UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VICTOR CARLSTRÖM, *et. al.,*	:	
	:	19 Cv. 11569 (DLC)
Plaintiffs,	:	
	:	
– against –	:	
	:	
FOLKSAM ÖMSESIDIG LIVFÖRSÄKRING, *et. al*.,	:	
	:	
Defendants.	:	

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS FINANSINSPEKTIONEN, SKATTEVERKET, ERIK THEDÉEN, AND KATRIN WESTLING PALM'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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Introduction

This Memorandum of Law is respectfully submitted on behalf of all Plaintiffs opposing the motion to dismiss filed by defendants *Skatteverket*, *Finansinspektionen*, Katrin Westling Palm, Erik Thedéen (ECF # 89) ("Swedish Defendants")[1] challenging the First Amended Complaint ("FAC") (ECF # 74).

As detailed below, the Swedish Defendants' motion should be denied in its entirety. Many of the Swedish Defendants's arguments related to the causes of action pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO") and the Computer Fraud and Abuse Act ("CFAA") mirror those made by the other defendants in their prior motions to dismiss and are deficient for many of the same reasons set forth in Plaintiffs' opposition ("Plaintiffs' Opp.") (ECF # 95) to those motions. As a result, this Memorandum of Law will not repeat those passages, but rather refer to them (and incorporate them by reference) in the context of responding to the Swedish Defendants. The same is true with respect to the Swedish Defendants' contention that personal jurisdiction is absent.

The two institutional Swedish Defendants, *Skatteverket* (the Swedish Tax Agency) and *Finansinspektionen* (the Swedish Securities and Exchange Commission), have invoked the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §1605. However, none of their FSIA arguments are availing, as the non-commercial tort exception codified in §1605(a)(5) overcomes FSIA's presumptive immunity.

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[1] Defendants *Skattaverket*, *Finansinspektionen*, Palm, and Thedéen have denominated themselves as the "Swedish Defendants," *see* Swedish Defendants, at 1, and for convenience of reference this Memorandum of Law adopts that description. Certain arguments are made only by *Skatteverket* and *Finaninspektionen*, who are referred to in those sections as the "institutional Swedish defendants."

The institutional Swedish Defendants raise other issues, such as the "act of state" doctrine, and Defendants Westling Palm and Thedéen assert immunity under the common law, but, as discussed below, those, too, are without merit. Similarly, Defendants' claim that certain of the corporate Plaintiffs lack capacity to sue is not an issue for resolution on a motion to dismiss.

Accordingly, it is respectfully submitted that the Swedish Defendants' motion to dismiss should be denied in its entirety.

Statement of the Facts

As set forth in Plaintiffs' Opp., the myriad allegations in the FAC are too voluminous and detailed to digest herein. They were summarized briefly in the Statement of Facts in Plaintiffs' Opp., at 2-5, but not necessarily with respect to the Swedish Defendants in any detail. Thus, below is a concise description of the FAC's allegations against them, which will also be referenced throughout this Memorandum of Law in their appropriate context in response to the Swedish Defendants' specific arguments.

As alleged in the FAC, several powerful individuals in Sweden, including but not limited to Defendant Westling Palm, the Director-General of the *Skatteverket*, and Erik Thedéen, the Director-General of *Finansinspektionen*, acted intentionally and knowingly to advance and implement various elements of the racketeering enterprise's scheme, including fraud and extortion, in their personal, corporate executive, and ministerial capacities. *See* FAC, at ¶ 31.

Defendants Palm and Thedéen used the official Swedish government organs, *Skattaverket* and *Finansinspektionen*, as well as employees of those agencies, in furtherance of the enterprise's unlawful activities and objectives by harrassing Plaintiffs, denying Plaintiffs certain licenses, and interfering with Plaintiffs's business relationships. Also, Defendant Westling Palm, in her prior

position as head of the Swedish Pension Authority, had been involved in a corrupt endeavor involving bribery and kickbacks with respect to a company called Indecap. *Id*., at ¶¶ 48-76. Efforts to conceal that misconduct contributed to Defendants' motivation to silence Carlström and destroy Plaintiffs and their businesses. *Id*., at ¶¶ 34, 55, 156. That conduct included acts within U.S. jurisdiction, particularly after Carlström's May 2019 arrival in the U.S. *Id*., at ¶¶ 307-09, 331-32.

The individual defendants, the defendant financial institutions, and Swedish government agencies, through the pattern of racketeering and other tortious conduct identified in the FAC, joined together to crush Victor Carlström, his companies and those of Plaintiff Stephen Brune. Carlström and Brune did business together, both in Sweden and the United States. *Id*. ¶ 28.

POINT I

THE FOREIGN SOVEREIGN IMMUNITIES ACT DOES NOT IMMUNIZE THE INSTITUTIONAL SWEDISH DEFENDANTS BECAUSE THE "NON-COMMERCIAL TORT" EXCEPTION IN 28 U.S.C. §1605(a)(5) APPLIES IN THIS CASE

The two institutional Swedish Defendants (*Finanspektionen* and *Skatteverket*) rely principally on the FSIA as their basis for dismissing the FAC. The institutional Swedish Defendants identify the operative exception to the FSIA – *i.e.*, the "non-commercial tort" exception set forth in 28 U.S.C. §1605(a)(5) – but that provision nonetheless provides subject matter jurisdiction over them in this case. *See* Swedish Defendants, at 4. As detailed below, with respect to each ground presented, both *Skatteverket* and *Finansinspektionen* fail to satisfy their ultimate burden of persuasion that the FSIA precludes Plaintiffs' lawsuit herein.[2]

[2] Only *Finanspektionen* and *Skatteverket* assert that the FSIA provides grounds for dismissal, recognizing that the FSIA does not apply to individuals. *See Samantar v. Yousuf*, 560 U.S. 305 (2010).

