

21-2921-CV

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

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OMAR ABDULAZIZ,

Plaintiff-Appellant,

v.

MCKINSEY & COMPANY, INC., MCKINSEY & COMPANY, INC.
UNITED STATES, MCKINSEY & COMPANY, INC. INTERNATIONAL,
DOES 1-100, XYZ CORPS., 1-100,

Defendants-Appellees.

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*On Appeal from the United States District Court
for the Southern District of New York*

BRIEF FOR PLAINTIFF-APPELLANT

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I.

JURISDICTIONAL STATEMENT

This is an appeal from a final decision of the district court that granted McKinsey's motion to dismiss and denied leave to amend, thereby ending the district court litigation. This Court has jurisdiction under 28 U.S.C. § 1291. The district court had subject matter jurisdiction under 28 U.S.C. § 1332 because Abdulaziz is a citizen of Canada and the McKinsey entities are citizens of the United States. The amount in controversy exceeds \$75,000. Abdulaziz timely filed a Notice of Appeal on November 26, 2021.

II.

ISSUES PRESENTED

1. Did the district court err when it found that defendants had no legally cognizable duty of care to plaintiff under New York law and therefore granted defendants' motion to dismiss plaintiff's negligence-based claims?
2. Did the district court err when it denied plaintiff's motion for leave to file an amended complaint?

III.

STATEMENT OF THE CASE

A. Nature of Case and Relevant Procedural History

On February 8, 2021, plaintiff-appellant Omar Abdulaziz filed a complaint in New York Supreme Court alleging claims against defendant-appellees

McKinsey & Company, Inc., McKinsey and Company, Inc. United States and McKinsey and Company, Inc. International (collectively, “McKinsey”) for Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, Negligence and Prima Facie Tort. (A12). Abdulaziz’s claims arise from a Report McKinsey prepared identifying plaintiff as one of the three most influential critics of the Kingdom of Saudi Arabia (“KSA”) and Mohammad Bin Salman (“MBS”). (A13; A34-A42). McKinsey removed the case to the Southern District of New York and filed a Rule 12(b)(6) motion to dismiss. (A7). On September 22, 2021, the district court, Lorna G. Schofield, U.S.D.J., granted McKinsey’s motion and dismissed the complaint in its entirety. (A72). The district court granted leave to allow Abdulaziz to move to amend. (A84). Abdulaziz filed his motion to amend his negligence based claims on October 13, 2021. (A86). The district court denied Abdulaziz’s motion to amend on October 28, 2021. (A112). On November 26, 2021, Abdulaziz timely filed his notice of appeal with the district court. (A115). Abdulaziz appeals from the district court’s October 28, 2021 and September 22, 2021 orders.

B. Facts Alleged in the Complaint and Proposed First Amended Complaint

1. The Complaint and Proposed First Amended Complaint Allege Abdulaziz is an Influential Critic of KSA and MBS Living in Exile in Canada

1. Plaintiff Omar Abdulaziz is a political dissident from the Kingdom of Saudi Arabia (“KSA”) who now resides in Montreal, Quebec and has been granted political asylum by Canada because he faces persecution were he to return to KSA. (A1; A90).

13. In 2009, Plaintiff moved from KSA to Canada to attend university. While he was a student in Montreal, Plaintiff began using Twitter and other social media platforms to publish political commentary concerning KSA. Frequent subjects of Plaintiff’s criticism are the way the KSA regime ran the country, the rampant human rights violations KSA would commit, the royal family, corruption and KSA’s misguided foreign policy. (A14; A92).

14. Plaintiff’s criticism has always focused heavily on the widespread human rights violations in KSA and KSA’s disregard for the rights and freedoms of Saudi citizens. (A14; A92).

26. Plaintiff was a close political ally and friend of Mr. Khashoggi. At the time of Mr. Khashoggi’s assassination, the two men were working together on a range of political activities designed to educate and empower the citizens of KSA and draw worldwide attention to the human rights atrocities within the kingdom.

The collaboration between Plaintiff and Mr. Khashoggi had the potential to build a broad political movement for democratic reform in Saudi Arabia. (A17; A95).

2. The Complaint and Proposed First Amended Complaint Allege KSA and MBS are Ruthless and Brutal in Their Treatment of Dissidents and Critics

17. KSA remains notorious for suppressing critical political speech and sentencing numerous writers and dissidents to death or long prison terms without due process and application of legal norms that are applied by the legal systems of civilized countries. Since at least December of 2015, many notable, nonviolent dissidents have been kidnapped from foreign countries and forcibly returned to KSA. Once back in the kingdom, the dissidents are taken into custody by government forces or agents and, frequently, never heard from again. (A15; A93).

