

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EL-SHIFA PHARMACEUTICAL)	
INDUSTRIES COMPANY, and)	
SALAH EL DIN AHMED MOHAMMED IDRIS,)	
77 Raynham, Norfolk Crescent, London, England,)	Civil Action No. 1:01CV00731 (RWR)
)	
Plaintiffs,)	
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)	
UNITED STATES OF AMERICA,)	
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Defendants.)	
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MEMORANDUM IN SUPPORT OF MOTION TO ALTER JUDGMENT

On November 29, 2005, this Court entered an order granting the Government’s motion to dismiss the complaint in this action. The Court held that the absence of an applicable waiver of sovereign immunity required dismissal of Count Three, seeking declaratory and injunctive relief to remedy defamatory statements made by the United States, and of Count Four, seeking a declaration that the failure to compensate Plaintiffs violates the law of nations. For the reasons set forth below, Plaintiffs submit that the Court’s opinion and order dismissing these Counts should be reconsidered and altered to correct clear error and prevent injustice.¹

¹This Court has discretion to reinstate Plaintiffs’ claims in order to correct clear error and prevent manifest injustice. *Piper v. United States DOJ*, 312 F. Supp. 2d 17, 20-21 (D.D.C. 2004) (citing *Anyanwutaku v. Moore*, 151 F.3d 1053, 1057-58 (D.C. Cir. 1998); *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir.1996).

1. The Dismissal of the Defamation Claim

The Court dismissed Plaintiffs' defamation claim in a single paragraph, on the grounds that Plaintiffs "cite to no explicit waiver of sovereign immunity for defamation claims" and that "the FTCA specifically exempts defamation actions from its waiver of sovereign immunity," Memorandum Opinion at 9, No. 01-731 (Nov. 29, 2005) ("Mem. Op.") (citing 28 U.S.C. §2680(h)). In their opposition brief, Plaintiffs acknowledged, however, that their defamation claim was "not covered by the waiver of sovereign immunity in the FTCA," and relied instead on the waiver of sovereign immunity provided by § 702 of the Administrative Procedure Act ("APA") for actions "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." (Pl. Opp. Mem. 24, citing 5 U.S.C. § 702). Both parties briefed the scope and availability of the § 702 waiver, and the Government never argued that the absence of an FTCA waiver was relevant to this analysis.²

The Court's ruling appears to be based on the assumption that the FTCA is the exclusive remedy for all actions against the government for defamatory statements, whether for damages or for equitable relief. The scope of FTCA exclusivity has not, however, been argued or briefed by the parties. The FTCA provides a remedy and a waiver of sovereign immunity only for certain

² The Government argued, first, that § 702 requires a "relevant statute" for the underlying claim and cannot waive immunity for common law violations (Gov. Mem. 20-21). Second, the Government argued that Plaintiffs' claims are not subject to § 702 because they are not reviewable under the APA, since the conduct alleged by Plaintiffs was either a) committed to agency discretion, b) action taken by the President, c) action related to foreign affairs and defense, or d) action that is not "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." (Gov. Mem. 21-28). Plaintiffs responded that, whether or not their claims are reviewable under the APA, they are within the sovereign immunity waiver in § 702 because that provision applies to all claims against the United States "seeking relief other than money damages," including non-APA, common law tort claims (citing Supreme Court authority as well as case law in six circuits, including D.C.) (Pl. Opp. Mem. at 24-25).

damages claims -- it does not permit equitable relief. *Westbay Steel v. United States*, 970 F.2d 648, 650 (9th Cir. 1992) (“the Act does not submit the United States to injunctive relief”); *Talbert v. United States*, 932 F.2d 1064, 1065-66 (4th Cir. 1991) (“the only relief provided in the Act is ‘money damages’”); *Birnbaum v. United States*, 588 F.2d 319, 335 (2nd Cir. 1978) (FTCA permits damages but not equitable remedy against CIA). The preclusive effect of the FTCA is likewise limited to actions for money damages: 28 U.S.C. § 2679(a), (b)(1) states that the FTCA provides the exclusive remedy for claims “which are cognizable under §1346(b) of this title”-- a provision which creates exclusive federal jurisdiction over claims “for money damages” against the United States -- and that the FTCA precludes “proceedings[s] for money damages” against the employee whose act or omission gave rise to the cognizable FTCA claim. The FTCA does not, however, bar a defamation suit against a government agency for declaratory and injunctive relief because that is “not an action for money damages cognizable under 28 U.S.C. §1346(b).” *B.C. Morton International Corp. v. F.D.I.C.*, 305 F.2d 692, 695, n. 2 (1st Cir. 1962).