A. *General Principles Applicable to the FSIA*

As a threshold matter, the Swedish Defendants do not address whatsoever the burden that they bear in invoking FSIA immunity. As the Second Circuit explained in *Swarna v. Al-Awadi*, 622 F.3d 123 (2d Cir. 2010), "[o]nce the defendant presents prima facie evidence that it is a foreign sovereign, the burden falls on the plaintiff to establish by a preponderance of the evidence that an exception under the FSIA permits jurisdiction over the foreign sovereign." *Id*., at 143, citing *Virtual Countries, Inc. v. Republic of S. Africa*, 300 F.3d 230, 241 (2d Cir.2002).

Yet there is another level that must be considered: when a plaintiff has satisfied its burden "that an FSIA exception applies, the foreign sovereign then bears the ultimate burden of persuasion that the FSIA exception does not apply." *Id*., citing *Virtual Countries*, 300 F.3d at 241. *See also Virtual Countries*, 300 F.3d at 242 ("district court reviews the allegations in the complaint and any undisputed facts supplied by the parties. The ultimate burden of persuasion by a preponderance of the evidence nevertheless remains with the alleged foreign sovereign"); *Robinson v. Government of Malaysia*, 269 F.3d 133, 140-41 (2d Cir. 2001).[3]

Also, in arguing that in presenting a basis for an exception to the FSIA, a "[g]ood argument to that effect is not sufficient[,]" *see* Swedish Defendants, at 3, quoting *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1316 (2017), the Swedish Defendants seize upon language pertaining to a discrete aspect of the FSIA that is *not*

[3] The facts in *Swarna*, *Virtual Countries* and *Robinson* are wholly inapposite. In *Swarna*, plaintiff alleged that the sovereign failed to monitor its diplomatic personnel adequately. 622 F.3d at 146. In *Virtual Countries*, plaintiffs relied upon the "commercial tort" exception to the FSIA, 300 F.3d at 236, while in *Robinson* plaintiff sued as a result of a slip and fall he suffered on a property, and for which plaintiff provided only conclusory claims of Malaysia's responsibility for the condition of the premises. 269 F.3d at 145-46.

relevant here: whether property was taken "in violation of international law." *See* §1605(a)(3).

As the Court observed in *Bolivarian Republic*, when §1605(a)(3) provides the basis for jurisdiction, "[s]imply making a nonfrivolous argument to that effect is not sufficient" to establish that property was taken "in violation of international law." 137 S. Ct. at 1324. In addition, that relates only to the FSIA's commercial exception generally – again, not at issue herein – and only to §1605(a)(3) specifically. *Id*., at 1318-24.

In *Bolivarian Republic* the Court also recognized that pursuant to 28 U.S.C. §1331 and *Bell v. Hood*, 327 U.S. 678 (1946), "the 'arising under' statute [§1331] confers jurisdiction if a plaintiff can make a nonfrivolous argument that a federal law provides the relief he seeks – even if, in fact, it does not." 137 S. Ct. at 1322, quoting *Bell v. Hood*, 327 U.S. at 685 (jurisdiction exists even when if the "Constitution and laws of the United States are given one construction," a claim will be "sustained," but if the laws are given a different construction, the claim "will be defeated").

In addition, as the Court pointed out in *Bolivarian Republic*, "a court normally need not resolve, as a jurisdictional matter, disputes about whether a party actually held rights in that property; those questions remain for the merits phase of the litigation[,]" 137 S. Ct. at 1316, but that it treated the expropriation exception to the FSIA differently. *See also Robinson v. Government of Malaysia*, 269 F.3d at 143 ("[i]t is ordinary tort law that applies to non-immune foreign governments and into which the court's inquiry would properly have been directed").

Thus, the more stringent standard imposed in the context of the FSIA's expropriation exception does not apply herein to an action under §1605(a)(5)'s non-commercial tort exception.

B. ***The FAC Is Not Precluded by the "Entire Tort" Doctrine***

The Swedish Defendants also claim that the institutional defendants are immune under the FSIA because of the "entire tort" doctrine – that when the FSIA exception is §1605(a)(5), the entire tort must be committed within the territorial jurisdiction of the United States. *See* Swedish Defendants, at 4-5. That objection is unavailing for several reasons.

As an initial matter, the Swedish Defendants ignore entirely the FAC's causes of action that unquestionably occurred entirely within the U.S., *i.e.*, Count Three (Computer Fraud and Abuse Act) and Count Six (Intentional Infliction of Emotional Distress). *See* FAC, at ¶¶ 307-09, 311-330, 331-32, 360-64, 385-89. In addition, the RICO causes of action (Counts One and Two) allege against the institutional Swedish Defendants sufficient predicate offenses committed entirely within the U.S. *See* FAC, at ¶¶ 336-51 & 353-59.

Also, as discussed below, even if the "entire tort" doctrine – a judicial creation, the parameters of which have not been carefully delineated – controls, the categorical construction advanced by the Swedish Defendants is in irreconcilable conflict with the FSIA's provisions, the Supreme Court case on which the "entire tort" doctrine is based, and the principles of tort law, and is even inconsistent with the language employed by the Second Circuit in explaining the doctrine.

For instance, the text of §1605(a)(5) does *not* require that the "entire tort" be committed in the U.S. The subsection reads as follows:

> [a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case – . . . in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that

> foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.

