No. _____

IN THE

Supreme Court of the United States

MOSES STRAUSS, ET AL.

Petitioners,

v.

CRÉDIT LYONNAIS, S.A.,

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

Peter Raven-Hansen
Gary M. Osen
Michael Radine
Ari Ungar
OSEN LLC
190 Moore Street
Suite 272
Hackensack, NJ 07601

Thomas C. Goldstein
Counsel of Record
Tejinder Singh
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tg@goldsteinrussell.com

James P. Bonner
FLEISCHMAN BONNER &
ROCCO LLP
81 Main Street, Suite 515
White Plains, NY 10601

Counsel for Petitioners

QUESTION PRESENTED

The question presented is:

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

The same question is presented by a parallel petition in *Weiss v. National Westminster Bank PLC*, also filed today. Petitioners here recommend that this Court consider the two petitions together, grant the petition in *Weiss*, hold this case pending the outcome of that one, and then vacate and remand as appropriate.

PARTIES TO THE PROCEEDING

Petitioners are Moses Strauss, Philip Strauss, Bluma Strauss, Ahron Strauss, Roisie Engelman, Joseph Strauss, Tzvi Weiss, Leib Weiss, Malke Weiss, Yitzchak Weiss, Yeruchaim Weiss, Esther Deutsch, 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 as the Administrator of 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 Administrators of the Estate of Hannah Rogen, Akiva Anachovich, 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, Bennett And Paula Finer as Legal Guardians for Chana Nachenberg, David Nachenberg, S.N., a minor, Bennett Finer, Paula Finer, Zev Finer, Shoshana Finer Ohana, Mina Dora Green, Mina Dora Green for the Estate of Howard M. Green, Steven Greenbaum for the Estate of Judith Greenbaum, Steven Greenbaum, Alan Hayman, Shirlee Hayman, David Danzig, Neil Danzig for the Estate of Rebecca Danzig, Neil Danzig, Hayyim Danzig, Sarah Pearlman, Clara Ben-Zaken Laser, Netanel Herskovitz, Martin Herskovitz, Pearl Herskovitz, Yaakov Herskovitz, 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 Gila Aluf, Estate of Bernice Wolf, Ari Horovitz, Batsheva Horovitz Sadan, David Horovitz, Estate of Debra Ruth Horovitz, Estate of Elnatan Horovitz, Estate of Leah Horovitz, Estate of Moshe Horovitz, Nechama Horovitz, Shulamite Horovitz, Tova Horovitz Naiman, Tvi Horovitz, Uri Horovitz, Estate of Bryan Wolf, Stanley Wolf, 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, Philip Litle, Estate of Abigail Litle, Elishua Litle, Hannah Litle, Heidi Litle, Josiah Litle, Noah Litle, 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 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, the Estate of Mordechai Reinitz, 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, Estate of Eli Zarkowsky, Ezriel Zarkowsky, Gittel Zarkowsky, Mendel Zarkowsky, Estate of Goldie Zarkowsky, Joseph Zarkowsky, Miriam Zarkowsky, Shrage Zarkowsky, Trany Zarkowsky, Yehuda Zarkowsky, the Estate of David Applebaum, Debra Applebaum, the Estate of Jacqueline Applebaum, Natan Applebaum, the Estate of Naava Applebaum, Shira Applebaum, Yitzchak Applebaum, Shayna Applebaum, Tovi Belle Applebaum, Geela Applebaum Gordon, Chaya Tziporah Cohen, Erik Schecter, Shlomo Tratner, and the Estate of Tiferet Tratner.

Respondent is Crédit Lyonnais, S.A.

RELATED PROCEEDINGS

Strauss v. Crédit Lyonnais, S.A., 06-cv-702 (E.D.N.Y. Mar. 31, 2019), consolidated with *Wolf v. Crédit Lyonnais, S.A.*, 07-cv-914 (E.D.N.Y.)

Strauss v. Crédit Lyonnais, S.A., Nos. 19-865, 19-1285 (2d Cir. Apr. 7, 2021)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

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 Crédit Lyonnais, S.A. (CL).

Petitioners allege that CL processed hundreds of transactions for Hamas's principal French fundraiser, the Comité de Bienfaisance et de Secours aux Palestiniens (translated, the Committee for Palestinian Welfare and Relief, which the parties and lower courts refer to as CBSP). Pet. App. 64a. These transfers were nominally for charitable purposes, but CL knew that CBSP was sending large sums of money to what it called "Islamist" organizations in a region experiencing near-daily terrorist violence. *Id*. at 158a. By its own admission, CL suspected that CBSP was engaged at least in money-laundering, which its own regulator warned is often associated with terror financing. *Id*. at 160a-61a. The transfers swelled Hamas's coffers, enabling its terrorist violence.

It is a fundamental axiom of our anti-terrorism laws 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." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 36 (2010) (quoting Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1247). Indeed, this Court held that it is "wholly foreseeable" that even

peaceful support to such organizations will be used "to promote terrorism." *Id*. at 36-37.

Under that rule, any bank that enabled Hamas to access millions of dollars during the Second Intifada should be subject to liability—or at least have to face a jury. But the Second Circuit ruled for CL as a matter of law, holding that even though the record evidence would enable a jury to find that CL knowingly provided support to Hamas, that was not enough for a jury to find that CL knew it was playing a role in illegal activities that foreseeably risked terrorist violence. The Second Circuit reached this conclusion because the transfers in this case purportedly were earmarked for charitable purposes, and there was no evidence that the specific dollars transferred were used for terrorist attacks or recruiting. The Second Circuit's holding effectively creates a charity loophole in the anti-terrorism laws—a result that has been emphatically rejected by other courts of appeals, as well as authoritative pronouncements from this Court, Congress, and the Executive.

This petition seeks review of an unpublished Second Circuit decision that was issued on the same day as the published decision in *Weiss v. National Westminster Bank, PLC*, 993 F.3d 144 (2d Cir. 2021) (included as Pet. App. 11a-52a). *Weiss* is a case brought by mostly the same petitioners, alleging that another bank moved money for a related Hamas fundraiser to substantially the same transferees at issue in this case. As the Second Circuit explained in this case:

> [B]oth sets of actions were commenced in the mid-2000's asserting ATA claims premised on international terrorist attacks attributed to Hamas; the actions proceeded largely along

> parallel lines (sometimes with coordinated pretrial discovery proceedings), involved the same legal issues, and were dismissed by the same district judge in opinions filed on the same day, with the opinion in the present case frequently citing past decisions and reasoning in the Weiss actions.

Pet. App. 9a. Moreover, "[t]he issues in these two sets of actions were the same; the issues in both appeals are the same; the arguments made by both sets of appellants are the same; and the two appellees pursue virtually identical conditional cross-appeals." *Ibid*. Accordingly, the Second Circuit affirmed in this case "for the reasons discussed in *Weiss*." *Ibid*.

Petitioners today filed a petition seeking review of the published decision in *Weiss*. Review is warranted here for substantially the same reasons as stated in that petition. Rather than repeat all the arguments verbatim, petitioners here recount the factual and procedural history of this case, and explain why the facts of this case strongly reinforce the argument for certiorari in *Weiss*. Petitioners also explain why the arguments in the *Weiss* petition apply with full force here. Petitioners respectfully urge the Court to grant certiorari in *Weiss*, hold this case pending the outcome, and then grant, vacate, and remand if petitioners prevail in *Weiss*.

OPINIONS BELOW

The Second Circuit's opinion (Pet. App. 1a-10a) is not published in the *Federal Reporter* but is reprinted at 842 F. App'x 701. The district court's opinion (Pet. App. 53a-81a) is reported at 379 F. Supp. 3d 148.

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, which extends 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 208a-211a.

STATEMENT OF THE CASE

1. Petitioners are victims, family members of victims, and estates of victims of terrorist attacks Hamas committed during the Second Intifada.

Petitioners allege that no later than 1997, CL knowingly sent money to Hamas for CBSP, which was Hamas's principal fundraiser in France. Pet. App. 73a. CBSP was a CL customer starting in 1990. *Id*. at 135a. During the relevant time period, CL directed at least 270 funds transfers, valued at approximately $2.5 million, to 13 Hamas-controlled organizations in the Palestinian Territories for CBSP. *See id.* at 173a.

These recipients were referred to below as the 13 Charities, and the record evidence would allow "a reasonable jury" to find that they "are operating as Hamas front groups." Pet. App. 170a. Some of the 13 Charities were "founded by co-founders of Hamas"; some "recruit[] youth to support Hamas and financ[e] Hamas land purchases"; and others run schools that "support[] Hamas' ideology," to give but a few

examples. *Id*. at 170a-171a. Petitioners' experts showed that the 13 Charities have "shared leadership" with Hamas, and display "an active support of Hamas' ideology and goals." *Id*. at 172a. More than that, the 13 Charities are "interwoven with Hamas and crucial to its success." *Ibid*. Based on the evidence in this case, one could reasonably find that the 13 Charities "were controlled by Hamas," such that sending money to them was "no different from sending the money directly to Hamas." *Id*. at 168a.

The United States designated CBSP a Specially Designated Global Terrorist (SDGT) on August 22, 2003. *See* Pet. App. 19a. The Treasury Department explained that Hamas raises "tens of millions of dollars per year throughout the world using charitable funding as cover." A-2219.[1] 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 announcement described CBSP as the "primary fundraiser[] for Hamas in France," explaining that CBSP "has collected large amounts of money from mosques and Islamic centers, which it then transfers

---

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

to sub-organizations of Hamas," *e.g.*, the 13 Charities. A-2220 (capitalization altered).

Even after CBSP was designated an SDGT, CL delayed closing CBSP's accounts until the following month. Pet. App. 147a. Upon closing the accounts, CL did not block or retain the funds (over €250,000), but instead returned them to CBSP despite CBSP's designation as an SDGT. *See ibid.*

2. Petitioners brought this case in parallel with *Weiss v. National Westminster Bank*, a case based on similar conduct by another bank moving money for another European Hamas fundraiser that was designated an SDGT on the same day as CBSP.

As relevant here, petitioners' complaints (which were filed in 2006 and 2007, and consolidated in 2011), Pet. App. 54a-55a & n.2, asserted causes of action against CL for primary liability (alleging that the provision of material support to designated foreign terrorist organizations (FTOs) is itself an act of international terrorism under the statutory definition) as well as aiding and abetting. *Id.* at 147a-148a. The aiding and abetting claims were dismissed because, at the time, the statute did not have that cause of action. The case proceeded on primary liability claims predicated on violations of the material support statutes, including 18 U.S.C. § 2339B, which makes it a felony to knowingly provide any material support to a designated FTO. *See* Pet. App. 148a-149a (recounting history).

After discovery, CL moved for summary judgment. The district court largely denied that motion in 2013. As relevant here, the court found that "[a] reasonable jury could conclude, based upon the evidence,

that Defendant sent millions of dollars to organizations controlled by Hamas, and was providing financial services to Hamas' primary fundraiser in France." Pet. App. 164a.

With respect to CL's scienter, the court found "a genuine issue of material fact as to whether Defendant knew about or deliberately disregarded CBSP's purported support of Hamas or Hamas front groups, and that, by sending money to the 13 Charities, it was facilitating Hamas' ability to carry out terrorist attacks." Pet. App. 157a. Thus, the record reflected that CL "had concerns about CBSP's accounts since at least 1997," and placed them "under heightened scrutiny." *Ibid*. CL's concerns included worries "about the large influx of cash coinciding with a major escalation of violence in Israel and Palestine." *Id*. at 157a-158a. On October 30, 2001, CL blocked a CBSP transfer sent through its New York branch to a Hamas front organization and filed a Suspicious Activity Report ("SAR") that solely identified "terrorism" in the summary of suspicious activity. A-729. The SAR further disclosed that, in January 2001, CL filed a declaration with French banking regulators related to CBSP's transactions. *See ibid*. Shortly thereafter, CL decided to close CBSP's accounts—but the accounts actually remained open until after CBSP was designated an SDGT, and even then they were not closed immediately. Pet. App. 158a.

CL believed that CBSP was engaged in illegal activity, but in its defense, it argued "strenuously that it was suspicious only that CBSP's accounts may have been used for money laundering and did not suspect that CBSP was funneling money to a terrorist group." Pet. App. 160a. But the French Banking Commission told CL in 2001 that "money laundering" may involve

"activities aimed at committing acts of terrorism, as well as collusion with such acts." A-625.

Unsurprisingly, therefore, the district court refused to grant summary judgment on this defense, explaining that a jury could find CL's explanation "incredible" and "unbelievable," and also that "there is no serious dispute that money laundering and terrorism are not mutually exclusive. It has been widely acknowledged that they can go hand in hand, as one certainly can be used to fund the other." Pet. App. 160a-161a.

CL also argued that the French government and the European Union had not sanctioned CBSP or concluded that it supported terrorism. Pet. App. 161a. The district court held, however, that "it would be perfectly reasonable for a jury to disagree and side with the United States government's assessments" instead. *Id*. at 162a; *accord Weiss v. Nat'l Westminster Bank PLC*, 768 F.3d 202, 210 (2d Cir. 2014) ("[I]n the face of contrary findings—in this case by the United States Treasury Department—such views of foreign governments could not support summary judgment.").

The district court also addressed the issue of proximate causation, concluding that:

> a reasonable juror could conclude that the sizable amount of money sent from Defendant to Hamas front organizations was a substantial reason that Hamas was able to perpetrate the terrorist attacks at issue, and that Hamas' increased ability to carry out deadly attacks was a foreseeable consequence of sending millions of dollars to groups controlled by Hamas.

Pet. App. 164a. The court further held that "plaintiffs who bring an ATA action are not required to trace specific dollars to specific attacks to satisfy the proximate cause standard. Such a task would be impossible and would make the ATA practically dead letter because '[m]oney is fungible.'" *Id.* at 167a (quoting *Holder*, 561 U.S. at 31). Indeed, the court recognized that "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." *Ibid.*

Finally, the district court found that the evidence was sufficient to create an issue of fact "as to whether Hamas perpetrated fourteen of the fifteen attacks" that injured petitioners. Pet. App. 187a. Indeed, with respect to one attack, the court granted summary judgment to the plaintiffs, finding that the undisputed evidence showed that Hamas committed the attack. *See id.* at 207a.

3. While this case was pending, Congress amended and lengthened the ATA's statute of limitations, which caused the district court to reinstate claims based on five attacks that previously were deemed time-barred. *See* Pet. App. 56a-57a.

Congress also enacted the Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222, 130 Stat. 852 (2016). In enacting the statute, Congress sought:

> 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 this intended breadth, Congress provided that if a plaintiff was injured in an act of terrorism "committed, planned, or authorized" by an organization that the Secretary of State has designated an 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).

Congress fleshed out the aiding and abetting cause of action by adopting the liability standard from *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983). JASTA § 2(a)(5). Under *Halberstam*, aiding and abetting has three elements:

> (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.

When a plaintiff alleges that a defendant aided and abetted an act of violence, the 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* 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.* Thus, in *Halberstam* itself, the defendant was a bookkeeper and secretary for a burglary enterprise, who was held liable for an unplanned murder that occurred during a botched getaway—even though she had no direct role in the murder, no knowledge that it would occur, and may not even have known that she was assisting burglaries. *See id.* at 475, 488. The court explained that the required awareness was not general awareness of her role in the principal tort (there "violence and killing"); it was general awareness of her role in any illegal activity from which "violence and killing is a foreseeable risk." *Id.* at 488.

For the support to be "substantial," (the third *Halberstam* element) 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." *Halberstam*, 705 F.2d at 488. By incorporating *Halberstam* into JASTA, Congress showed its resolve to create the broadest possible cause of action.

JASTA applies retroactively to any pending case based on injuries that arose on or after September 11, 2001. JASTA § 7. The statute applies to the attacks in this case because Hamas is a designated FTO that committed, planned, and authorized the attacks that injured petitioners and their family members.

4. Two years after JASTA was enacted, the Second Circuit decided *Linde v. Arab Bank, PLC*, 882 F.3d 314 (2d Cir. 2018). There, plaintiffs (many of whom are petitioners here) 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 18 U.S.C. § 2331(1)'s 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, as a matter of law, satisfy the elements of 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. CL filed another summary judgment motion arguing that it was entitled to judgment as a matter of law under *Linde*. For purposes of the motion, CL "assume[d] that a triable issue of fact remains as to whether Defendant knowingly provided material support to an FTO in violation of § 2339B," but it argued that knowingly providing support to an FTO was now insufficient to render it liable. Pet. App. 65a. Contemporaneously, petitioners sought to amend their complaints to add claims for aiding and abetting under JASTA. *See id*. at 75a.

The district court granted CL's renewed motion. The court first found the evidence insufficient to sustain a claim for primary liability after *Linde*. Thus, the court held that "the transfers" to the 13 Charities "were earmarked for charitable purposes," and none of them "were marked as being for a specific violent or terroristic purpose." Pet. App. 66a. Moreover, there was no evidence that the money transferred in this case was actually used in the terrorist attacks at issue. *See id*. at 67a. The court held that under *Linde*, the ostensible charitable purpose of the transfers defeated two of the primary liability elements as a matter of law. *See id*. at 69a-74a.

The district court also denied plaintiffs' motion to add an aiding and abetting claim as futile. *See* Pet. App. 79a. Although CL admitted that it suspected CBSP of illegal money laundering, the court held that the evidence did not show that CL "generally was aware that it played a role in any of Hamas' or even CBSP's violent or life-endangering activities." *Id*. at 80a-81a. It held that "[e]vidence that Defendant knowingly provided banking services to a terrorist organization, without more, is insufficient to satisfy JASTA's scienter requirement." *Id*. at 81a.

6. Petitioners appealed. On appeal, this case proceeded alongside *Weiss v. National Westminster Bank*, another case in which a bank secured summary judgment from the same district judge after *Linde*. As the Second Circuit explained, this case and *Weiss* have an overlapping factual background and procedural history and involve essentially the same legal issues. Pet. App. 9a. The court accordingly affirmed for the reasons stated in its precedential decision in *Weiss*. *Ibid*.

7. This petition followed. Although the lower courts addressed primary and secondary liability, this 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 *Weiss*. Because of the substantial overlap between the cases, petitioners respectfully recommend that the Court consider the two petitions together.

REASONS FOR GRANTING THE WRIT

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

As explained in the *Weiss* petition, the decisions in that case and this one conflict with the holdings of the Seventh and Fifth Circuits, both of which hold that providing money to Hamas's ostensibly nonviolent fronts foreseeably advances Hamas's terrorism.

1. In *Boim v. Holy Land Foundation for Relief & Development*, 549 F.3d 685, 691-92 (7th Cir. 2008) (en banc), the Seventh Circuit held that by imposing liability on those who provide material support to terrorists, the ATA "expressly impose[s] liability on a class of aiders and abetters."[2] With respect to scienter, the court held 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 specifically rejected an argument the district court accepted here, holding that "if you give money to an organization that you know to be engaged in terrorism, the fact that you earmark it for

---

[2] At the time, the ATA did not expressly include a cause of action for aiding and abetting, but the court in *Boim* found that "[p]rimary liability in the form of material support to terrorism has the character of secondary liability." 549 F.3d at 691. When Congress later added a cause of action for aiding and abetting with JASTA, it effectively codified the Seventh Circuit's analysis in *Boim* by imposing liability on any person who "knowingly provid[es] substantial assistance" to an FTO that commits an act of international terrorism. 18 U.S.C. § 2333(d)(2).

the organization's nonterrorist activities does not get you off the liability hook." *Boim*, 549 F.3d at 698; *cf.* Pet. App. 66a (letting CL off the liability hook because the transfers it executed for CBSP were "earmarked for charitable purposes"). Thus, as the Seventh Circuit explained, "[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." 549 F.3d at 698. To require any greater showing of knowledge or causation "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. *Id.* at 702.

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." 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.

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: petitioners relied on the same expert and 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 purportedly peaceful arm necessarily enable terrorist violence. That empirical proposition is no less true when presented as an argument for civil liability. 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. What is striking about the split is how much the facts overlap. The cases (*Boim*, *El-Mezain*, *Weiss*, and this case) all involve transfers of funds to an overlapping group of Hamas institutions (the recipients in *Boim* and *El-Mezain* include five of the beneficiaries in *Weiss* and this case; and the recipients in *Weiss* include essentially all the transferees in this case).

Moreover, in each case, the courts found that there was at least an issue of fact about whether the defendant knew that it was providing material support to an FTO (indeed, CL conceded as much for purposes of its summary judgment motion, Pet. App. 65a).

What is more, the courts do not even clearly disagree about the fact that providing support to Hamas front groups foreseeably leads to violence. In this case, the district court previously found (and did not appear to revisit) that a reasonable jury could conclude, based on the evidence:

> that the sizable amount of money sent from Defendant to Hamas front organizations was a substantial reason that Hamas was able to perpetrate the terrorist attacks at issue, and that Hamas' increased ability to carry out deadly attacks was a foreseeable consequence of sending millions of dollars to groups controlled by Hamas.

Pet. App. 164a. But after *Linde v. Arab Bank, PLC*, 882 F.3d 314 (2d Cir. 2018), the same court concluded that these facts no longer sufficed to even create a jury question about aiding and abetting under JASTA.

As that about-face shows, the difference between the circuit courts is a pure question of law. In the Seventh Circuit, the knowing provision of substantial funds to a designated FTO unambiguously supports ATA liability. In the Fifth Circuit, it supports felony liability as well as civil liability (in the district courts). But in the Second Circuit, the defendant prevails as a matter of law even when it knowingly provides funds to an FTO, and even when the evidence shows that

this support foreseeably contributes to terrorist violence.

This split about an important question of federal law is untenable, and the Court should grant certiorari to resolve it.

II. The Decision Below Is Incorrect.

Certiorari should also be granted because the decision below is incorrect. The core premise of the Second Circuit's holdings in *Linde*, *Weiss*, and this case is that even if a defendant knowingly provides material support to an FTO, that is not sufficient to allow a jury to find that the defendant was generally aware that it was playing a role in illegal activities that created a foreseeable risk of terrorist violence (which is the *mens rea* standard for aiding and abetting liability under JASTA). As explained in greater detail in the *Weiss* petition, that proposition has been roundly rejected by binding, authoritative statements from all three branches of our government, including this Court.

Specifically, this Court explained in *Holder* that it is "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." 561 U.S. at 36. The Court found that view supported by "persuasive evidence." *Ibid*.

