

**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,)
v.)
UNITED STATES OF AMERICA,)
Defendant.)

REPLY MEMORANDUM IN SUPPORT OF MOTION TO ALTER JUDGMENT

Stephen J. Brogan (No. 939082)
Timothy J. Finn (No. 963751)
Jonathan C. Rose (No. 117740)
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
Telephone: (202) 879-3939
*Attorneys for Plaintiffs El-Shifa
Pharmaceutical Industries Company and
Salah El Din Ahmed Mohammed Idris*

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REPLY MEMORANDUM IN SUPPORT OF MOTION TO ALTER JUDGMENT

In its Memorandum in Opposition to Plaintiffs’ Motion to Alter Judgment (“Gov. Opp.”), the Government implicitly concedes that the rationale offered by the Court for dismissing the defamation claim in Count Three was erroneous and offers new justifications to support the Court’s conclusion. To support dismissal of both Count Three and of the law of nations claim stated in Count Four, the Government relies primarily on the Court’s conclusion that the Administrative Procedure Act (“APA”) waiver of sovereign immunity at 5 U.S.C. § 702 does not apply to presidential conduct and attempts to construe both counts as simply attacks on action taken by President Clinton. As explained below and in Plaintiffs’ Memorandum in Support of Motion to Alter Judgment (“Pl. Mem.”), both Counts are, however, primarily focused on non-presidential, agency action within the waiver of sovereign immunity provided by § 702. Since “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him

to relief,” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), the Court should reconsider its Opinion and Order dismissing these claims.

A. Local Rule 7(m) Should Not Be Applied To Bar Consideration Of This Matter

As a threshold matter, the United States attempts to avoid the substantive issues presented by this Motion by arguing that it should be denied because of a violation of the “meet and confer” requirement of Local Rule 7(m). Though Plaintiffs submit that this Rule should not be applicable to this Motion, a breach would not, in any event, warrant denial of the Motion.

Local Rule 7(m) requires a “meet and confer” prior to filing a “nondispositive motion” for the purpose of limiting issues in dispute. In a different context, the D.C. Court of Appeals has stated that “[t]he term ‘dispositive motion’ includes a motion that, if granted, would result either in the determination of a particular claim on the merits or elimination of such a claim from the case.” *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1215 (D.C. Cir. 1997). Plaintiffs submit that, for purposes of Rule 7(m), motions that would, if denied, result in the determination of an action and motions for reconsideration of a ruling disposing of an action should also be considered “dispositive” rather than “nondispositive” motions. Since Rule 7(m) was written to exclude the “meet and confer” requirement for motions to dismiss, presumably because there is little possibility that a meeting would result in a resolution or narrowing of issues, there does not appear to be any reason why it should be read to require such a meeting prior to filing what is, in effect, a motion to reconsider such a dispositive motion under Fed. R. Civ. P. 59(e), where there is even less chance that a meeting would result in useful agreement.

However, as the Government correctly states, the court in *Niedermeier v. Office of Baucus*, 153 F. Supp. 2d 23, 26-27 (D.D.C. 2001), found that the “meet and confer” requirement does apply to a motion for reconsideration of a dismissal of an action under Fed. R. Civ. P. 59(e).

(Gov. Opp. at 4). Plaintiffs submit that the *Neidermeier* court relied on an unnecessarily restrictive reading of the definition of “dispositive motion” provided in *Burkhart* (which does not purport to be a comprehensive definition that would control Local Rule 7(m)) and failed to give weight to the rationale for limiting the “meet and confer” requirement to nondispositive motions. Nevertheless, had Plaintiffs’ counsel been aware of this precedent, they would certainly have notified the Government of this Motion pursuant to Local Rule 7(m) to avoid any possible issue.