If Congress meant for the entirety of the tort to occur within the U.S., it would have written §1605(a)(5) to provide – with the *italicized* words added – for torts "occurring *entirely* in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state *occurring entirely within the United States* while acting within the scope of his office or employment." Thus, the FSIA's plain, unambiguous statutory language fails to provide any support for the Swedish Defendants' construction of §1605(a)(5).[4]

Also, the provenance of the doctrine is not supported by its purported sources. In *In re Terrorist Attacks on September 11, 2001*, 714 F.3d 109 (2d Cir. 2013), cited by the Swedish Defendants, at 4, 6, the Second Circuit stated that the "so-called 'entire tort' rule was first articulated by the Supreme Court in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989)." *Id*., at 115-16.

Yet in *Amerada Hess* the Supreme Court did not adopt such a rule. Instead, it merely

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[4] The same is true for FSIA's legislative history, in which the House of Representatives' Report stated that the statute

> is directed primarily at the problem of traffic accidents but is cast in general terms as applying to all tort actions for money damages, not otherwise encompassed by section 1605(a)(2) relating to commercial activities. It denies immunity as to claims for personal injury or death, or for damage to or loss of property, caused by the tortious act or omission of a foreign state or its officials or employees, acting within the scope of their authority; the tortious act or omission must occur within the jurisdiction of the United States. . . .

H.R.Rep. No. 1487 at 20-21, 1976 U.S.Code Cong. & Ad.News at 6619; S.Rep. No. 1310 at 20. Again, absent is any requirement that an "entire" tort be committed within U.S. jurisdiction.

stated that §1605(a)(5) "is limited by its terms, however, to those cases in which the damage to or loss of property occurs *in the United States*." 488 U.S. at 439 (emphasis in original). *See also id*., at 441 ("exception in §1605(a)(5) covers only torts occurring within the territorial jurisdiction of the United States").

The Court therefore did not require an "entire tort" to occur within the U.S. in either expression of the jurisdictional requirements under §1605(a)(5). Indeed, in *In re Terrorist Attacks*, the Court quoted a passage set forth above, describing the ruling in *Amerada Hess* as follows: "[t]he Court held that the action was barred by the FSIA, holding that the noncommercial tort exception 'covers only torts occurring within the territorial jurisdiction of the United States.'" 714 F.3d at 116, quoting *Amerada Hess*, 488 U.S. at 441.

Nor did the facts in *Amerada Hess* demand that the Court decide that issue, as *all* the pertinent events – the acts, the damage, and loss of property – occurred on the high seas in international waters, and not within U.S. territory or jurisdiction. *Id*., at 440. Thus, *Amerada Hess* cannot properly be regarded as a source of an "entire tort" requirement for §1605(a)(5).

Similarly, the Second Circuit case cited in *In re Terrorist Attacks*, *Cabiri v. Government of Ghana*, 165 F.3d 193 (2d Cir. 1999), addresses the issue only in a footnote – likely because the §1605(a)(5) issue was decided on other grounds [that the actionable conduct was "misrepresentation," and consequently precluded pursuant to §1605(a)(5)(B)] – and again fails to require that an *entire* tort be committed within the U.S.: "[a]lthough [the words of the statute are] cast in terms that may be read to require that only the injury rather than the tortious acts occur in the United States, the Supreme Court has held that this exception 'covers only torts occurring within the territorial jurisdiction of the United States.'" 165 F.3d at 200 n. 3, *quoting Amerada*

Hess, 448 U.S. at 441. *See also In re Terrorist Attacks*, 714 F.3d at 116.

Likewise, Second Circuit exposition of fundamental tort doctrine contradicts the Swedish Defendants' unreasonable application of any "entire tort" doctrine. For example, in *Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyn*, 813 F.3d 98 (2d Cir. 2016), an FSIA case involving the commercial exception in which the Circuit affirmed denial of an FSIA-based motion to dismiss, the Court instructed that "[a] tort's locus – also known as the *locus delicti*, or "place of wrong"[] – is the place 'where the last event necessary to make an actor liable for an alleged tort takes place.'" *Id*., at 109, quoting *Restatement of Conflict of Laws* §377 (1934) ("First Restatement").

Elaborating, the Court pointed out that "'[s]ince a tort action traditionally has not been viewed as complete until the plaintiff suffers injury or loss,' the cause of action has generally 'been considered to arise at the place where this damage was sustained.'" 813 F.3d at 109, quoting *Sack v. Low*, 478 F.2d 360, 365 (2d Cir.1973), and citing Christopher A. Whitlock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. Rev. 719, 724–25 (2009) ("[t]he First Restatement defines the place of wrong as 'the state where the last event necessary to make an actor liable for an alleged tort takes place.' Usually this is the location where the plaintiff was injured, since liability does not arise without injury") (footnotes omitted) (quoting First Restatement §377)).

Thus, the tort itself did not occur until the acts occurred, the damage was inflicted, and the loss suffered, in the U.S. As a result, the torts alleged in the FAC against the institutional Swedish Defendants occurred in the U.S. as §1605(a)(5) demands. *See* **ante**, at 6.

Moreover, language in *In re Terrorist Attacks* substantially undermines the institutional

Swedish Defendants' construction of §1605(a)(5). For instance, in *In re Terrorist Attacks*, *all* of the conduct constituting the tort – "allegedly contributing financial and other resources to support Osama Bin Laden and al Qaeda[,]" *id*., at 116 (and not the September 11th attacks themselves) – was committed *abroad*. *Id*.

