No. _____

IN THE

Supreme Court of the United States

CHARLOTTE FREEMAN, ET AL.

Petitioners,

v.

HSBC HOLDINGS PLC, ET AL.

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Congress enacted the Justice Against Sponsors of Terrorism Act ("JASTA"), Pub. L. No. 114-222, 130 Stat. 852 (2016), Pet. App. 150a-155a, to provide enhanced relief to Americans injured by terrorist attacks that were committed, planned, or authorized by foreign terrorist organizations ("FTOs"). JASTA allows the victims of such attacks to assert a cause of action against anyone who "conspires with the person who committed such an act of international terrorism." 18 U.S.C. § 2333(d)(2). Congress's objective was to "provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief" from any party that "provided material support, directly or indirectly," to terrorist organizations that injured Americans. JASTA § 2(b), Pet. App. 152a.

In this case, Defendants-Respondents (except for Bank Saderat Plc, which was designated a Specially Designated Global Terrorist ("SDGT") for its role in money laundering for FTOs) entered into Deferred Prosecution Agreements ("DPAs") admitting that they unlawfully conspired with Iranian entities to circumvent U.S. counter-terrorism sanctions. Nevertheless, the Second Circuit Court of Appeals erroneously held that this admitted conduct did not constitute a civil conspiracy under the D.C. Circuit Court of Appeals decision *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983).

The questions presented are:

1. Whether a JASTA claim for civil conspiracy requires only that acts of international terrorism be a foreseeable consequence of the terrorism sanctions evasion conspiracy Respondents joined or, as the court below required, that (1) Respondents themselves shared a common intent to commit acts of international terrorism or (2)

that the terrorists somehow directly assisted Respondents in evading the terrorism sanctions.

2. Whether JASTA civil conspiracy liability reaches a conspiracy that furthers acts of international terrorism by knowingly enabling material support for FTOs or, as the court below held, only a conspiracy that—conversely—is furthered *by* acts of international terrorism.

PARTIES TO THE PROCEEDING

Petitioners are Charlotte Freeman, Kathleen Snyder, Randolph Freeman, G.F., a minor, I.F., a minor, Charlotte Freeman for the Estate of Brian S. Freeman, Danny Chism, Elizabeth Chism, Vanessa Chism, Julie Chism, Elizabeth Chism for the Estate of Johnathan B. Chism, Linda Falter, Russell J. Falter, Marjorie Falter, Russel C. Falter, John Sackett, Jason Sackett, Michael Lucas, Marsha Novak, David Lucas, Tim Lucas, Andrew Lucas Russell J. Falter for the Estate of Shawn P. Falter, Shannon Millican, Mitchell Millican, Shannon Millican for the Estate of Johnathon M. Millican, Noala Fritz, Daniel Fritz, Ethan Fritz, Noala Fritz for the Estate of Jacob Fritz, Noala Fritz for the Estate of Lyle Fritz, Billy Wallace, Stefanie Wallace, Austin Wallace, D.W., a minor, C.W., a minor, Evan Kirby, Johnny Washburn, Marvin Thornsberry, Cynthia Thornsberry, A.B., a minor, M.T., a minor, N.T., a minor, L.T., a minor, Tracie Arsiaga, Sylvia Macias, Gilbert Arsiaga, Jr., George Arsiaga, Matthew Arsiaga, Angel Munoz, Robi Ann Galindo, Patricia Arsiaga for the Estate of Jeremy Arsiaga, Cedric Hunt, Sr., Brian Neuman, Erika Neuman, Robert Bartlett, Terrel Charles Bartlett, Linda Jones, Shawn Bartlett, Raymond Montgomery, Patricia Montgomery, Bryan Montgomery, Tony Wood, Joedi Wood, Adam Wood, Megan Wood, Lisa Ramaci, Isabell Vincent, Charles Vincent, Lisa Ramaci for the Estate of Steven Vincent, Gwendolyn Morin-Marentes, E.M, a minor, Audelia (Audrey) Morin, Estevan (Steve) Morin Sr., Gwendolyn Morin-Marentes for the Estate of Steve Morin, Jr., Amy Lynn Robinson, Floyd Burton Robinson, Jacob Michael Robinson, Lucas William Robinson, Amy Lynn Robinson and Floyd Burton Robinson for the Estate of Jeremiah Robinson, Deborah Noble, David Noble, Charles E. Matheny, III, Deborah Noble for the Estate of Charles E. Matheny, IV, Silver Farr, Patrick Farr, Carrol Alderete, Anthony Alderete, Chad Farr, Patrick Farr for the Estate of Clay P. Farr, Rayanne

Hunter, W.H., a minor, T.H., a minor, Rayanne Hunter for the Estate of Wesley Hunter, Fabersha Flynt Lewis, Lorenzo Sandoval, Sr., Lorenzo Sandoval, Jr., Lorenzo Sandoval, Sr., for the Estate of Israel Devora-Garcia, H. Joseph Bandhold, Donald C. Bandhold, Erik Roberts, E.C.R., a minor, Robin Roberts, James Craig Roberts, Cara Roberts, Colin Roberts, Nanette Saenz, Juan Saenz, Nanette Saenz for the Estate of Carlos N. Saenz, John Vacho, Ashley Vacho Leslie, John Vacho for the Estate of Carol Vacho, John Vacho for the Estate of Nathan J. Vacho, Jeanette West, Shelby West, Jeanette West for the Estate of Robert H. West, Donna Engeman, Donna Engeman for the Estate of John W. Engeman, Suzzettee Lawson, C.L., a minor, Suzzettee Lawson for the Estate of Isaac S. Lawson, Kathy Stillwell, M.C., a minor, Kathy Stillwell for the Estate of Daniel Crabtree, Judy Ann Crabtree, Ronald Wayne Crabtree, Debra Wigbels, Ronald William Crabtree, Judy Huenink, Sean Slaven, Chastity Dawn Laflin, Nicole Landon, Misti Fisher, Judy Huenink for the Estate of Benjamin J. Slaven, Kousay Al-Taie, Nawal Al-Taie, Bashar Al-Taie, Hathal K. Taie, Kousay Al-Taie for the Estate of Ahmed Al-Taie, Fred Frigo, Lynn Forehand, Lance Haupt, Rhonda Haupt, Tifany Haupt, Sabrina Cumbe, David W. Haines, Dawn Haines, C.H., a minor, Mackenzie Haines, Harry Riley Bock, Jill Ann Bock, Mariah Simoneaux, Lawrence Kruger, Carol Kruger, Douglas Kruger, Kristy Kruger, Sangsoon Kim, Seop (Steve) Kim, Michelle Kim, Seop (Steve) Kim for the Estate of Jang Ho Kim, Helen Fraser, Richard Fraser, Richard Fraser for the Estate of David M. Fraser, Tricia English, N.W.E., a minor, N.C.E., a minor, A.S.E., a minor, Todd Daily for the Estate of Shawn L. English, Philip S. Ford, Linda Gibson, John Gibson, Stephanie Gibson Webster, Sean Elliott, Travis Gibson, Deborah Beavers, Denise Vennix, Chris Blohm, Kiana Blohm, Jeremy Blohm, James Smith, Megan Smith, Joanne Gutcher, Tracy Anderson, Jeffrey Anderson, Adam G. Stout, Anastasia Fuller, Anastasia Fuller for the Estate of Alexander H. Fuller, A.F., a minor,

(Melba) Anne F. Harris, Paul D. Harris, Hyunjung Glawson, Yolanda M. Brooks, Curtis Glawson, Sr., Kierra Glawson, Cortez Glawson, Ryan Sabinish, R.J.S., a minor, S.J.S., a minor, Ann Christopher, Ann Christopher for the Estate of Kwesi Christopher, Nancy Fuentes, Nancy Fuentes for the Estate of Daniel A. Fuentes, Armando Fuentes, Julio Fuentes, T.F., a minor, Emma McGarry on behalf of D.J.F., a minor, Michelle Klemensberg, Michelle Klemensberg for the Estate of Larry R. Bowman, Scott Lilley, Frank Lilley, Jolene Lilley, Matthew Lilley, Ava Tomson, Richard Tomson, Bradley Starcevich, Glenda Starcevich, Ariana Reyes, Trenton Starcevich, Samantha Tomson, Andrew Tomson, Ava Tomson for the Estate of Lucas V. Starcevich, Karen Funcheon, Robert Funcheon, Karen Funcheon for the Estate of Alexander J. Funcheon, Holly Burson-Gilpin, Holly Burson-Gilpin for the Estate of Jerome Potter, Nancy Umbrell, Mark Umbrell, Nancy Umbrell and Mark Umbrell for the Estate of Colby J. Umbrell, Daniel Dixon, Daniel Dixon for the Estate of Ilene Dixon, Daniel Dixon for the Estate of Robert J. Dixon, Rebecca J. Oliver, Daniel C. Oliver, Kimberlee Austin-Oliver, Shelley Ann Smith, Tiffany M. Little, K.L., a minor, Dakota Smith-Lizotte, Shyanne Smith-Lizotte, Tiffany M. Little for the Estate of Kyle A. Little, William Farrar, Sr., William Farrar, Sr. for the Estate of William A. Farrar, Tonya K. Dressler, Ardith Cecil Dressler, Melissa Dressler, Elizabeth Brown, Marian Brown, Wayne Brown, Elizabeth Brown for the Estate of Joshua D. Brown, Danielle Sweet, A.B., a minor, G.B., a minor, Danielle Sweet for the Estate of Ryan A. Balmer, Donna Kuglics, Les Kuglics, Emily Adams, Donna Kuglics for the Estate of Matthew J. Kuglics, Scott Hood, Flora Hood, Stephanie Howard, Dixie Flagg, C.F., a minor, William Parker, Meghan Parker-Crockett, Sylvia Johnson Spencer, Raymond Nigel Spencer, Sr., Amanda B. Adair, John D. Lamie, Donna Lewis, Donna Lewis for the Estate of Jason Dale Lewis, J.L., a minor, J.L., a minor, G.L., a minor, Jean Mariano, Katherine McRill-Fellini, Brett Coke, Brian Coke, Paula C. Bobb-Miles,