In *Holder*, the question was whether the material support statute, 18 U.S.C. § 2339B (the same statute CL concedes a jury could find it violated here), applied to peaceful support given to a designated FTO—and if so, whether the statute survived strict scrutiny. The Court answered both questions in the affirmative. It explained that the statute did not require intent "to

further a foreign terrorist organization's illegal activities," but only "knowledge about the organization's connection to terrorism." 561 U.S. at 16-17. The Court further held that this broad prohibition on providing material support to FTOs was narrowly tailored to the Government's compelling "interest in combating terrorism." *Id*. at 28.

The Court explained 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 (quoting AEDPA § 301(a)(7)). 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).

The Court found Congress's conclusion "justified" because even peaceful support still "further[s] terrorism by foreign groups in multiple ways." *Holder*, 561 U.S. at 29-30. This includes providing fungible resources that can subsidize or be diverted to terrorism, and also granting legitimacy that FTOs can use for recruiting and for political influence. *See id*. at 30-31.

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 (citation 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 upheld the material support statute even against a strict scrutiny challenge.

Congress enacted JASTA after *Holder* was decided, expressly stating that its 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). Given that this Court expressly held that the Constitution permits liability for knowingly providing even peaceful support to an FTO, whether that support is traced to violent acts or not, it is hard to see how JASTA could ever be interpreted to foreclose such liability as a matter of law. But that is exactly what the district court and the Second Circuit held: they granted summary judgment to CL because CBSP's transfers were not earmarked for a terroristic purpose, and because there was no evidence that the funds in question were used in violent activities. That decision was wrong.

Independently, the Second Circuit's decision conflicts with *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), the case Congress expressly incorporated into JASTA as the standard for aiding and abetting liability. Under *Halberstam*, the question is whether the defendant was "generally aware of his role as part of an overall illegal or tortious activity at the time he provides the assistance." 705 F.2d at 487-88. If the answer is "yes," then the defendant can be held liable for

any act of violence that is "a foreseeable risk" of the enterprise. *Id*. at 488.

The lower court here misinterpreted *Halberstam* to require petitioners to show that CL was aware that it was playing a role in terrorist violence specifically. *See* Pet. App. 80a-81a (throwing out the JASTA claim because there was "no evidence that creates a triable jury question as to whether Defendant generally was aware that it played a role in any of Hamas' or even CBSP's violent or life-endangering activities"). "Violent or life-endangering activities" is a formula derived directly from the statutory definition of an "international terrorism." 18 U.S.C. § 2331(1)(A) ("'[I]nternational terrorism' means activities that . . . involve violent acts or acts dangerous to human life . . . ."). That is the wrong standard. CL does not have to be aware of a role in the principal tort of international terrorism; it is enough if it knew that it was involved in any illegal activity from which terrorist violence was foreseeable.

As noted above, CL admitted that it suspected CBSP was involved in illegal activity, *i.e.*, money laundering, when CL assisted CBSP. *See* Pet. App. 160a. Based on that alone, a jury could find that CL was at least generally aware of its role in illegal activity as the money launderer's banker. Moreover, in light of the other facts CL knew, including that CBSP was sending money "to 'Islamist' organizations in Palestine during the Second Intifada," *ibid*., a jury could also find that terrorist violence was a foreseeable risk of the illegal enterprise, *see id*. at 164a (finding that "Hamas' increased ability to carry out deadly attacks was a foreseeable consequence of sending millions of dollars to groups controlled by Hamas"). Indeed, as the

district court previously recognized, "money laundering and terrorism are not mutually exclusive. It has been widely acknowledged that they can go hand in hand, as one certainly can be used to fund the other." *Id*. at 161a. Thus, even if the district court was correct that CL was not aware of its own role in terrorist violence, it applied the wrong legal standard to hold that CL was not subject to liability under *Halberstam*. In this case, CL's knowledge of its role in CBSP's illegal money laundering enterprise was sufficient given that terrorist attacks were a foreseeable risk of that conduct.[3]

As explained in greater detail in the petition in *Weiss*, this Court should grant certiorari and hold that there is no charity exception to JASTA liability. Instead, when a defendant knowingly provides substantial funds to an FTO, it should at least be a jury

---

[3] Of course, there was also evidence that CL was at least generally aware it was playing a role in terrorism. Most clearly, CL knew that CBSP was designated an SDGT for its role raising funds for Hamas, but still returned the equivalent of hundreds of thousands of dollars to the Hamas fundraiser. Pet. App. 147a. The district court documented other evidence that CL "had concerns about CBSP's accounts since at least 1997," which "may have been related to CBSP's possible connection to terrorist groups." *Id*. at 157a. This included multiple internal communications and reports to French authorities raising concern about terrorist financing, and an unsurprised reaction when CBSP was designated an SDGT. *Id*. at 157a-159a. The evidence was enough, in the district court's view, for "a reasonable fact-finder" to conclude that CL "knew of or was deliberately indifferent to its support of terrorism through its dealings with CBSP." *Id*. at 159a. After *Linde*, however, the district court deemed the same evidence insufficient to satisfy JASTA's scienter requirement. *Id*. at 80a-81a.

question whether the defendant has aided and abetted the FTO's terrorist activities.

III. The Question Presented Is Important.

As the *Weiss* petition explains, the question presented is important and frequently recurring. Numerous cases involving bank financing for FTOs are currently pending in courts in the Second Circuit, which has venue over almost all such cases. It is critical that the Second Circuit's erroneous construction of JASTA be addressed immediately.

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

Finally, as the *Weiss* petition argues, this Court should call for the views of the Solicitor General if it is unsure about the need for review. ATA cases implicate "sensitive and weighty interests of national security and foreign affairs," on which the Executive Branch may want to weigh in. *Holder*, 561 U.S. at 33-34. The Government has also previously expressed its interest in the proper scope of civil ATA liability (for example, it lobbied for passage of the ATA and also filed an *amicus* brief supporting the plaintiffs in *Boim*).

CONCLUSION

Certiorari should be granted in *Weiss*, and this case should be held pending the result. If the *Weiss* petitioners prevail, the Court should grant this petition, and vacate and remand for further proceedings consistent with the decision in *Weiss*.

Respectfully submitted,

Peter Raven-Hansen
Gary M. Osen
Michael Radine
Ari Ungar
OSEN LLC
190 Moore Street
Suite 272
Hackensack, NJ
07601

Thomas C. Goldstein
Counsel of Record
Tejinder Singh
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tg@goldsteinrussell.com

James P. Bonner
FLEISCHMAN BONNER &
ROCCO LLP
81 Main Street, Suite 515
White Plains, NY 10601

September 3, 2021

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 19-865(L), 19-1285(XAP)

April 7, 2021

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 7th day of April, two thousand twenty-one.

Present: AMALYA L. KEARSE,
DENNIS JACOBS,
JOSÉ A. CABRANES,
Circuit Judges.

MOSES STRAUSS, PHILIP STRAUSS, BLUMA STRAUSS, AHRON STRAUSS, ROISIE ENGELMAN, JOSEPH STRAUSS, TZVI WEISS, LEIB WEISS, MALKE WEISS, YITZCHAK WEISS, YERUCHAIM WEISS, ESTHER DEUTSCH, 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 AS THE ADMINISTRATOR OF 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 ADMINISTRATORS OF THE ESTATE OF HANNAH ROGEN, AKIVA ANACHOVICH, 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, BENNETT AND PAULA FINER AS LEGAL GUARDIANS FOR CHANA NACHENBERG, DAVID NACHENBERG, S.N., A MINOR, BENNETT FINER, PAULA FINER, ZEV FINER, SHOSHANA FINER OHANA, MINA DORA GREEN, MINA DORA GREEN FOR THE ESTATE OF HOWARD M. GREEN, STEVEN GREENBAUM FOR THE ESTATE OF JUDITH GREENBAUM, STEVEN GREENBAUM, ALAN HAYMAN, SHIRLEE HAYMAN, DAVID DANZIG, NEIL DANZIG FOR THE ESTATE OF REBECCA DANZIG, NEIL DANZIG, HAYYIM DANZIG, SARAH PEARLMAN, CLARA BEN-ZAKEN LASER, NETANEL HERSKOVITZ, MARTIN HERSKOVITZ, PEARL HERSKOVITZ, YAAKOV HERSKOVITZ, 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 AND GILA ALUF,

Plaintiffs-Appellants-Cross-Appellees,

v.

CRÉDIT LYONNAIS, S.A.,
Defendant-Appellee-Cross-Appellant.

ESTATE OF BERNICE WOLF, ARI HOROVITZ, BATSHEVA HOROVITZ SADAN, DAVID HOROVITZ, ESTATE OF DEBRA RUTH HOROVITZ, ESTATE OF ELNATAN HOROVITZ, ESTATE OF LEAH HOROVITZ, ESTATE OF MOSHE HOROVITZ, NECHAMA HOROVITZ, SHULAMITE HOROVITZ, TOVA HOROVITZ NAIMAN, TVI HOROVITZ, URI HOROVITZ, ESTATE OF BRYAN WOLF, STANLEY WOLF, 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, PHILIP LITLE, ESTATE OF ABIGAIL LITLE, ELISHUA LITLE, HANNAH LITLE, HEIDI LITLE, JOSIAH LITLE, NOAH LITLE, 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 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, THE ESTATE OF MORDECHAI REINITZ, 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, ESTATE OF ELI ZARKOWSKY, EZRIEL ZARKOWSKY, GITTEL ZARKOWSKY, MENDEL ZARKOWSKY, ESTATE OF GOLDIE ZARKOWSKY, JOSEPH ZARKOWSKY, MIRIAM ZARKOWSKY, SHRAGE ZARKOWSKY, TRANY ZARKOWSKY, YEHUDA ZARKOWSKY, THE ESTATE OF DAVID APPLEBAUM, DEBRA APPLEBAUM, THE ESTATE OF JACQUELINE APPLEBAUM, NATAN APPLEBAUM, THE ESTATE OF NAAVA APPLEBAUM, SHIRA APPLEBAUM, YITZCHAK APPLEBAUM, SHAYNA APPLEBAUM, TOVI BELLE APPLEBAUM, GEELA APPLEBAUM GORDON, CHAYA TZIPORAH COHEN, ERIK SCHECTER, SHLOMO TRATNER, THE ESTATE OF

TIFERET TRATNER,
Plaintiffs-Appellants-Cross-Appellees,

v.

CRÉDIT LYONNAIS, S.A.,
Defendant-Appellee-Cross-Appellant.*

---

* * *

Appeal and cross-appeal from a March 31, 2019 judgment of the United States District Court for the Eastern District of New York.

This cause came on to be heard on the record from the United States District Court for the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; the cross-appeal is dismissed as moot.

Plaintiffs Moses Strauss, *et al.*, and Estate of Bernice Wolf, *et al.*, who were injured, or represent persons who were injured, in terrorist attacks in Israel and Palestine in 2001-2004, allegedly committed by Hamas, jointly appeal from a March 31, 2019 judgment of the United States District Court for the Eastern District of New York in these consolidated actions, Dora L. Irizarry, then-*Chief Judge*, (A) dismissing the complaints seeking damages against defendant Crédit Lyonnais, S.A. ("CL"), under the Antiterrorism Act of 1990 ("ATA"), *see* 18 U.S.C. §§ 2333(a), 2331(1), and

---

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

2339B, 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 CL under the Justice Against Sponsors of Terrorism Act ("JASTA"), *see id.* § 2333(d). The district court granted CL's motion for summary judgment dismissing the complaints, relying principally on this Court's decision in *Linde v. Arab Bank*, PLC, 882 F.3d 314 (2d Cir. 2018), and concluding that plaintiffs failed to adduce evidence sufficient to permit an inference that CL had committed an act involving violence, danger to human life, or an appearance of intent to intimidate or coerce a population or a government—elements of an international terrorism claim under the ATA. The court also denied plaintiffs' motion for leave to file an amended complaint to allege that CL is liable for the attacks as an aider and abetter, concluding that, given the record on the summary judgment motion, such an amendment would be futile. *See Strauss v. Crédit Lyonnais, S.A.*, 379 F.Supp.3d 148 (E.D.N.Y. 2019).

On appeal, plaintiffs argue principally that the district court erred by misapplying *Linde* and concluding that plaintiffs' evidence of CL's violation of 18 U.S.C. § 2339B was insufficient to permit inferences either that CL itself engaged in terrorist activity or that it had the requisite state of mind to make it liable for aiding and abetting that activity. In its cross-appeal, CL argues that if we do not affirm the judgment of the district court, we should reverse that court's denial of CL's motion to dismiss the actions for lack of personal jurisdiction; however, CL 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." (CL brief on appeal at 61-62 (other internal quotation marks omitted).)

This appeal was argued in tandem with the appeal in *Weiss v. National Westminster Bank PLC*, Nos. 19-863, -1159, which we have decided today in a published opinion, *see* --- F.3d --- (2d Cir. 2021) ("*Weiss*"). Although CL is not the defendant against which the Weiss actions were brought, both sets of actions were commenced in the mid-2000's asserting ATA claims premised on international terrorist attacks attributed to Hamas; the actions proceeded largely along parallel lines (sometimes with coordinated pretrial discovery proceedings), involved the same legal issues, and were dismissed by the same district judge in opinions filed on the same day, with the opinion in the present case frequently citing past decisions and reasoning in the Weiss actions.

The issues in these two sets of actions were the same; the issues in both appeals are the same; the arguments made by both sets of appellants are the same; and the two appellees pursue virtually identical conditional cross-appeals. We conclude, for the reasons discussed in *Weiss*, that the district court did not err in granting summary judgment dismissing the Strauss and Wolf plaintiffs' complaints under the ATA or in denying their request for leave to amend in order to bring claims under JASTA. We accordingly affirm the judgment of the district court; CL's cross-appeal is thus moot.

We have considered all of plaintiffs' arguments on appeal and have found them to be without merit. The

judgment of the district court is affirmed; the cross-appeal is dismissed.

FOR THE COURT:

CATHERINE O'HAGAN WOLFE, Clerk of Court

APPENDIX B

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

---

* 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 C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 06-CV-702 (DLI) (RML)

MOSES STRAUSS, *et al.*,
Plaintiffs,
v.
CRÉDIT LYONNAIS, S.A.,
Defendant.

No. 07-cv-914 (DLI) (RML)

BERNICE WOLF, *et al.*,
Plaintiffs,
v.
CRÉDIT LYONNAIS, S.A.,
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 Crédit Lyonnais, S.A. ("Defendant"), seeking to recover damages from fifteen terrorist attacks in Israel and Palestine

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

BACKGROUND[1]

Plaintiffs first filed a complaint arising out of thirteen terrorist attacks in *Strauss v. Crédit Lyonnais, S.A.*[2] on February 16, 2006. *See*, Compl., *Strauss* Dkt.

---

[1] The Court assumes familiarity with the facts underlying this action, which are summarized more fully in the Court's previous orders. *See, e.g., Strauss v. Crédit Lyonnais, S.A. ("Strauss I")*, 2006 WL 2862704, at *1-6 (E.D.N.Y. Oct. 5, 2006); *See also*, *Strauss v. Crédit Lyonnais, S.A.* ("*Strauss III*"), 925 F. Supp.2d 414, 417-424 (E.D.N.Y. 2013).

[2] By order dated October 7, 2011, *Strauss* and *Wolf* formally were consolidated for the purposes of a hearing, trial, or other adjudication of liability. Citations to the "*Strauss* Docket" are to *Strauss v. Crédit Lyonnais, S.A.*, 06-CV-702. Citations to the "*Wolf* Docket" are to *Wolf v. Crédit Lyonnais, S.A.*, 07-CV-914.

Entry No. 1. On October 5, 2006, the late Honorable Charles P. Sifton, then presiding, dismissed Plaintiffs' aiding and abetting claim and claims arising out of three attacks as time barred, but denied dismissal of Plaintiffs' remaining claims and granted Plaintiffs leave to amend their complaint. *See*, *Strauss I*, 2006 WL 2862704, at *19. On March 2, 2007, Plaintiffs filed a complaint in *Wolf v. Crédit Lyonnais, S.A. Wolf*, Dkt. Entry No. 1. In light of Judge Sifton's rulings in *Strauss I*, the parties in *Wolf* agreed to dismissal of their aiding and abetting claim. *Wolf*, Dkt. entry No. 31. On November 6, 2006, Plaintiffs filed an amended complaint in *Strauss*, realleging the claims that Judge Sifton deemed time barred in *Strauss I*. *Strauss* Dkt. Entry No. 52. On August 6, 2007, Judge Sifton again dismissed those claims as time barred. *Strauss v. Crédit Lyonnais, S.A.* ("*Strauss II*"), 2007 WL 2296832, at *9 (E.D.N.Y. Aug. 6, 2007). In light of Judge Sifton's ruling regarding the time barred claims arising out of three attacks in *Strauss II*, the parties in *Wolf* agreed to dismissal of Plaintiffs' claims arising out of the same three attacks. *Wolf*, Dkt. Entry No. 36.

On February 28, 2013, the Court granted in part and denied in part Defendant's first motion for summary judgment. *See*, *Strauss III*, 925 F. Supp.2d 414. In *Strauss III*, the Court dismissed the claims brought by Shlomo Tratner, individually and on behalf of the Estate of Tiferet Tratner, in connection with the September 24 Attack only, and allowed the claims based on the remaining fourteen attacks to proceed. *See*, *Id.* at 452-53. Additionally, the Court granted in part Café

Where documents have been filed on both dockets, the Court cites to the *Strauss* Docket only, as the lead case.

Hillel Plaintiffs' cross-motion for summary judgment to the extent that they proved Hamas' responsibility for the Café Hillel attack. *See*, *Id.* The Court denied the remainder of Café Hillel's motion for summary judgment. *See*, *Id.*

On June 5, 2014, Defendants' moved to dismiss Plaintiffs' claims for lack of personal jurisdiction pursuant to Rule 12(b)(2), or in the alternative, for summary judgment pursuant to Rule 56. *See*, *Strauss* Dkt. Entry No. 369. On March 31, 2016, the Court denied Defendant's motion in its entirety. *Strauss v. Crédit Lyonnais, S.A.* ("*Strauss IV*"), 175 F. Supp.3d 3, 32 (E.D.N.Y. 2016).

After the Court's decision in *Strauss IV*, on December 6, 2016 Defendant moved for partial reconsideration of the Court's decision in *Strauss III*. *See*, Dkt. Entry Nos. 421-425. Specifically, Defendant moved for reconsideration of the Court's decision that: (1) Israeli military court convictions are admissible evidence, (2) Plaintiffs brought forth sufficient admissible evidence to create a genuine issue of material fact as to Hamas's responsibility for the Bus No. 19 Attack, and (3) Plaintiffs' witness Ronni Shaked's eyewitness testimony concerning the March 7, 2003 and October 22, 2003 Attacks are admissible. *See generally, Id.* The Court granted Defendant's motion only to the extent that Plaintiffs are collaterally estopped from arguing that Hamas committed the January 29, 2004 Attack. *Strauss v. Crédit Lyonnais, S.A.* ("*Strauss V*"), 2017 WL 4480755, at *5 (E.D.N.Y. Sept. 30, 2017). The Court denied the remainder of Defendant's motion for partial reconsideration. *Id.*

Pursuant to the 2013 statute of limitations amendment to the Anti-Terrorism Act ("ATA"),

Plaintiffs' claims arising from five attacks (the "Reinstated Attacks"), previously dismissed by this Court as time barred, were reinstated. *See*, ECF Order dated July 16, 2013. On September 26, 2016, Defendant moved for summary judgment as to the Reinstated Attacks. *See*, *Strauss* Dkt. Entry No. 427. The Court denied Defendant's motion to the extent that: (1) Plaintiffs' expert Ronni 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; (2) Plaintiffs' expert Eli Alshech's testimony is admissible; (3) Israeli military court conviction records are admissible; (4) 2005 and 2007 ISA Reports are admissible; (5) there is sufficient admissible evidence for a reasonable jury to conclude that Hamas is responsible for the Reinstated Attacks; and (6) a video of Muhammad Farhat is admissible subject to a finding of authenticity and reliability at a hearing. *Strauss v. Crédit Lyonnais, S.A.* ("*Strauss VI*"), 2017 WL 4481126, at *5 (E.D.N.Y. Sept. 30, 2017). The Court granted Defendant's summary judgment motion to the extent that: (1) the testimony of Plaintiffs' fact witnesses is not admissible; (2) hearsay documents such as newspaper reports, claims of responsibility on Hamas-sponsored websites, and video wills, generally, are not admissible; and (3) Plaintiffs' § 2339C claims are dismissed. *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 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*, Mot. For Summary Judgment ("Mot."), *Strauss* Dkt. Entry No. 462. Plaintiffs opposed Defendant's motion. *See*,Memorandum in Opposition ("Opp."), *Strauss* Dkt. Entry No. 470. Defendant replied. *See*, Reply in Support of Motion for Summary Judgment ("Reply"), *Strauss* Dkt. Entry No. 471.

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). 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 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 v. National Westminster Bank PLC,* 768 F.3d 202, 207 (2d Cir. 2014). 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,* 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* focused 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 had 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 the transfers of funds from Comite de Bienfaisance et de Secours aux Palestiniens (Committee for Palestinian Welfare and Relief) ("CBSP") to 13 charities (the "13 Charities"), which plaintiffs contend are alter egos of or controlled by Hamas, an FTO. *See*, *Strauss III*, 925 F. Supp.2d at 453. 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 whether Defendant's acts satisfy of all of these specific prongs. *See, e.g., Strauss III*, 925 F. Supp.2d 414. 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*.

For purposes of its summary judgment motion and because the Court previously ruled in Plaintiffs' favor on the issues, *See generally, Strauss III*, 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 CBSP involved violent acts or acts dangerous to

human life. *See*,Mot. at 9. Defendant argues that undisputed evidence demonstrates that, to Defendant's knowledge, CBSP was a charity "aiming to do good works in a deeply deprived and troubled region." *Id.* at 9-10. To support this contention, Defendant points to CBSP's bylaws, which describe CBSP's charitable objectives. *Id.*; *See also,* Defendant's Supplemental Rule 56.1 Statement ("CL 56.1 Stmt."), *Strauss*, Dkt. Entry No. 464 ¶ 1; Declaration of Mark E. McDonald in Support of Mot. ("McDonald Decl."), *Strauss*, Dkt. Entry No. 463, Ex. 1. Defendant provides evidence demonstrating that, of the transfers processed by Defendant to the 13 Charities on behalf of CBSP that contained a stated purpose, the transfers were earmarked for charitable purposes. Mot. at 10; CL 56.1 Stmt. ¶¶ 6-7; McDonald Decl., Ex. 4. None of the transfers processed by Defendant were marked as being for a specific violent or terroristic purpose. *Id.* Furthermore, Defendant's employee, Robert Audren, who worked in Defendant's Financial Security Unit and reviewed activity in CBSP's accounts, testified that he found CBSP's transfers were "perfectly coherent with the stated purpose of [CBSP] which was, in fact, welfare and solidarity with Palestine." Mot. at 11; CL 56.1 Stmt. ¶ 3. Audren understood the beneficiaries of CBSP's transfers to be "charitable Muslim associations." Mot. at 11; CL 56.1 Stmt. ¶ 4.