In explaining its decision, the Court in *In re Terrorist Attacks* did not rely on the fact that *any* of the conduct occurred outside U.S. jurisdiction, but that *none* occurred within it. *See id*., at 117 ("such allegations are not enough; *plaintiffs do not allege that the* [defendants at issue] *committed a single tortious act in the United States*") (emphasis added); *id*. ("[a]s *all of the tortious conduct allegedly committed* by the [defendants at issue] *occurred abroad*,[] plaintiffs' allegations cannot satisfy the noncommercial tort exception to the immunity conferred by the FSIA[]") (emphasis added).

Also, there is a dispute among the courts of appeal with respect to any "entire tort" doctrine. The Ninth Circuit has "rejected the rule that all the tortious conduct complained of must occur in the United States for the federal court to have jurisdiction under section 1605(a)(5)." *Risk v. Kingdom of Norw*ay, 707 F. Supp. 1159, 1164 (N.D. Cal. 1989), citing *Olsen by Sheldon v. Government of Mexico*, 729 F.2d 641, 646 (9th Cir. 1984), *abrogated on other grounds*, *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018 (9th Cir.1987). In *Olsen*, the Ninth Circuit held that "if plaintiffs allege at least one entire tort occurring in the United States" – which the FAC herein clearly has done, *see* **ante**, at 6 – they may claim under section 1605(a)(5)." 729 F.2d at 646. *Cf. Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 379 (7th Cir. 1985) (FSIA conferred immunity because the tortious act causing the injury occurred outside U.S.

jurisdiction).[5]

Panels within the D.C. Circuit have reached different conclusions on the issue. For example, in *Jerez v. Republic of Cuba*, 775 F.3d 419 (D.C. Cir. 2014), the Court reasoned that §1605(a)(5) would be satisfied if a defendant commenced a tortious course of conduct abroad, but completed a tortious act and caused a tortious injury within the U.S. *Id*., at 424. Thus, a foreign government could be sued in U.S. courts if one of its agents mailed an "anthrax package or bomb" from foreign soil to the United States, and the bomb caused an injury in the United States. *Id*. In contrast in *Doe v. Fed. Democratic Republic of Ethiopia*, 851 F.3d 7 (D.C. Cir. 2017), the Court found that FSIA immunity applied because a portion of the tortious conduct occurred abroad. *See also O'Bryan v. Holy See*, 556 F.3d 361, 382 (6th Cir. 2009) ("[i]n order to apply the tortious act exception to immunity under Foreign Sovereign Immunities Act (FSIA), the entire tort must occur in the United States").

Accordingly, regardless whether the "entire tort" doctrines applies in the manner asserted

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[5] The Court in *Olsen* provided a compelling policy rationale for rejecting an "entire tort" requirement:

> [b]y requiring every aspect of the tortious conduct to occur in the United States, a rule such as in [*Matter of SEDCO*, 543 F.Supp. 561, 567 (S.D.Tex.1982)] would encourage foreign states to allege that some tortious conduct occurred outside the United States. The foreign state would thus be able to establish immunity and diminish the rights of injured persons seeking recovery. Such a result contradicts the purpose of the FSIA, which is to "serve the interests of justice and . . . protect the rights of both foreign states and litigants in United States courts." 28 U.S.C. § 1602. The FSIA requires us to protect the rights of plaintiffs while respecting the sovereignty of foreign states.

729 F.2d at 646.

by the institutional Swedish Defendants, the FAC alleges torts and injuries that occurred within the U.S. for purposes of establishing §1605(a)(5)'s non-commercial tort exception.

C. ***The FAC Alleges Tortious Acts By the Swedish Defendants in the United States***

The Swedish Defendants' claims, at 5, that the FAC does not allege any "tortious act or omission" by them ignores the multiple acts set forth in the FAC describing the Defendants' relationships, corrupt conduct, acts in their official and personal capacities in furtherance of the RICO enterprise, participation in the conspiracies alleged, and Defendants' specific acts. *See* FAC, at ¶¶ 74, 87, 90-91, 119. *See also* **post**, at 22; Plaintiffs' Opp., at 7-10, 22-25, 29.

Also, the Swedish Defendants isolate certain paragraphs of the FAC as if they represent the only allegations against them. However, as noted in Plaintiffs' Opp., at 14, 22, the FAC must be viewed as a whole, thereby incorporating the full range of allegations noted above. In addition, the Swedish Defendants fail to confront the expansive nature of conspiratorial liability set forth in Plaintiffs' Opp., at 9, 27-30. Moreover, the Swedish Defendants' recasting, at 9-11, of the FAC to match their argument that certain causes of action are proscribed by §1605(a)(5)(B) is disingenuous and unavailing. The FAC alleges specific facts constituting the elements of distinct torts that are not listed within §1605(a)(5)(B). The Swedish Defendants cannot by their own device recraft those causes of action to their advantage.[6]

[6] Nor do the cases cited by the Swedish Defendants match the facts of this case. For example, in *Hilsenrath v. Swiss Confederation*, 402 Fed.Appx. 314 (9th Cir. 2010), a one-page summary Order from a *pro se* appeal, the plaintiff complained of the Swiss government's freezing of his assets during a criminal investigation, and not a wide-ranging criminal conspiracy contrived to destroy Plaintiffs. In *Khochinsky v. Republic of Poland*, 2019 WL 5789740, at *6 (D.D.C. November 6, 2019), all of the plaintiff's claims were based on the unsuccessful attempt to extradite him.