18. The 2016 Human Rights Report from the U.S. State Department states that judges within KSA were implicitly instructed to issue harsh sentences against human rights activists, reformers, journalists, and dissidents, even those not engaged in violent activities. (A15; A93).

19. KSA is well known for employing a technique known as “torture by proxy” whereby KSA targets Saudi-residing friends and family members of a dissident or political opponent who lives outside of Saudi Arabia and is therefore out of the usual reach of KSA security forces. (A15; A94).

20. In January 2016, Amnesty International reported that the sister of jailed dissident and blogger, Raif Badawi (who had taken refuge in Canada), was imprisoned. (A16; A93).

21. Mr. Badawi remains in prison and has been sentenced to flogging – 1,000 lashes. (A16; A94).

22. In June 2017, King Salman elevated MBS (one of his sons) to Crown Prince. MBS is heir to the Saudi throne and the de facto ruler of KSA. (A16; A94).

23. KSA, MBS and their agents and followers view political dissidents with disdain and consider them evil doers. As one Twitter employee recruited to help KSA quiet criticism on Twitter put it when accepting his assignment: “proactively and reactively we will delete evil, my brother.” (A16; A94).

24. In October 2018, KSA lured Jamal Khashoggi,¹ a KSA citizen and dissident, to the Saudi Consulate in Istanbul and sent a squad of assassins to murder Mr. Khashoggi while he was inside the consulate. Turkish investigators, the CIA and an independent investigative team assembled by the United Nations

¹ At the time of his death, Mr. Khashoggi was a Saudi journalist living in the United States and writing for the Washington Post. Mr. Khashoggi championed democracy, human rights, and anti-corruption efforts. He had been a fierce critic of KSA. (A16; A94).

concluded that Mr. Khashoggi's assassination was likely ordered by MBS. (A16; A94).

25. After torturing Mr. Khashoggi, the KSA assassin squad killed him and removed his limbs to make his body easier to conceal and transport out of the consulate. According to one investigator listening to recordings from within the consulate, one of the assassins asked the others about the mechanics of removing the body from the consulate. The doctor accompanying the assassin squad responded:

Joints will be separated. It is not a problem... If we take plastic bags and cut [Khashoggi's body] into pieces, it will be finished. We will wrap each of them.

Mr. Khashoggi's remains have never been found. (A17; A95).

3. The Complaint and Proposed First Amended Complaint Allege that McKinsey has Deep Ties to KSA and MBS and is Very Familiar with the way KSA and MBS treat Critics of the Regime

54. McKinsey has a long history of regularly and extensively advising KSA government agencies to the point that KSA's Ministry of Planning has acquired the nickname "Ministry of McKinsey" by some Saudis, including KSA's royal court. (A23; also at FAC 41 A98).

55. The Brookings Institute attributes "the Kingdom's new economic direction" and a major government cabinet reshuffling of high-ranking government ministers to McKinsey and MBS. MBS admitted that "McKinsey participates with

us in many studies.” Indeed, McKinsey prepared a December 2015 report entitled “Moving Saudi Arabia’s Economy Beyond Oil.” That December 2015 report outlines an ambitious blueprint for KSA’s economic transformation and diversification away from oil. In what the Brookings Institute refers to as a “glaring omission,” the December 2015 report fails to sufficiently explain how KSA “will be able to change the mindset of everyday Saudi Arabian citizens, who have long been accustomed to state largesse that included fuel subsidies, loans, free land, and public sector jobs.” The Brookings Institute goes on to insist that this is a “key issue” and questions how everyday citizens in Saudi Arabia will react to the reforms, referencing public discontent to a number of higher utility prices, which led to King Salman firing the water minister to appease the public. KSA was even forced to cave to protestors’ demands in the Arab Spring to unveil a populist \$130 billion social spending package. Controlling and manipulating public opinion (which include silencing voices like Plaintiff’s) especially with respect to KSA’s economic policies, is therefore, a vital requirement for MBS to achieve his goals. (A23; also at FAC 44 A99).

56. McKinsey has long maintained an office in Riyadh, KSA’s capital and financial center. On April 1, 2017, McKinsey announced it purchased a consulting firm known as Elixir, a politically connected Saudi consulting firm, and merged Elixir into its own Saudi operations. The new firm added 140 more employees to

McKinsey's 300 employees in the region. Many of Elixir's younger consultants were graduates of Saudi universities whose parents were either connected to the Royal Family or otherwise had significant political connections. On its website, McKinsey boasts that its "Saudi Arabia Practice helps Saudi leaders." (A24; A98, also at FAC42 A98).