Section 702 of the APA provides an unqualified waiver of immunity for claims that seek only “specific relief” rather than “money damages” (*Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261-62 (1999)), whether they are brought under the APA or any other law.³ Moreover, courts in this circuit have indicated a willingness to consider claims against the government for specific relief against defamatory statements by government agencies or employees under either common law principles of libel and slander (*Community for Creative*

³ The APA provides a “general waiver of the government’s sovereign immunity from injunctive relief” that “applies to any suit whether under the APA or not.” *Simmat v. United States Bureau of Prisons*, 413 F.3d 1225, 1233 (10th Cir. 2005) (citing *United States v. Murdock Mach. & Engr. Co.*, 81 F.3d 922, 930, n. 8 (10th Cir. 1996) and *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1329 (D.C. Cir. 1996)). See also *The Presbyterian Church v. United States*, 870 F.2d 518, 525 (9th Cir. 1989) (waiver not limited to claims challenging “agency action” in its “narrow definition”) and cases cited in Pl. Opp. Mem. at 25.

Non-Violence v. Pierce, 814 F.2d 663, 670-73 (D.C. Cir 1987) (reversing dismissal because slander by HUD officials if proven might merit court ordered retraction) or the review provisions of the APA (*Impro Products, Inc. v. Block*, 722 F.2d 845, 849 (1986) (criticizing rule that agency's defamatory misrepresentations are not "agency action" subject to court injunction stated in *Hearst Radio, Inc. v. FCC*, 167 F.2d 225 (D.C. Cir. 1948)); *Industrial Safety Equipment Association, Inc. v. Environmental Protection Agency*, 837 F.2d 1115, 1118-19 (1988) (courts have a duty to decide whether there is a remedy for stigmatizing and demonstrably false publicity that qualifies as agency "sanction" if not agency "rule"); *Kevin Trudeau v. FTC*, 384 F. Supp. 2d 281, 289-90 (D.D.C. 2005)). The facts pled here would permit the specific relief requested under the substantive standards of either legal theory.⁴

Finally, the rationales advanced by the Court for dismissal of other parts of the complaint would not apply to this defamation claim. The complaint states that the Government did not know that Mr. Idris owned the plant when it was attacked. (Compl. ¶ 64). The defamation claim concerns statements attempting to tie Mr. Idris to terrorism made by government officials several days after the attack that had nothing to do with the decision to attack the pharmaceutical plant. (Compl. ¶¶ 63-73). The complaint recites that the President's principal counter-terrorism advisor, Mr. Richard Clarke, has acknowledged that he has never seen any intelligence that would support these statements. (Supp. Compl. ¶¶ 3-5). The complaint also states that the Central Intelligence Agency denied Plaintiffs' request to retract the defamatory statements in a letter dated March 14, 2001, which is after President Clinton left office. (Compl. ¶¶ 85, 87).

⁴ The false and defamatory statements detailed in the complaint, together with the CIA's refusal to retract the statements, constitute both common-law defamation and "final agency action for which there is no other adequate remedy" (5 U.S.C. § 704), that is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" (5 U.S.C. (§ 706(2)(A))).

The complaint does not suggest that the statements or the decision not to retract them are attributable in any way to the President. Though the Government stated in its brief that “[t]hose who made alleged statements about plaintiffs did so at [the President’s] direction and consistent with his position” (Govt. Mem. 24), this assertion is not supported by the complaint or any other evidence. Accordingly, the Court must view this as a claim that concerns only agency rather than presidential action, which occurred well after the attack and addressed issues that were no part of the decision to destroy the plant.

The Court has also suggested that “plaintiffs’ claims likely present a nonjusticiable political question over which the court would lack jurisdiction” (Mem. Op. 18). The political question doctrine should not, however, be construed to prevent the Court from providing an appropriate remedy for damage caused to a private party by extremely defamatory statements that were not required by the President or essential to the conduct of Executive Branch functions, simply because they are related to a foreign policy issue. It is “error to suppose that every case which touches foreign relations lies beyond judicial cognizance.” *Japan Whaling Ass’n v. American Cetacean Soc’y*, 478 U.S. 221, 229-30 (1986). But even if the political question doctrine could be applied to limit review of judgments made by the Executive Branch concerning the veracity of these statements, it would be premature to dismiss the claim on that ground at this time. Until the Government answers the complaint, the Court does not know whether the Executive Branch disputes Plaintiffs’ claims that these statements are false and, as Mr. Clarke indicated, unsupported by any government intelligence. If the Government does not dispute Plaintiffs’ factual claims, there would be no risk that the Court would be required to review the judgments of the Executive Branch in assessing its intelligence.