D. *The "Discretionary Function" Exemption in §1605(a)(5)(A) Does Not Apply*

The institutional Swedish Defendants contend, at 5-9, they are immune under FSIA's §1605(a)(5)(A), which removes from the non-commercial tort exception a foreign official's "exercise or performance or the failure to exercise or perform a discretionary function." The case law – whether interpreting that section, or 28 U.S.C. §2680(a) of the Federal Tort Claims Act ("FTCA"), which has served as a reference point for the "discretionary function" aspect of FSIA – establishes that "the discretionary function exemption shields decisions 'which involve a measure of policy judgment[.]'" *Morgan v. International Bank for Reconstruction and Development*, 752 F. Supp. 492, 495 (D.D.C. 1990), quoting *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 922 (D.C.Cir.1987) (other citation omitted). *See also Gonzalez v. United States*, 814 F.3d 1022, 1027 (9th Cir. 2016).[7]

Thus, as the Second Circuit has explained, "[a]n activity is considered discretionary if it involves 'an element of judgment or choice,' and 'the judgment or choice in question [is] grounded in considerations of public policy or susceptible to policy analysis.'" *USAA Cas. Ins. Co. v. Permanent Mission of Republic of Namibia*, 681 F.3d 103, 111-12 (2d Cir. 2012). *See also United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984); *Dalehite v. United States*, 346 U.S. 15, 36 (1953).

Again, the institutional Swedish Defendants avoid mentioning that "[t]he government bears the burden of demonstrating that the discretionary function exception applies." *Gonzalez*,

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[7] In *Morgan*, the Court determined that with respect to the questioning and temporary detention of an employee during an investigation into theft, the discretionary function exemption "shields international organizations from liability with respect to internal personnel actions." 752 F. Supp. at 495.

814 F.3d at 1027, citing *GATX/Airlog Co. v. United States*, 286 F.3d 1168, 1174 (9th Cir. 2002).

The inquiry into whether the discretionary function exemption applies consists of two steps. First, "[i]f the conduct involves an element of judgment," next "the court then determines 'whether that judgment is of the kind that the discretionary function exception was designed to shield.'" *Gonzalez*, 814 F.3d at 1027, quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). *See also United States v. Gaubert*, 499 U.S. 315, 322-23 (1991) ("even 'assuming the challenged conduct involves an element of judgment,' it remains to be decided 'whether that judgment is of the kind that the discretionary function exception was designed to shield'"), quoting *Berkovitz*, 486 U.S. at 536 (other citation omitted).

Thus, as the Supreme Court has cautioned in *Gaubert*, "when properly construed, the exception 'protects only governmental actions and decisions based on considerations of public policy.'" 499 U.S. at 323, quoting *Berkovitz*, 486 U.S. at 537.[8] Also, "the discretionary function exception immunizes only the conduct of agents exercising judgment within their lawful discretion." *Limone v. United States*, 497 F.Supp.2d 143, 203 (D. Mass. 2007). *See also de Jaray v. Attorney General of Canada*, 2017 WL 3721751, *4 (W.D. Wa. January 5, 2017).[9]

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[8] In his concurring opinion in *Gaubert*, Justice Scalia noted that "[t]he present case comes to us on a motion to dismiss." 499 U.S. at 338 (Scalia, J., *concurring*). Thus, "[l]acking any sort of factual record, we can do little more than speculate as to whether the officers here exercised policymaking responsibility with respect to the individual acts in question." *Id*. As a result, "[w]ithout more, the motion would have to be denied." *Id*. However, Justice Scalia concurred in the judgment because it was the private banks, and not the federal government, that committed the conduct of which the plaintiff complained, and the federal government's threat to assume control of the banks unless they implemented certain recommendations was inarguably a discretionary function manifesting public policy. *Id*.

[9] In *de Jaray*, the plaintiff's causes of actions were also barred by the restrictions on specific causes of action listed in §1605(a)(5)(B). 2017 WL 3721751, at *6.

Thus, the exemption is subject to limitations. As the Second Circuit recognized in *Huntress v. United States*, 810 Fed. App'x 74 (2d Cir. 2020), "[t]o be sure, . . . '[i]t is, of course, a tautology that a federal official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority.'" *Id*., at 77 (quoting the District Court opinion) (quoting *Myers & Myers, Inc. v. U.S. Postal Serv.*, 527 F.2d 1252, 1261 (2d Cir. 1975)).

In *Myers & Myers*, the Second Circuit articulated plaintiff's claim as arguing "that the Postal Service has acted in contravention of its own regulations, if not unconstitutionally, in denying appellants a hearing prior to debarment from government contracting." 527 F.2d at 1261. Accordingly, a government agency lacks "discretion to act in disregard of its own applicable regulations and of the Constitution." *Id*. Here, the institutional Swedish defendants acted, as set forth in the FAC, in contravention and disregard of their applicable regulations in their treatment of Plaintiffs. Their conduct thereby nullifies the discretionary function exemption.

Moreover, the discretionary function exemption surely does not cover criminal conduct, including the criminal conduct (such as attempted murder and racketeering) alleged in the FAC. *See Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1518 (9th Cir.1987) (alleged assault with deadly weapon and kidnapping and interrogation of protester not discretionary); *Liu v. Republic of China*, 642 F.Supp. 297, 305 (N.D.Cal.1986) ("planning and conducting the murder of Henry Liu could not have been a discretionary function as defined by the FSIA. Such an act is not one where 'there is room for policy judgment and decision'"); *Letelier v. Republic of Chile*, 488 F.Supp. 665, 673 (D.D.C.1980) (no discretion to order or aid in assassination). *See also Joseph v. Office of Consulate General of Nigeria*, 830 F.2d at 1026-27 (removal of property from and damage to leased premises not a discretionary function); *Risk v. Kingdom of Norw*ay, 707 F. Supp. 1159,

1165-66 (N.D. Cal. 1989).[10]

In addition, as the FAC alleges, at ¶¶ 171-181, *Finansinspektionen*'s issuance of licenses for entities that meet the formal criteria for approval and submit the application fee is a ministerial function and not a discretionary function. Nor does the Declaration of Eric Leijonram (ECF # 91) (or any other submission by the institutional Swedish Defendants) aver otherwise. Indeed, notably, the paragraphs in Mr. Leijonram's Declaration, ¶¶ 14-17, that set forth the licensing process do not use the term "discretion" or "discretionary function" at all. As such, Mr. Leijonram's Declaration sidesteps the relevant issues presented by §1605(a)(5)(A)'s "discretionary function" exemption.

