No. _____

IN THE

Supreme Court of the United States

TZVI WEISS, ET AL.

Petitioners,

v.

NATIONAL WESTMINSTER BANK PLC,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), this Court scrutinized and endorsed Congress's finding that "[f]oreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any contribution to such an organization* facilitates that conduct." *Id*. at 29 (citation omitted). The Court thus upheld the constitutionality of 18 U.S.C. § 2339B, which makes it a felony to knowingly provide material support—even for charitable purposes—to entities that the Department of State has designated as foreign terrorist organizations (FTOs).

Congress subsequently enacted the Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222, 130 Stat. 852 (2016), which provides enhanced relief to Americans injured by terrorist attacks that were committed, planned, or authorized by FTOs. JASTA allows the victims of such attacks to assert a cause of action for aiding and abetting against any person or entity that "knowingly provid[ed] substantial assistance" to the people or entities that committed the attack. 18 U.S.C. § 2333(d)(2). Congress's objective was to "provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief" from any party that "provided material support, directly or indirectly," to FTOs that injured Americans. JASTA § 2(b).

The question presented is:

Whether a person who knowingly transfers substantial funds to a designated FTO aids and abets that organization's terrorist acts for purposes of civil liability under JASTA, 18 U.S.C. § 2333(d)(2).

PARTIES TO THE PROCEEDING

Petitioners are Tzvi Weiss, Leib Weiss, Malke Weiss, Yitzchak Weiss, Yeruchaim Weiss, Esther Deutsch, Moses Strauss, Philip Strauss, Bluma Strauss, Ahron Strauss, Roisie Engelman, Joseph Strauss, Matanya Nathansen, Chana Nathansen, Matanya and Chana Nathansen for the Estate of Tehilla Nathansen, Yehudit Nathansen, S.N., a minor, Hezekiel Toporowitch, Pearl B. Toporowitch, Yehuda Toporowitch, David Toporowitch, Shaina Chava Nadel, Bluma Rom, Rivka Pollack, Eugene Goldstein, Lorraine Goldstein, Barbara Goldstein Ingardia, Richard Goldstein, Michael Goldstein, Chana Freedman, Michal Honickman for the Estate of Howard Goldstein, Michal Honickman, David Goldstein, Harry Leonard Beer as Executor of the Estate of Alan Beer, Harry Leonard Beer, Anna Beer, Phyllis Maisel, Estelle Carroll, Sarri Anne Singer, Judith Singer, Eric M. Singer, Robert Singer, Julie Averbach for the Estate of Steven Averbach, Julie Averbach, Tamir Averbach, Devir Averbach, Sean Averbach, A.A., a minor, Maida Averbach for the Estate of David Averbach, Maida Averbach, Michael Averbach, Eileen Sapadin, Daniel Rozenstein, Julia Rozenstein Schon, Alexander Rozenstein, Esther Rozenstein, Jacob Steinmetz, Deborah Steinmetz, Jacob Steinmetz and Deborah Steinmetz for the Estate of Amichai Steinmetz, Nava Steinmetz, Orit Mayerson, Natanel Steinmetz, Robert L. Coulter, Sr. for the Estate of Janis Ruth Coulter, Dianne Coulter Miller, Robert L. Coulter, Sr., Robert L. Coulter, Jr., Larry Carter for the Estate of Diane Leslie Carter, Larry Carter, Shaun Choffel, Richard Blutstein and Katherine Baker for the Estate of Benjamin Blutstein, Richard Blutstein, Katherine Baker, Rebekah

Blutstein, Nevenka Gritz for the Estate of David Gritz, Nevenka Gritz, Nevenka Gritz for the Estate of Norman Gritz, Jacqueline Chambers as the Administrator of the Estate of Esther Bablar, Jacqueline Chambers, Levana Cohen, Eli Cohen, Sarah Elyakim, Yehuda Agababa, Menache Agababa, Yehezkel Agababa, Greta Geler, Ilana Eropa Dorfman, Refael Kitsis and Tova Guttman as the Administrator of the Estate of Hannah Rogen, Akiva Anachovich, Joshua Faudem, Zohar Fater, Bruce Mazer, Orly Rom, Richard Coffey, Gal Ganzman, Judith Buchman-Ziv, Ora Cohen, Mirav Cohen, Daniel Cohen, O.C., a minor, S.C., a minor, E.N.C., a minor, Faiga Zvia Lieberman, Einat Noked for the Estate of Eyal Noked, Einat Noked, A.N., a minor, Avishag Noked, Baruch Zuri Noked, Binyamin Elkana Noked, Neta Nechama Cohen, T.N., a minor, Karen Goldberg, Chana Weiss, Esther Goldberg, Yitzhak Goldberg, Shoshana Goldberg, Eliezer Goldberg, Y.M.G., a minor, T.Y.G., a minor, Nilly Choman, Temima Spetner, Jason Kirschenbaum, Isabelle Kirschenbaum, Isabelle Kirschenbaum for the Estate of Martin Kirschenbaum, Joshua Kirschenbaum, Shoshana Burgett, David Kirschenbaum, Danielle Teitelbaum, Netanel Miller, Chaya Miller, Arie Miller, Altea Steinherz, Jonathan Steinherz, Baruch Yehuda Ziv Brill, Chaya Beili, Gila Aluf, the Estate of David Applebaum, the Estate of Naava Applebaum, Debra Applebaum, the Estate of Jacqueline Applebaum, Natan Applebaum, Shira Applebaum, Yitzchak Applebaum, Shayna Applebaum, Tovi Belle Applebaum, Geela Applebaum Gordon, Chaya Tziporah Cohen, Philip Litle, the Estate of Abigail Litle, Elishua Litle, Hannah Litle, Heidi Litle, Josiah Litle, Noah Litle, Ari Horovitz, Batsheva Horovitz Sadan, David Horovitz, the Estate of Debra Ruth Horovitz, the Estate of Eli Natan

Horovitz, the Estate of Leah Horovitz, The Estate Moshe Horovitz, Nechama Horovitz, Shulamite Horovitz, Tovi Horovitz, Tvi Horovitz, Uri Horovitz, Bernice Wolf, Bryan Wolf, Stanley Wolf, Fran Strauss Baxter, William J. Baxter, Ariela Freirmark, Menachem Freirmark, Hadassah Freirmark, Phyllis Pam, Rivka Reena Pam, Shoshana Tita, Ezra Tita, Ephraim Tita, Ephriam Tita for the Estate of Bertin Tita, Rachel Potolski, Ovadia Topporowitch, Yisrael Topporowitch, Yitzchak Topporowitch, Miriam Ehrenfeld, Rose Joseph, Leibel Reinitz, Malvia Reinitz, Margali Reinitz, Mendy Reinitz, Miriam Reinitz, Rivka Reinitz, Samuel Reinitz, Shmuel Reinitz, Yakov Reinitz, the Estate of Mordechai Reinitz, the Estate of Yissocher Dov Reinitz, Yitzchok Reinitz, Raizel Shimon, Leah Tauber, Helen Weider, Avrohom D. Richter, Breina Richter, Miriam Leah Richter, Moshe Richter, Nechama Richter, Sara Malka Richter, Shlomo Chaim Richter, Tranne Richter, Yakov Yosef Richter, Yechiel Richter, Yehudis Richter, Yisroel Richter, Yitzchok Richter, Perl Brailofsky, Malky Breuer, Ester Buxbaum, Gittel Cohen, Chaya Freisel, Rachel Rosner, Elizabeth Schwartz, Jacob Schwartz, Max Schwartz, Michael Schwartz, Phillip Schwartz, Abraham Zarkowsky, Aron Zarkowsky, Bshava Zarkowsky Richter, the Estate of Eli Zarkowsky, Ezriel Zarkowsky, Gittel Zarkowsky, the Estate of Goldie Zarkowsky, Joseph Zarkowsky, Mendel Zarkowsky, Miriam Zarkowsky, Shrage Zarkowsky, Trany Zarkowsky, Yehuda Zarkowsky, Erik Schecter, Shlomo Tratner, the Estate of Tiferet Tratner, Averham Grossman, Devorah Chechanow Leifer, Joseph Leifer, Bracha Milstein, Shifra Miller, Chaya Rosenberg, Abraham Waxler, Arthur Waxler, Baruch Waxler, Chana Waxler, Dina Waxler, Ezekiel Waxler, Gedalia Waxler, Haggi

Waxler, Nachum Waxler, Obadiah Waxler, Yaakov Waxler, Yoel Waxler, Zacharia Waxler, Nethaniel Bluth, Moshe Naimi, Faye Chana Benjaminson, the Estate of Moshe Gottlieb, Seymour Gottlieb, and Sheila Gottlieb.

Respondent is National Westminster Bank, PLC.

RELATED PROCEEDINGS

Weiss v. National Westminster Bank PLC, No. 05-cv-4622 (DLI) (RML) (E.D.N.Y. Mar. 31, 2019), consolidated with *Applebaum v. National Westminster Bank PLC*, No. 07-cv-916 (DLI) (RML) (E.D.N.Y.)

Weiss v. National Westminster Bank PLC, Nos. 19-863, 19-1159 (2d Cir. Apr. 7, 2021)

Weiss v. National Westminster Bank PLC, No. 13-1618-cv (2d Cir. Sept. 22, 2014)

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INTRODUCTION

Petitioners are more than 200 American nationals (or the family members or estates of American nationals) who were injured or killed in terrorist attacks committed by Hamas in Israel during the Second Intifada, a widely reported period of intense terrorist violence in the early 2000s. They brought this action under the Antiterrorism Act (ATA), 18 U.S.C. § 2333, against respondent National Westminster Bank PLC (NatWest).

Petitioners allege that for more than a decade NatWest processed hundreds of transfers moving millions of dollars for Hamas's principal European fundraiser, Interpal. Although these transfers were nominally for charitable purposes, the evidence shows that NatWest knew that Interpal was closely linked with Hamas and that the transferees were controlled by or alter-egos of Hamas. These contributions swelled Hamas's coffers, enabling its terrorist violence.

Congress enacted a comprehensive legal regime to deter and punish such support to terrorists. First, Congress made it a felony to knowingly provide any material support (including currency and financial services) to certain designated foreign terrorist organizations (FTOs), including Hamas. *See* 18 U.S.C. §§ 2339A(b)(1), 2339B(a)(1). This prohibition applies with full force to charitable and humanitarian support. The only *mens rea* requirement is that the defendant must know that the support is going to a designated FTO, because they "are so tainted by their criminal conduct that *any contribution* to such an organization facilitates that conduct." Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L.

No. 104-132, § 301(a)(7), 110 Stat. 1214, 1247 (emphasis added).

Second, the ATA imposes complementary civil liability and provides redress to victims of terrorist attacks. *See* 18 U.S.C. § 2333(a). Congress strengthened the ATA with the Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222, 130 Stat. 852 (2016). This statute mirrors the criminal prohibition, providing the "broadest possible basis, consistent with the Constitution of the United States, to seek relief" from anybody that has "provided material support, directly or indirectly," to FTOs. JASTA § 2(b). Thus, when a designated FTO commits, plans, or authorizes an act of international terrorism, JASTA imposes civil liability on anybody who "aids and abets" that act by "knowingly providing substantial assistance" to the entity that committed it. 18 U.S.C. § 2333(d)(2).

Under these laws, any bank—like NatWest—that knowingly sent millions of dollars to Hamas should be liable for aiding and abetting its terrorist attacks. The Second Circuit nevertheless ruled for NatWest as a matter of law. That is because Second Circuit precedent holds that knowingly providing support (including substantial funds) to an FTO is insufficient to permit a jury to find that the defendant aided and abetted the FTO's attacks when, as here, the transferor did not admit that the funds were for a "terroristic purpose," and the victims cannot trace the funds to attacks or terrorist recruiting. Pet. App. 41a. In effect, the Second Circuit recognizes a humanitarian charity exception to aiding and abetting liability.

Other circuits disavow any such exception. The Seventh Circuit holds that "[a]nyone who knowingly contributes to the nonviolent wing of an organization

that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities." *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698 (7th Cir. 2008) (en banc). The Fifth Circuit likewise recognizes that "purportedly charitable donations . . . aid[] Hamas's violent activities." *United States v. El-Mezain*, 664 F.3d 467, 508 (5th Cir. 2011). These cases involved donations to many of the same Hamas "charities" at issue here.

The Second Circuit's holding also conflicts with the findings of every branch of our government, including this Court. In *Holder v. Humanitarian Law Project*, 561 U.S. 1, 36 (2010), this Court accepted "the considered judgment of Congress and the Executive that providing material support to a designated foreign terrorist organization—even seemingly benign support—bolsters the terrorist activities of that organization." The Court held that this judgment was supported by "persuasive evidence," which showed that it was "wholly foreseeable" that even peaceful support for designated FTOs would advance these organizations' violent agendas. *Ibid*.

Thus, people and entities that transferred money to Hamas "charities," even for purported humanitarian purposes, have been found civilly liable in the Seventh Circuit, and criminally culpable in the Fifth Circuit. But banks that enabled indistinguishable transactions escaped accountability in the Second Circuit—a particularly concerning result because of that court's near-monopoly on terror-financing cases, which generally premise jurisdiction on transfers routed through New York branches and accounts. This Court should grant certiorari to bring uniformity to the law, and to ensure that Congress's important objectives in

enacting the ATA are not frustrated by the Second Circuit's erroneous construction of the statute.

OPINIONS BELOW

The Second Circuit's opinion (Pet. App. 1a-42a) is reported at 993 F.3d 144. The district court's opinion (Pet. App. 43a-72a) is reported at 381 F. Supp. 3d 223.

JURISDICTION

The Second Circuit's judgment was entered on April 7, 2021. Pet. App. 1a. This petition is timely filed under this Court's March 19, 2020 order extending the deadline to file any petition for a writ of certiorari to 150 days from the date of the lower court judgment, and remains in effect in this case pursuant to this Court's July 19, 2021 order. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix at 165a-68a.

STATEMENT OF THE CASE

I. The Anti-Terrorism Laws

1. It has been the longstanding policy of the United States that certain terrorist organizations "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." AEDPA § 301(a)(7). Such organizations are designated FTOs by the Secretary of State.

The Secretary may designate an FTO by finding that the organization is: (1) foreign; and (2) engages in terrorism or retains the capability and intent to engage in terrorism; which (3) threatens the security of

United States nationals or the national security of the United States. 8 U.S.C. § 1189(a)(1). The list of FTOs includes entities like al-Qaeda, ISIS, and Hamas that have engaged in sustained violence against Americans and our allies. *See* U.S. Dep't of State, Foreign Terrorist Organizations, https://www.state.gov/foreign-terrorist-organizations/ (last visited Sept. 2, 2021).

Designation as an FTO is not the only tool the government uses to curb support for terrorism. Under Executive Order 13,224 (as amended), people or entities that provide support to terrorists may be named Specially Designated Global Terrorists (SDGTs). *See* U.S. Dep't of State, Executive Order 13224, https://www.state.gov/executive-order-13224/ (last visited Sept. 2, 2021). SDGT designation enables asset restrictions, and thus "provides a means by which to disrupt the financial support network for terrorists and terrorist organizations." *Ibid*.

2. FTO designation is particularly significant because it is a felony to knowingly provide any material support to an FTO. 18 U.S.C. § 2339B(a)(1). Such support is punishable by up to 20 years in prison, or by life imprisonment if death results. *Ibid*. This Court analyzed this prohibition in *Holder*, undertaking a detailed analysis of the legal history and policy behind our anti-terrorism laws.

In *Holder*, the respondents were advocacy organizations that wished to provide peaceful aid to members of designated FTOs, including training members "on how to use humanitarian and international law to peacefully resolve disputes," teaching them "how to petition various representative bodies such as the United Nations for relief," and offering "legal expertise in negotiating peace agreements." 561 U.S. at 14-15

(citation omitted). The respondents argued that the support they wished to provide was lawful because they lacked specific intent to advance terrorism or, in the alternative, that the statute was unconstitutional as applied to such support.

This Court held that the statute prohibited the support the respondents wanted to provide, rejecting the argument that the statute requires any intent "to further a foreign terrorist organization's illegal activities." *Holder*, 561 U.S. at 16. Instead, the statute is satisfied if the defendant has "knowledge about the organization's connection to terrorism." *Id*. at 16-17.

Regarding constitutionality, the Court applied strict scrutiny, and found that the statute survived it. The parties agreed, and the Court found, that the Government's "interest in combating terrorism" was compelling. The respondents argued, however, that the statute was not narrowly tailored to that interest because "their support will advance only the legitimate activities of the designated terrorist organizations, not their terrorism." *Holder*, 561 U.S. at 28-29.

This Court rejected that argument. It noted that "[w]hether foreign terrorist organizations meaningfully segregate support of their legitimate activities from support of terrorism is an empirical question," which Congress resolved in 1996 by making "specific findings," including that "*any contribution to [an FTO]* facilitates" its terrorist conduct. *Holder*, 561 U.S. at 29 (quotation marks omitted). Congress also specifically "considered and rejected the view that ostensibly peaceful aid would have no harmful effects" when, during drafting, it "removed an exception" to liability "for the provision of material support in the form of

'humanitarian assistance to persons not directly involved in' terrorist activity." *Ibid*. (citation omitted).

Consistent with the requirements of strict scrutiny, the Court did not blindly accept Congress's conclusion, but instead found it "justified." *Holder*, 561 U.S. at 29. The Court held that peaceful support still "further[s] terrorism by foreign groups in multiple ways." *Id*. at 30. Teaching FTO members how to request international disaster relief would enable them to access funds. *Id*. at 37. Those funds would "free[] up other resources within the organization that may be put to violent ends." *Id*. at 30. After all, "[m]oney is fungible." *Id*. at 31. Thus, when terrorist organizations raise funds for "civilian and humanitarian ends," that money is often redirected "to fund the purchase of arms and explosives." *Ibid*. (quotation marks omitted). As a specific example, the Court stated that "Hamas is able to use its overt political and charitable organizations as a financial and logistical support network for its terrorist operations." *Ibid.* (quoting Matthew Levitt, *Hamas: Politics, Charity, and Terrorism in the Service of Jihad* 2 (2006)).[1] The Court further found that support legitimizes FTOs, enabling recruiting and fundraising. *Id*. at 30.

In this regard, the Court credited an affidavit from the Executive Branch averring that "it is highly likely that any material support to [FTOs] will ultimately inure to the benefit of their criminal, terrorist functions—regardless of whether such support was ostensibly intended to support non-violent, non-terrorist activities" *Holder*, 561 U.S. at 30, 33 (quotation marks

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[1] Notably, Dr. Levitt delivered similar testimony in this case as one of petitioners' expert witnesses.

omitted). The Court found that this "evaluation of the facts by the Executive, like Congress's assessment, [was] entitled to deference." *Id*. at 33. The Court accordingly held that Congress's decision to outlaw even peaceful support to designated FTOs was narrowly tailored to its objective of combating terrorism. *Id*. at 40.

3. In parallel with criminal statutes forbidding material support to FTOs, the ATA's civil liability provision, 18 U.S.C. § 2333, provides a remedy for victims of terrorism. When the ATA was enacted, witnesses from the Department of Justice explained to Congress that § 2333 was "a significant new weapon against terrorists" that would "supplement [the Department's] criminal law enforcement efforts." *Antiterrorism Act of 1990: Hearing on S.2465 Before the S. Subcomm. on Cts. & Admin. Practice of the S. Comm. on the Judiciary*, 101st Cong. 25 (1990) (testimony of Steven R. Valentine, Deputy Asst. Att'y Gen., Civil Div.).

As originally enacted, the ATA provided a remedy to any American national injured by reason of an act of international terrorism. 18 U.S.C. § 2333(a). To constitute "international terrorism," activities must: (1) involve "violent acts" or "acts dangerous to human life"; (2) violate federal or state criminal law (assuming extraterritorial application of those laws); (3) "appear to be intended" to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of a government by mass destruction, assassination, or kidnapping; and (4) "occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries." 18 U.S.C. § 2331(1).

Congress intended for the ATA's civil cause of action to provide broad relief. Other than the requirement that injury result from acts of international terrorism, the substance of the action was "not defined by the statute, because the fact patterns giving rise to such suits will be as varied and numerous as those found in the law of torts." S. Rep. No. 102-342, at 45 (1992). Congress was clear, moreover, that the law was designed to impose "liability at any point along the causal chain of terrorism" and therefore to "interrupt, or at least imperil, the flow of money" to terrorists. *Id*. at 22.

Consistent with the flexible cause of action Congress created, courts held that knowingly providing funds to FTOs in violation of 18 U.S.C. § 2339B can itself constitute an act of international terrorism under the ATA. This is because the provision of such support is criminal, dangerous to human life, objectively appears intended to promote terrorists' political ends, and typically transcends national borders. *See Boim*, 549 F.3d at 690; *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 43-49 (D.D.C. 2010). But some courts questioned whether this Court's decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), foreclosed a cause of action predicated on aiding and abetting when Congress had not expressly codified one.

Congress put that issue to rest in 2016 with JASTA, which provides that if the "act of international terrorism" that injured the plaintiff was "committed, planned, or authorized" by a designated FTO, then "liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such

an act of international terrorism." 18 U.S.C. § 2333(d)(2). Thus, defendants that support an FTO are liable even if their assistance does not itself meet all the elements of an "act of international terrorism." JASTA applies retroactively to any pending case based on injuries that arose on or after September 11, 2001. JASTA § 7.

Aiding and abetting liability under JASTA is intended to be very broad. The statute seeks:

> to provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against persons, entities, and foreign countries, wherever acting and wherever they may be found, that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States.

JASTA § 2(b).

To achieve the intended breadth, Congress adopted the standards for secondary liability from *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983). JASTA § 2(a)(5); *see also Central Bank*, 511 U.S. at 181 (describing *Halberstam* as a "comprehensive opinion on the subject"). Under *Halberstam*, aiding and abetting liability is available when three elements are met:

> (1) the party the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time he provides the assistance; and

> (3) the defendant must knowingly and substantially assist the principal violation.

Halberstam, 705 F.2d at 487-88.

In *Halberstam*, a woman who provided administrative support to a burglar was held liable for aiding and abetting an unplanned murder he committed during a botched getaway—even though the defendant did not intend, know about, or cause the killing, and may not even have known she was aiding burglaries. 705 F.2d at 474-75, 488-89.

The D.C. Circuit held that when a plaintiff alleges that a defendant aided and abetted an act of violence, the general awareness element is met if the defendant was generally aware that she was playing a role in any illegal activity from which violence is a foreseeable risk. *See Halberstam*, 705 F.2d at 488. The defendant need not intend for violence to occur, nor contribute directly to the violent act; indeed, the defendant need not even know the precise nature of the illegal activity she is assisting. *See ibid.* All she has to know is that the principal is engaged in unlawful activity, and that "violence and killing is a foreseeable risk" from that activity. *Ibid.* For the support to be "substantial," courts look to multiple factors, including, but not limited to, the amount and duration of the assistance. Under this standard, even acts that are "neutral standing alone" can support liability based on the "context of the enterprise they aided." *Ibid*. By incorporating *Halberstam* into JASTA, Congress showed it was serious about creating the broadest possible cause of action.

II. Factual Background and Procedural History

1. Petitioners are victims, family members of victims, and estates of victims of terrorist attacks Hamas committed during the Second Intifada. *See* Pet. App. 7a-8a. Petitioners filed their consolidated complaints in 2005 and 2007, seeking redress for attacks that occurred from 2001 to 2004. *Ibid*.; *id.* at 9a.

The complaints allege that NatWest knowingly sent money to Hamas for an entity called Interpal. Pet. App. 9a. Interpal was one of Hamas's principal fundraisers; it raised funds from around the world (mostly in Western Europe) and sent those funds to Hamas. Interpal was a NatWest customer from at least 1994 to 2007. *Id*. at 9a-10a. During that period, NatWest executed over 450 wire transfers on Interpal's behalf to 13 Hamas-controlled entities. *Id*. at 10a.

These recipients are described as the "13 Charities." Pet. App. 10a. They operate as Hamas's "social network," and are controlled by, or are alter-egos of, Hamas itself. *Id.* at 85a. Specifically, the 13 Charities have "shared personnel and overlapping leadership" with Hamas. *Ibid*. And "multiple government agencies, including the German Ministry of Interior, the Israeli Minister of Defense, and the U.S. Department of Treasury," have found "that the 13 Charities were Hamas-controlled." *Ibid*. As petitioners' expert Dr. Matthew Levitt explained, "there is ample evidence for the role of Hamas social institutions in the terror activities directed and authorized by Hamas leaders and commanders" and that "[t]hese activities amplify, enable, and accelerate Hamas's overall ability to engage in incitement, recruitment, and logistical and operational

support for weapons smuggling, reconnaissance, and acts of terror from suicide bombings to rocket fire." A-243.[2]

The United States designated Interpal an SDGT on August 22, 2003. Pet. App. 9a; A-1032.[3] The Treasury Department explained that Hamas raises "tens of millions of dollars per year throughout the world using charitable funding as cover." A-1035. Using "a web of charities to facilitate funding and to funnel money," Hamas obtains funds that are "often diverted or siphoned to support terrorism." *Ibid*. Although this money is sometimes also used "for legitimate charitable work, this work is a primary recruiting tool for the organization's militant causes." *Ibid*. Thus, charitable donations "allow the group to continue to foment violence, strengthen its terrorist infrastructure, and undermine responsible leadership." *Ibid*.

The government identified Interpal as "a principal charity utilized to hide the flow of money to Hamas," which acted as "the conduit through which money flows to Hamas from other charities," and was also "the fundraising coordinator of Hamas." A-1036 (capitalization altered). In addition to raising funds for Hamas, Interpal's activities included "supervising activities of charities, developing new charities in targeted areas, instructing how funds should be transferred

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[2] Citations to A-____ are to the joint appendix in the court of appeals.

[3] For convenience, the public announcement of the designation, which was reproduced in the Joint Appendix below (A-1032-1037), is available at https://www.treasury.gov/press-center/press-releases/pages/js672.aspx. Excerpts appear in the Second Circuit's 2014 opinion. Pet. App. 149a.

from one charity to another, and even determining public relations policy." *Ibid*.

Even after NatWest knew its customer was an SDGT, it continued to make transfers from Interpal to Hamas-controlled charities. Petitioners seek to hold NatWest liable for its role in Hamas's violence.

2. The case has a long procedural history. As relevant here, the complaints originally asserted causes of action for primary liability as well as aiding and abetting. The pre-JASTA aiding and abetting claims were initially dismissed, and the case proceeded on primary liability claims predicated on violations of the material support statutes, including 18 U.S.C. § 2339B. *See Weiss v. Nat'l Westminster Bank PLC*, 453 F. Supp. 2d 609, 612, 633 (E.D.N.Y. 2006).

After discovery, NatWest moved for summary judgment. In 2013, the district court granted the motion on the element of scienter. *Weiss v. Nat'l Westminster Bank PLC*, 936 F. Supp. 2d 100, 114, 120 (E.D.N.Y. 2013).

The Second Circuit reversed, holding that the relevant legal question when considering "scienter for liability under 18 U.S.C. § 2333(a) predicated on a violation of 18 U.S.C. § 2339B(a)(1)" was whether "NatWest had knowledge that, or exhibited deliberate indifference to whether, Interpal provided material support *to a terrorist organization*, irrespective of whether Interpal's support aided *terrorist activities* of the terrorist organization." Pet. App. 147a. The court held that there was "a triable issue of fact as to whether NatWest possessed the requisite scienter." *Id.* at 148a.

The court of appeals described some of the evidence that would support a jury finding that NatWest

knew that it was providing material support to Hamas. This included:

- NatWest's knowledge that Treasury designated Interpal as an SDGT in August 2003.
- The 2004 written acknowledgment by the head of NatWest's Group Enterprise Risk that she was "aware that we had accounts for people connected to Hamas, but not Hamas itself."
- Testimony from the head of NatWest's Group Security and Fraud Office that NatWest would only terminate a relationship with a customer on terror financing grounds if the customer was first "convicted in a court of law," *and* NatWest had "clear evidence" that the money transferred had been used to "buy bullets or explosives."

Pet. App. 161a-163a (cleaned up).

That evidence was sufficient for the Second Circuit to hold that there was a triable issue as to whether NatWest knew it was providing material support to Hamas. But it was only some of the favorable record evidence. Additional evidence demonstrated that:

- NatWest filed an internal suspicious activity report based on a 1996 *Financial Times* article recounting Israeli government charges that Interpal "had masterminded fund-raising for the Hamas Islamic movement in Europe," and was providing "support to families of Hamas guerillas and suicide bombers." A-1054. The article stated that when Interpal's then-Chairman, Abdul Rahman Daya, was asked whether any of the charities funded by Interpal were linked to Hamas, he admitted, "Maybe." *Ibid*.

- Israel outlawed Interpal in 1997 and declared it a terrorist organization a year later. A-280.
- In September 2001, the same executive who later testified about NatWest's reluctance to close Interpal's accounts saw (and personally hand-delivered to British authorities), A-1119, a leaked South African National Intelligence Agency report indicating that Interpal was Hamas's principal fundraiser in Western Europe, and that Hamas used the Interpal funds to support terrorist activities, A-1171-1200.
- NatWest's internal customer risk program marked Interpal with a "red flag" throughout the relevant period, signifying "Extreme caution is advised," A-1479, "serious grounds for concern," *ibid.*, and after 2004, "[f]irm evidence of wrongdoing," A-1524.
- NatWest contemporaneously knew that the United States and the United Kingdom both designated Interpal's counterparty, the Al-Aqsa Foundation, on May 29, 2003, A-1569-1572. U.K. Chancellor Gordon Brown publicly explained that "[t]he Al-Aqsa Foundation describes itself as an organisation that helps widows and orphans but we have linked them to supporting terrorists." A-1572 (emphasis added). Nevertheless, NatWest kept depositing transfers from the Al-Aqsa Foundation into Interpal's account. A-3242, A-3247-3248.

Notwithstanding these damning facts, Interpal remained a NatWest customer until 2007 (after the motion to dismiss in this case was denied), at which point NatWest finally closed Interpal's accounts. *See* Pet. App. 151a.

On remand, the district court adjudicated NatWest's remaining summary judgment arguments, and denied the motion. *See* Pet. App. 73a-100a. Thus, the court held that petitioners had introduced sufficient evidence that the 13 Charities were controlled by, or alter-egos of, Hamas. *Id*. at 83a-86a.

The district court also found sufficient evidence that Hamas had committed 16 of the 18 terrorist attacks at issue, Pet. App. 89a, and that the money transferred to the 13 Charities had proximately caused the attacks. The court explained that by "provid[ing] funds to Hamas front-groups," NatWest's conduct proximately caused the attacks because "[t]he social services provided by Hamas and its front groups are integral to building popular support for its organization and goals, which then facilitates its ability to carry out violent attacks." *Id.* at 83a.

3. While this case was pending, Congress enacted JASTA in 2016, expressly adding a claim for aiding and abetting to the ATA. *See* 18 U.S.C. § 2333(d)(2).

4. Two years later, the Second Circuit decided *Linde v. Arab Bank, PLC*, 882 F.3d 314 (2d Cir. 2018). There, the plaintiffs, who were injured in attacks committed by Hamas from 2001 to 2004, sued a Jordanian bank for providing financial services to Hamas entities, leaders, and operatives. The plaintiffs prevailed after a liability trial. *See id.* at 317-18.

On appeal, the Second Circuit found that the district court had improperly instructed the jury regarding the elements of ATA primary liability. *See Linde*, 882 F.3d at 318. Specifically, the Second Circuit held that the district court erroneously allowed the jury to impose liability upon finding that the bank knowingly

provided material support to a terrorist organization without separately requiring the jury to find that the bank satisfied the elements of the ATA's § 2331(1) definition of "international terrorism" (*e.g.*, the "violent" or "dangerous to human life" requirement, and the apparent intent requirement).

The plaintiffs in *Linde* argued that any charging error was harmless, in part because, under JASTA (enacted after the trial in *Linde*), knowingly providing material support to a designated FTO was effectively the same as aiding and abetting the organization's terrorist violence. Thus, the plaintiffs argued, and the Second Circuit agreed, "the jury found Arab Bank to have provided material support in the form of financial services to what it knew was a designated terrorist organization." *Linde*, 882 F.3d at 329.

Nevertheless, the Second Circuit held that the jury's findings did not support a JASTA claim because "aiding and abetting an *act* of international terrorism requires more than the provision of material support to a designated terrorist *organization.*" *Linde*, 882 F.3d at 329. Specifically, *Linde* held that aiding and abetting liability requires a jury to find that, "in providing [financial] services, the bank was 'generally aware' that it was thereby playing a 'role' in Hamas's violent or life-endangering activities." *Ibid*. It was not enough, in the court's view, for the bank to know of Hamas's "connection to terrorism." *Id*. at 330.

Because the court concluded that the instructional error was not harmless, it vacated and remanded for a jury to consider JASTA's aiding and abetting elements. Pursuant to a settlement, the retrial never occurred. *See Linde*, 882 F.3d at 318-19.

5. NatWest filed another summary judgment motion, arguing that under *Linde*, evidence showing that NatWest had knowingly provided material support to Hamas was insufficient to render it liable. Indeed, NatWest instructed the district court to assume that there was sufficient evidence in the record for a jury to conclude that NatWest "knowingly provided material support to an FTO in violation of § 2339B," the felony material support statute. Pet. App. 55a. Contemporaneously, petitioners sought to amend their complaints to re-introduce claims for aiding and abetting liability under JASTA.

The district court granted NatWest's renewed motion. *See* Pet. App. 43a-72a. After finding the evidence insufficient to support primary liability, the court denied petitioners' motion for leave to amend as futile. *Id*. at 70a. The court explained that "[e]vidence that Defendant knowingly provided banking services to a terrorist organization, without more, is insufficient to satisfy JASTA's scienter requirement" because even if the evidence showed knowing support to an FTO, that would not "create[] a jury question as to whether [NatWest] generally was aware that it played a role in any of Hamas's or even Interpal's . . . violent or life-endangering activities" under *Linde*. *Id*. at 72a.

6. Petitioners appealed, and the Second Circuit affirmed. Pet. App. 7a.[4] The court explained that under *Linde*, "the mens rea element of aiding and abetting is 'different from the *mens rea* required to establish

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[4] NatWest cross-appealed the denial of its summary judgment motion on personal jurisdiction grounds. The Second Circuit did not reach that issue because it ruled for NatWest on the merits. Pet. App. 25a.

material support in violation of 18 U.S.C. § 2339B,'" and that "'[a]iding and abetting an *act* of international terrorism requires more than the provision of material support to a designated terrorist *organization*.'" Pet. App. 37a-38a (quoting *Linde*, 882 F.3d at 329-30).

Under the Second Circuit's rule, the ample evidence demonstrating that NatWest knowingly transferred funds for and to Hamas-controlled entities was deemed insufficient even to create a jury question regarding aiding and abetting because: petitioners conceded that the 13 Charities also "performed charitable work"; there was "no evidence that the charities funded terrorist attacks or recruited persons to carry out such attacks";[5] and "Interpal did not indicate to NatWest that the transfers were for any terroristic purpose." Pet. App. 41a. Legally, it did not matter that Interpal and the 13 Charities were controlled by Hamas or that Hamas was a designated FTO engaged in a campaign of violent terrorism when NatWest transferred funds for Interpal. *See ibid*. (rejecting the argument that NatWest's awareness "was established by evidence that NatWest was assisting Interpal").

7. This petition followed. Although the lower courts addressed primary and secondary liability, this

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[5] Although the "charities" did not directly fund attacks or recruit terrorists in their own name, employees and management of the charities were directly involved in planning two of the suicide bombings at issue in this case. A-279, A-362. Other "charitable" committee employees also recruited Hamas operatives, A-256-57; transported suicide bombers to their targets, A-363; and paid benefits to the families of Hamas "martyrs," A-308, A-313-314, A-431-432, A-2410.

petition solely concerns aiding and abetting under JASTA, 18 U.S.C. § 2333(d)(2).

Petitioners have filed a separate petition seeking review of the Second Circuit's decision in *Strauss v. Crédit Lyonnais, S.A.*, 842 F. App'x 701 (2d Cir. 2021). There, another bank processed donations to many of the same Hamas charities on behalf of another Hamas fundraiser. The Second Circuit decided this case and *Strauss* on the same day, issuing a published opinion here and an unpublished decision in *Strauss* incorporating the reasoning below. The Court may wish to consider the two petitions together.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With Decisions From Other Circuits.

Certiorari should be granted because two other circuits have squarely rejected the core premise underlying the Second Circuit's ruling—*i.e.*, that knowingly providing material support to a terrorist organization does not equate to knowingly playing a role in illegal activities that foreseeably risk violence. The conflict is exceptionally clear because all three cases arose out of indistinguishable transactions (*i.e.*, transfers to putative charities controlled by Hamas—at least five of which appear in each case).

1. In *Boim v. Holy Land Foundation for Relief & Development*, 549 F.3d 685, 687-88 (7th Cir. 2008) (en banc), the parents of an American national killed in Israel sued U.S.-based charities for providing financial

support to Hamas in violation of the ATA.[6] The defendants were found liable; on their appeal, the Seventh Circuit, sitting *en banc*, considered the standard for ATA liability "against financial supporters of terrorism." *Id*. at 688.