Johnny Javier Miles, Sr., J.J.M., Jr., a minor, Racquel Arnae Bobb Miles, Paula C. Bobb-Miles for the Estate of Brandon K. Bobb, Ursula Ann Joshua, Tammy Vanderwaal, A.L.R., a minor, Preston Shane Reece, Shaylyn C. Reece, Ashley Gudridge Houppert, Marion Crimens, Timothy W. Elledge, Christopher Levi, Eric Levi, Debra Levi, Emily Levi, Kimberly Vesey, Brenda Habsieger, Michael Habsieger, Jacob Michael Habsieger, Kelli D. Hake, Denice York, Russel York, Jill Hake, Peter Hake, G.H., a minor, Zachary Hake, Keri Hake, Skylar Hake, Kelli D. Hake for the Estate of Christopher M. Hake, Maria E. Calle, Cynthia Delgado, Cynthia Delgado for the Estate of George Delgado, Tabitha McCoy, L.M., a minor, R.M., a minor, Tabitha McCoy for the Estate of Steve A. McCoy, Kim Miller, Michael J. Miller, Walter Bailey, Cassandra Bailey, Kacey Gilmore, Terrell Gilmore, Jr., Kynesha Dhanoolal, Kynesha Dhanoolal for the Estate of Dayne D. Dhanoolal, Merlese Pickett, Harry Cromity, Marlen Pickett, Kemely Pickett, Vivian Pickett, Kyshia Sutton, Merlese Pickett for the Estate of Emanuel Pickett, Rachel M. Gillette, Rebekah Scott, Leonard Wolfer, Esther Wolfer, Patricia Smith, Michael Smith, Jacqueline A. Smith, Thomas Smith, David Hartley, David Hartley for the Estate of Jeffery Hartley, Allen Swinton, Temika Swinton, T.S., a minor, T.S., a minor, T.B., a minor, Linda Pritchett, Mary Jane Vandegrift, John Vandegrift, John Vandegrift for the Estate of Matthew R. Vandegrift, Pam Marion, Donnie Marion, Adrian McCann, Don Jason Stone, Wesley Williamson, Paula Menke, Daniel Menke, Matthew Menke, Nichole Lohrig, Rosemarie Alfonso, K.B., a minor, Michelle Benavidez, Daniel Benavidez, Christina Biederman, Daniel Benavidez, Jr., Jennifer Morman, Michelle Benavidez for the Estate of Kennith W. Mayne, Christopher Miller, Angeline (Angie) Jackson, Kaytrina Jackson, Shilyn Jackson, Tony Gonzales, Marlynn Gonzales, Tamara Runzel, Megan People, Shaula Shaffer, Kari Carosella, Gregory Bauer, Roberto Andrade, Sr., Veronica Pena Andrade, Angelica Andrade, Veronica Denisse Andrade, Theresa Davis, Robert

Canine, Janet Jones, Calvin Canine, James Canine, Linda David, Michael David, Christopher David, Linda David for the Estate of Timothy A. David, Timothy Karcher, Alesia Karcher, A.K., a minor, Audrey Karcher, Anna Karcher, Kenneth J. Drevnick, Megan Marie Rice, R.N.R., a minor, Tonya Latto, Jerry L. Myers, Jeffrey D. Price, Megan Marie Rice for the Estate of Zachary T. Myers, Cassie Collins, Deborah Smith, James Smith, Cory Smith, Christina Smith, Cassie Collins for the Estate of Shannon M. Smith, Nicholas Baumhoer, George D. White, Natalia White, K.W., a minor, George J. White, Edna Luz Burgos, John McCulley, Stephanie McCulley, T.M., a minor, R.M., a minor, B.D., a minor, Theresa Hart, Wayne Newby, Nathan Newby, Veronica Hickman, David Eugene Hickman and Devon Fletcher Hickman.

Respondents are HSBC Holdings PLC, HSBC Bank PLC, HSBC Bank Middle East Ltd., HSBC Bank USA, N.A. ("HBUS") (collectively, "HSBC"), Barclays Bank PLC ("Barclays"), Standard Chartered Bank ("SCB"), Royal Bank of Scotland, N.V. ("RBS"), Credit Suisse AG ("Credit Suisse"), Commerzbank AG ("Commerzbank") and Bank Saderat PLC ("Saderat").

DIRECTLY RELATED PROCEEDINGS

Freeman, et al. v. HSBC Holdings PLC, et al., No. 14-cv-6601, U.S. District Court for the Eastern District of New York. Memorandum and Order entered Sept. 16, 2019, Pet. App. 38a, Judgment entered Sept. 18, 2019, Pet. App. 94a, Motion for Reconsideration denied Oct. 28, 2019, Pet. App. 96a, 144a-145a.

Freeman, et al. v. HSBC Holdings PLC, et al., No. 19-3970, U.S. Court of Appeals for the Second Circuit. Judgment entered Jan. 5, 2023 (*see* Opinion at Pet. App. 1a-37a), Order denying Petition for Rehearing *en Banc* entered Feb. 7, 2023, Pet. App. 95a.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

This Court should grant certiorari because the decision below conflicts directly with *Halberstam*, the circuit decision that alone provides "the proper legal framework" for civil conspiracy liability under JASTA, as Congress mandated by a unique statutory directive. JASTA § 2(a)(5), Pet. App. 151a. Because Respondents have admitted to conspiring with Iran to evade U.S. terrorist financing sanctions, there are no issues of factual interpretation, and the errors are purely legal. Reversing the erroneous decision would resolve the legal question in dispute and restore the case. It would also properly defer to what this Court has called Congress's "careful deliberation" about "when, and how, *banks* should be held liable for the financing of terrorism," *Jesner v. Arab Bank, PLC,* 138 S. Ct. 1386, 1405 (2018) (emphasis added), by correcting the law in the circuit which has almost exclusive personal jurisdiction over foreign banks as they avail themselves of U.S. dollar-clearing services in New York.

Most of the Respondents have admitted in DPAs to conspiring with U.S.-designated, Iranian state-controlled entities (including those controlled by Iran's Islamic Revolutionary Guard Corps ("IRGC")) to launder billions of dollars through the United States by evading U.S. laws expressly and publicly intended to thwart terror financing. The Iranian entities' purpose for conspiring was clear—to finance Iran's terrorist apparatus, which killed and maimed thousands of Americans. Respondents' role was to help Iran *unlawfully* access the U.S. financial system in order to finance illicit activities it could not finance transparently, including terrorism. *Unlawfully*, because it is a felony to conspire to "conceal[] or disguise[] the nature" of "financial services" and other "material support or resources," knowing that others intend to use them in preparation for or carrying out acts of terrorism. 18 U.S.C. § 2339A(a). The U.S. government warned Respondents (other than Saderat) that the evasion

methods Iranian entities were using (and Respondents were enabling) were financing terrorism and weapons proliferation. Thus, the fatal consequences, including for the Petitioners' decedents, were the eminently foreseeable (if not inevitable) result of Respondents' money laundering conspiracy.

Yet even though that admitted conspiracy was criminal, the Circuit held that Petitioners' allegations of the *same* conduct did not plausibly state a *civil* conspiracy claim under JASTA. It found that Petitioners failed to plead that Respondents "intended to kill or injure U.S. service members in Iraq or that the terrorist groups agreed to help the Banks and Iranian entities evade U.S. sanctions." Pet. App. 26a, or that "terrorist attacks furthered the Banks' conspiracy with Iranian entities to circumvent U.S. sanctions." *Id.* at 32a.

But *Halberstam* and JASTA make clear that an intent to commit terrorism is not necessary—only an agreement to "contribute material support or resources, directly or indirectly, to persons or organizations that pose a significant risk of committing acts of terrorism" against the United States. JASTA § 2(a)(6), Pet. App. 151a-152a. Moreover, the foundational premise of JASTA and the Antiterrorism Act of which it is a part, is that any material support for FTOs "further[s]" their terrorist conduct. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33 (2010). The decision below illogically turns that empirical finding on its head, denying any deference to the determinations made by both Congress and the Executive Branch.

The result renders JASTA—a statute intended "to provide civil litigants with the broadest possible basis … to seek relief against" those who "have provided material support, directly or indirectly, to" terrorist groups, JASTA § 2(b), Pet. App. 152a—a dead letter against financial institutions or other corporations that conspire with terrorists and their front groups but are motivated by *greed*

rather than murderous intent, no matter the intent of their co-conspirators or the foreseeability of violent consequences. Indeed, the Circuit's erroneous reasoning caused it to affirm the dismissal even of *Bank Saderat*, Respondents' Iranian counterparty which has been designated an SDGT by the U.S. government for using the conspiracy's deceptive techniques to transfer at least $50 million to the FTO Hezbollah, which jointly committed, planned, or authorized the terrorist attacks at issue with the IRGC.

That legal result is both a travesty of justice and grave distortion of the statute's express purpose.

OPINIONS BELOW

The Second Circuit's opinion (Pet. App. 1a-37a) is published at 57 F.4th 66. The district court's opinion (Pet. App. 38a-93a) is published at 413 F. Supp. 3d 67.

JURISDICTION

The Second Circuit entered judgment on January 5, 2023. *See* Pet. App. 1a. It denied Respondents' timely petition for rehearing and rehearing *en banc* on February 7, 2023. Pet. App. 95a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

The following provides background, but Petitioners note that the Second Circuit accepted Petitioners' allegations as pleaded, and the errors in its decision are statements of law, not of fact.

