

**CASE BEING CONSIDERED FOR TREATMENT
PURSUANT TO RULE 34(j) OF THE GENERAL RULES**

No. 02-7006

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

Mel J. Hill, *et al.*,

Plaintiffs-Appellees,

Jack Frazier, *et al.*,

Plaintiffs -Appellants,

v.

**Republic of Iraq and Saddam Hussein, In his official capacity as President of
the Republic of Iraq, c/o Ministry of Foreign Affairs, Baghdad, Republic of Iraq,**

Defendants-Appellees.

**On Appeal from the United States District Court
for the District of Columbia**

BRIEF OF APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici.

The appellants are Apostolos (“Paul”) Eliopoulos, Jack Frazier, Rev. Virgil M. Graham, Charles Joseph Kolb, David Morris and Bill F. Rodebush, all of whom were plaintiffs in the district court. There are a total of 178 plaintiffs who appeared before the district court, including the six plaintiff-appellants. For the Court’s convenience, a list of all of the plaintiffs is attached hereto at Tab A. The defendant-appellees are the Republic Of Iraq and Saddam Hussein, in his official capacity as President of the Republic of Iraq, both of which were defendants in the district court. There were no *amici* or intervenors in the district court and there are none in this Court.

B. Rulings Under Review.

The rulings under review are the Judgments entered on behalf of each of the six plaintiff-appellants, all filed on December 5, 2001 (including the Decision and Order (per Judge Thomas Penfield Jackson), filed on December 5, 2001) and amended on June 28, 2002, insofar as those judgments deny their economic loss claims. The Judgments can be found in the Appendix at A64-70, the Amended Judgments can be found in the Appendix at A73-78, and the Decision and Order, which is reported at 175 F. Supp. 2d 36, can be found in the Appendix at A42-63.

C. Related Cases.

The case on review has not previously been before any court other than the district court.

The case of *Vine v. Republic of Iraq*, Case No. 01 CV 2674 (TPJ) (D.D.C.), is a related civil action in which 135 other plaintiffs, on behalf of themselves and a class of similarly situated individuals, are seeking money damages against the Republic of Iraq and Saddam Hussein for personal injuries resulting from acts of hostage taking and false imprisonment following the Iraqi

invasion of Kuwait on August 2, 1990 – the same acts which form the plaintiffs of complaints in this action. The complaint in *Vine* was originally filed on December 27, 2001. An amended complaint was filed on March 7, 2002. Plaintiffs in *Vine* are still in the process of attempting to complete service of process.

The case of *Frazier v. Secretary of the Treasury*, Case No. 02 CV 7642 (S.D.N.Y.), is a related legal proceeding in which 11 of the plaintiffs in this action, including the six plaintiff-appellants, have filed a Petition for Issuance of Writ of Execution and Turnover Order against Secretary of the Treasury Paul H. O'Neill and J.P. Morgan Chase Bank, seeking to compel J.P. Morgan Chase Bank to turnover funds held in accounts belonging to the Government of Iraq in satisfaction of the judgments entered in their favor by the district court in this action. The Petition in *Frazier* was filed on September 23, 2002.

There are no other known related cases before any other United States court of appeals or any other court in the District of Columbia.

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GLOSSARY

“FSIA”:	refers to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 <i>et. seq.</i>
“human shield”:	refers to U.S. citizens and nationals of other western countries who, following the Iraqi invasion of Kuwait on August 2, 1990, were deployed by Iraq at military installations and other strategic sites for purposes of deterring allied aerial bombardment.
“human shield policy”:	refers to the policy of the Iraqi Government pursuant to which U.S. citizens and nationals of other western countries were detained in Iraq and Kuwait following the Iraqi invasion of that country for purposes of extracting a commitment from the United States and its coalition allies to refrain from using armed force to liberate Kuwait.
“Iraq”	refers to the Republic of Iraq.
“Kuwait”	refers to the State of Kuwait.
“post-traumatic stress disorder”:	refers to a psychiatric disorder that can occur following the experience of traumatic and life-threatening events and which typically includes symptoms such as anxiety, flashbacks, exaggerated startle reactions, nightmares, insomnia, detachment and depression.
“PTSD	refers to post-traumatic stress disorder.
“state-sponsored terrorism exception”:	refers to the exception to sovereign immunity that is set forth in 28 U.S.C. § 1605(a)(7) and that applies when U.S. citizens suffer personal injury or death as a result of certain acts of terrorism, including hostage-taking, that are engaged in by a foreign states that has been designated as “a state-sponsor of terrorism.

STATUTES AND REGULATIONS

This case involves the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602, *et seq.*

The relevant provisions are set forth in the statutory appendix, attached hereto at Tab B.

STATEMENT OF JURISDICTION

Jurisdiction in the district court was predicated upon the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* (“FSIA”), which confers upon the district courts original jurisdiction in “any nonjury civil action against a foreign state . . . as to any claim for relief *in personam* with respect to which the foreign state is not entitled to immunity under sections 1605-1607 of this title.” 28 U.S.C. § 1330(a). The exception to immunity applicable in this case is set forth in § 1605(a)(7) – the “state-sponsored terrorism exception” – which provides, in pertinent part, that a foreign state shall not be entitled to immunity in any case in which:

money damages are sought against a foreign state for personal injury or death that was caused by an act of . . . hostage taking . . . if such act . . . is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment or agency . . .

28 U.S.C. § 1605(a)(7).

It is a matter of public record that, following the Iraqi invasion of Kuwait on August 2, 1990, the Iraqi regime detained American citizens who were then present in Iraq or Kuwait against their will as bargaining chips for the purpose of extracting concessions from the United States and its coalition allies. A42, A91-92, A321 & A357-58. The evidence before the district court established that the six plaintiff-appellants were among the American citizens who were detained by Iraq pursuant to that policy. Thus, as the district court held, they “were ‘hostages’ within the meaning of the FSIA” and, hence, jurisdiction over this action exists under the FSIA. A57.

Upon the direction of the district court, the clerk of the court entered judgments in favor of each of the six plaintiff-appellants on December 5, 2001. Within 30 days of the entry of those judgments, on January 3, 2001, plaintiff-appellants filed a joint notice of appeal in the district court. In an Order, filed on January 24, 2002, this Court directed plaintiff-appellants to show cause why the appeal should not be dismissed due to the lack of a final appealable order.¹ In response to that Order, plaintiff-appellants moved this Court: (a) to grant leave to the district court to enter final judgments in their favor in conformity with Fed. R. Civ. P. 54(b); and (b) to hold their appeals in abeyance pending the entry of such final judgments. In an Order, filed on March 13, 2002, this Court granted plaintiff-appellants' motion, ordering that the "appeal shall be held in abeyance pending appellants' filing of, and the district court's resolution of, a request for entry of final judgments complying with Fed. R. Civ. P. 54(b)." Subsequently, on June 28, 2002, the district court entered amended final judgments in accordance with Fed. R. Civ. P. 54(b) on behalf of each of the plaintiff-appellants – "*Nunc pro tunc* to 12/5/2001." A71-78. Accordingly, this Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred in requiring the plaintiff-appellants to establish their right to relief by a preponderance of the evidence in order to obtain a default judgment under 28 U.S.C. § 1608(e)?

2. Whether the district court erred in finding that each of the plaintiff-appellants failed to establish the causation element of their economic loss claims by satisfactory evidence in accordance with 28 U.S.C. § 1608(e)?

¹ The Court entered its show cause order because, when directing the clerk of the court to enter judgments in plaintiffs' favor, the district court failed to make the "express determination" required by Fed. R. Civ. P. 54(b) – that is, the district court did not recite the words "there is no just reason for delay."

STATEMENT OF THE CASE

Plaintiff-appellants are six of 178 plaintiffs who have brought this action against the Republic of Iraq (“Iraq”) and its President, Saddam Hussein (“Saddam”), for money damages resulting from acts of hostage taking and false imprisonment following the Iraqi invasion of the State of Kuwait (“Kuwait”) on August 2, 1990.

On December 15, 1999, plaintiff Mel J. Hill and nine other American citizens filed the original complaint in this case on behalf of themselves and a class of similarly situated American citizens who were held hostage in Iraq and/or Kuwait following the Iraqi invasion of Kuwait on August 2, 1990. The district court subsequently denied plaintiffs’ motion for class certification, but permitted 168 other plaintiffs to join the action pursuant to Fed. R. Civ. P. 15 and 20(a). A43 & A45. As the defendants failed to plead or otherwise to defend this action after having been properly served in accordance with 28 U.S.C. § 1608(a), the Clerk of the Court declared them in default on January 16, 2001. A43-44. Subsequently, the district court held an evidentiary hearing from October 9-12, 2001, at which it heard oral testimony in support of the claims of eleven of the plaintiffs in this case, including the six plaintiffs who have filed this appeal. A79-317.