Because *Boim* arose before JASTA's enactment, the discussion nominally concerned primary liability, *i.e.*, whether donations to terrorist organizations constitute acts of international terrorism. However, as the Seventh Circuit explained, secondary liability concepts applied because "[p]rimary liability in the form of material support to terrorism has the character of secondary liability. Through a chain of incorporations by reference, Congress has expressly imposed liability on a class of aiders and abettors." *Boim*, 549 F.3d at 691-92. JASTA essentially codifies the Seventh Circuit's primary-liability rule as a secondary-liability cause of action. Indeed, the Seventh Circuit cited and relied on *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), *see* 549 F.3d at 691, which Congress incorporated into JASTA § 2(a)(5).

As relevant here, the Seventh Circuit held that § 2333's scienter requirement is met if a person who provides funds to an organization "either knows that the organization engages in such [terrorist] acts or is deliberately indifferent to whether it does or not, meaning that one knows there is a substantial

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[6] At least six of the charities that received money in *Boim* also received transfers from Interpal: Islamic Charitable Society – Hebron; Jenin Zakat Committee; Nablus Zakat Committee; Tulkarem Zakat Committee; Ramallah al-Bireh Zakat Committee; and Sanabil Association for Relief and Development. *See Boim v. Quranic Literacy Inst.*, 2012 WL 13171764, at *6 (N.D. Ill. Aug. 31, 2012).

probability that the organization engages in terrorism but one does not care." *Boim*, 549 F.3d at 693. Applying that standard, the court reasoned that "[a] knowing donor to Hamas—that is, a donor who knew the aims and activities of the organization—would know . . . that donations to Hamas, by augmenting Hamas's resources, would enable Hamas to kill or wound . . . more people," including the "many U.S. citizens" who "live in Israel." *Id.* at 693-94.

The Seventh Circuit also grappled with the fact that Hamas was "engaged not only in terrorism but also in providing health, educational, and other social welfare services," and that many defendants "directed their support exclusively to such services." *Boim*, 549 F.3d at 698. The court concluded that "if you give money to an organization that you know to be engaged in terrorism, the fact that you earmark it for the organization's nonterrorist activities does not get you off the liability hook." *Ibid*. The court cited two bases for that holding. "The first is the fungibility of money. If Hamas budgets $2 million for terrorism and $2 million for social services and receives a donation of $100,000 for those services, there is nothing to prevent its using that money for them while at the same time taking $100,000 out of its social services 'account' and depositing it in its terrorism 'account.'" *Ibid*.

The second reason is that "Hamas's social welfare activities reinforce its terrorist activities both directly by providing economic assistance to the families of killed, wounded, and captured Hamas fighters and making it more costly for them to defect," as well as "indirectly by enhancing Hamas's popularity among the Palestinian population and providing funds for indoctrinating schoolchildren." *Boim,* 549 F.3d at 698.

The Seventh Circuit was explicit that:

> Anyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities. And that is the only knowledge that can reasonably be required as a premise for liability. To require proof that the donor *intended* that his contribution be used for terrorism—to make a benign intent a defense—would as a practical matter eliminate donor liability except in cases in which the donor was foolish enough to admit his true intent.

Boim, 549 F.3d at 698-99.

Finally, the Seventh Circuit held that those who provide funds to terrorists cannot "escape liability because terrorists and their supporters launder donations through a chain of intermediate organizations." *Boim*, 549 F.3d at 701-02. As long as the defendant "either knows or is reckless in failing to discover" that the donations "end up with Hamas," it is liable. *Id*. at 702. "[T]o set the knowledge and causal requirement higher . . . would be to invite money laundering, the proliferation of affiliated organizations, and two-track terrorism (killing plus welfare)," rendering the statute "a dead letter" against terrorist financing. *Ibid*.

The Seventh Circuit was assisted by the United States' *amicus* brief, which argued that defendants that knowingly provide substantial support to terrorist organizations can be liable even absent "a specific intent to further terrorist activities or the violent components of a terrorist organization." *Boim* U.S. Amicus Br., 2008 WL 3993242, at *31.

Under the Seventh Circuit's rule, NatWest was not entitled to summary judgment. The Second Circuit previously held (and NatWest instructed the district court to assume for present purposes) that there was sufficient evidence in the record to permit a jury to find that NatWest "knowingly provided material support to an FTO in violation of § 2339B" (the felony material support statute). Pet. App. 55a. Even if those transfers were purportedly earmarked for charitable purposes, they supported liability under *Boim* because the Seventh Circuit recognizes that any knowing support to an FTO foreseeably furthers that organization's violence, and therefore supports ATA liability. The facts that the Second Circuit found dispositive—*i.e.*, that the 13 Charities performed some charitable work, that transferred funds were not traced to specific terrorist attacks, and that Interpal did not admit that its transfers were for terroristic purposes—would not entitle NatWest to judgment as a matter of law. At most, they would create a jury issue.

2. In *United States v. El-Mezain*, 664 F.3d 467, 483 (5th Cir. 2011), the Fifth Circuit affirmed criminal liability under 18 U.S.C. § 2339B (the material support statute) for individuals and charities that sent funds to entities in Hamas's "social wing." The transfer recipients in *El-Mezain* included five of the same charities at issue here and in *Boim*. *See supra* n.6. Despite acknowledging that these "entities performed some legitimate charitable functions," the Fifth Circuit affirmed the defendants' convictions. 664 F.3d at 483. The court reasoned that the purported charities "were actually Hamas social institutions" and that, "by supporting such entities, the defendants facilitated Hamas's activity by furthering its popularity among

Palestinians and by providing a funding resource" that "allowed Hamas to concentrate its efforts on violent activity." *Id.* at 483-84.

The Fifth Circuit detailed the clear connections between Hamas's social wing and its terrorist objectives. It explained that "social services like education and medical care to the needy . . . build[] grassroots support for Hamas and its violent activities." *El-Mezain*, 664 F.3d at 486. Indeed, Hamas's social activities are "crucial to Hamas's success because, through its operation of schools, hospitals, and sporting facilities," Hamas can "win the 'hearts and minds' of Palestinians while promoting its anti-Israel agenda and indoctrinating the populace in its ideology." *Ibid*. Not only that, but Hamas's "social wing also supports the families of Hamas prisoners and suicide bombers, thereby providing incentives for bombing, and it launders money for all of Hamas's activities." *Ibid*. Consequently, "aid to Hamas's social wing critically assists Hamas's goals while also freeing resources for Hamas to devote to its military and political activities." *Ibid*.

Like the defendants in *Boim*, the defendants in *El-Mezain* argued "that they did not support Hamas or terrorism, but rather shared a sympathy for the plight of the Palestinian people." *El-Mezain*, 664 F.3d at 489. They also contended that the court could not treat the charities as Hamas fronts because the government had never designated them as terrorist organizations. *See ibid*.

The Fifth Circuit held that these arguments were properly presented to the jury, which rejected them in light of the government's "evidence of Hamas control of the" putative charities, which the Fifth Circuit described as "substantial." *El-Mezain*, 664 F.3d at 489-

90. The "plethora of evidence," *id*. at 527, the court cited largely overlapped with the evidence in this case: Dr. Levitt offered indistinguishable expert testimony, and petitioners relied on much of the same documentary evidence that supported the *El-Mezain* convictions, including voluminous materials seized by the Government of Israel from the "charities" offices.

Although *El-Mezain* is a criminal case, it stands clearly for the proposition that those who aid an FTO's peaceful arm necessarily enable terrorist violence. That empirical proposition is no less true when presented as an argument for civil liability. Unsurprisingly, in civil cases under the ATA, district courts in the Fifth Circuit have noted that this Court's "discussion of fungibility, legitimacy, and foreign affairs" in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), "confirms the broad sweep of the statute and supports the reasoning of *Boim*." *Abecassis v. Wyatt*, 785 F. Supp. 2d 614, 634 (S.D. Tex. 2011).

3. The Second Circuit's decisions in this case and *Strauss* are irreconcilable with the conclusions reached by the Fifth and Seventh Circuits. While other courts recognize that support for an FTO's nonviolent activities constitutes support for its terrorism, the Second Circuit adopted a contrary rule. The Second Circuit particularly stands apart in its willingness to grant judgment to defendants as a matter of law and thereby prevent a jury from considering whether a defendant that knows it is sending money to an FTO is also aiding that organization's violent activities. The split is stark.

In subsequent cases, the Second Circuit has adhered to its position that knowingly providing material support to FTOs is insufficient to support liability

for aiding and abetting. Thus, in *Kaplan v. Lebanese Canadian Bank, SAL*, 999 F.3d 842, 860-61 (2d Cir. 2021), the court reaffirmed the rule in *Linde v. Arab Bank, PLC*, 882 F.3d 314 (2d Cir. 2018), but found that the plaintiffs' complaint satisfied it by alleging that the bank's customers "were so closely intertwined with Hizbollah's violent terrorist activities that one can reasonably infer that [defendant] LCB was generally aware while it was providing banking services to those entities that it was playing a role in unlawful activities from which the rocket attacks were foreseeable." The Second Circuit does not permit such an inference, however, when the donations were nominally charitable.

The court made the point even more explicitly in *Honickman v. BLOM Bank SAL*, 6 F.4th 487 (2d Cir. 2021). There, the Second Circuit rejected the plaintiffs' "attempt to equate the *Halberstam* foreseeability standard with the 'fungibility' theory in *Holder v. Humanitarian Law Project*" because "*Linde* determined that the facts in *Holder*—adequate for criminal material support—fall short for the general awareness element of JASTA aiding and abetting." *Id.* at 498-99.

Honickman also acknowledged the conflict between the Seventh Circuit's decision in *Boim* and the Second Circuit's rule. The court noted that the Seventh Circuit held that "anyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities." 6 F.4th at 499 n.14 (quotation marks and alteration omitted). But the Second Circuit held that "any persuasive value [*Boim*] might have is insufficient to overcome the binding effects of *Linde* and *Kaplan* on us." *Ibid*.

In sum, a circuit split exists over whether, when a person knowingly provides funds to an FTO (or its fronts), a jury may find that the person aided and abetted the FTO's terrorist acts. The split is entrenched, and calls out for this Court's immediate review.

II. The Decision Below Is Incorrect.

Certiorari should also be granted because the decision below is incorrect. The Second Circuit's holding rejects a fundamental axiom of American counterterrorism policy: that any material support to designated FTOs advances their terrorist agendas. Congress found as much in 1996 in AEDPA, and operationalized that finding as a felony prohibition in the material support statute, 18 U.S.C. § 2339B(a)(1). The Executive Branch reaffirmed the principle before this Court in *Holder*, where this Court found it sufficiently powerful to overcome strict scrutiny.

Congress followed up with JASTA, codifying an action for aiding and abetting against any person who "knowingly provid[es] substantial assistance" to FTOs, 18 U.S.C. § 2333(d)(2), and explaining that by doing so, it invested victims of FTO violence with "the broadest possible basis, consistent with the Constitution of the United States, to seek relief" against any person or entity that "provided material support, directly or indirectly," to an FTO. JASTA § 2(b). The natural reading of the phrase "broadest possible basis" is that Congress intended JASTA liability to extend at least as far as the liability this Court recognized in *Holder* (which explored the limits the Constitution imposes on liability for material support). And under *Holder*, the fact that support to FTOs is given for nominally charitable or humanitarian purposes—or even

used for such purposes—does not eliminate liability as a matter of law. *Holder*, 561 U.S. at 30 ("Material support meant to promote peaceable, lawful conduct, can further terrorism by foreign groups in multiple ways.") (cleaned up).

Notwithstanding these authorities, the Second Circuit has insisted that the knowing provision of material support to FTOs is insufficient to establish aiding and abetting. The Second Circuit seeks to justify this approach by citing purported distinctions between supporting an organization, on the one hand, and supporting its terrorist acts, on the other. Pet. App. 37a-38a. But any such distinction is illusory vis-à-vis designated FTOs. As this Court observed in *Holder*, "the considered judgment of Congress and the Executive," is "that providing material support to a designated foreign terrorist organization—even seemingly benign support—bolsters the terrorist activities of that organization." 561 U.S. at 36. The Court found that view supported by "persuasive evidence," sufficient to overcome a strict scrutiny challenge. *Ibid*. All three branches of the federal government thus reject the Second Circuit's core legal premise, *i.e.*, that providing support to FTOs is not the sort of unlawful activity that foreseeably leads to terrorism.

In *Honickman*, the Second Circuit also concluded that treating material support for terrorist organizations as a proxy for aiding and abetting would conflict with *Halberstam*, which Congress identified as the standard for aiding and abetting under JASTA. *See* 6 F.4th at 498-99. This is incorrect. Under *Halberstam*, a defendant can be liable for aiding and abetting an act of violence if the defendant was "generally aware of his role as part of an overall illegal or tortious

activity," and violence was a "foreseeable consequence of the activity." 705 F.2d at 487-88. Thus, the D.C. Circuit determined that the defendant could be held liable for an unplanned murder even if she did not know that her partner was a burglar, let alone a killer—and even though she personally played no role in the murder. *See id.* at 488. Indeed, "her own acts were neutral standing alone." *Ibid*. But she was liable because she knew she was involved in "some type of personal property crime," and "violence and killing is a foreseeable risk" of that enterprise. *Ibid*.

Similar logic supports liability for NatWest—or at least precludes summary judgment. Knowingly providing an FTO with access to currency and financial services is playing a role in an illegal enterprise; terrorist violence is at least a foreseeable (if not inevitable) consequence of that enterprise. *See, e.g.*, *Holder*, 561 U.S. at 36. Thus, even if support for Hamas-controlled charities is "seemingly benign," *ibid*., or "neutral standing alone," *Halberstam*, 705 F.2d at 488, that support is culpable "in the context of the enterprise" it aids, *ibid*. Under *Halberstam*, no more is required. The facts the Second Circuit deemed exculpatory—including that Interpal did not foolishly earmark its transfers for terroristic purposes, that Hamas-controlled charities performed charitable work, and that the funds donated did not necessarily pay directly for violence—are insufficient to defeat JASTA liability as a matter of law. At most, these facts create a jury question about whether terrorist violence was a foreseeable risk from providing financial support to Hamas.

Indeed, the burden the Second Circuit imposed eviscerates JASTA. Sophisticated terrorist fundraisers know better than to admit that they are funding

terrorism. And victims of terrorism have no way to trace funds received by a terrorist front group through to terrorist attacks or recruiting. FTOs, after all, do not open their ledgers to the public. Congress knows this, which is why it outlawed all material support to FTOs. But if defendants are entitled to judgment as a matter of law any time terrorists do not hand the plaintiffs evidence connecting transfers to terrorism, "the statute would be a dead letter" against terrorist financing. *Boim*, 549 F.3d at 702.

On the other hand, answering the question presented in petitioners' favor does not require the Court to hold that *every* act that violates 18 U.S.C. § 2339B(a)(1) also gives rise to aiding and abetting liability under JASTA. For example, knowingly providing material support to an FTO might not equate to aiding and abetting the FTO's terrorist acts where the support was not "substantial" under JASTA. The question presented here focuses on the provision of substantial funds, the form of support most easily "diverted or siphoned to support terrorism." A-1035. NatWest knowingly moved millions of dollars from Interpal to Hamas, even after Interpal was designated an SDGT, and while Hamas was carrying out a wave of terrorist attacks during the Second Intifada. At a minimum, the aiding and abetting claim required a jury's consideration.

III. The Question Presented Is Important.

The question presented is important and frequently recurring. Halting the flow of money to terrorist organizations is key to stopping their violence against Americans, and civil liability is a critical deterrent to illicit terror financing.

It is well-understood that terrorists rely on U.S. dollars moving through the international banking system to finance violence. *See, e.g.*, Juan C. Zarate, *Treasury's War: The Unleashing of a New Era of Financial Warfare* 145-46 (2013) (ebook) (former Deputy Assistant to the President and Deputy National Security Advisor for Combating Terrorism explaining that "[f]or any criminal or terrorist enterprise to have global and sustained reach, it must have a financial infrastructure to raise, hide, and move money to its operatives and operations. Banks are the most convenient and important of these nodes of the financial system and are critical to nefarious networks."); Jimmy Gurulé, *Unfunding Terror: The Legal Response to the Financing of Global Terrorism* 151 (2008) (former Under Secretary of the Treasury for Terrorism and Financial Intelligence and later Assistant Attorney General explaining that banks are attractive to terrorists "because they provide an extensive range of financial services," "wide geographic availability," and the capacity to transfer "large sums of money . . . instantaneously" across the world). That is why, for example, Congress observed in JASTA that "terrorist organizations" "act[] through affiliated groups or individuals [and] raise significant funds outside of the United States." JASTA § 2(a)(3). For the same reason, the United States recently modernized its sanctions regime by authorizing the Treasury Department to deny foreign financial institutions that assist sanctioned terrorists any further access to U.S. dollar accounts. *See* Exec. Order No. 13,886, § 1, 84 Fed. Reg. 48,041 (Sept. 9, 2019).

Nevertheless, many banks have not halted the flow of terrorist financing. Indeed, NatWest continued

to transfer funds from Interpal to Hamas-controlled charities even after NatWest learned of Interpal's designation and after the U.K. froze payments "to, or for the benefit of, Hamas." Pet. App. 150a. It only ceased doing so in 2007, after losing the motion to dismiss this case. *See id*. at 151a.

As explained *supra* pp.31-32, the Second Circuit's rule undermines Congress's efforts to deter terror financing by imposing an illogical burden on plaintiffs, and excusing banks from undertaking even minimal diligence. The flaw in the Second Circuit's rule is particularly significant because most ATA cases against commercial banks arise in the Second Circuit. *See, e.g.*, *Honickman*, 6 F.4th 487; *Kaplan*, 999 F.3d 842; *Strauss*, 842 F. App'x 701; *Siegel v. HSBC N. Am. Holdings, Inc.*, 933 F.3d 217 (2d Cir. 2019); *Linde*, 882 F.3d 314; *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 118 (2d Cir. 2013); *Rothstein v. UBS AG*, 708 F.3d 82 (2d Cir. 2013); *Miller v. Arab Bank, PLC*, 372 F. Supp. 3d 33 (E.D.N.Y. 2019); *Freeman v. HSBC Holdings PLC*, 2021 WL 76925 (E.D.N.Y. Jan. 7, 2021); *Bartlett v. Société Générale de Banque Au Liban SAL*, 2020 WL 7089448 (E.D.N.Y. Nov. 25, 2020); *Est. of Henkin v. Kuveyt Türk Katilim Bankasi, A.Ş.*, 495 F. Supp. 3d 144 (E.D.N.Y. 2020), *motion to certify appeal granted,* 2020 WL 6700121 (E.D.N.Y. Nov. 13, 2020); *Spetner v. Palestine Inv. Bank*, 495 F. Supp. 3d 96 (E.D.N.Y. 2020); *Averbach ex rel. Est. of Averbach v. Cairo Amman Bank*, 2020 WL 1130733 (S.D.N.Y. Mar. 9, 2020); *O'Sullivan v. Deutsche Bank AG*, 2020 WL 906153 (S.D.N.Y. Feb. 25, 2020).

These cases, many of which remain pending, are incredibly consequential; they are brought by the victims of the September 11th attacks, Gold Star

families, and myriad other Americans killed and injured by terrorists. The cases arise in the Second Circuit because most international transfers of U.S. dollars pass through branch or intermediary banks in New York. *See Banque Worms v. BankAmerica Int'l*, 570 N.E.2d 189, 194 (N.Y. 1991). The Second Circuit thus plays an outsized role in determining what standard governs ATA claims against banks—and it has adopted the wrong rule. This Court should intervene immediately.

IV. This Court Should Consider Calling For The Views Of The Solicitor General.

If the Court is uncertain about the need for review, it should call for the views of the Solicitor General. The Court did so in *O'Neill v. Al Rajhi Bank*, No. 13-318, which concerned whether the ATA (before JASTA) included an action for aiding and abetting. A CVSG makes sense because, as this Court recognized in *Holder*, terrorism cases implicate "sensitive and weighty interests of national security and foreign affairs." 561 U.S. at 33-34.

The United States also has an interest in the scope of civil liability. The ATA's civil liability provision "was supported by the Executive Branch as an effective weapon in the battle against international terrorism." *Boim* U.S. Amicus Br., 2008 WL 3993242, at *1. Indeed, the Government lobbied for the statute, and argued for its broad application in *Boim*. Since then, Congress has only broadened the ATA with JASTA and other laws, including the Anti-Terrorism Clarification Act of 2018, Pub. L. No. 115-253, 132 Stat. 3183, and the Promoting Security and Justice for

Victims of Terrorism Act of 2019, Pub. L. No. 116-94, § 903, 133 Stat. 2534, 3082.

The Government also has an interest in this case because of how the civil and criminal liability provisions interact with the FTO and SDGT sanctions regime, which the Executive Branch enforces.

CONCLUSION

Certiorari should be granted.

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September 3, 2021

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 19-863(L), 19-1159(XAP)

August Term, 2019

Argued: May 14, 2020 Decided: April 7, 2021

TZVI WEISS, LEIB WEISS, MALKE WEISS, YITZCHAK WEISS, YERUCHAIM WEISS, ESTHER DEUTSCH, MOSES STRAUSS, PHILIP STRAUSS, BLUMA STRAUSS, AHRON STRAUSS, ROISIE ENGELMAN, JOSEPH STRAUSS, MATANYA NATHANSEN, CHANA NATHANSEN, MATANYA AND CHANA NATHANSEN FOR THE ESTATE OF TEHILLA NATHANSEN, YEHUDIT NATHANSEN, S.N., A MINOR, HEZEKIEL TOPOROWITCH, PEARL B. TOPOROWITCH, YEHUDA TOPOROWITCH, DAVID TOPOROWITCH, SHAINA CHAVA NADEL, BLUMA ROM, RIVKA POLLACK, EUGENE GOLDSTEIN, LORRAINE GOLDSTEIN, BARBARA GOLDSTEIN INGARDIA, RICHARD GOLDSTEIN, MICHAEL GOLDSTEIN, CHANA FREEDMAN, MICHAL HONICKMAN FOR THE ESTATE OF HOWARD GOLDSTEIN, MICHAL HONICKMAN, DAVID GOLDSTEIN, HARRY LEONARD BEER AS EXECUTOR OF THE ESTATE OF ALAN BEER, HARRY LEONARD BEER, ANNA BEER, PHYLLIS MAISEL, ESTELLE CARROLL, SARRI ANNE SINGER, JUDITH SINGER, ERIC M. SINGER,

ROBERT SINGER, JULIE AVERBACH FOR THE ESTATE OF STEVEN AVERBACH, JULIE AVERBACH, TAMIR AVERBACH, DEVIR AVERBACH, SEAN AVERBACH, A.A., A MINOR, MAIDA AVERBACH FOR THE ESTATE OF DAVID AVERBACH, MAIDA AVERBACH, MICHAEL AVERBACH, EILEEN SAPADIN, DANIEL ROZENSTEIN, JULIA ROZENSTEIN SCHON, ALEXANDER ROZENSTEIN, ESTHER ROZENSTEIN, JACOB STEINMETZ, DEBORAH STEINMETZ, JACOB STEINMETZ AND DEBORAH STEINMETZ FOR THE ESTATE OF AMICHAI STEINMETZ, NAVA STEINMETZ, ORIT MAYERSON, NATANEL STEINMETZ, ROBERT L. COULTER, SR. FOR THE ESTATE OF JANIS RUTH COULTER, DIANNE COULTER MILLER, ROBERT L. COULTER, SR., ROBERT L. COULTER, JR., LARRY CARTER FOR THE ESTATE OF DIANE LESLIE CARTER, LARRY CARTER, SHAUN CHOFFEL, RICHARD BLUTSTEIN AND KATHERINE BAKER FOR THE ESTATE OF BENJAMIN BLUTSTEIN, RICHARD BLUTSTEIN, KATHERINE BAKER, REBEKAH BLUTSTEIN, NEVENKA GRITZ FOR THE ESTATE OF DAVID GRITZ, NEVENKA GRITZ, NEVENKA GRITZ FOR THE ESTATE OF NORMAN GRITZ, JACQUELINE CHAMBERS AS THE ADMINISTRATOR OF THE ESTATE OF ESTHER BABLAR, JACQUELINE CHAMBERS, LEVANA COHEN, ELI COHEN, SARAH ELYAKIM, YEHUDA AGABABA, MENACHE AGABABA, YEHEZKEL AGABABA, GRETA GELER, ILANA EROPA DORFMAN, REFAEL KITSIS AND TOVA GUTTMAN AS THE ADMINISTRATOR OF THE ESTATE OF HANNAH ROGEN, AKIVA ANACHOVICH, JOSHUA

FAUDEM, ZOHAR FATER, BRUCE MAZER, ORLY ROM, RICHARD COFFEY, GAL GANZMAN, JUDITH BUCHMAN-ZIV, ORA COHEN, MIRAV COHEN, DANIEL COHEN, O.C., A MINOR, S.C., A MINOR, E.N.C., A MINOR, FAIGA ZVIA LIEBERMAN, EINAT NOKED FOR THE ESTATE OF EYAL NOKED, EINAT NOKED, A.N., A MINOR, AVISHAG NOKED, BARUCH ZURI NOKED, BINYAMIN ELKANA NOKED, NETA NECHAMA COHEN, T.N., A MINOR, KAREN GOLDBERG, CHANA WEISS, ESTHER GOLDBERG, YITZHAK GOLDBERG, SHOSHANA GOLDBERG, ELIEZER GOLDBERG, Y.M.G., A MINOR, T.Y.G., A MINOR, NILLY CHOMAN, TEMIMA SPETNER, JASON KIRSCHENBAUM, ISABELLE KIRSCHENBAUM, ISABELLE KIRSCHENBAUM FOR THE ESTATE OF MARTIN KIRSCHENBAUM, JOSHUA KIRSCHENBAUM, SHOSHANA BURGETT, DAVID KIRSCHENBAUM, DANIELLE TEITELBAUM, NETANEL MILLER, CHAYA MILLER, ARIE MILLER, ALTEA STEINHERZ, JONATHAN STEINHERZ, BARUCH YEHUDA ZIV BRILL, CHAYA BEILI, AND GILA ALUF,

Plaintiffs-Appellants-Cross-Appellees,

v.

NATIONAL WESTMINSTER BANK, PLC.,
Defendant-Appellee-Cross-Appellant.

THE ESTATE OF DAVID APPLEBAUM, THE ESTATE OF NAAVA APPLEBAUM, DEBRA APPLEBAUM, THE ESTATE OF JACQUELINE APPLEBAUM, NATAN APPLEBAUM, SHIRA APPLEBAUM, YITZCHAK APPLEBAUM, SHAYNA

APPLEBAUM, TOVI BELLE APPLEBAUM, GEELA APPLEBAUM GORDON, CHAYA TZIPORAH COHEN, PHILIP LITLE, THE ESTATE OF ABIGAIL LITLE, ELISHUA LITLE, HANNAH LITLE, HEIDI LITLE, JOSIAH LITLE, NOAH LITLE, ARI HOROVITZ, BATSHEVA HOROVITZ SADAN, DAVID HOROVITZ, THE ESTATE OF DEBRA RUTH HOROVITZ, THE ESTATE OF ELI NATAN HOROVITZ, THE ESTATE OF LEAH HOROVITZ, THE ESTATE MOSHE HOROVITZ, NECHAMA HOROVITZ, SHULAMITE HOROVITZ, TOVI HOROVITZ, TVI HOROVITZ, URI HOROVITZ, BERNICE WOLF, BRYAN WOLF, STANLEY WOLF, FRAN STRAUSS BAXTER, WILLIAM J. BAXTER, ARIELA FREIRMARK, MENACHEM FREIRMARK, HADASSAH FREIRMARK, PHYLLIS PAM, RIVKA REENA PAM, SHOSHANA TITA, EZRA TITA, EPHRAIM TITA, EPHRIAM TITA FOR THE ESTATE OF BERTIN TITA, RACHEL POTOLSKI, OVADIA TOPPOROWITCH, YISRAEL TOPPOROWITCH, YITZCHAK TOPPOROWITCH, MIRIAM EHRENFELD, ROSE JOSEPH, LEIBEL REINITZ, MALVIA REINITZ, MARGALI REINITZ, MENDY REINITZ, MIRIAM REINITZ, RIVKA REINITZ, SAMUEL REINITZ, SHMUEL REINITZ, YAKOV REINITZ, THE ESTATE OF MORDECHAI REINITZ, THE ESTATE OF YISSOCHER DOV REINITZ, YITZCHOK REINITZ, RAIZEL SHIMON, LEAH TAUBER, HELEN WEIDER, AVROHOM D. RICHTER, BREINA RICHTER, MIRIAM LEAH RICHTER, MOSHE RICHTER, NECHAMA RICHTER, SARA MALKA RICHTER, SHLOMO CHAIM RICHTER, TRANNE RICHTER, YAKOV YOSEF RICHTER, YECHIEL RICHTER, YEHUDIS RICHTER, YISROEL RICHTER, YITZCHOK

RICHTER, PERL BRAILOFSKY, MALKY BREUER, ESTER BUXBAUM, GITTEL COHEN, CHAYA FREISEL, RACHEL ROSNER, ELIZABETH SCHWARTZ, JACOB SCHWARTZ, MAX SCHWARTZ, MICHAEL SCHWARTZ, PHILLIP SCHWARTZ, ABRAHAM ZARKOWSKY, ARON ZARKOWSKY, BSHAVA ZARKOWSKY RICHTER, THE ESTATE OF ELI ZARKOWSKY, EZRIEL ZARKOWSKY, GITTEL ZARKOWSKY, THE ESTATE OF GOLDIE ZARKOWSKY, JOSEPH ZARKOWSKY, MENDEL ZARKOWSKY, MIRIAM ZARKOWSKY, SHRAGE ZARKOWSKY, TRANY ZARKOWSKY, YEHUDA ZARKOWSKY, ERIK SCHECTER, SHLOMO TRATNER, THE ESTATE OF TIFERET TRATNER, AVERHAM GROSSMAN, DEVORAH CHECHANOW LEIFER, JOSEPH LEIFER, BRACHA MILSTEIN, SHIFRA MILLER, CHAYA ROSENBERG, ABRAHAM WAXLER, ARTHUR WAXLER, BARUCH WAXLER, CHANA WAXLER, DINA WAXLER, EZEKIEL WAXLER, GEDALIA WAXLER, HAGGI WAXLER, NACHUM WAXLER, OBADIAH WAXLER, YAAKOV WAXLER, YOEL WAXLER, ZACHARIA WAXLER, NETHANIEL BLUTH, MOSHE NAIMI, FAYE CHANA BENJAMINSON, THE ESTATE OF MOSHE GOTTLIEB, SEYMOUR GOTTLIEB, SHEILA GOTTLIEB,

Plaintiffs-Appellants-Cross-Appellees,

v.

NATIONAL WESTMINSTER BANK, PLC.,
Defendant-Appellee-Cross-Appellant.*

Before: KEARSE, JACOBS, and CABRANES, *Circuit Judges*.

Joint appeal from judgments entered on March 31, 2019, in the United States District Court for the Eastern District of New York, Dora L. Irizarry, then-*Chief Judge*, (A) dismissing the operative amended complaints in these two actions that seek to hold defendant bank liable under the Antiterrorism Act of 1990 ("ATA"), *see* 18 U.S.C. §§ 2333(a), 2331(1), and 2339B, for providing banking services to a charitable organization with alleged ties to Hamas, a designated Foreign Terrorist Organization ("FTO") alleged to have committed a series of terrorist attacks in Israel in 2001-2004; and (B) denying leave to amend the complaints to allege aiding-and-abetting claims under the Justice Against Sponsors of Terrorism Act ("JASTA"), *see* 18 U.S.C. § 2333(d). The district court granted summary judgment dismissing the ATA claims in light of this Court's decision in *Linde v. Arab Bank, PLC*, 882 F.3d 314 (2d Cir. 2018), on the ground that plaintiffs failed to adduce sufficient evidence that the bank itself committed an act of international terrorism within the meaning of §§ 2333(a) and 2331(1); it denied leave to amend on the ground that amendment asserting JASTA claims would be futile because plaintiffs did not point to evidence sufficient to support an

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* The Clerk of the Court is directed to amend the official caption to conform with the above captions of the two cases, which were consolidated for pretrial proceedings in the district court.

inference that the bank had the requisite awareness that it was aiding and abetting the violent or life-endangering activities of the FTO Hamas. *See Weiss v. National Westminster Bank PLC*, 381 F.Supp.3d 223 (2019). On appeal, plaintiffs contend principally that the district court misapplied *Linde* and imposed unduly stringent standards (a) in requiring that the material support provided by the bank be traceable to the attacks on plaintiffs in order to hold the bank liable as a principal for the attacks, and (b) in concluding that plaintiffs' evidence of the bank's violation of § 2339B was insufficient to permit an inference that the bank was generally aware that it was playing a role in terrorism by Hamas, as required to make the bank liable as an aider and abetter.

Cross-appeal by defendant requesting, in the event the judgments are not to be affirmed, that we reverse the district court's denial of defendant's motion to dismiss the actions for lack of personal jurisdiction.

Concluding that the district court properly assessed the record and applied the principles articulated in *Linde*, we affirm the judgments. Defendant's conditional cross-appeal is dismissed as moot.

Judgment affirmed; cross-appeal dismissed.

* * *

KEARSE, Circuit Judge.

Plaintiffs Tzvi Weiss, *et al.*, United States citizens who were, or represent, victims of more than a dozen alleged Hamas terrorist attacks in Israel in 2001-2004, appeal from judgments entered on March 31, 2019, in the United States District Court for the Eastern District of New York, Dora L. Irizarry, *Chief*

Judge, (A) dismissing their amended complaints in these two actions seeking to recover damages under the Antiterrorism Act of 1990 ("ATA"), *see* 18 U.S.C. §§ 2333(a), 2331(1), and 2339B, against defendant National Westminster Bank PLC ("NatWest" or the "Bank") for providing banking services to a charitable organization that allegedly had ties to Hamas; and (B) denying leave to amend the complaints to allege aiding-and-abetting claims against the Bank under the Justice Against Sponsors of Terrorism Act ("JASTA"), *see id*. § 2333(d). The district court, in light of this Court's decision in *Linde v. Arab Bank, PLC*, 882 F.3d 314 (2d Cir. 2018) ("*Linde*"), granted summary judgment dismissing plaintiffs' claims under §§ 2333(a), 2331(1), and 2339B on the ground that plaintiffs failed to adduce sufficient evidence to hold the Bank liable as a principal for acts of international terrorism; the court denied plaintiffs' motion for leave to amend the complaints, concluding that amendment asserting JASTA aiding-and-abetting claims would be futile because plaintiffs did not point to evidence sufficient to support an inference that NatWest had the requisite knowledge—*i.e.*, at least a general awareness—that it played a role in Hamas's alleged violent or life-endangering activities. On appeal, plaintiffs contend principally that the district court misapplied *Linde* and (a) unduly credited evidence proffered by NatWest and imposed unduly stringent standards in requiring that the Bank's provision of banking services be traceable to specific terrorist attacks in order to make the Bank liable for the attacks as a principal, and (b) erred in concluding that plaintiffs' evidence of NatWest's violation of § 2339B was insufficient to permit an inference that the Bank was generally aware that it was playing a role in terrorism.

NatWest, while urging affirmance of the dismissals, cross-appeals to contend that if we do not affirm, we should reverse the district court's denial of NatWest's motion to dismiss these actions for lack of personal jurisdiction.

For the reasons that follow, we conclude that summary judgment was properly granted and that leave to amend the complaints was properly denied. We thus affirm the judgments, and we dismiss the cross-appeal as moot.

I. BACKGROUND

The first of these two actions was commenced in 2005 under the ATA by the Weiss plaintiffs against NatWest (the "*Weiss* action") following numerous terrorist attacks in Israel between March 27, 2002, and September 24, 2004. The Applebaum plaintiffs commenced their ATA action against NatWest in 2007 (the "*Applebaum* action"), and the two cases were soon consolidated for pretrial proceedings.

NatWest is a financial institution incorporated and headquartered in the United Kingdom. From at least 1994 to 2007, NatWest provided banking services to the Palestine Relief & Development Fund, commonly known as "Interpal." Interpal is a London-based nonprofit entity founded in 1994 and registered with the United Kingdom's Charity Commission for England & Wales ("UK Regulatory Authorities").

Hamas has been officially designated a Foreign Terrorist Organization ("FTO") by the United States since 1997. In August 2003, the United States officially designated Interpal a Specially Designated Global Terrorist ("SDGT") based on reports that it was operated as a major fundraiser for Hamas. Plaintiffs

contend that NatWest provided material support to Interpal between 1996 and 2003 by processing at least 457 wire transfers of funds from Interpal to 13 charities that NatWest allegedly knew, or willfully ignored, were controlled by, or were alter egos of, Hamas (the "13 Charities"). "It is undisputed that each of the attacks by which Plaintiffs were injured was 'an act of international terrorism'" within the meaning of 18 U.S.C. §§ 2333(a) and 2331(1). (NatWest brief on appeal at 4.)