1. The Iranian Regime Conducted a Terror Campaign Against U.S. Forces in Iraq.

Hezbollah is one of the world's most sophisticated—and most brutal—terrorist organizations. It has been a

designated an FTO since 1997, Second Amended Complaint ("SAC"), ¶11.[1] The IRGC is a paramilitary force that operates outside the formal institutions of Iran's government and is answerable to Iran's Supreme Leader. It was designated an FTO in 2019, in part for its role in attacks of the kind described in this case: "[t]he Iranian regime is responsible for the deaths of at least 603 American service members in Iraq since 2003 … in addition to the many thousands of Iraqis killed by the IRGC's proxies." Fact Sheet, U.S. State Dep't, *Designation of the Islamic Revolutionary Guard Corps*, cited in A-1072 ("IRGC Designation").[2] The attacks were part of "Iran's use of terrorism as a central tool of its statecraft and an essential element of its foreign policy." A-1072 (U.S. Treasury's Imposition of Fifth Special Measure against the Islamic Republic of Iran). The U.S. government found that the IRGC "has engaged in terrorist activity or terrorism *since its inception 40 years ago*," and that its "support for terrorism is *foundational and institutional.*" *Id*. (emphasis added). The IRGC's external covert operations directorate, the IRGC-Qods Force ("IRGC-QF"), was designated an SDGT in 2007, ¶16, and an FTO in 2019, as part of the IRGC's designation.

From 2004-2011, the Iranian regime waged a terror campaign against U.S. and other peacekeeping forces in Iraq ("Coalition Forces"), directing the IRGC-QF and Hezbollah to orchestrate attacks on Coalition Forces, including the attacks alleged here, in order to "thwart U.S. policy objectives in Iraq." ¶34. The IRGC and its Lebanese arm, Hezbollah, established, trained, and financed networks of local proxies, provided them with, *inter alia*, Hezbollah-

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[1] Citations to A-____ are to the joint appendix in the court of appeals. References to the Second Amended Complaint at A-318-927 are by paragraph number ("¶__").

[2] The URL in A-1072 n.21 has been replaced by the operative link at https://2017-2021.state.gov/designation-of-the-islamic-revolutionary-guard-corps/index.html.

designed and Iranian-manufactured explosively formed penetrators ("EFPs"), anti-armor roadside bombs that inflicted devastating damage on American armored vehicles and the service members inside. ¶¶257-81.

The district court found that the SAC plausibly alleged that Hezbollah planned, authorized, or committed the Attacks and that they were committed jointly by Hezbollah, the IRGC and the IRGC-QF, using the local proxies that they established, recruited, trained, equipped, and directed. Pet. App. 87a-88a.

2. The Iranian Regime Used the U.S. Financial System to Fund Terrorism.

Since designating Iran as a State Sponsor of Terrorism in 1984, the U.S. has attempted to constrain Iran's ability to commit and sponsor acts of terrorism by imposing a wide variety of economic sanctions publicly intended from their inception "to deny Iran the *ability to support international acts of terrorism*" and weapons proliferation. Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 3(a), 110 Stat. 1541 (emphasis added). To that end, Congress explicitly "deplore[d] decisions to … evade … international sanctions on state sponsors of terrorism…." Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, § 324, 110 Stat. 1214 (1996).

Because Iran's chief sources of revenue—oil and natural gas—are overwhelmingly purchased in U.S. Dollars ("USD") (or "petrodollars") on the global market, ¶110, and the IRGC controls most of those revenues through its control of the National Iranian Oil Company ("NIOC"), ¶¶23, 25, 400-01, the U.S. financial system has played a central role in the global movement of the USD-denominated assets of Iran and the IRGC. Nearly all USD-denominated transactions are processed through payment systems in the United States, and chiefly through correspondent and clearing banks in

New York, which are subject to monitoring by domestic clearing banks (which screen transactions against blacklists promulgated by Treasury's Office of Foreign Assets Control ("OFAC")), as well as U.S. regulators and law enforcement agencies. ¶¶25-26 & n.8, 138-45, 353-55. As a result, U.S. laws and regulations posed a significant obstacle to Iran's terror financing—provided that financial institutions that conducted business with Iranian agencies and instrumentalities did not conspire to "evade" those laws and regulations. *See, e.g.*, ¶¶140-45.

To overcome that obstacle, Iran needed a means to effect USD transfers through the U.S. that concealed the nature of these transactions from New York clearing banks and U.S. law enforcement authorities. Iran's IRGC therefore orchestrated a conspiracy by which—at its hub—the Central Bank of Iran ("CBI"), Bank Melli, Bank Saderat and NIOC worked closely with the Respondents and others to develop a series of covert and deceptive methods to move enormous sums of money through the USD-clearing system undetected. As the U.S. government later explained in declaring Iran a "Jurisdiction of Primary Money Laundering Concern":

> Iran has developed covert methods for accessing the international financial system and pursuing its malign activities, including misusing banks and exchange houses, operating procurement networks that utilize front or shell companies, exploiting commercial shipping, and masking illicit transactions using senior officials, including those at the Central Bank of Iran…. These efforts often serve to fund the Islamic Revolutionary Guard Corps (IRGC), its Islamic Revolutionary Guard Corps Qods Force (IRGC-

> QF), Lebanese Hizballah … and other terrorist groups.

A-1068.

Saderat served at the center of Iran's conspiracy (together with the IRGC, NIOC, the CBI,[3] and Bank Melli), using this "deceptive conduct" to funnel money to the IRGC and Hezbollah at Iran's direction. *See, e.g.*, ¶¶163, 991. In designating Bank Saderat and its branches and subsidiaries as SDGTs in 2007, Treasury found:

> Bank Saderat … has been used by the Government of Iran to channel funds to terrorist organizations, including Hezbollah…. For example, from 2001 to 2006, Bank Saderat transferred $50 million from the Central Bank of Iran through its subsidiary in London [Defendant Bank Saderat PLC] to its branch in Beirut *for the benefit of Hezbollah fronts in Lebanon that support acts of violence*.

¶18 (emphasis added).

Treasury publicly reported in 2006 that "Bank Saderat facilitates Iran's transfer of *hundreds of millions of dollars* to Hezbollah and other terrorist organizations each year." ¶366 (emphasis added). It also found that "Hezbollah uses Saderat to send money to other terrorist organizations as well." ¶368. During that period, Bank Saderat worked closely with HSBC (¶¶478, 521), Barclays (¶¶576, 614), SCB (¶¶623, 645, 660, 668), RBS (¶874), Credit Suisse (¶¶932-33), and Commerzbank (¶¶994, 1001) to launder enormous sums of USD-denominated transactions through the U.S. In fact, Barclays, HSBC, Commerzbank, SCB, and Credit Suisse

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[3] The CBI was designated an SDGT on September 20, 2019. *See* https://home.treasury.gov/news/press-releases/sm780.

continued to facilitate transactions on behalf of Saderat even *after* Saderat was designated an SDGT. ¶¶385-87.

Similarly, Treasury found that from 2002 to 2006, "Bank Melli was used to send at least $100 million to the Qods Force [using] *deceptive banking practices* to obscure its involvement from the international banking system, [such as] request[ing] that its name be removed from financial transactions." ¶422 (emphasis added). Bank Melli also worked closely with HSBC (¶¶426, 446, 478), Barclays (¶¶426-27, 576), SCB (¶¶426, 431-32, 623, 668), RBS (¶¶426, 430, 874), Credit Suisse (¶¶426, 442-43, 932-33), and Commerzbank (¶¶426, 444, 994, 1001), to launder enormous sums of USD through the U.S.

Respondents were vital to developing and employing those "deceptive banking practices" on behalf of the IRGC-controlled NIOC, Bank Melli, Bank Saderat, and the rest of Iran's "procurement networks that utilize front or shell companies." A-1068 (U.S. Treasury's Imposition of Fifth Special Measure against the Islamic Republic of Iran). For example, in 2019, Treasury designated a worldwide Iranian petroleum shipping network originating with NIOC for "financially support[ing] [the IRGC-QF] and its terror proxy Hizballah" in a "vast oil-for-terror shipping network."[4] It found that the shipping network "*is directed by* and financially supports [the IRGC-QF] and its terrorist proxy Hizballah," and declared "that those purchasing Iranian oil *are directly supporting Iran's militant and terrorist arm*, [the IRGC-QF]." *Id.* (emphasis added) (internal quotation marks omitted). Treasury confirmed the IRGC's "support for terrorism" and "history of attempting to circumvent

[4] Treasury Press Release, "Treasury Designates Vast Iranian Petroleum Shipping Network That Supports IRGC-QF and Terror Proxies" (Sept. 4, 2019), *available at* https://home.treasury.gov/news/press-releases/sm767.

sanctions by maintaining a complex network of *front companies.*"[5] It found that the IRGC-QF "uses several front companies to mask its role in selling the crude oil, condensate, and gas oil … [that] are overseen by Hizballah officials … both of whom were designated … in 2018 in connection with another oil-for-terror scheme."[6] Treasury explained that "*Iran's exportation of oil directly funds acts of terrorism by Iranian proxies*."[7]

3. Respondents Knowingly Participated in Iran's Conspiracy to Conceal its Use of the U.S. Financial System to Fund Terrorism.

Respondents and their Iranian counterparties jointly developed the "deceptive banking practices" that facilitated Iran's clandestine access to the U.S. financial system. These included removing or altering identifying information in the payment messages they sent through U.S. correspondent banks (commonly referred to as "stripping")—including laundering billions of dollars for sanctioned Iranian banks and the IRGC's agents NIOC and Iran's Ministry of Defense Armed Forces Logistics, directly funding Iran's terror apparatus. ¶¶25, 157-59, 400-05, 624-26. One Respondent also falsified records to help Iran obtain defense-related export-controlled items (¶¶673-838).[8] Respondents developed techniques and even employee manuals to execute these deceptive techniques. *See, e.g.*, ¶¶882, 917, 938. They also provided instructions to their Iranian bank

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[5] Treasury Press Release, "Treasury Submits Report to Congress on NIOC And NITC" (Sept. 24, 2012), *available at* https://home.treasury.gov/news/press-releases/tg1718 (emphasis added).

[6] *See* Press Release, *supra* at 8 n.4. *See also* A-1071 n.19.