On December 5, 2001, the district court issued a Decision and Order in this case, in which it made factual findings pursuant to Fed. R. Civ. P. 52(a), and found that each of the eleven testifying plaintiffs had established his or her right to relief by satisfactory evidence in accordance with 28 U.S.C. § 1608(e). A44 & A57-61. The district court awarded each of the eleven plaintiffs damages for pain and suffering in amounts ranging from \$136,000 to \$1,749,000 (A62-63), but rejected the economic loss claims of each of the six plaintiff-appellants on the ground that they were “too speculative.” A60.

STATEMENT OF FACTS

A. Iraq's "Human Shield" Policy.

On August 2, 1990, at the directive of its President, defendant Saddam Hussein, Iraq's armed forces invaded Kuwait, expelled the existing Kuwaiti government, and seized control of the country. Immediately thereafter, Saddam issued an order forbidding foreign nationals, including hundreds of American citizens located in both Kuwait and Iraq, from leaving these countries. Pursuant to this directive, all American citizens in both Iraq and Kuwait were denied access to their passports, refused exit visas, and precluded from leaving by roadblocks that were set up throughout Baghdad and Kuwait City. A42-44, A91-92 & A357-58. Thus, began Saddam's "human shield" policy pursuant to which U.S. citizens and nationals of other western countries were detained in Iraq and Kuwait as his "guests" while he sought to secure a commitment from the United States and its allies to refrain from using armed force to liberate Kuwait. *Id.* & A321.

Commencing on the day of the invasion itself, Iraqi military forces began taking American citizens and other western nationals into custody, confining them in detention centers and hotels and, subsequently, dispersing them to military installations and other strategic sites throughout Iraq, where they were deployed as "human shields" to deter an allied aerial bombardment. A92-93, A268-69, A274, A289-90, A296 & A357-58. Approximately two weeks after the invasion, in mid-August, Saddam issued an order instructing his security forces to seize all American citizens in Kuwait and Iraq who had not already been taken into custody. A358. By early September, more than 100 Americans citizens had been rounded up by Iraqi soldiers and forced to serve as "human shields." Secretary of State James Baker, *Why America is in the Gulf*, Address Before the Los Angeles World Affairs Council (Oct. 29, 1990), *in U.S.*

Dept. of State Dispatch at 7 (Nov. 5, 1990). Many other Americans avoided capture by taking refuge at the U.S. Embassy in Kuwait and diplomatic properties in Iraq, where they were confined for the duration of the crisis. A92, A236-37 & A256.

Within days of Saddam's new edict, on August 20, 1990, President George Herbert Walker Bush declared that:

[W]hen Saddam Hussein specifically offers to trade the freedoms of those citizens of many nations he holds against their will in return for concessions, there can be little doubt that whatever these innocent people are called, they are, in fact, hostages. And I want there to be no misunderstanding. I will hold the Government of Iraq responsible for the safety and well-being of American citizens held against their will.

A321. The view that all of the American citizens trapped in Iraq and Kuwait were hostages was universally shared within the Bush administration and the State Department. A96-100.

At the same time that President Bush was demanding the release of all American hostages in Iraq and Kuwait, the Baghdad regime announced that it did not recognize the diplomatic status of foreign embassies in Kuwait and ordered that those embassies, including the U.S. Embassy, be shut down. A255-56. As a result of this order, U.S. diplomatic personnel and their dependents were forced to depart for Baghdad – leaving behind a skeleton staff of caretaker diplomats and several dozen frightened civilians. A256-57. At the same time, Iraqi security forces took up positions around the perimeter of the Embassy, cut off water and electrical lines and prohibited anyone from entering or leaving the grounds. A257-58 & A358.

On August 31, 1990, Saddam issued an order authorizing the release of all American women and children who had been detained in Iraq and Kuwait. A92 & A359. In conjunction with that order, Saddam promised to free all American male hostages in exchange for a U.S. promise not to attack Iraq. A359. The United States refused to accept Saddam's terms, demanding the unconditional release of all American citizens in Iraq and Kuwait.

During the next three months, Saddam issued a series of orders authorizing the release of small groups of American citizens, principally on medical and “humanitarian” grounds. A192 & 359. The crisis came to an end in mid-December 1990, when, pursuant to yet another of Saddam’s orders, the remaining American hostages – approximately 400 in number – were liberated from their holding facilities in Iraq and Kuwait, transported to airports and flown out of the country. A359.

B. The Hostage Experiences Of The Plaintiff-Appellants

Jack Frazier and David Morris. At the time of the invasion of Kuwait, Mr. Frazier and Mr. Morris (then ages 53 and 48, respectively) were working in Iraq for Bechtel Corp. as managers on a petroleum project. A144-45 & A235. Over the next two weeks, the situation on the streets “grew increasingly and incredibly tense.” A235. Trapped in Baghdad, they spent the next two weeks laying low in their hotel rooms and at their offices. A148 & A235-36.

On the evening of August 18, Bechtel officials notified Mr. Frazier and Mr. Morris that Iraqi authorities were rounding up western nationals for use as “human shields.” A150 & A236. Shortly after midnight, they made their way to the Residence of the U.S. Ambassador. *Id.* As Mr. Frazier, who had mild diabetic and heart conditions at the time, was walking out of the hotel to an awaiting cab, a hotel security guard grabbed a bag he was carrying that contained his medication. A150.

Both Mr. Frazier and Mr. Morris were confined in the Ambassador’s residence for the remainder of their captivity. Iraqi soldiers guarded the front and rear entrances of the residence 24 hours a day. A151 & A236-37. During the first two weeks, the scene at the residence was chaotic with several dozen American citizens crowded into the four-bedroom house. A151-52. Mr. Morris slept on the floor under the dining room table. A238. Tensions inside the house

gradually mounted until September 1 when, while heeding an Iraqi instruction to escort their wives to a government office to pick up their exit visas, four of the male hostages were arrested by Iraqi police and taken to unknown destinations. A154 & A239. From that point on, the atmosphere inside the residence became a tinderbox of emotion and frayed nerves, as the remaining hostages struggled to retain their composure, their morale and, in some cases, their sanity. A153 & A239.

The unrelenting tension and stress took a similar toll on the psyches of Mr. Morris and Mr. Frazier. Both lived in a state of constant fear of being forcibly relocated to a strategic site, executed by Iraqi soldiers or angry mobs, or killed by errant bombs as the residence was located by a major bridge and as surface-to-air missile installations had been positioned in the immediate vicinity. A154-56, A237 & A240. Both found it impossible to sleep for more than two to four hours a night and were frequently awakened by nightmares. A159 & A240. Both described themselves as experiencing a “roller-coaster” of emotion, which caused them to lose any hope that they would ever make it out of Iraq alive. A155, A157-58 & A239-40.

One day, about a month after his arrival, Mr. Frazier awoke to find that he could no longer see out of his right eye. A160-61. As his physicians later confirmed, his loss of vision in that eye was a direct result of being without diabetic medication. A362, A371 & A373. He spent the remainder of his confinement living with the risk of becoming permanently blind in both eyes. A162. Fortunately, before that could happen, Saddam ordered his release on medical grounds and, pursuant to that order, he departed Iraq on October 23, 1990. A156 & A165. Mr. Morris remained at the residence for six additional weeks until he was finally released on December 11. A240. On the flight out of Iraq, he found himself shaking and crying uncontrollably. A241.

Bill F. Rodebush. In the summer of 1990, Mr. Rodebush was 52 years of age and working in Kuwait at an oil rig site near the Iraqi border, where he served as a field supervisor for Dresser Industries. A267. Early in the morning of August 2, he awoke to find invading Iraqi troops and tanks surrounding the area. A268. Along with about 50 other workers, Mr. Rodebush was taken into Iraqi custody and robbed at gunpoint. A268-69. He was then loaded onto a bus and driven to a P.O.W. camp north of Basra, Iraq, where he was packed into a putrid warehouse with approximately 200 other prisoners, who stood “elbow to elbow” in sweltering desert heat. A269-70. After about eight hours, he was transported to a military compound, where he was forced to sleep on the floor of a small cell with 13 other hostages. A271. Throughout the night, he could hear the screams of one of the prisoners, who was being held outside in a cage wearing nothing but his underwear. A271. Subsequently, on August 4, he was taken to a military airport outside Basra, flown to Baghdad and brought to a hotel, where he spent the next 13 days confined to his room and, later, to a single floor. A272-73.