57. In November 2017, in an effort to quell dissent and consolidate his family's power, MBS had 30 senior officials and scores of former government ministers arrested. Among those arrested and beaten was Hani Khoja, a McKinsey partner and founder of Elixir. During his captivity, McKinsey terminated Mr. Khoja and did not intervene, or even publicly complain about the treatment of one of its own partners. (A24; also at FAC 43 A98).

4. The Complaint and Proposed First Amended Complaint Allege that McKinsey Created a Report that Identified Abdulaziz as one of the Three Most Influential Critics of MBS and KSA on Social Media

8. In or around December 2016, McKinsey prepared a report in the form of a PowerPoint presentation that identified the three most influential dissidents using Twitter to criticize Crown Prince Mohammad Bin Salman's (hereinafter "MBS")² austerity plan (hereinafter the "McKinsey Report"). Plaintiff was one of the three individuals McKinsey identified in the McKinsey Report. On information and

² MBS is neither the head of the KSA state or KSA's government. However, he has been the de facto ruler of KSA for several years.

belief, McKinsey either furnished the McKinsey Report to MBS and/or his agents and/or McKinsey allowed MBS and/or his agents to gain access to the McKinsey Report. (A13; A91).

29.b. Second, in or about December 2016, McKinsey prepared the McKinsey Report which identified the three most influential social media critics of KSA and MBS. McKinsey collected and analyzed Twitter data from September and October 2016. The McKinsey Report was finalized in December 2016. A true and accurate copy of what Plaintiff believes is the McKinsey Report is attached hereto as Exhibit A. (A18, A34-A42; A96).

30. Locating these three “Key people” identified in the McKinsey Report was not an easy task. More than one-half of KSA’s population are millennials, a generation well-versed in technology and social media. This is one of the reasons KSA has the highest number of active Twitter users in the Arab world. (A18; A96).

31. According to the McKinsey Report, there are 316 million registered Twitter accounts in KSA and “Saudis produce over 500,000 tweets per day.” Report, p. 9. In the McKinsey Report, McKinsey boasts that to achieve its results it “closely analyzed data from twitter feed.” Part of the McKinsey Report’s analysis identifies “Key people who lead online conversations in their field.” Report, p. 2. (A18; A97).

32. The Report identified three men as “Major influencers in Saudi driving discussion regarding austerity measures.” The men identified are (i) Plaintiff, (ii) Khalid AlAlkami and (iii) “Ahmad.” Report, p. 8. (A19; A97).

33. The McKinsey Report describes Plaintiff as:

- “Saudi influencer with high following, mainly uses Twitter and Snapchat
- Omar has a multitude of negative tweets on topics such as austerity and the royal decrees”

Report, p. 8. (A19; A97).

34. Khalid AlAlkami was imprisoned after being identified in the McKinsey Report. (A19; A97).

35. Ahmad has disappeared – or has been disappeared – after being identified in the McKinsey Report. (A19; A97).

36. Another dissenter whose tweet was merely quoted in the McKinsey Report as an example of “highly negative sentiment,” Aesa al Nukhifi, was imprisoned on March 24, 2017. (A19; A97).

5. The Complaint and Proposed First Amended Complaint allege that KSA’s and MBS’s Reputation for the Brutal Treatment of Dissidents and Critics is Well Known and Well Documented

15. KSA has one of the worst human rights records in the world and this was common knowledge well before McKinsey prepared and furnished the McKinsey Report to MBS and/or his agents and/or allowed MBS and/or his agents

to gain access to the McKinsey Report. The State Department's 2014 Human Rights Report on Saudi Arabia summarized the situation:

“[H]uman rights problems reported included abuses of detainees; overcrowding in prisons and detention centers; investigating, detaining, prosecuting, and sentencing lawyers, human rights activists, and antigovernment reformists; holding political prisoners; denial of due process; arbitrary arrest and detention; and arbitrary interference with privacy, home, and correspondence. Violence against women, trafficking in persons, and discrimination based on gender, religion, sect, race, and ethnicity were common. Lack of government transparency and access made it difficult to assess the magnitude of many reported human rights problems.” “The government reportedly arrested and detained multiple persons during the year, refusing for extended periods in some cases to acknowledge the detention or to provide information about an individual's whereabouts.”

(A14; A93).

18. The 2016 Human Rights Report from the U.S. State Department states that judges within KSA were implicitly instructed to issue harsh sentences against human rights activists, reformers, journalists, and dissidents, even those not engaged in violent activities. (A15; A93).

51. On October 23, 2018, US Senator Elizabeth Warren wrote to Kevin Sneader, McKinsey's Global Managing Partner, and demanded, among other things, that McKinsey provide the Senator the following information:

1. For whom was the 2015 [sic] report on the Saudi public's views of the Kingdom's economic austerity policies prepared?
2. What was the rationale for the preparation of this report?