[7] *See id*. (emphasis added) (internal quotation marks omitted).

[8] *See* ¶¶173-96 regarding letters of credit and the regulatory architecture the U.S. employed in furtherance of its trade embargo against Iran.

co-conspirators on how to structure payment messages to evade OFAC filters. ¶¶887, 967. Some Respondents also communicated with each other about their roles in the conspiracy, and discussed internally the likelihood their illicit assistance was "connected to terrorism." ¶512.

Indeed, Iran's objectives were contemporaneously publicized by U.S. counter-terrorist financing officials to Respondents and the banking community. Beginning in September 2006, Treasury Department officials directly briefed forty international banks and financial institutions—reportedly including at least Respondents SCB, Commerzbank, and the HSBC banks—about the terror-financing dangers of doing business with Iran. ¶¶30-31, 520. Less than a month later, a senior HSBC compliance official informed senior bank officials that the United States was considering "withdrawing the U-Turn exemption from all Iranian banks .... on the basis that, whilst having *direct evidence against Bank Saderat particularly in relation to the alleged funding of Hezbollah*, they suspected all major Iranian State owned banks of involvement in *terrorist funding* and WMD procurement." ¶518 (emphasis added).[9] Similarly, within a month of the start of Treasury's briefings, a London-based SCB executive was warned by the CEO for SCB's U.S. operations that illegally laundering USD for Iranian instrumentalities could subject the bank to "catastrophic reputational damage" and its executives to "serious *criminal liability*." ¶665 (emphasis added). The executive responded, "You f---ing Americans. Who are you to tell us, the rest of the world, that we're not going to deal with Iranians." ¶666.

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[9] Until 2008, the so-called "U-Turn exemption" permitted Iranian entities to transit funds through the U.S. banking system under highly prescribed circumstances with requisite transparency.

Remarkably, Respondents continued to participate in the conspiracy even after receiving these governmental warnings that Iran was using the very "deceptive practices" in which they were engaged to fund its terrorism. Under Secretary for Terrorism and Financial Intelligence Levey—who also was briefing Respondents during this period—told Congress in 2007 that Iran:

> disguises its hand *in terrorism* and weapons proliferation through an array of deceptive techniques specifically designed to avoid suspicion and evade detection, … [including] front companies and intermediaries … [and having] Iranian banks request that other financial institutions take their names off U.S. dollar transactions…. This practice is specifically designed to evade controls … [and] can allow Iran's banks to remain undetected as they move money through the international financial system *to pay for the Iranian regime's illicit and terrorist-related activities*.

Press Release, "Testimony of Stuart Levey Under Secretary for Terrorism and Financial Intelligence Before the Senate Committee on Banking, Housing and Urban Affairs" (Mar. 21, 2007), *available at* https://home.treasury.gov/news/press-releases/hp325. *See also* ¶172 (describing similar statements in a 2008 Treasury document).

Finally, when Treasury revoked the U-turn exemption in 2008, it reiterated what had long been obvious to Respondents: "Iran's access to the international financial system enables the Iranian regime to facilitate its support for terrorism and proliferation." ¶172. Yet, most Respondents continued to actively participate in the conspiracy.

Respondents also illegally laundered money directly for IRGC agents. For example, SCB, Credit Suisse, RBS, and HSBC illicitly laundered *billions* of dollars for NIOC through the conspiracy. *See, e.g.*, ¶¶158, 400-05, 505. SCB also illegally provided letters of credit for NIOC and its subsidiaries, ¶¶811-24 (assisted by Saderat and Bank Melli) and illegally processed letters of credit, ¶¶673-93. Credit Suisse also facilitated some of these illicit letters of credit. ¶697.

Because Respondents knowingly subverted laws and regulations expressly intended to prevent Iranian terrorist financing, federal and state regulators levied massive fines against them and required them to admit at least some of their wrongdoing. *See* ¶523 (HSBC); ¶616 (Barclays); ¶¶841, 854, A-1045-59 (SCB); ¶919 (RBS); ¶¶987-91 (Credit Suisse); ¶¶992, 996, A-929-1044 (Commerzbank).

4. Iran's Conspiracy to Access the U.S. Financial System to Fund Terrorism Was Extremely Successful.

The conspiracy succeeded to an astonishing degree. Using the techniques for which the U.S. government designated Saderat, Bank Melli, and numerous other Iranian instrumentalities, Respondents illegally and knowingly laundered hundreds of billions of dollars for those Iranian instrumentalities (and the IRGC) clandestinely through the U.S. financial system. For instance, SCB *admitted* that, from at least 2001 through 2007, it illegally processed approximately 59,000 transactions through its New York branch for Iranian customers, totaling approximately *$250 billion*. ¶839. HBUS identified more than 25,000 illegal Iranian transactions it effected, worth more than $19.4 billion. ¶¶485-86. According to Treasury, "[a]s of 2018, the equivalent of *billions of USD* in funds had transited IRGC-QF controlled accounts at Bank Melli." A-1073 (emphasis added). Moreover, with Respondents' assistance, Bank Melli enabled the IRGC and its affiliates to move funds into and out

of Iran, and the IRGC-QF used Bank Melli's branches in Iraq to "dispense funds to Iraqi Shia militant groups"—the very groups that Hezbollah and the IRGC-QF jointly deployed to attack Americans, including Petitioners.[10]

B. PROCEEDINGS BELOW

Petitioners filed their original Complaint on November 10, 2014, a First Amended Complaint on April 2, 2015, and the SAC on August 17, 2016, adding additional Plaintiffs and further factual allegations. The SAC stated seven claims for relief under 18 U.S.C. § 2333(a), set forth as so-called "primary liability" claims. *See Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 691-92 (7th Cir. 2008) (*en banc*).

On September 14, 2016, Respondents served motions to dismiss the SAC. Two weeks later, on September 28, 2016, Congress enacted JASTA. Because § 2333(d) operates retroactively, *see Linde v. Arab Bank, PLC*, 882 F.3d 314, 328 (2d Cir. 2018), when Petitioners filed their opposition to the motions to dismiss, they restated each of their original claims as JASTA claims against all Respondents. Thus, the parties and district court treated the conspiracy claims brought under § 2333(a) as also brought under § 2333(d).

On July 27, 2018, Magistrate Judge Cheryl L. Pollak issued a detailed Report & Recommendation ("R&R") finding, *inter alia*, that the SAC plausibly pleaded the elements of § 2333(d)(2) and recommending that Respondents' motions to dismiss be denied in their entirety, essentially for the reasons urged by Petitioners below. *Freeman v. HSBC Holdings PLC*, No. 14-cv-6601, 2018 WL 3616845 (E.D.N.Y. July 27, 2018).

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[10] Press Release, A-1073 n.24.

Respondents filed objections to the R&R on August 31, 2019. On May 8, 2019, the case was reassigned to District Judge Pamela K. Chen.

On September 16, 2019, Judge Chen issued a Memorandum & Order lauding Judge Pollak's "exceedingly thorough R&R," Pet. App. 40a, but rejecting the R&R in deference to what she characterized as a "decided trend toward disallowing ATA claims against defendants who did not deal directly with a terrorist organization or its proxy." *Id.*, n.2. Although Judge Chen held that the SAC plausibly pleaded that "FTO Hezbollah … and the IRGC (an SGDT), acting through agents and proxies, are the entities responsible for committing the acts of international terrorism that injured Plaintiffs"), *id.*, 90a, she still found the SAC wanting for failure to allege that Respondents "*directly* conspired with Hezbollah or the IRGC" or that the Iranian banks, NIOC or other Iranian agencies "directly participated in the attacks…." *Id.*, 91a (emphasis in original). Judge Chen therefore dismissed all the claims in their entirety, and on September 18, 2019, the Clerk of Court entered judgment for Respondents. *Id.*, 94a.

On September 26, 2019, Petitioners filed a motion for partial reconsideration of the dismissal, limited to their § 2333(d)(2) aiding and abetting and conspiracy claims against SCB and their § 2333(d)(2) conspiracy claim against Saderat. Saderat did not respond to the Petitioners' motion. On October 28, 2019, the district court denied the motion in a bench ruling. *Id.*, 96a.

However, because there were two additional (largely identical) complaints filed in related cases, Nos. 18-cv-7359 and 19-cv-2146 (E.D.N.Y.), Judge Chen directed the parties to meet and confer with the aim of consolidating the three cases in an amended complaint that would allow for the Court's dismissal rulings to be addressed in one notice of appeal. *Id.*, 146a-148a. She therefore issued a minute order

tolling the time for the notice of appeal to be filed. A-314-315 (Oct. 28, 2019, Minute Order).

However, on November 4, 2019, the Second Circuit issued *Ren Yuan Deng v. New York State Off. of Mental Health*, 783 F. App'x 72, 73 (2d Cir. 2019), which suggested that the district court may not have had the power to toll the time to notice appeal of its dismissal of the SAC. On November 25, 2019, the Court issued a minute order alerting the parties to the decision and "not[ing] that, given *Deng*, Petitioners may wish to file their notice of appeal within 30 days of the denial of the reconsideration motion, i.e., November 27, 2019." The next day (November 26, 2019), Petitioners filed a timely appeal, challenging only the district court's dismissal of their civil conspiracy and civil aiding and abetting claims under § 2333(d)(2).[11]

The Circuit affirmed dismissal, but on different grounds. The panel's majority held that the district court erred in requiring Petitioners to plead that the respondents conspired "directly" with terrorist organizations, Pet. App. 24a-25a (Judge Jacobs disagreed on this point, but otherwise concurred, *id.*, 35a-37a). "To hold otherwise," the majority reasoned, "would require us to read 'directly' into the plain text of the statute, defy well-established principles of conspiracy law, and risk shielding avowed terrorists and terrorist facilitators from liability simply because they did not have direct dealings with those who detonated explosive devices—something that is clearly inconsistent with JASTA's stated purpose." *Id.*, 25a.

