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October 29, 2008

BY HAND

Honorable Catherine O'Hagan Wolfe
Clerk of the Court
United States Court of Appeals for the Second Circuit
Daniel Patrick Moynihan Courthouse
500 Pearl Street
New York, New York 10007

Re: *Matar, et al. v. Dichter*, Case No. 07-2579-cv

Dear Ms. Wolfe:

The Government hereby responds to plaintiffs' Rule 28(j) submission concerning *In re Terrorist Attacks of September 11, 2001*, 538 F.3d 71 (2d Cir. 2008), which holds that "the FSIA grants immunity to individual officials of a foreign government for their official-capacity acts." *Id.* at 83. Relying on *Dole Food Company v. Patrickson*, 538 U.S. 468 (2003), plaintiffs argue that Dichter cannot invoke FSIA immunity under *Terrorist Attacks* because he was not in office – and thus not an "agency" under the FSIA – when suit was filed. The Court should reject this argument.

As we have noted, *Patrickson* turns on a close reading of the FSIA's "agency or instrumentality" definition as applied to a foreign government-owned corporation rather than a natural person. See Gov't Br. 18 n **. By contrast, *Terrorist Attacks* relies on a far broader construction of the term "agency." See 538 F.3d at 83 ("[A]n agency is any thing or person through which action is accomplished."). Whether this construction constitutes an interpretation of the statutory definition, or a "judicially-created expansion" of it, *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 399 (4th Cir. 2004), it is decidedly not the construction on which *Patrickson* rested. As Dichter argues, Dichter Br. 18-21, the *Patrickson* Court simply did not address the FSIA's application to natural persons, and there is no reason to believe that the Court intended its holding to strip foreign officials of FSIA immunity after they leave office. Such a rule "makes no

practical sense” and “would be a dramatic departure from the common law of foreign sovereign immunity.” *Belhas v. Ya’alon*, 515 F.3d 1279, 1285 (D.C. Cir. 2008).

As is clear from our brief, the Government disagrees with the position adopted in *Terrorist Attacks* that the FSIA applies to foreign officials. Nevertheless, as in *Terrorist Attacks*, this court “need not consider any continuing vitality of sovereign immunity under the common law,” 538 F.3d at 83, if the court concludes, as the Government has argued in the alternative, *see* Gov’t Br. 18 n **, that Dichter is immune under an FSIA analysis because no FSIA exception to immunity applies here.

Respectfully,

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cc: Counsel of Record