3. To whom was the report distributed? Was it labeled or treated as a restricted access document?

4. Specifically, are you aware of any Saudi officials who obtained this report? If so, please provide a complete list and explain how they received the report.

9. Was McKinsey ever commissioned by any individual or entity associated with the Saudi government – either in Saudi Arabia or outside of the country – to prepare a report or any other material related to identifying critics or any other indicators of public perception of the government?

12. Does McKinsey have a review or risk management process in place to evaluate prospective business projects with foreign governments that could lead to potential human rights abuses or other adverse consequences? If available, please provide any official McKinsey documents, in electronic form, that explain the process.

13. In an official statement on October 20, 2018, McKinsey announced that “we are urgently investigating how and with whom this document was shared.” Please provide an electronic, unredacted copy of this investigation when it is complete.

October 23, 2018 Senator Elizabeth Warren letter to K. Sneader. (A22; A102).

6. The Complaint and Proposed First Amended Complaint Allege that McKinsey was aware of the Risks Created by its Identification of Abdulaziz and the Other Prominent Social Media Critics Featured in its Report

50. Since the existence of the McKinsey Report became public when it was mentioned in an October 20, 2018 *New York Times* article entitled *Saudis Image Makers: a Troll Army and a Twitter Insider*, McKinsey has admitted that it

authored the report. In filings in California, McKinsey admits the McKinsey Report was created by a McKinsey analyst working in Saudi Arabia. In a statement from a McKinsey spokesperson about the McKinsey Report, McKinsey claimed:

We are horrified by the possibility, however remote, that [the McKinsey Report] could have been misused in any way... We have seen no evidence to suggest it was misused, but we are urgently investigating how and with whom the document was shared.

(A21).

FAC 45. Since the existence of the McKinsey Report became public when it was mentioned in an October 20, 2018 *New York Times* article entitled *Saudis Image Makers: a Troll Army and a Twitter Insider*, McKinsey has admitted that its analysts authored the report. In a statement from a McKinsey spokesperson about the McKinsey Report, McKinsey claimed:

We were never commissioned by any authority in Saudi Arabia to prepare a report of any kind or in any form to identify critics. In our work with governments, McKinsey has not and never would engage in any work that seeks to target individuals based on their views. The document in question was a brief overview of publicly available information looking at social media usage. It was not prepared for any government entity. Its intended primary audience was internal. We are horrified by the possibility, however remote, that it could have been misused in any way. At this point, we have seen no evidence to suggest that it was misused, but we urgently investigating how and with whom the document was shared.

(A99).

FAC 30. Upon information and belief, KSA officials or a KSA ministry retained McKinsey's office in KSA to analyze social media postings critical of KSA and MBS and create the McKinsey Report identifying the most influential critics. (A96).

FAC 39. In filings in California, McKinsey admits the McKinsey Report was created by a McKinsey analyst working in Saudi Arabia. (A98).

FAC 65. At all times, the McKinsey analysts responsible for creating the McKinsey Report were aware that the purpose for which KSA retained it was to locate the most influential critics of KSA and MBS. (A104).

FAC 40 and 66. At all times, McKinsey knew, or should have known that, identifying anyone as a "major influencer" critical of KSA and MBS would subject those identified to imprisonment, torture and even murder by KSA, MBS and their agents. McKinsey was also aware that the family members, friends and associates of those identified would be subject to the same treatment. (A98, A104).

FAC 67. Recognizing the danger such an analysis and report would create, McKinsey stated that it would never accept such an assignment from a government client:

In our work with governments, McKinsey has not and never would engage in any work that seeks to target individuals based on their views.

Nevertheless, as McKinsey has admitted, its analysts created the McKinsey Report that identified “individuals based on their views” and those views were critical of KSA and MBS. (A104).

72. At all times, McKinsey was aware that identifying anyone as a “major influencer” critical of KSA and MBS would subject those identified to imprisonment, torture and even murder by KSA, MBS and their agents. McKinsey was also aware that the family members, friends and associates of those identified would be subject to the same treatment. (A27; A104).

73. Before the Report was drafted it was foreseeable that such information would be used to target dissidents because KSA’s abysmal human rights record and utter contempt for democratic values, political criticism and freedom of expression was well-known, including to those living and working outside of Saudi Arabia. (A27; A104).

7. The Complaint and Proposed First Amended Complaint Allege that McKinsey Owed a Duty Prevent the Disclosure of the Names Identified in the Report to KSA and MBS

78. McKinsey owed a duty to act prudently and protect the identity of the individuals identified in the McKinsey Report from disclosure to KSA or MBS. (A27).