It is not, however, necessary for this Court to determine whether the construction of Local Rule 7(m) adopted by *Niedermeier* is correct, because a failure to comply with the “meet and confer” requirement would not, in these circumstances, justify denial of this Motion. In *Niedermeier*, the court declined to strike the motion, notwithstanding the failure to “meet and confer,” in light of the “general judicial preference for resolving motions on their merits rather than dismissing them on technicalities.” *Id.* at 27; *see also Gray v. Poole*, No. Civ.A. 99-2233, 2000 WL 33301796, at *2 (D.D.C. Apr. 27, 2000), *rev’d in part on other grounds*, 275 F.3d 1113 (D.C. Cir. 2002). In *Alexander v. FBI*, 186 F.R.D. 197 (D.D.C. 1999), also cited by the Government (Gov. Opp. at 4), the court threatened (but did not impose after the motion was withdrawn) “appropriate consequences” for failure to meet and confer on a discovery motion, because the “court has been forced to remind plaintiffs [sic] counsel about Local Rule 108(m) [predecessor to Local Rule 7(m)] compliance at least three times before in this lawsuit.” 186 F.R.D. at 199. The Government here alleges only a single, technical violation of Local Rule 7(m) and does not contend that a meeting could have resulted in any narrowing of the issues before the Court. Even if the Government is correct in asserting that the procedures of Local Rule 7(m) should have been followed, it has offered no precedent that would support a

denial of the Motion with prejudice for such an isolated violation of the Rule with no substantive effect.¹

B. Plaintiffs Should Be Permitted To Pursue Their Defamation Claim

The Government does not dispute that the Court's reliance on the preclusive effect of the Federal Tort Claims Act to dismiss a defamation claim that does not seek monetary damages was erroneous. The Government thus implicitly concedes that the Court needs to find a new rationale to support dismissal. The Government offers two additional grounds for affirming the Court's dismissal of this claim, contending (1) that the defamation claim should be dismissed because it challenges presidential rather than agency action, and (2) that the defamation claim cannot be reviewed under the APA because it is not based on final agency action.

The Government argues, first, that the defamation claim should be construed as a challenge to presidential conduct that is unreviewable under the APA. The Government claims that Plaintiffs "blatantly misstate the record" by "falsely" claiming that "[t]he complaint does not suggest that the statements or the decision not to retract them are attributable in any way to the President." (Gov. Opp. at 5, citing Pl. Mem. at 5). The "statements" to which Plaintiffs refer in that sentence of their Memorandum, however, are only those "statements" identified earlier in the paragraph "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)." (Pl. Mem. at 4). None of these statements, which are gathered in the Complaint under the caption "The Defamation of Mr. Idris," are in any way attributable to the President, nor did they form part of the rationale for the President's decision.

¹ Where this Rule has been violated (in the context of discovery motions), courts have given the moving party the opportunity to re-file its motion after complying with the Rule's "meet and confer" requirements. *See Alexander v. FBI*, 186 F.R.D. 185, 186-87 (D.D.C. 1999).

Though the President did not make any statements about Mr. Idris, he did make statements about El-Shifa's activities. Count Three states claims for defamation on behalf of both Plaintiffs, Mr. Idris and the El-Shifa Pharmaceutical Industries Company, and references the President's statement relating to El-Shifa. Plaintiffs' Memorandum in support of this Motion refers only to the defamatory statement concerning Mr. Idris and does not address the defamation claim stated on behalf of El-Shifa. Plaintiffs do not ask for reconsideration of the dismissal of El-Shifa's defamation claim.

The defamation claim brought by Mr. Idris does not require consideration of any of the President's statements or a remedy that would conflict with any of his statements. Mr. Idris was seriously damaged by unidentified government officials who made statements after the attack asserting that, apart from his ownership of the destroyed facility, Mr. Idris was a personal associate and supporter of Osama bin Laden, the world's most infamous criminal, and of the Islamic Jihad terror organization. (Compl. ¶¶ 66, 102-106). The Central Intelligence Agency ("CIA") refused to issue a statement retracting these damaging and widely-publicized claims. (Compl. ¶¶ 85, 87). Mr. Idris seeks only a statement from the United States that retracts the claims that he was an associate or supporter of Osama bin Laden or international terrorism or a declaration from the Court that the claims were not true. (Compl. ¶ 107, Prayer for Relief ¶ 3).