Plaintiffs concede that there is no evidence that any of CBSP's transfers to the 13 Charities processed by Defendant were identified as being for any specific violent of terroristic purpose. *See*, Plaintiffs' Response to Defendant's 2011 Rule 56.1 Statement ("Pls.' Resp. to 2011 56.1 Stmt."), *Strauss*, Dkt. Entry No. 308 ¶ 255 ("Plaintiffs admit they do not contend that any of the

funds CBSP transferred from the accounts it maintained with Crédit Lyonnais to Hamas were used specifically to finance any of the terrorist attacks that injured Plaintiffs and/or killed their loved ones.") (internal quotation marks and citation omitted). 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 ("CL 2011 56.1 Stmt."), *Strauss*, Dkt. Entry No. 304 ¶¶ 269-71.

Citing to the expert 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."), *Strauss*, Dkt. Entry No. 469 ¶¶ 2-6 and Declaration of Aaron Schlanger ("Schlanger Decl."), *Strauss*, Dkt Entry No. 467, Exs. 23, 24). 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. ¶ 4 and Schlanger Decl. Ex. 3). 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.

Defendants rely 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 CBSP through Defendant accounts were used to

perpetrate the 15 attacks or that any of the 12 Charities[3] participated in, planned, trained the perpetrators of, requested that someone carry out, or was the cause of any of the 15 attacks. *See*, *Id.* at 12-13 (citing Pls.' Resp. to 2011 56.1 Stmt. ¶¶ 260-63, 265-66). Similarly, Spitzen does not opine that any funds transferred by CBSP 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. ¶¶ 272-75, 277-78). Defendant further maintains that the evidence upon which Plaintiffs rely does not relate to the wire transfers processed by Defendant. *See*, Reply at 6.

The Court previously held that Plaintiffs' allegations survive summary judgment as to whether Defendant had the requisite scienter under the material support statute, § 2339B. *See*, *Strauss III*, 925 F. Supp.2d at 427-31 ("[W]hen viewing the record in the light most favorable to Plaintiffs, there is a genuine issue of material fact as to whether Defendant knowingly provided material support to a terrorist organization."). In *Weiss*, the Second Circuit explained that § 2339 "requires only a showing that [Defendant] had knowledge that, or exhibited deliberate indifference to whether, [Defendant's SDGT banking client] provided material support *to a terrorist organization*, irrespective of whether [Defendant's SDGT banking client]'s support aided *terrorist activities* of the terrorist organization." 768 F.3d at 205 (alterations in original).

---

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

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 § 2339(B) "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," were "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. *Id.* Arab Bank processed transfers on behalf of purported charities known to funnel money to Hamas. *Id.* Notably, 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 described 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 CBSP to the 13 Charities as payments meant to involve a violent act or an act dangerous to human life.

Plaintiffs contend that Defendant's banking services to CBSP 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 request 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 terroristic 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*, 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 uncontroverted evidence does not show, that Defendant's apparent intent satisfies the specific intent requirement under § 2331(B).

Plaintiffs rely on evidence apparently 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 the scienter

requirement under § 2339. *See*, Opp. at 13-14 (discussing a New York State Department of Financial Services Consent Order with Crédit Agricole Corporate & Investment Bank New York Branch and Crédit Agricole S.A. and a Deferred Prosecution Agreement between the United States Attorney's Office for the District of Columbia and Crédit Agricole Corporate & Investment Bank).

In *Strauss III*, this Court found that a genuine issue of material fact remained "as to whether Defendant knew about or deliberately disregarded CBSP's purported support of Hamas or Hamas front groups, and that, by sending money to the 13 Charities, it was facilitating Hamas' ability to carry out terrorist attacks." 925 F. Supp.2d at 429. The evidence demonstrates that Defendant had concerns about CSBP's accounts since at least 1997, and that the concerns may have been related to CBSP's possible connection to terrorist groups. *See*, *Id.* at 429-431. Thus, this Court denied Defendant's motion for summary judgment as to whether Defendant knowingly provided material support to a terrorist organization. *Id*. at 431.

However, as clarified by the Second Circuit in *Linde*, the scienter requirement of the predicate material support statute is not the same as the definitional requirements of terroristic intent in § 2331(1). *See*, 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. Defendant merely provided banking services to CBSP for ostensibly charitable purposes, which does not satisfy the intent required by § 2331(B) as established by the Circuit in *Linde*. While the evidence creates an issue of fact as to whether Defendant knew about or deliberately disregarded CBSP's purported support of Hamas or Hamas front groups, 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. *See*, *Strauss*, Dkt. Entry No. 458, filed on March 8, 2018, and Opp. at 15, n.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 21-22. 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 21-24.

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*, *Strauss*, Dkt. Entry No. 458 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 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 evaluating such claims. *Id.* at 5-6 (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.* at 6, n.4 (citing *Strauss I*, 2006 WL 2862704, at *9).

Plaintiffs contend 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 15, n.16 (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 will not permit Plaintiffs to raise JASTA claims for the first time in the pretrial order.

The Court instead will consider whether it will grant 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, fashions the request as a cross-motion in a footnote in the opposition, and does not attach a proposed amended complaint. *See*, Opp. at 15, n.16 ("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 of June 17, 2016, for Plaintiffs to file the operative amended complaints. *See*, June 1, 2016 ECF Order. Although Plaintiffs met that deadline by filing Amended Complaints on June 17, 2016, *See*, Amended Complaint, *Strauss*, Dkt. Entry No. 408, and Amended Complaint, *Wolf,* Dkt. Entry No. 287, 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 *Strauss 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 8-9, 9, n.9 (citing *Strauss I*, 2006 WL 286704, at *9). 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*, which considered the *Halberstam* elements. *See*, *Id.* (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 *Strauss I* whether he applied the *Halberstam* factors. *See*, *Strauss I*, 2006 WL 2862704, at *9. 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 *Strauss 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 again rely on evidence that apparently 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 23-25. Specifically, Plaintiffs assert that Defendant was "generally aware of its role as repository and distribution mechanism for CBSP's continuing criminal enterprise which carried a foreseeable and enormous . . . risk of terror attacks." *Id.* at 23-24. However, as discussed in detail above, Plaintiffs present no evidence that creates a triable jury question as to whether Defendant generally was aware that it played a role in any of Hamas' or even CBSP'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 an 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.

SO ORDERED.

Dated: Brooklyn, New York
March 31, 2019

s/
DORA L. IRIZARRY
Chief Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 06-CV-702 (DLI) (RML)

MOSES STRAUSS, *et al.*,
Plaintiffs,
v.
CRÉDIT LYONNAIS, S.A.,
Defendant.

No. 07-cv-914 (DLI) (RML)

BERNICE WOLF, *et al.*,
Plaintiffs,
v.
CRÉDIT LYONNAIS, S.A.,
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, over 200 individuals and estates of people who are deceased (collectively, "Plaintiffs"), seek to recover damages from Defendant Crédit Lyonnais, S.A.

("Defendant") in connection with 19 attacks in Israel and Palestine allegedly perpetrated by Hamas. (*See generally* Fourth Am. Compl., ("*Strauss* FAC"), *Strauss* Dkt. Entry No. 358; Compl. ("*Wolf* Compl."), *Wolf* 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. (*Strauss* FAC ¶¶ 672-90; *Wolf* Compl. ¶¶ 407-25.) 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."), *Strauss* Dkt. Entry No. 369.) Plaintiffs oppose. (*See* Pls.' Mem. of Law in Opp'n to Mot. to Dismiss ("Pls.' Opp'n"), *Strauss* Dkt. Entry No. 371.) For the reasons set forth below, Defendant's motion is denied in its entirety.

---

[1] Citations to the "*Strauss* Dkt." are to docket 06-cv-702. Citations to the "*Wolf* Dkt." are to 07-cv-914. Where the same document has been filed on both dockets, the Court cites to the *Strauss* Docket only, as it is the lead case.

BACKGROUND[2]

I. The Parties

Plaintiffs' claims arise from 19 terrorist attacks that occurred in Israel and Palestine between approximately 2001 and 2004, which allegedly were perpetrated by Hamas.[3] *See Strauss v. Crédit Lyonnais, S.A.* ("*Strauss II*"), 925 F. Supp. 2d 414, 418 (E.D.N.Y. 2013). Plaintiffs comprise over 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 France. *Id.* At the time of the events giving rise to this action, Defendant conducted business in New York through the Crédit Lyonnais

---

[2] The Court assumes familiarity with the facts underlying this action, which are summarized more fully in the Court's February 28, 2013 Opinion and Order on the parties' cross-motions for summary judgment. *See Strauss v. Crédit Lyonnais, S.A.* ("*Strauss II*"), 925 F. Supp. 2d 414 (E.D.N.Y. 2013). The facts recounted herein are drawn from the statement of facts set forth in that Opinion and Order, affidavits 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." (*Strauss* FAC. ¶ 1 n.1.)

Americas New York Branch (Defendant's "New York Branch").[4] (*See* Decl. of Joseph Virgilio ("Virgilio Decl.") ¶ 2, Ex. 3 to the Decl. of Emily P. Eckstut in Supp. of Def's. Mot. for Summary Judgment, *Strauss* Dkt. Entry No. 316-1.) According to Defendant, the New York Branch served as the "intermediary bank for U.S. Dollar denominated transfers that were requested by customers of Crédit Lyonnais in France." (*Id.*) Plaintiffs allege that Defendant also maintains an office in Miami, Florida, and is registered with State banking authorities there. (*Strauss* FAC ¶ 579; *Wolf* Compl. ¶ 316.)

Among other customers, Defendant maintained bank accounts in France for the Comite de Bienfaisance et de Secours aux Palestiniens ("Committee for Palestinian Welfare and Relief") ("CBSP"), a nonprofit organization registered in France and self-described as providing humanitarian aid to various charitable organizations in the West Bank, Gaza, and surrounding areas. *See Strauss II*, 925 F. Supp. 2d at 418-19. During the time CBSP had accounts with Defendant, it transferred money to certain charitable organizations (each a "Charity," and collectively the "Charities") that Plaintiffs contend actually were front organizations for Hamas. *See Id.* at 419. Plaintiffs allege that Defendant aided Hamas by maintaining CBSP's accounts and sending money to the Charities on CBSP's behalf, despite knowing that CBSP supported Hamas. *See Id.* at 424-25. While the vast majority of

---

[4] Plaintiffs contend that the New York Branch was a "legally inseparable" corporate branch maintained by Defendant, rather than a subsidiary with an independent corporate existence. (*See* Pl.s' Opp'n at 12 n.26.) Nevertheless, the Court uses the term "New York Branch" as a matter of convenience only.

transfers Defendant made to the Charities on behalf of CBSP never went through the United States, the parties agree that Defendant executed five such transfers through its New York Branch (the "New York Transfers"), each in response to a specific request by CBSP to send funds in U.S. Dollars. (*See* Ex. A to the Oct. 16, 2015 Friedman Ltr., *Strauss* Dkt. Entry No. 393.) The relevant electronic transfer records reflect that each New York Transfer was initiated by Defendant in Paris and routed through its New York Branch, then was directed for the benefit of the respective Charity to a correspondent account maintained by that Charity's bank either at a New York branch of Arab Bank, PLC, or in one instance, Citibank N.A. (*See* Exs. A-D to the Feb. 7, 2014 Osen Ltr., *Strauss* Dkt. Entry No. 362; Ex. B to the Oct. 16, 2015 Osen Ltr., *Strauss* Dkt. Entry No. 392; Ex. A to the Oct. 16, 2015 Friedman Ltr.)

II. Procedural History

After initially commencing an action against Defendant in the United States District Court for the District of New Jersey, Plaintiffs refiled the *Strauss* case in this Court in February 2006. The initial complaint, 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 Strauss* FAC ¶ 4; *see also Wolf* Compl. ¶ 4.) Following its voluntary acceptance of service of process in February 2006, (*Strauss* Dkt. Entry No. 3), Defendant moved for dismissal of the *Strauss* action pursuant to Rule 12(b)(6), declining to contest personal jurisdiction at that time. (*See* Mot. to Dismiss, *Strauss* Dkt. Entry No. 10.) 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. *Strauss v. Crédit Lyonnais, S.A.* ("*Strauss I*"), 2006 WL 2862704 (E.D.N.Y. Oct. 5, 2006). Defendant similarly accepted service in the *Wolf* action and thereafter filed a motion to dismiss, which the parties resolved by stipulation without any objection by Defendant as to personal jurisdiction. (*See Wolf* Dkt. Entry Nos. 6, 13, and 31.)

Extensive merits discovery between the parties ensued. On October 7, 2011, the Court formally consolidated the *Strauss* and *Wolf* actions. Thereafter, Defendant moved for summary judgment dismissing the consolidated action, but again declined to raise a defense of lack of personal jurisdiction. (*See Strauss* Dkt. Entry No. 293.) By Opinion and Order dated February 28, 2013, the Court granted summary judgment in favor of Defendant with respect to one attack for which certain Plaintiffs sought recovery, but denied Defendant's motion with respect to Plaintiffs' claims concerning more than a dozen other attacks. *See Strauss II*, 925 F. Supp. 2d at 452-53.

On February 6, 2014, 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* Feb. 6, 2014 Friedman Ltr., *Strauss* Dkt. Entry No. 361.) 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 the "new rule" on general jurisdiction purportedly announced in *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 five New York Transfers it executed through its New York Branch. (*See* Def.'s Mem. at 15-25.) 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 five 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 *Strauss* and *Wolf a*ctions, then actively litigating this case for several years. (*See* Pl.s' Opp'n at 4-11.) Plaintiffs further argue that *Daimler* is distinguishable from this case, and therefore, the Court may exercise general jurisdiction over Defendant even if it finds that Defendant did not waive its personal jurisdiction defense. (*See Id.* at 12 n.27.) Finally, Plaintiffs contend that the Court 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* Tr. of Oct. 8, 2015 Oral Argument ("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 CBSP, and the portion or percentage of those transfers that went through New York or the broader United States. (*See Strauss* Dkt. Entry Nos. 391-97.) 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 *Strauss* and *Wolf* actions, then actively litigating this case over the course of several years. (*See* Pl.s' Opp'n at 4-11.) 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. 3l, 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 the question of waiver in this case is governed by Rule 12(h)(1) of the Federal Rules of Civil Procedure, which applies only to the parties to an action and, thus, was inapplicable to Bank of China as a non-party in *Gucci*. (*See* Sept. 23, 2014 Glatter Ltr., *Strauss* Dkt. Entry No. 378.) That argument is without merit. As relevant here, waiver under Rule 12(h)(1) expressly is limited to the "circumstances described in Rule 12(g)(2)." Subject to limited exception, Rule 12(g)(2) prohibits a party from raising a defense by way of a second motion to dismiss if that defense "was *available* to the party but omitted from its earlier motion." Fed. R. Civ. P. 12(g)(2) (emphasis added). In this respect, Rule 12(h)(1) comports with the well settled principle that a party cannot be deemed to have waived defenses not known to be available to it. *See Holzsager*, 646 F.2d at 796. Given the Court's prior determination that a personal jurisdiction defense was not available to Defendant prior to *Daimler*, consideration of Rule 12(h)(1) does not alter the Court's conclusion that Defendant did not waive that defense.

Plaintiffs' remaining arguments are similarly unavailing. Plaintiffs contend 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 10-11.) 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; *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

---

[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).

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 9.) Plaintiffs base their argument on representations by Defendant that it does not conduct business in the United States, which Defendant made in: (1) a November 2006 submission to the magistrate judge; and (2) Defendant's December 2006 answer to the first amended complaint. (*See* Ex. A to the Oct. 16, 2015 Osen Ltr., *Strauss* Dkt. Entry No. 391.) 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 France. (*See* Def.'s Opp'n to Pl.s' Discovery Motion, *Strauss* Dkt. Entry No. 61, at 22-23.) 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 Strauss v. Crédit Lyonnais, S.A.*, 242 F.R.D. 199, 203 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

---

[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, at oral argument in connection with the instant motion, the parties agreed that further discovery directed to the jurisdictional facts would be unnecessary. (*See* Tr. at 40:18-21; 41:22-42:8.)

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 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 Strauss* FAC ¶¶ 577-78; *Wolf* Compl. ¶¶ 314-15). 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.

---

[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.*

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).

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. Plaintiffs nevertheless attempt to distinguish *Daimler* on the ground that it involved a foreign corporation with a subsidiary in the forum State, whereas in this case the New York Branch purportedly was a legally inseparable branch office of Defendant. (*See* Pl.s' Opp'n at 12 n.27.) However, that distinction hardly renders *Daimler* inapposite. As a central principle, *Daimler* held that it would be "unacceptably grasping" to permit general jurisdiction over a corporation in every State where it engages in continuous and systematic business. *Daimler*, 134 S. Ct. at 761. There is no basis to suggest that such reasoning, though

---

at *18. Here, although 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).

articulated in the context of a case involving subsidiaries, would not also apply in cases involving a foreign bank with a branch in New York. *See Gliklad v. Bank Hapoalim B.M.*, No. 155195/2014, 2014 N.Y. Slip Op. 32117(U), at *3 (Sup. Ct. N.Y. Cnty. Aug. 4, 2014). In fact, the Second Circuit drew no such distinction when applying *Daimler* to the facts in *Brown*, which involved Lockheed's maintenance of offices and a facility in Connecticut. *See Brown*, 2016 WL 641392, at *6-7. Accordingly, *Daimler* is controlling here and clearly precludes the Court from exercising general jurisdiction over Defendant in this matter.

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 several provisions of New York's long-arm statute, alleging that Defendant is subject to specific jurisdiction under New York Civil Practice Law and Rules ("C.P.L.R.") §§ 302(a)(1), (a)(2), and (a)(3). (*See* Pl.s' Opp'n at 22-25.) Because the Court concludes that C.P.L.R. § 302(a)(1) ("§ 302(a)(1)") permits the exercise of jurisdiction over Defendant, it does not consider whether jurisdiction also exists under §§ 302(a)(2) and (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 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 question "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 that was staffed with employees and licensed to operate under New York banking laws. Defendant routinely conducted business in New York through that branch, utilizing it as the exclusive clearing channel for U.S. Dollar transfers requested by its customers. (*See* Virgilio Decl. ¶ 2; *see also* Tr. 20:22-21:6). 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 those five transfers represent only a subset of the total transfers Defendant made to the Charities on behalf of CBSP, they integrally constitute part of Defendant's alleged support of Hamas and its terrorist activities, including the 19 attacks in which Plaintiffs were injured. As such, the New York Transfers unquestionably are among the financial services underlying Plaintiffs' claims. (*See Strauss* FAC ¶¶ 676-90; *Wolf* Compl. ¶¶ 407-25.)

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, five separate times, Defendant deliberately routed a transfer through its New York Branch in response to a specific request by CBSP to transmit funds in U.S. Dollars to a given Charity. Furthermore, the first New York Transfer occurred in 1997, while the remaining four transfers all were performed in June and July of 2001. (*See* Ex. A to the Oct. 16, 2015 Friedman Ltr.) As such, those transfers not only overlapped with the attacks in 2001 through 2004 that caused Plaintiffs' injuries, but also occurred at a time when Defendant allegedly knew that funds it transferred on behalf of CBSP were being used to support a terrorist organization. (*See, e.g.*, *Strauss* Compl. ¶ 678; *Wolf* Compl. ¶ 419); *see also Strauss II*, 925 F. Supp. 2d at 429-430 (noting that "Defendant admittedly had concerns about CBSP's accounts since at least 1997," and further finding that "there is considerable documentary and testimonial evidence showing Defendant's knowledge of CBSP's possible terrorist affiliations from at least 2001 through 2003, which is contemporaneous to the attacks at issue.")

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 10-11.) 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 relied not only on

an averment of facts but also on actual transfer records showing that each New York Transfer was directed to a beneficiary Charity, was routed by Defendant through its New York Branch, and reached a correspondent account in New York maintained by the respective Charity's bank. (*See* Ex. B. to the Oct. 16, 2015 Osen Ltr.)

Defendant further argues that, even if each New York Transfer reached its intended beneficiary, those transfers do not support jurisdiction because they are *de minimis* in comparison to the many other transfers Defendant made to the Charities at CBSP's behest. The parties generally agree that, in addition to the five New York Transfers, Defendant executed at least 280 other transfers to the Charities on behalf of CBSP that never went through New York or the United States. (*See* Oct. 20, 2015 Osen Ltr., *Strauss* Dkt. Entry No. 395.) Furthermore, whereas the New York Transfers represented just $205,000 in transferred funds, the other relevant transfers routed elsewhere in the world totaled approximately $3 million. (*See* Oct. 16, 2015 Osen Ltr.) Accordingly, whether measured by number or monetary value, the vast majority of the transfers underlying Plaintiffs' claims were routed from CBSP's accounts in Paris to various bank accounts abroad, without any contact with New York or the United States.

While relevant to the Court's jurisdictional analysis, these facts do not foreclose jurisdiction under § 302(a)(1). As a "single act statute," even "one transaction in New York is sufficient to invoke jurisdiction [under § 302(a)(1)] . . . so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim

asserted." *Deutsche Bank Secs., Inc.*, *v. Montana Bd. of Invs.*, 7 N.Y.3d 65, 71 (2006) (internal quotation marks and citation omitted); *see also Chloé*, 616 F.3d at 170; *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467 (1988). In number, the New York Transfers accounted for approximately 1.8% of the total transfers Defendant made to the Charities on behalf of CBSP. (*See* Oct. 21, 2015 Friedman Ltr., *Strauss* Dkt. Entry No. 396). Defendant notes that a similar percentage of New York activity was deemed *de minimis* in *DH Services, LLC v. Positive Impact, Inc.*, 2014 WL 496875, at *9-10 (S.D.N.Y. Feb. 5, 2014), where the court found that it could not exercise jurisdiction over an out-of-state organization that received approximately 1% of its annual funding from New York sources.[8]

However, the court further explained that the grants and donations composing that 1% of funding had no demonstrated connection to the trademark claims that were the subject of the action. *Id.* at *9. The court sharply contrasted *Chloé*, 616 F.3d at 166, where the Second Circuit held that a defendant who shipped a single counterfeit handbag into New York was subject to jurisdiction under § 302(a)(1) because that "*was* the conduct underlying the lawsuit." *DH Services*, 2014 WL 496875, at *9 (emphasis in original). Here, although the New York Transfers

---

[8] The Court notes that Defendant makes an apples-to-oranges comparison. In *DH Services*, 1% represented the proportional *value* of funds received from New York sources, whereas in this case 1.8% represents the proportional *number* of transfers executed through New York. Expressed in terms of value, and based on the figures generally agreed upon by the parties, the New York Transfers may have represented as much as 6.8% of the total funds Defendant transferred to the Charities on behalf of CBSP.

represent a minority of the total transfers Defendant made to the Charities on behalf of CBSP, they are an integral facet of the conduct that is the basis for all of Plaintiffs' claims. Thus, similar to the facts in *Chloé*, the New York Transfers *are* the conduct underlying this lawsuit. As such, they establish the articulable nexus required by § 302(a)(1).