On August 16, Mr. Rodebush was loaded onto a bus with 36 other American citizens and transported to Al Qaim, where he was held as a “human shield” at a phosphate plant that was surrounded by a ten-foot high fence and guarded by Iraqi tanks. A274. There, he was detained in abandoned, dilapidated and filthy quarters, which reeked of human waste and rotting garbage and which were infested with vermin and countless ants, roaches, flies and mosquitoes. A275 & A296. On August 29, he was relocated to a missile factory just north of Baghdad, where he was detained for the next five weeks. A276 & A279. Conditions at the factory were much the same as at Al Qaim: cramped, unsanitary and infested with insects and scorpions, including one that he found in his bed. A276-79 & A278. On about October 1, Mr. Rodebush was moved south of Baghdad to another missile factory, where he was held in foul-smelling claustrophobic quarters

with loud noise blasting around-the-clock. A278. After about one week, he was transported to a nearby munitions factory, where he was detained for the last two months of the crisis under similarly wretched conditions and was forced to sleep on a steel cot without a mattress or sheet. A279-80.

As the physical conditions around him continued to deteriorate so too did his own emotional and physical well-being. Overwhelmed by the stress, his body shook so convulsively at times that he could not even write his name. A273, A277 & A279. He found it impossible to sleep for more than two or three hours at night and was, thus, continuously fatigued. A280. Forced to eat food that was cooked atop a toilet and that was barely edible at best, he was stricken with amoebic dysentery that gave him constant diarrhea and painful stomachaches. A277-81. He also suffered from intense back pain, headaches, a pinched nerve in his leg and “foot-drop due to trauma.” *Id.* By the time Mr. Rodebush was released on December 9, he had lost 17 pounds and his hair had gone white. A281. Upon arriving in the United States, he learned that his wife had become seriously ill and that his mother had suffered a severe stroke from which she would soon lose her life. *Id.*

Apostolos (“Paul”) Eliopoulos. At the time of the Iraqi invasion, Mr. Eliopoulos was 38 years old and living with his family in a suburb of Kuwait City, where he ran Arthur Andersen’s local consulting practice. A287-89. On the morning of August 2, 1990, Mr. Eliopoulos was home alone, as his wife and children were vacationing in Greece. A289. He secluded himself in his house until August 4, when he and two other westerners drove into the city in order to replenish their supplies of food and petrol. A289. Upon stopping at a checkpoint, they were forced from their car by Iraqi soldiers, who held them at gunpoint while their position came under heavy fire from Kuwaiti forces. *Id.* As Mr. Eliopoulos crouched close to the ground to

avoid the crossfire, he witnessed an Iraqi soldier execute a Kuwaiti soldier directly opposite him. A290.

When the fighting stopped, the Iraqi soldiers loaded Mr. Eliopoulos and his companions into a pick-up truck and drove them to the Kuwaiti Ministry of Defense. *Id.* While he waited in a locked room, Mr. Eliopoulos heard the screams of several Kuwaiti nationals as they were taken out one-by-one for interrogation, watched as they returned with their faces disfigured and their clothing soiled, and waited his turn to be tortured. A290-91. After a sleepless night, Mr. Eliopoulos and several other hostages were transported by truck to the Iraqi border. A291-92. En route, one of the guards, who was visibly aroused, leered at and sat next to him, fondling his face. *Id.* Mr. Eliopoulos was convinced that he was going to be raped, but fortunately the truck stopped and several soldiers approached, causing the guard to back off. A292.

Upon reaching the border, Mr. Eliopoulos demanded to speak with an officer. *Id.* Annoyed with his efforts, one of his Iraqi guards shoved the butt of his AK-47 into his face, bloodying his nose and breaking his glasses. *Id.* The soldiers then ordered Mr. Eliopoulos and the other hostages to line themselves up in front of a wall, leading him to believe that they were about to be shot. *Id.* Instead, they were packed into a minivan and driven into Iraq. At one point, the van stopped and a Kuwaiti man was ordered out by the Iraqi soldiers who then shot him, leaving his body on the side of the road as they drove away. A292-93.

The soldiers unloaded the van at a P.O.W. camp near Basra and locked Mr. Eliopoulos in a low-ceilinged cinderblock building, which was so overcrowded that the prisoners touched each other as they slept side-by-side on the earthen floor. A293-94. The next day, he was taken to a military installation, where he was interrogated and had his first drink of water in nearly 48 hours. A293. On August 7, he was taken to the to a hotel in Baghdad and detained there for the

next ten days. A294. On August 16, Iraqi soldiers informed Mr. Eliopoulos and two other hostages that they were being moved. A295. Convinced that they were to be executed, they all began to pray and one of them asked Mr. Eliopoulos to take his confession. A296.

The next day, Mr. Eliopoulos was taken, along with Mr. Rodebush and 35 other American hostages, to the phosphate plant in Al-Qaim. After three days, he was transported to a hydroelectric plant outside Beiji, where he was detained for just over one week. A297. At the end of August, he was separated from the other Americans and moved to an abandoned laboratory in a nearby urea plant, where he was detained for more than three months. A298-99. During that entire period, he and the others held with him were forced to breathe toxic urea dust and to smell the odor of urine that permeated the inside of the plant. A298.

During these three months, Mr. Eliopoulos' emotional and physical state spiraled downward, as he suffered from bleeding hemorrhoids, a fungal infection that caused bleeding in his groin and painful back spasms. A298-99. After being given antibiotics to treat the fungal infection, he shook like a leaf for a two-week period and thought he was going to die. A299. Owing to the lack of hygiene and a meager and inedible diet consisting mainly of rice, stale bread and rancid meat, he suffered from such a severe case of dysentery that he frequently soiled himself while sitting or lying down and lost approximately 30 pounds. A297-99. He kept his sanity and composure only by freezing out all thought of his wife and family and making himself totally numb to the world. A298.

On December 7, Mr. Eliopoulos was taken to Baghdad and reunited with his wife, who had flown to Iraq to meet him. When she saw him for the first time, he was thin, pale as a ghost, and so shell-shocked that he did not even react. A301-02. Four days later, they were allowed to fly out of the country together. A302.

Charles Joseph Kolb. On August 2, 1990, Mr. Kolb was 29 years old and living and working in Baghdad as a language instructor for the U.S. Information Agency. A199-200. Upon learning of the invasion of Kuwait and the subsequent seizure of American citizens, he secluded himself in his home and office as much as possible in an effort to avoid attracting the attention of the Iraqi authorities. A201-03.

On August 28, Mr. Kolb was captured by Iraqi secret police. A204-05. After being held overnight at a hotel, he was loaded onto a bus with approximately 20 other western civilians and transported across the desert, with no idea of his destination and terrified of the fate that awaited him. A205-06. Over the next 104 days, Mr. Kolb was detained as a “human shield” at the Dohra Oil Refinery outside Bagdad and subsequently at two other strategic sites near Kirkuk – one a mysterious location in the middle of the desert and the other a gas refinery. A206-26. At each of these sites, he was forced to endure harsh conditions of detention: cramped living quarters (A215 & A218), which were infested with snakes, rodents and/or insects (A220-21); exposure to extreme heat (A216); unsanitary bathrooms with toilets that were just holes in the ground (A218-19); and meager rations consisting mainly of bread and rice. A216 & A221.

Approximately three weeks after his arrest, in mid-September, an Iraqi guard locked Mr. Kolb into a trailer and started masturbating in front of him. A211-12. He then undid Mr. Kolb’s shirt and pants, groped at him, rubbed himself against him and otherwise sexually assaulted him for a period of about 20 to 30 minutes until interrupted by another guard. *Id.* Living under such difficult, stressful and degrading conditions took a heavy emotional toll on Mr. Kolb and his fellow hostages, one of whom appeared to be losing his mind. A223. Mr. Kolb wondered whether he might suffer a similar fate and was overcome by feelings of anxiety, fear, loneliness and depression. A211, A217 & A222-24. His confinement also took a physical toll as he was

plagued by constant diarrhea (A228), developed a leg problem for which he required a cane, and lost 20 percent of his body weight as he dropped from 135 to 110 pounds. A224-28.

Finally, on approximately December 11, 1990, Mr. Kolb was transported to Baghdad, where he was forced to remain at a hotel for one week, until he was able to secure an exit visa and allowed to leave the country. A225-27.

Rev. Virgil Maurice Graham. On August 2, 1990, Rev. Graham was living with his wife and his 13 and 10 year-old sons in the parsonage at the Evangelical Church in Kuwait City, where he served as minister. A251. On four separate occasions that day, small bands of Iraqi troops burst into their home, brandishing weapons, barking out orders and terrifying the children. A252-53. On the third of these incursions, one soldier held Rev. Graham downstairs at gunpoint, while three others went upstairs. A253. Upon finding the rest of the family, one of them sexually assaulted Mrs. Graham, fondling her breast as her sons looked on in abject horror. A252.

Fearing for their lives, the Graham family abandoned their house and, with the war raging on around them, drove across town to the American consul's home. A254. They hid in the consul's house for the next five days, rationing food among some two-dozen people who had taken refuge there. A254-55. The atmosphere in the house was extremely tense and Rev. Graham lived in fear that he and his family would be captured by Iraqi forces and either killed or forced to serve as "human shields." A255.