A. *The Course of This Litigation*

The procedural history of the present actions has been tracked through several opinions of the district court and this Court, including the following, familiarity with which is assumed. *See Weiss v. National Westminster Bank PLC*, 453 F.Supp.2d 609 (E.D.N.Y. 2006) ("*Weiss I*"); *Weiss v. National Westminster Bank PLC*, 936 F.Supp.2d 100 (E.D.N.Y. 2013) ("*Weiss II*"), *vacated and remanded by Weiss v. National Westminster Bank PLC*, 768 F.3d 202 (2d Cir. 2014) ("*Weiss III*"); *Weiss v. National Westminster Bank PLC*, 278 F.Supp.3d 636 (E.D.N.Y. 2017) ("*Weiss IV*"); and *Weiss v. National Westminster Bank PLC*, 381 F.Supp.3d 223 (E.D.N.Y. 2019) ("*Weiss V*").

The original complaint in the *Weiss* action alleged that NatWest aided and abetted the murder or attempted murder of, or physical violence to, United States citizens in violation of 18 U.S.C. §§ 2332(a), 2332(b), 2332(c), and 2333(a), and that as a principal it committed acts of international terrorism in violation of 18 U.S.C. §§ 2339B(a)(1) and 2333(a). In 2006, the aiding-and-abetting causes of action were dismissed, without prejudice, for failure to state a claim.

See Weiss I, 453 F.Supp.2d at 622. The plaintiffs in the *Applebaum* action, whose original complaint also included aiding-and-abetting claims, thereafter agreed to the dismissal of those claims without prejudice.

In 2013, the district court granted a motion by NatWest for summary judgment ("First Summary Judgment Motion") dismissing the actions. The court found that plaintiffs could not show that NatWest acted with the requisite scienter to support their claims. *See Weiss II*, 936 F.Supp.2d at 114. In 2014, this Court vacated the judgments, concluding that plaintiffs had proffered evidence "sufficient to create a triable issue of fact as to whether NatWest's knowledge and behavior in response satisfied the statutory scienter requirements." *Weiss III*, 768 F.3d at 212. We remanded for further proceedings, including consideration of other grounds asserted by NatWest in its motion for summary judgment.

In June 2016, plaintiffs filed their present complaints—an amended *Applebaum* action complaint and the sixth amended *Weiss* action complaint—adding claims arising from three additional attacks. NatWest promptly moved for summary judgment dismissing the new claims and renewed its motion for summary judgment on grounds the district court had not reached in *Weiss II*. In September 2017, in *Weiss IV*, the district court granted the motion in part, but found there were triable issues of fact with respect to 16 of the 18 alleged attacks. *See Weiss IV*, 278 F.Supp.3d at 650.

In September 2016, in the interim between plaintiffs' filing of the current complaints and the district court's decision in *Weiss IV*, the ATA was amended by the enactment of JASTA to provide that a civil ATA

action under § 2333(a) may be maintained on theories of aiding and abetting or conspiracy. *See* 18 U.S.C. § 2333(d). Congress made JASTA retroactively applicable to actions such as these (*see* Part II.B. below).

A few months after the decision in *Weiss IV*, this Court decided *Linde*, an appeal from an ATA judgment in favor of the *Linde* plaintiffs after a jury trial. The jury had been instructed that if it found that the defendant, Arab Bank PLC ("Arab Bank"), provided material support to Hamas in violation of § 2339B—which makes it a crime to knowingly provide, or attempt or conspire to provide, material support or resources to an FTO—that finding was sufficient to establish Arab Bank's own commission of an act of international terrorism under § 2333(a). As discussed further in Part II.A. below, we vacated the judgment, concluding that that instruction was erroneous because a bank's provision of material support to a known terrorist organization is not, by itself, sufficient to establish the bank's liability under the ATA. *See Linde*, 882 F.3d at 326. Rather, in order to satisfy the ATA's requirements for civil liability as a principal, the "defendant's act must," *inter alia*, "*also* involve violence or endanger human life. *See* [18 U.S.C.] § 2331(1)(A). Further, the act must appear to be intended to intimidate or coerce a civilian population or to influence or affect a government. *See id*. § 2331(1)(B)." *Linde*, 882 F.3d at 326 (emphasis in original).

In addition, *Linde* noted that in order to hold a defendant liable for an ATA violation on a JASTA theory of aiding and abetting, a plaintiff must show that the entity the defendant aided—*i.e.*, the principal—performed a wrongful act that caused an injury, that the defendant must have been "generally aware of his role

as part of an overall illegal or tortious activity at the time that he provide[d] the assistance," and that "the defendant must [have] knowingly and substantially assist[ed] the principal violation." *Id*. at 329 (internal quotation marks omitted).

B. *NatWest's Renewed Summary Judgment Motion Based on* Linde

In the wake of *Linde*, NatWest sought and received permission to file another renewed motion for summary judgment ("2018 Summary Judgment Motion"). NatWest contended that plaintiffs could not adduce evidence sufficient to permit an inference that its financial services of transmitting Interpal moneys to the 13 Charities involved violence, or endangered human life, or appeared to be intended to intimidate or coerce a civilian population or to influence or affect a government.

In support of its 2018 Summary Judgment Motion, NatWest cited, *inter alia*, facts that were undisputed as revealed in statements that had been submitted by the parties pursuant to Local Rule 56.1 ("Rule 56.1 Statement" or "Rule 56.1 Response") in connection with the Bank's First Summary Judgment Motion; and it submitted a Rule 56.1 Supplemental Statement as to additional facts it asserted were undisputed. NatWest's Rule 56.1 Supplemental Statement principally quoted Interpal documents and quoted declarations or deposition testimony of the Bank's managerial employees as to the policies and practices of NatWest and their institutional knowledge of the operations and affairs of Interpal. It included the following assertions.

In 1998, NatWest's Relationship Manager for the accounts of Interpal "completed a customer appraisal form for Interpal describing it as an organization that '[p]rovides charitable relief' in Palestine and Lebanon, usually involving 'food or allowances for children's education.' The form further noted [Interpal's statement] that the '[t]wo major times of the year for receipts are Ramadan . . . and at Easter time.'" (NatWest Rule 56.1 Supplemental Statement ¶ 1.) Plaintiffs' response to this was as follows:

> RESPONSE: Admit the quoted statements were made, but note that the Second Circuit has expressly held that:
>
> > The requirement to "appear to be intended . . ." does not depend on the actor's beliefs, but imposes on the actor an objective standard to recognize the apparent intentions of actions. *Cf. Boim v. Holy Land Found. for Relief and Dev.*, 549 F.3d 685, 693-94 (7th Cir. 2008) (en banc) (Posner, *J*.) (describing the appearance-of-intention requirement "not [as] a state-of-mind requirement" and stating that "it is a matter of external appearance rather than subjective intent . . . .").
>
> *Weiss v. Nat'l Westminster Bank PLC*, 768 F.3d 202, 207 (2d Cir. 2014). Therefore, the customer appraisal form for Interpal is irrelevant to the subject of the pending motion. The "external appearance" relevant to 18 U.S.C. § 2331 is not the "external appearance" presented by a terrorist group or its funders. If that were the case, Hamas's description of its terror campaign as "legitimate

> resistance to occupation" would itself nullify the ATA. Instead, the question for the jury is whether the Defendant's conduct presents the "external appearance." That is to be determined by assessing the Bank's culpability in contributing to the acts of terrorism at issue.

(Plaintiffs' Response to Rule 56.1 Supplemental Statement ¶ 1) (Plaintiffs' "External Appearance Caveat").

NatWest's proffer of supplemental facts it believed to be undisputed also included the following: NatWest's internal inquiries in 2002 with regard to "'details of the most recent due diligence undertaken in respect of the Bank's knowledge of dealings in [Interpal's] US$ account,'" and Interpal's characterizations of its charitable operations (NatWest Rule 56.1 Supplemental Statement ¶¶ 2-3); a 2003 record from UK Regulatory Authorities—which NatWest maintained in its files—listing among Interpal's objectives "the provision of aid and assistance, support[,] guidance[,] and comfort to poor[,] needy[,] sick children and widows" (*id*. ¶ 4); and Interpal annual reports for 1999-2003 (also maintained in NatWest's files) detailing Interpal's spending allocations—a planned 5% for fundraising, 5% for administration, and 10% for future distribution, and actual yearly expenditures of 87.3% to 94.7% directly on charitable projects (*id*. ¶ 5). NatWest also asserted that "[b]etween November 8, 1996 and September 25, 2003, at the request of its customer Interpal, NatWest processed 457 wire transfers (the 'Relevant Transfers') to the 13 charities that plaintiffs contend are alter egos of or controlled by Hamas," and that the "stated purposes for these transfers included" programs for orphans, a maternity clinic, student aid, emergency medical aid, food parcels, winter clothes,

and other community projects (*id*. ¶ 7); that Interpal on its website stated that it felt an obligation "'to ensure that the funds' it received were 'used for charitable purposes as specified,'" "stated that it allowed transfers only to 'bona fide organisations,'" and stated that it insisted on—and sent delegations to verify—the charities' adherence to "'the proper charitable use of funds as specified'" (*id*. ¶¶ 9-12); and that "[n]one of the Relevant Transfers was identified as being for any violent or terroristic purpose" (*id*. ¶ 8).

As to each of these NatWest Rule 56.1 Supplemental Statements other than ¶¶ 7 and 8, plaintiffs' response was to state that they "[a]dmit[ted]" that the statement described was made by the speaker cited or was contained in the document cited, but to incorporate by reference their (above quoted) External Appearance Caveat. Plaintiffs gave a qualified response to ¶ 7 by admitting that there were "*at least*" 457 wire transfers, and by asserting that the transfers were "for Hamas" and totaled approximately $12,000,000; and as to ¶ 8, plaintiffs "[a]dmit[ted] that Interpal did not identify any of the Relevant Transfers as being for any violent or terroristic purpose." (Plaintiffs' Rule 56.1 Response to Supplemental Statement ¶¶ 7, 8 (emphasis in Response).)

NatWest also quoted testimony and declarations from the managers of its customer-relations, fraud-prevention, and anti-money-laundering groups stating that the Bank was aware of Interpal's "*alleged*" links to Hamas (NatWest Rule 56.1 Supplemental Statement ¶ 16 (emphasis in Statement)), but that the Bank had no tolerance for the funding of terrorism, did not want to be related in any way to such activities, and would have taken quick action to terminate its

relationship with Interpal "if the bank believed that Interpal was funding terrorism" (*id*. ¶ 15; *see*, *e.g.*, *id*. ¶¶ 14-19). Plaintiffs' response to each of these NatWest assertions was to "[a]dmit" that each cited speaker had so testified, but to add, by incorporation, their External Appearance Caveat.

In addition, NatWest cited facts that plaintiffs had conceded in responding to the Bank's First Summary Judgment Motion (made when the then-operative *Weiss* action complaint alleged 15 terrorist attacks), including the following.

- Plaintiffs "admit[ted] they 'do not contend that any of the funds Interpal transferred from the accounts it maintained with NatWest to HAMAS was used specifically to finance any of the terrorist attacks that injured Plaintiffs and/or killed their loved ones.'" (First Summary Judgment Rule 56.1 Statement and Response ¶ 248 (quoting Plaintiffs' response to an interrogatory));
- Plaintiffs' expert Dr. Levitt "offers no evidence that any funds transferred by Interpal through its NatWest accounts was used to perpetrate the 15 attacks" (*id*. ¶ 253);
- Nor did Dr. Levitt "opine that any of the 12 Charities [that he addressed] participated in" or "recruited" "any of the perpetrators of the 15 attacks"; he did not offer any opinion as to what individuals or entities planned and executed the attacks at issue (*id*. ¶¶ 254, 261);
- Plaintiffs' expert "Spitzen does not opine that any of the 13 Charities requested that someone carry out any of the 15 attacks" (*id*. ¶ 272).

C. *The District Court's Decision in* Weiss V

The district court concluded, in light of the decision in *Linde* and the undisputed facts in the present actions, that the evidence adduced by plaintiffs was insufficient to establish all of the elements necessary to hold NatWest liable under the ATA either as a principal or as an aider and abetter.

1. *Liability as a Principal*

First, the district court addressed plaintiffs' claims seeking to hold NatWest liable as a principal:

> Plaintiffs bring their claims under 18 U.S.C. § 2339B as the predicate criminal violation to satisfy the . . . require[ment] that the [defendant's] act violate federal criminal law. Section 2339B makes it a felony to "knowingly provide[] material support or resources to a [F]oreign [T]errorist [O]rganization," or attempting or conspiring to do so. 18 U.S.C. § 2339B; *See also*, *Weiss [III]*, 768 F.3d at 207. Under § 2339B, "a defendant may be liable for civil remedies under § 2333(a) for providing material support to an organization that solicits funds for an FTO," even if that support is not provided directly to the FTO itself. *Weiss [III]*, 768 F.3d at 209.

Weiss V, 381 F.Supp.3d at 229. The court noted, however, that

> [i]n *Linde*, the Second Circuit rejected the argument that providing material support to a known FTO in violation of § 2339B *invariably* constitutes a violent act or act dangerous to human life. *Linde*, 882 F.3d at 326. ("*[T]he provision of material support to a terrorist*

> *organization does not invariably equate to an act of international terrorism*. Specifically, . . . providing financial services to a known terrorist organization may afford material support to the organization even if the services *do not involve violence or endanger life and do not manifest the apparent intent required by § 2331(1)(B)*."). The Second Circuit explained that, "conduct that violates a material support statute can also satisfy the § 2331(1) definition requirements of international terrorism *in some circumstances*." *Id*. (emphasis added). However, the Second Circuit found that it was "incorrect [for the trial court in *Linde*] to instruct the jury that a finding that Arab Bank provided material support to Hamas in violation of § 2339(B) *was alone sufficient* to prove the bank's own commission of an act of international terrorism under § 2333(a)." *Id*. Instead, *the jury "needed to be instructed on and to find proved all of § 2331(1)'s definitional requirements for an act of international terrorism, including those pertaining to violence or danger and the apparent intent to intimidate or influence*." *Id*.

Weiss V, 381 F.Supp.3d at 229 (emphases ours, except as indicated); *see id*. at 230 ("Thus, the Second Circuit determined that the provision of material support to a terrorist organization alone is not enough to constitute international terrorism.").

The district court noted that in *Weiss II*, it had ruled on only one of the several grounds argued by NatWest for summary judgment. However, it then explained that:

> the ATA sets forth four separate requirements for an act to constitute international terrorism. *The act at issue must: (1) involve violence or endanger human life*; (2) violate federal or state criminal law if committed in the United States; *(3) appear intended to intimidate or coerce civilian population, influence government policy, or affect government conduct by specified means*; and (4) occur primarily outside the United States or transcend national boundaries. *See*, *Licci [ex rel. Licci v. Lebanese Canadian Bank, SAL]*, 673 F.3d [50,] 68 [(2d Cir. 2012)].

Weiss V, 381 F.Supp.3d at 231 (emphases added). Taking into account that in order to prevail, plaintiffs were required to establish all four of those elements, the court found merit in NatWest's contention that summary judgment dismissing the complaints was required because plaintiffs had not adduced sufficient evidence to prove the first and third elements, *i.e.*, to permit an inference that NatWest's conduct involved violence or danger to human life or to permit an inference that its conduct appeared to be intended to intimidate or coerce a civilian population, influence government policy, or affect government conduct by statutorily prohibited means.

The court noted that "[i]n *Linde*, the evidence demonstrated that defendant Arab Bank *processed bank transfers that 'were explicitly identified as payments for suicide bombings*,'" *id*. at 235-36 (quoting *Linde*, 882 F.3d at 321 (emphasis ours)). "Here," however, the court found that "Plaintiffs provide no such evidence," *Weiss V*, 381 F.Supp.3d at 236—*i.e.*, "[t]here is no evidence that the transfers Defendant processed

on behalf of the 13 charities were used explicitly for purposes similar to those describe[d] in *Linde*," *id*. at 234. Rather, the court noted that "Plaintiffs' experts . . . admitted that the 13 Charities performed charitable work," *id*. at 232 (citing First Summary Judgment Rule 56.1 Statement and Response), and that

> *Plaintiffs concede that there is no evidence that any of Interpal's transfers to the 13 Charities processed by Defendant were identified as being for any specific violent or terroristic purpose*. . . . "Plaintiffs admit they do not contend that any of the funds Interpal transferred from the accounts it maintained with NatWest to Hamas was used specifically to finance any of the terrorist attacks that injured Plaintiffs and/or killed their loved ones." . . . "*[Plaintiffs a]dmit that Interpal did not identify any of the Relevant Transfers as being for any violent or terroristic purpose*."

Weiss V, 381 F.Supp.3d at 232 (quoting First Summary Judgment Rule 56.1 Response ¶¶ 248 and 8 (emphases ours)).

The court thus concluded that NatWest's "motion for summary judgment as to the violent acts and acts dangerous to human life prong of § 2331(1) is granted because Plaintiffs fail to present evidence sufficient to create a jury question as to whether Defendant's activities involved violent acts or acts dangerous to human life." *Weiss V*, 381 F.Supp.3d at 235; *see id*. at 233 ("a reasonable juror cannot conclude that Defendant's alleged conduct involves violence or endangers human life").

In addition, given that plaintiffs "adduce[d] no evidence" from which to infer that NatWest "had the

apparent intent to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of a government by mass destruction, assassination, or kidnapping," *id*. at 236, the court concluded that NatWest's motion for summary judgment should be granted for lack of a triable issue on the appearance-of-intent-to-intimidate-or-coerce element of plaintiffs' ATA claim against the Bank as a principal.

2. *Plaintiffs' Attempt To Raise Claims of Aiding and Abetting*

With respect to the matter of secondary liability under the ATA, the district court faced the preliminary question of whether such claims were procedurally foreclosed. The original claims of aiding and abetting, based on common-law principles, had been dismissed in *Weiss I* in 2006 for failure to state a claim. *See* 453 F.Supp.2d at 622. In opposition to NatWest's 2018 Summary Judgment Motion, plaintiffs argued that there was sufficient evidence to warrant a trial as to whether NatWest aided and abetted the terrorist attacks, and they urged the court either to allow them to further amend their complaints to state such claims under JASTA or to construe the action as it stood to include such claims because they were advocated by plaintiffs in the parties' July 2016 joint pretrial order ("Pretrial Order"). The court rejected plaintiffs' contention that they could pursue aiding-and-abetting claims merely on the basis of their mention in the Pretrial Order. *See Weiss V*, 381 F.Supp.3d at 237.

However, the court also rejected NatWest's contention that *Weiss I* had precluded any future aiding-and-abetting claims. The court determined that the

mere passage of time should not preclude plaintiffs' proposed amendment (a) because plaintiffs could not have amended their pleading to assert JASTA aiding-and-abetting claims prior to the filing of the Pretrial Order as that order was entered months before JASTA was enacted, and (b) because Congress made JASTA retroactively applicable in pending actions such as those here, with respect to an organization that had been designated an FTO at the time it committed, planned, or authorized a terrorist attack. *Id*. at 238.

Ultimately, however, the district court decided to deny leave to amend the complaints to assert aiding-and-abetting claims under JASTA, holding that such an amendment would be futile. The court noted that while the mens rea element of a § 2339B claim of providing material support can be satisfied by proof of the defendant's "knowledge of the organization's connection to terrorism," a JASTA claim of aiding and abetting has a different mens rea element, requiring proof that the defendant be "'aware' that, by assisting the principal, it is itself assuming a 'role' in terrorist activities.'" *Id*. at 238-39 (quoting *Linde*, 882 F.3d at 329 (other internal quotation marks omitted)). Thus, while *Weiss III* established that there was sufficient evidence in the present case to create a triable issue as to NatWest's mens rea on the "material support" claim, the addition of an aiding-and-abetting claim would be futile because plaintiffs had adduced

> no evidence that creates a jury question as to whether Defendant generally was aware that it played a role in any of Hamas's or even Interpal's . . . violent or life-endangering activities. Evidence that Defendant knowingly provided banking services to a terrorist

> organization, without more, is insufficient to satisfy JASTA's scienter requirement.

Id. at 239.

Accordingly, final judgments were entered in the *Weiss* action and the *Applebaum* action, dismissing the complaints in their entirety. A joint notice of appeal was filed in the two actions, challenging *Weiss V*'s grant of summary judgment and denial of leave to amend the complaints.

II. DISCUSSION

On appeal, plaintiffs contend principally that the district court (1) in dismissing their claims to hold NatWest liable as a principal, erred by crediting Interpal's "ostensibly charitable purposes" (Plaintiffs' brief on appeal at 43 (internal quotation marks omitted)) and requiring evidence tracing the Bank's transactions for Interpal to specific terrorist attacks; and (2) in denying their motion to amend the complaints to assert claims against NatWest as an aider and abetter, erred by applying an erroneous standard in assessing the evidence proffered as to the Bank's general awareness that its services to Interpal were aiding and abetting terrorism by Hamas.

NatWest has cross-appealed to request, in the event the judgments are not to be affirmed, that we reverse the district court's denial of NatWest's motion to dismiss the actions for lack of personal jurisdiction. But it urges that "[g]iven the number of years during which these cases have already been pending, this Court can and should 'assume jurisdiction' and affirm on the . . . merits . . . as a means of preventing waste of judicial resources." (NatWest brief on appeal at 62 (other internal quotation marks omitted).)

When a cross-appeal is conditional, asking that it be "reached only if and when the appellate court decides to reverse or modify the main judgment," and "the direct appeal fails and the judgment is affirmed, the usual procedure is to dismiss the cross-appeal as moot." *Trust for Certificate Holders of Merrill Lynch Mortgage Investors, Inc. Mortgage Pass-Through Certificates, Series 1999-C1, ex rel. Orix Capital Markets, LLC v. Love Funding Corp.*, 496 F.3d 171, 174 (2d Cir. 2007) (internal quotation marks omitted). We follow that procedure here.

For the reasons that follow, viewing the record in the light most favorable to plaintiffs as the non-moving parties, *see*, *e.g.*, *Longman v. Wachovia Bank, N.A.*, 702 F.3d 148, 150 (2d Cir. 2012), we conclude that the district court did not err in granting summary judgment or in denying plaintiffs' motion for leave to amend. Accordingly, we affirm the judgments; and we dismiss the cross-appeal as moot.

A. *Liability under the ATA as a Principal: 18 U.S.C. § 2333(a)*

The ATA (or the "Act") authorizes a private right of action by providing, *inter alia*, that

> [a]ny national of the United States *injured* in his or her person, property, or business *by reason of an act of international terrorism*, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

18 U.S.C. § 2333(a) (emphases added). The Act defines acts of "international terrorism" as follows:

> As used in this chapter—
>
> (1) the term "international terrorism" means activities that—
>
> (A) *involve violent acts or acts dangerous to human life* that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
>
> (B) *appear to be intended*—
>
> (i) *to intimidate or coerce a civilian population*;
>
> (ii) *to influence the policy of a government by intimidation or coercion*; or
>
> (iii) to affect the conduct of a government by *mass destruction*, *assassination*, *or kidnapping*; ***and***
>
> (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . .

18 U.S.C. § 2331(1) (emphases added).

The Act also defines as crimes the homicide of a United States national who is outside the United States, an attempt or conspiracy from outside the United States to kill a United States national, and other "physical violence" by a person outside the United States that either did or was intended to cause serious bodily injury to a United States national. *See* 18 U.S.C. §§ 2332(a), (b), and (c). However, it provides

that there is to be no prosecution under § 2332 without a proper certification that the "offense *was intended* to coerce, intimidate, or retaliate against a government or a civilian population." *Id*. § 2332(d) (emphasis added).

The Act further makes it a crime to provide, or attempt or conspire to provide, "material support or resources *to a foreign terrorist organization*," punishable by a fine and/or up to 20 years' imprisonment, or up to life imprisonment if a death has resulted. 18 U.S.C. § 2339B(a)(1) (emphasis added). The term "material support or resources" is defined to include "financial services." *Id*. §§ 2339B(g)(4) and 2339A(b)(1).

Section 2339B(a)(1) also provides, *inter alia*, that "to violate" its prohibition against providing "material support or resources to" an FTO, "*a person must have knowledge* that *the organization is a designated terrorist organization* (as defined in subsection (g)(6)), [or] that *the organization has engaged or engages in terrorist activity* (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act[, 8 U.S.C. § 1182(a)(3)(B)])." 18 U.S.C. § 2339B(a)(1) (emphases added). The definitions expressly referred to in § 2339B(a)(1) themselves import additional definitions from other statutes. *See id*. § 2339B(g)(6) ("the term 'terrorist organization' means an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act[, 8 U.S.C. § 1189]"); 8 U.S.C. § 1189(a) (such designation is authorized with respect to "a foreign organization" that "engages in terrorist activity (as defined in [8 U.S.C. §] 1182(a)(3)(B)[)] . . . or terrorism (as defined in section 2656f(d)(2) of Title 22), or retains the capability and intent to engage in terrorist activity or terrorism)" and

whose "terrorist activity or terrorism . . . threatens the security of" the United States or its nationals); *see also* 8 U.S.C. § 1182(a)(3)(B)(iii) (defining "terrorist activity" to include criminal activity that "involves" "threatening to kill" a person in order to coerce a government to do or refrain from doing an act); 22 U.S.C. § 2656f(d)(2) (defining "terrorism" to "mean[] premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents").

Thus, as we have noted, if a defendant "provid[es] material support to an organization that solicits funds for an FTO" in violation of § 2339B, the defendant, "through this complex series of statutory incorporation—18 U.S.C. § 2333(a) to 18 U.S.C. § 2331(1) to 18 U.S.C. § 2339B(a)(1) to 8 U.S.C. § 1182(a)(3)(B)— . . . *may be liable for civil remedies under § 2333(a)*." *Weiss III*, 768 F.3d at 209. Section § 2339B, while making the provision of material support or resources to an FTO a crime, does not itself provide a private right of action; the civil action is authorized by § 2333(a).

As *Linde* held, and as shown in the statutory language quoted above, § 2333 allows a civil action by a person injured "by reason of an act of international terrorism," 28 U.S.C. § 2333(a); that section specifies what elements must be proven in order for the private plaintiff to recover; and the definitions provided, whether spelled out in ATA § 2331 or imported from other statutes, inform the nature of those elements. *See Linde*, 882 F.3d at 319-20. Thus, given that the ATA allows a United States national to recover for injury suffered "by reason of an act of international terrorism," 18 U.S.C. § 2333(a), the definition of international terrorism in § 2331(1) means that such a

plaintiff must prove that the defendant's act not only violated United States law or a State law (or would be a criminal violation if committed within the United States or a State), but that the act "*also* involve[d] violence or endanger[ed] human life," and "[f]urther . . . *appear[ed] to be intended* to intimidate or coerce a civilian population or to influence or affect a government," *Linde*, 882 F.3d at 326 (citing 18 U.S.C. §§ 2331(1)(A) and (1)(B)) (first emphasis in original; second emphasis added).

Whether a defendant "appear[ed]" to have intended its activities to intimidate or coerce is not a question of the defendant's subjective intent but rather a question of what its intent objectively appeared to be. *See*, *e.g.*, *Weiss III*, 768 F.3d at 207 n.6. Assessment of what an observer could reasonably find "*appear[ed] to be intended*" depends on whether the consequences of the defendant's activities were reasonably foreseeable, *see*, *e.g.*, *Boim v. Holy Land Foundation for Relief & Development*, 549 F.3d 685, 693-94 (7th Cir. 2008), and reasonable foreseeability depends largely on what the defendant knew, *see id*. ("A *knowing* donor" to an FTO—"that is *a donor who knew*" the terroristic "aims and activities" directed at a particular territory—"would *know* . . . that donations to" the entity would enable it to "kill more people in" the territory. "And *given such foreseeable consequences*, such donations would *appear to be intended* . . . to intimidate or coerce a civilian population or to affect the conduct of a government by . . . assassination, as required by section 2331(1) in order to distinguish terrorist acts from other violent crimes." (internal quotation marks omitted) (emphases ours)).

We see no merit in plaintiffs' contention that the district court found the evidence as to whether NatWest appeared to intend intimidation or coercion insufficient by "crediting Interpal's ostensibly charitable purposes" (Plaintiffs' brief on appeal at 38 (internal quotation marks omitted)). The court did not find that Interpal in fact had only charitable purposes; rather, it observed that plaintiffs' own experts said the 13 charities performed charitable work, and that plaintiffs admitted they had no evidence that those charities had funded terrorist attacks or recruited persons to carry out such attacks. It also noted plaintiffs' admission that Interpal had not identified any of the moneys it instructed NatWest to transfer to the charities as being for any violent or terroristic purpose. The absence of evidence to show that the charities themselves were engaged in terrorism—or to show that the transfers were designated for that purpose by Interpal—was material to an assessment of what a rational juror could find NatWest knew. Given that dearth of evidence, the court concluded that a rational juror could not find that NatWest's processing of Interpal's money transfers to the charities objectively exhibited the appearance that NatWest intended to intimidate or coerce a population or a government.

Plaintiffs also contend that the district court misapplied the holdings of *Linde*, arguing that "*Linde* held that where evidence establishes a knowing violation of § 2339B that proximately causes injuries in terrorist attacks, *§ 2331(1)'s elements must be submitted to the jury*." (Plaintiffs' brief on appeal at 39 (emphasis added).) We disagree with plaintiffs' characterization of *Linde*, in part because it disregards the procedural posture in which the case arrived in this Court and the

substantive record that had been developed in the district court. The procedural issue before *Linde* was not, as in the present case, whether summary judgment had been properly granted against the plaintiffs for lack of proof as to certain § 2331(1) elements (on which they had the burden of proof), but rather whether an instruction that resulted in judgment in favor of the plaintiffs had improperly removed consideration of some of those elements from the jury. The jury had been instructed that if it found "that Arab Bank provided material support to Hamas in violation of § 2339B," that finding "was alone sufficient to prove the bank's own commission of an act of international terrorism under 2333(a)"; that instruction was error, relieving the plaintiffs of their burden of proving one of the elements of their claim. *Linde*, 882 F.3d at 326.

And while *Linde* did indeed say that questions as to the satisfaction of the § 2333(a) elements were to be resolved by the jury, we in no way intimated that the existence of a genuine issue as to one element—whether § 2339B was violated—requires a trial in a case where there is not sufficient evidence as to another element. In stating that the § 2333(a) elements of whether the defendant Arab Bank's provision of material support involved "violence or endanger[ed] life" and "manifest[ed] the apparent intent required by § 2331(1)(B)" were issues to be submitted to the jury, *Linde*, 882 F.3d at 326, we not only were dealing with the procedural posture of the case as indicated above, but also were considering the record before us, in which there was "evidence" that transfers were made to "purported charities *known* to funnel money to Hamas," and that some of those transfers were "explicitly *identified as payments for suicide bombings*," *id*. at

321 (emphases added). A suicide bombing is an act that inherently involves violence and objectively would appear intended to intimidate a population or government. The evidence in *Linde* thus sufficed to present a triable issue as to whether Arab Bank had committed an act of international terrorism by processing transfers that "involve" violence and that "appear" to intend intimidation or coercion of a population or government.

The district court in the present case granted summary judgment to NatWest because it found that plaintiffs had not presented any such evidence as to the transfers made for Interpal by NatWest—or any other evidence that the transfers by NatWest involved violence, or danger to human life, or had the appearance of intending to intimidate or coerce a population or government. Plaintiffs have not called to our attention anything in the record to contradict that finding.

Plaintiffs' reliance on this Court's decision in *Weiss III*, vacating the district court's prior grant of summary judgment, is misplaced. On that appeal, we ruled only on the issue of scienter, the sole element on which the district court in *Weiss II* had granted summary judgment. *See*, *e.g.*, *Linde*, 882 F.3d at 328 ("[I]n *Weiss [III]* we addressed the 'scienter requirement' of the predicate material support violation, not the definitional requirements of the ATA."). The fact that *Weiss III* concluded that there was sufficient evidence to present a genuine dispute as to that element is of no moment here. Where the undisputed facts reveal that there is an absence of sufficient proof as to one essential element of a claim, any factual disputes with respect to other elements of the claim become immaterial and cannot defeat a motion for summary

judgment. *See*, *e.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

In sum, the § 2333(a) principles announced in *Linde* were properly applied in the present case: In order for a plaintiff to prevail on an ATA claim against a defendant as a principal, the elements listed in § 2333(a) must be proven; an element is not proven unless the evidence comports with the ATA's definition of the element; and proof of the provision of banking services, in and of itself, is insufficient either to show that the services involved an act of violence or threat to human life or to give the appearance that such services were intended to intimidate or coerce a civilian population or government.

In order to establish NatWest's liability under the ATA as a principal, plaintiffs were required to present evidence sufficient to support all of § 2331(1)'s definitional requirements for an act of international terrorism. We see no error in the district court's conclusion that plaintiffs failed to proffer such evidence, and that NatWest was entitled to summary judgment dismissing those claims.

B. *The Denial of Leave To Amend To Allege Aiding and Abetting*

"We review a district court's denial of leave to amend for abuse of discretion, unless the denial was based on an interpretation of law, such as futility, in which case we review the legal conclusion *de novo*." *Panther Partners Inc. v. Ikanos Communications, Inc.*, 681 F.3d 114, 119 (2d Cir. 2012). Normally, a motion for leave to amend is assessed on the basis of a plaintiff's proposed new pleading on its face; however, where, as here, the request is made in response to a

motion for summary judgment, it is well within the court's discretion to consider the evidence in the existing record in assessing whether the plaintiff's new allegations would, "as a matter of law, . . . withstand [a] motion for summary judgment," *Milanese v. Rust-Oleum Corp.*, 244 F.3d 104, 110 (2d Cir. 2001) (internal quotation marks omitted). For the reasons that follow, we affirm the district court's denial of plaintiffs' request to assert JASTA claims of aiding and abetting.

JASTA was enacted in 2016, amending § 2333 by adding a new subsection (d) to allow a person injured by an act of international terrorism to recover from a person who aided and abetted or conspired in that act. It provides, in relevant part as follows:

> (2) Liability.—In an action under subsection (a) for an injury *arising from an act of international terrorism* committed, planned, or authorized *by an organization that had been designated as a foreign terrorist organization* under section 219 of the Immigration and Nationality Act (8 U.S.C. 1189), as of the date on which such act of international terrorism was committed, planned, or authorized, *liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance*, or who conspires with the person who committed *such an act of international terrorism*.

18 U.S.C. § 2333(d)(2) (emphases added). Congress gave JASTA a measure of retroactivity by providing that such a secondary liability theory would be available in any action pending on or commenced after its enactment, arising out of an injury occurring on or after September 11, 2001, with respect to any

organization responsible for a terrorist attack if the organization had been designated an FTO at the time of its commission, planning, or authorization of that attack. *See id.*; JASTA, Pub. L. No. 114-222, § 7, 130 Stat. at 855 (Sept. 28, 2016) ("Effective Date").

Congress's stated purpose in enacting JASTA was "to provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against persons [and] entities . . . that have provided material support . . . to foreign organizations or persons that engage in terrorist activities against the United States," whether "directly or indirectly." JASTA, Pub. L. No. 114-222, § 2(b), 130 Stat. at 853 ("Purpose"). Under JASTA, therefore, a plaintiff will "not have to prove that the [defendant's] own acts constitute[d] international terrorism satisfying all the definitional requirements of § 2331(1)." *Linde*, 882 F.3d at 328.

As to what a plaintiff will be required to prove, Congress, in its JASTA "Findings," stated that the decision in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983) ("*Halberstam*"), "which has been widely recognized as the leading case regarding Federal civil aiding and abetting and conspiracy liability, including by the Supreme Court of the United States, provides the proper legal framework for how such liability should function in the context of chapter 113B of title 18 United States Code [, 18 U.S.C. § 2331 *et seq*.]." Pub. L. No. 114-222, § 2(a)(5), 130 Stat. at 852 ("Findings"). As set out in *Halberstam*,

> [a]iding-abetting includes the following elements: (1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) *the defendant must be generally*

> *aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance*; [and] (3) *the defendant must knowingly and substantially assist the principal violation*.

705 F.2d at 477 ("*Halberstam* elements") (emphases added). And as to "how much aid is 'substantial aid,'" which may depend on "many variables," *id*. at 483, *Halberstam*, after exploring caselaw, concluded that that element is appropriately evaluated in terms of the following five factors suggested by the *Restatement (Second) of Torts* (1979) ("*Restatement*"), to wit,

> [1] the nature of the act encouraged; [2] the amount [and kind] of assistance given; [3] the defendant's absence or presence at the time of the tort; [4] his relation to the tortious actor; [5] and the defendant's state of mind,

Halberstam, 705 F.2d at 483-84 (citing Restatement § 876(b), comment *d*), along with a sixth factor, the "duration of the assistance provided," *Halberstam*, 705 F.2d at 484.