FAC 71. McKinsey owed a duty to plaintiff and others to enforce its policy to “never [] engage in any work that seeks to target individuals based on their

views.” McKinsey management was required act prudently to make sure all of its offices and analysts understood that this was McKinsey’s policy and that any assignment violating this policy should be rejected and, to the extent such an assignment was inadvertently undertaken by any McKinsey office, it should be terminated immediately, and steps should have been taken to protect the identities of any individuals identified during the assignment. This policy is consistent with the common law duty of reasonable care to avoid harm others. In this case, the duty was to avoid identifying critics of KSA and MBS – both of which are notorious for their treatment of critics and their families. (A105).

FAC 72. Upon information and belief, McKinsey breached its duty to plaintiffs and the others identified in the McKinsey Report and allowed its analysts to complete the assignment and, eventually, furnish copies of the McKinsey Report (and/or the information contained therein) to agents and representatives of KSA and/or MBS or failed to safeguard the identities of those identified and agents and representatives of KSA and/or MBS were able to obtain copies of the McKinsey Report (and/or the information contained therein). (A105).

FAC 73. As a direct result of McKinsey’s negligent conduct, KSA and MBS were provided with the identities of their three most influential critics. The level of harassment of plaintiff from KSA and MBS increased substantially upon the release of this information. Plaintiff was forced into hiding and had to move

from hotel to hotel for four months to avoid being kidnapped or harmed. Plaintiff has also suffered severe emotional distress. Plaintiff suffers and continues to suffer humiliation, stress, anxiety, emotional distress, pain and suffering, mental anguish, loss of sleep and loss of enjoyment. KSA, MBS and their agents continue to use the tactics described in this complaint to pressure Plaintiff to cease all of his political activities. Plaintiff's friends and family members have been arrested and tortured and remain in KSA prisons where they continue to be tortured. (A105).

93. McKinsey owed a duty to act prudently and warn the individuals identified in the McKinsey Report that it had identified them as major influencers driving dissent. (A30).

IV.

SUMMARY OF THE ARGUMENT

In or around December 2016 McKinsey prepared a written report that identified the three most influential dissidents using social media to criticize the Kingdom of Saudi Arabia ("KSA"), Crown Prince Mohammad Bin Salman ("MBS") and an austerity plan put in place in KSA ("Report"). Predictably, two of the three men identified in the McKinsey Report have disappeared since the date of the Report. Unable to "disappear" Abdulaziz, because he now resides in Canada (although there have been several attempts to do so, including KSA sending a hit team to kill Mr. Abdulaziz in October 2018), KSA has, instead, resorted to the

practice known as “torture by proxy.” As part of its efforts to silence Abdulaziz, in July and August of 2018, KSA arrested and began torturing many of Abdulaziz’s family and friends to silence plaintiff. Among other things, KSA removed Abdulaziz’s younger brother’s teeth and imprisoned and tortured many of Abdulaziz’s family and friends. Abdulaziz has suffered intense emotional and physical distress because of these actions and lives in fear of being captured, tortured and killed by KSA agents – like his friend Jamal Khashoggi – and he has forever altered the way he lives his daily life.

Abdulaziz’s complaint against McKinsey alleges claims for (i) Intentional Infliction of Emotional Distress, (ii) Negligent Infliction of Emotional Distress, (iii) Negligence and (iv) Prima Facie Tort. McKinsey filed a Rule 12(b)(6) motion to dismiss and the district court granted the motion, but invited Abdulaziz to move to re-plead his negligence and negligent infliction claims. The district court denied Abdulaziz’s motion to amend. (A112).

The basis for the district court’s dismissal of Abdulaziz’s negligence claims is that McKinsey had no duty to Abdulaziz. The district court’s reasoning was simple: McKinsey did not control KSA or MBS, so it had no duty to Abdulaziz. (A89). To find otherwise, the district court reasoned, would create an onerous duty on “corporations, consulting firms, research organizations, libraries or any organization providing investigative services” to anticipate how their clients may

react. (A83). Accordingly, the district court ruled that, under New York law, since McKinsey had no ability to control KSA and MBS it owed no duty to Abdulaziz. (A82).

The district court's analysis and application of New York law focuses only on two facts (i) KSA and MBS were the physical actors that created the harm to plaintiff and his family and friends and (ii) McKinsey had no control over KSA and MBS. (A82). This simple analysis of duty is inconsistent with New York law. Since *Palsgraf v. Long Island Railroad Company*, 248 N.Y. 339 (1928), New York courts have always evaluated duty in relation to the risk associated with the defendant's conduct: "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." *Id.* at 344. Under *Palsgraf* and its progeny, in determining the nature and existence of any duty, the court must consider the conduct of the defendant, especially the defendant's awareness of the risk created by the circumstances. When evaluated under this standard, the fact that McKinsey had no control over KSA or MBS is relevant, but this fact alone does not mandate a finding of no duty without further analysis. The district court failed to engage in the factual and legal analysis required under New York law and should be reversed. This Court should find that, as alleged in the complaint and proposed first amended complaint, McKinsey owed a duty to Abdulaziz.