Furthermore, the nexus between Plaintiffs' claims and Defendant's New York conduct is premised on more than just the New York Transfers. As an element of their claims, "Plaintiffs must show that Defendant knew or was deliberately indifferent to the fact that CBSP was financially supporting terrorist organizations." *Strauss II*, 925 F. Supp. 2d at 428. According to Plaintiffs, what Defendant knew about CBSP's potential involvement in financing terrorism was informed, at least in part, by Defendant's communications and other interactions with the New York Branch. In particular, consistent with its general practice, Defendant's New York Branch filtered all transfer requests made by CBSP through a system designed to detect terrorism financing based on notices from the United States Treasury Office of Foreign Asset Control ("OFAC"). (*See* Virgilio Decl. ¶ 3.) In October 2001, the New York Branch blocked a transfer from CBSP's main account in Paris to the "El Wafa Charitable Society-Gaza" (the "El Wafa Transfer"), as that organization's name was similar to the name of an organization designated by OFAC as an Al Qaeda fundraiser. (*See Id.* ¶¶ 2-4.) Ultimately, those two organizations were determined to be distinct. As such, the New York Branch's blocking of the El Wafa Transfer, by itself, provides limited insight into what Defendant

potentially knew about CBSP's involvement in financing terrorism. *See Strauss II*, 925 F. Supp. 2d at 430 n.10.

Nevertheless, Plaintiffs allege that the blocking of the El Wafa Transfer precipitated communications between Defendant and its New York Branch regarding CBSP's banking activities. (*See* Ex. A to the Oct. 22, 2015 Osen Ltr., *Strauss* Dkt. Entry No. 397) (attaching list of communications). Those communications, in turn, allegedly renewed suspicions at Defendant's home office in Paris regarding CBSP, and led to discussions among bank officials there regarding stricter scrutiny of CBSP's accounts. (*See* Pl.s' Opp'n at 13 & n.29.) Defendant nonetheless contends that those communications, potentially implicating what Defendant knew about CBSP's ties to terrorism, are not relevant to the Court's jurisdictional analysis under § 302(a)(1) because they do not give rise to Plaintiffs' claims. (*See* Def.'s Reply Mem. in Supp. of Mot. to Dismiss ("Def.'s Reply") at 3, *Strauss* Dkt. Entry No. 372.)

However, Defendant too narrowly construes the nexus requirement of § 302(a)(1). The defendant in *Chloé* similarly misconstrued that requirement, arguing that counterfeit bags it shipped into New York bearing marks not registered to the plaintiff were irrelevant to a jurisdictional analysis, as the plaintiff's trademark claims necessarily did not arise from those particular shipments. The Second Circuit rejected that argument on appeal, explaining that those shipments were relevant to an analysis under § 302(a)(1) because they evidenced a "larger business plan purposefully directed at New York." *Chloé*, 616 F.3d at 166-67. With the benefit of that broader context, the shipment of a single bag into New York bearing the plaintiff's marks

was not the "one-off transaction" it otherwise appeared to be. *Id.* Here, the blocking of the El Wafa Transfer and the ensuing communications between the New York Branch and bank officials at Defendant's home office in Paris similarly evidence a broader operation fundamentally intertwined with New York. Standing alone, that relationship perhaps would not be enough to establish the nexus required by § 302(a)(1). However, those interactions give deeper context to the New York Transfers, demonstrating that Plaintiffs' claims are tied to New York by more than just those five transactions.

In any event, jurisdiction under § 302(a)(1) is not determined by the quantity of a defendant's contacts with New York, but by 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 through which it continuously and systematically conducted business in New York, utilizing that branch to execute 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 CBSP. Most importantly, Defendant executed the five New York Transfers through the New York Branch, 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 at 5.) 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. (*See, e.g.*, Tr. 55:1-10.)

Because Plaintiffs allege injuries in connection with 19 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 19 attacks. To explain why, it is useful to consider the result if Plaintiffs had pursued their claims in 19 separate actions, each premised upon a single attack. As previously noted, the first New York Transfer was in 1997 and the remaining four transfers all occurred in June and July of 2001, while the 19 attacks at issue in this action all took place between March 2001 and September 2004. (*See* Ex. A to the Oct. 16, 2015 Friedman Ltr.) Given the timing of those transfers and the substantial amount underlying them, Plaintiffs in all 19 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 1992, five years before the first New York Transfer. Under such circumstances, the nexus between claims arising from the 1992 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 19 separate actions, the New York Transfers would embody purportedly unlawful conduct relevant to establishing Defendant's liability in each action.[9] As

---

[9] Defendant notes that one of the attacks at issue occurred on March 28, 2001, at which point the only New York Transfer that had been executed was a 1997 transfer in the amount of $5,000. (*See* Def.'s Mem. at 23.) According to Defendant, the four remaining New York transfers necessarily could not have proximately caused that attack because they were performed after it occurred, in June and July of 2001. That argument presents a question of causation not appropriately resolved here, but the Court notes that the Honorable Brian M. Cogan, of this Court, recently rejected the very same argument in denying the defendant's post-trial motions in *Linde v. Arab Bank, PLC*, 97 F. Supp. 3d 287, 329 (E.D.N.Y. 2015). As Judge Cogan explained: "Defendant's emphasis on the fact that these payments were made after the attacks

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 assumption that, if the Court were to adjudicate all of those claims, 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] discrete wire transfers that touched New York as providing a basis for asserting personal jurisdiction over [Defendant] in New York with respect to 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 the New York Branch, 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

---

occurred misses the point; the jury was entitled to find that the prospect that the families of dead Hamas terrorists would be financially rewarded was a substantial factor in increasing Hamas' ability to carry out attacks such as these." *Id.*

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 19 attacks in which Plaintiffs were injured. Because the New York Transfers were part of that allegedly unlawful conduct, the Court may exercise jurisdiction with respect to claims made in connection with all 19 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 July 2001.[10] There is no requirement

---

[10] 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 10-11.) 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, and outweighs Defendant's relevant New York conduct, 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 the 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.[11]

Here, Defendant does not dispute that it properly was served with process at its agency in Miami, Florida in connection with the original filing of this action in the District of New Jersey. (*See* Ex. A to the Declaration of Aaron Schlanger, dated May 1, 2014 ("Schlanger Decl."), *Strauss* Dkt. Entry No. 370.) Furthermore, when the *Strauss* action was refiled in this Court, Defendant expressly agreed to accept service of

---

[11] *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).

the Summons and Complaint by stipulation of the parties dated February 17, 2006.[12] (*See* Ex. B to the Schlanger Decl.) Defendant voluntarily accepted service in the *Wolf* action as well. (*See* Stipulation and Order dated April 5, 2007, *Wolf* 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 permitted by due process.[13] *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

---

[12] At the time Defendant accepted service, the provision presently embodied by Rule 4(k)(1)(C) of the Federal Rules of Civil Procedure was in effect as Rule 4(k)(1)(D), which subsequently was renumbered pursuant to the 2007 Amendment to the Federal Rules.

[13] 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).

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 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.[14]

---

[14] *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

Nevertheless, aside from an office Defendant purportedly maintains in Miami, Florida, 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. *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 that branch as its exclusive clearing channel for U.S. Dollar transfers requested by its customers. Defendant's officers in Paris also regularly communicated with the New York Branch, including with regard to CBSP on several occasions. (*See* Ex. A to the Oct. 22, 2015 Osen Ltr.) (attaching list of communications).

Most notably, Defendant deliberately used New York's banking system to execute the five New York Transfers. Given that similar recurring 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 were executed through Defendant's own branch in New York. As such, there is no question that Defendant purposefully

---

proper for determining personal jurisdiction in cases arising under federal statutes that authorize nationwide service.)

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 CBSP 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 a fraction of the transfers at issue contacted 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.

The Court acknowledges that *Licci III* involved dozens of wire transfers through New York totaling millions of dollars, whereas in this case there were only five New York Transfers totaling $205,000. Nevertheless, if not for the New York Transfers, $205,000 would not have been provided to the Charities and thereupon purportedly delivered into the hands of Hamas during the same timeframe that Hamas allegedly 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). Furthermore, Plaintiffs allege facts to support a finding 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 sending money from CBSP to the Charities. *See Strauss*, 925 F. Supp. 2d at 429-30; *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)). Under *Licci III*, these factual assertions are sufficient to satisfy the "minimum contacts" component of the due process inquiry.

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 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 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 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.; *see also* Tr. 44:12-25.) 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 CBSP in close temporal proximity to the 19 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 19 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 has purposefully 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.[15]

III. Pendent Personal Jurisdiction

Plaintiffs invoke the doctrine of pendent personal jurisdiction as an alternative basis for finding that Defendant is subject to jurisdiction with respect to all of Plaintiffs' claims. (*See* Pl.s' Opp'n at 19 n.9.) In general, that doctrine permits a court to exercise personal jurisdiction with respect to a claim for which it otherwise lacks jurisdiction, if that claim arises from the same common nucleus of fact as another claim for which the court properly has jurisdiction over the defendant. *See* 4 Wright & Miller, Federal Practice and

---

[15] 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.

Procedure § 1069.7 (4th ed.) However, within the Second Circuit, the doctrine of pendent personal jurisdiction primarily has been embraced to permit the adjudication of pendent state law claims that derive from the same common nucleus of fact as a federal claim for which the court has jurisdiction over the defendant. *See, e.g., IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1059 (2d Cir. 1993); *see also Hargarve v. Oki Nursery, Inc.*, 646 F.2d 716, 719-21 (2d Cir. 1980) (court that properly had jurisdiction over defendant on state law claim permitted to exercise pendent jurisdiction as to related state law claims). Notably, those are not the circumstances here, where all of Plaintiffs' claims are brought under a single federal statute. In any event, having already determined that it may exercise jurisdiction with respect to all of Plaintiffs' claims under traditional personal jurisdiction principles, the Court need not decide whether it also would be appropriate to exercise pendent personal jurisdiction. Therefore, the Court declines to do so.

IV. 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 five transfers. (*See* Def.'s Mem. at 15-25.) In other words, Plaintiffs purportedly cannot prevail on their claims because they cannot prove that as of July 31, 2001—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 DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 06-CV-702 (DLI) (RML)

MOSES STRAUSS, *et al.*,
Plaintiffs,
v.
CRÉDIT LYONNAIS, S.A.,
Defendant.

No. 07-cv-914 (DLI) (RML)

BERNICE WOLF, *et al.*,
Plaintiffs,
v.
CRÉDIT LYONNAIS, S.A.,
Defendant.

OPINION AND ORDER

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

Over 200 individuals and estates of deceased persons (collectively, "Plaintiffs"), brought this consolidated action against defendant Crédit Lyonnais, S.A. ("Defendant"), seeking to recover damages from fifteen terrorist attacks in Israel and Palestine pursuant to the civil liability provision of the Antiterrorism Act of

1992 ("ATA"), 18 U.S.C. § 2333(a) ("Section 2333(a)"). Defendant moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. In addition, a group of Plaintiffs who seek damages related to one of the fifteen attacks, a September 9, 2003 terrorist attack at the Café Hillel in Jerusalem, ("Café Hillel Plaintiffs"),[1] cross-moved for summary judgment as to liability against Defendant. For the reasons set forth below, Defendant's motion is denied in part and granted in part, and the Café Hillel Plaintiffs' motion is denied in part and granted in part.

BACKGROUND[2]

I. The Parties

Plaintiffs' claims arise from fifteen attacks in Israel and Palestine that occurred between March 27, 2002 and September 24, 2004, which Plaintiffs allege were perpetrated by the Palestinian organization, Hamas. (Def.'s Am. Statement of Material Facts, Strauss Dkt. Entry 295 ("CL's 56.1 Stmnt."), ¶ 251; Pls.' Resp. to Def.'s Am. Statement of Material Facts, Strauss Dkt. Entry 297 ("Pls.' 56.1 Resp.") ¶ 251.)[3] Plaintiffs

---

[1] The Café Hillel Plaintiffs are Natan Applebaum for the Estate of David Applebaum and 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 and Chaya Tziporah Cohen.

[2] Except where otherwise stated, the Background is taken from facts that are not genuinely in dispute.

[3] Citations to the "Strauss Docket" are to docket 06-cv-702. Citations to the "Wolf Docket" are to 07-cv-914. Where documents have been filed on both dockets, the court cites to the Strauss Docket only, as it is the lead case.

comprise over 200 United States citizens who were injured in the terrorist attacks, the estates of those killed in the terrorist attacks and/or are family members of people killed or injured in the terrorist attacks. (See 3d Am. Compl., Strauss Dkt. Entry 127 ("Strauss 3d Am. Compl."), ¶¶ 5-572; Compl., Wolf Dkt. Entry 1 ("Wolf Compl."), ¶¶ 5-313.)

Defendant is a financial institution incorporated and headquartered in France that also does business in the United States. (CL's 56.1 Stmnt. ¶ 1; Pls.' 56.1 Resp. ¶ 1.)

II. CBSP

The Comite de Bienfaisance et de Secours aux Palestiniens ("Committee for Palestinian Welfare and Relief") ("CBSP") is a non-profit organization registered in France and currently headquartered in Paris. (CL's 56.1 Stmnt. ¶ 2; Pls.' Resp. ¶ 2.) CBSP opened an account with Defendant in May 1990, and opened three additional accounts with Defendant in 1993. (CL's 56.1 Stmnt. ¶ 3; Pls.' 56.1 Resp. ¶ 3.) CBSP indicated in the account opening documentation it provided to Defendant that it collects funds for humanitarian aid that it transfers to various charitable organizations in the West Bank and Gaza and surrounding areas. (CL's 56.1 Stmnt. ¶ 2; Pls.' 56.1 Resp. ¶ 2.)

During the period relevant to this case, neither France nor the European Union included CBSP on any lists of persons subject to the freezing of assets or supervision of their financial transactions. (CL's 56.1 Stmnt. ¶ 114; Pls.' 56.1 Resp. ¶ 114.) However, on August 21, 2003, the United States Treasury Office of Foreign Assets Control ("OFAC") listed CBSP as a "Specially-Designated Global Terrorist" ("SDGT").

(CL's 56.1 Stmnt. ¶ 116; Pls.' 56.1 Resp. ¶ 116.) In the press release issued by the Department of Treasury's Office of Public Affairs announcing the designation, CBSP was described as a primary fundraiser for Hamas in France that has "collected large amounts of money . . ., which it then transfers to sub-organizations of Hamas." (Decl. of Joel Israel, Wolf Dkt. Entry 182-4 ("Israel Decl.") Ex. 31 at 5.) Hamas already had been designated as a Foreign Terrorist Organization ("FTO") in 1997 by the United States. (CL's 56.1 Stmnt. ¶¶ 299-301; Pls.' 56.1 Resp. ¶¶ 299-301.) The press release announcing CBSP's designation also stated that CBSP had worked "in collaboration with more than a dozen humanitarian organizations based in different towns in the West Bank and Gaza and in Palestinian refugee camps in Jordan and Lebanon." (Israel Decl. Ex. 31 at 5.) In addition, in 1997, the Israeli government had designated CBSP as a "terrorist organization" under the Prevention of Terrorism Ordinance and an "unlawful organization" under Israel's Defense (Emergency) Regulations. (CL's 56.1 Stmnt. ¶ 125; Pls.' 56.1 Resp. ¶ 125.)

III. The Charities

While CBSP had accounts with Defendant, it transferred money to "13 Charities"[4] Plaintiffs contend

---

[4] The 13 Charities are: Al-Mujama al-Islami-Gaza (the Islamic Center-Gaza); Al- Jam'iya al-Islamiya-Gaza (the Islamic Society-Gaza); Al-Salah Islamic Association-Gaza (Jam'iyat al-Salah al-Islamiya-Gaza); Al-Wafa Charitable Society-Gaza (Jam'iyat al-Wafa al-Khiriya-Gaza); Islamic Charitable Society-Hebron (Al-Jam'iya al-Khiriya al-Islamiya al-Khalil); Jenin Zakat Committee (Lajnat al-Zakaa Jenin); Nablus Zakat

were "alter egos" of Hamas. (CL's 56.1 Stmnt. ¶¶ 284, 299-301; Pls.' 56.1 Resp. ¶¶ 284, 299-301.) The United States, however, did not designate any of the transferees of funds from CBSP's accounts as SDGTs before August 21, 2003. (CL's 56.1 Stmnt. ¶ 117; Pls.' 56.1 Resp. ¶ 117.)

The boards of directors of at least some of the 13 Charities included members of Hamas. (CL's 56.1 Stmnt. ¶ 317; Pls.' 56.1 Resp. ¶ 317.) Each of the 13 Charities maintained its own bank accounts in either its own name or the names of the treasurer or the head of the entity. (CL's 56.1 Stmnt. ¶¶ 322-23; Pls.' 56.1 Resp. ¶¶ 322-23.)

IV. Defendant's Suspicions About CBSP's Accounts

A. Defendant's Initial Suspicions

From 1997 through 2003, activity in CBSP's accounts was monitored by Defendant's unit responsible for the prevention of fraud and money laundering, which became known as the Financial Security Unit ("FSU"). (CL's 56.1 Stmnt. ¶ 5; Pls.' 56.1 Resp. ¶ 5.) The FSU's Committee for the Prevention of Money Laundering and Fraud ("CPML") was the body within the FSU responsible for analyzing information it

---

Committee (Lajnat al-Zakaa Nablus); Al-Tadamum Charitable Society-Nablus (Jam'iyat Al-Tadamum al-Khiriya al-Islamiya Nablus); Tulkarem Zakat Committee (Lajnat al-Zakaa Tulkarem); Ramallah-al Bireh Zakat Committee (Lajnat al-Zakaa Ramallah wal-Bireh); Al-Islah Charitable Society-Ramallah & Al-Bireh (Jam'iyat al-Islah al-Khiriya al-Ajithamiya Ramallah wal-Bireh); Beit Fajar Zakat Committee (Lajnat al-Zakaa Beit Fajar); and Jerusalem Central Zakat Committee (Lajnat al-Zakaa al-Markaziya al-Quds). (CL's 56.1 Stmnt. ¶ 284; Pls.' 56.1 Resp. ¶ 284.)

received about suspicious activity by Defendant's customers, including CBSP, and then evaluating what steps should be taken based on that information. (CL's 56.1 Stmnt. ¶ 9; Pls.' 56.1 Resp. ¶ 9.)

In 1997, Robert Audren, the individual at the FSU in charge of monitoring activities in CBSP's accounts, opened an investigative file on CBSP's accounts. (*See* Decl. of Aitan D. Goelman, Strauss Dkt. Entry 299 ("Goelman Decl."), Ex. 11 at 21-22, 46.) Audren opened the investigative file after the accounts were brought to Audren's attention by employees at the local branch where CBSP maintained its accounts. (*See id.* 22.) Audren testified that he believed the local branch brought the accounts to his attention because "Associations" "are not very common types of accounts in a branch and an account which through its title or through its name raised questions." (*Id*.) During his review, Audren requested back-up information for transfers to several of the 13 Charities. (*See id.* Ex. 11 at 60-66, Exs. 16-18.) Audren testified that he believed the transfers "corresponded or they were at least perfectly coherent with the stated purpose of this Association which was, in fact, welfare and solidarity with Palestine." (*Id.* Ex. 11 at 66.) After reviewing account statements, Audren determined that the account's operation seemed normal and that "the incoming funds were coming from private individuals, seemingly, according to the names of the donors of North African origin and that seemed coherent in people's minds with the account such that it was opened. Now, the way that the funds left the account didn't pose a problem for us." (*Id.* 28.)

B. Defendant Reports CBSP to the French Government

In late fall of 2000, Audren became aware of what he perceived to be large and unexplained increases in the number and amounts of deposits into CBSP's main account coming from sources he was unable to identify. (CL's 56.1 Stmnt. ¶ 20; Pls.' 56.1 Resp. ¶ 20.) Audren concluded that the increase in the number and amounts of unidentifiable inflows made the origins of the deposits more opaque. (CL's 56.1 Stmnt. ¶ 21; Pls.' 56.1 Resp. ¶ 21.) More specifically, Audren testified that, "[i]n terms of the names of the donors there is no opacity. As for the origin of the funds contributed by the donors, well, I don't know them personally." (Goelman Decl. Ex. 15 at 114-15.) According to Audren, he believed that the large increase in cash flows indicated that CBSP's main account might have been used for money laundering. (Decl. of Emily P. Eckstut, Strauss Dkt. Entry 316 ("Eckstut Decl.") Ex. 2 ¶ 4.)

On December 19, 2000, Audren drafted for the CPML's review what he referred to as a "pre-declaration," describing the suspicious activity in CBSP's main account. (CL's 56.1 Stmnt. ¶ 26; Pls.' 56.1 Resp. ¶ 26.) In the pre-declaration, Audren described CBSP's activities as "[c]ollection of funds from 'supporters'[5]

---

[5] The actual French word in the pre-declaration is "sympathisants." Plaintiffs dispute Defendant's translation of this word as "supporters" and insist that the proper translation is "sympathizers." (See Pls.' 56.1 Resp. ¶ 32.) Audren testified that he used the word to "convey the sympathy and support sufficient that people would set up permanent transfers or even give checks." (Goelman Decl. Ex. 11 at 100-01.) The court takes no position on the correct translation, and notes that the translation of this word does not affect the outcome of the Order.

and individual donors, then transfers to banks established in LEBANON or PALESTINE, to non-resident charitable and/or Islamic associations." (Eckstut Decl. Ex. 32.) Audren described his "reason for suspicion" as:

> Essentially, the increased amount. The movements, up to now, apparently compatible with a collection provided by individuals, by checks, wire transfers, cash for low amounts, increased in October, November 2000 . . ., mainly by increasing payments in cash, both in number and amounts. Similarly, the check deposits grew and the current main account balance is now often around one million francs. If the events in ISRAEL partly explain this new increase in support, the source of funds is also much more obscure. Moreover, the personality of the President appears contrasted.