The first *Halberstam* element itself has multiple parts. The person the defendant is alleged to have aided is the principal; the principal itself must have performed a wrongful act; and the principal's act must have caused an injury. *See*, *e.g.*, *id*. at 478 ("[a]n aider-abettor is liable for damages caused by the main perpetrator"); *id*. at 481 ("an aider-abettor is liable for injuries caused by the principal tortfeasor"). For an ATA aiding-and-abetting claim, JASTA identifies the principal as "an organization that had been designated as a foreign terrorist organization," 18 U.S.C. § 2333(d)(2). The aid the defendant provided need not be have been given to the principal directly; as quoted

above, Congress expressly so declared in its statement of "Purpose" in enacting JASTA. However, the second and third *Halberstam* elements require proof that at the time the defendant (directly or indirectly) aided the principal, the defendant was "generally aware" of the overall wrongful activity and was "knowingly" assisting the principal violation. *Halberstam*, 705 F.2d at 477.

In *Linde*, which had been tried before the enactment of JASTA, we discussed the second *Halberstam* element in the course of considering whether the trial court's instruction error (*see* Part II.A. above) could be considered harmless. We concluded that the error was not harmless in part because the mens rea element of aiding and abetting is "different from the *mens rea* required to establish material support in violation of 18 U.S.C. § 2339B, which requires" proof only of the defendant's "knowledge of the organization's connection to terrorism." *Linde*, 882 F.3d at 329-30; *see generally Holder v. Humanitarian Law Project*, 561 U.S. 1, 16-17 (2010) ("Congress plainly spoke to the necessary mental state for a violation of § 2339B, and it chose knowledge about the organization's connection to terrorism, *not specific intent to further the organization's terrorist activities*." (emphasis added)).

In contrast to what is needed to show a violation of § 2339B, the second *Halberstam* element of aiding and abetting requires a plaintiff to show the defendant's "general[] aware[ness] of his role *as part of an overall illegal or tortious activity at the time that he provides the assistance*." *Linde*, 882 F.3d at 329 (emphasis added) (internal quotation marks omitted).

> [A]iding and abetting an *act* of international terrorism requires more than the provision of

> material support to a designated terrorist *organization*. Aiding and abetting requires the secondary actor to be "aware" that, by assisting the principal, it is itself assuming a "role" in terrorist activities. *Halberstam v. Welch*, 705 F.2d at 477.

Id. at 329 (emphases in original).

The issue of the mens rea requirements for a JASTA claim of aiding and abetting acts of international terrorism was presented more directly in *Siegel v. HSBC North America Holdings, Inc.*, 933 F.3d 217 (2d Cir. 2019) ("*Siegel*"), in which we considered the district court's dismissal of such an action pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. The *Siegel* plaintiffs were victims, or representatives of victims, of a series of terrorist attacks in Jordan on November 9, 2005. They brought suit under JASTA against HSBC Bank USA, N.A. ("HSBC"), and other defendants, alleging that HSBC had provided financial services to the defendant Al Rajhi Bank (or "ARB"), a prominent Saudi bank.

The *Siegel* complaint included the following allegations: that al-Qaeda in Iraq ("AQI") was the terrorist organization responsible for the attacks; that ARB had links to terrorist organizations including AQI; that HSBC was aware of ARB's links to terrorist organizations; that ARB was, at all relevant times, involved in financing terrorist activity; that the government of Saudi Arabia was monitoring ARB accounts for links to terrorist organizations; that in 2003, the United States Central Intelligence Agency referred to ARB as a conduit for terrorist transactions; that in 2004, the United States government designated several Saudi-based non-profit organizations—all of which were

clients of ARB—as terrorist organizations; that HSBC internal communications in 2002 and 2003 revealed that senior officers within the company were concerned that ARB's account may have been used by terrorists, and that one of ARB's clients had been linked to AQI; that despite HSBC's knowledge of ARB's support of terrorist organizations, HSBC provided ARB with a wide range of banking services, including wire transfers, foreign exchange, trade financing, and asset management services; and that HSBC helped ARB to conceal the passage of billions of U.S. dollars through the United States, and provided ARB with the means to transfer millions of U.S. dollars to AQI which was actively engaged in planning and perpetrating the murder and maiming of Americans, including the victims of the November 2005 bombings in Jordan. *See Siegel*, 933 F.3d at 220-21. ARB was an HSBC customer for some 25 years, until January 2005 when HSBC decided to sever ties with ARB due to its concerns about possible terrorist financing. *See id*. at 221.

After other defendants had been dismissed for lack of personal jurisdiction, the district court dismissed the complaint against HSBC for failure to state a claim under JASTA. This Court affirmed, "conclud[ing] that the plaintiffs' aiding-and-abetting claim fail[ed] as a matter of law because the plaintiffs ha[d] not plausibly alleged that HSBC assumed a role in the November 9 Attacks or provided substantial assistance to AQI." *Id*. at 222.

We observed first that the *Siegel* plaintiffs "fail[ed] to advance any plausible, factual, non-conclusory allegations that HSBC knew or intended that" the funds they forwarded for ARB "would be sent to AQI or to any other terrorist organizations"; we found that

failure alone sufficient to "foreclose[] their JASTA claim." *Id*. at 224-25. In the absence of factual "allegations that would support a conclusion that HSBC *knowingly* played a role in the terrorist activities," the plaintiffs' allegations that HSBC "*was aware*," based on "public reports," that its banking customer "*was believed by some* to have links to . . . terrorist organizations" "are insufficient to state a claim for aiding-and-abetting liability under JASTA." *Id*. at 224 & n.6 (emphases added).

In addition, applying the six "factors" that *Linde* and *Halberstam* found relevant to a determination as to what may constitute "'substantial assistance,'" we noted that "[t]he plaintiffs have also failed adequately to plead the 'substantial assistance' element of aiding-and-abetting liability under JASTA." *Siegel*, 933 F.3d at 225. We stated, *inter alia*, that

> plaintiffs here have not plausibly alleged that HSBC encouraged the heinous November 9 Attacks or provided any funds to AQI. To be sure, the plaintiffs did allege that HSBC provided hundreds of millions of dollars to ARB, but *they did not advance any non-conclusory allegation that AQI received any of those funds or that HSBC knew or intended that AQI would receive the funds*. . . . Similarly, on the fifth factor—defendant's state of mind—the *plaintiffs do not plausibly allege that HSBC knowingly assumed a role in AQI's terrorist activities or otherwise knowingly or intentionally supported AQI*.

Id. (emphases added). We concluded that

> [t]aken as true and viewed in the light most favorable to the plaintiffs, the allegations

> establish, at most, that, up until January 2005, HSBC helped ARB violate banking regulations despite knowing that ARB supported terrorist organizations. *Even were that proven, however, it would be an insufficient basis for liability under JASTA because the plaintiffs have failed to allege that HSBC knowingly* assumed a role *in AQI's terrorist activities or substantially assisted AQI in those activities, specifically the November 9 Attacks*. We therefore conclude that the plaintiffs' aiding-and-abetting claim fails.

Id. at 225-26 (emphases added).

Thus, in the present case, plaintiffs' argument that the relevant JASTA mens rea element—*i.e.*, whether NatWest was generally aware it was providing material assistance to Hamas—was established by evidence that NatWest was assisting Interpal is contrary to *Linde* and foreclosed by *Siegel*.

The district court appropriately assessed plaintiffs' request to add JASTA claims, given the undisputed evidence adduced, in connection with the summary judgment motions, as to the state of NatWest's knowledge. As discussed in Part II.A. above, the record included evidence that plaintiffs' experts said the charities to which NatWest transferred funds as instructed by Interpal performed charitable work and that, as plaintiffs admitted, Interpal did not indicate to NatWest that the transfers were for any terroristic purpose; and plaintiffs proffered no evidence that the charities funded terrorist attacks or recruited persons to carry out such attacks. On this record, the district court did not err in denying leave to amend the complaints as futile on the ground that plaintiffs could not

show that NatWest was knowingly providing substantial assistance to Hamas, or that NatWest was generally aware that it was playing a role in Hamas's acts of terrorism.

CONCLUSION

We have considered all of plaintiffs' arguments on this appeal and have found them to be without merit. The judgments are affirmed. Defendant's conditional cross-appeal is dismissed as moot.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 05-CV-4622 (DLI) (RML)

TZVI WEISS, *et al.*,
Plaintiffs,
v.
NATIONAL WESTMINSTER BANK PLC,
Defendant.

No. 07-cv-916 (DLI) (RML)

NATAN APPLEBAUM, *et al.*,
Plaintiffs,
v.
NATIONAL WESTMINSTER BANK PLC,
Defendant.

OPINION AND ORDER

DORA L. IRIZARRY, Chief United States District Judge:

Approximately 200 individuals and estates of deceased persons (collectively, "Plaintiffs"), brought this consolidated action against defendant National Westminster Bank PLC ("Defendant"), seeking to recover damages from terrorist attacks in Israel and the

Palestine Territories pursuant to the civil liability provision of the Antiterrorism Act of 1992 ("ATA"), 18 U.S.C. § 2333(a). Specifically, Plaintiffs allege that Defendant is liable civilly pursuant to the ATA's treble damages provision for: (1) aiding and abetting the murder, attempted murder, and serious physical injury of American nationals outside the United States in violation of 18 U.S.C. § 2332; (2) knowingly providing material support or resources to a Foreign Terrorist Organization ("FTO") in violation of 18 U.S.C. § 2339B; and (3) willfully and unlawfully collecting and transmitting funds with the knowledge that such funds would be used for terrorist purposes in violation of 18 U.S.C. § 2339C. Defendant now brings the instant limited renewed motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. For the reasons set forth below, Defendant's motion for summary judgment is granted; Plaintiff's cross-motion for leave to amend the complaint to add a claim under the Justice Against Terrorism Act, 18 U.S.C. § 2333(d)(2) is denied and this action is dismissed.

BACKGROUND[1]

The Plaintiffs first filed a complaint in *Weiss v. National Westminster Bank PLC*[2] on September 29,

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[1] The Court assumes familiarity with the facts and circumstances underlying this action, which are summarized more fully in the Court's previous orders. *See, e.g., Weiss v. National Westminster Bank PLC* ("*Weiss II*"), 936 F. Supp.2d 100 (E.D.N.Y. 2013), *vacated*, 768 F.3d 202 (2d Cir. 2014) ("*Weiss II-A*").

[2] By order dated December 27, 2007, *Weiss* and *Applebaum* were formally consolidated for pretrial proceedings. Citations to the "*Weiss* Docket" or "*Weiss*" are to *Weiss v. National*

2005. *See,* Compl., *Weiss* Dkt. Entry No. 1. On September 27, 2006, the late Honorable Charles P. Sifton, then presiding, dismissed Plaintiffs' aiding and abetting claim, but denied dismissal of Plaintiffs' remaining claims. *Weiss v. National Westminster Bank PLC* ("*Weiss I*"), 453 F. Supp.2d 609 (E.D.N.Y. 2006). On March 2, 2007, Plaintiffs filed a complaint in *Applebaum v. National Westminster Bank PLC*. *Applebaum* Dkt. Entry No. 1. In light of Judge Sifton's rulings in *Weiss I*, the parties in *Applebaum* agreed to dismissal without prejudice of their aiding and abetting claim. *Applebaum* Dkt. Entry Nos. 26, 28.

Defendant first moved for summary judgment pursuant to Rule 56 on December 7, 2011, *Weiss* Dkt. Entry No. 264, which Plaintiffs opposed, *Weiss* Dkt. Entry No. 271. Defendant moved on three grounds, the first of which was that no reasonable jury could find that Defendant acted with the requisite scienter under the ATA. On March 28, 2013, this Court granted Defendant's motion, reaching only the scienter element. *See, Weiss II,* 936 F. Supp.2d 100. On September 22, 2014, the Second Circuit reversed the Court's grant of summary judgment to Defendant and remanded the case "for further proceedings, including consideration of NatWest's other asserted grounds for summary judgment." *Weiss II-A*, 768 F.3d at 212.

On January 12, 2015, in light of the decision of the United States Supreme Court in *Daimler AG v.*

Westminster Bank PLC, 05-CV-4622. Citations to the "*Applebaum* Docket" or "*Applebaum*" are to *Applebaum v. National Westminster Bank PLC*, 07-CV-916. Where documents have been filed on both dockets, the Court cites to the *Weiss* Docket only, as the lead case.

Bauman, 571 U.S. 117 (2014), Defendant moved to dismiss the action for lack of personal jurisdiction pursuant to Rule 12(b)(2), or in the alternative, for summary judgment pursuant to Rule 56. *Weiss* Dkt. Entry No. 327. Plaintiffs opposed Defendant's motion. *Weiss* Dkt. Entry No. 329. Defendant replied. *Weiss* Dkt. Entry No. 330. The Court held oral argument on Defendant's motion on October 8, 2015. On March 31, 2016, the Court denied Defendant's motion in its entirety, holding that NatWest is subject to personal jurisdiction in New York. *See, Weiss v. National Westminster Bank PLC* ("*Weiss III*"), 176 F. Supp.3d 264 (E.D.N.Y. 2016).

On June 17, 2016, Plaintiffs amended their complaint, adding claims arising from three additional attacks, the Ben Yehuda Street Bombings on December 1, 2001, the Part Junction Bus #32A Bombing on June 18, 2002, and the March 7, 2002 suicide attack on Atzmona (collectively, the "SoL Attacks"). *See,* Amended Complaint, *Weiss* Dkt. Entry No. 345 and Amended Complaint, *Applebaum,* Dkt. Entry No. 218. On August 2, 2016, the Court granted Defendant permission to file a renewed motion for summary judgment with respect to the ATA elements that the Court did not reach in *Weiss II*, as well as Defendant's motion for summary judgment with respect to Plaintiffs' claims based on the SoL Attacks. On February 24, 2017, Defendant filed a renewed motion for summary judgment. *See,* Motion for Summary Judgment, *Weiss* Dkt. Entry No. 358, which Plaintiffs opposed, *See,* Memorandum in Opposition, *Weiss* Dkt. Entry No. 362. Defendant replied. Reply, *Weiss* Dkt. Entry No. 365. On September 30, 2017, the Court granted in part and denied in part Defendant's renewed motion for summary judgment. *See, Weiss v. National*

Westminster Bank PLC ("*Weiss IV*"), 278 F. Supp.3d 636 (E.D.N.Y. 2017).

The Court denied Defendant's summary judgment motion to the extent that: (1) there are genuine issues of material fact as to whether Defendant proximately caused international terrorism under the ATA; (2) there is sufficient admissible evidence for a reasonable jury to conclude that the 13 Charities are alter egos of Hamas under Hamas' control; (3) Plaintiffs' expert Ronni Shaked may testify to put factual evidence into context to establish Hamas's responsibility for an attack, but not to establish the basic facts in the first instance; (4) Plaintiffs' witness Evan Kohlmann may testify as an expert about Hamas' background and use of propaganda, but his summaries of the attacks and recitation of the presented evidence, without using any expertise, is not admissible; (5) there is sufficient admissible evidence for a reasonable jury to conclude that Hamas committed sixteen of the eighteen attacks; (6) Israeli military court convictions are admissible; and (7) eyewitness accounts are admissible. *Id.* at 651. The Court granted Defendant's summary judgment motion to the extent that: (1) Plaintiffs have not provided sufficient admissible evidence of Hamas' responsibility for the September 24 attack; (2) Hamas' claims of responsibility, standing alone, are not admissible; (3) Plaintiffs are collaterally estopped from arguing that Hamas committed the Bus No. 19 Attack; and (4) Plaintiffs' § 2339C claims are dismissed. *Id.* The Court concluded that Plaintiffs' remaining claims may proceed. *Id.*

On March 14, 2018, the Court granted Defendant permission to file a second renewed motion for summary judgment to address the narrow issue of how the

Second Circuit's recent decision in *Linde v. Arab Bank, Plc*, 882 F.3d 314 (2d Cir. 2018), supports its position. On May 23, 2018, Defendant filed the instant motion for summary judgment. *See,* Motion for Summary Judgment ("Mot."), *Weiss* Dkt. Entry No. 395. Plaintiffs opposed Defendant's motion. *See,* Memorandum in Opposition ("Opp."), *Weiss* Dkt. Entry No. 403. Defendant replied. *See,* Reply in Support of Motion for Summary Judgment ("Reply"), *Weiss* Dkt. Entry No. 404.

LEGAL STANDARD

I. Summary Judgment

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The court must view all facts in the light most favorable to the nonmoving party, but "only if there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380 (2007). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id*. A genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (internal quotations and citations omitted). The nonmoving party, however, may not rely on "[c]onclusory allegations, conjecture, and speculation." *Kerzer v. Kingly Manufacturing,* 156 F.3d 396, 400 (2d Cir. 1998). "When no rational jury could find in favor of the nonmoving

party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper." *Gallo v. Prudential Residential Services, Limited Partnership*, 22 F.3d 1219, 1224 (2d Cir. 1994) (citing *Dister v. Continental Group, Inc.*, 859 F. 2d 1108, 1114 (2d Cir. 1988)).

II. Primary Liability Under the ATA

Section 2333(a) provides a civil remedy for "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs," stating that such national "may sue therefor in any appropriate district court of the United States . . ." 18 U.S.C. § 2333(a). Under the ATA, "international terrorism" means activities that:

> (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
>
> (B) appear to be intended—
>
> (i) to intimidate or coerce a civilian population;
>
> (ii) to influence the policy of a government by intimidation or coercion; or
>
> (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
>
> (C) occur primarily outside the territorial jurisdiction of the United States, or transcend

> national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . .

18 U.S.C. § 2331(1); *See, Linde*, 882 F.2d 314. Thus, the ATA has four separate requirements for an act to constitute international terrorism. The act at issue must: (1) involve violence or endanger human life; (2) violate federal or state criminal law if committed in the United States; (3) appear to be intended to intimidate or coerce civilian population, influence government policy, or affect government conduct by specified means; and (4) occur primarily outside the United States or transcend national boundaries. *See, Linde*, 882 F.3d at 326 (citing *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 68 (2d Cir. 2012)).

Plaintiffs bring their claims under 18 U.S.C. § 2339B as the predicate criminal violation to satisfy the second prong, which requires that the act violate federal criminal law. Section 2339B makes it a felony to "knowingly provide[] material support or resources to a [F]oreign [T]errorist [O]rganization," or attempting or conspiring to do so. 18 U.S.C. § 2339B; *See also*, *Weiss II-A,* 768 F.3d at 207. Under § 2339B, "a defendant may be liable for civil remedies under § 2333(a) for providing material support to an organization that solicits funds for an FTO," even if that support is not provided directly to the FTO itself. *Weiss II-A,* 768 F.3d at 209.

In *Linde*, the Second Circuit rejected the argument that providing material support to a known FTO in violation of § 2339B invariably constitutes a violent act or act dangerous to human life. *Linde*, 882 F.3d at

326. ("[T]he provision of material support to a terrorist organization does not invariably equate to an act of international terrorism. Specifically, . . . providing financial services to a known terrorist organization may afford material support to the organization even if the services do not involve violence or endanger life and do not manifest the apparent intent required by § 2331(1)(B)."). The Second Circuit explained that, "conduct that violates a material support statute can also satisfy the § 2331(1) definition requirements of international terrorism *in some circumstances.*" *Id*. (emphasis added). However, the Second Circuit found that it was "incorrect [for the trial court in *Linde*] to instruct the jury that a finding that Arab Bank provided material support to Hamas in violation of § 2339(B) was alone sufficient to prove the bank's own commission of an act of international terrorism under § 2333(a)." *Id.* Instead, the jury "needed to be instructed on and to find proved all of § 2331(1)'s definitional requirements for an act of international terrorism, including those pertaining to violence or danger and the apparent intent to intimidate or influence." *Id.*

In *Boim v. Holy Land Foundation for Relief and Development*, the Seventh Circuit rejected the plaintiffs' arguments that the defendant's financial donations to Hamas and Hamas-affiliated charities constituted an act of international terrorism as a matter of law when the defendant knew that Hamas used such money to finance the killing of Israeli Jews (some of whom were American citizens). 549 F.3d 685 (7th Cir. 2008) (*en banc*). The Second Circuit in *Linde* explained that the holding in *Boim* was not contrary to its holding, noting that in *Boim*, the Seventh Circuit had not determined that the provision of material support is

"always" an act of international terrorism. *Linde*, 882 F.3d at 327. Instead, in *Boim*, the Seventh Circuit analogized that "'giving money to Hamas' [is like] 'giving a loaded gun to a child,' explaining that, while neither transfer is a violent act, both are acts 'dangerous to human life.'" *Id.* (quoting *Boim*, 549 F.3d at 690). The Seventh Circuit in *Boim* focussed on the foreseeability that providing Hamas funding would enable Hamas to kill more people. *Id.* However, the Second Circuit in *Linde* explained: "We need not here decide whether we would similarly conclude that a jury could find that direct monetary donations to a known terrorist organization satisfy § 2331(1)'s definitional requirements for an act of terrorism." *Id.* (citing *Licci*, 673 F.3d at 68–69). The Second Circuit in *Linde* concluded "only that providing routine financial services to members and associates of terrorist organizations is not so akin to providing a loaded gun to a child as to . . . compel a finding that as a matter of law, the services were violent or life-endangering acts that appeared intended to intimidate or coerce civilians or to influence or affect governments." *Id*. Thus, the Second Circuit determined that the provision of material support to a terrorist organization alone is not enough to constitute international terrorism.

III. Secondary Liability Under the ATA

Initially, the ATA did not provide a civil remedy against secondary actors who facilitated acts of international terrorism by others. *See, Linde*, 882 F.3d at 319-20 (citing *Rothstein v. UBS AG*, 708 F.3d 82, 97 (2d Cir. 2013)) ("Initially, the ATA afforded civil relief only against the principals perpetrating acts of international terrorism."). On September 28, 2016, Congress amended the ATA by enacting the Justice

Against Terrorism Act, Publ. L. No. 114-222 130 Stat. 852 (2016) ("JASTA"). JASTA amends § 2333 by providing a cause of action against "any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed . . . an act of international terrorism." 18 U.S.C. § 2333(d)(2).

"JASTA expressly states that such secondary liability claims are not temporally limited to terrorist acts occurring after that statute's enactment." *Linde*, 882 F.3d at 320. Rather, aiding and abetting and conspiracy claims can be asserted "as of the date on which such act of international terrorism was committed, planned, or authorized." 18 U.S.C. § 2333(d). JASTA's amendment to the ATA applies to any civil action: "(1) pending on, or commenced after [the date of JASTA's] enactment; and (2) arising out of an injury . . . on or after September 11, 2001." *Id.* at Statutory Note (Effective and Applicability Provisions); *See also, Linde*, 882 F.3d at 320.

In enacting JASTA, Congress instructed that the "proper legal framework for how [aiding and abetting] liability should function" under the ATA is the framework identified in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983). 18 U.S.C. § 2333 Statutory Note (Findings and Purpose § 5); *See also*, *Linde*, 882 F.3d at 329. *Halberstam* set forth three elements for finding aiding and abetting liability in the civil context: (1) "the party whom the defendant aids must perform a wrongful act that causes an injury," (2) "the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance," and (3) "the defendant must knowingly and substantially assist the principal

violation." 705 F.2d at 487. As discussed in *Linde*, *Halberstam* identified six relevant factors for "determining 'how much encouragement or assistance is substantial enough' to satisfy the third element: (1) the nature of the act encouraged, (2) the amount of assistance given by defendant, (3) defendant's presence or absence at the time of the tort, (4) defendant's relation to the principal, (5) defendant's state of mind, and (6) the period of defendant's assistance.'" *Linde*, 882 F.3d at 329 (citing *Id*. at 483-84).

The Second Circuit has explained that, "[a]iding and abetting requires the secondary actor to be aware that, by assisting the principal, it is itself assuming a role in terrorist activities." *Linde*, 882 F.3d at 319 (citation omitted). For a defendant that is a financial institution, this requires a showing that "in providing [financial] services, the bank was generally aware that it was thereby playing a role in [the terrorist organization's] violent or life-endangering activities," which "requires more than the provision of material support to a designated terrorist organization." *Id*. (citation omitted).

DISCUSSION

I. Defendant's Primary Liability Under the ATA

Plaintiffs assert, and this Court concluded before the Second Circuit's decision in *Linde*, that a triable issue of material fact remains as to whether Defendant committed an act of international terrorism by facilitating Interpal's transfers of funds to 13 charities ("13 Charities"), which plaintiffs contend are alter egos of or controlled by Hamas, an FTO. *See, Weiss IV*, 278 F. Supp.3d at 644, 651. As discussed above, the ATA sets forth four separate requirements for an act

to constitute international terrorism. The act at issue must: (1) involve violence or endanger human life; (2) violate federal or state criminal law if committed in the United States; (3) appear intended to intimidate or coerce civilian population, influence government policy, or affect government conduct by specified means; and (4) occur primarily outside the United States or transcend national boundaries. *See, Licci,* 673 F.3d at 68. The Court did not consider in its previous decisions the satisfaction of all of these specific prongs. *See, e.g., Weiss IV*, 278 F. Supp.3d 636. Defendant argues that it is entitled to summary judgment because Plaintiffs cannot satisfy all four requirements. *See generally*, Mot. Specifically, Defendant contends that there is no triable issue of fact as to whether Defendant engaged in violent acts or acts dangerous to human life and did so with terroristic intent, and thus, Plaintiffs cannot demonstrate the first and third prongs discussed in *Linde*. *Id.*

For purposes of its summary judgment motion and because the Second Circuit previously ruled in Plaintiffs' favor on the issue, *See, Weiss II-A*, 768 F.3d at 212, Defendant assumes that a triable issue of fact remains as to whether Defendant knowingly provided material support to an FTO in violation of § 2339B. *See,* Mot. at 5, n.4. Thus, Defendant does not dispute that the second *Linde* prong presents a triable issue of fact. Additionally, Defendant does not dispute the fourth *Linde* prong, that its alleged conduct occurred primarily outside the United States or transcended national boundaries. *Id.* at 5, n.3.

A. Violent Acts or Acts Dangerous to Human Life

Defendant contends that no reasonable juror could find that Defendant's routine banking services to Interpal involved violent acts or acts dangerous to human life. *See,* Mot. at 9. Defendant argues that undisputed evidence demonstrates that, to Defendant's knowledge, Interpal was a charity "aiming to do good works in a deeply deprived and troubled region." *Id.* To support this contention, Defendant points to customer information forms and emails between Defendant's employees, internal meeting minutes, internal records, and Interpal's annual reports, all of which indicate that Interpal was a charitable organization. *Id.* at 9-11; *See also,* Defendant's Supplemental Rule 56.1 Statement ("Def.'s 56.1 Stmt."), *Weiss* Dkt. Entry No. 397 ¶¶ 3-6; Declaration of Mark E. McDonald in Support of Mot. ("McDonald Decl."), *Weiss* Dkt. Entry No. 396, Exs. 3, 5-7. Defendant provides evidence demonstrating that, of at least 457 wire transfers processed by Defendant from Interpal to the 13 Charities, none were identified as being for a specific violent or terroristic purpose. *See,* Def.'s 56.1 Stmt. ¶¶ 7-8; McDonald Decl., Ex. 8.

Plaintiffs concede that there is no evidence that any of Interpal's transfers to the 13 Charities processed by Defendant were identified as being for any specific violent or terroristic purpose. *See,* Plaintiffs' Response to Defendant's 2011 Rule 56.1 Statement ("Pls.' Resp. to 2011 56.1 Stmt."), *Weiss* Dkt. Entry No. 283 ¶ 248 ("Plaintiffs admit they do not contend that any of the funds Interpal transferred from the accounts it maintained with NatWest to Hamas was used specifically to finance any of the terrorist attacks

that injured Plaintiffs and/or killed their loved ones.") (internal quotation marks and citation omitted); *See also*, Plaintiffs' Response to Defendant's 56.1 Stmt. ("Pls.' Resp. to 56.1 Stmt."), *Weiss* Dkt. Entry No. 401 ¶ 8 ("Admit that Interpal did not identify any of the Relevant Transfers as being for any violent or terroristic purpose."). Furthermore, Plaintiffs' experts Dr. Matthew Levitt and Mr. Arieh Spitzen admitted that the 13 Charities performed charitable work. *See,* Defendant's 2011 Rule 56.1 Statement ("Def.'s 2011 56.1 Stmt."), *Weiss* Dkt. Entry No. 279 ¶¶ 240-42.

Citing to the experts reports by Levitt and Spitzen, Plaintiffs instead argue that the evidence demonstrates that the 13 Charities were controlled by Hamas founders and that the 13 Charities "were instrumental in organizing and distributing payments to families of suicide bombers and other terrorists." *See,* Mot. at 10 (citing Plaintiffs' Supplemental Rule 56.1 Statement ("Pls.' 56.1 Stmt."), *Weiss* Dkt. Entry No. 402 ¶ 19 and Declaration of Aaron Schlanger ("Schlanger Decl."), *Weiss* Dkt Entry No. 400, Exs. 11, 19-21). Plaintiffs claim that the evidence shows that the 13 Charities "recruited Hamas operatives to commit terrorist attacks." *See, Id*. at 11 (citing Pls.' 56.1 Stmt. ¶ 19 and Schlanger Decl. Exs. 11, 19-21). Plaintiffs further assert that the 13 Charities were "integral to Hamas's structure and operational capacity," without providing evidentiary support for such an assertion. *See, Id.* at 11.

Defendant relies on concessions made by Plaintiffs' own experts, Levitt and Spitzen, to counter the arguments made by Plaintiffs. *See,* Reply at 6. Specifically, Levitt does not opine that any funds transferred by Interpal through Defendant accounts were used to

perpetrate the 15 attacks[3] or that any of the 12 Charities[4] participated in, planned, trained the perpetrators of, requested that someone carry out, or was the cause of any of the 15 attacks. *Id.*; *See also*, Mot. at 12-13 (citing Pls.' Resp. to 2011 56.1 Stmt. ¶¶ 253-56, 258-59). Similarly, Spitzen does not opine that any funds transferred by Interpal through its Defendant account were used to perpetrate the 15 attacks or that any of the 13 Charities participated in, planned, trained the perpetrators of, requested that someone carry out, or was the cause of any of the 15 attacks. *See,* Reply at 6; *See also*, Mot. at 12-13 (citing Pls.' Resp. to 2011 56.1 Stmt. ¶¶ 266-69, 271-72). Defendant further maintains that the evidence upon which Plaintiffs rely does not relate to the wire transfers processed by Defendant. *See,* Reply at 6.

Plaintiffs rely on the fact that the United States designated Interpal as a Specially Designated Global Terrorist ("SDGT") for providing support, including fundraising to Hamas, to support their contention that Defendant's services involved violent or dangerous acts. *See,* Opp. at 10 (citing Pls.' 56.1 Stmt. ¶ 7 and Schlanger Decl. Ex. 4). Defendant replies that Interpal's designation as an SDGT demonstrates, at best, a violation of § 2339B because of Defendant's

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[3] Defendant refers to 15 attacks because, at the time of the experts' concessions, Plaintiffs' claims arose from 15 attacks between March 27, 2002 and September 24, 2004 that Plaintiffs allege were perpetrated by Hamas. *See,* Pls.' Resp. to 2011 56.1 Stmt. ¶ 241. After this Court's decision in *Weiss IV*, Plaintiffs' claims now arise out of 16 attacks. *See, Weiss IV*, 278 F. Supp.3d at 651.

[4] The Expert Report of Dr. Matthew Levitt refers only to twelve of the 13 Charities. *See,* Mot. at 12, n.8.

support of an FTO. *See,* Reply at 6-7 (citing *Weiss II-A*, 768 F.3d at 211). The Second Circuit indeed distinguished an SDGT designation by OFAC from the State Department's FTO designation. *See, Weiss II-A*, 768 F.3d at 208-09, n.7 ("While an organization designated as an FTO by the State Department is a terrorist organization for the purposes of § 2339B, that is not true for organizations designated as SDGT by OFAC."). Defendant also emphasizes that nothing in the OFAC designation of Interpal as an SDGT states that Interpal had any involvement with Hamas's terrorist activities. *See,* Reply at 7. The OFAC designation also does not state that the banking services Defendant provided to Interpal involved Hamas's terrorist activities. *Id.*

Finally, Plaintiffs maintain that the Union of Good, designated as an SDGT in 2008 as an organization created by Hamas leadership in late 2000 to transfer funds Hamas, was Defendant's customer. *See,* Opp. at 10, n.12 (citing Pls.' 56.1 Stmt ¶ 12 and Schlanger Decl. Ex. 9). Defendant's disputes this assertion. *See,* Reply at 7. Additionally, Defendant argues that, even if Union of Good were Defendant's customer, that evidence, at best, would show a violation of § 2339B as Defendant's support of an agent of an FTO. *See,* Reply at 7.

On appeal from this Court's initial grant of summary judgment to Defendant, the Second Circuit held that Plaintiffs' allegations survive summary judgment as to whether Defendant had the requisite scienter under the material support statute, § 2339B. *See, Weiss II-A*, 768 F.3d 205. The Second Circuit explained that § 2339 "requires only a showing that [Defendant] had knowledge that, or exhibited deliberate indifference to

whether, Interpal provided material support *to a terrorist organization*, irrespective of whether Interpal's support aided *terrorist activities* of the terrorist organization." *Id.* (alterations in original). However, § 2331(1) specifies that, to constitute an act of international terrorism supporting civil liability under § 2333, Defendant's *activities* must meet the definitional requirements of international terrorism § 2331(1). *See,* 18 U.S.C. § 2331(1). Thus, as the Second Circuit subsequently elaborated in 2018 in *Linde*, a violation of § 2339B "does not invariably equate to an act of international terrorism." *Linde*, 882 F.3d at 326. While, "conduct that violates a material support statute can also satisfy the § 2331(1) definitional requirements of international terrorism *in some circumstances*," *Id.* (emphasis added), a reasonable juror cannot conclude that Defendant's alleged conduct involves violence or endangers human life.

Plaintiffs assert that the issue of whether Defendant's conduct satisfies the elements of § 2331(1) and § 2333(d) always is a question for the jury. *See,* Opp. at 3. However, that assertion is not supported by the Second Circuit's ruling in *Linde.* Instead, the Second Circuit concluded in *Linde* that in that case, the acts alleged, *i.e.*, "providing routine financial services to members and associates of terrorist organizations," was "not so akin to providing a loaded gun to a child as to . . . compel a finding that as a matter of law, the services were violent or life-endangering acts that appeared intended to coerce civilians or to influence or affect government." *Linde*, 882 F.3d at 327. *Linde* did not preclude a finding that, as a matter of law, providing routine financial services for charitable purposes to charities that include members and associates of

terrorist organizations is not a violent act or act dangerous to human life under § 2331(1).

The Second Circuit remanded the *Linde* case for the jury to determine whether the § 2331(1) requirements were satisfied without finding that defendant Arab Bank did not satisfy the § 2331(1) requirements as a matter of law. *Id*. However, evidence was presented in the *Linde* case that is not present in this case. *See, Id.* at 321-22. For example, Arab Bank executed wire transfers for known Hamas leaders and operatives. *Id.* at 321. At least one Hamas spokesman held an account at an Arab Bank branch. *Id.* Arab Bank employees admitted their awareness of the Hamas affiliations, as it is alleged Defendant did in this case. *Id.* Arab Bank processed transfers on behalf of purported charities known to funnel money to Hamas. *Id.* However, some of the Arab Bank transfers were identified explicitly as payments for suicide bombings. *Id.* at 321-22. There is no evidence that the transfers Defendant processed on behalf of the 13 Charities were used explicitly for purposes similar to those describe in *Linde*.

Without guidance from the Second Circuit as to the types of activities that would constitute violent acts or acts dangerous to human life, the Court looks to the plain language of the statute. Black's Law Dictionary offers three definitions of 'violent': (1) "[o]f, relating to, or characterized by strong physical force;" (2) "[r]esulting from extreme or intense force;" and (3) "[v]ehemently or passionately threatening." *Violent*, Black's Law Dictionary (10th ed. 2014). Black's Law Dictionary offers two definitions of 'dangerous': (1) "([o]f a condition, situation, etc.) perilous; hazardous;

unsafe;" and (2) "([o]f a person, an object, etc.) likely to cause serious bodily harm." *Dangerous*, *Id.*

While the evidence Plaintiffs rely upon is sufficient to demonstrate a triable issue of fact as to whether Defendant provided material support to a foreign terrorist organization in violation of § 2339B, the evidence does not warrant a trial as to whether Defendant's activities involved violent acts or acts dangerous to human life as required under § 2331(1). Plaintiffs' reliance on the fact that the 13 Charities were controlled by Hamas founders, without more, is insufficient to prove that Defendant's activities were violent or endangered human life. Indeed, Plaintiffs offer no evidence, and their experts do not opine, that the 13 Charities participated in, planned, trained the perpetrators of, requested that someone carry out, or were the cause of the attacks giving rise to Plaintiffs' claims. Plaintiffs identify no transfers from Interpal to the 13 Charities as payments meant to involve a violent act or an act dangerous to human life. Similarly, the fact that Interpal and the Union of Good were designated as SDGTs alone is insufficient to satisfy the violent act or act dangerous to human life prong of § 2331(1).