On August 7, the Grahams made their way to the U.S. Embassy compound, joining roughly 150 other Americans who had sought sanctuary within its gates. A256. They were forced to share cramped quarters in an office trailer, where they slept on the floor without mattresses or bedding. *Id.* Throughout their confinement, they lived in a state of constant

anxiety and fear, knowing that Iraqi forces might storm the compound at any moment. A256-58. Following the evacuation of the diplomatic staff and the sealing of the compound on August 24, conditions inside became increasingly intolerable. With their water and electrical lines cut, the remaining hostages could get no relief from temperatures that reached 130 degrees and were forced to erect a makeshift latrine. *Id.* Their supplies of perishable food quickly spoiled and they were forced to survive on a monotonous diet consisting of rice and canned tuna for every meal. A258. Rev. Graham's one saving grace came in mid-September, when Iraqi authorities allowed his wife and children to leave Kuwait on an evacuation flight. A257.

Following their departure, the situation within the compound continued to deteriorate. It became more and more difficult for the hostages to maintain hygiene and they were forced to decontaminate their limited supply of stored water with Clorox. A258. In early October, Iraqi troops positioned two large canisters of what appeared to contain poison gas in front of the Embassy. A257-58. At about the same time, Rev. Graham was informed that U.S. special forces were planning to conduct a rescue mission and that many of the hostages would not survive, whereupon he recorded a tearful good-bye tape to his family. A257. As the weeks wore on and it appeared increasingly less likely that he would ever see his wife and children again, Rev. Graham fell into a state of utter depression and despair. A258-59.

On December 9, Iraqi security forces unbolted the gates to the Embassy and bused its occupants to a military airport on the edge of Kuwait City. A260. Upon their arrival, Iraqi soldiers ushered them into an airport hangar, closing the doors behind them. For the next several minutes, Rev. Graham waited in terror, imagining that he was about to be gassed to death. *Id.* Instead, the back door of the hangar was opened and the hostages were permitted to board an awaiting plane and fly to freedom. *Id.*

C. The Long-Term Consequences Of Plaintiff-Appellants' Experience As Hostages.

Following their release from captivity, the plaintiff-appellants found the adjustment to normal life extremely difficult. All have suffered from post-traumatic stress disorder (“PTSD”) with symptoms that have included depression, guilt, anxiety, panic attacks, flashbacks, exaggerated responses to unexpected or loud noises, insomnia and nightmares. *See infra* pp. 29-39. They have experienced difficulties with concentration and memory, problems with anger and intimacy, including, in some cases sexual dysfunction, and an obsessive preoccupation with the episode. *Id.* While the precise mix of symptoms and their intensity vary among the six plaintiff-appellants, they all continue to be plagued by painful recollections of an experience that continues to have a profound and disturbing impact on each of their lives. *Id.*

In particular, the psychological fallout from their hostage-taking ordeals has caused all six of the plaintiff-appellants to experience problems in their working lives. *Id.* In the case of Mr. Morris, the psychological damage he suffered was so severe that, immediately upon his return to the United States, he was forced to abandon his career and has been declared permanently disabled by the Social Security Administration. *Id.* at 20. Four of the other plaintiff-appellants – Messrs. Eliopolous, Rodebush, Kolb and Graham – found themselves emotionally unable to return to the Middle East or other unstable regions of the globe and, as a result, were forced to give up more lucrative career opportunities. *Id.* at 20-21. Finally, Mr. Frazier was released from captivity only to find that his diabetic condition had been severely aggravated during his confinement. *Id.* at 31. For nearly six months after his release, he was physically and psychologically unable to return to work. *Id.* As a direct consequence of the denial of his diabetic medication while he was a hostage in Iraq, he began developing a

progressive form of diabetic neuropathy – a condition that has deteriorated rapidly over the past five years and left him completely and permanently disabled. *Id.*

D. The District Court’s Decision.

From October 9 through 12, 2001, the district court held an evidentiary hearing in this case at which each of the plaintiff-appellants gave detailed testimony concerning his experience in Iraq and Kuwait and the impact it has had on his life. In addition, Dr. Robert Blum, a board-certified psychiatrist and specialist in the psychiatric consequences of hostage taking and confinement,² and Ambassador Morris D. Busby, Coordinator for Counter-terrorism for the U.S. Department of State from 1988 to 1991, testified in support of plaintiffs’ claims.

On December 5, 2001, the district court issued its decision, finding that jurisdiction existed under the state-sponsored terrorism exception of the FSIA and that each of the plaintiffs had established his or her right to relief by satisfactory evidence in accordance with 28 U.S.C. § 1608(e). A44 & A57-61. The district court held that plaintiffs had properly invoked its jurisdiction because “[i]t is beyond doubt that the American citizens denied permission to leave Kuwait and Iraq from August through mid-December, 1990,” including each of the testifying plaintiffs, “were ‘hostages’ within the meaning of the FSIA”³ and, hence, that they were “entitled to maintain an action against Iraq for an appropriate award of money damages for the personal

2. Dr. Blum served for more than two decades as a psychiatric consultant to the Departments of State and Defense, during which period he evaluated or treated hundreds of hostages, including most of those who were held at the U.S. Embassy in Tehran and in Lebanon, and designed the program that served as the model for treating hostages upon their reentry into freedom. A309-10.

³ Under subparagraph 1605(e)(2) of the FSIA, the term “hostage taking” is borrowed from Article 1 of the International Convention Against the Taking of Hostages, which provides that an act of hostage taking occurs whenever any person “seizes or detains and threatens to kill, to injure or to continue to detain another person . . . in order to compel . . . a State . . . to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage.” T.I.A.S. No. 11,081 (Dec. 17, 1979).

injuries that they have suffered.” A57.⁴ Applying federal common law, the district court thus found that the evidence was “clearly sufficient” to entitle plaintiffs to recover damages on both their claims for false imprisonment and hostage taking. A58 & 60.

As a consequence of having been held in Iraq and Kuwait against their will, the district court found that “each of the plaintiffs had suffered compensable injury” in two respects. A59. First, the district court found that they suffered “physical and psychic pain” during the course of their detention. A58-59. Based on the severity of their respective experiences, the district court awarded plaintiffs damages ranging from \$3,000 and \$5,000 per day of confinement for this element of damages. A61. In addition, the district court held that each of the plaintiffs was entitled to compensation for the residual psychological trauma that they experienced after their release. A60. In particular, the district court found that “each” of the testifying plaintiffs:

suffers today from a chronic post-traumatic stress disorder of varying degrees of severity. They remain depressed, anxious, lethargic, moody and are often irritable. They experience sudden flashbacks; are frequently insomniac, startle easily; have vivid nightmares; are sexually indifferent or actually impotent. Intimacy with others is difficult to achieve. They avoid any situation or experience, physical or mental, which is likely to revive recollections of their ordeals. Occasionally they also feel guilty, sometimes suicidal, for having survived the ordeal at all, or for having done so more successfully than others have done.

Id. Depending on the duration and intensity of their symptoms, the district court held that each of the testifying plaintiffs was entitled to a lump sum damage award of between \$100,000 to \$500,000 for the residual psychic injuries that they suffered as a result of their confinement.

A61.

⁴ A district court may hear a claim under § 1605(a) (7) if: (a) the defendant state was designated as a state sponsor of terrorism at the time or as a result of the actionable conduct; (b) the claimant or victim was a national of the United States; and (c) the defendant state has been afforded a reasonable opportunity to arbitrate the claim if the actionable conduct occurred within its territory. 28 U.S.C. § 1605(a)(7) (A) & (B). As the district court properly found, each of these three requirements were satisfied in this case. A57.

The district court, however, refused to award the plaintiff-appellants any damages whatever to compensate them for the loss of income that they attributed to their hostage-taking experience. In so doing, the district court acknowledged that the “residual psychic effects” of their detention “have altered their lives in myriad ways, not only with respect to the quality of their personal lives but also in relation to their livelihoods.” A60. Indeed, the district court specifically found that their claims that they suffered “work-related problems” as a direct result of their “experiences as hostages” in Iraq were “plausible.” *Id.* Without addressing any of the specific evidence that any of the individual plaintiff-appellants proffered in support of their lost income claims, the district court nonetheless concluded that in each case the evidence was “too speculative” to establish a causal relationship between their hostage experiences and the “adverse fortunes” they encountered “in their working lives” following their release from captivity. *Id.*⁵

In the case of plaintiff-appellant Jack Frazier, the district court found that, as a result of being “deprived of daily medication for diabetes,” he “experienced an acute, severe, and irreversible exacerbation of his condition that has progressed to . . . a peripheral neuropathy and rendered him a cripple.” A59. The district court awarded Mr. Frazier damages of \$1 million “for the exacerbation of his diabetic complications.” A61. Yet, despite its finding that Mr. Frazier had become disabled as a direct result of his captivity, the court swept up his lost income claim in the same bin as the other plaintiff-appellants’ lost income claims and denied it on the

⁵ In view of its conclusion that plaintiff-appellants had failed to establish the causation element of their lost income claim by satisfactory evidence, the district court had no occasion to determine the amount of damages that they suffered. *See, e.g., MCI Communications v. AT&T Co.*, 708 F.2d 1081, 1161 (7th Cir. 1982) (“The courts have always distinguished between proof of causation of damages and proof of the amount of damages.”). Each of the plaintiff-appellants, however, did present evidence (in the form of a declaration from their financial expert) that would have enabled the district court to quantify the amount of his lost income had it ruled in their favor on the causation issue. *See* Declarations of John I. Salomon, filed on Oct. 30, 2001 (docket entry no. 58).

same grounds. Similarly, the district court denied Mr. Frazier’s claim for reimbursement of past and future medical expenses without explanation.