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[11] The district court rejected Respondents' personal jurisdiction arguments for dismissal, except that it dismissed a claim against Commerzbank (Plaintiffs' sixth claim for relief) for lack of pendent personal jurisdiction over that claim, because it dismissed Plaintiffs' conspiracy claims against Commerzbank. Pet. App. 56a.

However, the Circuit affirmed dismissal of the complaint on a novel reading of civil conspiracy law, conflicting with the controlling D.C. Circuit precedent mandated by Congress, and with Congress's clear instruction in JASTA, as described below.

This petition followed.

REASONS FOR GRANTING THE WRIT

Respondents were the primary players in one of the greatest money laundering and terrorist financing rings in history. They *admittedly* laundered hundreds of billions of dollars for a State Sponsor of Terrorism and avowed enemy of the United States. They knew that their deceptions moved money undetected "to pay for the Iranian regime's illicit and terrorist-related activities," *infra* at p. 11, including funding FTO Hezbollah and the IRGC, and that the U.S. government "suspected all major Iranian State owned banks of involvement in terrorist funding." ¶518.

It was entirely foreseeable that at least some of the funds Respondents concealed and disguised would be used to fund terrorist activities by Hezbollah, the IRGC, and their local proxies. What was foreseeable then happened: Iran's concealed access to hundreds of billions of U.S. dollars through the U.S. financial system enabled the Iranian regime "to facilitate its support for terrorism" as Treasury found. ¶172. Thus supported, Hezbollah planned, authorized, or committed the attacks at issue jointly with the IRGC using local proxies.

But while Respondents made binding admissions to criminal conduct in their DPAs and paid billions of dollars in penalties for their crimes, the Second Circuit held that Respondents' conduct did not satisfy the JASTA standards for civil conspiracy that Congress expressly intended to provide litigants "the broadest possible basis … to seek relief." It held that Petitioners did not plead that (1)

Respondents "intended to kill or injure U.S. service members in Iraq, or that the terrorist groups agreed to help the Banks and Iranian entities evade U.S. sanctions," Pet. App. 26a, and (2) the "terrorist attacks furthered the Banks' conspiracy with Iranian entities to circumvent U.S. sanctions." *Id.* at 32a.

The Circuit's first reason imposes a specific intent requirement that is found nowhere in JASTA's text or companion statutes and is contrary to the D.C. Circuit's articulation of civil conspiracy law in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), which Congress identified as JASTA's governing legal framework. Consistent with *Halberstam*, JASTA does not require a defendant to conspire *to commit* any act; it reaches defendants who conspire *with* a person (or entity) that commits the attack. Nor does *Halberstam* require a civil conspiracy defendant to intend that the injurious act occur. There, defendant Linda Hamilton's boyfriend killed a homeowner while attempting to escape a botched burglary. Hamilton did not intend for her boyfriend to commit the unplanned murder, or even to participate in the burglary during which the murder occurred. She only "agreed to participate in an unlawful course of action"—property crimes at night—but the foreseeability of violence from that course was "a sufficient basis for imposing tort liability on Hamilton according to the law on civil conspiracy." 705 F.2d at 487.

The Circuit's second reason for affirmance turns JASTA on its head. Three times in JASTA, Congress declared that it was extending civil liability to entities that, directly or indirectly, provide material support to FTOs. JASTA §§ 2(a)(6), 2(a)(7) & 2(b), Pet. App. 151a-152a. It did so because an FTO—like Hezbollah, which Respondents were warned their conduct would support—inherently "pose[s] a significant risk of committing acts of terrorism that threaten the security of nationals of the United States," JASTA § 2(a)(6), Pet. App. 151a-152a. *Any* support to it necessarily

"facilitates" its terrorist conduct. AEDPA, § 301(a)(7). As the Executive Branch told this Court in *Holder*, "all contributions to foreign terrorist organizations *further their terrorism*." 561 U.S. at 33 (emphasis added).

By instead requiring the converse—that Petitioners plead that the attacks *further the material support*—the Circuit not only failed to give any deference to the political branches' findings but also thwarted Congress's stated intent to provide "the broadest possible basis" for civil liability.

Indeed, "furtherance" is only an *alternative* requirement for civil conspiracy: the *Halberstam* legal framework extends that liability to acts "in furtherance of, *or within the scope of the conspiracy*." 705 F.2d at 484 (emphasis added). *See also id.* at 487 ("The use of violence to escape apprehension was *certainly not outside the scope of a conspiracy* to obtain stolen goods through regular nighttime forays and then to dispose of them.") (emphasis added). Respondents knew—because they were told repeatedly by the U.S. government—that Iran needed to conceal and disguise the funds they processed to finance its terrorism and other illicit activities and yet they nevertheless cooperated in such deceptive practices anyway. Terrorist financing was not just within the "scope of the conspiracy"; it was its chief purpose and Respondents' deceptive practices were its means.

The decision below creates a sharp conflict with the D.C. Circuit's decision in *Halberstam*, which is the sole circuit law that Congress has identified as the "proper legal framework" for JASTA liability, and "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." JASTA § 2(a)(5), Pet. App. 151a. Congress's unique specification of a single circuit decision as the legal framework obviates any need for additional circuit conflicts to justify granting certiorari. Furthermore, nearly

all USD transfers on which FTOs depend that are initiated through banks outside the United States are processed electronically by correspondent banks in New York. The opinion below therefore effectively nullifies civil conspiracy liability for banks that knowingly provide, conceal, or disguise material support for FTOs in the principal circuit in which such conspiracy claims must be filed.

This Court should grant certiorari to reinstate JASTA civil conspiracy liability—which the court below has effectively foreclosed in all but the narrowest of circumstances.

I. THE CIRCUIT ERRONEOUSLY HELD THAT JASTA REQUIRES PLAINTIFFS TO PLEAD THAT ALL CONSPIRATORS SHARE A COMMON INTENT TO KILL OR INJURE U.S. SERVICE MEMBERS, OR THAT THE TERRORISTS AGREED TO HELP THE RESPONDENTS EVADE TERRORIST FINANCING SANCTIONS.

A. Civil Conspiracy under JASTA Does Not Require that a Defendant Intend to Commit Acts of International Terrorism.

The SAC alleges that Respondents conspired with several IRGC agents to use deceptive techniques "specifically designed to avoid suspicion and evade detection by responsible financial institutions and companies" in order to "disguise[] [Iran's] involvement in [the] illicit activities" of "*terrorism* and proliferation," ¶172 (emphasis added); but the Circuit nevertheless found the complaint deficient because it "fails to allege that the Banks and the terrorist groups shared any 'common intent.'" Pet. App. 26a. That is, Petitioners did not allege that the Respondents themselves "intended to kill or injure U.S. service members in Iraq…." *Id.*

The plain text of 18 U.S.C. § 2333(d)(2) provides in relevant part that for injuries arising from an act of

international terrorism committed, planned, or authorized by an FTO, "liability may be asserted as to any person …*who conspires with the person* who committed such an act of international terrorism." (emphasis added).[12] It thus requires a conspiracy *with* the person (or entity) that committed the act, not an intent to *commit* an act of terrorism. *Compare id*. *with, e.g.*, 18 U.S.C. §§ 249, 757, 1513, 2332f, 2339C (all using "conspires to commit.").

If the text of § 2333(d)(2) left any ambiguity about whether conspirators must intend to commit terrorism, such ambiguity is put to rest by JASTA's findings and purpose, which make clear that the statute is aimed at entities that "knowingly or recklessly contribute material support or resources, directly or indirectly," to "foreign organizations or persons that engage in terrorist activities against the United States." JASTA §§ 2(a)(6) and 2(b), Pet. App. 151a-152a.

The coordinate criminal provisions have similar targets. They prohibit conspiring to provide material support to FTOs (18 U.S.C. § 2339B) or to terrorists (18 U.S.C. § 2339A)—and neither requires any *intent* to commit acts of terrorism. There is no textual or structural justification for construing the civil-liability provision of § 2333(d)(2) more narrowly that its criminal counterparts, particularly under a statute expressly intended to provide civil litigants "the broadest possible basis" for relief against those that provide material support. The criminal material support statutes' empirical basis is no less clear: such organizations pose a "significant risk of committing acts of terrorism that threaten the security of the United States," JASTA § 2(a)(6),

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[12] Section 2333(d)(1) defines the "person" who committed the act of international terrorism by incorporating by reference the expansive definition in 1 U.S.C. § 1, and thus includes terrorist organizations and their agents.

Pet. App. 151a-152a, such that any support for them "facilitates," AEDPA § 301(a)(7), and "further[s]" their terrorist conduct, *Holder*, 561 U.S. at 33 (concluding that these "empirical" findings by the political branches are "entitled to deference").

JASTA's incorporation of the legal framework from *Halberstam* confirms that the statute is directed at holding liable those that agree to tortious or illegal enterprises from which acts of terrorism are a "foreseeable risk"—not just those who intend, or conspire, to commit acts of terrorism. *Halberstam*, 705 F.2d at 488. In *Halberstam*, the defendant (Hamilton) was found liable under both civil conspiracy and aiding and abetting theories for the unplanned murder of Dr. Halberstam committed by her boyfriend, Bernard Welch, during a botched burglary. However, Hamilton, who assisted what she claimed was her boyfriend's antiques business, did not know about, let alone intend to commit (or intend that Welch commit), the murder—or even the burglary. The *Halberstam* court expressly rejected the argument that the object of her unlawful agreement had to be murder or even the burglary during which the murder took place:

> It was not necessary that Hamilton knew specifically that Welch was committing burglaries. Rather, when she assisted him, it was enough that she knew he was involved in some type of personal property crime at night—whether as a fence, burglar, or armed robber made no difference—because violence and killing is a foreseeable risk in any of these enterprises.