Plaintiffs contend that Defendant's banking services to Interpal and the 13 Charities contributed to terrorism merely because those organizations engage in terroristic activity. *See,* Opp. at 8-9. Plaintiffs' assertions address Defendant's indirect contribution, through banking services, to terrorist activities without establishing any nexus between the banking services and the terrorist activities. Plaintiffs offer no evidence that Defendant's banking services directly involved strong physical force, or intense force, or

vehement or passionate threats. Plaintiffs also do not offer evidence sufficient to create a factual dispute as to whether Defendant's banking services directly involved peril or hazard or were likely to cause serious bodily harm.

Thus, Defendant's motion for summary judgment as to the violent acts and acts dangerous to human life prong of § 2331(1) is granted because Plaintiffs fail to present evidence sufficient to create a jury question as to whether Defendant's activities involved violent acts or acts dangerous to human life.

B. Terroristic Intent

The terrorist intent prong of § 2331(1) requires that Defendant's actions "appear to be intended to (i) intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping." 18 U.S.C. § 2331(1)(B). The "appear to be intended" requirement "does not depend on the actor's beliefs, but imposes on the action an objective standard to recognize the apparent intention of action." *Weiss II-A*, 768 F.3d at 207, n.6. As with the violent act or act that is dangerous to human life prong of § 2331(1), the provision of material support to a terrorist organization in violation of § 2339B "does not invariably equate to an act of international terrorism. Specifically, . . . providing financial services to a known terrorist organization may afford material support to the organization even if the services . . . do not manifest the apparent intent required by § 2331(1)(B)." *Linde*, 882 F.3d at 326. Here, Plaintiffs have not alleged, and the evidence

does not show that Defendant's apparent intent satisfies specific the intent requirement under § 2331(B).

Plaintiffs rely on evidence tending to show that Defendant provided material support to a terrorist organization to argue that an issue of fact exists as to whether Defendant had the requisite terroristic intent under § 2331. Plaintiffs rely on evidence that Defendant knowingly provided financial services to a designated FTO, which satisfies that scienter requirement under § 2339. *See,* Opp. at 13-15 (discussing an RBS consent order that detailed its efforts to evade U.S sanctions against State Sponsors of Terrorism and an OFAC Settlement Agreement in which OFAC found that Defendant cleared U.S. dollars on behalf of an SDGT and its subsidiary and evaded U.S. sanctions). However, the scienter requirement of the predicate material support statute is not the same as the definitional requirements of terroristic intent in § 2331(1). *See, Linde*, 882 F.3d at 328.

In *Linde* the Second Circuit provided an example of an action that would constitute material support and satisfy the requirements for international terrorism as defined by § 2331(1):

> Most obviously, a person who voluntarily acts as a suicide bomber for Hamas in Israel can thereby provide material support to that terrorist organization while also committing an act of terrorism himself. The suicide bombing is unquestionably a violent act whose apparent intent is to intimidate civilians or influence government.

Id. at 326. In *Linde*, the evidence demonstrated that defendant Arab Bank processed bank transfers that

"were explicitly identified as payments for suicide bombings." *Id*. at 321. The Second Circuit concluded that such evidence was sufficient to create a triable issue of fact as to whether Arab Bank's activities satisfied the intent requirement under § 2331(1)(B). *Id.* at 327. Here, Plaintiffs provide no such evidence that Defendant merely provided banking services to Interpal for ostensibly charitable purposes, which does not satisfy the intent required by § 2331(B) as established by the *Linde* Court. Plaintiffs adduce no evidence that Defendant had the apparent intent to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of a government by mass destruction, assassination, or kidnapping.

Accordingly, Defendant's summary judgment motion as to the terroristic intent prong of § 2331(1) is granted because there is no material issue of fact as to whether Defendant's activities appeared to be intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of a government by mass destruction, assassination, or kidnapping.

II. Plaintiffs' Aiding and Abetting Claims

Although Judge Sifton dismissed Plaintiffs' aiding and abetting claims in 2006, Plaintiffs contend that they properly have asserted an aiding and abetting claim by including a claim pursuant to § 2333(d) in the proposed joint pretrial order, *Weiss* Dkt. Entry No. 391, filed on March 8, 2018. *See,* Opp. at 16. Defendant argues that this Court already dismissed Plaintiffs' aiding and abetting claim, and that Plaintiffs have not sought to replead any such claim. *See,* Mot. at 3, 20-

21. Defendant further contends that, even if the Court permits Plaintiffs to plead an aiding and abetting claim, Defendant is entitled to summary judgment on that claim. *See, Id*. at 20-24.

A. The Joint Pretrial Order

In the proposed joint pretrial order, Plaintiffs allege that Defendant is liable under § 2333(d) for aiding and abetting a person or entity who committed an attack committed, planned, or authorized by a FTO. *See, Weiss* Dkt. Entry No. 391 at 3-6. Specifically, Plaintiffs allege that:

> (1) Hamas was responsible for the attacks that injured the Plaintiffs; (2) Defendant provided substantial assistance to Hamas for its terrorist activities, including these attacks, by transferring significant sums of money to organizations that it knew (or consciously avoided knowing) were controlled by Hamas; and (3) Defendant's acts were a substantial factor in causing the Plaintiffs' injuries and those injuries were a reasonably foreseeable result of the significant sums of money Defendant sent to Hamas.

Id. at 5 (footnote omitted). Plaintiffs concede that the Court dismissed Plaintiffs' common law aiding and abetting claim previously, but they allege that, because JASTA expressly is retroactive, § 2333(d) provides a new and superseding legal basis for Plaintiffs' aiding and abetting claims, and that *Halberstam* is "the proper legal framework" for such claims. *Id.* (citing *Linde,* 882 F.3d at 329). Defendant's summary of defenses in the proposed joint pretrial order includes a statement that, "[t]he claims to be tried do not

include an aiding and abetting claim because Judge Sifton dismissed the only aiding and abetting claim plaintiffs have ever pleaded in these lawsuits long ago." *Id.* (citing *Weiss I*, 453 F. Supp.2d at 621).

Plaintiffs argue that they are entitled to proceed on the aiding and abetting claims alleged in the proposed joint pretrial order because Rule 16(d) "provides that a pretrial order controls the course of the action, and such an action supersedes the pleadings." Opp. at 16, n.18 (quotations and citations omitted). Plaintiffs offer that, should the Court prefer that Plaintiffs assert their § 2333(d) claims by amending their complaint rather than through a pretrial order, Plaintiffs would comply. *Id.*

As a threshold matter, the Court must decide whether it will permit Plaintiffs to include an aiding and abetting claim under § 2333(d) in the pretrial order even though Plaintiffs have not included the statutory claim in the pleadings. While a pretrial order does supersede all prior pleadings and controls the subsequent course of the action, *See, Rockwell International Corp. v. United States*, 549 U.S. 457, 474 (2007), the Court normally does not expect to see claims or defenses not contained in the pleadings appearing for the first time in the pretrial order, particularly in a case such as this that has been pending a long time and has had substantial motion practice. *See, Wilson v. Muckala*, 303 F.3d 1207, 1215 (10th Cir. 2002) ("The laudable purpose of Fed. R. Civ. P. 16 is to avoid surprise, not foment it."). Instead, a party may amend its pleading to add claims with the court's leave. *See,* Fed. R. Civ. P. 15(a). Accordingly, the Court does not permit Plaintiffs to raise JASTA claims for the first time in the pretrial order.

The Court instead will consider whether it grants Plaintiffs leave to amend their complaint pursuant to Federal Rule of Civil Procedure 15(a) even though Plaintiffs ask for this relief only in the alternative to the Court's acceptance of the claim in the pretrial order, and fashions the request as a cross-motion in a footnote in the opposition, but does not attach a proposed amended complaint. *See,* Opp. at 16, n.18 ("Should the Court prefer that Plaintiffs assert their § 2333(d) claims by amended their complaints rather than through the Joint Pre-Trial Order, they will of course do so.").

Federal Rule of Civil Procedure 15(a) provides that a party shall be given leave to amend "when justice so requires." *Id*. "Leave to amend should be freely granted, but the district court has the discretion to deny leave if there is a good reason for it, such as futility, bad faith, undue delay, or undue prejudice to the opposing party." *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 101 (2d Cir. 2002); *See also*, *Local 802, Assoc. Musicians of Greater N.Y. v. Parker Meridien Hotel*, 145 F.3d 85, 89 (2d Cir. 1998). If a scheduling order has been entered setting a deadline for amendments, the schedule "may be modified" to allow the amendment "only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4).

Here, a June 1, 2016 order set the deadline, June 17, 2016, for Plaintiffs to file the operative amended complaints. *See,* June 1, 2016 Order. Although Plaintiffs met that deadline by filing Amended Complaints on June 17, 2016, *See,* Amended Complaint, *Weiss* Dkt. Entry No. 345, and Amended Complaint, *Applebaum,* Dkt. Entry No. 218, Plaintiffs could not have included their JASTA claims in the amended

complaints because Congress enacted JASTA over three months later on September 28, 2016. "A finding of good cause depends on the diligence of the moving party." *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 86 (2d Cir. 2003) (citing *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 340 (2d Cir. 2000)). The enactment of an explicitly retroactive statute after a scheduling deadline constitutes sufficient good cause.

Nonetheless, Defendant argues that Plaintiffs should not be able to raise these claims because Judge Sifton addressed them in *Weiss I*. *See,* Mot. at 21. However, Judge Sifton dismissed Plaintiffs' common law aiding and abetting claims, but did not, and could not address Plaintiffs' statutory aiding and abetting claims under JASTA as the statute did not exist at the time. *See, Owens v. BNP Paribas, S.A.*, 897 F. 3d 266, 278 (D.C. Cir. 2018) ("JASTA does not indicate that Congress merely "clarified" existing law when it amended § 2333. . . . If anything, JASTA's passage confirms that Congress knows how to provide for aiding and abetting liability explicitly and that the version of § 2333 in effect [previously] did not provide for that liability."). Defendant contends that Judge Sifton relied on the same legal framework for dismissing Plaintiffs' common law aiding and abetting claims as required for dismissing JASTA claims. *See,* Reply at 8 (citing *Weiss I*, 453 F. Supp.2d at 621-22). Specifically, Defendant contends that Judge Sifton evaluated Plaintiffs' aiding and abetting claim by relying on aiding and abetting precedent set forth in *In re Terrorist Attacks on Sept. 11, 2001*, which considered the *Halberstam* elements. *See,* Reply at 8-9, 9, n.9 (citing *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp.2d 765, 798-800 (S.D.N.Y. 2005)). While Judge Sifton did

reference *In re Terrorist Attacks on Sept. 11, 2001*, it is unclear from *Weiss I* whether he applied the *Halberstam* factors. *See, Weiss I*, 453 F. Supp.2d at 621-22. The Second Circuit in *Linde* made clear that the *Halberstam* elements of civil aiding and abetting liability and factors relevant to the substantial assistance element provide the proper legal framework for evaluating a JASTA aiding and abetting claim. 882 F.3d at 329. Because it is unclear whether Judge Sifton applied that framework, the Court does not consider the decision in *Weiss I* as a bar to Plaintiffs amending their complaint. However, for the reasons that follow immediately below, amendment of the complaint is denied as futile.

B. Summary Judgment on Plaintiffs' § 2333(d) Claims

Finally, Defendant maintains that, even if the Court were to permit Defendant to amend its complaint to include an aiding and abetting claim under JASTA, the amendment would be futile because Defendant would be entitled to summary judgment as to that claim. *See,* Opp. at 21-24. As a general matter, a Rule 12(b)(6) motion is the benchmark for determining whether amendment is futile. *See, Lucente v. International Business Machines Corp.*, 310 F.3d 243, 258 (2d Cir. 2002) ("An amendment to a pleading is futile if the proposed claim could not withstand a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6)."); *See also, Alexander v. Westbury Union Free School District*, 829 F. Supp.2d 89, 118-19 (E.D.N.Y. 2011) ("Usually, a proposed amendment is futile if it could not survive a Rule 12(b)(6) motion to dismiss for failure to state [a] claim."). However, "when a motion to amend is made in response to a summary judgment motion, the court

may deny the amendment as futile when the evidence in support of the plaintiff's proposed new claim creates no triable issue of fact, even if the amended complaint would state a valid claim on its face." *Alexander*, 829 F. Supp.2d at 119 (citing *Milanese v. Rust-Oleum Corp.*, 244 F.3d 104,110 (2d Cir. 2001)). Here, amendment would be futile because Plaintiffs' proposed JASTA claim fails as a matter of law.

Plaintiffs cannot demonstrate that Defendant had the requisite knowledge required by JASTA. As explained in *Linde*, "[a]iding an abetting requires the secondary actor to be 'aware' that, by assisting the principal, it is itself assuming a 'role' in terrorist activities." *Linde*, 882 F.3d at 329 (quoting *Halberstam*, 705 F.2d at 477). Thus, JASTA requires Plaintiffs to show that, "in providing [financial] services, [Defendant] was 'generally aware' that it was thereby playing a 'role' in [the terrorist organization's] violent or life-endangering activities," which "requires more than the provision of material support to a designated terrorist organization." *Id*. (citing *Halberstam*, 705 F.2d at 477). Accordingly, knowledge under JASTA "is different from the *mens rea* required to establish material support in violation of 18 U.S.C. § 2339B, which requires only knowledge of the organization's connection to terrorism, not intent to further its terrorist activities or awareness that one is playing a role in those activities." *Id.* (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1, 16-17 (2010)).

Plaintiffs again rely on evidence that tends to support a finding that Defendant had the requisite scienter required for providing material support to a terrorist organization under § 2339B to support their claim that Defendant had the requisite scienter for aiding

and abetting liability under JASTA. *See,* Opp. at 24-25 (discussing Defendant's "massive, illicit funds transfers" for Interpal and the Union of Good). However, as discussed in detail above, Plaintiffs present no evidence that creates a jury question as to whether Defendant generally was aware that it played a role in any of Hamas's or even Interpal's or the Union of Good's violent or life-endangering activities. Evidence that Defendant knowingly provided banking services to a terrorist organization, without more, is insufficient to satisfy JASTA's scienter requirement.

Plaintiffs' proposed JASTA aiding and abetting claim cannot survive summary judgment. Accordingly, such amendment would be futile and Plaintiffs' motion for leave to amend the complaint is denied with prejudice.

CONCLUSION

For the foregoing reasons, Defendant's summary judgment motion as to Plaintiffs' remaining claims of civil liability under the ATA is granted in its entirety. Plaintiffs' motion for leave to amend the complaint to add a claim under JASTA is denied. Accordingly, this action is dismissed.

SO ORDERED.

Dated: Brooklyn, New York
March 31, 2019

s/
DORA L. IRIZARRY
Chief Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 05-CV-4622 (DLI) (RML)

TZVI WEISS, et al.,

Plaintiffs,

v.

NATIONAL WESTMINSTER BANK PLC,
Defendant.

No. 07-cv-916 (DLI) (RML)

NATAN APPLEBAUM, et al.,
Plaintiffs,

v.

NATIONAL WESTMINSTER BANK PLC,
Defendant.

OPINION AND ORDER

DORA L. IRIZARRY, Chief United States District Judge:

Approximately 200 individuals and estates of deceased persons (collectively, "Plaintiffs"), brought this consolidated action against defendant National Westminster Bank Plc ("NatWest" or "Defendant"), seeking to recover damages from terrorist attacks in Israel and

the Palestine Territories pursuant to the civil liability provision of the Antiterrorism Act of 1992 ("ATA"), 18 U.S.C. § 2333(a) ("Section 2333(a)").

On December 7, 2011, Defendant moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure (*Weiss* Dkt. Entry No. 264),[1] which Plaintiffs opposed (*Weiss* Dkt. Entry No. 271). Defendant moved on three grounds, the first of which was that no reasonable jury could find that Defendant acted with the requisite scienter under the ATA. On March 28, 2013, the Court granted Defendant's motion, reaching only the scienter element. (*See* Opinion & Order, *Weiss* Dkt. Entry No. 310.)[2]

On September 22, 2014, the Second Circuit reversed the Court's grant of summary judgment to Defendant and remanded the case "for further proceedings, including consideration of NatWest's other asserted grounds for summary judgment." *Weiss v. Nat' Westminster Bank Pic,* 768 F.3d 202, 212 (2d Cir. 2014).

On June 17, 2016, Plaintiffs amended their complaint, adding claims arising from three additional attacks, the Ben Yehuda Street Bombings on December 1, 2001, the Part Junction Bus #32A Bombing on June 18, 2002, and the March 7, 2002 suicide attack on Atzmona (collectively, the "SoL Attacks"). (*See*

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[1] Citations to the "*Weiss* Docket" are to docket 05-CV-4622. Citations to the "*Applebaum* Docket" are to docket 07-CV-916. Where documents have been filed on both dockets, the Court cites to the *Weiss* Docket only, as the lead case.

[2] This Order is written for the parties and familiarity with the underlying facts and circumstances of this action is assumed. For a full recitation of the facts, see the 2013 Opinion & Order.

Amended Complaint "Am. Compl.," *Weiss* Dkt. Entry No. 345 and Amended Complaint "Applebaum Am. Compl.," *Applebaum* Dkt. Entry No. 218.)

On August 2 and 12, 2016, the Court granted Defendant permission to file this renewed motion for summary judgment with respect to the ATA elements that the Court did not reach in its March 28, 2013 Opinion & Order, as well as Defendant's motion for summary judgment with respect to Plaintiffs' claims based on the SoL Attacks.

On February 24, 2017, pursuant to the Court's bundle rule, Defendant filed this motion for summary judgment (*See* Motion for Summary Judgment, "Mot.," *Weiss* Dkt. Entry No. 358), Plaintiffs opposed (*See* Memorandum in Opposition, "Opp.," *Weiss* Dkt. Entry No. 362), and Defendant replied (*See* Reply in Support re Motion for Summary Judgment, "Reply," *Weiss* Dkt. Entry No. 365).

LEGAL STANDARD

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The court must view all facts in the light most favorable to the nonmoving party, but "only if there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380 (2007). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id*. A genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a

verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The nonmoving party, however, may not rely on "[c]onclusory allegations, conjecture, and speculation." *Kerzer v. Kingly Mfg.,* 156 F. 3d 396, 400 (2d Cir. 1998). "When no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper." *Gallo v. Prudential Residential Servs., Ltd. P'ship*, 22 F. 3d 1219, 1224 (2d Cir. 1994) (citing *Dister v. Cont'l Grp., Inc.*, 859 F. 2d 1108, 1114 (2d Cir. 1988)).

DISCUSSION

I. Proximate Causation

A. Proximate Causation under the ATA and Second Circuit Case Law

Defendant asserts that Plaintiffs have failed to raise a triable issue of fact of proximate causation because there is insufficient evidence that Defendant's provision of routine banking services to its customer Interpal proximately caused the terrorist attacks by which Plaintiffs were injured. (Mot. at 1-2.) Specifically, Defendant contends that Plaintiffs admittedly have no evidence that any of the funds that Defendant transferred at Interpal's request actually were used to perpetrate any of the attacks, and, therefore, Plaintiffs cannot establish indirect causation. (*Id.* at 3.) Defendant further contends that merely transferring money to the 13 Charities is not sufficient to show direct causation without establishing that the 13 Charities are legally the same as Hamas, such that the transfers to the 13 Charities were in fact direct transfers to Hamas itself. (*Id.*) Defendant also maintains that the evidence

upon which Plaintiffs rely to show that the 13 Charities and Hamas are one and the same is inadequate for that purpose as a matter of law under Second Circuit precedent. (*Id.*) Plaintiffs counter that, given the amount and proximity of the funds transferred by Defendant to Hamas-controlled organizations, Defendant cannot establish as a matter of law that the funds did not aid in the attacks. (Opp. at 5.)

Section 2333(a) provides for recovery by individuals injured "by reason of" international terrorism. 18 U.S.C. § 2333(a). The Second Circuit has held that the phrase "by reason of" requires that plaintiffs show that their damages were proximately caused by defendant. *See Rothstein v. UBS AG*, 708 F. 3d 82, 95 (2d Cir. 2013) ("We are not persuaded that Congress intended to permit recovery under § 2333 on a showing of less than proximate cause . . . ."). In its holding, the court rejected the plaintiffs' contention that the "'by reason of' language chosen by Congress in creating a civil right of action under the ATA was intended to permit recovery on a showing of less than proximate cause, as the term is ordinarily used." *Id*. As the term is "ordinarily used," proximate cause requires a showing that Defendant's actions were "a substantial factor in the sequence of responsible causation," and that the injury was "reasonably foreseeable or anticipated as a natural consequence." *Lerner v. Fleet Bank, N.A.*, 318 F. 3d 113, 123 (2d Cir. 2003).

Two months later, in *Al Rajhi Bank,* the Second Circuit revisited proximate causation under the ATA, reaffirming *Rothstein*. *See In re Terrorist Attacks on Sept. 11, 2001,* 714 F.3d 118 (2d Cir. 2013) ("*Al Rajhi Bank*") ("*Rothstein* holds that proximate cause is required to state a claim under § 2333"). The court

found, as it did in *Rothstein*, that plaintiffs' allegations were insufficient for the purposes of establishing proximate causation. *Id.* at 124.

In *Rothstein*, the Second Circuit held that plaintiffs failed to establish proximate cause based on the allegation that defendant provided Iran with hundreds of millions of dollars in cash knowing that Iran: (1) promoted terrorism to injure and intimidate Jewish residents of Israel; (2) provided Hamas and Hizbollah with millions of dollars to fund terrorist attacks; and (3) conditioned that funding on an agreement by those organizations to conduct terrorist attacks on Israel and its residents. *Rothstein*, 708 F. 3d at 92.

In *Al Rajhi Bank*, the Second Circuit held that plaintiffs failed to establish proximate cause based on the allegation that defendants provided funding to charities known to support terrorism, that, in turn, provided funding to al Qaeda and other terrorist organizations. 714 F.3d at 124. The court held that plaintiffs' allegations "fell short" of establishing proximate cause because plaintiffs did not allege that defendants: (1) participated in the terrorist attacks; (2) provided money directly to al Qaeda; or (3) donated money to the charities that actually was transferred to al Qaeda and aided the terrorist attacks. *Id.* The court held that it was "not persuaded that providing routine banking services to organizations and individuals said to be affiliated with al Qaeda – as alleged by plaintiffs – proximately caused the September 11, 2001 attacks or plaintiffs' injuries. *Id.*

B. Proximate Cause and Routine Banking

Here, Plaintiffs argue that there is nothing "routine" about knowingly providing banking services to

fund terrorism. The district court in *Al Rajhi Bank* remarked that "[p]roviding routine banking services, *without having knowledge of the terrorist activities*, cannot subject [bank] to liability." 349 F. Supp.2d at 835 (emphasis added). In its remand order, the Second Circuit found that there was "a triable issue of fact as to whether NatWest's knowledge and behavior in response satisfied the statutory scienter requirements" and whether "NatWest had actual knowledge that, or exhibited deliberate indifference to whether, Interpal provided material support to a terrorist organization." *Weiss*, 768 F.3d at 206, 212. The court in *Linde v. Arab Bank, PLC* agreed that a bank cannot "routinely" provide banking services, if they provide those services with knowledge of their assistance in funding terrorist activities. *See* 384 F. Supp.2d 571, 588 (E.D.N.Y. 2005) ("Although the Bank would like this court to find, as did the court in *In re Terrorist Attacks* [*Al Rajhi Bank*], that it is engaged in 'routine banking services,' here, given plaintiffs' allegations regarding the knowing and intentional nature of the Bank's activities, there is nothing 'routine' about the services the Bank is alleged to provide.").

However, the Second Circuit did not address whether banking services were no longer "routine" if the bank had knowledge of the ultimate use of the funds. Instead, the Second Circuit, in *Al Rajhi Bank*, cited the District of D.C.'s use of the phrase. *See Burnett v. Al Baraka inv. & Dev. Corp.,* 274 F. Supp.2d 86, 109 (D.D.C. 2003) ("Plaintiffs offer no support, and we have found none, for the proposition that a bank is liable for injuries done with money that passes through its hands in the form of deposits, withdrawals, check clearing services, *or any other routine banking*

service.") (emphasis added). As such, the 2006 ruling of the Honorable Charles P. Sifton, U.S. District Judge of this Court,[3] on the scope of "routine banking business" stands. *See Weiss v. Nat'l Westminster Bank PLC,* 453 F. Supp.2d 609, 625 (E.D.N.Y. 2006) ("However, defendant misconstrues the *Terrorist Attacks* decision. In holding that there could be no liability on the basis of 'routine banking business' that court did not mean that the provision of basic banking services could never give rise to bank liability. Rather the court relied on the routine nature of the banking services to conclude that the defendant bank had no knowledge of the client's terrorist activities. Where the Bank knows that the groups to which it provides services are engaged in terrorist activities even the provision of basic banking services may qualify as material support.") (internal quotations and citations omitted).

C. *Rothstein* and *Al Rajhi* are Distinguishable

While Defendant asserts that the Second Circuit's decisions in *Rothstein* and *Al Rajhi Bank* require this Court to decide in Defendant's favor here, both cases are distinguishable because they were dismissed based on plaintiffs' conclusory allegations.

In *Rothstein*, the plaintiff alleged that the defendant-financial institution provided United States currency to the Iranian government. 708 F.3d at 92. The Iranian government has long been designated a state sponsor of terrorism by the United States government and provides material support to Hamas and Hezbollah. *Id.* at 86. The plaintiffs were injured and/or had

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[3] Judge Sifton is since deceased, and this case assigned to this Court.

family members injured or killed in Hamas or Hezbollah attacks. *Id.* at 85. To make a causation connection among the currency provided by the defendant to Iran, Iran's support of Hamas and Hezbollah, and the attacks at issue, the plaintiffs alleged that Hezbollah and Hamas "needed large sums of money to fund their operations; that those organizations, by reason of their nature and the existence of counterterrorism sanctions, could not freely use normal banking services such as checks or wire transfers; and that U.S. currency is a universally accepted form of payment." *Id.* at 93.

The Second Circuit held that these allegations, along with conclusory allegations that the dollars the defendant provided to the Iranian government "would be used *to cause and facilitate terrorist attacks* by Iranian-sponsored terrorist organizations *such as* Hamas [and] Hizbollah," were not adequate to plead proximate causation. *Id.* at 97 (emphasis in original). This connection is more attenuated than in the instant case, where the money from Defendant was purportedly going directly to Hamas front-groups, rather than to a government that performs myriad legitimate functions in addition to allegedly funding terrorist organizations. *Cf. Id.* ("But the fact remains that Iran is a government, and as such it has many legitimate agencies, operations, and programs to fund."). Here, Hamas carried out the attacks during the same period of time within which the money was transferred, which distinguishes this case from *Rothstein*, where Iran did not carry out the attacks at issue.

These differences are meaningful because Congress specifically has found that "foreign organizations that engage in terrorist activity are so tainted by their

criminal conduct that any contribution to such an organization facilitates that conduct." Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-32, § 301(a)(7), 110 Stat. 1214, 1247 (1996). The same thing cannot be said about a government. *See Rothstein v. UBS AG*, 772 F. Supp.2d 511, 516 (S.D.N.Y. 2011) ("[T]he Supreme Court's finding that FTOs are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct is specific to FTOs. Such a finding does not necessarily, or even probably, apply to state sponsors of terrorism."). Indeed, unlike here, in *Rothstein*, the Second Circuit explained that, "[t]he Complaint does not allege that [the defendant] was a participant in the terrorist attacks that injured plaintiffs. It does not allege that [the defendant] provided money to Hizbollah or Hamas. It does not allege that U.S. currency [the defendant] transferred to Iran was given to Hizbollah or Hamas." *Rothstein*, 708 F.3d at 97. Therefore, *Rothstein* does not require judgment as a matter of law in favor of Defendant here.

In *Al Rajhi*, the Second Circuit reiterated that Congress "did not intend to permit recovery under § 2333 on a showing of less than proximate cause." *Al Rajhi* 714 F.3d 118, 123 (2d Cir. 2013). Plaintiffs there alleged that defendants provided funding to charity organizations known to support terrorism that, in turn, provided funding to al Qaeda and other terrorist organizations. *Id.* at 124. The court held that those allegations were "insufficient for proximate causation purposes for the same reasons the allegations in *Rothstein* fell short," because plaintiffs did not allege that defendants participated in the September 11, 2001 attacks or that they provided money directly to al Qaeda.

Id. Plaintiffs also did not allege that the money the defendants allegedly donated to the charities actually was transferred to al Qaeda and aided in the September 11, 2001 attacks. *Id.* Thus, the court held that the allegations were conclusory. *Id.*

Plaintiffs here do not engage in such conclusory allegations. Here, Plaintiffs sufficiently allege that Defendant provided funds to Hamas front-groups and Hamas carried out the attacks during the same period of time within which the money was transferred. The social services provided by Hamas and its front groups are integral to building popular support for its organization and goals, which then facilitates its ability to carry out violent attacks. *See Boim III*, 549 F. 3d at 698 ("Hamas's social welfare activities reinforce its terrorist activities both directly by providing economic assistance to the families of killed, wounded, and captured Hamas fighters and making it more costly for them to defect (they would lose the material benefits that Hamas provides them), and indirectly by enhancing Hamas's popularity among the Palestinian population and providing funds for indoctrinating schoolchildren."). Congress crafted the ATA to cut off *all* money to terrorist organizations, finding that they are fundamentally tainted, even if they also have non-violent public welfare operations. Thus, *Al Rajhi* does not require judgment as a matter of law in favor of Defendant either.

D. Hamas Alter Egos

Defendant asserts that, to show proximate causation, Plaintiffs must establish that the 13 Charities that received the transfers are, as a matter of law, equivalent to transfers to Hamas itself. (Mot. at 7.)

Defendant argues that there is no evidence on which a reasonable juror could make such a finding because Plaintiffs rely solely on insufficient expert testimony. (*Id.*) Plaintiffs contend that their proposed experts, Dr. Mathew Levitt and Arieh Spitzen, rely upon substantial evidence confirming that the Defendant counterparties to which Interpal sent funds were controlled by Hamas. (Opp. at 7.) Assuming, *arguendo*, that, to show proximate causation, Plaintiffs must establish that at least some of the 13 Charities are alter egos of Hamas or under Hamas' control, Plaintiffs have met their burden for purposes of Defendant's summary judgment motion.

In his September 27, 2006 decision granting in part and denying in part Defendant's motion to dismiss, Judge Sifton adopted the holding in *National Council of Resistance of Iran v. Department of State*, 373 F.3d 152 (D.C. Cir. 2004), where then-United States Circuit Judge John G. Roberts, Jr., writing for a panel of the D.C. Circuit, addressed the question of when an entity is considered an "alias" of an FTO for purposes of the statute granting the Secretary of State power to designate FTOs. *Weiss v. Nat'l Westminster Bank PLC,* 453 F. Supp.2d 609, 622 (E.D.N.Y. 2006). Specifically, the D.C. Circuit held that:

> [O]rdinary principles of agency law are fairly encompassed by the alias concept under AEDPA. When one entity so dominates and controls another that they must be considered principal and agent, it is appropriate, under AEDPA, to look past their separate juridical identities and to treat them as aliases. . . . Just as it is silly to suppose that Congress empowered the Secretary to designate a terrorist

> organization only for such periods of time as it took such organization to give itself a new name, and then let it happily resume the same status it would have enjoyed had it never been designated, so too is it implausible to think that Congress permitted the Secretary to designate an FTO to cut off its support in and from the United States, but did not authorize the Secretary to prevent that FTO from marshaling all the same support via juridically separate agents subject to its control.

Nat'l Council of Resistance of Iran, 373 F. 3d at 157-58 (internal citation, quotation marks and alteration omitted). In adopting the D.C. Circuit's alter ego concept, Judge Sifton explained that "[f]actors to be considered include whether the organizations share leadership, whether they commingle finances, publications, offices, and personnel, and whether one operates as a division of the other." *Weiss,* 453 F. Supp.2d at 623.

In apparent disregard of the law of the case, Defendant argues that Plaintiffs' experts rely on "insufficient" facts, even though these facts parallel the factors outlined by Judge Sifton. (Mot. at 7-8.) These facts include the shared personnel and overlapping leadership between Hamas and the 13 Charities. (*Id.*) Plaintiffs' experts detail the findings of multiple government agencies, including the German Ministry of Interior, the Israeli Minister of Defense, and the U.S. Department of Treasury, that the 13 Charities were Hamas-controlled. (Opp. at 7.) Furthermore, Plaintiffs' experts discuss how the 13 Charities operated as the social network of Hamas. As the Honorable Brian M. Cogan, U.S. District Judge of this Court, described in

Linde v. Arab Bank, Dr. Levitt and Spitzen present "a cornucopia of circumstantial evidence to support a jury finding that defendant knew or was willfully blind to the charities' Hamas affiliations." 97 F. Supp.3d 287, 335 (E.D.N.Y. 2015).

Considering the factors described by Judge Sifton and the record developed in this case thus far, a reasonable jury could find that the 13 Charities are Hamas alter egos.

II. Hamas' Responsibility for the Attacks

Defendant asserts that Plaintiffs failed to present any admissible evidence from which a reasonable juror could find that Hamas perpetrated the attacks at issue. (Mot. at 12.) Defendant argues that Plaintiffs' experts Ronni Shaked, Evan Kohlmann, and Shaul Naim rely on hearsay to form their opinions. (*Id.*) For the reasons set forth below, the court finds that certain portions of the proposed testimony of Shaked and Kohlmann are inadmissible. However, Plaintiffs have presented sufficient independently admissible evidence to create a genuine issue of material fact as to whether Hamas perpetrated sixteen of the eighteen attacks.

A. Shaked

Plaintiffs submit a report from Ronni Shaked, in which Shaked analyzes various materials, including newspaper articles, claims of responsibility by Hamas through its reputed websites, interviews of purported Hamas members, Hamas propaganda literature, Israeli government press releases, and Israeli civilian and military court records. Based upon these materials, Shaked concludes that Hamas is responsible for each of the attacks at issue here. Defendant asserts

that Shaked's opinions are inadmissible to prove that Hamas was responsible for the attacks under *United States v. Mejia*, 545 F. 3d 179 (2d Cir. 2008). (Mot. at 12-13.)

Under *Mejia*, much of Shaked's testimony is inadmissible because it does not require expert knowledge. In *Mejia*, the Second Circuit held that testimony by a government expert that the "unspecified deaths of eighteen to twenty-three persons have been homicides committed by members of" a certain gang was outside the scope of appropriate expert testimony pursuant to Federal Rule of Evidence 702, because it repeated evidence that was understandable to a layperson. 545 F. 3d at 195-96. However, the court held that the expert could testify about how evidence admitted through a lay witness connected the murders to the gang. *Id.* at 195. For example, the expert could provide an "explanation of how the graffiti near a body indicated that the murderer was a member of [the gang]," or "testimony that the gang used a particular method to kill enemies and that as a result of his review of the autopsy reports (which would have been in evidence before the jury), he had concluded that [the gang] committed those murders." *Id*.

Shaked may use his expertise to provide context to a jury, but he cannot, under *Mejia*, use attribution testimony to introduce and summarize straightforward factual evidence that has not been admitted, such as a webpage that says "Hamas carried out a suicide bombing." While Shaked can put factual evidence in context to help Plaintiffs establish that Hamas is responsible for an attack, he cannot be used to establish basic facts in the first place. *See Mejia*, 545 F. 3d at 196 ("Expert testimony might have been helpful in

establishing the relationship between these facts and [the gang], but it was not helpful in establishing the facts themselves."). Thus, Plaintiffs cannot use Shaked's opinions to establish a genuine issue of material fact as to Hamas' responsibility for the attacks at issue without first building a proper foundation.

B. Kohlmann

Defendant objects to Kohlmann's testimony to the extent that it recites hearsay. (Mot. at 15.) The Court finds that part of Kohlmann's proposed testimony is inadmissible.

Kohlmann is permitted to give background on Hamas, including a description of its use of propaganda and its websites. These topics are appropriate subjects of an expert opinion, and are similar to testimony that Kohlmann has been allowed to give in the past. *See United States v. Paracha,* 2006 WL 12768, *21-22 (S.D.N.Y. Jan. 3, 2006), *aff'd,* 313 F. App'x 347 (2d Cir. 2008); *United States v. Kassir,* 2009 WL 910767, *7 (S.D.N.Y. Apr. 2, 2009) (holding that Kohlmann's "testimony on the origins, history, structure, leadership and various operational methods of al Qaeda and other terrorist groups is sufficiently reliable.").

However, the parts of Kohlmann's testimony that are nothing more than a recitation of inadmissible secondary evidence is inadmissible. This tactic of simply "repeating hearsay evidence without applying any expertise whatsoever" has been rejected by the Second Circuit, and therefore must be rejected here. *Mejia*, 545 F. 3d at 197.

Accordingly, Kohlmann may testify as an expert about Hamas' background and use of propaganda, but his summaries of the attacks and repetition of

evidence that Hamas was responsible for those attacks, without using any expertise, is not admissible and cannot be relied upon by this Court in deciding the summary judgment motion.

C. Other Evidence

Plaintiffs contend that they have brought forth uncontradicted admissible evidence demonstrating that Hamas committed the relevant terrorist attacks apart from the expert reports. (Opp. at 10-25.) Defendant contends that the evidence Plaintiffs have set forth is inadmissible hearsay. (Reply at 6-10.)