SUMMARY OF ARGUMENT

Section 1608(e) of the FSIA provides that “[n]o judgment by default shall be entered against a foreign state . . . unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.” The sole issue on this appeal is whether the evidence proffered by the six plaintiff-appellants in support of their economic loss claims met that requirement. The district court’s ruling that they did not is wrong for two reasons.

I.

First, in requiring plaintiff-appellants to prove their claims by a preponderance of the evidence, the district court applied the wrong legal standard. In imposing a “satisfactory evidence” requirement for the entry of default judgments against foreign states, Congress was necessarily creating a lower standard of proof than that which would normally be required to support findings of fact under Fed. R. Civ. P. 52(a). Indeed, were the quantum of evidence required to prove a claim against a foreign state the same regardless of whether it chose to appear in a case, foreign states would be encouraged to shirk our legal system by defaulting at will, thereby, undermining one of the principal purposes of the FSIA. Accordingly, the “correct standard” under § 1608(e) – and the only one that makes sense – “is evidence that would withstand a motion for judgment as a matter of law made pursuant to Fed. R. Civ. P. 50(a),” namely “a legally sufficient evidentiary basis for a reasonable jury to find for plaintiff.” *Ungar v. Islamic Republic of Iran*, 211 F. Supp. 2d 91, 98 (D.D.C. 2002).

The district court specifically found that the evidence proffered by the plaintiff-appellants furnished a “plausible” basis upon which to find that the work-related problems that each of

them experienced after his release were causally related to his ordeal as a hostage. A60. There is no distinction between evidence furnishing a “plausible” basis for finding in favor of a plaintiff and evidence furnishing a “legally sufficient” basis for a reasonable fact finder to find in his favor. Accordingly, had it applied the correct legal standard, the district court would have necessarily found that each of the plaintiff-appellants had established his claim that he suffered economic loss as a result of his confinement in Iraq and/or Kuwait by satisfactory evidence in accordance with 28 U.S.C. § 1608(e).

II.

Even if the district court were correct in its assumption that the evidentiary requirement under § 1608(e) is proof by a preponderance of the evidence, the district court’s factual findings denying plaintiff-appellants’ economic injury claims should be reversed because they are clearly erroneous. Failing to draw any distinctions among the evidence proffered in support of the economic loss claims of any of the six plaintiff-appellants, the district court denied each of those claims on the ground that the evidence supporting them was “too speculative” and that it was just as likely that “unrelated factors” were “causative of adverse fortunes in their working lives.” A60. That ruling simply cannot be squared with the compelling – and, indeed, often overwhelming – evidence in the record establishing that causal relationship for each of the six claims that are the subject of this appeal:

- **David Morris:** The evidence, which included a determination of the Social Security Administration and the unanimous conclusion of six licensed therapists, established that Mr. Morris has been afflicted with severe PTSD since his release from confinement and that, as a result, he is permanently and completely disabled.
- **Jack Frazier:** In the case of Mr. Frazier, the district court’s denial of his claim for lost income and medical expenses as “too speculative” is contradicted by its own factual finding that he had been rendered permanently and completely disabled as a result of having been denied diabetic medication during his confinement in Iraq. A59.

- ***Apostolous Elioupolos:*** In the case of Mr. Eliopoulos, the district court’s denial of his lost income claim is, likewise, irreconcilable with its factual finding that, following his release from captivity, he was “emotionally unable to resume his work in Kuwait” (A48) and was, thus, dismissed from his position with Arthur Andersen, where he “had been promised a full partnership as of September, 1991.” A47.
- ***Charles Kolb:*** The evidence, which included the expert psychiatric opinion of Dr. Blum, established that, following his release from captivity, Mr. Kolb suffered from PTSD and that, as a result, he was psychologically unable to return to the Middle East and was forced to abandon his career as a language instructor.
- ***Rev. Virgil Maurice Graham:*** In the case of Rev. Graham, the evidence established that following his release, he was diagnosed as suffering from PTSD and, hence, was emotionally unable to return to Kuwait to fulfill his duties to his congregation or to work elsewhere overseas.
- ***Bill Rodebush:*** The evidence established that, after having worked on oil rigs across the globe for approximately 30 years, Mr. Rodebush found that he was psychologically unable to work overseas as a result of his affliction with PTSD – a diagnosis that was confirmed by a psychiatrist who examined Mr. Rodebush after his release from confinement and by Dr. Blum.

ARGUMENT

The standard of review in this case turns upon the quantum of evidence by which a plaintiff is required to establish his right to relief in order to obtain a default judgment under 28 U.S.C. § 1608(e). Under that section, a default judgment may not be entered against a foreign state “unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.” 28 U.S.C. § 1608(e). If, as appears to have been assumed in the decision below, the satisfactory evidence standard set forth in § 1608(e) requires a plaintiff to establish his right to relief by a preponderance of the evidence, then the district court’s factual findings denying plaintiff-appellants’ economic injury claims may not be set aside unless they are “clearly erroneous” in accordance with the mandate of Fed. R. Civ. P. 52(a). *See, e.g., Morrison v. Int’l Programs Consortium, Inc.*, 253 F.3d 5, 9 (D.C. Cir. 2001) (reviewing “findings of fact” made pursuant to Fed R. Civ. P. 52(a) “for clear error”). “A finding is ‘clearly erroneous’ when,

although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985).

If, on the other hand, § 1608(e) requires only that a plaintiff establish a legally sufficient evidentiary basis for a reasonable fact-finder to rule in his favor, then the district court’s decision to deny plaintiff-appellants’ economic injury claims are reviewable *de novo* in this Court. *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 827-28 (D.C. Cir. 1988) (holding that *de novo* review applies to trial court’s grant of judgment as a matter of law based on absence of legally sufficient evidentiary basis to rule in plaintiff’s favor). Under that standard, the district court’s denial of plaintiff-appellants’ economic loss claims can be affirmed only if this Court finds, “based on [its] own independent review of the evidence, that no reasonable jury could reach a verdict in [their] favor.” *Holbrook v. Reno*, 196 F.3d 255, 259 (D.C. Cir. 1999). The evidence must be viewed “in the light most favorable” to plaintiff-appellants and “all conflicts” must be resolved in their favor. *Id.*

For the reasons set forth below, plaintiff-appellants believe that a legally sufficient evidentiary basis to find in their favor is all that the FSIA requires a plaintiff to establish in order to obtain a default judgment against a foreign state that has failed to appear or otherwise defend an action brought against it. Ultimately, however, in this case, it does not matter what standard of proof the plaintiff-appellants were required to meet in the district court or what standard of review is applied in this Court. Even if plaintiff-appellants were obligated to establish their right to relief by a preponderance of the evidence, the district court’s decision to deny their economic injury claims was clearly erroneous and should be reversed.

I. The District Court Erred In Requiring The Plaintiffs To Establish Their Right To Relief By A Preponderance Of The Evidence.

In its decision below, the district court expressly construed § 1608(e)'s satisfactory evidence requirement as relating solely to the kind or quality of evidence that would support a default judgment against a foreign state, but not to the quantum of evidence that is required. In particular, the district court stated that for purposes of § 1608(e), the phrase "evidence satisfactory to the court means "evidence of a nature and quality sufficient to support summary judgment under Fed. R. Civ. P. 56, namely, oral or written testimony under oath, made upon personal knowledge by witnesses competent to testify to the matters stated therein." A44. Assuming that § 1608(e) does not speak to the standard of proof by which a plaintiff must establish his right to relief, the district court made factual findings pursuant to Fed. R. Civ. P. 52(a), just as it would have done had Iraq and Saddam appeared and defended this action. Thus, while the district court did not explicitly state what standard of proof it was holding plaintiffs to, it is apparent from the district court's decision that it required them to prove their claims by a preponderance of the evidence. A44. Such proof is considerably more than § 1608(e) requires.