V.

ARGUMENT

A. The Legal Standards Of Review

The district court's grant of McKinsey's motion to dismiss is reviewed *de novo*. *Frommert v. Conkright*, 433 F.3d 254, 262 (2d Cir. 2006). The district court's denial of Abdulaziz's motion for leave to file an amended complaint is also reviewed *de novo*. *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F. 3d 162, 185-86 (2d Cir. 2012).

In deciding a motion to dismiss, a court "must accept as true all of the factual allegations set out in plaintiff's complaint, draw inferences from those allegations in the light most favorable to plaintiff, and construe the complaint liberally." *Roth v. Jennings*, 489 F.3d 499, 510 (2d Cir. 2007). The question is whether a claim is *plausible* and, therefore, "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). "Fact-specific questions cannot be resolved on the pleadings." *Anderson News*, 680 F.3d at 185. "A complaint may not be dismissed under Rule 12(b)(6) unless it 'appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' The review of such a motion is limited, and '[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.' ... Recovery may

appear remote and unlikely on the face of the pleading, but that is not the test for dismissal.” *Bernheim v. Litt*, 79 F.3d 318, 321 (2d Cir. 1996) (citations omitted). The complaint may only be dismissed when “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

Leave to file an amended pleading should be freely given: “Fed.R.Civ.P. 15(a) requires that ‘leave [to amend] shall be freely given when justice so requires.’ See *Foman v. Davis*, 371 U.S. 178, 182 (1962). When a motion to dismiss is granted, ‘the usual practice is to grant leave to amend the complaint.’ 2A Moore & Lucas, Moore’s Federal Practice ¶ 12.14 at 12–99 (2d ed. 1989); see also *Luce v. Edelstein*, 802 F.2d 49, 56 (2 Cir.1986) (‘Complaints dismissed under Rule 9(b) are ‘almost always’ dismissed with leave to amend’).” *Ronzani v. Sanofi S.A.*, 899 F.2d 195, 198 (2d Cir. 1990).

B. McKinsey had a Duty not to Identify Plaintiff as an Effective Dissident to KSA and MBS – a Regime that Tortures, Imprisons and Disappears Dissidents and Their Friends and Families

The district court dismissed Abdulaziz’s negligence claims against McKinsey because it ruled that McKinsey owed no duty to Abdulaziz. Opinion, p. 9.³ Rather than examine the totality of the circumstances alleged, the district

³ In a footnote, the district court noted that the complaint also fails because it fails to allege proximate causation since KSA and MBS were aware of Abdulaziz before the Report was prepared. Opinion, note 3. However, the district court is

simply concluded that, under New York law, McKinsey owed no duty to Abdulaziz because it had no duty or ability to control KSA and MBS: “Generally, there is no duty to control the conduct of third persons to prevent them from causing injuries to others.” Opinion, p. 9, citing *Lanfranchi v. Grille*, 98 N.Y.S.3d 470, 470 (2d Dep’t 2019) (A80). The district court also noted that foreseeability, alone, is not a sufficient basis to find a duty. Opinion, p. 10. (A81). The district court then discussed the fact that the relationship between McKinsey and KSA was not one that created an inference that McKinsey could control KSA. Opinion, pp. 10-13. (A81-A84).

The district court’s analysis was incorrect under New York law because it focused almost entirely on the relationship between the parties and between McKinsey and KSA and MBS, rather than the risk created by McKinsey’s conduct. Under New York law, it is the risk created by the defendant’s conduct that determines whether there is a duty owed to a particular plaintiff. *Palsgraf v. Long Island Railroad Company*, 248 N.Y. 339 (1928)

In *Palsgraf*, the plaintiff was waiting on a train platform for a train to Rockaway Beach. A train headed to another destination stopped at the platform

incorrect. The complaint and proposed first amended complaint allege that the Report caused KSA and MBS to increase and intensify their efforts to silence Abdulaziz. Complaint, ¶¶ 27-29, 38-40, 42, 68, 69, 80, 81, 96, 97, 106 & 107. (A17). First Amended Complaint, ¶¶ 27-30, 47-49, 51, 73-75, 80-82. (A90).

and two men hurried to board the train. One man got on without incident, the other, carrying a package, struggled to get aboard the train. A guard on the train pulled the struggling passenger up, while another on the platform pushed the passenger up. The package the passenger was holding fell to the ground. The package contained fireworks and exploded. The explosion caused scales further down the platform to fall and injure the plaintiff. 248 N.Y. at 340-41. The trial court found liability and the Appellate Division affirmed. The Court of Appeals reversed. *Id.* at 347.