The Court holds that there is sufficient admissible evidence for a reasonable jury to determine that Hamas committed sixteen of the eighteen attacks. Shaked and Kohlmann, relied at least in part, upon judgments of Israeli courts assigning responsibility to Hamas or its operatives, official Israeli government investigative reports concluding that Hamas or its operatives were responsible for the attack, and/or Shaked's own eye-witness accounts. These materials can be authenticated and are admissible.

A judgment of conviction is admissible in a civil case as an exception to the hearsay rule, if: (1) it was entered after trial or guilty plea; (2) the conviction was for a crime punishable by death or imprisonment for more than one year; and (3) the evidence is admitted to prove any fact essential to the judgment. Fed. R. Evid. 803(22). The parties do not dispute that: (1) the convictions are for crimes punishable by death or more than one year of imprisonment; (2) the evidence is admitted to prove an essential fact; and (3) this exception can be "applied to admit evidence of foreign criminal judgments." Jack B. Weinstein & Margaret A. Berger,

Weinstein's Federal Evidence § 803.24[2], at 803-146 (Joseph M. McLaughlin ed., 2d ed. 2012). Moreover, as foreign public documents, they can be self-authenticated, and Defendant has not challenged the authenticity of the judgments at issue here. *See* Fed. R. Evid. 902(3); *Raphaely Int'l, Inc. v. Waterman S.S. Corp.*, 972 F.2d 498, 502 (2d Cir. 1992).

Defendant argues that the Israeli judgments are inadmissible in this case because Plaintiffs have not proven that the proceedings that produced the convictions complied with due process. (Reply at 6.) This Court disagrees. Israeli military courts comport with minimum due process standards. Israeli military trials typically are open to the public; defendants are entitled to representation by an attorney; the same rules of evidence as in Israeli civilian courts apply; defendants are entitled to challenge confessions on the grounds of coercion; witnesses are subject to cross-examination; defendants enjoy the privilege against self-incrimination; and, if defendants enter a guilty plea, the judge must explain the consequences of the plea to the defendant before accepting the plea. *Strauss v. Credit Lyonnais*, 925 F. Supp.2d 414, 448 (E.D.N.Y. 2013). Any criticisms of the due process afforded defendants in Israeli military courts and their ability to come to a reliable verdict affects the weight of the evidence, not admissibility, particularly where it appears on this record that the accused were afforded more than a modicum of due process. *Id.*

Accordingly, Plaintiffs have sufficient admissible evidence to create a genuine issue of material fact as to Hamas' responsibility for the attacks on the following dates, at the following places: (1) March 27, 2002, Park Hotel, Netanya; (2) May 7, 2002, Sheffield Club,

Rishon LeZion; (3) July 31, 2002, Hebrew University Cafeteria; (4) January 29, 2003, Route 60; (5) March 5, 2003, Bus 37, Haifa; (6) March 7, 2003, Kiryat Arba; (7) May 18, 2003, Bus 6, French Hill, Jerusalem; (8) June 11, 2003, Bus 14A, Jaffa Road, Jerusalem; (9) June 20, 2003, Route 60; (10) August 19, 2003, Bus 2, Jerusalem; (11) September 9, 2003, Café Hillel, Jerusalem; (12) December 1, 2001, Ben Yehuda Street, Jerusalem; (13) January 18, 2002, Bus 32A, Patt Junction, Jerusalem. (*See* Plaintiff's Response to Defendant's Supplemental Statement of Additional Material Facts, and Supplemental Counter-Statement of Additional Material Facts, *Weiss* Dkt. Entry No. 364 ("Pl. Supplemental 56.1") ¶ 128-29.)

Hamas' responsibility for some of the attacks substantiated by a military court conviction, as well as the April 30, 2003 suicide bombing of Mike's Place in Tel Aviv (for which there is no conviction), are supported by conclusions of public Israeli government reports that are admissible as hearsay exceptions. *See* Fed. R. Evid. 803(8) (public records containing "factual findings from a legally authorized investigation" are admissible); *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 681 F. Supp.2d 141, 159 (D. Conn. 2009) (admitting conclusions of official foreign investigation as hearsay exception). Defendant argues that these documents simply recite conclusory statements without citing to any investigative steps that were taken or evidence that was gathered. (Reply at 8.) However, these documents, including the 2003 ISA Report and the 2007 ISA Report, can be self-authenticated as foreign public documents. *See* Fed. R. Evid. 902(3). In addition, Defendant gives no reason why these reports are unreliable. *See Bridgeway Corp. v.*

Citibank, 201 F. 3d 134, 143-44 (2d Cir. 2000) (affirming admissibility of factual findings in government report where nothing in the record "indicates any motive for misrepresenting the facts" in the report). Accordingly, there is sufficient admissible evidence indicating that Hamas is responsible for the attacks, supported by the foreign reports. *See Estate of Parsons v. Palestinian Auth.*, 651 F. 3d 118, 121-26 (D.C. Cir. 2011) (holding that there is a triable issue of responsibility for attack based upon statement to Palestinian interrogators by person who planted bomb, an FBI report and a memo in Palestinian Authorities' investigative files assigning blame for attack).

For the October 22, 2003 shooting attack in Tel Rumeida, Shaked states that he witnessed firsthand the aftermath of the attack and saw evidence that Hamas was responsible. (*See* Shaked Report at 127.) This eyewitness account is admissible to show that Hamas perpetrated the attack.

Plaintiffs have not provided sufficient admissible evidence of Hamas' responsibility for the September 24 Attack. The evidence Plaintiffs rely on consists solely on Hamas claims of responsibility, which Plaintiffs assert are credible because there is no evidence that Hamas asserts false claims of responsibility. (Opp. at 17-18.)

The claims of responsibility by Hamas, even assuming they could be authenticated, are hearsay. Plaintiffs assert that the statements are admissible as a hearsay exception because they are declarations against interest by unavailable witnesses pursuant to Rule 804(b)(3) of the Federal Rules of Evidence, and that there is no evidence that Hamas was motivated to assert a false claim of responsibility for the

September 24 Attack. (Opp. at 19-20.) While admitting to a violent attack on innocents typically is detrimental to a declarant's interests, the interests and motives of terrorists are far from typical. "Under the perverse assumptions of terrorists, an armed attack on civilians reflects glory. Taking 'credit' for such an attack is deemed a benefit, not a detriment, and is not reliable under the circumstances." *Gill v. Arab Bank, PLC,* 893 F. Supp.2d 542, 569 (E.D.N.Y. 2012). As Plaintiffs' experts explain in detail, Hamas actively seeks publicity for its claims of responsibility for attacks against Israelis as part of its propaganda. Thus, in this instance, Hamas' claims of responsibility were not against its interest as an organization such that Hamas only would have made them if it believed them to be true.

Plaintiffs next feebly assert that the claims of responsibility are admissible under the business records exception. (Opp. at 20.) Under Federal Rule of Evidence 803(6), records kept in the course of a regularly conducted business activity, if it was the regular practice of that business to make the record, may be admitted as exceptions to hearsay, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. For the reasons stated above, the Court rejects Plaintiffs' argument.

Finally, the Court finds that Plaintiffs are collaterally estopped from arguing that Hamas committed the January 29, 2004 Bus No. 19 attack ("Bus No. 19 Attack") because Plaintiffs did not challenge a ruling in *Linde v. Arab Bank, PLC,* 97 F. Supp.3d 287, 330 (E.D.N.Y. 2015), which found that the Al-Aqsa Martyrs Brigade ("AAMB") – and not Hamas – was responsible for the Bus No. 19 Attack.

Collateral estoppel, or issue preclusion, bars the relitigation of issues actually litigated and decided in a prior proceeding. *Cent. Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A.,* 56 F.3d 359, 368 (2d Cir. 1995). Four elements must be met for collateral estoppel to apply: (1) the issues of both proceedings must be identical; (2) the relevant issues actually were litigated and decided in the prior proceeding; (3) there must have been full and fair opportunity for the litigation of the issues in the prior proceeding; and (4) the issues were necessary to support a valid and final judgment on the merits. *Id.* at 368. Defendant argues, and Plaintiffs do not dispute, that: (1) the issues of both proceedings involve Hamas's responsibility for the Bus No. 19 Attack; (2) the same plaintiffs were involved in *Linde*; and (3) the issue actually was litigated to support a valid judgment on the merits.

Plaintiffs argue that Defendant waived collateral estoppel by failing to raise it in its July 1, 2016 answer. (Opp. at 23.) Federal Rule of Civil Procedure 8(c) requires parties to raise affirmative defenses, such as estoppel, in the pleadings. *Rose v. AmSouth Bank of Florida,* 391 F.3d 63, 65 (2d Cir. 2004). "[T]he purpose of requiring collateral estoppel to be pled as an affirmative defense 'is to give the opposing party notice of the plea of estoppel and a chance to argue, if he can, why the imposition of an estoppel would be inappropriate.'" *Curry v. City of Syracuse,* 316 F.3d 324, 331 (2d Cir. 2003) (quoting *Blonder–Tongue Labs. v. Univ. Of Ill. Found.,* 402 U.S. 313, 350 (1971)). The Second Circuit has recognized that "waiver of an unpleaded defense may not be proper where the defense is raised at the first pragmatically possible time and applying it at

that time would not unfairly prejudice the opposing party." *Rose,* 391 F.3d at 65.

Although Defendant did not add collateral estoppel to its amended answer of July 1, 2016, Plaintiffs were on notice of Defendant's collateral estoppel defense and Plaintiffs had the opportunity to respond. Plaintiffs do not argue, nor can they, that they were unfairly prejudiced by Defendant's failure to raise collateral estoppel in its amended answer. *See Curry v. Syracuse,* 316 F.3d at 331 (finding that the district court did not abuse its discretion in permitting a collateral estoppel defense that was raised for the first time in the reply memorandum to the summary judgment motion because plaintiff was given leave, and additional time, to file a sur-reply in which plaintiff opposed the application of collateral estoppel. The court reasoned, "if the primary purpose of requiring collateral estoppel to be pled as an affirmative defense is providing notice and an opportunity to respond, that purpose was served in the instant case.")

Plaintiffs next argue that, because their settlement in *Linde* "tabled" their motion for reconsideration of Judge Cogan's decision concerning Hamas's involvement in the Bus No. 19 Attack, Judge Cogan's ruling is "factually disputed" and "not now appealable." (Opp. at 24.)

The Court is not persuaded. Plaintiffs cite no case law supporting their position that a ruling subject to a motion for reconsideration has no preclusive effect. Plaintiffs voluntarily "tabled" the motion for reconsideration when they settled the *Linde* case, rather than wait for the adjudication of that motion. Plaintiffs cannot exploit the timing of settlement to avoid issue preclusion.

Furthermore, Plaintiffs' argument that Judge Cogan's ruling is not final because it is not appealable contradicts controlling case law and thus fails. In *Lummus Co. v. Commonwealth Oil Ref. Co.,* 297 F.2d 80, 89 (2d Cir. 1961), the Second Circuit, in examining whether a nonfinal decision under 28 U.S.C. § 1291 is subject to issue preclusion, reasoned:

> 'final' in the sense of precluding further litigation of the same issue, turns upon such factors as the nature of the decision (i.e., that it was not avowedly tentative), the adequacy of the hearing, and the opportunity for review. 'Finality' in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again.

Id. See also Metromedia Co. v. Fugazy, 983 F.2d 350, 366 (2d Cir. 1992) ("As to the need for finality of decision, collateral estoppel, unlike appealability under 28 U.S.C. § 1291 (1988), does not require a judgment which ends the litigation and leaves nothing for the court to do but execute the judgment. Rather the concept of finality for collateral estoppel purposes includes many dispositions which, though not final in that sense, have nevertheless been fully litigated.") (quoting *Zdanok v. Glidden Company, Durkee Famous Foods Division,* 327 F.2d 944, 955 (2d Cir. 1964)); *Kurlan v. C.I.R.,* 343 F.2d 625, n.1 (2d Cir. 1965) ("general expressions that only final judgments can ever have collateral estoppel effect are considerably overstated."); *Rosen v. Paul, Hastings, Janofsky & Walker LLP,* No. 05 CIV. 4211 (LAK), 2005 WL 1774126, at *5 (S.D.N.Y. July 28, 2005) (finding that collateral

estoppel precluded plaintiff from arguing that the state court lacked jurisdiction to confirm an arbitration award merely because plaintiff had moved for reconsideration of the arbitration award in the arbitration forum).

Plaintiffs next argue that collateral estoppel should not apply because Plaintiffs' claims "changed dramatically when JASTA added 18 U.S.C. § 2333(d) to the ATA." (Opp. at 24-25.) Section 2333(d) adds a secondary liability provision to the ATA, which reads as follows:

> In an action under subsection (a) for an injury arising from an act of international terrorism committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization under section 219 of the Immigration and Nationality Act (8 U.S.C. 1189), as of the date on which such act of international terrorism was committed, planned, or authorized, liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism.

Plaintiffs argue that because Judge Cogan only ruled on whether Hamas *committed* the Bus No. 19 Attack, and not whether Hamas committed, planned, *or authorized* the Bus No. 19 Attack, collateral estoppel is not appropriate.

Plaintiffs misread the statute. Section 2333(d) creates a cause of action for injuries arising from terrorism committed, planned, or authorized by a foreign

terrorist organization against any person who aids and abets or conspires with the person *who committed* the terrorist act. By the plain language of the statute, § 2333(d) does not create liability against a person who aids and abets or conspires with the person who merely authorized (rather than committed) the terrorist act, as Plaintiffs suggest.

Accordingly, summary judgment is granted in favor of the Defendant for the January 29, 2004 Bus No. 19 Attack and for the September 24 Attack, but there is sufficient admissible evidence for a jury to conclude that Hamas was responsible for the other sixteen attacks.

III. § 2339C Claims

Defendant argues that the third claims of relief in *Weiss* and *Applebaum* should be dismissed in part because § 2339C was enacted after the attacks occurring on December 1, 2001, March 7, 2002, March 27, 2002, May 7, 2002, and June 18, 2002, and it cannot be applied retroactively. (Mot. at 25.) Plaintiffs fail to address this argument. The Court agrees with Defendant.

Public Law 107-197 provided that all parts of § 2339C would take effect between June and July 2002. Pub. L. 107-197, Title II, § 203, June 25, 2002, 116 Stat. 727. "Statutes are disfavored as retroactive when their application would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Fernandez-Vargas v. Gonzales,* 548 U.S. 30, 37 (2006). "It has become a rule of general application that a statute shall not be given

retroactive effect unless such construction is required by explicit language or by necessary implication." *Id.*

Congress has not explicitly made § 2339C retroactive, nor is a retroactive construction necessary. Thus, to the extent that Plaintiffs' claims are predicated on conduct by Defendant that allegedly violated § 2339C, those claims are dismissed. *See Owens v. BNP Paribas S.A.,* 2017 WL 394483, at *9 (D.D.C. Jan. 27, 2017) ("[T]o the extent that plaintiffs raise a claim for primary liability based on an underlying violation of § 2339C, this claim is also dismissed, as the enactment of § 2339C in 2002 post-dates the relevant conduct here leading up to the 1998 embassy bombings."). *See also Boim v. Holy Land Found. for Relief & Dev.,* 549 F.3d 685, 691 (7th Cir. 2008) (holding that, to state a § 2333 claim predicated on a violation of § 2339A, the defendant must have provided material support "between the effective date of section 2339A and [Plaintiff's] killing.").

CONCLUSION

For the foregoing reasons, Defendant's summary judgment motion is denied to the extent that: (1) Second Circuit case law on proximate cause under the ATA does not require judgment as a matter of law in favor of Defendant; (2) there is sufficient admissible evidence for a reasonable jury to conclude that the 13 Charities are alter egos of Hamas or under Hamas' control; (3) Shaked may testify to put factual evidence already admitted into context to establish Hamas' responsibility for an attack, but not to establish the basic facts in the first instance; (4) Kohlmann may testify as an expert about Hamas' background and use of propaganda, but his summaries of the attacks and recitation

of the presented evidence, without using any expertise, is not admissible; (5) there is sufficient admissible evidence for a reasonable jury to conclude that Hamas committed sixteen of the eighteen attacks; (6) Israeli military court convictions are admissible; and (7) eyewitness accounts are admissible. Defendants' summary judgment motion is granted to the extent that: (1) Plaintiffs have not provided sufficient admissible evidence of Hamas' responsibility for the September 24 attack; (2) Hamas' claims of responsibility, standing alone, are not admissible; (3) Plaintiffs are collaterally estopped from arguing that Hamas committed the Bus No. 19 Attack; and (4) Plaintiffs' § 2339C claims are dismissed. Plaintiffs' remaining claims may proceed.

SO ORDERED.

Dated: Brooklyn, New York
September 30, 2017

s/
DORA L. IRIZARRY
Chief Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 05-CV-4622 (DLI) (RML)

TZVI WEISS, et al.,

Plaintiffs,

v.

NATIONAL WESTMINSTER BANK PLC,
Defendant.

No. 07-cv-916 (DLI) (RML)

NATAN APPLEBAUM, et al.,
Plaintiffs,

v.

NATIONAL WESTMINSTER BANK PLC,
Defendant.

OPINION AND ORDER

DORA L. IRIZARRY, U.S. District Judge:

This is a consolidated action pursuant to the civil liability provision of the Antiterrorism Act of 1992 ("ATA"), 18 U.S.C. § 2333(a) ("§ 2333(a)"). Plaintiffs, approximately 200 individuals and estates of people who are deceased (collectively, "Plaintiffs"), seek to recover damages from Defendant National Westminster

Bank PLC ("Defendant") in connection with 15 attacks in Israel and Palestine allegedly perpetrated by Hamas. (*See generally* Fifth Am. Compl., ("*Weiss* FAC"), *Weiss* Dkt. Entry No. 141; Compl. ("*Applebaum* Compl."), *Applebaum* Dkt. Entry No. 1).[1] Specifically, Plaintiffs allege that Defendant is civilly liable pursuant to the ATA's treble damages provision for: (1) aiding and abetting the murder, attempted murder, and serious physical injury of American nationals outside the United States in violation of 18 U.S.C. § 2332; (2) knowingly providing material support or resources to a Foreign Terrorist Organization ("FTO") in violation of 18 U.S.C. § 2339B; and (3) willfully and unlawfully collecting and transmitting funds with the knowledge that such funds would be used for terrorist purposes in violation of 18 U.S.C. § 2339C. (*Weiss* FAC ¶¶ 579-97; *Applebaum* Compl. ¶¶ 426-44.) Defendant moves for dismissal of this action for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, or in the alternative, for summary judgment pursuant to Rule 56. (*See* Def.'s Mem. of Law in Supp. of Mot. to Dismiss ("Def.'s Mem."), *Weiss* Dkt. Entry No. 327.) Plaintiffs oppose. (*See* Pls.' Mem. of Law in Opp'n to Mot. to Dismiss ("Pls.' Opp'n"), *Weiss* Dkt. Entry No. 329.) For the reasons set forth below, Defendant's motion is denied in its entirety.

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[1] Citations to the "*Weiss* Dkt." are to docket 05-cv-4622. Citations to the "*Applebaum* Dkt." are to 07-cv-916. Where the same document has been filed on both dockets, the Court cites to the *Weiss* Docket only, as it is the lead case.

BACKGROUND[2]

I. The Parties

Plaintiffs' claims arise from 15 attacks that occurred in Israel and Palestine between approximately 2002 and 2004, which allegedly were perpetrated by Hamas.[3] *See Weiss v. Nat'l Westminster Bank PLC* ("*Weiss II*"), 936 F. Supp. 2d 100, 103 (E.D.N.Y. 2013). Plaintiffs comprise approximately 200 United States nationals who were injured in those attacks, the estates of persons killed in those attacks, and/or family members of persons killed or injured in those attacks. *Id.*

Defendant is a financial institution incorporated and headquartered in the United Kingdom. *Id.* At the

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[2] The Court assumes familiarity with the facts underlying this action, which are summarized more fully in the Court's March 28, 2013 Opinion and Order on Defendant's motion for summary judgment. *See Weiss v. Nat'l Westminster Bank PLC* ("*Weiss II*"), 936 F. Supp. 2d 100 (E.D.N.Y. 2013), *vacated* 768 F.3d 202 (2d Cir. 2014). The facts recounted herein are drawn from the statement of facts set forth in that Opinion and Order, affidavits and/or testimony submitted in connection with the motions for summary judgment that were the subject of that Order, the pleadings, and certain materials submitted by the parties in connection with the instant motion. *See Baron Philippe de Rothschild, S.A. v. Paramount Distillers, Inc.*, 923 F. Supp. 433, 436 (S.D.N.Y. 1996) ("Matters outside the pleadings, however, may also be considered in resolving a motion to dismiss for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2) without converting it into one for summary judgment.") (citing *Visual Sciences, Inc. v. Integrated Comms., Inc.*, 660 F.2d 56, 58 (2d Cir. 1981)).

[3] Hamas is an acronym for "Harakat al-Muqawama al-Islamiyya," also known as the "Islamic Resistance Movement." (*Weiss* FAC. ¶ 1 n.1.)

time of the events giving rise to this action, Defendant allegedly conducted business in the United States through an office in Houston, Texas and certain "agencies" in Connecticut and New York, including a branch location in New York City. (Defendant's "New York Branch").[4] *Id.* Defendant purportedly used its New York Branch as an intermediary bank to execute U.S. Dollar denominated transactions requested by its customers. (*See* Dep. Tr. of Neil Trantum ("Trantum Dep.") at 90:4-5, Ex. 97 to the Decl. of Valerie Schuster in Supp. of Def.'s Mot. for Summary Judgment, *Weiss* Dkt. Entry No. 267; *see also* Tr. of Oct. 8, 2015 Oral Argument ("Tr.") at 4:19-7:8 ("When the customers asked for funds to be denominated in dollars, it was necessary to go through this correspondent banking track because [Defendant] didn't deal in dollars directly, it dealt in dollars through its New York [B]ranch."))

Among other customers, Defendant maintained bank accounts in London for Interpal, a/k/a the Palestine Relief & Development Fund, a/k/a Palestinians Relief & Development Fund ("Interpal"), a non-profit organization registered in the United Kingdom and self-described as providing humanitarian aid to various charitable organizations throughout Jordan, Lebanon, and the Palestinian territories. *See Weiss II*, 936 F. Supp. 2d at 104. During the time Interpal had accounts with Defendant, it transferred money to certain charitable organizations (each a "Charity," and

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[4] The parties do not clearly elucidate the corporate relationship between Defendant and its New York location. Accordingly, the Court uses the term "New York Branch" as a matter of convenience only.

collectively the "Charities") that Plaintiffs contend actually were front organizations for Hamas. *See Id.* at 104, 111. Plaintiffs allege that Defendant aided Hamas by maintaining Interpal's accounts and sending money to the Charities on Interpal's behalf, despite knowing that Interpal supported Hamas. *See Id.* at 111. While a number of the transfers Defendant made to the Charities on behalf of Interpal never went through the United States, the parties agree that Defendant executed 196 such transfers through its New York Branch (or otherwise through correspondent bank accounts that Defendant maintained in New York) (collectively, the "New York Transfers"), each in response to a specific request by Interpal to send funds in U.S. Dollars. (*See* Oct. 16, 2015 Osen Ltr., *Weiss* Dkt. Entry No. 335.) Each New York Transfer was initiated by Defendant and routed through a correspondent bank account in New York, then was directed for the benefit of the respective Charity to a separate correspondent account maintained by that Charity's bank in New York. (*See* Def.'s Mem. at 5-6; *see also* Tr. at 4:23-5:13.)

II. Procedural History

In September 2005 and March 2007, respectively, the *Weiss* and *Applebaum* Plaintiffs brought separate actions against Defendant in this Court. The initial complaints, and every amended complaint thereafter, alleged that Defendant is subject both to general personal jurisdiction ("general jurisdiction") and specific personal jurisdiction ("specific jurisdiction") in the United States. (*See Weiss* FAC ¶ 4; *Applebaum* Compl. ¶ 4.) The *Weiss* Plaintiffs served Defendant with process at its agencies and/or offices in New York, Texas, and Connecticut in September and October 2005.

(*Weiss* Dkt Entries Nos. 3, 7, 8.) Thereafter, Defendant moved for dismissal of the *Weiss* action pursuant to Rule 12(b)(6), declining to contest personal jurisdiction at that time. (*See* Mot. to Dismiss, *Weiss* Dkt. Entry No. 38.) The late Honorable Charles P. Sifton, then presiding, denied the motion to dismiss with respect to Plaintiffs' claims that Defendant provided material support to an FTO and knowingly transmitted funds that financed terrorism, but dismissed Plaintiffs' aiding and abetting claim, with leave to amend. *Weiss v. Nat'l Westminster Bank PLC* ("*Weiss I*"), 453 F. Supp. 2d 609 (E.D.N.Y. 2006). In the *Applebaum* action, Defendant voluntarily accepted service, (*see Applebaum* Dkt. Entry No. 6), and thereafter filed a motion to dismiss. (*Applebaum* Dkt. Entry No. 13.) The parties subsequently resolved that motion by stipulation, absent any objection by Defendant as to personal jurisdiction. (*See Applebaum* Dkt. Entry Nos. 26, 28.) By order dated December 27, 2007, the Court formally consolidated the *Weiss* and *Applebaum* actions.

Extensive merits discovery between the parties ensued. On March 22, 2012, Defendant moved for summary judgment dismissing the consolidated action, but again declined to raise a defense of lack of personal jurisdiction. (*See Weiss* Dkt. Entry No. 264.) By Opinion and Order dated March 28, 2013, the Court granted summary judgment in favor of Defendant on each claim and dismissed the action in its entirety, finding that Plaintiffs had failed to establish that a genuine issue of material fact existed as to the required *scienter* element of their claims. *Weiss II*, 936 F. Supp. 2d at 120. Plaintiffs subsequently appealed the dismissal to the Second Circuit Court of Appeals. On September 22, 2014, the Second Circuit vacated

this Court's decision and remanded the consolidated action for further proceedings, ruling that there were triable issues of fact as to whether Defendant's knowledge in transferring funds on behalf of Interpal satisfied the statutory *scienter* requirements under § 2333(a). *Weiss v. Nat'l Westminster Bank PLC* ("*Weiss III*"), 768 F.3d 202 (2d Cir. 2014.)

Upon remand, Defendant notified the Court that, in light of the Supreme Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), it intended to assert a personal jurisdiction defense for the first time in these proceedings. (*See* Oct. 17, 2014 Friedman Ltr., *Weiss* Dkt. Entry No. 316.) Decided in January 2014, *Daimler* addressed the extent to which a forum State may exercise general jurisdiction over a foreign corporation. Revisiting its past personal jurisdiction jurisprudence, the Supreme Court clarified that a corporation is subject to general jurisdiction in a forum State only where its contacts are "so continuous and systematic," judged against the corporation's nationwide and worldwide activities, that it is "essentially at home" in that State. *Daimler*, 134 S. Ct. at 761 & n.20 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011)) (internal quotation marks omitted). Aside from the "exceptional case," the Supreme Court explained, a corporation is at home and subject to general jurisdiction *only* in a State that represents its formal place of incorporation or principal place of business. *See Id.* & nn.19-20. The Supreme Court emphasized that the "exceptional case" exists only in rare and compelling circumstances like those in *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), where a foreign corporation maintained a surrogate headquarters in Ohio during a period of

wartime occupation in its native Philippines. *See Id.* at 755-56 & nn.8, 19.

Citing *Daimler*, (*see* Feb. 6, 2014 Friedman Ltr.), Defendant filed the instant motion to dismiss this action pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure. In the alternative, Defendant contends that it is entitled to summary judgment dismissing Plaintiffs' claims because, at most, it is subject to personal jurisdiction in New York only with respect to the 196 transfers it executed on behalf of Interpal using correspondent accounts in New York. (*See* Def.'s Mem. at 18-24.) Renewing arguments from its prior summary judgment motion, Defendant contends that no reasonable juror could find that it possessed the requisite *scienter* to establish liability under the ATA when making those New York Transfers, nor could a reasonable juror find that its activities as of the date of those transfers proximately caused Plaintiffs' injuries.

Plaintiffs oppose the instant motion, arguing as a threshold matter that Defendant waived a personal jurisdiction defense by failing to raise one in its prior motions to dismiss the *Weiss* and *Applebaum* actions, then actively litigating this case for several years. (*See* Pl.s' Opp'n at 3-10.) Plaintiffs further argue that, even if the Court declines to find that Defendant waived its personal jurisdiction defense, it still may exercise specific jurisdiction over Defendant based on its contacts with New York and the broader United States, including most significantly the New York Transfers. (*See Id.* at 12-25.)

On October 8, 2015, oral argument was held on Defendant's motion. (*See generally* Tr.) Following argument, at the Court's request, the parties provided

additional information concerning the extent of the transfers Defendant made to the Charities on behalf of Interpal, and the portion or percentage of those transfers that went through New York or the broader United States. (*See Weiss* Dkt. Entry Nos. 335, 336.) This decision followed.

DISCUSSION

I. Waiver

Taken together, Rules 12(g)(2) and 12(h)(1) of the Federal Rules of Civil Procedure provide that a party that moves to dismiss an action, but omits an available personal jurisdiction defense, forfeits that defense. Even a party that complies with those rules may forfeit the right to contest personal jurisdiction if it unduly delays in asserting that right, or acts inconsistently with it. *See, e.g.*, *Insur. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-04 (1982); *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 61-62 (2d Cir. 1999). However, an exception exists where a defendant seeks to assert a personal jurisdiction defense that previously was not available, as it is well recognized that "a party cannot be deemed to have waived objections or defenses which were not known to be available at the time they could first have been made." *Holzsager v. Valley Hosp.*, 646 F.2d 792, 796 (2d Cir. 1981).

Here, Plaintiffs argue that Defendant waived its personal jurisdiction defense by omitting that defense from its prior motions to dismiss the *Weiss* and *Applebaum* actions, then actively litigating this case over the course of several years. (*See* Pl.s' Opp'n at 3-10.) However, Plaintiffs' argument is foreclosed by *Gucci America, Inc. v. Weixing Li* ("*Gucci II*"), 768 F.3d 122

(2d Cir. 2014). In *Gucci II*, non-party Bank of China appealed from an order of the district court compelling it to comply with an asset freeze injunction and certain disclosures. For purposes of that order, the district court assumed that Bank of China was subject to general jurisdiction in New York because it maintained branch locations there. *See Gucci Am. Inc., v. Weixing Li* ("*Gucci I*"), 2011 WL 6156936, at *4 n.6 (S.D.N.Y. Aug. 23, 2011), *vacated* 768 F.3d 122. While the appeal was pending, the Supreme Court decided *Daimler*, prompting Bank of China to assert an objection that it was not subject to general jurisdiction in New York. That objection ordinarily would have been waived because it was not raised in the district court. However, the Second Circuit declined to find waiver, explaining that Bank of China's personal jurisdiction objection was not available until *Daimler* cast doubt upon, if not outright abrogated, controlling precedent in this Circuit holding that a foreign bank with a branch in New York was subject to general jurisdiction here. *See Id.* at 135-36 (citing *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 93-95 (2d Cir. 2000)) (emphasis in original).

The same conclusion is compelled in this case. Under controlling precedent in this Circuit prior to *Daimler*, Defendant was subject to general jurisdiction in New York because it had a New York Branch through which it routinely conducted business. *Gucci II* expressly acknowledged that, in the wake of *Daimler*, contact of such a nature with a forum State, absent more, is insufficient to sustain general jurisdiction over a foreign corporation. *See Gucci II*, 768 F.3d at 134-35. Accordingly, just as the *Daimler* ruling permitted Bank of China to raise its personal jurisdiction

objection in *Gucci II*, it similarly permits Defendant to assert its personal jurisdiction defense at this juncture. It follows that Defendant did not waive that defense, having asserted it promptly after *Daimler* first made it available.

Other courts in this Circuit, relying on the Second Circuit's application of *Daimler* in *Gucci II*, have held similarly. *See, e.g., In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 2015 WL 4634541, at *30-31 (S.D.N.Y. Aug. 4, 2015); *7 West 57th St. Realty Co., LLC v. Citigroup, Inc.*, 2015 WL 1514539, at *5-7 (S.D.N.Y. Mar. 31, 2015). Plaintiffs do not provide any valid reason why this Court should depart from those decisions, or ignore the clear guidance of *Gucci II*. At best, Plaintiffs argue that, if the Supreme Court narrowed the law on general jurisdiction, it did so three years before *Daimler* in *Goodyear*, 131 S. Ct. 2846, in which case Defendant waived its personal jurisdiction defense by waiting too long to assert it. (*See* Pl.s' Opp'n at 7-10.) Plaintiffs' argument finds limited support outside this Circuit. *See, e.g.*, *Am. Fidelity Assur. Co. v. Bank of N.Y. Mellon*, 2014 WL 4471606 (W.D. Okla. Sept. 10, 2014), *aff'd* 2016 WL 231474 (10th Cir. 2016); *Gilmore v. Palestinian Interim Self-Government Auth.*, 8 F. Supp. 3d 9 (D.D.C. June 23, 2014). However, the Court is not aware of any authority in this Circuit holding that *Goodyear*, rather than *Daimler*, narrowed the law on general jurisdiction. To the contrary, the issue was briefed in *Gucci II* and the Second Circuit ultimately held that *Daimler* effected the relevant change in the law.[5] *See Gucci II*, 768 F.3d at 135-36;

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[5] *See, e.g.,* Letter Brief of Bank of China et al., *Gucci Am., Inc. v. Bank of China*, 2014 WL 1873367, at *3 (2d Cir. Apr. 8, 2014).

see also 7 West 57th St., 2015 WL 1514539, at *6-7 (rejecting argument that *Goodyear* altered the law on general jurisdiction, as "*Gucci America* unequivocally holds . . . that *Daimler* effected a change in the law.")

The Second Circuit recently reaffirmed that holding in *Brown v. Lockheed Martin Corp.*, 2016 WL 641392, at *6-7 (2d Cir. Feb. 18, 2016). There, the Second Circuit explained that "*Goodyear* seemed to have left open the possibility that contacts of substance, deliberately undertaken and of some duration, could place a corporation 'at home' in many locations." *Id.* at *7. However, *Daimler* all but eliminated that possibility, "considerably alter[ing] the analytic landscape for general jurisdiction" by more narrowly holding that, aside from the truly exceptional case, a corporation is at home and subject to general jurisdiction *only* in its place of incorporation or principal place of business. *Id.; see also Daimler*, 134 S. Ct. at 760 ("*Goodyear* did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business") (emphasis in original). As Defendant relies on that newly articulated principle of law for its personal jurisdiction defense, it reasonably could not have raised that defense prior to *Daimler*.

Plaintiffs also erroneously contend that Defendant actually contested personal jurisdiction in this case as early as 2006, or at least could have, despite now asserting that its personal jurisdiction defense only became available after *Daimler*. (Pl.s' Opp'n at 6-7.) Plaintiffs base their argument on representations by Defendant that it does not conduct business in the United States, which Defendant made in: (1) a December 2006 submission to the magistrate judge; and (2)

Defendant's November 2006 answer to the second amended complaint. (*See* Ex. A to the Oct. 16, 2015 Osen Ltr.) Upon review, the Court finds that neither filing reasonably can be construed as asserting an objection as to personal jurisdiction.

In particular, in its 2006 submission to the magistrate judge, Defendant emphasized its lack of business activity in the United States only in the context of arguing that it would be unduly burdensome to disclose business records maintained in the United Kingdom. (*See* Def.'s Opp'n to Pl.s' Discovery Motion, *Weiss* Dkt. Entry No. 83, at 20.) Although the magistrate judge's order on the discovery motions at issue noted, in a footnote, that Defendant had waived a personal jurisdiction defense by not raising one in its answer, *see Weiss v. Nat'l Westminster Bank PLC*, 242 F.R.D. 33, 36 n.5 (E.D.N.Y. 2007), the Court declines to treat that ruling as the law of the case in light of the intervening change in the law effected by *Daimler*. *See Johnson v. Holder*, 564 F.3d 95, 99 (2d Cir. 2009) ("We may depart from the law of the case for cogent or compelling reasons including an intervening change in law . . .") (internal quotation marks and citation omitted).

Plaintiffs' argument that Defendant could have asserted a personal jurisdiction defense earlier in this case fares no better. The crux of Plaintiffs' argument is that, if Defendant really conducted no business whatsoever in the United States, as it represented in 2006, then Defendant had a valid basis to contest personal jurisdiction even under pre-*Daimler* precedent. Nevertheless, as discussed, any argument by Defendant prior to *Daimler* that it was not subject to personal jurisdiction in New York would have been futile because Defendant had a branch in New York during the

timeframe relevant to the Court's jurisdictional inquiry. *See Gucci II*, 768 F.3d at 135-36; *see also Porina v. Marward Shipping Co., Ltd.*, 521 F.3d 122, 128 (2d Cir. 2008) ("In general jurisdiction cases, we examine a defendant's contacts with the forum state over a period that is reasonable under the circumstances—up to an including the date the suit was filed.") The Court declines to find that Defendant, in failing to raise a futile argument, waived its personal jurisdiction defense.