The purpose of Section 1608(e)'s satisfactory evidence requirement is "to provide foreign states protection from unfounded default judgments rendered solely upon a procedural default." *Compania Interamericana Export-Import, S.A. v. Compania Dominicana de Aviacion*, 88 F.3d 948, 950-51 (11th Cir. 1996). The protection that § 1608(e) affords to foreign states parallels that afforded the federal government under Fed. R. Civ. P. 55(e), which likewise requires a claimant to establish his "right to relief by evidence satisfactory to the court" before a default judgment can be entered in his favor. *Id.* at 951; *see also Commercial Bank of Kuwait v.*

Rafidain Bank, 15 F.3d 238, 242 (2d Cir. 1994).⁶ As the First Circuit has observed, “the natural intendment of this language is that, after entry of default against the government, the quantum and quality of evidence that might satisfy a court can be less than that normally required.”

Alameda v. Secretary of Health, Education & Welfare, 622 F.2d 1044, 1048 (1st Cir. 1980); *see also Mariliano v. Heckler*, 728 F.2d 151, 158 (2d Cir. 1984); *Ungar v. Islamic Republic of Iran*, 211 F. Supp. 2d 91, 98 (D.D.C. 2002).

Apart from being inconsistent with its plain language, a construction of § 1608(e) that would require a plaintiff to establish his right to relief in a default setting by the same quantum of evidence that would be required of him had a foreign state appeared and participated in discovery would contravene one of the important purposes underlying the FSIA. In enacting the FSIA, Congress pronounced a “strong policy . . . of encouraging foreign states and their instrumentalities to appear before United States courts.” *American International Industries v. Action-Tungsum, Inc.*, 925 F.2d 970, 976 (6th Cir. 1991); *see also Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1552 (D.C. Cir. 1987) (noting that it is in “the interest of United States’ foreign policy to encourage foreign states to appear before our courts in cases brought under the FSIA”). In many cases, much, if not most, of the information relevant to a plaintiff’s claim will be within the exclusive possession of the foreign state against which the action has been brought. If that state refuses to participate in the litigation, the plaintiff will have no means of discovering that information. Accordingly, to require a plaintiff to establish his entitlement to relief against a defaulting state by the same quantum of evidence that would be required of him

6. “Rule 55(e) reflects Congress’ recognition ‘that the government is sometimes slow to respond and the public should be protected from claims that are unfounded but would be granted solely because the government failed to make a timely response.’” *Commercial Bank of Kuwait*, 15 F.3d 238 at 242.

had that state appeared, would be to reward foreign governments for shirking their “duty to defend” cases that have been properly filed against them. *Commercial Bank of Kuwait*, 15 F.3d at 242.

While it is apparent that “evidence satisfactory to the court” must be something less than a preponderance of the evidence, the appellate courts that have addressed the issue have failed to define that phrase in a way that would provide any meaningful guidance to the district courts. *See, e.g., Compania Dominicana*, 88 F.3d at 951 (stating that plaintiff “is required to establish entitlement to relief by providing satisfactory evidence as to each element of the claims upon which relief was sought”); *Commercial Bank of Kuwait*, 15 F.3d at 951 (stating that record must reveal that the “plaintiff provided sufficient evidence in support of its claims”). In his recent decision in *Ungar v. Islamic Republic of Iran*, however, Judge Robertson of the District Court for the District of Columbia gave content to the satisfactory evidence requirement when he held that “the correct standard” under § 1608(e) “is evidence that would withstand a motion for judgment as a matter of law made pursuant to Fed. R. Civ. P. 50(a),” namely “a legally sufficient evidentiary basis for a reasonable jury to find for plaintiff.” 211 F. Supp. 2d at 98. Applying that standard in the default judgment context, a district court should regard a plaintiff as having proffered satisfactory evidence in support of his claim for relief, unless “the evidence, together with all the inferences that can reasonably be drawn therefrom” is so unconvincing that “reasonable men and women” could not find in his favor. *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1227 (D.C. Cir. 1984); *accord Milone v. Washington Metro. Area Transit Auth.*, 91 F.3d 229, 231 (D.C. Cir. 1996) (same).

Construing the phrase “evidence satisfactory to the court” to call for the same quantum of evidence as would be sufficient to withstand a motion for judgment as a matter of law makes

good sense. If evidence is legally sufficient for a reasonable jury to find in a plaintiff's favor, than that evidence should, by definition, be sufficient (or "satisfactory") for purposes of establishing a plaintiff's right to relief in a default setting under 28 U.S.C. § 1608(e). Moreover, if § 1608(e)'s satisfactory evidence requirement calls for a standard of proof that is less than a "preponderance of evidence," it is difficult to imagine what alternative to a Rule 50(a) standard there is. Indeed, plaintiff-appellants are able to find no daylight between: (a) the amount of evidence that would *permit* a reasonable fact finder to conclude that it is more likely than not that the plaintiff's injuries were caused by the wrongful conduct of the defendant; and (b) the amount of evidence that would, in fact, *persuade* a reasonable fact finder that it is more likely than not that his injuries were caused by the defendant's wrongful conduct. As it is apparent from the district court's decision that it applied a much stricter standard than that required in order to withstand a motion for judgment as a matter of law, that decision should be reversed on that basis alone.

II. The District Court Erred In Finding That Plaintiff-Appellants Failed To Establish Their Economic Loss Claims By Satisfactory Evidence In Accordance With 28 U.S.C. § 1608(e).

Each of the plaintiff-appellants presented evidence that provided a legally sufficient evidentiary basis for a reasonable fact finder to determine that he suffered economic losses as a result of his unlawful confinement in Iraq and/or Kuwait. Indeed, the district court itself found that the evidence proffered by the plaintiff-appellants furnished a "plausible" basis upon which to find that the work-related problems that each of them experienced after his release were causally related to his ordeal as a hostage. A60. That finding alone should have been sufficient for the district court to grant plaintiff-appellants' economic loss claims. Nevertheless, the district court denied each of those claims on the ground that in all six cases the evidence was "too

speculative” and that it was just as likely that “unrelated factors” were “causative of adverse fortunes in their working lives.” A60. That finding cannot be squared with the compelling – and, indeed, often overwhelming – evidence in the record establishing that causal relationship in each case.

Given its failure to credit the evidence supporting any of the six economic loss claims that were before it, the district court’s decision can be construed only as a ruling that, *as a matter of law*, damages for lost income are not available on the basis of an alleged linkage between psychological injuries (or at least psychological injuries arising out of unlawful confinement) and impaired earning capacity because evidence supporting such a linkage is inherently too speculative. That, however, cannot be right and is, in fact, directly contrary to the result reached in the only two other cases brought under the FSIA’s state-sponsored terrorism exception in which plaintiffs have sought damages for income loss that they attributed to their hostage experiences.

In *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62 (D.D.C. 1998), Judge Jackson himself granted the lost income claim of one American citizen who was taken hostage by agents of the Iranian Government on the basis of evidence that he was “unable to work because of his severe depression and his permanently injured feet” and granted the lost income claim of another on the basis of testimony that he “was unable to find a job in the United States” for a couple of years after his release. *Id.* at 69-70. Similarly, in *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001), four former hostages who were imprisoned in Iraq for periods ranging from 5 to 205 days asserted claims for loss of income based on their emotional inability to work overseas – the same basis upon which four of the plaintiff-appellants seek damages for loss of income in this case. *Id.* at 24. The district court (per Judge Oberdorfer) granted all four of those

claims based on each hostage's own testimony about his unwillingness and inability to work overseas and the supporting testimony of a psychiatric expert. *Id.* at 21 & 24.

The decisions in *Cicippio* and *Daliberti* are consistent with those in other personal injury cases in which the courts have made clear that a psychological injury can be every bit as incapacitating as a physical injury.⁷ Whether a particular psychological injury is, in fact, disabling can, of course, be determined only on a case-by-case basis upon a consideration of all of the evidence. Such determinations are routinely made by Administrative Law Judges in Social Security Disability hearings in accordance with regulations that specifically set forth the criteria for determining when a psychological injury becomes disabling. *See, e.g., Andler v. Chater*, 100 F.3d 1389, 1393 (8th Cir. 1996) (describing evidence that claimant was “incapable of performing work for sustained periods” as a result of his affliction with post-traumatic stress disorder suffered while serving in Vietnam); *Golden v. Secretary of Health and Human Servs.*, 740 F. Supp. 955, 962-63 (W.D.N.Y. 1990) (holding that plaintiff had been disabled for ten years due to post-traumatic stress disorder and reversing administrative decision denying him benefits); 20 C.F.R. part 404, subpart P, App. 1 § 12.08(B)(1)-(4).