Id. at 488. That "Hamilton agreed to participate in an unlawful course of action and that Welch's murder of Dr. Halberstam was a reasonably foreseeable consequence of the scheme are a sufficient basis for imposing tort liability on Hamilton according to the law on civil conspiracy." *Id*. at

487. Just as there was no requirement that Hamilton intended to kill Halberstam, neither are Petitioners here required to "plead that the Banks intended to kill or injure U.S. service members in Iraq," as the Circuit required. Pet. App. 26a.

The Circuit's contrary reasoning simply erases the distinction between criminal and civil conspiracy that Judge Learned Hand identified over 80 years ago: whereas the *criminal* conspirator or aider and abettor "must in some sense promote [the unlawful] venture himself, make it his own, have a stake in its outcome," a defendant's *civil* liability "extends to any injuries which he should have apprehended to be likely to follow from his acts." *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir. 1940). *See also Halberstam,* 705 F.2d at 477 ("the agreement in a civil conspiracy does not assume the same importance it does in a criminal action"). Petitioners have plausibly pleaded that Respondents not only should have realized, but in fact did realize, that terrorism was "likely to follow" from their laundering of hundreds of billions of dollars in violation of terrorist financing sanctions that they had been warned would be used, and were being used, to fund the IRGC, Hezbollah, and their terrorist activities.

Finally, even in *criminal* conspiracy law, co-conspirators are not required to share *all* the same aims or motivations of their co-conspirators. *See, e.g.*, *United States v. Papadakis*, 510 F.2d 287, 297 (2d Cir. 1975) ("Where a conspiracy has multiple objectives, a conviction will be upheld so long as evidence is sufficient to show that an appellant agreed to accomplish at least one of the criminal objectives."). Conspirators' "goals need not be congruent for a single conspiracy to exist, so long as their goals are not at 'cross purposes.'" *United States v. Beech-Nut Nutrition Corp*., 871 F.2d 1181, 1192 (2d Cir. 1989) (citation omitted). Respondents' goal of helping the IRGC conceal and disguise

funds it would use for illicit activities was not at "cross-purposes" with the terrorist campaign against U.S. service members that the IRGC thereby financed. Laundering billions of dollars—by concealing and disguising funds—*was the means by which the campaign was accomplished.*

B. JASTA Does Not Require Pleading That the Terrorist Organizations Agreed to Help the Respondents Conduct Deceptive Banking Practices.

The Circuit also faulted the SAC for failing to allege "that the terrorist groups *agreed to help the Banks* and Iranian entities evade U.S. sanctions," Pet. App. 26a (emphasis added), seemingly contemplating that for conspiracy liability to be properly pleaded, Hezbollah and the IRGC had to help Respondents devise and implement various money laundering techniques.

This again has the conspiracy's aims backward. The purpose of the conspiracy was to give the IRGC undetected access to U.S. dollars for its illicit terrorist ends. It was Respondents' role to facilitate this evasion of terrorist financing controls. The SAC alleges that Respondents used several deceptive financial bookkeeping techniques to conceal and disguise material support, including "stripping" transactional documents of Iran-identifying information and falsifying cover sheets and other bank documents. ¶¶342-43. These techniques were so sophisticated that they required extensive training even of bank professionals and multiple communications among them and often their compliance departments. *Supra* pp. 9-10. It was not the aim of the conspiracy—or the role of the terrorist groups

participating in and benefiting from it—to help the *banks* improve their money laundering techniques.[13]

When a lawyer prepares fictitious paperwork using pseudonyms to rent an airplane on behalf of a smuggler, the lawyer's conspiracy liability for smuggling does not require that the smuggler agreed to help the lawyer prepare the paperwork. *See, e.g.*, *United States v. Kehm*, 799 F.2d 354, 362 (7th Cir. 1986). Similarly, if an arms dealer conspires, directly or indirectly, to buy roadside bombs or AK-47s for Hezbollah, the dealer's conspiracy liability does not require showing that the Hezbollah buyers agreed to somehow *arrange the dealer's purchases*. Killing Americans with those weapons is clearly within the "scope of the conspiracy" even if the terrorist organizations themselves did not help the banks with their paperwork.

II. THE CIRCUIT ERRONEOUSLY HELD THAT *HALBERSTAM* REQUIRES THAT ACTS OF TERRORISM MUST BE IN FURTHERANCE OF THE CONSPIRACY WHICH RESPONDENTS AGREE TO JOIN.

The Circuit decision concluded that the SAC failed to allege "ways by which the 'acts of international terrorism' furthered 'the Conspiracy.'" Pet. App. 27a. But *Halberstam* confirms that "in civil conspiracy cases … a conspirator is liable for acts pursuant to, in furtherance of, ***or*** within the scope of the conspiracy." 705 F.2d at 484 (emphasis added).

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[13] Nevertheless, the SAC does plausibly allege in detail how Hezbollah and the IRGC directly benefitted from and were part of the conspiracy to access money undetected by the U.S. sanctions regime, ¶¶346, 357, 365, 385-86, 420, 422. It also alleges, quoting U.S. government findings, that Bank Saderat was a "significant facilitator of Hezbollah's financial activities and … served as a conduit between the Government of Iran and Hezbollah," ¶365, and that Hezbollah even used Saderat to send money to other terrorist organizations, ¶368.

What these alternatives have in common is the foreseeability of the consequences. *See id.*

The Circuit dismissed *Halberstam*'s alternative phrasing of this element by asserting that foreseeability as discussed in *Halberstam* just "pertains to aiding-and-abetting liability—not conspiracy." Pet. App. 30a (citing *Halberstam*, 705 F.2d at 482-83).

Not so.

The D.C. Circuit stated explicitly, under the heading of "Civil Conspiracy," that because Hamilton agreed to participate in an unlawful course of action and Welch's murder of Halberstam was a *reasonably foreseeable consequence* of the scheme, there was a sufficient basis for imposing tort liability on Hamilton *according to the law on civil conspiracy*. *Id.* at 487 (emphasis added).

In fact, the D.C. Circuit also explained:

> As for the second issue in aiding-abetting, the extent of liability, the test from *Cobb* and *Grim* appears to be that a person who assists a tortious act may be liable for other reasonably foreseeable acts done in connection with it. While this language is slightly different from that found in civil conspiracy cases—where a conspirator is liable for acts pursuant to, in furtherance of, or within the scope of the conspiracy—*we are not sure that it is a distinction that makes a practical difference. Foreseeability is surely an elusive concept and does not lend itself to abstract line-drawing.*

Id. at 484-85 (emphasis added).

Yet, the Circuit rejected *Halberstam's* clear holding by pointing to a hypothetical:

> For instance, in a conspiracy between A and B to smuggle firearms into the United States, it may well be foreseeable to A that B might use the smuggled firearms to commit a robbery; but, without more, there is no basis for concluding that B's use of the firearm in the robbery would somehow further A and B's firearms-smuggling conspiracy.

Pet. App. 30a-31a.

Not only does the Circuit's hypothetical rest on the most restrictive of *Halberstam*'s three alternative formulations, but it also ignores that in this case there *is* "more." Suppose A knew that the government had previously prosecuted and convicted B for armed robbery and that he was still engaged in multiple armed robberies, and that B had asked A to falsify paperwork to avoid laws specifically meant to prevent B from engaging in more armed robberies. This is the analog of U.S. government designation of an FTO or State Sponsor of Terrorism, and Respondents' evasion of terrorism-financing sanctions on Iranian entities' behalf. On these facts, when A conspires with B to smuggle weapons, the foreseeable consequences of A's assistance to B extends beyond the illicit smuggling of weapons, and A is naturally liable for the foreseeable results that are "within the scope of the conspiracy."

Here, one of the Respondents and co-conspirators, Saderat, was designated as an SDGT for transferring at least $50 million in laundered money to the FTO Hezbollah. ¶¶18, 236. A senior HSBC official even told his colleagues that the United States had "direct evidence against Bank Saderat particularly in relation to the alleged funding of Hezbollah, [and] they suspected all major Iranian State owned banks of involvement in terrorist funding…." ¶518. Another expressly foresaw that USD-denominated Iranian transactions that his bank deceptively altered might prove to be "connected to

terrorism." ¶512. The other Respondents also conspired to launder hundreds of billions of dollars to evade terrorist financing controls for the ultimate benefit of Hezbollah, the IRGC and other designated Iranian SDGTs.

It would indeed "defy credulity," as the Magistrate Judge found, that the banks did not know that their Iranian co-conspirators were engaged in illegal conduct—terrorist financing—"given that the banks intentionally sought ways to surreptitiously arrange for funding and U.S. dollar transfers that did not identify Iranian connections even though legitimate means were in fact available." 2018 WL 3616845, at *25. *Compare United States v. Morse,* 851 F.2d 1317, 1319-20 (11th Cir. 1988) (defendant's secret sale of an unregistered plane "particularly suited for smuggling" without the regular paperwork for an above-market price to buyers who used it for drug smuggling showed that he knew and participated in smuggling conspiracy).

Evading sanctions that are expressly intended to thwart terrorist financing ineluctably facilitates terrorist financing, as the sophisticated Respondents and their compliance departments admittedly knew. ¶¶164, 523, 616, 841, 919-20, 992. Given the known purpose of these sanctions and the multiple government warnings about terrorist financing that Respondents were given, terrorism cannot credibly be said to be "wholly detached from the shared conspiratorial plan," as the Circuit suggested. Pet. App. 31a. Terrorist organizations were not fortuitous, unintended, and unforeseen beneficiaries of the vast sums of money channeled to them through the conspiracy by Respondents. *See, e.g.*, ¶¶346, 357. Rather, acts of terrorism – financed with concealed and disguised funds provided by Respondents—were within the scope of the conspiracy Respondents joined.

III. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE OPINION BELOW CONFLICTS DIRECTLY WITH THE CONTROLLING CIRCUIT COURT DECISION IN *HALBERSTAM* AND NULLIFIES CONGRESS'S CAREFULLY DESIGNED FRAMEWORK FOR WHEN AND HOW BANKS SHOULD BE LIABLE FOR HELPING FINANCE TERRORISM.