Finally, Plaintiffs argue in passing that, even if an objection as to general jurisdiction was unavailable to Defendant prior to *Daimler*, Defendant still could have challenged the existence of specific jurisdiction earlier in this case. However, any challenge to that effect would have been purely academic because, regardless of the outcome, Defendant still would have been subject to general jurisdiction in New York under existing law at the time. To the extent Defendant failed to contest specific jurisdiction at an earlier time, the Court is satisfied it was for that reason. Accordingly, the Court concludes that Defendant did not waive its personal jurisdiction defense.

II. Personal Jurisdiction

A. Legal Standard

Once personal jurisdiction has been challenged, "the plaintiff bears the burden of establishing that the court has jurisdiction over the defendant." *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 784 (2d Cir. 1999). On a motion to dismiss for lack of personal jurisdiction, the plaintiff need only make a *prima facie* showing that jurisdiction exists to satisfy that burden. *See Dorchester Fin. Secs., Inc. v.*

Banco BRJ, S.A., 722 F.3d 81, 84 (2d Cir. 2013). Where, as here, discovery regarding a defendant's forum contacts has been conducted but no evidentiary hearing has been held, the "plaintiff['s] *prima facie* showing, necessary to defeat a jurisdiction testing motion, must include an averment of facts that, if credited by [the ultimate trier of fact], would suffice to establish jurisdiction over the defendant."[6] *Chloé v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 163 (2d Cir. 2010) (quoting *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567 (2d Cir. 1996)) (alterations in original). The Court must "construe the pleadings and affidavits in the light most favorable to plaintiffs, resolving all doubts in their favor." *Porina*, 521 F.3d at 126. However, the Court is not to "draw argumentative inferences in the plaintiff's favor," *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir. 1994) (internal quotation marks and citation omitted), or "accept as true a legal conclusion couched as a factual allegation." *Jazini v. Nissan Motor Co*., Ltd., 148 F.3d 181, 185 (2d Cir. 1998) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

To make a *prima facie* showing that personal jurisdiction exists, a plaintiff must demonstrate: "(1) proper service of process upon the defendant; (2) a statutory basis for personal jurisdiction over the defendant; and (3) that [the court's] exercise of jurisdiction over the defendant is in accordance with

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[6] No jurisdictional discovery has been ordered in this matter. However, in the course of merits discovery, Plaintiffs sought and obtained extensive disclosure concerning the relevant jurisdictional facts. As such, the parties agree that further discovery directed to the jurisdictional facts would be unnecessary. (*See* Tr. at 15:22-16:1; *see also* Def.'s Mem. at 7 n.8.)

constitutional due process principles." *Stroud v. Tyson Foods, Inc.*, 91 F. Supp. 3d 381, 385 (E.D.N.Y. 2015) (citing *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL* ("*Licci I*"), 673 F.3d 50, 59-60 (2d Cir. 2012)). Here, because Defendant does not dispute that it properly was served with process, the Court's analysis primarily is a two-part inquiry to determine whether there is a statutory basis for jurisdiction, and, if so, whether due process is satisfied.

In conducting this analysis, the Court distinguishes between general and specific jurisdiction. General or "all-purpose" jurisdiction is "based on the defendant's general business contacts with the forum state and permits a court to exercise its power in a case where the subject matter of the suit is unrelated to those contacts." *Metro. Life*, 84 F.3d at 568 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16 & nn.8-9 (1984)). In contrast, specific or "case-linked" jurisdiction depends "on the relationship among the defendant, the forum, and the litigation," *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014), and is said to exist where "a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum." *Metro. Life*, 84 F.3d at 567-68 (quoting *Helicopteros*, 466 U.S. at 414-16 & nn.8-9).

B. General Jurisdiction

A court may exercise general jurisdiction over a foreign corporation to hear any and all claims against it when the corporation's affiliations with the forum State are so continuous and systematic as to render it essentially at home there. *Goodyear*, 131 S. Ct. at 2851 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317

(1945)). Here, it is undisputed that New York is neither Defendant's principal place of business nor its place of incorporation. (*See Weiss* FAC ¶ 439; *Applebaum* Compl. ¶ 288.) Therefore, Defendant is not at home in New York under either of the two paradigm bases for general jurisdiction discussed in *Daimler*. *See Daimler*, 134 S. Ct. at 760. It follows that exercising general jurisdiction over Defendant would not comport with the principles of due process articulated in *Daimler* unless this is an exceptional case, akin to *Perkins*, 342 U.S. 437, where Defendant's contacts with New York are so substantial and of such a nature as to render it essentially at home there. *See Daimler*, 134 S. Ct. at 761 n.19.

The Court has little difficulty concluding that the facts here do not present an exceptional case. Defendant's alleged contacts with New York are nowhere near as substantial as those in *Perkins*, where the defendant corporation maintained a surrogate headquarters in Ohio, the forum State. *Id*. By contrast, Defendant in this case merely had a New York Branch, which it used just for that discrete element of its worldwide operations that required clearing U.S. Dollar transfers. *See Brown*, 2016 WL 641392, at *8 (for purposes of a general jurisdiction analysis, a corporation's in-forum conduct must be assessed "in the context of the company's overall activity" throughout the United States and the world) (citing *Daimler*, 134 S. Ct. at 762 n.20) (emphasis omitted). In fact, such contacts with New York are even more attenuated than those maintained by Bank of China in *Gucci II*, which the Second Circuit deemed insufficient to permit the exercise of general jurisdiction. *See Gucci II*, 768 F.3d at 135.

Moreover, Defendant's New York contacts fall far short of the contacts maintained with Connecticut by Lockheed Martin ("Lockheed"), the corporate defendant that was the subject of the Second Circuit's recent decision in *Brown*. For example, Lockheed continuously maintained a physical presence in Connecticut for over 30 years, ran operations out of as many as four leased locations in the State, employed up to 70 workers there, and derived about $160 million in revenue from its Connecticut-based work during the relevant timeframe.[7] *Brown*, 2016 WL 641392, at *6-7. Nevertheless, the Second Circuit held that those facts still did not rise to an exceptional case that would support general jurisdiction over Lockheed in a forum where it neither was headquartered nor incorporated. *Id.* at *7-9. In reaching its decision, the Second Circuit emphasized that a corporation's "mere contacts" with such a forum, "no matter how systematic and continuous, are extraordinarily unlikely to add up to an exceptional case." *Id.* at *8 (internal quotation marks omitted).

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[7] Lockheed also was formally registered to do business in Connecticut. Notably, the Second Circuit declined to interpret the Connecticut business registration statute as requiring foreign corporations to consent to general jurisdiction as a condition of registration. *Brown*, 2016 WL 641392, at *9-18. The Second Circuit further observed that, even if the statute required such consent, it is questionable whether such consent validly could confer general jurisdiction over a foreign corporation after *Daimler*. *Id.* at *18. Here, even if Defendant's New York Branch was registered in New York under § 200 of the Banking Law, the Court declines to find that Defendant consented to general jurisdiction in New York by virtue of such registration. *See 7 West 57th St.*, 2015 WL 1514539, at *11 ("The plain language of this provision limits any consent to personal jurisdiction by registered banks to *specific* personal jurisdiction.") (emphasis in original).

Given the fact that neither *Gucci II* nor *Brown* amounted to an exceptional case, the instant case clearly is not exceptional either. Accordingly, in light of *Daimler*, there is no basis for the Court to exercise general jurisdiction over Defendant in New York.

C. Specific Jurisdiction Under Rule 4(k)(1)(A)

Rule 4(k)(1)(A) of the Federal Rules of Civil Procedure permits a federal court to "exercise personal jurisdiction to the extent of the applicable [State] statutes." *Peterson v. Islamic Republic of Iran*, 2013 WL 1155576, at *11 (S.D.N.Y. Mar. 13, 2013), *aff'd* 758 F.3d 185 (2d Cir. 2014) (citing Fed. R. Civ. P. 4(k)(1)(A)). Under this rule, a federal court may look to the long-arm statute of the State in which it sits to establish a statutory basis for the exercise of personal jurisdiction over a defendant. Here, Plaintiffs invoke provisions of New York's longarm statute, alleging that Defendant is subject to specific jurisdiction under New York Civil Practice Law and Rules ("C.P.L.R.") §§ 302(a)(1) and (a)(3). (*See* Pl.s' Opp'n at 15-17.) Because the Court concludes that C.P.L.R. § 302(a)(1) ("§ 302(a)(1)") permits the exercise of specific jurisdiction over Defendant, it does not consider whether jurisdiction also exists under § 302(a)(3).

1. CPLR § 302(a)(1)

Pursuant to § 302(a)(1), a court may exercise personal jurisdiction over a non-domiciliary that "transacts any business within the state." N.Y. C.P.L.R. § 302(a)(1). This provision confers jurisdiction over a defendant if two requirements are met. First, the defendant must have transacted business in New York. Known as the "purposeful availment" prong of § 302(a)(1), this requirement calls for a showing that

the defendant "purposefully avail[ed] itself of the privilege of conducting activities within New York . . . thereby invoking the benefits and protections of its laws." *Id.* at 61 (internal quotation marks and citations omitted). The second requirement, known as the "nexus" prong of § 302(a)(1), holds that there must be an "articulable nexus" or "substantial relationship" between the plaintiff's claim and the defendant's transaction in New York. *See Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 246 (2d Cir. 2007) (quoting *Henderson v. INS*, 157 F.3d 106, 123 (2d Cir. 1998)).

In *Licci v. Lebanese Canadian Bank, SAL* ("*Licci II*"), 20 N.Y.3d 327 (2012), the New York State Court of Appeals ("Court of Appeals") answered questions certified from the Second Circuit concerning the reach of § 302(a)(1) in the context of an action, like the instant one, alleging that a foreign bank violated the ATA by knowingly transferring funds that supported an FTO. Notably, the defendant bank in *Licci II* "did not operate branches or offices, or maintain employees, in the United States." *Id.* at 332. Nevertheless, the Court of Appeals held that the bank transacted business in New York by executing dozens of wire transfers through a correspondent bank account in New York on behalf of an entity that allegedly served as the financial arm of an FTO. As the Court of Appeals explained: "[A] foreign bank's repeated use of a correspondent account in New York on behalf of a client—in effect, a course of dealing—show[s] purposeful availment of New York's dependable and transparent banking system, the dollar as a stable and fungible currency, and the predictable jurisdictional and commercial law of New York and the United States." *Id.*

at 339 (internal quotations marks and citation omitted).

The Court of Appeals further explained that the nexus prong of § 302(a)(1) does not demand a causal connection between the defendant's New York transaction the plaintiff's claim, but instead requires only a "relatedness . . . such that the latter is not completely unmoored from the former." *Id.* at 339. This "relatively permissive" nexus is satisfied where "at least one element [of the plaintiff's claim] arises from the [defendant's] New York contacts." *Id.* at 339, 341. The Court of Appeals held that this requisite nexus was established in *Licci II* because the defendant bank, in utilizing a correspondent account in New York allegedly to send money to a terrorist organization, purportedly violated the very statutes under which the plaintiffs sued. *Id.* at 340. Furthermore, the bank did not direct those funds through New York "once or twice by mistake," but deliberately and repeatedly used a New York account allegedly to support the same terrorist organization accused of perpetrating the attacks in which the plaintiffs were injured. *Id.* at 340-41.

Turning to the instant action, Defendant's relevant New York conduct is even more substantial and sustained than that of the foreign bank in the *Licci* cases (collectively, "*Licci*"). Whereas the bank in *Licci* maintained only a correspondent account as its sole point of contact in New York, Defendant had a New York Branch. Defendant routinely conducted business in New York through a correspondent account it maintained at that branch, utilizing that account to clear U.S. Dollar transfers requested by its customers. In doing so, Defendant necessarily availed itself of the benefits and protections accorded to such transactions

when carried out using New York's dependable banking system, under the auspices of New York banking and commercial laws. *See Licci II*, 20 N.Y.3d at 339-40. These facts satisfy the purposeful availment prong of § 302(a)(1).

With respect to the nexus prong of § 302(a)(1), the relevant facts further demonstrate a close relatedness between Plaintiffs' claims in this action and Defendant's New York conduct. Most significantly, in executing the New York Transfers, Defendant allegedly used New York's banking system to effect the very financial support of Hamas that is the basis for Plaintiffs' claims. While the New York Transfers represent only a subset of the total transfers Defendant made to the Charities on behalf of Interpal, they integrally constitute part of Defendant's alleged support of Hamas and its terrorist activities, including the attacks in which Plaintiffs were injured. As such, the New York Transfers unquestionably are among the financial services underlying Plaintiffs' claims.

That nexus would be too attenuated if, contrary to the facts alleged here, Defendant routed transfers through New York just "once or twice by mistake," or executed the New York Transfers at a time far removed from the attacks that caused Plaintiffs' injuries. *Licci II*, 20 N.Y.3d at 340. However, 196 separate times, Defendant deliberately routed a transfer through New York in response to a specific request by Interpal to transmit funds in U.S. Dollars. Those transfers by no means were *de minimis*, representing as much as $4,345,342.35 in total funds allegedly transferred to the Charities. (*See* Oct. 16, 2015 Osen Ltr.) Furthermore, the first New York Transfer occurred in 1996, while the last New York Transfer

purportedly occurred on August 15, 2003. (*See* Def.'s Mem. at 5, 18.) As such, those transfers not only overlapped with the attacks in 2002 through 2004 that caused Plaintiffs' injuries, but also occurred at a time when Defendant allegedly knew that funds it transferred on behalf of Interpal were being used to support a terrorist organization. (*See, e.g., Weiss* FAC ¶¶ 550-561; *Applebaum* Compl. ¶¶ 398-407.)

Defendant nevertheless argues that the nexus required by § 302(a)(1) is foreclosed because Plaintiffs have not proven with respect to any New York Transfer that the beneficiary Charity actually received and took possession of the underlying funds. (*See* Def.'s Mem. at 15-16.) However, it is not Plaintiffs' burden to adduce any such proof at this stage. Rather, Plaintiffs need only plead facts that, if credited, would establish jurisdiction over Defendant. *See Metro. Life*, 84 F.3d at 567. Plaintiffs have done so, having alleged on the basis of the relevant electronic transfer records that each New York Transfer was directed to a beneficiary Charity, was routed by Defendant through a correspondent account in New York, and reached a separate correspondent account in New York maintained by the beneficiary Charity's bank.

Finally, a court analyzing jurisdiction under § 302(a)(1) must consider not only the quantity of a defendant's contacts in New York, but also the quality of those contacts when viewed in the totality of the circumstances. *Fischbarg v. Doucet*, 9 N.Y.3d 375, 380 (2007); *Farkas v. Farkas*, 36 A.D.3d 852, 853 (2d Dep't 2007). Here, Defendant had a New York Branch where it maintained a correspondent account to facilitate the clearing of U.S. Dollar transfers requested by its customers. Whatever efficiency and cost savings

Defendant gained as a result allowed Defendant to retain relationships with customers that had a need to deal in U.S. currency, a contingent that from time to time included Interpal. Most importantly, Defendant executed the 196 New York Transfers, repeatedly and deliberately using New York's banking system to effect the alleged financial support of Hamas that is the basis for Plaintiffs' claims. Given the quality of those contacts and their close connection to New York, the Court concludes that § 302(a)(1) permits the exercise of jurisdiction over Defendant.

2. Scope Of Jurisdiction Under § 302(a)(1)

A plaintiff must establish personal jurisdiction with respect to each claim asserted. *See Sunward Elecs., Inc. v. McDonald*, 362 F.3d 17, 24 (2d Cir. 2004). Invoking this principle, Defendant argues that each Plaintiff in this action asserts a claim under the ATA separately and individually, and that jurisdiction must be established uniquely for each one of these claims. (*See* Def.'s Reply in Further Supp. of Mot. to Dismiss ("Def.s Reply"), *Weiss* Dkt Entry No. 330.) Plaintiffs argue otherwise, essentially contending that they assert a "claim" under the ATA, and that a single New York contact that would support the exercise of specific jurisdiction is sufficient to confer jurisdiction over that entire claim.

Because Plaintiffs allege injuries in connection with 15 different attacks, each associated with a distinct class of Plaintiffs, the Court disagrees that all of their claims can be aggregated into a single, unitary claim under the ATA for purposes of establishing specific jurisdiction. Even so, the Court concludes that Defendant is subject to jurisdiction under § 302(a)(1) with

respect to claims made in connection with all 15 attacks. To explain why, it is useful to consider the result if Plaintiffs had pursued their claims in 15 separate actions, each premised upon a single attack. As previously noted, the first New York Transfer was in 1996 and the last transfer purportedly occurred on August 15, 2003. (*See* Def.'s Mem. at 5, 18.) Given the timing of those transfers and the substantial amount underlying them, Plaintiffs in all 15 actions legitimately could rely upon the New York Transfers as among the financial services and material support allegedly provided by Defendant in violation of the ATA.

That conceivably would not be the case if, for instance, one of the attacks for which Plaintiffs sought recovery occurred in 1991, five years before the first New York Transfer. Under such circumstances, the nexus between claims arising from the 1991 attack and a series of transfers that did not even begin to occur until five years later theoretically would be too attenuated to support jurisdiction under § 302(a)(1). *See, e.g.*, *Standard Chartered Bank* v. *Ahmad Hamad Al Gosaibi & Bros. Co.*, No. 653506/2011, 2013 N.Y. Slip. Op. 32312(U), at *3-5 (Sup. Ct. N.Y. Cnty. Sept. 24, 2013) (nexus required under § 302(a)(1) not satisfied where 2009 default could not have arisen from business the defendant transacted in New York in 2010 and thereafter). However, those are not the facts here. Even assuming that Plaintiffs had pursued their claims in 15 separate actions, the New York Transfers would embody purportedly unlawful conduct relevant to establishing Defendant's liability in each action. As such, the claims in each action could be said to arise, at least in part, from the New York Transfers, in which

case § 302(a)(1) would confer jurisdiction over Defendant in each action. *See Licci II*, 20 N.Y.3d at 341.

Nevertheless, Defendant contends that the scope of jurisdiction the Court may exercise in this action, where Plaintiffs assert their claims collectively, is narrower and does not permit adjudication of all of Plaintiffs' claims. Defendant's position rests on the fact that the New York Transfers are not the only transfers underlying Plaintiffs' claims. Rather, aside from those 196 transfers, Defendant executed approximately 300 other transfers to the Charities on behalf of Interpal during the relevant timeframe, none of which was routed through New York or the United States. (*See* Oct. 16, 2015 Osen Ltr.) Defendant contends that, if the Court were to adjudicate all of Plaintiffs' claims arising from all of the relevant transfers, it necessarily would be exercising specific jurisdiction not only with respect to the New York Transfers, but also with respect to numerous other transfers that never touched New York or the United States. (*See* Def.'s Mem. at 8-10) ("This Court cannot treat [Defendant's] prior wire transfers that touched New York as providing a basis for asserting personal jurisdiction over [Defendant] in New York for claims based on subsequent transfers that never touched the United States.") According to Defendant, exercising jurisdiction over the latter category of transfers is impermissible in a "specific jurisdiction universe" because those transfers, which were not routed through New York, have no connection to Defendant's New York conduct.

Defendant's argument is fundamentally flawed, however, as it erroneously assumes that the Court's adjudicatory power over Defendant is defined according to which individual *transfers* satisfy the

jurisdictional requirements of § 302(a)(1), rather than which *claims* satisfy those requirements. In fact, the two are distinct. Plaintiffs' claims are that Defendant violated the ATA, causing injury, by providing material support to an FTO and knowingly financing terrorism. *See* 18 U.S.C. §§ 2339B and 2339C. Those claims do not necessarily correspond one-to-one with particular transfers, but instead rest upon the millions of dollars Defendant allegedly transferred to Hamas front organizations in close temporal proximity to the 15 attacks in which Plaintiffs were injured. Because the New York Transfers were a substantial part of that allegedly unlawful conduct, the Court may exercise jurisdiction with respect to claims made in connection with all 15 attacks.

This is true notwithstanding the fact that those claims also may arise from other transfers Defendant did not route through New York, including ones performed after the last of the New York Transfers was executed in August 2003.[8] There is no requirement

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[8] For this reason, the Court rejects Defendant's argument that Plaintiffs should be required to prove their claims based on the state of affairs, and what Defendant knew, as of the date of the last New York Transfer. (*See* Def.'s Mem. at 16-17.) That argument is premised on the fallacy that the Court only may exercise jurisdiction over the individual New York Transfers, which uniquely give rise to specific claims that are not premised on any other transfers. That is not the case, however, as all of Plaintiffs' claims arise more broadly from the many transfers Defendant made to the Charities during the relevant timeframe, of which the New York Transfers were a part. Moreover, the Court unequivocally rejects Defendant's unsupported contention that personal jurisdiction limits the evidence Plaintiffs may use to prove their claims, confining it just to what existed at the time of the last New York Transfer.

under § 302(a)(1) that a plaintiff's claim must arise *exclusively* from New York conduct. To the contrary, as long as there is a relatedness between a plaintiff's claim and the defendant's New York transaction, § 302(a)(1) confers jurisdiction even if some, or all, of the acts constituting the breach sued upon occurred outside New York. *See Hoffritz for Cutlery, Inc. v. Amajac Ltd.*, 763 F.2d 55, 59 (2d Cir. 1985) (applying § 302(a)(1) and rejecting the district court's "finding of no jurisdiction over defendants merely on the basis that the acts alleged in the complaint did not take place in New York."); *Hedlund v. Products from Sweden, Inc.*, 698 F. Supp. 1087, 1091-93 (S.D.N.Y.1988) (finding defendant subject to jurisdiction in New York under § 302(a)(1) with respect to a claim of tortious interference that arose from conduct in Sweden). Thus, even if Defendant's conduct outside New York substantially gave rise to Plaintiffs' claims, Plaintiffs' claims still are within the permissible scope of jurisdiction under § 302(a)(1) because they are all "sufficiently related to the business transacted [in New York] that it would not be unfair . . . to subject [Defendant] to suit in New York." *Hoffritz*, 763 F.2d at 59.

The Court is not persuaded that a different result is compelled by *Fontanetta v. American Board of Internal Medicine*, 421 F.2d 355 (2d Cir. 1970), a case Defendant heavily relies upon even though it was decided 45 years ago without the benefit of clear precedent from the New York courts regarding how § 302(a)(1) should be applied. *See Hoffritz*, 763 F.2d at 61. *Fontanetta* involved a physician who sought certification as an internist from the American Board of Internal Medicine, which required passing both an oral and written exam. *See Fontanetta*, 421 F.2d at 356. The

physician passed the written exam in New York in 1963, but twice failed the oral exam—once in Philadelphia, Pennsylvania in 1965, and once in St. Louis, Missouri in 1967. *Id.* After he failed the oral exam for a second time, the physician brought suit in New York to compel the Board to disclose the reasons why he had failed the two oral exams, and to issue the requested certification. *Id.* Applying § 302(a)(1), the Second Circuit held that the physician's claim, which concerned only the oral exam, was not sufficiently related to the written exam to sustain jurisdiction in New York. *Id.* at 357-58. As the Second Circuit later explained in *Hoffritz*: "We held [in *Fontanetta*] that the substantive differences between the two kinds of examination, together with the separation both in time and geographic location of the oral examination from the written examination, rendered unrealistic a view of the two as one unit." *Hoffritz*, 763 F.2d at 61.

Here, while the transfers at issue vary in time and location to a degree, substantively they constitute a single course of conduct by Defendant that purportedly entailed violations of the same statute in the same manner with respect to all of Plaintiffs' claims. Moreover, whereas in *Fontanetta* the plaintiff's claim did not relate to the written examination, the Court already has determined that all of Plaintiffs' claims in this action relate to the New York Transfers. *See Id.* at 61-62 (similarly distinguishing *Fontanetta* and holding that jurisdiction existed under § 302(a)(1) with respect to a claim "sufficiently connected to defendants' transaction of business in New York.") As such, the Court's finding that it may exercise jurisdiction with respect to all of Plaintiffs' claims is not inconsistent with *Fontanetta*.

Defendant's reliance on *State v. Samaritan Asset Management Services, Inc.*, 22 Misc.3d 669 (Sup. Ct. N.Y. Cnty. 2008), similarly is unavailing. There, the New York Attorney General brought a securities fraud action against the defendants under the State's Martin Act, N.Y. Gen. Bus. Law § 352 *et. seq*. The court dismissed the action in part, holding that it could exercise personal jurisdiction with respect to trades the defendants executed through New York brokers, but not with respect to trades executed through a trust company located in Phoenix, Arizona. *Id.* at 676-77. However, that holding substantially was a consequence of the territorial limitations of the Martin Act, which applies exclusively to acts "within and from" New York. *See Id.* at 674, 676-77. No such limitation binds the Court here. To the contrary, the ATA expressly is directed at terrorist activities that "occur primarily outside the territorial jurisdiction of the United States." 18 U.S.C. § 2331(1). Indeed, the very purpose of the ATA was to "provide a new civil cause of action in Federal law for international terrorism that provides extraterritorial jurisdiction over terrorist acts abroad against United States nationals." *In re September 11 Litig.*, 751 F.3d 86, 93 (2d Cir. 2014) (quoting H.R. 2222, 102d Cong. (1992)) (internal quotation marks omitted). While these are concepts of territorial jurisdiction, not personal jurisdiction, they distinguish *Samaritan* and render it inapposite here.

D. Jurisdiction Under Rule 4(k)(1)(C)

Plaintiffs argue that Rule 4(k)(1)(C) of the Federal Rules of Civil Procedure provides an additional statutory basis for the Court to exercise personal jurisdiction over Defendant. The Court agrees. Under Rule 4(k)(1)(C), personal jurisdiction may be established

through proper service of process upon a defendant pursuant to a federal statute that contains its own service provision. *See* Fed. R. Civ. P. 4(k)(1)(C) ("Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant . . . when authorized by a federal statute."); *see also* 4B Wright & Miller et al., Federal Practice & Procedure § 1125 (4th ed.) As relevant here, the ATA expressly authorizes nationwide service of process, thereby establishing personal jurisdiction over a defendant properly served under the statute.[9]

Here, Defendant does not dispute that it properly was served with process in New York, Texas, and Connecticut in connection with the *Weiss* action, and voluntarily accepted service in connection with the *Applebaum* action. (*See Weiss* Dkt Entry Nos. 3, 7, 8; *Applebaum* Dkt. Entry No. 6.) As such, Rule 4(k)(1)(C) provides an additional basis for this Court to exercise personal jurisdiction over Defendant, to the extent

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[9] *See* 18 U.S.C. § 2334 (providing for nationwide service of process "where[ever] the defendant resides, is found, or has an agent"); *Licci I*, 673 F.3d at 59 n.8 (2d Cir. 2012) (acknowledging the ATA's nationwide service of process provision as a possible basis for personal jurisdiction); *Stansell v. BGP, Inc.,* 2011 WL 1296881, at *3 (M.D. Fla. Mar. 31, 2011); *Sokolow v. Palestine Liberation Org.*, 2011 WL 1345086, at *2 (S.D.N.Y. Mar. 30, 2011); *Wultz v. Islamic Republic of Iran* ("*Wultz I*"), 755 F. Supp. 2d 1, 31-32 (D.D.C. 2010); *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 806-07 (S.D.N.Y. 2005); *see also IUE AFL-CIO Pension Fund v. Hermann*, 9 F.3d 1049, 1056 (2d Cir. 1993) (federal statute authorizing nationwide service of process may be used to establish personal jurisdiction).

permitted by due process.[10] *See In re Terrorist Attacks*, 349 F. Supp. 2d at 806 (exercise of personal jurisdiction pursuant to Rule 4(k)(1)(C) still requires demonstration that defendant has sufficient "minimum contacts" to satisfy traditional due process inquiry); *see also Wultz I*, 755 F. Supp. 2d at 32 ("Nationwide service of process does not dispense with the requirement that an exercise of personal jurisdiction comport with the Due Process Clause.")

E. Constitutional Due Process

Having concluded that there is a statutory basis to exercise personal jurisdiction over Defendant, the Court must consider whether exercising such jurisdiction would comport with the due process protections provided by the United States Constitution. As articulated by the Supreme Court in *International Shoe*, the touchstone due process principle requires that the defendant "have certain minimum contacts [with the forum state] such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL* ("*Licci III*"), 732 F.3d 161, 169 (2d Cir. 2013) (quoting *Int'l Shoe*, 326 U.S. at 316) (alterations in

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[10] In *Wultz v. Republic of Iran* ("*Wultz II*"), 762 F. Supp. 2d 18, 25-29 (D.D.C. 2011), the district court held that the ATA's nationwide service of process provision cannot be invoked to establish personal jurisdiction unless the first clause of that provision, concerning proper venue under the statute, also is satisfied. Here, Defendant has waived any argument that venue is improper by failing to raise that issue. In any event, given that the ATA provides for venue in any district where any plaintiff resides or where the defendant is served, the Court would find that venue is proper in this district even if Defendant had asserted a challenge. *See* 18 U.S.C. § 2334(a).

original). Assuming the threshold showing of "minimum contacts" is satisfied, the Court also must consider whether its exercise of jurisdiction would be reasonable under the circumstances. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985); *see also Licci III*, 732 F.3d at 173-74.

Notably, after the Court of Appeals determined in *Licci II* that the defendant bank was subject to jurisdiction in New York under § 302(a)(1), the Second Circuit in *Licci III* considered whether exercising such jurisdiction would comport with due process. In concluding that due process was satisfied, the Second Circuit observed that it would be "rare" and "unusual" for a court to determine that the exercise of personal jurisdiction over a defendant was permitted by § 302(a)(1), but prohibited under principles of due process. *Licci III*, 732 F.3d at 170. In fact, the Second Circuit noted that it was aware of no such decisions within this Circuit. *Id.* Therefore, given the Court's prior determination that § 302(a)(1) permits the exercise of jurisdiction over Defendant, it would be unusual, and even unprecedented, for the Court to find that due process is not satisfied here.

1. Minimum Contacts

Where, as here, a court's specific jurisdiction is invoked, "minimum contacts" sufficient to satisfy due process exist if "the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there." *Licci III*, 732 F.3d at 170 (quoting *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 127 (2d Cir. 2002.)) Courts typically conduct this inquiry under two separate prongs: (1) the "purposeful

availment" prong, "whereby the court determines whether the entity deliberately directed its conduct at the forum"; and (2) the "relatedness" prong, "whereby the court determines whether the controversy at issue arose out of or related to the entity's in-forum conduct." *Gucci Am., Inc. v. Weixing Li* ("*Gucci III*"), 2015 WL 5707135, at *7 (S.D.N.Y. Sept. 29, 2015) (citing *Chew v. Dietrich*, 143 F.3d 24, 27-29 (2d Cir. 1998)).

Because this action arises under the ATA, a nationwide service of process statute, the appropriate "minimum contacts" inquiry is whether Defendant has sufficient contacts with the United States as a whole.[11] Nevertheless, aside from offices and/or agencies Defendant purportedly maintained in Connecticut and Texas, essentially all of the contacts relevant to the Court's due process inquiry involve Defendant's conduct in New York. Moreover, having already determined that Defendant's New York conduct satisfies the purposeful availment prong of § 302(a)(1), the Court has little difficulty concluding that it similarly demonstrates purposeful availment sufficient to establish "minimum contacts" with the United States.

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[11] *See LIBOR*, 2015 WL 4634541, at *18; *Wultz II*, 762 F. Supp. 2d at 25; *In re Terrorist Attacks*, 349 F. Supp. 2d at 806 (Where jurisdiction is asserted under the ATA's service provision, the "relevant inquiry under such circumstances is whether the defendant has minimum contacts with the United States as a whole [to satisfy Fifth Amendment due process requirements], rather than . . . with the particular state in which the federal court sits.") (quoting *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 153 F. Supp. 2d 76, 87 (D.R.I. 2001)) (alterations in original). *But see Gucci II*, 768 F.3d at 142 n.21 (noting that the Second Circuit has not yet decided whether the "national contacts" approach is proper for determining personal jurisdiction in cases arising under federal statutes that authorize nationwide service.)

See Licci III, 732 F.3d at 170. There is nothing remotely "random, isolated, or fortuitous" about that conduct that would call into question whether it was purposefully directed at the United States. *Id.* at 171 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)). Defendant had a New York Branch and systematically utilized a correspondent account at that branch as a clearing channel for U.S. Dollar transfers requested by its customers.

Most notably, Defendant deliberately used New York's banking system to execute the New York Transfers. Given that "dozens" of similar transfers routed through a New York correspondent account were sufficient to establish purposeful availment in *Licci III*, the New York Transfers demonstrate such availment *a fortiori* because they represent almost 200 transactions totaling over $4 million carried out through Defendant's own branch in New York (or otherwise through correspondent accounts Defendant maintained in New York.) As such, there is no question that Defendant purposefully availed itself of the "privilege of conducting business in [New York]," thereby subjecting itself to suit in the United States with respect to any and all claims substantially related to such conduct. *Licci III*, 732 F.3d at 171 (quoting *Bank Brussels Lambert*, 305 F.3d at 127); *see also Gucci III*, 2015 WL 5707135, at *8.

Turning to the question of relatedness, the Second Circuit held in *Licci III* that the defendant bank's use of an in-forum correspondent account to execute the very wire transfers that were the basis for the plaintiffs' claims satisfied "minimum contacts." As the Second Circuit explained:

> [W]e by no means suggest that a foreign defendant's 'mere maintenance' of a correspondent account in the United States is sufficient to support the constitutional exercise of personal jurisdiction over the account-holder in connection with any controversy. In this case, the correspondent account at issue is alleged to have been used as an instrument to achieve the very wrong alleged. We conclude that in connection with this particular jurisdictional controversy—a lawsuit seeking redress for the allegedly unlawful provision of banking services of which the wire transfers are a part—allegations of [the defendant's] repeated, intentional execution of U.S.-dollar-denominated wire transfers on behalf of Shahid, in order to further Hizballah's terrorist goals, are sufficient [to sustain jurisdiction].

Licci III, 732 F.3d at 171. The same conclusion is compelled here, where the New York Transfers are among the allegedly unlawful financial services Defendant provided to Interpal for which Plaintiffs seek redress in this action.

Defendant attempts to distinguish *Licci III* on the ground that all of the wire transfers at issue in that case were routed through New York, whereas in this case only 196 of the approximately 496 transfers at issue went through New York. However, in *Licci III*, the Second Circuit did not hold, or even suggest, that due process was satisfied because the transfers at issue were routed *exclusively* through New York. That fact was not even made explicit in the Second Circuit's opinion. Rather, per the Second Circuit's express holding, "minimum contacts" were established by the

defendant bank's *repeated* and *deliberate* use of a New York correspondent account to effect the financial services underlying the plaintiffs' claims. *See Id.* at 171-73; *Wultz I*, 755 F. Supp. 2d at 34 (suggesting that a single wire transfer knowingly performed in the U.S. for the benefit of a terrorist organization could support a finding of specific jurisdiction in the ATA context); *see also Burger King*, 471 U.S. at 475 n.18 ("So long as it creates a substantial connection with the forum, even a single act can support jurisdiction.") (internal quotation marks and citation omitted). The facts alleged here demonstrate the same repeated and deliberate conduct by Defendant.

Furthermore, such conduct allegedly resulted in the provision of over $4 million to the Charities, which thereafter purportedly was delivered into the hands of Hamas during the same timeframe that Hamas carried out the attacks in which Plaintiffs were injured. *Contra 7 West 57th St.*, 2015 WL 1514539, at *10 ("minimum contacts" not satisfied in LIBOR fixing case because defendant bank's conduct in New York had no alleged connection with plaintiff's injury and did not even occur during the relevant timeframe). Plaintiffs further allege that Defendant executed the New York Transfers at a time when it knew, or at least suspected, that it was supporting a terrorist organization by transferring money from Interpal to the Charities. *Cf. Wultz I*, 755 F. Supp. 2d at 34 ("Where a bank has knowledge that it is funding terrorists . . . contacts created by such funding can support such a finding [of specific jurisdiction].") (citing *In re Terrorist Attacks*

on Sept. 11, 2001, 718 F. Supp. 2d 456, 488-90 (S.D.N.Y. 2010)).[12]

For the reasons discussed by the Court when analyzing the scope of jurisdiction under § 302(a)(1), *supra*, the Court further concludes that Defendant's New York conduct established "minimum contacts" as to which all of Plaintiffs' claims substantially relate. As such, the Court finds that it may exercise jurisdiction over Defendant with respect to all of those claims without offending due process. *See Walden*, 134 S. Ct. at 1121 ("minimum contacts" satisfied if "the defendant's suit-related conduct . . . create[s] a substantial connection with the forum State."). Furthermore, as

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[12] In its March 28, 2013 summary judgment Order, the Court ruled that the evidence in the record was insufficient to establish that, at any time between 1994 and 2007, Defendant had the requisite *scienter* to support liability under § 2333(a), *i.e.* that Defendant knew (or exhibited deliberate indifference to whether) Interpal provided material support to Hamas. In vacating the Court's Order, the Second Circuit held that Plaintiffs had presented sufficient evidence to create a triable issue of fact as to *scienter*. According to Defendant, all such evidence specifically identified by the Second Circuit concerned facts *after* August 15, 2003, the date when the last New York Transfer was executed. Therefore, Defendant argues that there is no evidence to support a conclusion that, at the time it made the New York Transfers, it knew that it was providing support to a terrorist organization. (Def.'s Mem. at 19-24.) Whatever relevance that argument may have to Plaintiffs' burden to prove *scienter* at trial, it is not dispositive as to the question of personal jurisdiction presently before the Court, particularly in light of: (1) the millions of dollars Defendant funneled through New York on Interpal's behalf for the benefit of the Charities in close proximity to the attacks at issue; (2) the fact that the Second Circuit, in its decision, actually did discuss evidence potentially relevant to a finding of *scienter* prior to August 2003; and (3) Plaintiffs' burden at this stage, which does not require them to *prove* any jurisdictional fact.

acknowledged by the Second Circuit, there is authority for the "general proposition that use of a forum's banking system as part of an allegedly wrongful course of conduct may expose the user to suits seeking redress in that forum when that use is an integral part of the wrongful conduct." *Licci III*, 732 F.3d at 172 n.7. Here, Defendant is a sophisticated financial institution that had a New York Branch and routinely conducted business in the United States through an account it maintained at that branch. As such, it reasonably can be presumed that Defendant was "fully aware of U.S. law concerning financial institutions, including provisions of the ATA criminalizing material support to terrorist organizations." *Wultz I*, 755 F. Supp. 2d at 34. Assuming the truth of Plaintiffs' allegations, Defendant reasonably could have foreseen that repeatedly availing itself of New York and its laws to execute the New York Transfers would subject it to jurisdiction in the United States with respect to the overall course of conduct of which those transfers were a part.

