all proceedings, including the preparation and implementation of a joint discovery plan under the Court's supervision. Dkts. 75 & 76.

ARGUMENT

I. DEFENDANTS ARE COMMITTED TO LITIGATING THE CASE ON THE MERITS AND SHOULD BE ALLOWED TO DO SO, ESPECIALLY IN LIGHT OF THE FOREIGN POLICY CONSEQUENCES OF A DEFAULT JUDGMENT.

A. Introduction

A number of cases have been brought against the PA and PLO in the United States under the Anti-Terrorism Act, 18 U.S.C. § 2333. The unstated premise of these cases, including this one, is that every alleged act of violence committed within the Palestinian Occupied Territory is assumed to be committed by a Palestinian acting at the behest of the PA or PLO, even though the reality is that the acts are committed by individuals operating as part of militant groups or factions who have their own agendas, agendas that are at odds with that of the PA and PLO.

Collectively, the U.S. Plaintiffs seek well over $4 billion, and they seek more than $350 million in this case alone. Such judgments would devastate the Palestinian economy and people. The United Kingdom Foreign Office describes the current state of the PA economy as follows:

> As a result of Israeli restrictions imposed both within the West Bank and Gaza Strip and on Palestinian external economic relations since the start of the Intifada (uprising) in September 2000, the economy has been fragmented. Significant damage has been done to infrastructure, and economic activity and incomes have contracted very sharply. Levels of poverty have increased dramatically, and much of the population is now dependent on food aid.

Exh. H at 2 (Country Profile of the "Occupied Palestinian Territories" from the U.K.'s Foreign & Commonwealth Office's website). At the recent donors' conference in Paris, Secretary of State Rice underscored the dire nature of the PA's "serious budgetary crisis" by describing the $7.4

billion aid package as the "government's last hope to avoid bankruptcy." Exh. A at 1. At the same December 17, 2007 conference, President Abbas explained: "Without this support, without the payment of aid that will allow the Palestinian treasury to fulfill its role, we will be facing a total catastrophe in the West Bank and Gaza." *Id.*

Courts disfavor the potential windfall effect of default judgments in cases involving "large sums of money." *Livingston Powdered Metal, Inc. v. NLRB*, 669 F.2d 133, 137 (3d Cir. 1982); *Hutton v. Fisher*, 359 F.2d 913 (3d Cir. 1966); *Rooks v. American Brass Co.*, 263 F.2d 166 (6th Cir. 1959); *Hester Int'l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 175 (5th Cir.1989) ("We have recognized previously that if the amount of money involved is very great the amount militates in favor of granting a full trial on the merits."). These concerns are heightened when the windfall is at the expense of the public fisc, and should be especially heightened here in light of the desperate financial state of the PA and the foreign policy implications of diverting financial resources urgently needed to rebuild and stabilize the PA.

B. The PA/PLO's Commitment to Litigate the Case on the Merits, and the United States' Commitment to Support the Current Leadership of the Palestinian Authority.

When this case was brought and during the motions litigation, the PA and PLO might rightly have wondered why they would be haled into U.S. courts to litigate claims, such as Plaintiffs', involving an attack in the Occupied Territories that arose against the backdrop of the Palestinian-Israeli conflict. Despite the PA's and PLO's understandable confusion, however, Defendants have come to appreciate that they need to address these cases head on, rather than continuing to rely exclusively on jurisdictional defenses.

This change was impeded by a period of considerable political turmoil in the Occupied Territories -- turmoil created by the degradation of government institutions resulting from

violence in the region and exacerbated by President Arafat's death in November 2004 and the legislative elections in early 2006. As described more fully in the Declaration of Ahmad Abdel-Rahman (Exh. X), this turmoil severely hampered the ability of the PA/PLO to make critical decisions concerning the litigation. Nonetheless, a change in the litigation posture began to take shape near the end of 2006, when President Abbas sought guidance from Secretary Rice about how to respond to the U.S. litigation. Upon receipt of this guidance, President Abbas charged then-Finance (now Prime) Minister Salam Fayyad with responsibility for "mak[ing] decisions for both the PA and the PLO in connection with these lawsuits." *See* Exh. D (Prime Minister Fayyad Declaration) at ¶ 10. As Prime Minister Fayyad describes more fully in his attached Declaration, he reviewed President Abbas' correspondence with Secretary Rice, engaged in appropriate inquiries, and "decided to retain new counsel for the PA and PLO to handle all of the U.S. lawsuits, to provide them with clear instructions about their responsibilities with respect to the litigation, and to discharge predecessor counsel." *Id.* ¶ 12.

