Amended Complaint in *Lloyds I* (Civil Action No. 06-731) and Complaint in *Lloyds II* (Civil Action No. 08-504) with prejudice in their entirety pursuant to Rules 12(b)(1) and 12(b)(2) of the Federal Rules of Civil Procedure for lack of subject-matter and personal jurisdiction, and Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

In support of its motion, the Libyan Defendants respectfully submit the accompanying memorandum of points and authorities.

Dated: November 20, 2008

Respectfully submitted,

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and Complaint (*Lloyds II*, Civil Action No. 08-504) for lack of subject-matter and personal jurisdiction, and for failure to state a claim upon which relief can be granted. As set forth below, due to the Secretary of State's Certification of the receipt of funds described in the Act, the Act restores the Libyan Defendants' immunity from suit under the FSIA. Act at § 5(a)(1)(A). The Act also specifically precludes the assertion of any private rights of action against the Libyan Defendants under federal, state, or foreign law. Act at § 5(a)(1)(B).

## **BACKGROUND**

### **I. Plaintiffs' Claims Against The Libyan Defendants Are Based On The Terrorism Exceptions To The Foreign Sovereign Immunities Act**

The Foreign Sovereign Immunities Act of 1976 ("FSIA") "provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989). Under the FSIA, a foreign state such as Libya "shall be immune from the jurisdiction of the courts of the United States and of the States except as otherwise provided in [28 U.S.C. §§ 1605-1607]." 28 U.S.C. § 1604.

Plaintiffs' claims in these suits arise from the Egypt Air Flight 648 hijacking in 1985. *Lloyds I* Sec. Am. Compl. at 6 (D.E. 60); *Lloyds II* Compl. at 6 (D.E. 1). In bringing their claims, Plaintiffs relied on the "terrorism" exceptions to immunity in the FSIA. The first exception, 28 U.S.C. § 1605(a)(7), came into effect with the 1996 enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which, among other things, amended the FSIA to permit the assertion of jurisdiction over civil suits against designated state sponsors of terrorism for certain acts affecting U.S. victims. Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241-43 (1996) (codified at 28 U.S.C. § 1605(a)(7)). Alleging that Defendants' actions met the requirements for subject-matter jurisdiction under Section 1605(a)(7), Plaintiffs brought the *Lloyds I* suit on April 21, 2006. *Lloyds I* Compl. at ¶ 3 (D.E. 1).

On March 28, 2008, Plaintiffs amended the *Lloyds I* Complaint to bring it under 28 U.S.C. § 1605A. *Lloyds I* Sec. Am. Compl. at ¶ 1. On March 24, 2008, Plaintiffs filed a new suit (*Lloyds II*), also under 28 U.S.C. § 1605A. *Lloyds II* Compl. at ¶ 1. Section 1605A became effective on January 28, 2008, when the President signed into law the National Defense Authorization Act for 2008, which created a new federal cause of action against states designated as sponsors of terrorism (including states formerly designated as sponsors of terrorism) as well as a new jurisdictional basis under the FSIA for such causes of action. Pub. L. No. 110-181, § 1083 (2008). The new federal cause of action and jurisdictional provision under 28 U.S.C. § 1605A replaced 28 U.S.C. § 1605(a)(7), the “terrorism” exception that Plaintiffs originally relied on in the *Lloyds I* suit. The D.C. Circuit recently issued a comprehensive opinion addressing the operation of Section 1605A. *See Simon v. Republic of Iraq*, 529 F.3d 1187, 1192 (D.C. Cir. 2008) (discussing the operation of new Section 1605A versus old Section 1605(a)(7)).

## **II. Recent Legislative And Diplomatic Developments Restore The Libyan Defendants’ Immunity And Preclude The Instant Suits**

On July 31, 2008 Congress passed, and on August 4, 2008 the President signed into law, the Libyan Claims Resolution Act (“the Act”), Pub. L. No. 110-301 (2008) (Exhibit A). The Act sets forth the following “Sense of Congress”:

Congress supports the President in his efforts to provide fair compensation to all nationals of the United States who have terrorism-related claims against Libya through a comprehensive settlement of claims by such nationals against Libya pursuant to an international agreement between the United States and Libya as part of the process of restoring normal relations between Libya and the United States.

Act at § 3.

Under the Act, once the United States and Libya have entered into a “claims agreement” and the United States has received payment of certain agreed-upon funds, the Secretary of State would submit a “certification” to appropriate congressional committees

stating that the United States Government has received funds pursuant to the claims agreement that are sufficient to ensure . . . fair compensation of claims of nationals of the United States for wrongful death or physical injury in cases pending on the date of enactment of this Act against Libya . . . .

Act at § 5(a)(2). The Act provides that the Secretary of State’s certification “shall not be subject to judicial review.” Act at § 5(c).

Once the Secretary of State submits her certification to the appropriate congressional committees, the Act expressly restores Libya’s sovereign immunity with respect to suits (1) arising on or before June 30, 2006 and (2) brought under the “terrorism” exceptions set forth in Section 1605(a)(7) and Section 1605A:

(a) IMMUNITY.—

(1) IN GENERAL.—Notwithstanding any other provision of law, upon a submission of a certification described in paragraph (2)—

(A) Libya, an agency or instrumentality of Libya, and the property of Libya or an agency or instrumentality of Libya, ***shall not be subject to the exceptions to immunity from jurisdiction***, liens, attachment, and execution contained in section 1605A, 1605(a)(7) or 1610 (insofar as section 1610 relates to a judgment under such section 1605A or 1605(a)(7)) of title 28, United States Code;

(B) section 1605A(c) of title 28, United States Code, section 1083(c) of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181; 122 Stat. 342; 28 U.S.C. 1605A note), section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (28 U.S.C. 1605 note), and any other private right of action relating to acts by a state sponsor of terrorism arising under Federal, State, or foreign law shall not apply with respect to claims against Libya, or any of its agencies, instrumentalities, officials, employees, or agents in any action in a Federal or State court . . . .