As set forth below, the evidence supporting each of the plaintiff-appellants' economic loss claims is no less “speculative” than the evidence presented in countless other cases in which judicial and administrative fact-finders have found claimants to be partially or totally disabled on the basis of psychological injuries. The district court's failure to make an individual assessment

⁷ *See, e.g., King v. Board of Regents of University of Wisconsin System*, 898 F.2d 533, 540 (7th Cir. 1990) (“damages are available for inability to work due to psychological problems resulting from discrimination”); *Maturo v National Graphics, Inc.*, 722 F. Supp. 916, 926 (D. Conn. 1989) (finding that reasons plaintiff was “compelled to leave” her job and was unable “to work during those periods in which she was unemployed” were “directly related to the emotional injuries sustained from the [defendant's] sexual harassment”).

of the evidence supporting plaintiff-appellants' economic loss claims and, upon doing so, to find in their favor was clearly erroneous and should be reversed by this Court.

A. Plaintiff David Morris Established His Claim For Lost Income By Satisfactory Evidence.

The evidence establishing that a causal relationship between Mr. Morris' experience as a hostage and his subsequent inability to maintain a job was not merely satisfactory. It was overwhelming. During the evidentiary hearing, Mr. Morris testified that since his release from confinement, he has suffered from impaired concentration, loss of memory, paranoia, social isolation, lethargy, intrusive recollections, recurring nightmares, insomnia, emotional liability, a sense of doom and an obsessive preoccupation with his ordeal in Iraq. A241-46, A328-29, A336 & A44-49. The evidence further established that during the last 12 years, Mr. Morris has seen no less than seven therapists, who are unanimous in their conclusion that he suffers from major depression and/or severe post-traumatic stress disorder. A243-45, A314, A326-29 & A336. Based on this evidence, the district court found that Mr. Morris was, indeed, afflicted by severe and chronic post-traumatic stress disorder. A22.⁸

At the time of his detention, Mr. Morris was employed as a procurement manager for Bechtel, where he had worked for the past 23 years. A234. After his release from detention, he stopped working for Bechtel and has never worked for anyone since. A234, A243-44, A314 & A346. The fact that the point at which Mr. Morris' working life came to a halt coincided precisely with his hostage-taking experience and the onset of his affliction with PTSD is, of course, no coincidence. Indeed, in April 1994, an Administrative Law Judge determined that, owing to that disorder, Mr. Morris was – and had been since his release from captivity on

⁸ From the amount of his judgment, it is apparent that the district court awarded Mr. Morris \$500,000 as compensation for his PTSD – the maximum amount that it awarded for post-release emotional distress.

December 11, 1990 – permanently and totally disabled from working. A346. That finding was consistent with the opinions of at least four different therapists, all of whom had likewise concluded that the psychological injuries Mr. Morris had suffered as a result of his captivity in Iraq had made it impossible for him to hold a job. A244-45, A326-29 & A336. It is also consistent with the opinion of Dr. Blum, who testified that Mr. Morris continues to be afflicted with severe post-traumatic stress and dysthymic disorders, which have left him permanently disabled. A314.

It is difficult to imagine what additional evidence Mr. Morris could have proffered in support of his claim that he has been rendered disabled as a result of the psychological fallout of his hostage experience. Unquestionably, had this case been tried before a jury, the evidence submitted in support of Mr. Morris' lost income claim would have furnished "a legally sufficient evidentiary basis" for that jury to find on his behalf and it would have been an abuse of discretion for the court to resolve that claim against him as a matter of law. Indeed, the evidence filed in support of Mr. Morris' lost income claim should have been sufficient even under a clear and convincing standard. The district court's contrary finding – that the termination of his working life could just as reasonably be explained by unrelated causative factors – is entirely implausible "in light of the evidence viewed in its entirety." That finding should, therefore be set aside as clearly erroneous even under the most deferential standard of review that could be applied to this case.

B. Plaintiff Jack Frazier Established His Claims For Lost Income And Medical Expenses By Satisfactory Evidence.

Unlike the other five plaintiff-appellants, Mr. Frazier's claim for lost income and medical expenses is based principally upon the physical, rather than upon the psychological, effects of his confinement. His lost income claim covers two separate periods. The first period covers the five

and one half months following his release. According to the testimony he gave at the evidentiary hearing, Mr. Frazier was hospitalized for two weeks following his release from confinement and for much of that five and one half month period was in no physical condition to perform the kind of demanding work that is associated with a typical Bechtel construction assignment. A167-68 & A194; *see also* A140-41. Moreover, even if he had been physically able to work, he was emotionally unable to return to his job so soon after having made it through such a traumatic experience. A168-70 & A193. Mr. Frazier's testimony in this regard is consistent with that of Dr. Blum and at least one other psychiatrist, who have diagnosed him as suffering from post-traumatic stress disorder. A185 & A312. At a minimum, Mr. Frazier's explanation for the temporary interruption in his career is, as the district court itself acknowledged, a "plausible" one. Accordingly, there is no basis for a finding that Mr. Frazier failed to prove this first part of his loss of income claim by satisfactory evidence.

Mr. Frazier also sought to establish a lost income claim covering the period between the summer of 1998 when he was declared permanently disabled and the present. As the evidence presented in support of this claim demonstrated, in the years following his release from detention, Mr. Frazier began developing a progressive form of diabetic neuropathy (A173, A195-96 & A364-66), which has, in the words of the district court, "rendered him a cripple." A59. His condition has deteriorated rapidly since 1997 and has caused him to suffer from the extreme wasting of his muscles, loss of all sensation in his upper and lower extremities, severe bilateral foot drop, sexual dysfunction and loss of bladder control. He is barely able to walk, has difficulty climbing even a single stair, has virtually lost the use of his hands and suffers from constant – indeed, often excruciating – pain. A179-84, A196-97 & A366-67. He was declared

permanently disabled by the Social Security Administration in 1998 and had a life expectancy of approximately two years as of October 2000. A181 & A369.

The district court found that the “acute, severe and irreversible exacerbation” of Mr. Frazier’s diabetic condition occurred as a direct result of his having been “deprived of daily medication for diabetes” during his confinement (A59) – a finding that was amply supported by the sworn testimony of all three of Mr. Frazier’s principal physicians. A175, A367-69, A372 & A374. Yet, despite this finding, the district court held that Mr. Frazier had failed to establish a causal relationship between his experience as a hostage and his subsequent inability to earn a livelihood. Whether the quantum of proof necessary to establish his lost income claim was “legally sufficient evidentiary basis” for a fact-finder to find in his favor or some more demanding standard, that holding is clearly erroneous.

The evidence established that, following his release from captivity, Mr. Frazier worked as long as he was physically able to do so. Indeed, he so desired to continue working that he took a hardship post in Kazakstan, where he worked on a Bechtel project through the Winter of 1998, despite the fact that he was losing sensation in his hands, was suffering from drop foot and required leg braces in order to walk. A179-81 & A195. Though he “didn’t want to give up,” he was physically unable to complete the assignment and, by the time, he returned to the United States his condition had deteriorated to the point that he was unable ever to work again. A181 & A 196-97. In light of all of the evidence, the premature ending of Mr. Frazier’s working life cannot plausibly be attributed to any reason other than the “acute, severe and irreversible exacerbation” of his diabetic condition. In view of its finding linking the exacerbation of his condition to his being denied diabetic medication during his captivity in Iraq, the district court’s decision to deny Mr. Frazier’s lost income claim cannot stand.

In addition to denying his lost income claim, the district court also denied Mr. Frazier's claim for medical expenses incurred in connection with the treatment of his diabetic condition. In support of that claim, Mr. Frazier submitted evidence showing that between October 1997 and October 2001, he incurred expenditures in excess of \$150,000 to treat his diabetic condition. A376. He also proffered the sworn testimony of his doctor establishing that he could expect to incur medical bills over the course of his two-year life expectancy that would be at least as high as those he had incurred in the two preceding years. A369. In view of this evidence, Mr. Frazier was plainly entitled to a damages award that would compensate him for the costs of his medical expenses. The district court's unexplained refusal to grant him such an award was clearly erroneous.⁹

C. Plaintiff Paul Eliopoulos Established His Claim For Lost Income By Satisfactory Evidence.

Mr. Eliopoulos' claim for lost income was based upon his psychological inability to resume his career in Kuwait as a result of his hostage-taking ordeal. According to his testimony at the evidentiary hearing, Mr. Eliopoulos founded Arthur Young's sole consulting office in Kuwait in 1987 and headed that office until early 1990, when the firm split and merged with Arthur Andersen & Company. A287. In June 1990, he accepted an offer to run Arthur Andersen's consulting practice in Kuwait, where his "stellar client list" included Kuwait Airways, the Department of the Interior and the Kuwait Finance House, which was the largest Islamic bank in the country. A288. As the district court found, he accepted that offer pursuant

⁹ The district court did explain that "the evidence of the costs of [psychiatric] therapy [plaintiffs] have had or might seek is too imprecise to quantify into damage awards." A60. That finding was supportable in view of the fact none of the testifying plaintiffs who had received psychiatric therapy in the past submitted evidence quantifying the cost of such therapy. In contrast, Mr. Frazier submitted evidence quantifying the amount of medical expenses he has incurred for treatment of his diabetic condition since 1998.

to a contract in which he “had been promised a full partnership in the company as of September 1991.” A41; *see also* A288-89 & A352-53.