This remedy does not require that the Court consider or dispute President Clinton's claim that the plant was involved with chemical weapons. Though this false information about Mr. Idris was offered to journalists to further support the conclusion that the plant was an appropriate target, the personal defamation of Mr. Idris can be corrected without disputing the justifications offered by the President for destroying the facility, which did not include any allegations against Mr. Idris. The United States has acknowledged that it was unaware of Mr.

Idris' ownership at the time of the attack and that initial claims that Osama bin Laden was an owner or financier of the plant were inaccurate. (Compl. ¶¶ 59-62). Furthermore, Mr. Richard Clarke has acknowledged the absence of intelligence implicating Mr. Idris.² Even President Clinton has acknowledged in his recent publication the absence of evidence implicating Mr. Idris in terrorist involvement while confirming that the soil sample on which the Government relied was taken well before Mr. Idris purchased the plant (in March 1998).³ Because the soil sample on which the Government relied was in fact taken in 1997, the United States has never claimed that it had evidence of chemical weapons activity at the plant during the time it was owned by Mr. Idris. Thus, declarative or injunctive remedy that finally clears Mr. Idris of the charges publicly made by United States officials cannot be viewed as in any way interfering with presidential management of foreign affairs.

The Government also advances a new argument that, even if this is agency action, the defamation and refusal to retract do not constitute "final agency action" reviewable under the APA. As Plaintiffs stated in response to other Government arguments that Plaintiffs have not stated a claim for relief under the APA, "[w]hether or not that is true, plaintiffs' 'non-statutory' claims for declarative relief still fall within the scope of section 702's waiver." (Plaintiffs' Memorandum in Opposition to Motion to Dismiss at 24.) Thus, the Government's new argument against APA review does not compel dismissal on grounds of sovereign immunity of a

² "[I]t was reported that the plant had been acquired in March 1998 by Salah Idris, a Saudi businessman. The intelligence I had seen never implicated Mr. Idris in any investment by the Sudan Military Industry Commission nor in any involvement with Osama bin Laden nor any terrorist activities." RICHARD A. CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA'S WAR ON TERROR* 189 (Free Press 2004). See Supplemental Complaint, ¶ 4, *citing* CLARKE 189.

³ "The owner of the chemical plant at the time of the Cruise missile strike, Mr. Salah Idris, had reportedly purchased the factory just a few months earlier and some time after the soil sample tests were done. After the strike he strongly denied that he himself had any connection to

defamation claim for non-monetary relief based on common law. *See Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951) (reversing dismissal of common-law defamation action for injunctive and declaratory relief against U.S. Attorney General and federal agency).

Even if the Government were correct in insisting that a claim that relies for its waiver on 5 U.S.C. § 702 must also be reviewable under 5 U.S.C. § 704 as “final agency action,” Mr. Idris’ defamation claim would still not merit dismissal because, as Plaintiffs previously noted, the D.C. Circuit has made clear -- albeit *in dicta* -- that, at least in limited circumstances involving false claims targeting a private individual, agency defamation should be reviewable under the APA. *See Impro Products Inc. v. Block*, 722 F.2d 845, 849 (D.C. Cir. 1983) (recommending review of “concededly false” agency publicity and noting that “*Hearst Radio* may no longer be a viable precedent”); *Indus. Safety Equip. Ass’n, Inc. v. EPA*, 837 F.2d 1115, 1118-19 (D.C. Cir. 1988) (recommending review of “false or unauthorized” agency publicity “intent on penalizing a party” and noting a “problem with *Hearst Radio*’s absolute immunity rule”). *Hearst Radio, Inc. v. FCC*, 167 F.2d 225 (1948), on which the Government relies (Gov. Opp. at 7, n.4), is not only discredited by these cases but is readily distinguishable because it considered only publication of a routine, industry-wide report, not a deliberate attempt to stigmatize a targeted individual. *Cf. Trudeau v. FTC*, 384 F. Supp. 2d 281, 290 n.8 (D.D.C. 2005) (noting that “[t]he D.C. Circuit has since expressly shied away from a reading of *Hearst Radio* that would preclude a cause of action for *all* agency publicity”) (emphasis added).