....

(b) TEMPORAL SCOPE.—Subsection (a) shall apply only with respect to any conduct or event occurring before June 30, 2006, regardless of whether, or the extent to which, application of that subsection affects any action filed before, on, or after that date.

Act at §§ 5(a)(1)(A)-(B) and 5(b) (emphasis added).

On August 14, 2008, the United States and Libya executed a “claims agreement,” the Claims Settlement Agreement. *See* Claims Settlement Agreement Between the United States of America and the Great Socialist People’s Libyan Arab Jamahiriya (Aug. 14, 2008) (Exhibit B) (the “Claims Settlement Agreement”). The settlement between the United States and Libya encompasses

all pending suits . . . if such claim or suit is against [Libya] or its agencies or instrumentalities, or against officials, employees, or agents thereof (whether such officials, employees, or agents are sued in an official and/or personal capacity), or (where the claim or suit implicates in any way the responsibility of any of the foregoing) against [Libya’s] nationals; and such claim or suit is brought by or on behalf of [the United States’] nationals (including natural and juridical persons) or such suit is brought on or behalf of others (including natural and juridical persons); and such claim or suit arises from personal injury (whether physical or non-physical, including emotional distress), death, or property loss caused by . . . an act of torture, extrajudicial killing, aircraft sabotage, hostage taking or detention or other terrorist act, or the provision of material support or resources for such an act . . . .

Claims Settlement Agreement at Art. I.

On October 31, 2008, Secretary of State Condoleezza Rice submitted her Certification under Section 5(a)(2) of the Act that the United States Government had received the funds described in the Act. *See* Certification Under Section 5(a)(2) of the Libyan Claims Resolution Act Relating to the Receipt of Funds for Settlement of Claims Against Libya and Press Release, U.S. Department of State, Implementation of the Libyan Claims Settlement Agreement (October 31, 2008) (Exhibit C).

Also on October 31, 2008, President Bush issued an Executive Order regarding settlement of claims against Libya. Exec. Order No. 13,477, 73 Fed. Reg. 65,965 (Oct. 31, 2008) (Exhibit D). Section 1(a) of the Executive Order provides:

- (i) No United States national may assert or maintain any claim within the terms of Article I [of the Claims Settlement Agreement] in any forum, domestic or foreign, except under the procedures provided for by the Secretary of State.

(ii) Any pending suit in any court, domestic or foreign, by United States nationals . . . coming within the terms of Article I shall be terminated.

Exec. Order No. 13,477 at § 1(a).

The Libyan Defendants have requested Plaintiffs to stipulate to dismissal under Rule 41(a) of the Federal Rules of Civil Procedure, but Plaintiffs have declined to do so.

### ARGUMENT

Given Secretary Rice's Certification under Section 5(a)(2) of the Act, the Libyan Defendants are immune from suits asserting any claims under 28 U.S.C. § 1605(a)(7) and 28 U.S.C. § 1605A based on conduct occurring before June 30, 2006. Act at § 5(a)(1)(A) ("Libya, an agency or instrumentality of Libya, and the property of Libya or an agency or instrumentality of Libya, shall not be subject to the exceptions to immunity from jurisdiction . . ."); *see also* Exec. Order No. 13,477 at § 1(a)(ii) ("Any pending suit in any court, domestic or foreign, by United States nationals (including any suit with a judgment that is still subject to appeal or other forms of direct judicial review) coming within the terms of Article I shall be terminated.").

As Plaintiffs asserted Section 1605A as the jurisdictional basis for these suits, and their claims relate to events that occurred in 1985, Section 5 of the Act restores the Libyan Defendants' immunity from these suits. Under the FSIA, a lack of subject-matter jurisdiction also deprives a court of personal jurisdiction over the foreign state. 28 U.S.C. § 1330(b); *see also Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 485 n.5 (1983) ("Thus, if none of the exceptions to sovereign immunity set forth in the [FSIA] applies, the District Court lacks both statutory subject matter jurisdiction and personal jurisdiction.").

Additionally, Section 5(a)(1)(B) of the Act explicitly precludes all claims brought against the Libyan Defendants in this action. *See* Act at § 5(a)(1)(B) ("[P]rivate right[s] of action relating to acts by a state sponsor of terrorism arising under Federal, State, or foreign law shall



not apply with respect to claims against Libya, or any of its agencies, instrumentalities, officials, employees, or agents . . . .”). Under the Act, Plaintiffs can no longer state any claims against the Libyan Defendants upon which relief can be granted arising from the facts alleged in these suits.

Accordingly, this Court must dismiss these actions with prejudice. *See Sinochem Int’l Co. v. Malay. Int’l Shipping Co.*, 549 U.S. 422, 127 S. Ct. 1184, 1193 (2007) (“[O]nce a court determines that jurisdiction is lacking, it can proceed no further and must dismiss the case on that account.”); *see also Antolok v. United States*, 873 F.2d 369, 375 (D.C. Cir. 1989) (affirming dismissal for lack of jurisdiction, based on a congressional act implementing bilateral settlement agreement between the United States and the Marshall Islands: “Congress has deprived the courts of the United States of jurisdiction over these claims. . . . That is the end of the matter.”).

**CONCLUSION**

For the foregoing reasons, the Court should grant the Libyan Defendants' motion to dismiss for lack of subject-matter and personal jurisdiction, and for failure to state a claim upon which relief can be granted, pursuant to the Act and Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the Federal Rules of Civil Procedure.

Dated: November 20, 2008

Respectfully submitted,

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