(*Id*.) Audren testified that by "events" in Israel he was referring to the increased period of conflict in Israel and Palestine at the time, known as the "Second Intifada." (CL's 56.1 Stmnt. ¶ 33; Pls.' 56.1 Resp. ¶ 33; Goelman Decl. Ex. 11 at 107-08; Café Hillel Pls.' Statement of Material Facts, Wolf Dkt. Entry 182-2 ("CH Pls.' 56.1 Stmnt.") ¶ 3; Def.'s Resp. to Café Hillel Pls.' Statement of Material Facts, Wolf Dkt. Entry 188-2 ("CL's 56.1 Resp.") ¶ 3.) Audren also explained that his description of the "President" as "contrasted" was intended to refer to Defendant's personnel's perception that CBSP's president had an uncooperative and unfriendly demeanor. (CL's 56.1 Stmnt. ¶ 34; Pls.' 56.1 Resp. ¶ 34.)

Audren drafted this pre-declaration so the CPML could decide whether to report CBSP's activity to the

French government agency known as TRACFIN and/or to terminate Defendant's relationship with CBSP. (CL's 56.1 Stmnt. ¶ 27; Pls.' 56.1 Resp. ¶ 27.) Defendant believed that it was obligated by French law to file a declaration with TRACFIN when Defendant suspected that one of its customers was laundering money so that TRACFIN could analyze the bank's report and, if appropriate, refer the matter to French prosecutors. (CL's 56.1 Stmnt. ¶ 28; Pls.' 56.1 Resp. ¶ 28.) The CPML discussed the pre-declaration at a meeting on January 9, 2001, where they decided to file a declaration concerning Defendant's suspicions about CBSP with TRACFIN. (CL's 56.1 Stmnt. ¶¶ 35, 39; Pls.' 56.1 Resp. ¶¶ 35, 39.) During the meeting, the CPML also decided to place CBSP's accounts under heightened surveillance. (CL's 56.1 Stmnt. ¶ 40; Pls.' 56.1 Resp. ¶ 40.)

The local prosecutors in the region where CBSP maintained its accounts with Defendant investigated CBSP, but, on July 19, 2001, the local authorities issued a decision to end the investigation and not bring charges, due to an "absence of offense." (CL's 56.1 Stmnt. ¶ 100; Pls.' 56.1 Resp. ¶ 100.)

C. Defendant Reports CBSP to the French Government for the Second Time

In late 2001, Audren decided to bring the CBSP file to the attention of the CPML for a second time. (CL's 56.1 Stmnt. ¶ 42; Pls.' 56.1 Resp. ¶ 42.) On November 27, 2001, Audren drafted for the CPML's consideration a "pre-declaration" for a "complementary" declaration to be filed with TRACFIN regarding CBSP, providing updated information about CBSP. (CL's 56.1 Stmnt. ¶ 44; Pls.' 56.1 Resp. ¶ 44.) The pre-

declaration stated that the movements of funds in CBSP's main account had increased since the previous filing with TRACFIN, but that Defendant was not suspicious with respect to any change in the origin of the funds, and the destination of CBSP's outgoing transfers had not changed. It also noted that CBSP was depositing funds through an intermediary French bank, rather than directly from the original donors, which made it impossible for Defendant to identify the original sources of those funds. (CL's 56.1 Stmnt. ¶ 46; Pls.' 56.1 Resp. ¶ 46.)

Audren also wrote, for the CPML's eyes only, "[t]hese developments, the international context, and the potential repercussions on the image of the CL lead us to ask ourselves whether or not to maintain the accounts in our Establishment. Of course, any decision in this matter will essentially be political." (Eckstut Decl. Ex. 17.) Audren testified that he was referring to possible bad press if the media discovered Defendant was holding "the accounts of Muslim organizations or Muslim individuals," but also the concern that there would be negative repercussions within the Muslim community if the accounts were closed. (Goelman Decl. Ex. 15 at 122.) The CPML discussed the pre-declaration at a meeting on December 6, 2001, and directed that an updated declaration be filed with TRACFIN. (CL's 56.1 Stmnt. ¶ 50; Pls.' 56.1 Resp. ¶ 50.)

Upon submission of the declaration, the French authorities re-opened their investigation into CBSP. (*See* CL's 56.1 Stmnt. ¶ 104; Pls.' 56.1 Resp. ¶ 104.) On September 19, 2002, as part of the investigation, Audren provided a sworn statement concerning CBSP to the local police in the region where CBSP

maintained its accounts. (CL's 56.1 Stmnt. ¶ 101; Pls.' 56.1 Resp. ¶ 101.) Auden explained in his statement that he became aware of CBSP at some point in 1998 "following an increase in the movements received in the accounts and the fact that transfers to banks located in Palestine or Jordan were operated for the benefit of seemingly Islamist organizations without visibility on our part." (Eckstut Decl. Ex. 39.) Audren later testified that he understands "Islamist" means "that it promotes a radical form of Islam. . . . Now, without thinking that all persons who are referred to as Islamists are potential terrorists certain events have demonstrated that certain branches of this trend use violence." (Goelman Decl. Ex. 15 at 54.) Audren also explained in his statement to the police that Defendant perceived a considerable increase in the movement of funds in CBSP's accounts at the end of 2000 and in November 2001, and that, while Defendant decided to terminate CBSP's accounts, it was giving CBSP an extension of time to establish a relationship with another bank. (Eckstut Decl. Ex. 39.)

On October 28, 2002, the local prosecutor issued a decision to end the investigation and not bring any charges, due to "insufficient evidence of offense." (CL's 56.1 Stmnt. ¶ 104; Pls.' 56.1 Resp. ¶ 104.) Investigations also were conducted into CBSP by the French National Police in Paris from January 2003 through April 2008. (CL's 56.1 Stmnt. ¶ 105; Pls.' 56.1 Resp. ¶ 105.) On April 11, 2008, the prosecutor directing the investigation decided not to bring any charges. (CL's 56.1 Stmnt. ¶ 105; Pls.' 56.1 Resp. ¶ 105.)

D. Defendant Decides to Close the CBSP Accounts

In the December 6, 2001 CMPL meeting where the committee decided once again to report CBSP to the French authorities, the CMPL also decided to close CBSP's accounts. (CL's 56.1 Stmnt. ¶ 51; Pls.' 56.1 Resp. ¶ 51.) In a letter dated January 9, 2002, Defendant informed CBSP that CBSP's accounts would be closed on May 9, 2002. (CL's 56.1 Stmnt. ¶ 86; Pls.' 56.1 Resp. ¶ 86.) On February 19, 2002, the president of CBSP responded to Defendant by letter, requesting a postponement of the closing date to December 31, 2002 so that CBSP would have time to set up a new account and inform donors. (Eckstut Decl. Ex. 53.) The president of CBSP wrote "[b]ecause, if it were necessary to close our accounts with CL now, we would be obligated to give the exact reasons for this change. We would like to spare you the bad publicity." (*Id*.) The CPML granted CBSP's request to keep its accounts open until the end of 2002. (Eckstut Decl. Ex. 54.) The last time CBSP transferred money from its account with Defendant to another organization was on February 11, 2002, but CBSP's accounts with Defendant remained officially open until after the end of 2002. (CL's 56.1 Stmnt. ¶¶ 89-90; Pls.' 56.1 Resp. ¶¶ 89-90.)

By letter dated April 1, 2003, CBSP's attorney accused Defendant of closing its accounts based upon religious discrimination. (Eckstut Decl. Ex. 59 at 1.) The letter stated that Audren told local police:

> that he needed to know about CBSP accounts specifically due to: "*transfers to banks located in Palestine or Jordan were operated for the benefit of seemingly Islamist organizations without visibility on our part*." Essentially,

> this is saying that you are refusing this charity as a client because you believe it has relationships with Muslim NGOs.

(*Id.* (emphasis in original).) In the letter, CBSP's attorney asserted that Defendant's concerns had "no basis" and that it had reported its money laundering concerns to TRACFIN in "complete bad faith." (*Id*. 2.) The attorney also noted that "[y]ou emphasized that large amounts of money were sitting in my client's accounts, while you were the one refusing to make the transfers." (*Id*.)

Defendant's legal department assessed and rejected the discrimination allegation, instead finding that the decision to close the account was "based on the sudden change in volume of the transactions recorded in CBSP's accounts, compared to the previous period." (Eckstut Decl. Ex. 60; CL's 56.1 Stmnt. ¶ 95; Pls.' 56.1 Resp. ¶ 95.) On May 10, 2003, Defendant sent a response to CBSP denying that its decision to close the accounts was based upon discrimination and instructing CBSP to close its accounts by May 31, 2003, or Defendant would send the money left in the accounts by cashier's check. (Eckstut Decl. Ex. 61.) Defendant also sent numerous letters to CBSP requesting that CBSP provide information for an account at another bank to which Defendant could transfer the balance of CBSP's funds, but CBSP never responded. (CL's 56.1 Stmnt. ¶ 97; Pls.' 56.1 Resp. ¶ 97.)

E. CBSP Is Designated as a Terrorist Supporter and Its Accounts Are Closed

As described above, on August 21, 2003, the OFAC listed CBSP as a SDGT because of its purported financial support of Hamas. (CL's 56.1 Stmnt. ¶ 116; Pls.'

56.1 Resp. ¶ 116.) The following day, the Vice President and Compliance Officer for Defendant's operations in the United States emailed the OFAC bulletin officially designating CBSP as a SDGT to a number of Defendant's employees. (CH Pls.' 56.1 Stmnt. ¶ 18; CL's 56.1 Resp. ¶ 18.) Among those who received the bulletin were the head of Defendant's Anti-Fraud and Anti-Money Laundering Department and the employee who oversaw international issues in Defendant's FSU, who then further distributed the bulletin internally. (CH Pls.' 56.1 Stmnt. ¶¶ 20-22; CL's 56.1 Resp. ¶¶ 20-22.)

On August 25, 2003, after learning that CBSP's accounts at Defendant remained open, Alain Marsat, who worked in the FSU, emailed Antoine Blachier, who was a risk supervisor for the region where CBSP maintained its accounts, and others requesting an explanation for the delay in closing the accounts. (CH Pls.' 56.1 Stmnt. ¶ 23; CL's 56.1 Resp. ¶ 23.) Blachier responded by summarizing the correspondences between Defendant and CBSP since Defendant told CBSP that it would close the accounts. (Israel Decl. Ex. 45.) Marsat replied the following day by e-mail stating "[t]his is what I do not understand, because since we announced (by registered letter with acknowledgment of receipt) the balance of the accounts at June 2, 03, why was this decision not applied? . . . [A]s one could foresee, this case is taking on international proportions." (*Id.* Ex. 50.) Marsat attached to his e-mail an Associated Press story about the designation of CBSP as a SDGT and CBSP's denial that it supported Hamas. (*Id.*) On August 26, 2003, Blachier sent an e-mail to Marsat and others requesting confirmation that, "following the embargo announced in the

USA, it is still advisable to close the accounts immediately and send the funds to the association, or alternatively if we have to change the way of doing it." (*Id.* Ex. 46.)[6] Marsat responded that "[t]he OFAC embargo does not change our closure decision and the manner of doing it." (*Id*.)

On August 29, 2003, Defendant sent a letter to CBSP explaining that, because CBSP had not told Defendant what bank it wanted its money sent to, Defendant was proceeding to close the accounts, and enclosed four checks for the balance of CBSP's accounts, which totalled over €250,000. (Eckstut Decl. Ex. 62.) However, the accounts continued to receive deposits into September 2003. (CH Pls.' 56.1 Stmnt. ¶ 37; CL's 56.1 Resp. ¶ 37.) In early September 2003, Defendant sent checks to CBSP with the additional money that had been deposited. (CH Pls.' 56.1 Stmnt. ¶ 43; CL's 56.1 Resp. ¶ 43.)

V. This Action

Pursuant to Section 2333(a) of the ATA, two groups of Plaintiffs brought separate actions in this district against Defendant, captioned *Strauss, et al. v. Crédit Lyonnais, S.A.*, 06-cv-702, and *Wolf, et al. v. Crédit Lyonnais, S.A.*, 07-cv-914. (Compl., Strauss Dkt. Entry 1 ("Strauss Compl.") ¶¶ 536-54; Wolf

---

[6] Defendant insists that this phrase is properly translated as "[h]owever, please confirm that following the embargo declared in the U.S., it is still appropriate to close the accounts immediately and send the funds to the association, or if we should change the approach." (CL's 56.1 Resp. ¶ 26.) The court takes no position on the correct translation, but notes that the court finds the differences in the two translations immaterial for purposes of the summary judgment motions.

Compl. ¶¶ 407-25.) Plaintiffs sought damages arising out of terrorist attacks allegedly carried out by Hamas in Israel and Palestine, and alleged that Defendant aided and abetted the murder or attempted murder of United States citizens, committed acts of international terrorism and collected and transmitted funds on behalf of a terrorist organization. (Strauss Compl. ¶¶ 536-54; Wolf Compl. ¶¶ 407-25.) More specifically, Plaintiffs alleged that Defendant aided Hamas because it maintained bank accounts for CBSP and sent money to Hamas front organizations on behalf of CBSP, even though it knew that CBSP supported Hamas. (Strauss Compl. ¶¶ 528-35; Wolf Compl. ¶¶ 393-400.)

Defendant in the *Strauss* action moved to dismiss the action in its entirety. The Honorable Charles B. Sifton, Senior United States District Judge, who was presiding over the action at the time,[7] granted the motion with respect to Plaintiffs' claim that Defendant aided and abetted the murder or attempted murder of United States citizens, but denied the motion with respect to Plaintiffs' claims that Defendant committed acts of international terrorism and collected and transmitted funds on behalf of foreign terrorists. *See Strauss v. Credit Lyonnais, S.A.*, 2006 WL 2862704 (E.D.N.Y. Oct. 5, 2006). The court also granted the motion to dismiss with respect to claims arising from three of the attacks as time barred. *See id.* at *7-8.

In light of Judge Sifton's rulings in *Strauss*, the parties in *Wolf* agreed to dismissal of the aiding and abetting claim and claims arising out of the three

---

[7] These cases were ultimately reassigned to this court on January 28, 2011.

attacks that were outside of the statute of limitations without prejudice to re-file the claims consistent with any appellate rulings in *Strauss* or *Wolf*. (*See* Wolf Dkt. Entries 31, 35.) By order dated October 7, 2011, *Strauss* and *Wolf* were formally consolidated.

Defendant moves for summary judgment, asserting that no reasonable juror could find that: 1) Defendant acted with the requisite scienter; 2) Plaintiffs have proven proximate causation and Article III standing; or 3) Hamas was responsible for the terrorist attacks at issue. (*See* Mem. of Law of Def. in Supp. of its Mot. for Summ. J., Strauss Dkt. Entry 294 ("Def.'s Mem.").) Defendant also contends that the proposed testimony of the experts Plaintiffs put forth to establish scienter, causation and Hamas' responsibility for the attacks is inadmissible, and, therefore, cannot be relied upon by the court in deciding the motion for summary judgment. (*See id*.)

Plaintiffs opposes Defendant's motion for summary judgment, and a sub-set of Plaintiffs who seek damages arising from a terrorist attack on the Café Hillel in Jerusalem ("Café Hillel Plaintiffs"), cross-moves for summary judgment on their claims with respect to Defendant's liability. (*See* Pls.' Mem. of Law in Opp'n to Def.'s Mot. for Summ. J., Strauss Dkt. Entry 306 ("Pls.' Opp'n"); Mem. of Law of Café Hillel Pls. in Supp. of Their Mot. for Summ. J., Wolf Dkt. Entry 186 ("CH Pls.' Mem.").) Café Hillel Plaintiffs contend that they have proven all the elements required by Section 2333(a) and are entitled to judgment as a matter of law that Defendant is liable for the damages Café Hillel Plaintiffs suffered as a result of the attack on the Café Hillel. (*See* CH Pls.' Mem.) Defendant opposes Café Hillel Plaintiffs' motion for summary

judgment for the same reasons it seeks summary judgment on all claims. (*See* Mem. of Law of Def. in Opp'n to the Café Hillel Pls.' Mot. for Summ. J., Wolf Dkt. Entry 184 ("Def.'s Opp'n").)

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. Statutory Background

Plaintiffs' claims arise under Section 2333(a) of the ATA, which provides a civil remedy for United States citizens who are injured by a terrorist attack. The statute provides 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). Plaintiffs contend that Defendant committed an act of international terrorism because it violated 18 U.S.C. § 2339B ("Section 2339B") and 18 U.S.C. § 2339C ("Section 2339C"). Violations of Sections 2339B and 2339C are considered to be acts of "international terrorism" under Section 2333(a). *See Strauss*, 2006 WL 2862704, at *1 ("Violations of 18 U.S.C. § 2339B and § 2339C are recognized as international terrorism under 18 U.S.C. 2333(a)"); *Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief & Dev.*, 291 F. 3d 1000, 1015 (7th Cir. 2002) ("*Boim I*") ("If the plaintiffs could show that [Defendants] violated either section 2339A or section 2339B, that conduct would certainly be sufficient to meet the definition of 'international terrorism' under sections 2333 and 2331.").

Section 2339B imposes criminal penalties on anybody who:

> knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so. . . . To violate

> this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . ., that the organization has engaged or engages in terrorist activity . . . , or that the organization has engaged or engages in terrorism.

18 U.S.C. § 2339B(a)(1).

Section 2339C imposes criminal penalties on anybody who:

> by any means, directly or indirectly, unlawfully and willfully provides or collects funds with the intention that such funds be used, or with the knowledge that such funds are to be used, in full or in part, in order to carry out . . . any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

18 U.S.C. § 2339C(a)(1).

II. Scienter

Defendant asserts that no reasonable jury could find that it acted with the scienter required by Sections 2333(a), 2339B or 2339C because there is no evidence that it knowingly provided support to terrorists. (*See* Def.'s Mem. 1-18.) Plaintiffs contend that there is ample evidence upon which a reasonable juror can conclude that Defendant had the requisite state of mind. (*See* Pls.' Opp'n 14-30.)

Courts have held that a party must engage in knowing misconduct to be liable under Section 2333(a). *See Boim v. Holy Land Found. for Relief & Dev.*, 549 F. 3d 685, 694 (7th Cir. 2008) (en banc) ("*Boim III*"). A party also must "knowingly" provide material support to a terrorist organization to run afoul of Section 2339B, which means that it must "have knowledge that the organization is a designated terrorist organization . . . that the organization has engaged or engages in terrorist activity . . . , or that the organization has engaged or engages in terrorism." 18 U.S.C. § 2339B(a)(1). Section 2339C similarly requires that the party act "with the *knowledge* that such funds are to be used" to carry out terrorist attacks. 18 U.S.C. § 233C(a)(1) (emphasis added); *see also Strauss*, 2006 WL 2862704, at *17.

The parties disagree vigorously over the definition of "knowledge" and "knowingly" in these statutes for purposes of a claim under Section 2333(a). Defendant suggests that Plaintiffs must show that it "intended that the funds CBSP transferred" from its accounts with Defendant "would be used to carry out terrorist attacks." (Def.'s Mem. 3.) However, ruling on Defendant's motion to dismiss, Judge Sifton rejected reading an intent requirement into the statute. *See Strauss*, 2006 WL 2862704, at *13, *17 ("The statute requires only that the defendant knowingly provide material support or resources to a foreign terrorist organization and makes no mention of an intent to further the organization's goals." (quotation marks omitted)). This holding is the law of the case and the court finds no reason to disturb it. *See Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F. 3d 147, 167 (2d Cir. 2003) (previous

holdings "may not usually be changed unless there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent a manifest injustice" (quotation marks omitted)). Thus, for the same reasons that Judge Sifton determined that there is no intent requirement in the ATA, this court holds that Plaintiffs need not prove that Defendant intended specifically to support terrorist acts to be held liable under Section 2333(a).

Plaintiffs assert that they need to show only that Defendant was reckless or willfully blind to the fact that it was sending money to terrorists. (*See* Pls.' Opp'n 15-16.) Defendant accepts, for purposes of its motion only, that Plaintiffs can establish scienter by showing willful blindness, but argues that recklessness is insufficient. (Def.'s Mem. 3; Reply Mem. of Law of Def. in Further Supp. of its Mot. for Summ. J., Strauss Dkt. Entry 301 ("Def.'s Reply") at 10.)

Plaintiffs urge the court to adopt the scienter standard described in *Boim III*, which they argue supports a recklessness standard that is less demanding than willful blindness. (*See* Pls.' Opp'n 15-16.) However, the standard elucidated by the Seventh Circuit in *Boim III*, while using the term "reckless," appears to be indistinguishable from willful blindness. In *Boim III*, after explaining that the punitive treble damages provision in Section 2333(a) suggests that Congress sought to punish deliberate wrongdoing, the court held:

> To give money to an organization that commits terrorist acts is not intentional misconduct unless one either knows that the organization engages in such acts or is deliberately

> indifferent to whether it does or not, meaning that one knows there is a substantial probability that the organization engages in terrorism but one does not care. When the facts known to a person place him on notice of a risk, he cannot ignore the facts and plead ignorance of the risk. That is recklessness and equivalent to recklessness is wantonness, which has been defined as the conscious doing of some act or omission of some duty under knowledge of existing conditions and conscious that from the doing of such act or omission of such duty injury will likely or probably result.

Boim III, 549 F. 3d at 693 (internal citations and quotation marks omitted). Circuit Judge Richard A. Posner, writing for the Seventh Circuit's *en banc* majority, explained that, while "recklessness" can mean different things in different contexts, under the ATA "[t]he mental element required to fix liability on a donor to Hamas is therefore present if the donor knows the character of that organization." *Id.* at 695.

In *Goldberg v. UBS AG*, the court adopted the *Boim III* recklessness standard and explained that:

> Plaintiffs need not show that the defendant in fact knew its actions would further terrorism. Rather, it is sufficient to show that it knew the entity had been designated as a terrorist organization, and deliberately disregarded that fact while continuing to provide financial services to the organization with knowledge that the services would in all likelihood assist the organization in accomplishing its violent goals.