Prime Minister Fayyad's declaration fully describes the manner in which the new Palestinian leadership intends to conduct the litigation going forward:

> I have instructed new counsel that the Defendants will participate fully in this and other litigation, in a cooperative manner, including complete participation in the discovery process. I have further instructed new counsel to transmit this commitment to the United States courts. I personally commit to sustain this instruction throughout the effort to litigate these cases. It is my belief there are meritorious defenses to the claims brought in the United States and it is important to the PA to present those defenses. Moreover, it is important to the PA's role in the international community to participate in the legal process, even when it is process brought in the United States for actions that occurred far from the United States. The importance of this was not fully appreciated by the PA government, as a whole, until recently. Now we can act on that understanding, and we therefore seek to contest this litigation, fully and responsively.

Id. ¶ 13.

Prime Minister Fayyad's Declaration deserves the Court's serious consideration. The United States has praised the new Palestinian leadership for "striving to build the institutions of a modern democracy," "working to strengthen Palestinian security services, so they can confront the terrorists and protect the innocent," and "ensuring that Palestinian society operates under the rule of law." Exh. I at 1 (July 16, 2007 Speech of President Bush). As President Bush explained in a July 2007 speech, "[b]y supporting the reforms of President Abbas and Prime Minister Fayyad, we can help them show the world what a Palestinian state would look like -- and act like." *Id.* at 1-2. One indication of the PA's and PLO's commitment to "operate[] under the rule of law," is the Defendants' unambiguous desire to fully defend this lawsuit within the American legal framework. Defendants thus ask the Court, in reviewing this motion, to weigh the importance of encouraging the designated representatives of the Palestinian people -- representatives who have won the support of our own Government -- to participate fully in the American legal process. As further evidence of Defendants' readiness to participate in the litigation, Defendants have attached as Exhibit J a Verified Answer, which the Defendants would file if the Court grants permission to do so.

C. U.S. Law Recognizes the Importance of Giving Foreign Governments an Opportunity to Litigate on the Merits and Avoid Default Judgments.

As noted, a number of cases have been brought against the PA and PLO in the United States under the Anti-Terrorism Act, 18 U.S.C. § 2333. Because the U.S. courts lack jurisdiction over the individuals and militant groups responsible for the acts, the plaintiffs in these cases sue the PA and PLO, hoping that the courts will take jurisdiction over the PA and PLO, and that the PA and PLO will then default due to the difficulty of defending such suits in the United States.

Plaintiffs also understand they have a greater prospect of collecting on a judgment against the PA and PLO than they do against the individuals and groups actually responsible for the acts.

Recognizing the necessity of protecting the public fisc from unfounded, unproven claims, U.S. law -- both statutory and case law -- goes to great lengths to protect foreign governments from default judgments based solely on a procedural default. Accordingly, federal law, as embodied in both the Foreign Sovereign Immunities Act (28 U.S.C. § 1608(e)) and Fed. R. Civ. P. 55(e), contains heightened safeguards where defaults threaten the domestic or foreign public fisc, reflecting "congressional recognition that public fisc should be protected from unfounded claims which would be granted solely because of government's delay in responding." *Compania Interamericana v. Campania Dominica*, 88 F.3d 948, 951 (11th Cir. 1996); (citing *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 242 (2d Cir. 1994)).