Nevertheless, Defendant asserts the same fallacy as it did with respect to § 302(a)(1), arguing that due process prohibits the Court from exercising "jurisdiction" over transfers that never went through New York or the United States. Defendant contends that this principle is exemplified in a decision recently reached by the Honorable Naomi R. Buchwald, United States District Judge for the Southern District of New York, in a multidistrict litigation concerning alleged manipulation of the London Interbank Offer Rate ("LIBOR"). (*See* Oct. 16, 2015 Friedman Ltr., *Weiss* Dkt. Entry No. 336; *see also* Tr. 11:3-18, 20:5-7.) In basic terms, LIBOR is a set of interest-rate benchmarks calculated on the basis of quotes from a panel of leading

banks, each of which reports on a daily basis the rate at which it could borrow funds under certain stated conditions. *See LIBOR*, 2015 WL 4634541, at *2-3. The plaintiffs in the multidistrict litigation allege, *inter alia*, that the panel banks knowingly and persistently submitted falsely high or low quotes to manipulate LIBOR in a manner designed to fraudulently improve their respective positions in the market. As a threshold ruling, Judge Buchwald indicated that specific jurisdiction would not exist in New York with respect to any claim alleging fraud based upon a false LIBOR quote that neither was determined nor submitted in New York, nor otherwise requested by a trader located in New York. *See Id.* at *32.

Whatever basis in the facts and law that ruling had in *LIBOR*, no such basis can be found here. In that case, each purportedly false LIBOR submission at issue was alleged to have caused a distinct and identifiable harm that directly gave rise to a specific plaintiff's claim. The transfers at issue here are not comparable. Without rehashing the Court's entire analysis concerning the scope of jurisdiction under § 302(a)(1), *supra*, Plaintiffs' claims are that Defendant provided material support to an FTO and knowingly financed terrorism. Those claims rest upon the many transfers Defendant made to the Charities on behalf of Interpal in close temporal proximity to the 15 attacks in which Plaintiffs were injured. Due process does not require that the Court secure a basis for jurisdiction over all of those transfers in order to adjudicate Plaintiffs' claims. Rather, as discussed, Plaintiffs must show that there is a substantial relationship between claims made in connection with all 15 attacks and Defendant's relevant New York conduct. *See Walden*, 134

S. Ct. at 1121. Based on its prior determination that Plaintiffs adequately have done so, *prima facie*, the Court may exercise jurisdiction with respect to all of their claims without offending due process.

2. Reasonableness

At the second stage of the due process analysis, the party challenging jurisdiction bears a heavy burden to make "a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Bank Brussels Lambert*, 305 F.3d at 129 (quoting *Metro. Life Ins. Co.*, 84 F.3d at 568). Where a defendant purposefully has directed its suit-related conduct at the forum State, as is the case here, "dismissals resulting from the application of the reasonableness test should be few and far between." *Metro. Life*, 84 F.3d at 575 (citing *Burger King*, 471 U.S. at 477). Among the factors typically considered by a court assessing the reasonableness of exercising jurisdiction are: (1) "the burden that the exercise of jurisdiction will impose on the [entity]"; (2) "the interests of the forum state in adjudicating the case"; (3) "the plaintiff's interest in obtaining convenient and effective relief"; (4) "the interstate judicial system's interest in obtaining the most efficient resolution of the controversy"; and (5) "the shared interest of the states in furthering substantive social policies." *Gucci III*, 2015 WL 5707135, at *9 (citing *Bank Brussels Lambert*, 305 F.3d at 129) (alterations in original). In addition, "[w]hen the entity that may be subject to personal jurisdiction is a foreign one, courts consider the *international* judicial system's interest in efficiency and the shared interests of the *nations* in advancing substantive policies." *Id.* (citing *Asahi Metal Indus. Co. v.*

Superior Ct. of Cal., Solano Cnty. 480 U.S. 102, 115 (1987)) (emphasis in original).

Here, in challenging jurisdiction, Defendant does not directly address the individual reasonableness factors. Having considered those factors anyway, the Court concludes that they support the exercise of jurisdiction over Defendant. To begin with, Defendant has been litigating this action in this Court for the better part of ten years. Extensive discovery already has taken place, with the parties capably surmounting any obstacles presented by the fact that many of the pertinent witnesses and documents are located abroad. As such, Defendant cannot seriously contend that continuing to litigate this case in New York presents an unreasonable burden. *See Licci III*, 732 F.3d at 174 (observing that any such burden is eased by "the conveniences of modern communication and transportation"). Indeed, up until *Daimler* was decided, Defendant presumably had every expectation of litigating this matter to a resolution in New York.

Furthermore, the claims in this action are predicated on the overall course of conduct by which Defendant allegedly provided financial support to a terrorist organization. To the extent Defendant's use of New York's banking system was integral to that conduct, the Court also may take into account "the United States' and New York's interest in monitoring banks and banking activity to ensure that its system is not used as an instrument in support of terrorism." *Id*. Finally, although not a controlling factor, it is appropriate to consider the federal policy underlying Congress' enactment of the ATA. *Cf.* 4 Wright & Miller, Federal Practice and Procedure § 1068.1 (4th ed.) ("[W]hen Congress has undertaken to enact a nationwide

service statute applicable to a certain class of disputes, that statute should be afforded substantial weight as a legislative articulation of federal social policy.") As demonstrated by the legislative history and express language of the ATA, a clear statutory objective is "to give American nationals broad remedies in a procedurally privileged U.S. forum." *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 422 (E.D.N.Y. 2009). That policy by no means overrides the due process to which Defendant is entitled. However, having already determined that Defendant established "minimum contacts" with the United States as a whole, the Court is further persuaded by that policy and the other reasonableness factors that exercising jurisdiction over Defendant is consistent with due process. Accordingly, Defendant's motion to dismiss for lack of personal jurisdiction is denied.[13]

III. Defendant's Motion for Summary Judgment

Defendant alternatively moves for summary judgment on the basis that the Court can exercise jurisdiction only with respect to the New York Transfers, and Plaintiffs cannot prove Defendant's liability in a case confined just to those 196 transfers. (*See* Def.'s Mem.

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[13] In *Gucci II*, the Second Circuit directed the district court to consider, upon remand, whether the exercise of jurisdiction over Bank of China would comport with principles of international comity. *See Gucci II*, 768 F.3d at 138-39. However, in that case, there was an alleged conflict of law between Chinese banking laws and an asset-freeze injunction issued by the district court. *Id.* Here, Defendant does not address the issue of comity, nor is there any suggestion that merely continuing to exercise jurisdiction over Defendant, albeit on a theory of specific jurisdiction rather than general, would conflict with any foreign laws or otherwise infringe on the sovereign interests of a foreign state.

at 15-25.) In other words, Plaintiffs purportedly cannot prevail on their claims because they cannot prove that as of August 15, 2003—the date of the last New York Transfer—Defendant acted with the requisite *scienter* and proximately caused Plaintiffs' injuries. However, the Court already has rejected Defendant's arguments seeking to limit the scope of jurisdiction in this manner, including the fallacy that the Court must secure jurisdiction over individual transfers rather than jurisdiction over Defendant itself. Accordingly, Defendant's motion for summary judgment is denied.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss this action, or in the alternative for summary judgment, is denied in its entirety.

SO ORDERED.

Dated: Brooklyn, New York
March 31, 2016

s/
DORA L. IRIZARRY
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 13-1618-cv

TZVI WEISS ET AL., NATAN APPLEBAUM, ET AL.,

Plaintiff-Appellants,

v.

NATIONAL WESTMINSTER BANK PLC,
Defendant-Appellee.[1]

August Term, 2013

Argued: March 11, 2014 Decided: September 22, 2014

Before: JACOBS, LEVAL, and POOLER, *Circuit Judges*.

Plaintiffs Weiss et al. appeal from the judgment of the United States District Court for the Eastern District of New York (Irizarry, *J.*) dismissing, on summary judgment, their claims against Defendant National Westminster Bank PLC for civil remedies pursuant to the Antiterrorism Act, 18 U.S.C. §§ 2331(1)(A), 2333(a), 2339B(a)(1), and 2339C. The Court of Appeals (Leval, *J.*) concludes that the district

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[1] The Clerk of the Court is directed to amend the caption in this case to conform to the listing of the parties above.

court misapplied § 2339B(a)(1)'s scienter requirement and finds that there was a triable issue of fact as to whether Defendant possessed the mental state required for liability under §§ 2333(a) and 2339B(a)(1). The judgment of the district court is, therefore, VACATED and the case REMANDED with instructions to consider Defendant's other arguments in support of summary judgment.

* * *

LEVAL, *Circuit Judge*:

Plaintiffs, who are approximately 200 United States nationals (or their estates, survivors or heirs) who were victims of terrorist attacks launched in Israel by Hamas, appeal from the judgment of the United States District Court for the Eastern District of New York (Irizarry, *J.*), dismissing, on summary judgment, their suit against Defendant National Westminster Bank PLC ("NatWest"). The claimed basis of liability is that NatWest provided material support and resources to a terrorist organization in violation of the Antiterrorism Act ("ATA"), 18 U.S.C. §§ 2331(1)(A), 2333(a) and 2339B(a)(1), and collected and provided funds for the financing of terrorism in violation of 18 U.S.C. §§ 2331(1)(A), 2333(a) and 2339C.[2] The complaint accuses NatWest of providing material support and resources to a foreign terrorist organization by maintaining bank accounts and

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[2] Plaintiffs also sought civil remedies under § 2333(a) based on alleged violations of 18 U.S.C. § 2332 for aiding and abetting the murder of United States citizens. This claim was dismissed for failure to state a claim pursuant to Rule 12(b)(6). *Weiss v. Nat'l Westminster Bank PLC*, 453 F. Supp. 2d 609 (E.D.N.Y. 2006). Plaintiffs do not challenge that dismissal here.

transferring funds for the Palestine Relief & Development Fund, a/k/a Interpal ("Interpal"). Interpal allegedly engaged in "terrorist activity" by soliciting funds, and otherwise providing support, for Hamas.

NatWest moved for summary judgment on the grounds that Plaintiffs could not show that NatWest acted with the requisite scienter to support an award of civil remedies under the ATA, that its acts were the proximate cause of the Plaintiffs' injuries, that Plaintiffs had Article III standing, and that Hamas was responsible for the terrorist attacks at issue. The district court granted the motion for summary judgment on the basis of Plaintiffs' failure to establish a triable issue of fact as to whether NatWest had the requisite scienter, and did not address the other asserted grounds. *Weiss v. Nat'l Westminster Bank PLC*, 936 F. Supp. 2d 100 (E.D.N.Y. 2013).

Plaintiffs contend on this appeal that the district court used an incorrect standard for determining whether NatWest acted with the requisite scienter for liability under 18 U.S.C. § 2333(a) predicated on a violation of 18 U.S.C. § 2339B(a)(1),[3] by focusing on whether NatWest had knowledge that, or exhibited deliberate indifference to whether, Interpal funded terrorist *activities*. We conclude that the statute's requirement is less exacting, and requires only a showing that NatWest had knowledge that, or exhibited deliberate indifference to whether, Interpal provided material support *to a terrorist organization,* irrespective of whether Interpal's support aided *terrorist activities* of the terrorist organization. As Hamas is an

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[3] Plaintiffs have not argued on appeal that the district court erred in dismissing their claims based on 18 U.S.C. § 2339C.

organization designated as a Foreign Terrorist Organization ("FTO") by the United States Secretary of State, Plaintiffs can fulfill this burden by demonstrating either that NatWest had actual knowledge that Interpal provided material support to Hamas, or that NatWest exhibited deliberate indifference to whether Interpal provided material support to Hamas. There is a triable issue of fact as to whether NatWest possessed the requisite scienter. Therefore, we vacate the judgment and remand for the district court to consider NatWest's other arguments in support of summary judgment.

BACKGROUND

I. Factual Background

Interpal is a non-profit organization registered with the Charity Commission for England & Wales (the "Charity Commission"). Its Declaration of Trust states that Interpal collects funds for humanitarian aid, which it transfers to various charitable organizations in England and Wales, Jordan, Lebanon, and the Palestinian Territories. NatWest maintained accounts for Interpal from 1994, the year Interpal was founded, until 2007.[4] During that time, NatWest recorded unusual activity in a permanent database and reported certain suspicious activity to British authorities. NatWest is a member of the Royal Bank of Scotland Group and is incorporated and headquartered in the United Kingdom.

On August 21, 2003, the United States Treasury Department Office of Foreign Assets Control ("OFAC")

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[4] NatWest provided banking services to Interpal's predecessor, the Palestine & Lebanon Relief Fund, beginning in 1987.

designated Interpal as a Specially Designated Global Terrorist ("SDGT"). OFAC issued a press release stating:

> Interpal . . . has been a principal charity utilized to hide the flow of money to HAMAS. Reporting indicates it is the conduit through which money flows to HAMAS from other charities . . . . Reporting indicates that Interpal is the fundraising coordinator of HAMAS. This role is of the type that includes supervising activities of charities, developing new charities in targeted areas, instructing how funds should be transferred from one charity to another, and even determining public relations policy.

Joint App'x ("JA") at 1681, *Weiss v. Nat'l Westminster Bank PLC*, No. 13-1618 (Aug. 5, 2013).

On August 26, 2003, the Charity Commission issued an order freezing Interpal's accounts and commenced an investigation of Interpal's activities. On September 24, 2003, the Charity Commission published a report, announcing that it had completed its investigation and cleared Interpal of any allegations of terror financing. The Report concluded that: (1) "The US Authorities were unable to provide evidence to support allegations made against INTERPAL . . .," and (2) "in the absence of any clear evidence showing INTERPAL had links to Hamas' political or violent militant activities, INTERPAL's bank accounts should be unfrozen and the Inquiry closed." JA at 702-03. According to internal NatWest communications, the Metropolitan Police Special Branch (the "Special Branch") also investigated OFAC's SDGT designation and "found that there was insufficient evidence to prove a

link [of Interpal] to terrorism, so no UK action was taken against INTERPAL . . . .” JA at 736.

Following OFAC’s designation of Interpal as an SDGT, NatWest sought guidance from the Financial Sanctions Unit of the Bank of England. On October 3, 2003, the Bank of England informed NatWest that “there are presently no plans to list [Interpal] under the Terrorism Order in the UK” and “there is no need to take any further action . . . .” JA at 2996. The Financial Sanctions Unit also informed NatWest that “any payments to, or for the benefit of, Hamas are prohibited,” and any suspicion of such payments should be reported to the Charities Commission, the Bank of England, and the Special Branch. JA at 2996. NatWest began conducting reviews of Interpal’s accounts every six months.

In May 2005, while conducting one of these reviews, NatWest uncovered a payment by Interpal to an organization that was subsequently designated by the Bank of England as “an organisation suspected of supporting terrorism.” JA at 736. NatWest’s reviews also revealed that some of the organizations receiving funds from Interpal were suspected of having connections with Hamas, including at least five committees alleged by United States authorities to be “operated on behalf of, or under the control of, Hamas” in a 2004 indictment. Superseding Indictment, *United States v. Holy Land Found. for Relief & Dev.*, No. 3:04-CR-240-P (N.D. Tex. July 26, 2004), JA at 2707. On the other hand, there is no evidence NatWest was aware of any Interpal payments to any organizations that were designated as terrorist organizations by the Bank of England or OFAC at the time of the payment.

NatWest closed the last of Interpal's accounts in March 2007.

DISCUSSION

I. Analysis

Plaintiffs argue that, in its focus on whether NatWest was shown to have awareness of Interpal's financing of *terrorist activities*, the district court employed an incorrect scienter standard. We agree. As we understand the statute, in order to establish entitlement to a civil remedy under 18 U.S.C. § 2333(a) predicated on a violation of § 2339B(a)(1), Plaintiffs were obliged to show that NatWest had actual knowledge that, or exhibited deliberate indifference to whether, Interpal provided material support to a *terrorist organization,* irrespective of whether the support aided terrorist activities.

a. The Statutory Framework

Plaintiffs seek relief under a complex statutory framework involving the ATA, 18 U.S.C. §§ 2331(1)(A), 2333, and 2339B, and the Immigration and Nationality Act, 8 U.S.C. §§ 1182, 1189. Through a series of statutory incorporations, in order for NatWest to be liable under § 2333(a), it must have had knowledge that (or exhibited deliberate indifference to whether) Interpal provided material support to Hamas (an FTO), regardless of whether that support was for terrorist activities.

Section 2333(a) provides civil remedies for United States nationals injured by acts of international terrorism:

> Any national of the United States injured in his or her person, property, or business by

> reason of an *act of international terrorism*, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

18 U.S.C. § 2333(a) (emphasis added). The term "international terrorism," as used in that Section, is defined by § 2331(1) to mean:

> [A]ctivities that (A) involve violent acts or acts dangerous to human life *that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State*; (B) appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States . . . .

18 U.S.C. § 2331(1) (emphasis added).[5] This wording is sufficient indication that Congress intended extra-territorial application.[6]

The complaint alleges that NatWest committed acts that fall within § 2331(1)(A) by providing banking services to Interpal in violation of 18 U.S.C.

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[5] In *Morrison v. National Australia Bank Ltd.*, the Supreme Court recognized a presumption against extraterritoriality pursuant to which we must presume a statute does not apply extra-territorially "unless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect." 561 U.S. 247, 255 (2010) (internal quotation marks and citation omitted). Congress clearly expressed its intention for § 2333(a) to apply extraterritorially by focusing on "international terrorism" and defining it to include exclusively activities that "occur primarily outside the territorial jurisdiction of the United States." 18 U.S.C. § 2331(1); *see In re September 11 Litig.*, 751 F.3d 86, 93 (2d Cir. 2014) ("The purpose of the ATA was '[t]o provide a new civil cause of action in Federal law for international terrorism that provides extraterritorial jurisdiction over terrorist acts abroad against United Sates nationals.'" (quoting H.R. 2222, 102d Cong. (1992))). Accordingly, we find that NatWest may be found liable under § 2333(a) for conduct that occurred in the United Kingdom.

[6] The requirement to "appear to be intended . . ." does not depend on the actor's beliefs, but imposes on the actor an objective standard to recognize the apparent intentions of actions. *Cf. Boim v. Holy Land Found. for Relief and* Dev., 549 F.3d 685, 693-94 (7th Cir. 2008) (en banc) (Posner, *J.*) (describing the appearance-of-intention requirement "not [as] a state-of-mind requirement" and stating that "it is a matter of external appearance rather than subjective intent . . . ."). On appeal, we review only whether there is a triable issue of fact as to whether NatWest fulfilled §§ 2333(a) and 2339B's scienter requirement; we do not address whether NatWest fulfilled this definitional requirement or the other requirements of the statute.

§ 2339B(a)(1). That section imposes criminal penalties on

> [w]hoever *knowingly* provides material support or resources to a foreign terrorist organization . . . . To violate this paragraph, a person *must have knowledge* . . . that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act) . . . .

18 U.S.C. § 2339B(a)(1).

While § 2333(a) does not include a mental state requirement on its face, it incorporates the knowledge requirement from § 2339B(a)(1), which prohibits the knowing provision of *any* material support to terrorist organizations without regard to the types of activities supported. Its application is not limited to the provision of support to the terrorist activities of a terrorist organization. *Id.* In upholding the constitutionality of § 2339B against as applied challenges for vagueness and violations of the First Amendment rights to freedom of association and speech, the Supreme Court found that "Congress plainly spoke to the necessary mental state for a violation of § 2339B, and it chose knowledge about the organization's connection to terrorism, not specific intent to further the organization's terrorist activities." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 16-17 (2010); *see also* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1247, note following 18 U.S.C. § 2339B (Findings and Purpose) ("[F]oreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct."). The Court explained:

> Money is fungible, and when foreign terrorist organizations that have a dual structure raise funds, they highlight the civilian and humanitarian ends to which such moneys could be put. But there is reason to believe that foreign terrorist organizations do not maintain legitimate *financial* firewalls between those funds raised for civil, nonviolent activities, and those ultimately used to support violent, terrorist operations. Thus, funds raised ostensibly for charitable purposes have in the past been redirected by some terrorist groups to fund the purchase of arms and explosives.

Humanitarian Law Project, 561 U.S. at 31 (internal quotation marks, citations, and alterations omitted); *cf. Boim v. Holy Land Found. for Relief and Dev.*, 549 F.3d 685, 698 (7th Cir. 2008) (en banc) (Posner, *J.*) ("If Hamas budgets $2 million for terrorism and $2 million for social services and receives a donation of $ 100,000 for those services, there is nothing to prevent its using that money for them while at the same time taking $100,000 out of its social services 'account' and depositing it in its terrorism 'account.'").

Thus, to fulfill § 2339B(a)(1)'s scienter requirement, incorporated into § 2333(a), Plaintiffs must show that NatWest both knew that it was providing material support to Interpal and knew that Interpal engaged in terrorist activity. Section 2339B(a)(1) does not require a showing that NatWest knew it was providing material support for terrorist activity.

For the purposes of § 2339B(a)(1), a defendant has knowledge that an organization engages in terrorist activity if the defendant has actual knowledge of such activity or if the defendant exhibited deliberate

indifference to whether the organization engages in such activity. *See Strauss v. Credit Lyonnais, S.A.*, 925 F. Supp. 2d 414, 428-29 (E.D.N.Y. 2013); *In re Terrorist Attacks on September 11, 2001*, 740 F. Supp. 2d 494, 517 (S.D.N.Y. 2010). A defendant exhibits deliberate indifference if it "knows there is a substantial probability that the organization engages in terrorism but . . . does not care." *Boim*, 549 F.3d at 693.

Section 2339B(a)(1) explicitly incorporates the meaning of "engage[] in terrorist activity" from § 212(a)(3)(B) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(3)(B)(iv)(IV), which defines "engage in terrorist activity" to include "solicit[ing] funds or other things of value for . . . (bb) a terrorist organization described in clause (vi)(I) . . . ." Clause (vi)(I) defines "terrorist organization" to mean "an organization . . . designated under section 1189 of this title . . . ," 8 U.S.C. § 1182(a)(3)(B)(vi)(I), and § 1189 authorizes the Secretary of State to designate an organization as a foreign terrorist organization ("FTO").[7] Pursuant to § 1189, the Secretary of State designated Hamas as an FTO on October 8, 1997. U.S. Dep't of State Bureau of Counterterrorism, *Foreign Terrorist Organizations*, http://www.state.gov/j/ct/rls/other/des/123085.htm (last visited August 6, 2014). Thus, if Interpal solicited funds for Hamas, then Interpal engaged in terrorist activity within the meaning of Section 212(a)(3)(B) of the Immigration and Nationality Act.

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[7] OFAC's SDGT designation is distinct from the State Department's FTO designation. While an organization designated as an FTO by the State Department is a terrorist organization for the purposes of § 2339B, that is not true for organizations designated as SDGT by OFAC.

In sum, through this complex series of statutory incorporation—18 U.S.C. § 2333(a) to 18 U.S.C. § 2331(1) to 18 U.S.C. § 2339B(a)(1) to 8 U.S.C. § 1182(a)(3)(B)—a defendant may be liable for civil remedies under § 2333(a) for providing material support to an organization that solicits funds for an FTO. Under Plaintiffs' theory of liability, in order for Plaintiffs to establish that NatWest came within the scienter requirement of § 2339B, they must present evidence showing that NatWest provided material support to Interpal while having knowledge that, or exhibiting deliberate indifference to whether, Interpal "solicit[ed] funds or other things of value" for Hamas, regardless of whether those funds were used for terrorist or non-terrorist activities. 8 U.S.C. § 1182(a)(3)(B)(vi)(IV); 18 U.S.C. § 2339B(a)(1).

b. The District Court's Decision

As we understand the district court's reasoning, it imposed on Plaintiffs a more onerous burden with respect to NatWest's scienter than § 2339B(a)(1) requires. The court focused on NatWest's employees' knowledge of Interpal's *terror financing* as opposed to their knowledge of Interpal's financing of *a terrorist organization*. *See, e.g.*, *Weiss v. Nat'l Westminster Bank PLC*, 936 F. Supp. 2d 100, 115 (E.D.N.Y. 2013) ("The filing of [Suspicious Activity Reports] does not equate to knowledge or even legitimate suspicion of *terror financing* . . . ." (emphasis added)); *id.* ("It is undisputed that none of the [Suspicious Activity Reports] and resulting investigations led to any credible evidence of *terror financing*." (emphasis added)); *id.* ("NatWest employees involved with internal investigations of Interpal testified that NatWest had a zero tolerance policy for *terror financing*." (emphasis

added)); *id.* at 117 ("There is no evidence to suggest that, had NatWest known or actually suspected Interpal of *terror financing*, it would have done anything other than close its accounts." (emphasis added)). This focus on "terror financing," as opposed to the financing of a terrorist organization, regardless of the character of the activities being financed, is not consistent with the text of § 2339B(a)(1) or the Supreme Court's opinion in *Humanitarian Law Project*. *See* 561 U.S. at 16.

Moreover, the district court found that NatWest did not exhibit deliberate indifference to whether Interpal was a terrorist organization following Interpal's SDGT designation, in part, because British authorities—the Charity Commission, the Special Branch, and the Bank of England—condoned NatWest's relationship with Interpal. *Weiss*, 936 F. Supp. 2d at 114. In this regard, the court gave inappropriate weight to the British authorities' decisions. The Charity Commission and the Bank of England condoned NatWest's relationship with Interpal based on the Charity Commission's 2003 investigation, which focused on only a subset of conduct that is criminalized under United States law. The Charity Commission investigated whether Interpal financed Hamas's political and violent militant activities, not whether Interpal provided any material support to Hamas, regardless of purpose. While the Charity Commission's 2003 report found no clear evidence showing that Interpal supported Hamas's political or violent militant activities, the report made no findings regarding whether Interpal provided material support to Hamas for non-political and non-

violent activities.[8] Thus the conclusions of the British authorities were in response to a different question than is posed by the United States statutes. The British authorities' guidance, based on the Charity Commission's 2003 report, is not inconsistent with a finding that NatWest had knowledge that, or exhibited deliberate indifference to whether, Interpal financed Hamas's *non-political* and *non-violent* activities.

The same observations apply to the conclusions of the Special Branch. An internal NatWest memorandum reported that the Special Branch investigated OFAC's SDGT designation of Interpal and found "insufficient evidence to prove a *link to terrorism*, so no UK action was taken against Interpal . . . ." JA at 736. There is no evidence, however, that the Special Branch investigated whether Interpal financed Hamas's non-terrorist activities. As with the Charity Commission's investigation, the Special Branch's conclusion is in no way incompatible with a finding that NatWest met § 2339B(a)(1)'s scienter requirement.

Even if the British authorities had investigated whether Interpal provided material support to Hamas

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[8] The Charity Commission previously investigated Interpal's connections with Hamas in 1996. In its 1996 report, the Charity Commission explained, "The allegation that funds were going to supporters of Hamas and in particular the families of suicide bombers was not of direct concern so long as the funds were being applied within the objects of the charity." JA at 557. The Charity Commission found no evidence of pro-terrorist activity, and the Charity Commission's review of Interpal's bank accounts "provided evidence of an appropriate end use for its funds." JA at 566. It recommended closing its investigation and prescribed that "[w]hat [Interpal needs] to do is to take whatever steps [it] can to ensure that [its] donations only go to charitable purposes within [its] objects." JA at 566.

for any purpose and had concluded that Interpal had no links to Hamas at all, the British authorities' conclusion would not be inconsistent with liability under the United States statutes and could not justify summary judgment in the face of contrary evidence. The views of foreign governments, particularly when addressed to the same questions of fact as are pertinent under United States law, could support NatWest's contentions to the jury that it believed Interpal was not supporting a terrorist organization just as its inquiries to the U.K. authorities (and the answers it received) could support the contention that it was not indifferent to the issue. However, in the face of contrary findings—in this case by the United States Treasury Department—such views of foreign governments could not support summary judgment. *See* Fed. R. Civ. Pro. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

As with the extraterritorial application of any law, applying § 2333(a) to non-domestic activities risks creating circumstances where United States law conflicts with foreign law. The Supreme Court acknowledged the importance of avoiding such conflicts in *Morrison v. National Australia Bank Ltd. See* 561 U.S. 247, 255 (2010); *see also supra* note 6. But, as the Court explained, whether a United States law applies extraterritorially (risking conflict with foreign laws) is a question of congressional intent. *Morrison*, 561 U.S. at 255. The presumption against extraterritoriality is only a *presumption*; it is overcome by clearly expressed Congressional intent for a statute to apply extraterritorially. When Congress has manifested clear intent that

a statute apply extraterritorially, it will generally apply extraterritorially regardless of whether there is a risk of conflict with foreign law. *Cf. id.* Although the British government's approval of NatWest's relationship with Interpal and decision not to designate Interpal as a terrorist organization creates tension with OFAC's decision to designate Interpal as an SDGT, Congress clearly expressed its intention for § 2333(a) to apply to extraterritorial activities when the statute's standards are met, regardless of the views and laws of other nations. *See supra* note 6.

c. Evidence Supporting a Finding that NatWest Knew Interpal Provided Material Support to Hamas

We conclude that Plaintiffs have presented sufficient evidence to create a triable issue of fact as to whether NatWest fulfilled § 2339B(a)(1)'s scienter requirement, especially if assessed under the "lenient" standard we have approved for ruling on the sufficiency of evidence of scienter issues. *See In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 693 (2d Cir. 2009) ("We are . . . lenient in allowing scienter issues to withstand summary judgment based on fairly tenuous inferences, because such issues are appropriate for resolution by the trier of fact." (internal quotation marks omitted)). First, NatWest was aware of OFAC's designation of Interpal as an SDGT[9] in

[9] We do not mean to suggest that the designation of an organization as an SDGT is sufficient, without more, to create a triable issue of fact regarding a foreign defendant's scienter. Interpal's SDGT status is, of course, significant, but we consider it only as one of several pieces of evidence that we view in the light most favorable to Plaintiffs.

August 2003 and of its press release announcing that Interpal provided material support to Hamas, which stated:

> Interpal . . . has been a principal charity utilized to hide the flow of money to HAMAS. Reporting indicates it is the conduit through which money flows to HAMAS from other charities . . . . Reporting indicates that Interpal is the fundraising coordinator of HAMAS. This role is of the type that includes supervising activities of charities, developing new charities in targeted areas, instructing how funds should be transferred from one charity to another, and even determining public relations policy.

JA at 1681.

Second, in December 2004, Amanda Holt, the head of NatWest's Group Enterprise Risk, the department responsible for the oversight of terrorism-related matters, sent an internal email stating, "[W]e were aware that we had accounts for people connected to Hamas, but not Hamas itself." JA at 2640.

Third, Michael Hoseason, the head of NatWest's Group Security and Fraud Office, which is responsible for reviewing suspicious activities and reporting suspicions of terror financing to British authorities, testified that NatWest would cease banking with a customer on the basis that the customer engaged in unlawful activity only "[i]f [NatWest] knew with *absolute certainty* that the customer was engaged in any kind of illegal activity." JA at 1767 (emphasis added). He testified that he would not recommend ending NatWest's relationship with a customer suspected of

terror financing unless the customer was "[c]onvicted in a court of law . . . ." JA at 1769-70. Furthermore, he stated that NatWest would need "proof of the purpose of the transfers," in other words, "if [NatWest] had been supplied with clear evidence that demonstrated that . . . funds were subsequently utilized to buy bullets . . . ." JA at 1795. When asked, "[S]hort of evidence that the funds were used to buy bullets or explosives, is there anything else that you would consider to be proof of the nefarious purposes of the transfers?", Hoseason responded, "No." JA at 1795.

Fourth, through its biannual reviews of Interpal's accounts, NatWest discovered that Interpal made payments to organizations suspected of "being connected with terrorism, in particular Hamas." JA at 2666. Specifically, in December 2004, NatWest uncovered Interpal payments to at least five committees, which the United States alleged were "operated on behalf of, or under the control of, Hamas" in a 2004 indictment. Superseding Indictment, *United States v. Holy Land Found. for Relief & Dev.*, No. 3:04-CR-240-P (N.D. Tex. July 26, 2004), JA at 2707. That indictment alleged that Holy Land Foundation for Relief and Development et al. conspired to provide material support to foreign terrorist organizations in violation of § 2339B(a)(1) by providing funds to, *inter alia*, those committees. JA 2702-07.[10]

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[10] *United States v. Holy Land Found. for Relief & Dev.* did not proceed to trial until after NatWest closed Interpal's accounts in March 2007. After an initial mistrial, the defendants were convicted of conspiracy to provide material support to foreign terrorist organizations in violation of § 2339B(a)(1). *United States v. El-*

Fifth, in May 2005, NatWest discovered that Interpal made a payment to an organization which in June 2005 was designated by the Bank of England as "an organisation suspected of supporting terrorism." JA at 736.

This evidence was sufficient to create a triable issue of fact as to whether NatWest's knowledge and behavior in response satisfied the statutory scienter requirements.

CONCLUSION

For the foregoing reasons, the judgment of the district court is VACATED and the case REMANDED for further proceedings, including consideration of NatWest's other asserted grounds for summary judgment.

Mezain, 664 F.3d 467, 489 (5th Cir. 2011) (affirming the convictions and noting that "[t]he evidence of Hamas control of the . . . committees was substantial").

APPENDIX F

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18 U.S.C. § 2331 provides in relevant part:

§ 2331. Definitions

As used in this chapter—

(1) the term "international terrorism" means activities that—

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum;

* * *

18 U.S.C. § 2333 provides:

§ 2333. Civil remedies

(a) ACTION AND JURISDICTION.—Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

(b) ESTOPPEL UNDER UNITED STATES LAW.—A final judgment or decree rendered in favor of the United States in any criminal proceeding under section 1116, 1201, 1203, or 2332 of this title or section 46314, 46502, 46505, or 46506 of title 49 shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding under this section.

(c) ESTOPPEL UNDER FOREIGN LAW.—A final judgment or decree rendered in favor of any foreign state in any criminal proceeding shall, to the extent that such judgment or decree may be accorded full faith and credit under the law of the United States, estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding under this section.

(d) LIABILITY.—

(1) DEFINITION.—In this subsection, the term "person" has the meaning given the term in section 1 of title 1.

(2) LIABILITY.—In an action under subsection (a) for an injury arising from an act of international terrorism committed, planned, or authorized by an

organization that had been designated as a foreign terrorist organization under section 219 of the Immigration and Nationality Act (8 U.S.C. 1189), as of the date on which such act of international terrorism was committed, planned, or authorized, liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism.

(e) USE OF BLOCKED ASSETS TO SATISFY JUDGMENTS OF U.S. NATIONALS.—For purposes of section 201 of the Terrorism Risk Insurance Act of 2002 (28 U.S.C. 1610 note), in any action in which a national of the United States has obtained a judgment against a terrorist party pursuant to this section, the term "blocked asset" shall include any asset of that terrorist party (including the blocked assets of any agency or instrumentality of that party) seized or frozen by the United States under section 805(b) of the Foreign Narcotics Kingpin Designation Act (21 U.S.C. 1904(b)).

18 U.S.C. § 2339A provides in relevant part:

§ 2339A. Providing material support to terrorists

* * *

(b) DEFINITIONS.—As used in this section—

(1) the term "material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more

individuals who may be or include oneself), and transportation, except medicine or religious materials;

(2) the term "training" means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and

(3) the term "expert advice or assistance" means advice or assistance derived from scientific, technical or other specialized knowledge.

18 U.S.C. § 2339B provides in relevant part:

§ 2339B. Providing material support or resources to designated foreign terrorist organizations

(a) PROHIBITED ACTIVITIES.—

(1) UNLAWFUL CONDUCT.—Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 20 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

* * *