660 F. Supp. 2d 410, 428 (E.D.N.Y. 2009); *see also Gill v. Arab Bank, PLC*, 2012 WL 4960358, at *31 (E.D.N.Y. Oct. 17, 2012) ("*Gill I*") ("[I]t must be shown that the defendant's alleged actions were reckless, knowing, or intentional."); *In re Terrorists Attacks on Sept. 11, 2001*, 740 F. Supp. 2d 494, 517 (S.D.N.Y. 2010) ("A defendant must either know that the recipient of the material support provided by him is an organization that engages in terrorist acts, or defendant must be deliberately indifferent to whether or not the organization does so, *i.e.*, defendant knows there is a substantial probability that the organization engages in terrorism, but does not care.").

Finally, in *Linde v. Arab Bank, PLC*, which Defendant urges this court to follow, the court explicitly held that Section 2339B (and thus Section 2333(a)) "is violated if the Bank provides material support in the form of financial services to a designated foreign terrorist organization and the Bank either knows of the designation or knows that the designated organization has engaged or engages in terrorist activities." 384 F. Supp. 2d 571, 585 n.8, 587 (E.D.N.Y. 2005).

The court fails to perceive much, if any, difference between recklessness as described by the Seventh Circuit in *Boim III* and applied by the court in *Goldberg*, and the standard the court described in *Linde*. Under both formulations, it is apparent that, whether it is labelled willful blindness or recklessness, Plaintiffs must show that Defendant knew or was deliberately indifferent to the fact that CBSP was financially supporting terrorist organizations, meaning that Defendant knew there was a substantial probability that Defendant was supporting terrorists by hosting the CBSP accounts and sending money at the behest of

CBSP to the 13 Charities. *See Boim III*, 549 F. 3d at 693-94.

Viewing the record in the light most favorable to Plaintiffs, there is a genuine issue of material fact as to whether Defendant knew about or deliberately disregarded CBSP's purported support of Hamas or Hamas front groups, and that, by sending money to the 13 Charities, it was facilitating Hamas' ability to carry out terrorist attacks.[8] Defendant admittedly had concerns about CBSP's accounts since at least 1997, and placed the accounts under heightened scrutiny. (Goelman Decl. Ex. 11 at 21-22, 46.) There is also evidence showing that these concerns may have been related to CBSP's possible connection to terrorist groups. In 2000 and 2001, Audren was sufficiently suspicious of CBSP that he raised the matter with the CPML twice, which itself was sufficiently concerned that it referred CBSP to TRACFIN, the French governmental entity in charge of policing money laundering and, arguably, terrorism financing.[9] (CL's 56.1 Stmnt. ¶¶ 35, 50; Pls.' 56.1 Resp. ¶¶ 35, 50; Eckstut Decl. Exs. 17, 32.) In 2000, Audren admittedly was concerned about the

---

[8] The court also is mindful that determining whether a given state of mind existed is "generally a question of fact, appropriate for resolution by the trier of fact . . . . The Second Circuit has been lenient in allowing scienter issues to withstand summary judgment based on fairly tenuous inferences." *Press v. Chem. Inv. Servs. Corp.*, 166 F. 3d 529, 538 (2d Cir. 1999) (quotation marks omitted).

[9] Defendant contends that TRACFIN was not responsible for investigating terrorist financing during the relevant period, but there is evidence on the record that French banking regulators believed that concerns about terrorist financing should be reported to TRACFIN. (*See* Eckstut Decl. Ex. 66.)

large influx of cash coinciding with a major escalation of violence in Israel and Palestine. (CL's 56.1 Stmnt. ¶¶ 20, 33; Pls.' 56.1 Resp. ¶¶ 20, 33; CH Pls.' 56.1 Stmnt. ¶ 3; CL's 56.1 Resp. ¶ 3; Goelman Decl. Ex. 11 at 107-08.) In November 2001, on the heels of the September 11, 2001 terrorist attacks, Audren again noted "the international context" in which his concerns arose and urged "the potential repercussions on the image of the CL lead us to ask ourselves whether or not to maintain the accounts in our Establishment." (Eckstut Decl. Ex. 17.)

Audren more directly linked Defendant's concerns with CBSP's accounts to possible international terrorist ties by telling French authorities in 2001 that he was concerned about the CBSP accounts because of "transfers to banks situated in Palestine or in Jordan being made in favor of probably Islamist associations with no visibility from our end." (Goelman Decl. Ex. 87.) Audren later explained that he understands "Islamist" to mean "that it promotes a radical form of Islam. . . . Now without thinking that all persons who are referred to as Islamists are potential terrorists certain events have demonstrated that certain branches of this trend use violence." (Goelman Decl. Ex. 15 at 54.) These concerns led Defendant by December 2001 to decide to close CBSP's accounts and block transfers from CBSP's accounts from February 2002 until the accounts were actually closed in 2003. (CL's 56.1 Stmnt. ¶¶ 51, 89-90; Pls.' 56.1 Resp. ¶¶ 51, 89-90.)

In August 2003, Defendant received confirmation that CBSP arguably was raising money for Hamas, when the OFAC announced that CBSP was a SDGT because it was a primary fundraiser in France for Hamas. (CL's 56.1 Stmnt. ¶¶ 116, 299-301; Pls.' 56.1

Resp. ¶¶ 116, 299-301; Israel Decl. Ex. 31 at 5.) It is undisputed that the OFAC's announcement was distributed within Defendant. (CH Pls.' 56.1 Stmnt. ¶¶ 18, 20-22; CL's 56.1 Resp. ¶¶ 18, 20-22.) Moreover, a reasonable fact-finder could infer that Defendant's reaction to the announcement was not one of surprise that CBSP had been identified as a supporter of a FTO, but rather of frustration that the accounts had not yet been closed because of the possible repercussions of hosting CBSP's accounts. As one employee said in an email after complaining that CBSP's accounts remained open, "*as one could foresee*, this case is taking on international proportions." (Israel Decl. Ex. 50 (emphasis added).)[10] In light of this information, a reasonable fact-finder could come to the conclusion that Defendant knew of or was deliberately indifferent to its support of terrorism through its dealings with CBSP.

Such testimonial and documentary evidence from Defendant's employees relating to the same period as the attacks at issue distinguishes this case from *Gill v. Arab Bank, PLC*, 2012 WL 5395746 (E.D.N.Y. Nov. 6, 2012) ("*Gill III*"), where the Honorable Jack B.

---

[10] Plaintiffs also assert that an incident where Defendant froze a transfer from one of CBSP's accounts in October 2001 to an organization called the "El Wafa Charitable Society-Gaza" demonstrates Defendant's knowledge that its transfers on behalf of CBSP were supporting terrorism. (*See* Pls.' Opp'n 19.) However, the blocking provides limited, if any, support for Plaintiffs, because there is no genuine dispute that Defendant blocked this transaction because the organization had a name similar to the Wafa Humanitarian Organization, which had been designated by OFAC as a fundraiser for Al Qaeda, and that the two organizations are distinct. (*See* CL's 56.1 Stmnt. ¶¶ 58-63, 80; Pls.' 56.1 Resp. ¶¶ 58-63, 80.)

Weinstein, Senior United States District Judge, granted summary judgment in favor of the defendant financial institution in an ATA action. In *Gill*, in opposition to the defendant's motion for summary judgment, the plaintiff relied upon "a chain of inferences of remote dates with little or no citation or documentation." *Id.* at *15. For example, events that allegedly put the defendant in *Gill* on "notice" that it was supporting Hamas-affiliated charities "took place in 2005 or earlier" and, therefore, had "no substantial probative force in proving the [defendant's] intentions concerning an event that took place in 2008." *Id.* at *16. Here, there is considerable documentary and testimonial evidence showing Defendant's knowledge of CBSP's possible terrorist affiliations from at least 2001 through 2003, which is contemporaneous to the terrorist attacks at issue.

Defendant argues strenuously that it was suspicious only that CBSP's accounts may have been used for money laundering and did not suspect that CBSP was funnelling money to a terrorist group. (*See* Def.'s Mem. 6-10.) While the court agrees that this is a plausible interpretation of the record, the court cannot adopt this interpretation *as a matter of law*. For example, Defendant has not pointed to any evidence showing that some other criminal activity was the source of the money possibly being laundered by CBSP (for example, narcotics trafficking), while there is evidence that it was concerned about the accounts, at least in part, because money was being sent to "Islamist" organizations in Palestine during the Second Intifada. A reasonable juror also could find incredible testimony that Defendant was concerned only about the sources of CBSP's money, and not its destination. In

particular, Audren testified that he thought that the source of CBSP's money was opaque, even though he could determine the names of people sending money to CBSP's accounts, because he did not know the donors "personally." (Goelman Decl. Ex. 15 at 114-15.) A reasonable juror could find this explanation unbelievable, because presumably Audren did not know personally a significant number of donors to any non-profit. Thus, by Audren's definition, taken it to its logical extreme, non-profits are *per se* suspicious and he should have reported them all to TRACFIN.

Moreover, and perhaps most importantly, there is no serious dispute that money laundering and terrorism are not mutually exclusive. It has been widely acknowledged that they can go hand in hand, as one certainly can be used to fund the other. (*See* Eckstut Decl. Ex. 66.) In other words, even if Defendant sincerely believed that CBSP's accounts were being used to launder money, that does not show it could not have thought that the accounts also were being used to support terrorism.

Defendant also asserts that it could not have known that CBSP was funding a terrorist organization because neither France nor the European Union have ever sanctioned CBSP or charged it with supporting terrorists, and French authorities cleared CBSP of any crimes after Defendant filed its two declarations with TRACFIN. (*See* Def.'s Mem. 4-5.) However, just because the French government and the European Union have decided that they have insufficient evidence to sanction CBSP under their own governing law, does not mean that CBSP was not supporting a terrorist

organization for purposes of the ATA.[11] While a reasonable jury could conclude that France and the European Union essentially are correct, and that there is not sufficient evidence that CBSP was sending money to terrorists, it would be perfectly reasonable for a jury to disagree and side with the United States government's assessments.

Thus, when viewing the record in the light most favorable to Plaintiffs, there is a genuine issue of material fact as to whether Defendant knowingly provided material support to a terrorist organization.[12]

III. Proximate Causation and Article III Standing

A. Proximate Causation

Defendant asserts that Plaintiffs have failed to raise a triable issue of fact of proximate causation

---

[11] Indeed, the court notes that, according to Plaintiffs' proposed expert, Dr. Matthew Levitt, French officials have resisted banning CBSP, not because they dispute that CBSP is affiliated with Hamas, but because Hamas also provides social welfare services. (Eckstut Decl. Ex. 102 at 34.) Levitt quotes from a 2005 letter written by then-Minister of Interior Nicholas Sarkozy to the director of the Wiesenthal Center in Paris acknowledging CBSP's connection with Hamas: "[s]ome of the Palestinian organizations the CBSP works with are affiliated with the Hamas movement, which is on the European list of terrorist organizations. The CBSP justifies these transfers, which are not a secret, by the need for this structure to rely on partners that are reliable and not corrupted." (*Id*.)

[12] Defendant also seeks to exclude the proposed expert testimony of Frances McLeod and Thierry Bergeras relating to the question of Defendant's scienter. (*See* Def.'s Mem. 15-18.) The court need not decide this issue at this time because, even without the proposed expert testimony, there is a genuine issue of material fact as to Defendant's state of mind.

because there is insufficient evidence that the money remitted to the 13 Charities from CBSP's accounts caused the terrorist attacks at issue. (*See* Def.'s Mem. 18-29.) Specifically, Defendant contends that Plaintiffs admittedly have no evidence that the money transferred by Defendant to CBSP and the 13 Charities was used specifically to finance the terrorist attacks at issue. (*See id.* 19.) Defendant contends that merely transferring money to the 13 Charities is not sufficient to show causation without showing the money was used to fund the attacks because the money was sent through third parties, rather than directly to Hamas. (*See id.* 25-29.) Plaintiffs counter that Defendant cannot escape liability by funding a terrorist group's non-violent activities. (*See* Pls.' Opp'n 31-32.)

Section 2333(a) provides for recovery by individuals injured "by reason of" international terrorism. 18 U.S.C. § 2333(a). Recently, the Second Circuit held that the phrase "by reason of" requires that Plaintiffs show that their damages were proximately caused by Defendant. *See Rothstein v. UBS AG*, --- F. 3d ---, 2013 WL 535770, at *12 (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).

Here, there is a genuine issue of material fact as to whether Defendant's conduct is a proximate cause of Plaintiffs' injuries. A reasonable jury could conclude, based upon the evidence, that Defendant sent millions of dollars to organizations controlled by Hamas, and was providing financial services to Hamas' primary fundraiser in France. (*See* Israel Decl. Ex. 31 at 5; Eckstut Decl. Ex. 97 at 1-17.) There also is evidence that, during the same period, Hamas financed and executed the attacks that injured Plaintiffs and/or Plaintiffs' family members. *See infra* § V. On this record, a reasonable juror could conclude that the sizable amount of money sent from Defendant to Hamas front organizations was a substantial reason that Hamas was able to perpetrate the terrorist attacks at issue, and that Hamas' increased ability to carry out deadly attacks was a foreseeable consequence of sending millions of dollars to groups controlled by Hamas. *Cf. Gill I*, 2012 WL 4960358, at *31 ("A defendant who is deliberately indifferent to – that is, reckless with regard to – facts that should put him on notice that his actions are substantially likely to result in harm to American nationals will be more likely have his actions be found to be the proximate cause of any subsequent harm to Americans. . . .").[13]

---

[13] In contrast, the monetary transfers and financial services at issue in *Gill* took place years before the attack at issue. *See Gill III*, 2012 WL 5395746, at *18, *26 ("No single or total transfer highlighted by plaintiff establishes the requisite magnitude and temporal connect on to the attack required to find that the Bank's actions proximately caused plaintiff's injuries.").

None of Defendant's counterarguments are convincing. Defendant asserts that the Second Circuit's decision in *Rothstein* requires this court to decide in Defendant's favor here. However, *Rothstein* is distinguishable from this case. In *Rothstein*, the plaintiff alleged that the defendant-financial institution provided United States currency to the Iranian government. 2013 WL 535770, at *3. The Iranian government has been designated a state sponsor of terrorism by the United States government and it provides material support to Hamas and Hezbollah. *Id.* at *1-2. The plaintiffs were injured and/or had family members injured or killed in Hamas or Hezbollah attacks. *Id.* at *4. 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 *10.

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 *14 (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.* at *14 ("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, again, is distinguishable from *Rothstein*, where Iran did not carry out the attacks at issue.

These differences are meaningful because Congress has specifically 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."), *aff'd*, 2013 WL 535770 (2d Cir. 2013). 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*, 2013 WL 535770, at *14. Therefore, *Rothstein* does not require judgment as a matter of law in favor of Defendant here.

Defendant also maintains that there is no evidence that the money it provided to the 13 Charities was used to fund the attacks at issue or even used to support violence, rather than peaceful charitable activities. However, plaintiffs who bring an ATA action are not required to trace specific dollars to specific attacks to satisfy the proximate cause standard. Such a task would be impossible and would make the ATA practically dead letter because "[m]oney is fungible." *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725 (2010). As Judge Weinstein held in denying in part a financial institution's motion to dismiss Section 2333(a) claims, money transferred by the defendant "need not be shown to have been used to purchase the bullet that struck the plaintiff. A contribution, if not used directly, arguably would be used indirectly by substituting it for money in Hamas' treasury; money transferred by Hamas' political wing in place of the donation could be used to buy bullets." *Gill I*, 2012 WL 4960358, at *32; *see also Boim III*, 549 F. 3d at 698 ("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.'").

Indeed, 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."). That is why 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.

The court also finds unconvincing Defendant's argument that its alleged support for Hamas was indirect because the money went through CBSP and the 13 Charities. A jury could find that Defendant sent the money to organizations that were controlled by Hamas, which is no different from sending the money directly to Hamas for purposes of the ATA. *See Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F. 3d 192, 200 (D.C. Cir. 2001) ("Logically, indeed mathematically, if A equals B and B equals C, it follows that A equals C. If the NCRI is the PMOI, and if the PMOI is a foreign terrorist organization, then the NCRI is a foreign terrorist organization also."). To hold otherwise would "invite money laundering, the proliferation of affiliated organizations, and two-track terrorism (killing plus welfare)." *Boim III*, 549 F. 3d at 702.

Accordingly, a reasonable juror could decide that Defendant's actions proximately caused Plaintiffs' injuries.

B. Hamas Alter Egos

Defendant asserts that, to show proximate causation, Plaintiffs must establish that the 13 Charities were either alter egos of or controlled by Hamas, which the evidence does not establish. (*See* Def.'s Mem. 20-

24.) Plaintiffs contend that proposed testimony of Plaintiffs' experts, Dr. Mathew Levitt and Arieh Spitzen, describing the connections between the 13 Charities and Hamas, is sufficient for a jury to determine that the 13 Charities are Hamas alter egos. (*See* Pls.' Opp'n 37-39.) 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 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 a FTO for purposes of the statute granting the Secretary of State power to designate FTOs. 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, etc., and whether one operates as a division of the other." *See Strauss*, 2006 WL 2862704, at *10 (internal citations omitted). The parties do not dispute that this standard applies for purposes of Defendant's motion for summary judgment.[14]

Considering the factors described by Judge Sifton in *Strauss* and the record developed in this case thus far, a reasonable jury could find that the 13 Charities are operating as Hamas front groups. To cite a few examples:

- The Islamic Center Gaza was founded by cofounders of Hamas. (Eckstut Decl. Ex. 102 ("Levitt Supp. Report") at 55-58.)

---

[14] Defendant also recites the traditional factors for corporate veil piercing, and asserts that Plaintiffs must satisfy these elements. While these factors may be similar to the factors listed by Judge Sifton, the court questions whether legitimate corporations are sufficiently analogous to terrorist groups such that every corporate veil piercing factor applies here.

- The Islamic Society Gaza was founded by Hamas' founder; its chairman from 1985 to 2004 was a senior Hamas leader who vocally has supported Hamas' terrorist attacks; the German intelligence service has warned that the Islamic Society Gaza is "closely associated with Hamas;" it has been outlawed previously by both Israel and the Palestinian Authority because of its affiliation with Hamas; it supports Hamas' ideology through, among other things, the schools that it runs; and the Palestinian Ambassador in Saudi Arabia wrote a letter in 2000 to the Saudi government complaining about Saudi donations to radical groups, including Islamic Society Gaza, "which belongs to Hamas." (*Id.* 10-11, 58-62.)
- The Al-Salah Society has been described by one Hamas leader as "one of three charities that form Hamas' welfare arm;" the United States designated the Al- Salah Society as a SDGT in 2007 and has accused it of financing Hamas' terrorist agenda by recruiting youth to support Hamas and financing Hamas land purchases; it has been described as one of "our organizations" by a Hamas operative; and its director for over a decade personally was designated as a SDGT, and has since served as a minister for the Hamas government in Gaza. (*Id.* 62-64.)
- The Islamic Charitable Society-Hebron ("ICS") has been described by the German intelligence service as "the most important Hamas association on the West Bank;" current and former leaders have been identified as Hamas operatives or have worked with Hamas, including a member of ICS's administrative board; a one-time head of ICS was

> also the Hamas spokesman in Hebron and became a senior strategist for Hamas; the directorate co-chairman of ICS has been imprisoned for Hamas-related activities; the head of the ICS's Orphan Branch was a member of Hamas' leadership in Hebron; schools run by the ICS purportedly instill their pupils with Hamas' values. (*Id.* 65-69.)

The expert reports submitted by Plaintiffs describe similar overlap among the rest of the 13 Charities and Hamas, including shared leadership and an active support of Hamas' ideology and goals. (*See id.* 72-89; *see also* Eckstut Decl. Ex. 103 ("Spitzen Report") at 36-142.) Though some of the 13 Charities share stronger connections with Hamas than others, the reports paint a plausible picture of the 13 Charities as interwoven with Hamas and crucial to its success.[15] Thus, a reasonable jury could weigh the overlap and mutual support evidence and determine whether the 13 Charities are alter egos of and/or are controlled by Hamas.

C. Article III Standing

For similar reasons that it contends that Plaintiffs have not shown proximate causation, Defendant asserts that Plaintiffs lack Article III standing. (*See* Def.'s Mem. 18-19.) Article III, Section 2 of the United

---

[15] Defendant tries to poke holes in the expert reports by pointing to alter ego factors where the evidence is weak or non-existent, including evidence (or lack thereof) relating to overlapping bank accounts and the presence of non-Hamas members on the 13 Charities' boards of directors. (*See* Def.'s Mem. 20-24.) This is for a jury to weigh against the evidence described above supporting Plaintiffs' contention that the 13 Charities are affiliated with Hamas.

States Constitution limits federal court jurisdiction to the resolution of "cases" and "controversies." There are three elements necessary to show the "irreducible constitutional minimum of standing" under Article III:

> First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

McCormick v. Sch. Dist. of Mamaroneck, 370 F. 3d 275, 284 (2d Cir. 2004) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations, footnote, and internal quotation marks omitted)). To show a sufficient causal connection for purposes of Article III standing, Plaintiffs must show that their injuries are "fairly . . . trace[able] to the challenged action of the defendant." *Lujan*, 504 U.S. at 560 (alterations in original). "[T]he test for whether a complaint shows the 'fairly traceable' element of Article III standing imposes a standard lower than proximate cause." *Rothstein*, 2013 WL 535770, at *9.

In this case, for the same reasons that there are triable proximate causation issues, *a fortiori*, there is sufficient evidence that Plaintiffs' injuries are fairly traceable to Defendant's conduct. Plaintiffs have set forth evidence in the record that Defendant sent, at the behest of CBSP, over $2 million to Hamas front organizations, the 13 Charities, between 1997 and 2003. (*See* Eckstut Decl. Ex. 97 at 1-17; *supra* § III.A.)

Moreover, Defendant performed financial services to CBSP, an organization labelled as a primary fundraiser for Hamas in France (*see* Israel Decl. Ex. 31 at 5), over the same period, and remitted to CBSP hundreds of thousands of dollars upon closing its accounts in 2003. (*See* Eckstut Decl. Ex. 62.) Finally, as discussed *infra* § V, there is evidence that Hamas executed terrorist attacks injuring Plaintiffs during the same period as these transfers.

Accordingly, Plaintiffs have Article III standing.