Chief Judge Cardozo found the railroad had no duty to the plaintiff under the circumstances presented – helping a patron board a train with an innocuous looking package did not create a duty to the plaintiff standing some distance away: “Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed.” *Id.* at 341. Justice Cardozo continued: “If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to some one else.” *Id.* at 342. Justice Cardozo contrasted the act of the guards helping the passenger board the train with the act of firing a weapon: “Some acts, such as shooting, are so imminently dangerous to any one who may come within reach of the missile, however

unexpectedly, as to impose a duty of prevision not far from that of an insurer.” *Id.* at 344. Under *Palsgraf*, a court must examine the risk involved and the relation of the parties to determine whether a duty exists: “The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.” *Id.*

Since *Palsgraf* was decided, courts in New York have applied Justice Cardozo’s definition of duty to determine whether a duty exists. For example, in *Palka v. Servicemaster*, 83 N.Y.2d 579 (1994), the plaintiff was a nurse tending to a patient in a hospital in Schenectady when a wall-mounted fan fell and injured her. The plaintiff sought to hold Servicemaster responsible for negligence since Servicemaster was contractually obligated to the hospital to develop and implement a maintenance program. *Id.* at 582. Plaintiff won a jury award in the trial court, but the Appellate Division overturned the verdict based on its finding that Servicemaster owed no duty to plaintiff. The Court of Appeals reversed, finding a duty.

The *Palka* court relied on Justice Cardozo’s opinion in *Palsgraf* to determine whether Servicemaster owed a duty to Ms. Palka:

Chief Judge Cardozo sagely instructed all who have continued to search for this shimmering line of duty in endless fact patterns and juridical relationships with the now familiar axiom that “[t]he risk reasonably to be perceived defines the duty to be obeyed, *and risk imports relation*” (*Palsgraf v Long Is. R. R. Co.*, 248 NY 339, 344 [emphasis added]). It has been said, with

additional words, that "whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he [or she] did not use ordinary care and skill in his [or her] own conduct with regard to the circumstances he [or she] would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger" (*Havas v Victory Paper Stock Co.*, 49 NY2d 381, 386, quoting *Heaven v Pender*, 11 QBD 503, 509, Brett, MR [1883]).

The *Palka* Court recognized that duty was not open-ended and that many factors had to be considered when deciding whether a duty existed: "Courts traditionally and as part of the common-law process fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability." *Id.* at 586. However, the Court found that, when it accepted the maintenance role for the hospital, Servicemaster also took on a duty to the plaintiff and any other person entering the hospital to perform its services in a manner that was not negligent. *Id.* at 587.

In *Stevens v. Kirby*, 450 N.Y.S.2d 607 (4th Dep't 1982), the plaintiff was a patron at a bar injured in a fight in the parking lot after he left the bar. A jury had found the tavern owner negligent and the tavern owner appealed. *Id.* at 609. The central question decided on appeal was the admissibility of certain evidence at trial. *Id.* However, the Appellate Division also had to determine if the tavern

owner had a duty to prevent harm to the plaintiff by third parties. The court, relying on *Palsgraf* and other authority found that a duty existed:

A tavern owner owes a duty to his patrons to protect them from personal attack when he has reasonable cause to anticipate conduct on the part of third persons which is likely to endanger their safety (see *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 519; *Taylor v Centennial Bowl*, 65 Cal 2d 114; *Restatement, Torts 2d*, § 344; Prosser, *Torts* [4th ed], § 56, pp 348-350; see, also, *De Gelorm v Pelc*, 52 Misc 2d 336; *Shank v Riker Rests. Assoc.*, 28 Misc 2d 835, aff'd 15 AD2d 458). The nature and scope of this duty is derived from the general concept of foreseeability: “[the] risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation” (*Palsgraf v Long Is. R. R. Co.*, 248 NY 339, 344; see *Havas v Victory Paper Stock Co.*, 49 NY2d 381, 385-386; *Basso v Miller*, 40 NY2d 233).

Stevens, 450 N.Y.S.2d at 610.

In *Stagl v. Delta Airlines, Inc.*, 52 F.3d 453 (2d Cir. 1995), this Court had to determine whether Delta Airlines owed a duty to its passengers once they had progressed to the baggage carousel. The district court had ruled that there was no duty to maintain customer order at the baggage carousel, this Court reversed, noting that under New York law, a duty arises:

[w]henver one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to the circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger. *Havas v. Victory Paper Stock Co.*, 49 N.Y.2d 381, 386, 426 N.Y.S.2d 233, 236, 402 N.E.2d 1136 (1980) (quoting *Heaven v. Prender*, 11 Q.B.D. 503, 509 (1883)).