The Palestinian Authority is not recognized as a foreign state for purposes of the Foreign Sovereign Immunities Act. But it is in fact a foreign government and any default judgment against the PA would be paid from the public fisc. The Palestinian taxpayers, many of whom live in poverty, are as deserving as other taxpayers of being protected from a procedural default. No doubt opposing counsel will assert that the satisfaction of any judgment would not come at the expense of the Palestinian people, but the U.S. plaintiffs' own collection efforts demonstrate that is not the case. Plaintiffs in *Estate of Yaron Ungar v. PA*, No. 00cv105L (D.R.I.), have, for example, sought to attach Arab League funds earmarked for humanitarian aid to the PA, garnish the Value Added Taxes collected by Israel on goods delivered into the Palestinian Territories,

and attach funds of the Palestinian Pension Fund for state employees.[3] The Ungars' counsel (Mr. Strachman) represents Plaintiffs here, making similar collection efforts likely should the default stand.

Indeed, Plaintiffs' counsel appears to be working in these cases in conjunction with the Shurat HaDin Israel Law Center (ILC), an advocacy group whose stated goal is to "economically destroy" the PA, which it refers to on its website as a "hate group in the Middle East." Exh. Y (Shurat HaDin Israel Law Center, "About Us"). The leader of the ILC, Nitsana Darshan-Leitner, has taken credit in the media for decisions favorable to plaintiffs in the federal litigation in Rhode Island (where Mr. Strachman is also counsel), and the ILC website similarly claims credit for the federal litigation in the United States, asserting that the ILC "won judgments of over $702 million against terrorist organizations, including the Palestinian Authority, and their state sponsors." *Id.* Ms. Darshan-Leitner has stated in interviews that the international legal team ultimately hopes to "bankrupt" the PA, and to "expose" what she describes as the European Union's "reckless" humanitarian subsidies to the PA. Exh. K (John Turley-Ewart, *Fighting Terrorism in Court: Israeli Lawyer Sues in Bid to Cut off Funds to Palestinian Authority*, NATIONAL POST (Nov. 23, 2002)).

It is because foreign governments can easily be the target of these sorts of unfounded, politically-motivated lawsuits (and for other reasons as well) that courts generally exercise great caution before enforcing defaults and even default judgments against foreign governing entities. *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1552 & n.19 (D.C. Cir. 1987);

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[3] *See, e.g., Ungar v. PA*, No. 05mc00180 (D.D.C.) (GK) (Arab League funds); *Ungar v. PA*, No. H/P 4318/05 (Jerusalem District Court) (action to domesticate *Ungar* judgment in Israel and attach VAT funds); *Estate of Yaron Ungar v. PA*, 841 N.Y.S.2d 61 (N.Y. App. Div. 2007) (discussing plaintiffs' actions with regard to Palestinian Pension Fund).

Hester Int'l Corp. v. Federal Republic of Nigeria, 879 F.2d 170, 175 (5th Cir. 1989); *Gregorian v. Izvestia*, 871 F.2d 1515, 1525 (9th Cir. 1989); *First Fidelity Bank v. Government of Antigua & Barbuda-Permanent Mission*, 877 F.2d 189, 196 (2d Cir. 1989) ("Courts go to great lengths to avoid default judgments against foreign sovereigns or to permit those judgments to be set aside.").

This caution also stems from the "broad divergence" of "cultural, governmental and political" approaches to litigation when a foreign government is involved, and the importance of encouraging foreign entities to submit their disputes to resolution by the United States courts "on the basis of all relevant legal arguments," particularly in cases involving serious foreign policy overtones. *Practical Concepts, Inc.*, 811 F.2d at 1551-52. Just last year, the D.C. Circuit, applying Rule 60(b), vacated a default judgment against the Democratic Republic of Congo. *See FG Hemisphere Assocs., LLC v. Democratic Republic of Congo,* 447 F.3d 835 (D.C. Cir. 2006). The court explained: "Intolerant adherence to default judgments against foreign states could adversely affect this nation's relations with other nations and undermine the State Department's continuing efforts to encourage foreign sovereigns generally to resolve disputes within the United States' legal framework." *Id.* at 838-39 (internal quotation and citation omitted).