As explained above, the Circuit's decision directly conflicts with the sole circuit law that Congress has specified as "the proper legal framework for how [civil conspiracy] liability should function" under JASTA. JASTA § 2(a)(5), Pet. App. 151a. Petitioners have found no other statute in which Congress has selected a single circuit court decision as the controlling legal framework for application of a statute and are unaware of any past statute incorporating such a specific mandate. In this unique circumstance, there is now a conflict in the circuits justifying immediate review by certiorari; nothing further can be gained by awaiting an additional conflict except delay in effectuating the clearly expressed purpose of Congress to provide the "broadest possible basis" for civil liability under JASTA. *Id.* § 2(b), Pet. App. 152a.

This appeal also presents a special case for this Court's review because the overwhelming majority of civil terrorist financing cases are brought in the Second Circuit. Personal jurisdiction over defendants sued for laundering money and/or providing financial services to terrorists (and that cannot be "served in any district," 18 U.S.C. § 2334) is largely limited to New York. *See Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161 (2d Cir. 2013). This is because most terrorist organizations remain dependent on U.S. dollars, which are predominantly processed and cleared through New York. *See* ¶¶109-39. It is no coincidence, therefore, that American victims of terrorism

overwhelmingly bring actions against foreign banks for material support of FTOs in the Second Circuit.[14]

This gives the Second Circuit a near (albeit not perfect) monopoly on the interpretation and use of this statute when employed for its primary purpose: deterring terrorist financing.[15] In fact, JASTA was enacted in relevant part in response to a series of decisions in the Second Circuit dismissing claims of common law secondary liability against banks that channeled material support, directly or indirectly, to FTOs through New York.[16] Despite JASTA's purpose, the holding below continues this trend. As eight Senators (including Senator Grassley, the original sponsor of the ATA) explained, "a growing body of recent cases … profoundly misconstrue and misapply the plain language of 18 U.S.C. § 2333(d) and Congress's express intent—incorporated in JASTA's Findings and Purpose, § 2—by incorrectly applying far more stringent pleading requirements than in analogous conspiracy and aiding-and-abetting contexts." Brief of Amici Curiae Eight United States Senators in Support of Plaintiffs-Appellants, *Freeman v.*

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14 *See, e.g.*, *Weiss v. Nat'l Westminster Bank PLC,* 993 F.3d 144 (2d Cir. 2021); *Honickman v. BLOM Bank SAL*, 6 F.4th 487 (2d Cir. 2021); *Siegel v. HSBC N. Am. Holdings*, *Inc*., 933 F.3d 217 (2d Cir. 2019); *Linde v. Arab Bank, PLC*, 882 F.3d 314 (2d Cir. 2018); *In re Terrorist Attacks on Sept. 11, 2001 (al Rajhi Bank, et al*.), 714 F.3d 118 (2d Cir. 2013); *Rothstein v. UBS AG*, 708 F.3d 82 (2d Cir. 2013).

15 As the Solicitor General of the United States argued in another context, "[t]here will be no opportunity for a circuit split to develop because the counterclaim is available only in patent infringement actions, as to which the Federal Circuit has exclusive appellate jurisdiction." Brief of the U.S. Solicitor Gen., *Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S*, No. 10-844. 2011 WL 2066594 (U.S. May 26, 2011) (citations omitted). This Court granted that petition for certiorari.

16 *See al Rajhi Bank*, *Rothstein*, *supra* n.14.

HSBC Holdings PLC, No. 19-3970, ECF No. 87 at 2 (2d Cir. 2023).

This Court has recognized that the ATA reflects Congress's "careful deliberation" about "when, and how, *banks* should be held liable for the financing of terrorism." *Jesner,* 138 S. Ct. at 1405 (emphasis added). By requiring that banks share the terrorist' murderous intent or that terrorists agree to directly help banks with their deceptive accounting, or that terrorist attacks further material support (when the reverse is the premise of JASTA and the material support statutes), the opinion below essentially writes conspiracy liability for banks out of the statute. Remarkably, the opinion even stops Petitioners from pursuing a civil conspiracy claim under JASTA against Bank Saderat, the SDGT that the United States designated for funneling $50 million dollars to the very FTO that attacked them and channeled funds to other terrorists.

This Court's review of the opinion below is therefore necessary to restore Congress's framework for when and how banks should be liable for financing terrorism.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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May 8, 2023

APPENDIX

APPENDIX TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 19-3970

FREEMAN,

v.

HSBC HOLDINGS PLC

August Term 2020

Argued: February 1, 2021
Decided: January 5, 2023

CHARLOTTE FREEMAN, for the Estate of BRIAN S. FREEMAN, KATHLEEN SNYDER, RANDOLPH FREEMAN, G.F., a minor, I.F., a minor, DANNY CHISM, LINDA FALTER, RUSSELL FALTER, for the Estate of SHAWN O. FALTER, SHANNON MILLICAN, for the Estate of JOHNATHON M. MILLICAN, MITCHELL MILLICAN, BILLY WALLACE, STEFANIE WALLACE, D.W., a minor, C.W, A.W., a minor, TRACIE ARSIAGA, CEDRIC HUNT, SR., ROBERT BARTLETT, SHAWN BARTLETT, LISA RAMACI, ISABELL VINCENT, CHARLES VINCENT, GWENDOLYN MORIN-MARENTES, for the Estate of STEVE MORIN, JR., E.M., a minor, AUDREY MORIN, STEVE MORIN, AMY LYNN ROBINSON, FLOYD BURTON ROBINSON, for the Estate of JEREMIAH ROBINSON, DEBORAH NOBLE, for the Estate of CHARLES E. MATHENY, IV, CHARLES E. MATHENY, III, SILVER FARR, PATRICK FARR, for the Estate of CLAY P. FARR, RAYANNE HUNTER, W.H., a

minor, T.H., a minor, FABERSHA FLYNT LEWIS, LORENZO SANDOVAL, SR., for the Estate of ISRAEL DEVORA-GARCIA, LORENZO SANDOVAL, JR., H. JOSEPH BANDHOLD, DONALD C. BANDHOLD, NANETTE SAENZ, for the Estate of CARLOS N. SAENZ, JUAN SAENZ, JOHN VACHO, for the Estate of CAROL VACHO, for the Estate of NATHAN J. VACHO, ASHLEY VACHO, JEANETTE WEST, for the Estate of ROBERT H. WEST, SHELBY WEST, DONNA ENGEMAN, SUZZETTEE LAWSON, for the Estate of ISAAC S. LAWSON, C.L., a minor, JUDY ANN CRABTREE, RONALD WAYNE CRABTREE, DEBRA WIGBELS, RONALD WILLIAM CRABTREE, JUDY HUENINK, SEAN SLAVEN, CHASTITY DAWN SLAVEN, NICOLE LANDON, MISTI FISHER, FRED FRIGO, LYNN FOREHAND, LANCE HAUPT, RHONDA HAUPT, TIFANY HAUPT, SABRINA CUMBE, DAVID W. HAINES, DAWN HAINES, C.H., a minor, SANGSOON KIM, MICHELLE KIM, SEOP STEVE KIM, for the Estate of Jang H. Kim, HELEN FRASER, RICHARD FRASER, for the Estate of DAVID M. FRASER, TRICIA ENGLISH, N.W.E., a minor, N.C.E., a minor, A.S.E., a minor, TODD DAILY, for the Estate of SHAWN L. ENGLISH, PHILIP S. FORD, LINDA GIBSON, JOHN GIBSON, DENISE BLOHM, JEREMY BLOHM, JOANNE GUTCHER, TRACY ANDERSON, JEFFREY ANDERSON, ANASTASIA FULLER, A.F., a minor, ANNE F. HARRIS, PAUL D. HARRIS, HYUNJUNG GLAWSON, YOLANDA M. BROOKS, CURTIS GLAWSON, SR., RYAN SABINISH, ANN CHRISTOPHER, for the Estate of KWESI CHRISTOPHER, D.J.F., a minor, AVA TOMSON, for the Estate of LUCAS V. STARCEVICH, RICHARD TOMSON, BRADLEY STARCEVICH, GLENDA STARCEVICH, ARIANA REYES, TRENTON STARCEVICH, KAREN FUNCHEON, for the Estate of ALEXANDER J. FUNCHEON, ROBERT FUNCHEON, HOLLY BURSON-GILPIN, for the Estate of JEROME POTTER, NANCY UMBRELL, MARK UMBRELL, NANCY and MARK UMBRELL, for the Estate of COLBY

J. UMBRELL, ILENE DIXON, SHELLEY ANN SMITH, WILLIAM FARRAR, SR., for the Estate of WILLIAM A. FARRAR, TONYA K. DRESSLER, ARDITH CECIL DRESSLER, MELISSA DRESSLER, ELIZABETH BROWN, for the Estate of JOSHUA D. BROWN, MARIAN BROWN, WAYNE BROWN, DANIELLE SWEET, for the Estate of RYAN A. BALMER, A.B., a minor, G.B., a minor, DONNA KUGLICS, for the Estate of MATTHEW J. KUGLICS, LES KUGLICS, EMILY KUGLICS, SYLVIA JOHNSON SPENCER, RAYMOND NIGEL SPENCER, SR., JOHN D. LAMIE, PAULA C. BOBB-MILES, for the Estate of BRANDON K. BOBB, JOHNNY JAVIER MILES, SR., J.J.M., JR., a minor, RACQUEL ARNAE BOBB MILES, URSULA ANN JOSHUA, BRITTANY MARIONIQUE JOSHUA, ASHLEY GUDRIDGE, MARION CRIMENS, TIMOTHY W. ELLEDGE, CHRISTOPHER LEVI, BRENDA HABSIEGER, MICHAEL HABSIEGER, JACOB MICHAEL HABSIEGER, KELLI D. HAKE, for the Estate of CHRISTOPHER M. HAKE, DENICE YORK, RUSSEL YORK, JILL HAKE, PETER HAKE, G.H., a minor, MARIA E. CALLE, KIM MILLER, WALTER BAILEY, CASSANDRA BAILEY, KACEY GILMORE, TERRELL GILMORE, JR., MICHELLE KLEMENSBERG, for the Estate of LARRY R. BOWMAN, HARRY PICKETT, E.C.R., a minor, RACHEL M. GILLETTE, KOUSAY AL-TAIE, for the Estate of AHMED AL-TAIE, ADAM G. STOUT, REBEKAH A. COLDEWE, SCOTT HOOD, PATRICIA SMITH, KATHY STILLWELL, for the Estate of DANIEL CRABTREE, MICHAEL SMITH, CHAD FARR, JACQUELINE A. SMITH, R.J.S., a minor, DAVID HARTLEY, for the Estate of JEFFREY HARTLEY, LINDA PRITCHETT, ALLEN SWINTON, DANIEL FRITZ, TEMIKA SWINTON, MARLYNN GONZALES, T.S., a minor, JULIE CHISM, T.B., a minor, KARI CAROSELLA, MARY JANE VANDEGRIFT, WILLIAM PARKER, SCOTT LILLEY, PAM MARION, KYSHIA SUTTON, DONNIE MARION, JASON SACKETT, PAULA MENKE, ROBERT CANINE, DANIEL MENKE, S.J.S., a minor,