D. Expert Testimony

Defendant asserts that, even if Levitt's and Spitzen's proposed testimony were sufficient to show proximate cause and Article III standing, the proposed testimony is inadmissible. Specifically, Defendant attacks the proposed expert testimony on five grounds: 1) the testimony is irrelevant; 2) the testimony is repackaged hearsay; 3) Levitt's proposed testimony is not supported sufficiently by his sources and he did not consider any alternative conclusions that could be drawn from those sources; 4) Spitzen employs no accepted, peer reviewed or verifiable methodology; and 5) Levitt and Spitzen offer improper legal conclusions. (*See* Def.'s Mem. 24, 30-34.)

Federal Rule of Evidence 104(a) provides that the admissibility of expert testimony is a preliminary question of law for the court to determine. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993). In *Daubert*, the Supreme Court explained that the trial judge must perform a "gatekeeping" function to ensure that the expert testimony "both rests on a reliable foundation and is relevant to the task at hand." 509 U.S. at 597. It is, therefore, proper for district

courts to screen out inadmissible expert testimony on summary judgment:

> Because the purpose of summary judgment is to weed out cases in which "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law," Fed. R. Civ. P. 56(c), it is appropriate for district courts to decide questions regarding the admissibility of evidence on summary judgment. Although disputes as to the validity of the underlying data go to the weight of the evidence, and are for the fact-finder to resolve, questions of admissibility are properly resolved by the court.

Raskin v. Wyatt Co., 125 F. 3d 55, 66 (2d Cir. 1997) (internal citations omitted). This is true even if the exclusion of expert testimony would be outcome determinative. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142-43 (1997) (rejecting "[the] argument that because the granting of summary judgment in [a] case [may be] 'outcome determinative,' [the exclusion of expert testimony] should [be] subjected to a more searching standard of review.").

As discussed below, Defendant's request that the court exercise its gatekeeping function and discard Levitt's and Spitzen's proposed expert testimony for purposes of Defendant's summary judgment motion is denied.[16]

---

[16] This decision that the expert testimony is admissible for purposes of summary judgment is without prejudice, and Defendant is free to renew its challenge to the admissibility the witnesses' testimony via voir dire at trial.

1. Relevance

Defendant contends that Levitt's and Spitzen's proposed testimony is inadmissible because neither addresses the relevant factors for determining alter ego or control status. (Def.'s Mem. 30.) In fulfilling the court's gatekeeping role with respect to expert testimony, "the trial court should look to the standards of Rule 401 in analyzing whether proffered expert testimony is relevant, *i.e.*, whether it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F. 3d 256, 265 (2d Cir. 2002) (quotation marks and alteration omitted).

Here, the proposed expert testimony tends to make the existence of Hamas' control over the 13 Charities more probable, because, upon consideration of the proposed testimony about the connections among the 13 Charities and Hamas, a reasonable jury could determine that they are alter egos of Hamas. The proposed expert testimony may not align perfectly with the relevant control factors, but the proposed experts describe in detail, among other things, the origins of the 13 Charities and their personnel overlap with Hamas, all of which is evidence a jury can rely on to find they are Hamas front groups. As Judge Weinstein held in admitting testimony by Levitt, Spitzen and other terrorism experts in *Gill*, "[w]ith so many vectors at play – most of which will not be familiar to jurors – a wide gateway to large amounts of evidence must be provided. Jurors will not have the broad background knowledge and hypotheses they bring to bear in run-of-the-mill cases within their ken." *Gill v. Arab*

Bank, PLC, 2012 WL 5177592, at *1 (E.D.N.Y. Oct. 19, 2012) ("*Gill II*"). Accordingly, Spitzen's and Levitt's testimony is relevant.

2. Hearsay

Defendant asserts that Levitt's and Spitzen's proposed testimony is repackaged hearsay from secondary sources, and, thus, is an impermissible end-run around the Federal Rules of Evidence. (*See* Def.'s Mem. 30.) Pursuant to the Federal Rules of Evidence:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

Fed. R. Evid. 703. Although an expert may rely upon inadmissible hearsay, the expert "must form his own opinions by applying his extensive experience and a reliable methodology to the inadmissible materials. Otherwise, the expert is simply repeating hearsay evidence without applying any expertise whatsoever, a practice that allows the [party] to circumvent the rules prohibiting hearsay." *United States v. Mejia*, 545 F. 3d 179, 197 (2d Cir. 2008) (quotation marks and internal citations omitted).

However, courts in this circuit have admitted testimony from experts based upon hearsay analyzing the "origin, leadership, and operational structure" of terrorist organizations, analogizing such testimony "to the type of expert testimony regularly permitted by the United States Court of Appeals for the Second Circuit in cases involving organized crime families."

United States v. Paracha, 2006 WL 12768, at *21 (S.D.N.Y. Jan. 3, 2006) (citing *United States v. Amuso*, 21 F. 3d 1251, 1263-64 (2d Cir. 1994); *United States v. Locascio*, 6 F. 3d 924, 936 (2d Cir. 1993); *United States v. Daly*, 842 F. 2d 1380, 1388 (2d Cir. 1988)), *aff'd*, 313 F. App'x 347 (2d Cir. 2008). Indeed, courts, including this one, have allowed Levitt to testify about similar terrorist organizational matters over objections that his testimony only repeated inadmissible hearsay. *See United States v. Damrah*, 412 F. 3d 618, 625 (6th Cir. 2005) (Affirming district court's holding that Levitt's reliance upon hearsay was permissible because, "[g]iven the secretive nature of terrorists, the Court can think of few other materials that experts in the field of terrorism would rely upon."); *United States v. Hammoud*, 381 F. 3d 316, 336-38 (4th Cir. 2004) (en banc) (Affirming admission of Levitt's testimony describing Hezbollah's structure and leadership.), *rev'd on other grounds*, 543 U.S. 1097 (2005); *United States v. Defreitas*, 2011 WL 317964 (E.D.N.Y. Jan. 31, 2011) (Admitting Levitt's testimony about "background information on Hezbollah and that group's longstanding presence in South America and its efforts to secure financing, recruit operatives and conduct terrorist attacks." (quotation marks omitted)). Additionally, as stated above, in *Gill*, Judge Weinstein also held that similar testimony about Hamas' organizational structure from both Levitt and Spitzen were admissible, notwithstanding objections that their reports relied upon inadmissible evidence. *Gill II*, 2012 WL 5177592, at *6.

Here, while both Levitt and Spitzen rely in large part upon sources such as news reports and academic materials that are hearsay, and portions of their

reports appear to be repetition of other secondary sources, their proposed testimony generally is admissible. Their reports do not only regurgitate the hearsay, but bring to bear their terrorism expertise, and the types of sources they use are reasonably relied upon by experts in the field. For example, rather than just cut and paste or summarize what others have said about Hamas, Levitt uses the information to opine that social welfare organizations affiliated with Hamas are crucial to its ability to carry out terrorist attacks. (*See* Levitt Supp. Report 2.) He uses his expertise to describe the leadership structures of Hamas and the 13 Charities, and thus how the 13 Charities are connected to Hamas. (*Id.* 2-3.) Moreover, as other courts have noted in the past, it is reasonable that an expert in terrorism would have to rely on hearsay as opposed to relying solely on fieldwork, as terrorist organizations necessarily are secretive and dangerous, and there may be political reasons against meeting with reputed terrorists. (*See* Goelman Decl. Ex. 125 at 111 (Levitt's testimony that, while he has met with Hamas members who are in jail, he does not meet with those who are not in jail because he does not want to create the impression, as a former government official, that he was opening up a back channel between the United States government and Hamas).)

Spitzen also analyzes sources, including both primary and secondary sources, and makes conclusions about the structure of Hamas and its affiliations with the 13 Charities based upon his professional expertise. Spitzen goes beyond rehashing secondary sources, and analyzes factors he believes are important in determining whether each of the 13 Charities is controlled by Hamas. (*See, e.g.*, Spitzen Report 48-59 (discussing

the Islamic Society-Gaza (one of the 13 Charities) and concluding that it is "controlled by Hamas.")

This testimony by Levitt and Spitzen is precisely the type of analysis of a criminal group's organization and leadership of criminal groups that courts have admitted in the past. Thus, their reliance on hearsay does not preclude their testimony, as it is "less an issue of admissibility for the court than an issue of credibility for the jury." *Locascio*, 6 F. 3d at 938.

3. Levitt's Sources and Alternative Explanations

Defendant also opposes the admission of Levitt's proposed testimony because his sources are insufficient to support his conclusions and he did not consider alternative explanations for the information upon which he relied. (Def.'s Mem. 31-32.) Defendant contends that Levitt could not rely upon secondary sources rather than fieldwork, because other experts have performed fieldwork and come to different conclusions from Levitt, which Levitt fails to consider. (*Id*.) Defendant further asserts that Levitt mischaracterizes his sources and they actually do not support his conclusions. (*Id*.)

In considering whether expert testimony is admissible, "[a] district court must determine whether the proffered testimony has a sufficiently reliable foundation to permit it to be considered." *Amorgianos*, 303 F. 3d at 265 (quotation marks omitted). "In short, the district court must make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* at 265-66

(quotation marks omitted). In other words, expert testimony should be excluded if it is "speculative or conjectural," or if is based on assumptions that are "'so unrealistic and contradictory as to suggest bad faith' or to be in essence an 'apples and oranges comparison.'" *Boucher v. U.S. Suzuki Motor Corp.*, 73 F. 3d 18, 21 (2d. Cir. 1996) (quoting *Shatkin v. McDonnell Douglas Corp.*, 727 F. 2d 202, 208 (2d Cir. 1984)).

The purported flaws in Levitt's report described by Defendant are insufficient to render his report inadmissible. As support for its contention that other experts have done more extensive field work, Defendant provides a laundry list of books and articles that Defendant argues are based on primary sources and contradict Levitt's conclusions. (*See* Def.'s Mem. 31; Def.'s 56.1 Stmnt. ¶ 385.) However, the court is not convinced that the materials Defendant cites to conclusively contradict Levitt's report such that his failure to discuss these articles could render his report fundamentally flawed, and there appears to be a genuine dispute over how much of the materials are based upon "field work." (*See* Pls.' 56.1 Resp. ¶ 385.) Notably, Defendant may cross-examine the expert concerning the evidence or lack of evidence upon which his opinion is based.

Similarly, Defendant's assertions that Levitt mischaracterizes certain of his sources and that other conclusions lack support, do not appear to undermine his basic conclusion that Hamas exerts certain degrees of control over the 13 Charities. Rather, Defendant takes issue generally with statements that do not have an immediate citation, but are supported elsewhere in the report (*see* Pls.' 56.1 Resp. ¶ 390), or are relatively minor misquotes. (*See id.* ¶ 401.) Additionally, in

support of its contention that Levitt did not properly vet his sources, Defendant only points to two sources, and there is a genuine dispute as to how thoroughly Levitt vetted those two sources. (Def.'s Mem. 32; Def.'s 56.1 Stmnt. ¶¶ 420-30; Pls.' 56.1 Resp. ¶¶ 420-30.) At most, these issues raise questions about Levitt's credibility that can be tested on cross-examination during trial and are up to the jury to resolve. *Amorgianos*, 303 F. 3d at 267 ("[O]ur adversary system provides the necessary tools for challenging reliable, albeit debatable, expert testimony. As the Supreme Court has explained, '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'" (quoting *Daubert*, 509 U.S. at 596)).

4. Spitzen's Methodology

Defendant next contends that Spitzen's proposed expert testimony should be rejected because he does not employ an accepted, peer reviewed methodology. (Def.'s Mem. 32-33.) More specifically, Defendant asserts that Spitzen invented his own 18-factor test to determine whether the 13 Charities are alter egos or controlled by Hamas, and he does not apply his test consistently. (*Id.* 32-34.) It is well settled that "[u]nder *Daubert* and Rule 702, expert testimony should be excluded if the witness is not actually applying expert methodology." *United States v. Dukagjini*, 326 F. 3d 45, 54 (2d Cir. 2003). District courts may consider factors such as:

> (1) whether a theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) a technique's known or

> potential rate of error, and the existence and maintenance of standards controlling the technique's operation; and (4) whether a particular technique or theory has gained general acceptance in the relevant scientific community.

Amorgianos, 303 F. 3d at 266 (internal citations and quotation marks omitted). However, these factors are not a "definitive checklist or test," as the court's inquiry is a "flexible one," that "must be tied to the facts of a particular case." *Id*.

While there may be legitimate questions as to whether Spitzen's 18-point test demonstrates definitively that the 13 Charities are alter egos under the standard previously discussed (*see supra* § III.B), his methodology is supported sufficiently to be admissible. Spitzen testified that the factors he used in his test are based upon those used by law enforcement authorities and other experts in determining whether an entity is controlled by Hamas, and that his methodology was approved by the Israel Security Agency ("ISA"), a government security agency where Spitzen worked. (Goelman Decl. Ex. 128 at 430-31, 440-41.) The court finds this testimony sufficient to establish admissibility for purposes of summary judgment. Indeed, Defendant fails to point to any factors that are unreliable or are different from those used by other experts in the field. As Judge Weinstein held in admitting Spitzen's testimony in *Gill*, "Mr. Spitzen's eighteen-factor analysis encompasses categories of information generally considered by experts who analyze entities believed to act for terrorist entities. His methodology passes muster under *Daubert* and Rule 702." *Gill II*, 2012 WL 5177592, at *6.

Contrary to Defendant's conclusion that Spitzen purposely ignored certain factors in analyzing several of the 13 Charities, Spitzen's omission of these factors appears to be the unsurprising result of the unavailability of certain information. Finally, the court does not consider Spitzen's somewhat subjective weighing of the evidence supporting his factors as a fatal methodological flaw. Spitzen's expertise is in a social science field where there are not the type of hard data and neat conclusions that would be expected with a hard science. Thus, Spitzen's proposed testimony is admissible.

5. Legal Conclusion

Defendant also asserts that Levitt's and Spitzen's proposed testimony is inadmissible because they make legal conclusions that the 13 Charities are alter egos of Hamas. (*See* Def.'s Mem. 24.) The court must determine whether expert testimony will "usurp either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it." *United States v. Lumpkin*, 192 F. 3d 280, 289 (2d Cir. 1999). "In evaluating the admissibility of expert testimony, [the Second Circuit] requires the exclusion of testimony which states a legal conclusion." *United States v. Duncan*, 42 F. 3d 97, 101 (2d Cir. 1994).

The court finds that Levitt's and Spitzen's reports do not state legal conclusions. Levitt's report provides information and analysis on the structure of Hamas and its connections with the 13 Charities, but it does not provide any conclusions that these connections satisfy the legal alter ego standard or otherwise describe the legal requirements of establishing that the 13 Charities are alter egos of Hamas.

Spitzen's 18-factor test purporting to show whether an organization is "controlled by Hamas, only supports Hamas or coincidentally employs one or more members of Hamas," (Spitzen Report 4-5), also does not define the legal definition of alter ego, as the test does not track courts' definition of alter ego or separately try to legally define the term alter ego. *See Duncan*, 42 F. 3d at 101-02 (expert testimony not impermissible legal conclusion where expert did not "use any legally specialized terms" that tracked the relevant statute). Therefore, this case is different from the case Defendant cites, *Pereira v. Cogan*, 281 B.R. 194 (S.D.N.Y. 2002). In *Pereira*, unlike here, the expert report at issue actually sought "to define the term 'alter ego,'" which would have usurped the court's function. *Id.* at 199-200. Instead, Spitzen presents an 18-factor test that he based on his experience in law enforcement, which leaves for to the jury to decide whether satisfying some or all of the factors makes the 13 Charities alter egos of Hamas under the legal definition provided by this court. Thus, at this stage, the court finds that Spitzen's expert testimony could assist the jury in deciding whether Plaintiffs have demonstrated that the 13 Charities are alter egos of Hamas, without intruding on the exclusive fact finding province of the jury or the legal determinations of the court. *See Gill II*, 2012 WL 5177592, at *6 (Spitzen's "report and testimony will aid the jury in understanding issues related to the Bank's conduct and state of mind.").

Accordingly, Levitt's and Spitzen's testimony do not state legal conclusions and are admissible.

IV. Section 2339B Claim

Defendant seeks to dismiss Plaintiffs' Section 2339B claim on the ground that Plaintiffs must show Defendant gave support directly to a FTO, reiterating that the 13 Charities are not Hamas alter egos. (Def.'s Mem. 34.) As discussed above, this assertion is without merit because Plaintiffs have shown that there is a material issue of fact as to whether the 13 Charities are Hamas alter egos.[17]

V. Hamas' Responsibility for the Attacks

Defendant asserts that, based on the admissible evidence, no reasonable trier of fact could find that Hamas is responsible for the fifteen attacks at issue in this case. (Def.'s Mem. 35-50.) Defendant strenuously argues that the testimony of Plaintiffs' proposed experts supporting Plaintiffs' contention that Hamas is responsible for the fifteen attacks (Ronni Shaked and Evan Kohlmann) is inadmissible because the experts: 1) are unqualified; 2) aggregate inadmissible hearsay; 3) opine on topics that are not proper subjects of expert testimony; and/or 4) do not utilize a sufficient methodology under *Daubert*. (*Id.* 35-48.) Defendant further

---

[17] The court also notes that Plaintiffs do not and could not assert a claim directly under Section 2339B, but rather bring claims under Section 2333(a). Section 2339B imposes criminal penalties and does not provide for an independent private cause of action. *See* 18 U.S.C. § 2339B. Plaintiffs can prove that they have a claim under Section 2333(a) by showing that Defendant violated Section 2339B, so long as knowledge and causation are shown, because such "conduct would certainly be sufficient to meet the definition of 'international terrorism' under sections 2333 and 2331." *Boim I*, 291 F. 3d at 1015. However, the claim is still brought pursuant to Section 2333(a) and not Section 2339B. (*See* Strauss 3d Am. Compl. ¶¶ 676-81; Wolf Compl. ¶¶ 415-20.)

maintains that the evidence upon which Shaked and Kohlmann rely is inadmissible and, thus, if the court strikes their proposed testimony, Plaintiffs will have no evidence showing that Hamas is responsible for the attacks. (*Id.* 48-50.) 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 fourteen of the fifteen attacks.

A. Shaked

Plaintiffs submit a report from Ronni Shaked, who has worked as an analyst and commentator for *Yedioth Ahronoth*, a major Israeli newspaper, covering terrorism and security-related subjects. (Eckstut Decl. Ex. 130 ("Shaked Supp. Report") at 1.) In addition, between 1969 and 1982, Shaked worked for the ISA, the security agency responsible for the "war against terror" in Israel and Palestine, where he held the positions of Commander of the Jerusalem Sector and Commander of the Ramallah Sector. (*Id.*) In his report, Shaked generally describes how Hamas typically publicizes its terrorist attacks and the resulting Israeli investigations. (*Id.* 3-16.) For each of the fifteen attacks, Shaked analyzed various materials, including news reports, claims of responsibility by Hamas through its reputed websites, video "wills" of suicide bombers, documents issued by the ISA, convictions from Israeli courts and, for some of the attacks, his interviews with Hamas operatives. (*See id.* 28-140; Eckstut Decl. Ex. 132 ("Shaked Supp. Report for Mar. 7, 2003 Attack") at 1-10.) Based upon these materials, Shaked gives his opinion, with varying degrees of certainty, that Hamas

is responsible for each of the fifteen terrorist attacks. (*See* Shaked Supp. Report 28-140; Shaked Supp. Report for Mar. 7, 2003 Attack 9.)

Defendant asserts that Shaked is unqualified and that his opinions are not based upon a reliable methodology as required by *Daubert*. (*See* Def.'s Mem. 38-42.) This contention lacks merit. Shaked has established that he has specialized "knowledge, skill, experience, training, or education," about Hamas. Fed. R. Evid. 702. Among other things, he served for over a decade in the ISA, has worked as a consultant for the FBI, authored a published book about Hamas and covered Palestinian affairs and terrorism for Israel's largest newspaper for over twenty years. (Shaked Supp. Report at 1-2.)

Moreover, Shaked's analysis appears to comport with the "same level of intellectual rigor that characterizes" a terrorism expert. *Paracha*, 2006 WL 12768, at *19. He states that his findings are based upon multiple sources of information, including interviews and reviews of secondary materials, and he has cross-checked his findings against other sources of information (*see* Shaked Supp. Report at 3-4), which is similar to what other courts have held is a typical methodology accepted among and used by terrorism experts. *See Gill II*, 2012 WL 5177592, at *4-5; *Paracha*, 2006 WL 12768, at *20.

Defendant avers that Shaked's opinion as to whether Hamas committed each of the attacks is an inappropriate topic for expert testimony and is an improper summary of inadmissible testimony. (Def.'s Mem. 36-38.) Plaintiffs respond that Shaked's testimony is similar to testimony that has been admitted in other terrorism cases, and is particularly

appropriate here where Hamas operates, in part, covertly on a different continent. (Pls.' Opp'n 42-44.)

Under the Second Circuit's decision in *United States v. 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.*[18]

Here, significant portions of Shaked's proposed testimony appear to summarize factual, non-technical materials. For example, Shaked repeats at length postings on websites and describes video "wills" he has

---

[18] Contrary to Plaintiffs' suggestion otherwise, (*see* Pls.' Opp'n 42), the holding in *Mejia* was based on both Federal Rule of Evidence 702 as well as the Confrontation Clause, and, therefore, its holding applies in civil cases. *See CIT Group/Business Credit, Inc. v. Graco Fishing & Rental Tools, Inc.*, 815 F. Supp. 2d 673, 678 (S.D.N.Y. 2011) (relying upon *Mejia* in civil case).

watched of purported Hamas suicide bombers before some of the attacks at issue, which Plaintiffs use to establish as fact Hamas' responsibility for the attacks. These materials apparently largely consist of Hamas boasting about and promoting their involvement in various attacks. For example, in support of his conclusion that Hamas was responsible for the March 27, 2002 suicide bombing in the Park Hotel in Netanya, Shaked summarizes an announcement that appeared on the internet using Hamas letterhead. Shaked quotes the substance of the announcement that basically describes the attack, praises the suicide bomber and states that Hamas' military wing, the Izz al-Din al-Qassam Brigades, is responsible for the attack. (*See* Shaked Supp. Report 29.) If the announcement were otherwise admissible, Shaked could use his expertise to explain, for example, that the logo on the letterhead is Hamas', how Hamas typically makes announcements over the internet or that the Izz al-Din al-Qassam Brigades is Hamas' military branch. Such testimony might provide helpful context for the jury, akin to using expertise on gang violence to explain that graffiti near a dead body indicates that a member of a gang is the murderer. However, under *Mejia*, attribution testimony cannot be used as an excuse to introduce and summarize straightforward factual evidence that has not been admitted, such as a webpage that says "Hamas carried out a suicide bombing." Thus, 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.").