D. It Is Imperative that a Foreign Government Be Given a Second Chance at Having Its Day in Court Where, as Here, as a Result of Terrorism Allegations and the Sheer Size of the Judgment, the Default Judgment Would Have Serious Foreign Policy Consequences.

It is true that courts have sometimes declined to provide state-owned instrumentalities relief from default judgments in cases involving ordinary contract disputes. *See, e.g.*, *Compania Interamericana v. Campania Dominica*, 88 F.3d 948, 951-52 (11th Cir. 1996) (applying abuse of discretion standard in affirming denial of national airline's motion for relief from entry of default

and default judgment in breach of contract action); *Transaero v. La Fuerza Area Boliviana*, 24 F.3d 457, 462 (2d Cir. 1994) ("The case before us is fundamentally an ordinary contract dispute which has no such profound [foreign policy] implications."). This case, however, does not involve an ordinary contract dispute with a state-owned instrumentality but a claim directly against the foreign government, alleging government-sponsored terrorism.

Such claims require the courts to give special and careful consideration to the Defendants' commitment to litigate on the merits -- even if this commitment comes at what might be considered an otherwise inexcusably late stage in the litigation if an individual or corporate defendant were involved. In *Owens v. Republic of Sudan*, 374 F. Supp. 2d 1, 9 (D.D.C. 2005), for example, the Court vacated a default against the Sudanese government after noting the "uniquely sensitive nature of a suit in which a foreign state wishes to challenge the allegation that it has harbored terrorists."

Moreover, though the PA does not enjoy the "foreign state" recognition enjoyed by China, the foreign policy implications of this case are far greater than those present in *Jackson v. People's Republic of China*, 794 F.2d 1490, 1496 (11th Cir. 1986), where the court vacated a default judgment against China employing the much less forgiving Rule 60(b) standard than the Rule 55 "good cause shown" standard under which Defendants seek relief. First, *Jackson* involved allegations that China had breached its obligations to holders of railroad bonds; here the PA and PLO are accused of supporting an act of international terrorism. In addition, the size of the default judgment sought in relation to the annual GDP of the defendant is vastly greater here than it was in *Jackson*. Jackson involved a $41 million default judgment against China; this case involves a potential $350 million (or more) default judgment against the Palestinian Authority, whose financial situation is so dire that it is a regular recipient of financial assistance and

humanitarian aid from other countries, including the United States. *See* Exh. I at 2 (July 16, 2007 speech of President Bush).

If the Court has any doubt about the foreign policy implications of entering a default judgment against the PA and PLO in a terrorism case, we invite the Court to seek a Statement of Interest from the State Department. As noted, Judge Marrero has already made a global inquiry in the *Knox* case concerning the State Department's interest in these cases, and has a directed a response in late January. *See* Exh. C (Judge Marrero's Dec. 11, 2007 Order). Any Statement of Interest can speak to the importance of continuing the progress toward stability being made by the current PA leadership and how the imposition of default liability in cases like this one might affect any current progress. At the recent peace summit in Annapolis, President Bush robustly praised the Palestinian leadership. *See* Exh. E at 2 (Nov. 27, 2007 Speech of Pres. Bush) ("President Abbas seeks to fulfill his people's aspirations for statehood, dignity and security. . . . He and Prime Minister Fayyad have both declared, without hesitation, that they are opposed to terrorism and committed to peace. . . . The emergence of responsible Palestinian leaders has given Israeli leaders the confidence they need to reach out to the Palestinians in true partnership."). Indeed, Secretary Rice has often described the effort to establish a Palestinian state and to achieve a peaceful resolution of the Israel-Palestinian conflict as one of President Bush's "highest priorities." *See* Exh. L at 1-2 ("Remarks with Palestinian Authority President Mahmoud Abbas," Oct. 15, 2007) ("I hope you understand and that everybody understands that the President has decided to make this one of the highest priorities of his Administration and of his time in office. It means that he is absolutely serious about moving this issue forward and moving it as rapidly as possible to conclusion.").