Stagl, 52 F.3d at 469 (2d Cir. 1995). In *Stagl*, this Court cautioned that trial courts should redefine that definition duty in only very limited circumstances. *Id.*

Although *Palsgraf* is not cited in the *Stagl* opinion, the Court relies on *Havas* which cites *Palsgraf* and explains the concepts discussed in Justice Cardozo's opinion. *Havas*, 49 N.Y.2d at 385-86.

Under the concept of duty discussed above, McKinsey owes a duty to Abdulaziz. McKinsey's Report identified the three most influential critics of KSA and MBS. In so doing, "every one of ordinary sense who did think would at once recognize" that McKinsey put Abdulaziz's life in danger. Even McKinsey seems to recognize this fact. In a statement made after the existence of the Report was made public by a story in the New York Times, McKinsey said:

We were never commissioned by any authority in Saudi Arabia to prepare a report of any kind or in any form to identify critics. In our work with governments, McKinsey has not and never would engage in any work that seeks to target individuals based on their views. The document in question was a brief overview of publicly available information looking at social media usage. It was not prepared for any government entity. Its intended primary audience was internal. We are horrified by the possibility, however remote, that it could have been misused in any way. At this point, we have seen no evidence to suggest that it was misused, but we urgently investigating how and with whom the document was shared.

First Amended Complaint, ¶ 45, Complaint, ¶ 50. (A99; A21).

Under New York law, since McKinsey created the dangerous condition, it had a duty to use "ordinary care and skill" to avoid the danger created by the

Report. Whether or not McKinsey could control KSA or MBS is irrelevant for the purpose of determining the existence of a duty.⁴ Once McKinsey created the danger, New York law recognizes a duty to prevent harm to Abdulaziz. In *Stagl*, this Court ruled that Delta had an obligation to prevent chaos at the baggage carousel: “Delta was required to take all reasonable measures to ensure that Mrs. Stagl's trip to the baggage carousel was a safe one.” *Stagl*, 52 F.3d at 468. In *Stevens*, the tavern owner had a duty to protect patrons “from personal attack when he has reasonable cause to anticipate conduct on the part of third persons which is likely to endanger their safety.” *Id.* at 610. In *Palka*, Servicemaster owed a duty to hospital visitors to perform its maintenance services with care. *Palka*, 83 N.Y.2d at 589. Here, McKinsey owes a duty to Abdulaziz.

C. For the Purpose of this Appeal and Defendants’ Rule 12(b)(6) Motion, this Court Must Assume the Allegations of KSA’s and MBS’s Ruthless Brutality Towards Dissidents is True

In *Palsgraf*, Chief Justice Cardozo provides an example of a situation where the defendant’s conduct creates a situation that creates a duty: “Some acts, such as shooting, are so imminently dangerous to any one who may come within reach of the missile, however unexpectedly, as to impose a duty of prevision not far from that of an insurer.” *Palsgraf*, 248 N.Y. at 344. McKinsey’s conduct should be

⁴ It is possible that the issue of McKinsey’s ability to control KSA and MBS will be relevant when determining whether McKinsey breached its duty to Abdulaziz.

treated the same as the shooter in Justice Cardozo's example. The complaint and first amended complaint allege that MBS and KSA ruthlessly hunt down, torture and kill dissidents – especially dissidents that have become well known, like Jamal Khasoggi and the two other dissidents identified in McKinsey's Report. The complaint's allegations must be construed liberally and accepted as true and all reasonable inferences must be drawn in plaintiff's favor. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002), citing *Gregory v. Daly*, 243 F.3d 687, 691 (2d Cir. 2001)). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 378 (2d Cir. 1995) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). Dismissal is only appropriate when "it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him or her to relief." *Sweet v. Sheahan*, 235 F.3d 80, 83 (2d Cir. 2000).

In this context under New York law, the complaint and first amended complaint have alleged facts sufficient to show McKinsey owed a duty to Abdulaziz to not place him in danger by identifying him as one of the three most effective critics of KSA and MBS. McKinsey, like the shooter Justice Cardozo describes in *Palsgraf*, created this danger and owes Abdulaziz a duty to prevent

MBS and KSA from harming him. Abdulaziz should be able to proceed to discovery to develop further evidence in support of his claim.

V.

CONCLUSION

For all of the foregoing reasons, plaintiff Omar Abdulaziz respectfully requests that the Court (i) find that McKinsey owed a duty of care to Abdulaziz, (ii) reverse the district court's decisions dismissing the complaint and denying Abdulaziz's motion to amend, and (iii) granting Abdulaziz's motion to file his first amended complaint.

Date: January 18, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 7,080 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century font type.

Dated: January 18, 2022

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