Accordingly, none of the FSIA's provisions that would grant the Swedish Defendants immunity thereunder are applicable herein, or override the non-commercial tort exception in §1605(a)(5).

POINT II

DEFENDANTS WESTLING PALM AND THEDÉEN'S MOTION TO DISMISS THE FAC ON COMMON LAW IMMUNITY GROUNDS SHOULD BE DENIED

Defendants Westling Palm and Thedéen assert that the common law immunizes their conduct as government officials. *See* Swedish Defendants, at 11-13. However, Westling Palm and Thedéen cite only those allegations relating to their official roles directing *Skatteverket* and

[10] In *Risk*, the Court concluded that "[t]he decision to assist in the repatriation of a national is a decision of a different character and order than those held to be non-discretionary. A sovereign's issuance of travel document and funds to its citizens, and taking other actions in aid of its citizens' interests, are policy decisions, based on social, legal, and perhaps political considerations." 707 F. Supp. at 1166. Thus, the circumstances in *Risk* do not at all resemble those here.

Finansinspektionen, respectively. *Id*. In doing so, they completely ignore the other allegations in the FAC regarding their conduct in their personal capacities that they performed in order to conceal their own corruption and assist their co-defendants (all of whom were professional and personal associates for years) in the enterprise's affairs. *See* FAC, at ¶¶ 74, 87. Defendants Westling Palm's and Thedéen's purpose was to injure Plaintiffs in their business and property, and advance their own careers and financial position.

As the Court in *Moriah v. Bank of China, Ltd.*, 107 F. Supp.3d 272 (S.D.N.Y. 2015) stated, "Courts have consistently distinguished between official and private acts to determine immunity: 'a foreign official may assert immunity for official acts performed within the scope of his duty, but not for private acts where the officer purports to act as an individual and not as an official . . ." *Id*., at 277, quoting *Samantar v. Yousuf*, 699 F.3d 763, 775 (4th Cir. 2012) (after remand) (internal quotation marks omitted) (footnote omitted). *See also Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1106 (9th Cir. 1990) (recognizing that an individual is not "entitled to sovereign immunity for acts not committed in his official capacity" and explaining that where "the officer purports to act as an individual and not as an official, a suit directed against that action is not a suit against the sovereign") (internal quotation marks omitted); *Hilao v. Estate of Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation)*, 25 F.3d 1467, 1472 (9th Cir.1994) ("[i]mmunity is extended to an individual only when acting on behalf of the state because actions against those individuals are the practical equivalent of a suit against the sovereign directly" and that "[a] lawsuit against a foreign official acting outside the scope of his authority does not implicate any of the foreign diplomatic concerns involved in bringing suit against another government in United States courts") (internal quotation marks omitted).

Nor is there any impediment to the FAC alleging wrongdoing by Defendants Westling Palm and Thedéen in both their official and personal capacities. It is well-settled that "[u]nder Rule 8(e)(2) [Fed.R.Civ.P.], the plaintiff may allege alternate and inconsistent theories of liability and relief without being forced to select the single theory on which it bases recovery." *FDIC v. Bernstein*, 1990 WL 198738, at *8 (E.D.N.Y. November 2, 1990), citing *Balderman v. United States Veterans Admin.*, 870 F.2d 57, 62 (2d Cir.1989).[11]

In addition, absent from Defendant Westling Palm's and Thedéen's motion is any instruction from the U.S. government that such common law immunity should be conferred upon them. In *Samantar*, the Fourth Circuit concluded that "[t]he district court properly deferred to the State Department's position that Samantar be denied head-of-state immunity[]" because "[t]he State Department's determination regarding conduct-based immunity, by contrast, is not controlling, but it carries substantial weight in our analysis of the issue." 699 F.3d at 772-73.

The U.S. government's position was also decisive in *Matar v. Dichter*, 563 F.3d 9 (2009), cited by the Swedish Defendants, at 11, in which the Court noted that the U.S. Department of Justice had "filed a Statement of Interest in the district court specifically recognizing [the defendant's] entitlement to immunity and urging that appellants' suit 'be dismissed on immunity grounds.'" *Id*., at 14. Here, there has only been silence from the U.S. government. Thus, Defendants Westling Palm and Thedéen are not entitled to immunity for their actions in their personal capacities. Nor have either demonstrated that they merit the common law immunity they

[11] There exists a fundamental inconsistency in Defendants' positions – the institutional Swedish Defendants argue that the conduct alleged in the FAC is encompassed with the FSIA's discretionary function exemption, while Defendants Westling Palm and Thedéen seek immunity on the ground that even their personal unlawful conduct, which could not be considered part of any discretionary function, was committed in their official capacities.

seek for conduct performed in their official governmental roles.