The court declines Plaintiffs' invitation to follow the Seventh Circuit's holding in *Boim III* that an expert's opinion based upon unauthenticated documents, such as Hamas-affiliated websites, an unsigned set of notes prepared by a United States foreign service officer who attended the trial of the Hamas operative convicted in the attack, and an Arabic-language document that purportedly was the written conviction and sentence of the alleged perpetrator of the attack, established, as a matter of law, Hamas' responsibility for an attack. 549 F. 3d at 703-05. This holding, which determined merely that the district court did not abuse its discretion in admitting the expert's testimony, cannot be squared with *Mejia*, as *Boim III* would allow a party to prove responsibility for an attack without first building a proper evidentiary foundation.[19] As United States Circuit Judge Ilana D. Rovner, joined by United States Circuit Judges Diane P. Wood and Ann C. Williams, explained in concurring in part and dissenting in part from the majority *en banc* panel in *Boim III*, such an expert report purporting to attach responsibility for an attack "is meaningless without reference to the websites and documents that he so heavily relied upon in forming his opinion, and yet allowing [the expert] to recount what those sources

---

[19] The court also is unconvinced by Plaintiffs' arguments based on other cases from outside this circuit that "courts routinely permit expert attribution in terrorism cases." (Pls.' Opp'n 44 (emphasis omitted).) As Defendant correctly asserts, in *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998), *Belkin v. Islamic Republic of Iran*, 667 F. Supp. 2d 8 (D.D.C. 2009), *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46 (D.D.C. 2003) and *Beer v. Islamic Republic of Iran*, 574 F. Supp. 2d 1 (D.D.C. 2008), the defendant, Iran, defaulted and there was no discussion of the admissibility of attribution testimony.

say without establishing their authenticity and trustworthiness would contradict the basic requirement that expert opinion have 'a reliable foundation.'" *Id.* at 715 (Rovner, J., concurring in part and dissenting in part) (quoting *Daubert*, 509 U.S. at 597).

Thus, Plaintiffs cannot use Shaked's opinions to establish a genuine issue of material fact as to Hamas' responsibility for the fifteen attacks without first building a proper foundation.

B. Kohlmann

As with Shaked, Defendant contends that Kohlmann's testimony is inadmissible because he is unqualified, his methodology is unreliable, and his report merely aggregates inadmissible and unauthenticated materials. (*See* Def.'s Mem. 42-48.) Plaintiffs respond that Kohlmann has studied terrorism extensively and his methods have been approved by other courts. (Pls.' Opp'n 46-47.)

As with Shaked, the court finds that Kohlmann is qualified as a terrorism expert and that his methodology is sufficiently reliable. Among other things, he is the author of a textbook on terrorism that is used in graduate level courses at Harvard University's Kennedy School of Government and Princeton University, and oversees one of the largest digital collections of terrorist multimedia and propaganda in the world. (*See* Eckstut Decl. Ex. 159 ("Kohlmann Report") at 3.) Notably, Kohlmann has testified as an expert in sixteen cases in federal courts and before the Guantanamo Bay military commissions. (*Id.* 3-4.) Moreover, his research and archival methodology appear to be consistent with those in the terrorist field, as other courts have recognized. *See Paracha*, 2006 WL 12768,

at *20 ("Although Kohlmann's methodology is not readily subject to testing and permits of no ready calculation of a concrete error rate, it is more reliable than a simple cherry-picking of information from websites and other sources."); *United States v. Kassir*, 2009 WL 910767, at *6-7 (S.D.N.Y. Apr. 2, 2009) (rejecting argument that Kohlmann's methodology is unreliable); *see also Gill II*, 2012 WL 5177592, at *5 ("[Expert's] analysis of Internet-based material is rooted in the methodology employed by other experts in his field.").

However, part of Kohlmann's proposed testimony is inadmissible. The first portion of his report gives background on Hamas, focusing on a description of its use of propaganda and its websites. (*See* Kohlmann Report at 9-28.) This part of the report is background information that is admissible and an appropriate subject for an expert opinion, (*see supra* § III.D), and is similar to testimony that Kohlmann has been allowed to give in the past. *See Paracha*, 2006 WL 12768, at *21-22; *Kassir*, 2009 WL 910767, at *7 (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."). The rest of the report, however, is nothing more than a recitation of secondary evidence, not all of which is admissible (*see infra* § V.C), that Hamas perpetrated the fifteen attacks. (*See* Kohlmann Report at 28-44.) In this section of his report, he makes no attempt to bring his expertise to bear and comes to no conclusion as to the import or accuracy of his summaries other than concluding that Hamas has claimed responsibility for the attacks. (*See id*.) 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.

Therefore, Kohlmann may testify as an expert about Hamas' background and use of propaganda, but his summaries of the fifteen 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 motions.

C. Other Evidence

Plaintiffs contend that they have set forth sufficient evidence besides Shaked's and Kohlmann's reports that are non-hearsay or exceptions to the hearsay rule and can be authenticated. (*See* Pls.' Opp'n 48-50.) In particular, Plaintiffs rely upon video "wills" of suicide bombers, Israeli court documents, Hamas' claims of responsibility on its websites, Hamas' written claims taking credit for attacks faxed directly to Shaked and Israeli government records. (*Id.* 48-49.) Defendant contends that the evidence Plaintiffs have set forth has not been authenticated and is inadmissible hearsay. (*See* Def.'s Mem. 47-50.)

The court holds that, while not all of the evidence Plaintiffs point to is admissible, there is sufficient admissible evidence for a reasonable jury to determine that Hamas committed all of the fifteen attacks except for one attack, the September 24, 2004 mortar fire attack in Neve Dekalim ("September 24 Attack"). Except for the September 24 Attack, Shaked and Kohlmann relied at least in part upon judgments in 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. (*See generally* Shaked Supp. Report 28-140; Shaked Supp. Report for Mar. 7, 2003 Attack 1-9; Kohlmann Report 28-44.) These materials are admissible and can be authenticated.

A judgment of conviction is admissible in a civil case as an exception to the hearsay rule, if it was entered after trial or guilty plea, the conviction was for a crime punishable by death or imprisonment for more than one year and the evidence is admitted to prove any fact essential to the judgment. Fed. R. Evid. 803(22). The parties do not dispute that the convictions are for crimes punishable by death or more than one year imprisonment, the evidence is admitted to prove an essential fact and 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's expert concedes that, in all of the fifteen attacks except four (the March 7, 2003 attack in Kiryat Arba ("March 7 Attack"), the April 30, 2003 attack at Mike's Place in Tel Aviv ("April 30 Attack"), the October 22, 2003 attack in Hebron ("October 22 Attack") and the September 24 Attack) are linked to Hamas by Israeli criminal judgments. (*See* Eckstut Decl. Ex. 154 ("Azoulay Report") 7-13.) For these eleven attacks, therefore, Plaintiffs have sufficient admissible evidence to create a genuine

issue of material fact as to Hamas' responsibility for the attacks.[20]

Defendant argues that the Israeli judgments are inadmissible in this case because Defendant was not a party to the Israeli proceedings. (*See* Def.'s Mem. 47.) Defendant is incorrect, as the plain language of Rule 803(22) of the Federal Rules of Evidence does not impose such a limit. *See Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 2001 WL 99506, at *3 (S.D.N.Y. Feb. 6, 2001) (rejecting argument "that a criminal judgment may not be admissible against a party who was not the subject of that judgment"). Rule 803(22)(d) specifically prevents using a previous conviction in a criminal case for purposes other than impeachment, unless the judgment was against the defendant. Fed. R. Evid. 803(22)(d). This carve out would be unnecessary if judgments always were inadmissible against a non-party. Defendant also argues that the Israeli judgments would be inadmissible hearsay in Israeli courts. (*See* Def.'s Mem. 47-48.) However, Defendant neither points to any authority (and the court is unaware of any) nor provides any reasoned explanation as to why this court should look to Israeli evidentiary rules and not the Federal Rules of Evidence in making its admissibility rulings.

Defendant further maintains that verdicts from Israeli military courts that provide evidence of Hamas' responsibility for some of the fifteen attacks, are

---

[20] For the January 29, 2004 attack in Jerusalem, where there is a judgment linking Hamas to the attack, Defendant argues that Hamas was not responsible because there is evidence that another group carried out the attack. (*See* Def.'s Mem. 41-42.) At most, the contradictory evidence raises a triable issue of fact.

inadmissible because these courts do not comport with American notions of due process. In support of its argument, Defendant directs the court to *Lloyd v. American Export Lines, Inc.*, where the Third Circuit held that "[t]he test of acceptance, then, of foreign judgments for which domestic recognition is sought, is whether the foreign proceedings accord with civilized jurisprudence, and are stated in a clear and formal record." 580 F. 2d 1179, 1189 (3d Cir. 1978). Assuming, *arguendo*, that this standard applies in the Second Circuit, and that by "civilized jurisprudence" the Third Circuit was referring to some minimum due process, the military court verdicts still are admissible. The record reflects that many of the basic rights that accused persons have in American courts also are applicable to defendants in the Israeli military courts. For example, 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. (*See* Eckstut Decl. Ex. 155 (Gross Report) 20-23.) While there may be some criticisms of the process afforded defendants in Israeli military courts and their ability to come to a reliable verdict, (*see* CL's 56.1 Stmnt. ¶¶ 605-33), this 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.

For three of the four attacks for which there are no Israeli court judgments assigning blame to Hamas, there is alternative admissible evidence a reasonable jury can consider to determine Hamas' responsibility. For the October 22 Attack, Shaked states that he witnessed firsthand the aftermath of the attack and saw evidence that Hamas was responsible. (*See* Shaked Supp. Report 127.) This eyewitness account is admissible to show that Hamas perpetrated the attack.

Hamas' responsibility for the March 7 and April 30 Attacks 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). Hamas is blamed for the March 7 Attack in an Israeli government indictment, and the ISA's yearly public report on terrorist attacks concluded that Hamas was responsible for carrying out the April 30 Attack. (*See* Shaked Supp. Report 82-83; Shaked Supp. Report for Mar. 7, 2003 at 7-8.) These documents can be self-authenticated as foreign public documents. *See* Fed. R. Evid. 902(3).[21] In addition, Defendant gives no

---

[21] Plaintiffs also purport to authenticate various government documents by a proposed expert, Shaul Naim. (*See* Eckstut Decl. Ex. 175 (Naim Report).) Defendant objects to Naim's ability to authenticate these materials. (*See* Def.'s Mem. 48-49.) The court need not determine whether Naim can authenticate Plaintiffs' evidence, because evidence sufficient to raise a genuine issue of material fact of Hamas' responsibility can be authenticated without Naim's testimony, as discussed more fully in this section.

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.)[22] Accordingly, there is sufficient admissible evidence indicating that Hamas is responsible for the March 7 and April 30 Attacks. *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).

However, Plaintiffs have not provided sufficient admissible evidence of Hamas' responsibility for the September 24 Attack. The evidence Plaintiffs rely on, through Shaked's report, consists of: 1) newspaper reports from the *Associated Press* and an Israeli newspaper, *Ha'aretz*; 2) claims of responsibility posted on a Hamas-affiliated website; and 3) a videotape that Shaked purportedly viewed showing three masked men wearing bandanas that indicate they are affiliated with Hamas. (*See* Shaked Supp. Report 122-23.)

---

[22] The court notes that Judge Weinstein held that an ISA report linking a militant cell that purportedly carried out the terrorist attack to Hamas was inadmissible because the report's conclusion was unreliable. *See Gill III*, 2012 WL 5395746, at *25. However, in *Gill*, the relevant conclusion was supported only by a confession repeating second-hand information of uncertain provenance, and there was "no evidence independent of the confession that served as a basis of the ISA reports' indication" that the terrorist cell at issue was Hamas' agent. *Id*. In this instance, there is much more support for the ISA's conclusion that Hamas perpetrated the April 30 Attack. (*See* Shaked Supp. Report 79-84.)

The newspaper reports are inadmissible hearsay and cannot be relied upon. *See Delrosario v. City of New York*, 2010 WL 882990, at *7 (S.D.N.Y. Mar. 4, 2010) ("Newspaper articles are hearsay when introduced to prove the truth of the matter asserted, and also must not be admitted."); *Ladner v. City of New York*, 20 F. Supp. 2d 509, 519 (E.D.N.Y. 1998) (newspaper article "inadmissible hearsay and unusable to defeat summary judgment"), *aff'd*, 181 F. 3d 83 (2d Cir. 1999) (unpublished table decision).

The claims of responsibility by Hamas taken from their website, 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. (*See* Pls.' Opp'n 49.) 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 III*, 2012 WL 5395746, at *23. As Plaintiffs' experts explain in detail, Hamas actively seeks publicity for its claims of responsibility for attacks against Israelis as part of its propaganda. (*See* Shaked Supp. Report 5-6; Kohlmann Report 8.) 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.

Finally, Shaked's claim that he viewed a videotape of masked men wearing Hamas bandanas firing

mortars is insufficient to defeat summary judgment on the September 24 Attack, even assuming Plaintiffs could produce this video. The court finds that a video of men with Hamas bandanas firing mortars in the general area where the September 24 Attack occurred, without more, is insufficient to create a jury issue as to Hamas' responsibility for the attack. Plaintiffs have not explained how they could authenticate such a video filmed by an unidentified third party, allegedly affiliated with Hamas. Among other infirmities, Plaintiffs do not point to any admissible evidence establishing when the video was filmed or who is in the video. Notably, even Shaked concludes only that Hamas "apparently" perpetrated the September 24 Attack and explains that the evidence he relies upon for his tentative conclusion "is not subject to the same level of comparative analysis as were the other attacks which were examined." (Shaked Supp. Report 16.)

Accordingly, summary judgment is granted in favor of the Defendant for the September 24 Attack, but there is sufficient admissible evidence for a jury to conclude that Hamas was responsible for the other fourteen attacks.

VI. Café Hillel Plaintiffs' Motion for Summary Judgment

A. Scienter

The Café Hillel Plaintiffs assert they have proven, as a matter of law, that Defendant knew it was supporting terrorism by at least August 2003, when the United States government designated CBSP as a SDGT, and before the terrorist attack on the Café Hillel. (*See* CH Pls.' Mem. 12-27.) Defendant responds that OFAC's designation of CBSP as a SDGT did not

apply to Defendant's conduct as a French bank in its relations with its French customer in France, and that OFAC's designation under its regulatory power cannot be used as a shortcut to show scienter under the ATA. (*See* Def.'s Opp'n 4-21.) The court agrees with Defendant.

CBSP was designated as a SDGT pursuant to Executive Order 13224, 66 Fed. Reg. 49,079 (Sept. 23, 2001). (*See* Israel Decl. Ex. 31 at 5); *see also* 31 C.F.R. § 594.310 ("The term specially designated global terrorist or SDGT means any foreign person or person . . . designated pursuant to Executive Order 13224 of September 23, 2001.") Pursuant to federal regulations, "property and interests in property" of organizations designated as a SDGT "that are in the United States, that hereafter come within the United States, or that hereafter come within the possession or control of U.S. persons, including their overseas branches, are blocked and may not be transferred, paid, exported, withdrawn or otherwise dealt in." 31 C.F.R. § 594.201(a).

Defendant and Café Hillel Plaintiffs argue at length about the extraterritorial application of United States OFAC regulations, but this discussion largely misses its mark. Even assuming, for the sake of argument only, that Defendant's French operations[23]

[23] While Defendant does operate some branches within the United States, none of the parties have presented any evidence that contributions to CBSP, through its accounts with Defendant, were made by persons within the United States.

somehow come within the definition of "U.S. persons"[24] and, therefore, Defendant was required to block transactions with CBSP for purposes of federal regulations, there is nothing in either the ATA or the regulations promulgated pursuant to Executive Order 13224 suggesting that providing services for a SDGT is a violation *per se* of the ATA. Instead, the ATA explicitly prevents only doing business with a FTO, *see* 18 U.S.C. § 2339B(a), which is a separate designation under different regulations. Notably, CBSP was never designated as a FTO by the United States government. The OFAC regulations provide their own civil penalties for parties that do business with SDGTs, *see* 31 C.F.R. § 594.701, and the ATA is a separate statute that imposes civil and criminal penalties for providing material support to FTOs specifically, *see* 18 U.S.C. § 2339B, and terrorist acts more generally. *See* 18 U.S.C. § 2339C. Thus, while conceivably there may be occasions where an entity violates 31 C.F.R. § 594.201(a) and the ATA, there is nothing in either that suggests that a violation of one automatically constitutes a violation of the other. Accordingly, the OFAC designation of CBSP as a SDGT does not establish scienter automatically as a matter of law under Section 2333(a).

Moreover, while, as discussed above, the United States government's announcement that it had "credible evidence" that CBSP was a primary fundraiser for Hamas in France provides evidence that Defendant

---

[24] The relevant regulations define "U.S. person" as "any United States citizen, permanent resident alien, entity organized under the laws of the United States (including foreign branches), or any person in the United States." 31 C.F.R. § 594.315.

knew or deliberately disregarded that it was supporting terrorism through CBSP's accounts, a reasonable juror need not necessarily come to that conclusion. For example, the French government investigated CBSP twice after Defendant referred it to the government and did not bring charges, and CBSP still is a lawfully registered charity in France. (CL's 56.1 Stmnt. ¶¶ 100, 104-05, 114; Pls.' 56.1 Resp. ¶¶ 100, 104-05, 114.) Defendant reasonably may have relied upon the French government's exoneration of CBSP and honestly believed there was no evidence that CBSP was raising money for Hamas. Therefore, Café Hillel Plaintiffs have not established scienter conclusively after August 2003. Accordingly, summary judgment is denied for the Café Hillel Plaintiffs.

B. Proximate Cause and Article III Standing

Café Hillel Plaintiffs assert that they have established as a matter of law that Defendant proximately caused their damages and that they have Article III standing. (*See* CH Pls.' Mem. 27-41.) They contend the evidence demonstrates that Defendant sent money to Hamas front groups at the behest of CBSP, and that this is sufficient to show standing and proximate causation. (*Id*.) Defendant responds with the same arguments it made in its memorandum of law in support of its summary judgment motion. (*See* Def.'s Opp'n 25-37.)

While, for the same reasons discussed above (*see supra* § III), Plaintiffs have shown at this stage of the proceedings that Defendant's conduct is fairly traceable to Café Hillel Plaintiffs' damages and a reasonable jury could find that Defendant was a substantial factor in causing the damages, a reasonable juror also could

find the opposite. Among other things, based on evidence that Hamas receives much more money from other sources, that other intervening actors may have caused any given terrorist attack, and lack of evidence that the 13 Charities had any direct role in the Café Hillel attack (*see* Def.'s 56.1 Stmnt. ¶ 598; Pls.' 56.1 Resp. ¶ 598), a reasonable juror could conclude the connection between Defendant and the attack is too attenuated as a factual matter to hold Defendant liable.

Moreover, while the record shows that there is significant overlap among the 13 Charities and Hamas, the evidence is not conclusive that they were mere Hamas alter egos. There is evidence that they did have some independent identity, because, for example, they maintained their own bank accounts and had their own boards of directors. (*See* Def.'s 56.1 Stmnt. ¶¶ 313, 316-18, 322-23; Pls.' 56.1 Resp. ¶¶ 313, 316-18, 322-23.) A juror thus could conclude that Defendant was not sending money to terrorists when it sent money to the 13 Charities. For this additional reason, summary judgment is inappropriate.

C. Hamas' Responsibility

Café Hillel Plaintiffs assert that the record establishes, as a matter of law, that Hamas was responsible for the Café Hillel attack. (*See* CH Pls.' Mem. 37-41.) Besides Shaked's and Kohlmann's reports, Plaintiffs point to evidence that a Hamas operative was convicted for his role in the attack and Hamas claimed responsibility for the attack on its websites. (*See id*.) Defendant responds that Hamas' claims of responsibility and the convictions are inadmissible hearsay and not authenticated. (*See* Def.'s Opp'n 38-42.)

As discussed above (*see supra* § V), Shaked's and Kohlmann's proposed attribution testimony is inadmissible to the extent that it simply repeats inadmissible evidence. However, Café Hillel Plaintiffs have admissible conviction evidence showing that Hamas was responsible for the attack. Specifically, Café Hillel Plaintiffs submit certified sentencing and appellate records of Amru Abd Al-Aziz, who was convicted for his role in the Café Hillel attack. (*See* Israel Decl. Exs. 66-67.) In the sentencing record, the civilian Jerusalem District Court describes how Al-Aziz was convicted of assisting the suicide bomber who perpetrated the Café Hillel attack and how the attack was carried out at Hamas' direction. (Israel Decl. Ex. 66, ¶¶ 2-4.) The record also reflects that the court sentenced Al-Aziz to seven life imprisonment terms, one for each of the seven people who died in the attack, and thirty years' imprisonment for assisting an enemy in war and for the attempted murder of the 64 people who were injured in the attack. (*Id.* ¶ 10.) The appellate decision by the Israeli High Court of Justice affirming the conviction describes in more detail the attack on the Café Hillel and the testimony of Al-Aziz's co-conspirators. (Israel Decl. Ex. 67, ¶¶ 1-4.) The court also describes the Hamas cell that planned and perpetrated the attack. (*See id.* ¶ 11.)

Defendant does not present any evidence contradicting the findings of the Israeli courts that blame Hamas for the attack and there is nothing in either the sentence or the appeal calling into question Hamas' responsibility. Defendant attacks the admissibility and authenticity of the documents, but the certified sentencing record and the appellate decision are admissible as foreign judgments and are authenticated. *See*

Fed. R. Evid. 803(22), 902(3); *see also* § V.C. On this record, because of the uncontroverted evidence that Hamas carried out the Café Hillel attack, Café Hillel Plaintiffs have established as a matter of law that Hamas carried out the Café Hillel attack, and summary judgment is granted in Café Hillel Plaintiffs' favor with respect to the Hamas responsibility element of their claims.

CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment is denied in part and granted in part. Accordingly, the claims brought by Shlomo Tratner, individually and on behalf of the Estate of Tiferet Tratner, in connection with the September 24 Attack only are dismissed. The claims based on the remaining fourteen attacks shall proceed. In addition, Café Hillel Plaintiffs' motion for summary judgment is denied in part and granted only to the extent that they have proven Hamas' responsibility for the Café Hillel attack. The other elements of the claim must be proven before a jury.

SO ORDERED.

Dated: Brooklyn, New York
February 28, 2013

s/
DORA L. IRIZARRY
United States District Judge

APPENDIX F

---

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).

* * *