In an effort to put his life back in order, Mr. Eliopoulos returned to Kuwait as soon as the war ended in March with every intention of going back to work with Arthur Andersen. A303-04. Upon seeing his home and the wreckage done to it, however, he became “physically sick” and soon realized that he would not be able to live and work in the place where such “terrible things” had happened to him. A304. As a result, his contract with Arthur Andersen, which was contingent upon him working in Kuwait, was terminated, and his career plans were shattered. A304.

The district court found that the reason Mr. Eliopoulos was unable to “resume his work in Kuwait” was that he was “emotionally unable” to do so. A48. That finding was amply supported by Mr. Eliopoulos’ own testimony (A303-06) and by that of Dr. Blum, who testified that since his release from confinement Mr. Eliopoulos has suffered from chronic post-traumatic stress and dysthymic disorders, with symptoms including depression, anxiety, insomnia, nightmares, detachment, inactivity and sexual dysfunction. A315. Dr. Blum further testified that “avoiding the area” in which the traumatic event occurred is a reaction that is commonly found among hostage victims. A313.

The district court’s finding that Mr. Eliopoulos was “emotionally unable” to resume his career with Arthur Andersen in Kuwait cannot be squared with its later rejection of his lost income claim on the basis that the evidence was too speculative to establish a linkage between that claim and his experience as a hostage. Prior to that experience, Mr. Eliopolous had been living a “blessed life” in Kuwait, was enjoying a highly successful career, and had every intention of remaining in Kuwait as a partner of Arthur Andersen for the foreseeable future.

A289 & A303. The only conceivable reason that he did not resume his life and career in that country following the cessation of hostilities with Iraq is precisely the explanation that he gave at the evidentiary hearing: he was “emotionally unable” to return to that part of the world after all he had been through. Inasmuch as the district court itself accepted that explanation, there is no rational basis for its decision to deny Mr. Eliopoulos’ lost income claim.

D. Plaintiff Charles Kolb Established His Claim For Lost Income By Satisfactory Evidence.

Mr. Kolb based his claim for lost income upon his psychological inability to resume his career in the Middle East as a result of his hostage-taking ordeal. Mr. Kolb has a background in linguistics and has developed specialized language skills in Arabic and Farsi. A199 & A233. In 1989, he moved to Baghdad, where he had been offered a position as an English language instructor with the U.S. Department of State’s American Cultural Center. A199 & A201.

After his release from detention, Mr. Kolb was unwilling to “go anywhere near the Middle East” (A 229) and “abandoned any thought of ever returning” to that part of the world. A46; *see also* A233-34. At the evidentiary hearing, Mr. Kolb testified that he spent nearly one year searching in vain for employment opportunities outside the Middle East that would enable him to use his language skills. A233. As a result of his inability to find any such opportunities, he was forced to give up his career as a language instructor. A233-34.

It is plain from the entirety of the evidence that the “adverse fortunes” that Mr. Kolb suffered in his “working life” were caused by the psychological fallout from his experience as a hostage in Iraq. Prior to that experience, Mr. Kolb had lived in the Middle East for years, enjoyed his job in Baghdad and had every intention of continuing his work as a language instructor in the Middle East in the years to come. A229 & A234. According to both his testimony and that of Dr. Blum, following his release from captivity, Mr. Kolb suffered from

symptoms of post-traumatic stress disorder, including depression, intrusive recollection and avoidance – symptoms that continue to affect him to this day and that have rendered him psychologically unable to return to the Middle East. A229-30 & A313.

Given Mr. Kolb’s history of employment in the Middle East and his credible testimony concerning his career plans prior to the Iraqi invasion of Kuwait, the psychological problems he suffered as a result of his captivity not only furnish a plausible explanation for the problems that he suffered in his “working life” following his release from detention; they furnish the *only* plausible explanation for those problems. The district court’s failure to find in Mr. Kolb’s favor was, therefore, clearly erroneous and should be reversed, regardless of what standard of review is applied in this case.

E. Plaintiff Rev. Virgil Maurice Graham Established His Claim For Lost Income By Satisfactory Evidence.

The evidence in the record establishes that, following a three-year mission in Liberia, Rev. Graham moved to Kuwait in May 1990, where he had been offered a position as pastor for the National Evangelical Church of Kuwait. A251. He and his family were “very excited to be in Kuwait [and looked] forward to spending the next few years there.” A251. Rev. Graham’s lost income claim was based upon his psychological inability to resume his career in Kuwait or to work elsewhere overseas as a result of the psychological consequences of his confinement in late 1990.

The district court’s conclusion that Rev. Graham failed to establish that linkage is clearly erroneous. According to Rev. Graham’s testimony, he wanted to return to Kuwait to fulfill his duties to his congregation, but he and his family “just could not function well enough to be able to go back overseas and to do this responsibility that I felt called to do.” A261. As a result, Rev. Graham was forced to abandon his parsonage in Kuwait and to accept a position in the United

States for significantly lower compensation than he would have earned had he been able to work abroad. A63-64.

Rev. Graham's testimony concerning his psychological inability to return to Kuwait was fully consistent with the statements that he made to a pastoral counselor upon his release from Kuwait. A261 & A330. His testimony was also consistent with the findings of a licensed psychiatrist who evaluated him from March through May 1991 and who concluded that he was suffering from PTSD, the symptoms of which included anxiety, panic attacks, compulsiveness, insomnia, recurrent nightmares, social phobia, sense of guilt and depression. A261-62 & A331. Those findings were supported by Dr. Blum, who testified that Rev. Graham continues to suffer from severe symptoms of PTSD. A314 .

The only explanation for the sudden shift in Rev. Graham's career plans following his release from confinement that is supported by the evidence in the record is the one he gave in his testimony: he was too traumatized by his experience as a hostage to return to Kuwait or to live in another country overseas. Accordingly, there is nothing "speculative" about Rev. Graham's lost income claim and the decision of the district court to deny that claim should be reversed.

F. Plaintiff Bill Rodebush Established His Claim For Lost Income By Satisfactory Evidence.

In the case of Mr. Rodebush, the evidence established that following his graduation from college in 1964, he worked for some "30 years mostly overseas" in the drilling business for Dresser Industries. A267. During the six years prior to August 1990, he had been posted to Kuwait, where he served as a field supervisor for production drilling operations. A267. Several months after his release from confinement, Dresser sent him to China, where he worked for the next two years. A282. Mr. Rodebush testified that during that period, he experienced a lot of

anxiety and would feel “very uncomfortable” whenever he saw Chinese troops “marching or running” by or heard reports of Chinese atrocities. A282.

Upon the completion of his assignment in China, Mr. Rodebush returned to the United States, only to learn that Dresser was planning to send him to Russia. A282. He felt that he could not accept that assignment and, hence, was forced into early retirement. A282. The basis for Mr. Rodebush’s lost income claim is that, after having experienced so much emotional turmoil in China every time he was reminded of his hostage-taking ordeal, he could no longer bear the thought of working away from home.

That claim is fully supported by the evidence, which established that upon his release from captivity in December 1990, Mr. Rodebush was diagnosed with post traumatic stress disorder. A282 & A333-34. That diagnosis was confirmed by Dr. Blum, who testified that Mr. Rodebush continues to suffer from symptoms of PTSD to this day and avoids putting himself in situations that are likely to trigger painful recollections of his ordeal in Iraq. A314-15. Thus, as Mr. Rodebush himself testified, after having experienced two difficult years in China, he told his wife that: “‘There is no way that I can go back to the instability of Russia the way I feel. I just can’t do it.’ I said, ‘we may starve to death, but I am going to stay home.’” A282. He further testified that he “had no intention” to retire from his job at Dresser, but that his experience as a hostage had turned his “world upside down” and that that “had this mess not happened,” he would have gone to Russia and would most likely still be working somewhere else overseas. *Id.* Instead, he remained in the United States where, unable to find work in the oil business, he was forced to take a job earning substantially lower compensation at a local Wal-Mart. *Id.*

As the above discussion makes clear, the evidence in the record admits of just one conclusion: that Mr. Rodebush’s unwillingness to work in Russia or elsewhere overseas

following his return from China in 1993 was causally related to his experience as a hostage in Iraq two years earlier. Accordingly, insofar as it denies Mr. Rodebush's claim for lost income damages, the district court's decision is clearly erroneous and should be reversed by this Court.

CONCLUSION

For the foregoing reasons, the district court's decision denying the economic loss claims of all six of the plaintiff-appellants should be reversed and this case should be remanded to that court to determine the appropriate amount of damages in connection with those claims.

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Respectfully submitted,

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