POINT III

THE COURT POSSESSES PERSONAL JURISDICTION OVER THE SWEDISH DEFENDANTS

The Swedish Defendants' objections to personal jurisdiction, at 13-15 are essentially the same as those advanced by the other defendants in their previously submitted motions to dismiss (ECF #s 79 & 82). They are defeated for primarily the same reasons as set forth in Plaintiffs' Opp., at 5-13, including (1) that acts the Swedish Defendants committed were within New York or exerted an effect in New York, *see* FAC, at ¶¶ 307-09, 311-330, 331-32, 360-64, 385-89; (2) the extent of conspiratorial liability for acts both before and after joining (*see* Plaintiffs' Opp., at 9, 27-30); and (3) the jurisdictional provisions in Rule 4(k)(2), Fed.R.Civ.P., and 18 U.S.C. §1965(b). Plaintiffs' Opp., at 10-13. In that context, the Swedish Defendants conveniently ignore altogether the conduct by Defendant Palm in her communications with Plaintiff Carlström while he was in New York. *See* FAC, at ¶¶ 308-09, 331-32.

Also, in *Atlantica*, the Second Circuit noted (without deciding) that "the district court concluded that because the FSIA authorizes personal jurisdiction over a foreign state whenever it is not immune from suit, *see* 28 U.S.C. §1330(b), the conclusion that [the sovereign defendant] was not immune under the FSIA's commercial-activity exception also meant that the district court could exercise personal jurisdiction over SK Fund." 813 F.3d at 105, citing *Atlantica Holdings*, 2 F. Supp.3d 550, 559 n. 5 (S.D.N.Y. 2014).

Accordingly, as with the other Defendants, the Court possesses personal jurisdiction over the Swedish Defendants.

POINT IV

THE FAC STATES VALID CAUSES OF ACTION

The Swedish Defendants contend that the FAC does not state valid causes of action. As set forth in Plaintiffs Opp., at 13-31, as well as below, that argument must be rejected in all respects.

A. *Whether Plaintiff Corporations Have Authority to Sue Is Not Ripe for Adjudication*

The Swedish Defendants, at 16-17, argue that certain Plaintiff entities do not have the capacity to sue. However, that is not a viable ground for a motion to dismiss, which limits consideration to the four corners of the FAC, even if extraneous information disputes the FAC's version of events. *See Goel v. Bunge, Ltd.*, 820 F.3d 554, 558-59 (2d Cir. 2016). The two narrow exceptions to that strict limitation on what may considered at this juncture – documents "incorporated by reference [in] or otherwise integral to the complaint[,]" *Concord Assocs., L.P. v. Entm't Props. Tr.*, 817 F.3d 46, 51 n.2 (2d Cir. 2016), or documents susceptible to judicial notice if plaintiffs "rel[ied] on the documents in drafting the [c]omplaint[,]" *id*. – do not apply here.

The proper evaluation of a motion to dismiss is "not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985). Accordingly, the status of certain Plaintiff entities is not a subject ripe for consideration on a Rule 12(b)(6) motion to dismiss.

B. *The FAC Sufficiently States RICO and RICO Conspiracy Causes of Action*

The Swedish Defendants, at 17-19, challenge the FAC's RICO and RICO conspiracy causes of action. Again, their arguments must meet the same fate as those arguments by the other Defendants' motions to dismiss. For example, the FAC clearly alleges a domestic RICO injury, *see* Plaintiffs' Opp., at 26-28 (FAC, at ¶¶ 82, 107-111, 120, 131, 137, 164), clearly alleges a RICO

enterprise and the Swedish Defendants' membership and participation therein, *see id*., at 14-19 (FAC, at ¶¶ 27-29, 31-32, 34, 78-82, 87, 338-44), and clearly alleges the requisite predicate offenses. *Id*., at 19-25 (FAC, at ¶¶ 13-21, 119, 126, 140-41, 149-170, 171-81, 212, 344-46).[12]

In addition, as discussed in Plaintiffs' Opp., at 28-30, the FAC's RICO conspiracy cause of action survives regardless of the resolution of the motions with respect to the substantive RICO cause of action.

C. ***The FAC Sufficiently States a CFAA Claim***

For the same reasons set forth in Plaintifffs' Opp., at 30-31, the FAC states a CFAA claim against the Swedish Defendants as well. *See* FAC, at ¶¶ 331-33 (describing involvement of the Swedish Defendants).

D. ***The FAC Sufficiently States the New York State Common Law Claims***

The Swedish Defendants' challenges to the FAC's New York State common law claims, *see* Swedish Defendants, at 20-21, fail for the same reasons set forth in Plaintiffs' Opp., at 31. The issue of the Plaintiff Corporations' capacity to sue, *see* Swedish Defendants, at 16-17, is addressed **ante**, at 20.

POINT V

THE "ACT OF STATE" DOCTRINE DOES NOT APPLY TO THE SUBJECT MATTER OF THIS ACTION

The institutional Swedish Defendants also invoke the "act of state" doctrine in an attempt to immunize them from suit. *See* Swedish Defendants, at 22. As will be demonstrated below, the

[12] While the Swedish Defendants' assert that the various defendants did not share all the motives and objectives of the RICO enterprise, it is not necessary that all members of the RICO enterprise, or a conspiracy, share all the objectives and motives. *See* Plaintiffs' Opp., at 17-18.

"act of state" doctrine does not apply to the subject matter of this action, and even if it did, it would be premature to grant a Rule 12(b)(6), Fed.R.Civ.P., motion to dismiss on that ground.