The Government also argues that agency defamation does not constitute “final agency action” under *Bennett v. Spear*, 520 U.S. 154 (1997) (Gov. Opp. 8). The Supreme Court in

(continued...)

Al Queda and this contention has recently been supported by Dick Clarke.” BILL CLINTON, MY LIFE, 805 note (London: Arrow Books 2005) (2004) (attached as Exhibit 1).

Bennett holds that, “[a]s a general matter,” agency action is final if it “mark[s] the consummation of the agency’s decisionmaking process” and is “one by which rights or obligations have been determined, or from which legal consequences will flow.” 520 U.S. at 177-78 (citations and internal quotations omitted). The Government does not dispute that the first prong of the *Bennett* test is satisfied. The second prong has been broadly construed by the courts. The *Bennett* court indicates that the second prong would be met by agency action that carries “direct consequences” for the parties. *Id.* (distinguishing *Franklin v. Mass.*, 505 U.S. 788 (1992)). The D.C. Circuit construes the *Bennett* test to determine whether the agency action “is ‘definitive’ and whether it has a ‘direct and immediate . . . effect on the day-to-day business’ of the parties.” *Indep. Petroleum Ass’n of Am. v. Babbitt*, 235 F.3d 588, 595 (D.C. Cir. 2001) (citing *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 436 (D.C. Cir. 1986), quoting *FTC v. Standard Oil Co.*, 449 U.S. 232, 239 (1980)). *See also Fund for Animals v. Williams*, 391 F. Supp. 2d 132, 137 (D.D.C. 2005) (citing *Bennett* and applying D.C. Circuit test of “effect on day-to-day business”).

The public statements at issue here — that Mr. Idris was an associate of Osama bin Laden and foreign terrorism — not only have interfered with his ability to conduct business activities but have created an ongoing risk of an array of serious legal consequences, including investigations, detentions, and civil or criminal actions in the United States and other countries that are combating terrorism. Consequences that Mr. Idris has suffered in the United States that may be related to the defamatory statements at issue include a temporary freeze on his assets (imposed a few days prior to these public statements and continued for several months) and the denial of his claims for compensation. Since *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 152 (1967), courts have interpreted finality “in a pragmatic way,” recognizing that the impact of agency action may be “sufficiently direct and immediate as to render the issue

appropriate for judicial review.” Here, the Government’s unretracted allegations that Mr. Idris is a supporter of Osama bin Laden and other terrorists impose sufficient constraints on the conduct of his day-to-day business, as well as sufficient risks to his liberty and property, to merit this Court’s review.

C. Plaintiffs’ Law Of Nations Claim Challenges Agency Conduct Within The Waiver Of Sovereign Immunity

Plaintiffs have argued that the Court erred in finding that the § 702 waiver of sovereign immunity does not apply to their law of nations claim on grounds that “the action in question was the President’s decision to target and strike El-Shifa,” rather than agency action. Plaintiffs contend that the Court’s analysis is mistaken because this claim is predicated not just on the President’s destruction of the facility but the failure to provide compensation as required by international law. Thus, the “final action” at issue in this claim was the decision to reject Plaintiffs’ claim for compensation made by an agency, not the President, long after it became clear that El-Shifa was not a chemical weapons facility.

The Government has responded, first, that the law of nations claim stated in Count Four in fact challenges the President’s decision to target El-Shifa, rather than agency action, as the Court found. Count Four refers to two principles of international law: (1) the prohibition against the use of force (Compl. ¶ 109); and, (2) the requirement to provide just and adequate compensation for the taking or unjustified destruction of private property. (Compl. ¶¶ 110-111). Count Four alleges injury from the “refusal of the United States to pay just compensation for the destruction of the Plant or otherwise acknowledge that the destruction of the Plant was mistaken and not justified under the law of nations.” (Compl. ¶ 115). The Complaint also cites a letter to the CIA dated August 17, 2000, which, as the Government knows, claimed a right to