2. The Dismissal of the Law of Nations Claim

The Court likewise dismissed Plaintiffs' law of nations claim for declaratory relief on grounds of sovereign immunity, reasoning that the APA's waiver of sovereign immunity for judicial review of federal administrative agency action cannot apply to "presidential actions" as "the President is not an agency." (Pl. Opp. Mem. 10). The Court concluded that immunity is not waived for this claim by § 702 because "the action in question is the President's decision to target and strike El-Shifa." *Id.*

The Court's analysis is, however, clearly erroneous because the action placed at issue by this claim is not the President's decision to target El-Shifa but the subsequent failure to compensate Plaintiffs for their property, as required by international law, after it became apparent that it was not a terror-related chemical weapons facility. The complaint makes clear that this was an action taken, not by the President, but by a U.S. agency long after the President's decision to destroy the plant. A request for compensation under the law of nations was submitted to the Central Intelligence Agency on August 17, 2000, and was denied by that agency on March 14, 2001. (Compl. ¶¶ 85-87). The complaint also relates that government officials other than the President continued long after the attack to make factual misrepresentations concerning Mr. Idris and the threat posed by the plant that would, if true, tend to refute the existence of any obligation to provide compensation under international law. (Compl. ¶¶ 55-73). Plaintiffs have not alleged (and the Government has not claimed) that either President Clinton or President Bush was involved in the decision to deny compensation.

As noted, the Court has also suggested that "plaintiffs' claims likely present a nonjusticiable political question" (Mem. Op. 1, 18). The Court could not grant the declaratory relief requested by the law of nations claim if the claims tying the plant to terrorism and chemical weapons made by the Executive Branch at the time of the attack were true. The Court

doubted, however, that it had authority to second-guess the judgments reached by the Executive Branch concerning the threat presented by the plant.

Plaintiffs have previously asserted that questions regarding the nature of the destroyed facility present straightforward issues of fact that can be proven and decided without consideration of Executive Branch conduct or intelligence. Though cases from this jurisdiction have found that the courts have a constitutional role to play in reviewing factual support for Executive Branch designations of terrorist organizations,⁵ this claim would not require the Court to review whether the President's determination to attack the plant was adequately supported by evidence. Regardless of the information or policies that motivated the decision to attack, the failure to provide compensation violates norms of the law of nations if the plant in fact was private property that did not present a threat to the United States. While such a conclusion could prove embarrassing for a least some former members of the Executive Branch, that risk is not sufficient to bar this claim under the political question doctrine.⁶

But even if the Court is correct in its surmise that it cannot second-guess the judgments once made by the Executive Branch concerning the threat posed by the destroyed plant, application of the political question doctrine to dismiss this claim would, again, be premature. At this time, it is not clear whether the Executive Branch disputes or agrees with Plaintiffs' claim that the plant was innocent private property. The Government has not yet answered the factual

⁵ *E.g., People's Mojahedin Org. of Iran v. United States Dep't of State*, 182 F.3d 17, 24 (D.C. Cir. 1999) (the court may constitutionally determine whether the designation has "substantial support" in the record and "set aside [] the Secretary's determination on that ground...without thrusting the judiciary into the political realm"); *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 197 (D.C. Cir. 2001).

⁶ Though "potentiality for embarrassment from multifarious pronouncements" is one of the prudential factors listed by *Baker v. Carr*, 369 U.S. 186, 217 (1962) favoring application of the political question doctrine, the Supreme Court has recently noted the lesser importance of these factors in political question analysis. *Vieth v. Jubiler*, 511 U.S. 267, 278 (2004).

allegations made in the complaint or stated its defenses. Until the Government answers the complaint, the Court cannot determine whether this case will present any issues that it cannot properly consider. The Court should not “anticipate a question of constitutional law in advance of the necessity of deciding it.” *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

CONCLUSION

For the foregoing reasons, the Court should amend its Order of November 29, 2005 to reinstate Count Three and Count Four of Plaintiffs’ complaint and require the United States to submit its answer to the allegations of fact contained in those claims.

Respectfully Submitted,

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