The "act of state" doctrine provides that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897), quoted with approval in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1963). As a result, the doctrine cannot, and, in fact, does not protect the institutional Swedish Defendants from the acts that occurred *outside Sweden and/or in the U.S.* *See* FAC, at ¶¶ ¶¶ 307-09, 311-330, 331-32, 360-64, 385-89. *See also* **ante**, at 6.

Moreover, the "act of state" doctrine is limited to cases involving "sovereign activity effectuating 'public' rather than private interests." *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 406 (9th Cir. 1983). *See also International Association of Machinists and Aerospace Workers (IAM) v. OPEC*, 649 F.2d 1354, 1358, 1360 (9th Cir. 1981) ("a United States court will not adjudicate a politically sensitive dispute which would require the court to judge the legality of the sovereign act of a foreign state").

Thus, in *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979), a foreign sovereign's grant of patents did not qualify as "a considered policy decision by a government to give effect to its political and public interests . . .," 595 F.2d at 1294, and therefore was "not the type of sovereign activity that would be of substantial concern to the executive branch in its conduct of international affairs." *Id*. *See also Clayco*, 712 F.2d at 406-07.[13]

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[13] In *Clayco*, the Court dismissed on "act of state" grounds for reasons dramatically different than those present here: because the act in question – the award of an offshore oil concession challenged on antitrust grounds – was "adjudication [by a U.S. court that] would interfere with United States foreign policy[,]" and because "judicial scrutiny of sovereign decisions allocating the benefits of oil development would embarrass the political branches of

In *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir.1976), the Ninth Circuit, quoting from the Restatement (Second) of Foreign Relations Law of the United States, explained that:

> [a]n "act of state" as the term is used in this Title involves the public interest of a state as a state, as distinct from its interest in providing the means of adjudicating disputes or claims that arise within its territory. . . . A judgment of a court may be an act of state. Usually it is not, because it involves the interests of private litigants or because court adjudication is not the usual way in which the state exercises its jurisdiction to give effect to public interests.

Id., at 608 (quoting the Restatement at comment "d," page 127). See also Liu v. Republic of China, 642 F.Supp. 297, 302-03 (N.D.Cal.1986) (refusing to dismiss because resolution of case need not necessarily involve inquiry into the national security and intelligence affairs of the Republic of China).

Here, the acts committed by the institutional Swedish Defendants do not meet that criteria for classification as acts protected by the "act of state" doctrine. They were instead related to private parties – Plaintiffs herein – and not affairs of state or otherwise "public" interests as the doctrine has required. *See also Garcia v. Chase Manhattan Bank, N.A.*, 735 F.2d 645, 651 (2d Cir. 1984), quoting *Texas Trading & Mill. Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981) ("[a]ct of state analysis depends upon a careful case-by-case analysis of the extent to which the separation of powers concerns on which the doctrine is based are implicated by the action before the court"), *overruled on other grounds by Frontera Res. Azerbaijan Corp. v. State Oil Co.*

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our government in the conduct of foreign policy." 712 F.2d at 407.

of Azerbaijan Republic, 582 F.3d 393 (2d Cir. 2009).[14]

Simply because the Defendants are institutions of a foreign government does not, *per se*, act as a shield for their tortious conduct. As alleged in the FAC, those institutional Swedish Defendants used those institutions to harm Plaintiffs for their own interest and benefit. The "act of state" doctrine does not protect them from such conduct.

In addition, unlike disposition of FSIA immunity issues, the "act of state" doctrine "is not jurisdictional, . . . nor is its observance mandated by the Constitution." *DeRoburt v. Gannett Co., Inc.*, 733 F.2d 701, 702-03 (9th Cir. 1984). *See also Liu*, 642 F. Supp. at 300. Consequently, in *Liu*, the Court deferred decision on the "act of state" challenge until the summary judgment stage of the case. 642 F. Supp. at 303.

Accordingly, either the "act of state" doctrine does not apply to the conduct alleged in the FAC, and/or resolution of any such claim by the institutional Swedish Defendants should await a later stage in the case.

POINT VI

DEFENDANTS' MOTION TO DISMISS ON GROUNDS OF FORUM NON CONVENIENS SHOULD BE DENIED

Like the issues raised in POINTs II and III, the Swedish Defendants' motion based on *forum non conveniens* suffers from the same defects as the other Defendants' motions in that regard. *See* Swedish Defendants, at 22-25. It ignores the prevailing law and standards, as well as Plaintiff Brune's continued residence in New York, Plaintiff Carlström's New York residence by

[14] In *Texas Trading and Milling Corp.*, the Court also noted that, unlike in other cases the U.S. "executive branch has not stated its views in these cases regarding either the propriety of applying the act of state doctrine." 647 F.2d at 316 n.38. Here, too, there has been only silence from the U.S. government.

necessity since mid-2019, and the restrictions Carlström's pending asylum petition impose on him – requiring that he remain in the U.S. until his asylum application is decided. *See* Plaintiffs' Opp., at 31-35.[15]

Conclusion

Accordingly, for all the reasons set forth above, as well as in Plaintiffs's opposition to the other Defendants' motions to dismiss as referenced herein, it is respectfully submitted that the Swedish Defendants' motion to dismiss should be denied in its entirety.

Dated: 11 September 2020
New York, New York

Respectfully submitted,

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[15] The decision in *Online Payment Sols. v. Svenska Handelsbanken*, 638 F.Supp.2d 375 (S.D.N.Y. 2009), *see* Swedish Defendants, at 23-24, is easily distinguishable because in that case, in complete contrast to the facts herein, the Court, in determining deference to plaintiff's choice of forum, noted that the "the real party in interest" on plaintiff's side was a British corporation. *Id*., at 380.