compensation under international law,⁴ and the denial of the claim presented by that letter on March 21, 2001, by the CIA. (Compl. ¶¶ 86-87). Though the Prayer for Relief asks simply for “[a] declaration that the United States attack on the El-Shifa pharmaceutical plant violated the law of Nations,” it also asks for “[s]uch other and further relief as the Court deems equitable, just, and proper.” (Compl., Prayer for Relief ¶¶ 2, 7). Thus, the Complaint certainly gave the Government “fair notice” that it was seeking a declaration that the denial of compensation by the CIA long after the attack violated the law of nations. *See, e.g., Kingman Park Civic Ass’n v. Williams*, 348 F.3d 1033, 1040-41 (D.C. Cir. 2003) (noting that Fed. R. Civ. P. 8(a)(2) requires only “fair notice of the claim and the grounds upon which it rests”).

Second, the Government argues that Plaintiffs are raising a new argument that cannot now be considered by the Court. While the Government argued generally that the Complaint attacked presidential decisions, it did not specifically contend (and still does not contend) that the decision to deny compensation was made in 2001 by President Bush. Plaintiffs did not have occasion to explain that an agency made the decision to deny a claim for compensation under international law, because this was indicated by the Complaint and not disputed by the Government. Under these circumstances, Plaintiffs cannot be deemed to have waived this argument (*cf. Kattan v. D.C.*, 995 F.2d 274, 276 (D.C. Cir. 1993)), and the Court is not precluded from reconsidering the effect of agency action on its analysis.

⁴ The letter of August 17, 2000 (attached as Exhibit 2) stated:

Our clients are entitled to compensation for damages caused by the destruction of the El Shifa pharmaceutical plant not only under the Federal Tort Claims Act but also under principles of international law. The destruction of this facility without justification or just compensation violates principles of customary international law reflected in the laws and treaty obligations of the United States. The action of the United States constitutes a tort “committed in violation of the law of nations or a treaty of the United States” within the terms of the Alien Tort Act, 28 U.S.C. § 1350.

Finally, the Government contends that this claim is, in any event, barred by the political question doctrine, because it may require the Court to consider whether El-Shifa was a chemical weapons facility associated with terrorism that may be destroyed without compensation. The Court will not, however, be required to consider that defense unless the Government can assert, as a matter of fact, that the facility was involved in production of such weapons. Since it is doubtful that the Government can, in light of its current knowledge, make such a claim, the Court may not be required to decide whether the initial rationale for the attack was true.⁵

CONCLUSION

For the foregoing reasons, Plaintiffs submit that the Court should grant this Motion to amend its judgment and allow the claims for declarative and injunctive relief stated in Counts Three and Four to proceed.

Respectfully submitted,

/s/

Stephen J. Brogan (No. 939082)

Timothy J. Finn (No. 963751)

Jonathan C. Rose (No. 117740)

JONES DAY

51 Louisiana Avenue, N.W.

Washington, D.C. 20001

Telephone: (202) 879-3939

Attorneys for Plaintiffs El-Shifa
Pharmaceutical Industries Company and
Salah El Din Ahmed Mohammed Idris

Date: December 29, 2005

⁵ While the Government has asserted that “[t]he United States has never altered its position” on the plant (Gov. Opp. at 12 n.6), it has never taken a position on its current understanding of Plaintiffs’ factual allegations in this case or in the case that was litigated in the Court of Claims, except to say that the statements made by President Clinton at the time of the attack may not be disputed.

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of December, 2005, I caused a true and correct copy of the foregoing Plaintiffs' Reply Memorandum in Support of Motion to Alter Judgment to be served by United States mail, first class, postage prepaid, upon the following individuals:

Kenneth L. Wainstein, Esq.
U.S. Attorney for the District of
Columbia
Judiciary Center Building
555 4th Street, N.W.
Washington, D.C. 20001

Paul Figley, Esq.
Deputy Director, FTCA Staff
Torts Branch, Civil Division
U.S. Department of Justice
P. O. Box 888
Ben Franklin Station
Washington, D.C. 20044

_____/s/_____
Timothy J. Finn