IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MAHER ARAR,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 06-4216-cv
	)	
JOHN ASHCROFT, formerly Attorney General; LARRY D. THOMPSON, formerly Acting Deputy Attorney General, TOM RIDGE, Secretary of State of Homeland Security, J. SCOTT BLACKMAN, formerly Regional Director of the Regional Office of Immigration and Naturalization Services, PAULA CORRIGAN, Regional Director of Immigration and Customs Enforcement, EDWARD J. MCELROY, formerly District Director of Immigration and Naturalization Services for New York District, and now Customs Enforcement, ROBERT MUELLER, Director of the Federal Bureau of Investigation, JOHN DOE 1-10, Federal Bureau of Investigation and/or Immigration and Naturalization Service Agents, JAMES W. ZIGLAR, formerly Commissioner for Immigration and Naturalization Services, UNITED STATES,	)	
	)	
Defendants-Appellees.	)	
	)	

APPELLEES THE UNITED STATES OF AMERICA, THE OFFICIAL CAPACITY DEFENDANTS, AND INDIVIDUAL CAPACITY DEFENDANTS EDWARD J. McELROY, J. SCOTT BLACKMAN AND ROBERT MUELLER'S RESPONSE TO MOTION FOR JUDICIAL NOTICE

Appellees, the United States of America, the official capacity defendants, and individual capacity defendants Edward J. McElroy, J. Scott Blackman and Robert Mueller, hereby respond to plaintiff-appellant Arar's motion for judicial notice.[1]

1. Plaintiff-Appellant asks this Court to take judicial notice of the 2006 REPORT OF THE EVENTS RELATING TO MAHER ARAR written by Dennis R. O'Connor, Associate Chief Justice of Ontario, acting as the Commissioner of the "Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar." Plaintiff begins by arguing that the issuance of the report is itself a fact subject to judicial notice, and he concedes that judicial notice is not appropriate for "the fact of the matters asserted" in the report. Mem. in Support of Judic. Notice 3. But plaintiff then proceeds to cite and rely upon the conclusions contained in this report commissioned by a foreign government. *See, e.g.,* Arar Br. 14 ("The Commission Report fully exonerates Arar, finding no evidence he was involved with any terrorist activities"); LaHood Dec. in Support of Judicial Notice, ¶ 7 ("Canadian investigators made extensive efforts to find any information that could implicate Mr. Arar in terrorist activities," and "they found none"); Mem. in Support of Judic. Notice 2 ("Canadian investigators made extensive efforts to find any information that could implicate Mr. Arar in terrorist activities," and "they found none").

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[1]The remaining appellees are joining this response in their separate filings.

2. While we agree that the mere fact of the issuance of the report could possibly be the subject of judicial notice if that fact were relevant to this appeal, the content and conclusions of the report are not judicially noticeable. *See Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70 (2d Cir. 1998) ("A court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings") (citation omitted); *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991) (same). Thus, in *Global Network Commun., Inc. v. City of New York*, 458 F.3d 150 (2d Cir. 2006), this Court held that judicial notice could be taken of the fact that the City had issued a final determination denying the plaintiff's franchise application, but that the district court had erred by relying on the contents of that determination "to provide the reasoned basis for the court's conclusion" that the plaintiff could not state a claim. *Id.* at 157. Just so here, it would be error for the Court to accept plaintiff's invitation to rely on the report to find, for example, that plaintiff has been "fully exonerate[d]" of any connection to terrorist activities. Arar Br. 14.[2]

3. In any event, the "facts" from the report that plaintiff cites are not the types of indisputable facts subject to judicial notice. Under Federal Rule of Evidence

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[2] *Cf.* Arar Br. 56 (asserting, without citation, that plaintiff was "falsely labeled as a member of al-Qaeda").

201(b)(2), "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is * * * capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." It would be inappropriate for a court of the United States, in litigation against the United States and U.S. officials, to deem "indisputable" the findings of a commission created by a foreign government. In *International Star Class Yacht Racing Ass'n*, this Court held that even "[f]acts adjudicated in a prior case" in a U.S. federal court are not so indisputable as to be judicially noticeable. 146 F.3d at 70. That conclusion applies *a fortiori* to the findings in the report, which were not the product of an adversary process of adjudication. Indeed, given that the Commission's task was to investigate the actions of Canadian officials, not those of the U.S. government, the United States did not give evidence or otherwise participate in the Commission proceedings. *See* Factual Inquiry Report at 10, 11. The report's findings also were made without the benefit of testimony by plaintiff himself. *Id.* at 11.

4. Although, in the abstract, the mere fact of the issuance of the report could be sufficiently indisputable to be the subject of judicial notice, plaintiff has not identified any reason why that fact would be relevant. Plaintiff's appeal challenges the grant of Rule 12(b) motions on legal grounds, so plaintiff's well-pleaded factual allegations have to be taken as true for purposes of the appeal regardless of what has been said

about those allegations outside of this litigation. As noted above, despite plaintiff's concession in his motion, plaintiff quite clearly seeks to rely on the report's conclusions, not merely on the fact of its issuance. Because the mere fact of the report's issuance is irrelevant to this appeal, there is no reason to take judicial notice of that fact.

CONCLUSION

For the foregoing reasons, this Court should deny the motion for judicial notice.

Respectfully submitted,

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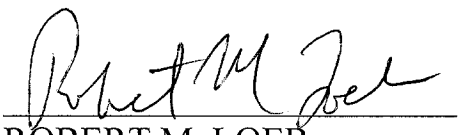

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January 4, 2007

CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2007, I served the foregoing "APPELLEES THE UNITED STATES OF AMERICA, THE OFFICIAL CAPACITY DEFENDANTS, AND INDIVIDUAL CAPACITY DEFENDANTS EDWARD J. McELROY, J. SCOTT BLACKMAN AND ROBERT MUELLER'S RESPONSE TO MOTION FOR JUDICIAL NOTICE" upon counsel of record by causing copies to be sent by e-mail and first-class mail to:

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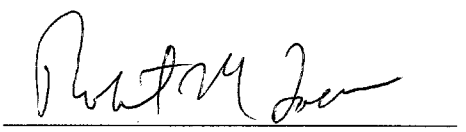

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