MATTHEW MENKE, ADAM WOOD, NICHOLE LOHRING, ROSEMARIE ALFONSO, ANNA KARCHER, K.B., a minor, ANASTASIA FULLER, for the Estate of ALEXANDER H. FULLER, MICHELLE BENAVIDEZ, for the Estate of KENNITH W. MAYNE, DAN DIXON, for the Estate of ILENE DIXON, DANIEL BENAVIDEZ, SR., DAN DIXON, for the Estate of ROBERT J. DIXON, CHRISTINA BIEDERMAN, CYNTHIA DELGADO, DANIEL BENAVIDEZ, JR., KYNESHA DHANOOLAL, JENNIFER MORMAN, MERLESE PICKETT, CHRISTOPHER MILLER, JOHN VANDEGRIFT, ANGIE JACKSON, MEGAN MARIE RICE, TRINA JACKSON, NANCY FUENTES, for the Estate of DANIEL A. FUENTES, S.J., a minor, NOALA FRITZ, for the Estate of LYLE FRITZ, GREGORY BAUER, NOALA FRITZ, THERESA DAVIS, TIFFANY M. LITTLE, LINDA DAVID, for the Estate of TIMOTHY A. DAVID, MICHELLE KLEMENSBERG, MICHAEL DAVID, KOUSAY AL-TAIE, DONNA LEWIS, TIMOTHY KARCHER, KENNETH J. DREVNICK, ELIZABETH CHISM, for the Estate of JONATHAN B. CHISM, TONYA LOTTO, TABITHA MCCOY, for the Estate of STEVE A. MCCOY, JERRY L. MYERS, KATHY STILLWELL, THERESA HART, ROBERTO ANDRADE, SR., WAYNE NEWBY, ROBI ANN GALINDO, VERONICA HICKMAN, RYANNE HUNTER, for the Estate of WESLEY HUNTER, DAVID EUGENE HICKMAN, DEBRA LEVI, DEVON FLETCHER HICKMAN, CORTEZ GLAWSON, REBECCA J. OLIVER, LINDA JONES, J.L., a minor, ARMANDO FUENTES, WOOD MEGAN, SEAN ELLIOTT, GILBERT ARSIAGA, JR., EDNA LUZ BURGOS, ADRIAN MCCANN, ERIK ROBERTS, FRANK LILLEY, N.T., a minor, HARRY RILEY BOCK, COLIN ROBERTS, JILL ANN BOCK, ROBIN ROBERTS, BRETT COKE, CHASTITY DAWN LAFLIN, M.C., a minor, T.M., a minor, MEGHAN PARKER- CROCKETT, KERI COTTON, JANET JONES, JULIO FUENTES, WESLEY WILLIAMSON, DANIEL C. OLIVER, J.L., a minor, TRAVIS GIBSON, DEBBIE

BEAVERS, GEORGE J. WHITE, ERIC LEVI, JOHNNY WASHBURN, DAN DIXON, DAKOTA SMITH- LIZOTTE, R.N.R., a minor, GEORGE ARSIAGA, JOHN MCCULLY, HATHAL K. TAIE, JAMES SMITH, C.F., a minor, ANTHONY ALDERETE, AMANDA B. ADAIR, MICHAEL J. MILLER, NICHOLAS BAUMHOER, STEVE MORIN, SR., KIMBERLEY VESEY, ZACHARY HAKE, CASSIE COLLINS, GEORGE D. WHITE, CARA ROBERTS, M.T., a minor, STEPHANIE MCCULLY, T.F., a minor, TERREL CHARLES BARTLETT, CORY SMITH, A.B., a minor, EVAN KIRBY, JUDY HUENINK, for the Estate of BENJAMIN J. SLAVEN, CARROL ALDERETE, B.D., a minor, NANCY FUENTES, JOHN VANDEGRIFT, for the Estate of MATTHEW R. VANDEGRIFT, D.J.F., a minor, CYNTHIA DELGADO, for the Estate of GEORGE DELGADO, MACKENZIE HAINES, NATALIA WHITE, CYNTHIA THORNSBERRY, K.W., a minor, MEGAN MARIE RICE, for the Estate of ZACHARY T. MYERS, R.M., a minor, STEPHANIE GIBSON WEBSTER, CHRISTINA SMITH, DEBBIE SMITH, JEFFREY D. PRICE, CASSIE SMITH, HARRY CROMITY, JAMES CRAIG ROBERTS, MARVIN THORNSBERRY, L.T., a minor, SKYLAR HAKE, VIVIAN PICKETT, ANDREW TOMSON, FLORA HOOD, PATRICIA MONTGOMERY, PATRICIA ARSIAGA, for the Estate of JEREMY ARSIAGA, DON JASON STONE, MATTHEW ARSIAGA, ALESIA KARCHER, LAWRENCE KRUGER, AUDREY KARCHER, THOMAS SMITH, SHAYLYN C. REECE, ANDREW LUCAS, JOHN SACKETT, SHAULA SHAFFER, NOALA FRITZ, for the Estate of JACOB FRITZ, SHYANNE SMITH-LIZOTTE, MEGAN PEOPLE, NATHAN NEWBY, R.M., a minor, TONY GONZALES, KATHERINE MCRILL-FELLINI, VICTORIA DENISSE ANDRADE, KRISTY KRUGER, JOEDI WOOD, AUSTIN WALLACE, TAMMY VANDERWAAL, ANGELICA ANDRADE, BRIAN NEUMAN, ESTHER WOLFER, SAMANTHA TOMSON, MATTHEW LILLEY, BRYAN MONTGOMERY, ANGEL MUNOZ, KEMELY

PICKETT, MARIAH SIMONEAUX, JAMES CANINE, VANESSA CHISM, A.K., a minor, RAYMOND MONTGOMERY, DONNA ENGEMAN, for the Estate of JOHN W. ENGEMAN, CAROL KRUGER, NAWAL AL-TAIE, MEGAN SMITH, LEONARD WOLFER, TIM LUCAS, DAVID NOBLE, MARSHA NOVAK, EMILY LEVI, TONY WOOD, E.C.R., a minor, DONNA LEWIS, for the Estate of JASON DALE LEWIS, KIERRA GLAWSON, ETHAN FRITZ, STEPHANIE HOWARD, RUSSELL C. FALTER, KYNESHA DHANOOLAL, for the Estate of DAYNE D. DHANOOLAL, DOUGLAS KRUGER, L.M., a minor, BRIAN COKE, PRESTON SHANE REECE, JEAN MARIANO, A.L.R., a minor, CASSIE COLLINS, for the Estate of SHANNON M. SMITH, G.L., a minor, ERIKA NEUMAN, MICHAEL LUCAS, CALVIN CANINE, DIXIE FLAGG, BASHAR AL-TAIE, MARJORIE FALTER, JOLENE LILLEY, VICTORIA PENA ANDRADE, TIFFANY M. LITTLE, for the Estate of KYLE A. LITTLE, ELIZABETH CHISM, TAMARA RUNZEL, K.L., a minor, MARLEN PICKETT, TABITHA MCCOY, SHILYN JACKSON, KIMBERLEE AUSTIN-OLIVER, SYLVIA MACIAS, MERLESE PICKETT, for the Estate of EMMANUEL PICKETT, DAVID LUCAS,

Plaintiffs-Appellants,

v.

HSBC HOLDINGS PLC, HSBC BANK PLC, HSBC BANK MIDDLE EAST LIMITED, HSBC BANK USA, N.A., BARCLAYS BANK PLC, STANDARD CHARTERED BANK, ROYAL BANK OF SCOTLAND, N.V., CREDIT SUISSE, BANK SADERAT PLC, JOHN DOES 1–50, COMMERZBANK AG,

Defendants-Appellees.[*]

[*] The Clerk of Court is respectfully directed to amend the official case caption as set forth above.

Appeal from the United States District Court
for the Eastern District of New York
No. 14-cv-6601, Pamela K. Chen, *Judge*.

Before: JACOBS, SULLIVAN, *Circuit Judges*, and BROWN, *District Judge*.[†]

Plaintiffs-Appellants are U.S. service members wounded in terrorist attacks in Iraq and the families and estates of service members killed in such attacks. They appeal from the dismissal of their claims under the Antiterrorism Act (the "ATA"), Pub. L. No. 101-519, 104 Stat. 2250–53 (1990), as amended by the Justice Against Sponsors of Terrorism Act (the "JASTA"), Pub. L. No. 114-222, 130 Stat. 852–56 (2016), against various financial institutions in the United States and abroad (the "Banks"). As relevant to this appeal, Plaintiffs allege that the Banks conspired with and aided and abetted Iranian entities to circumvent sanctions imposed by the United States and channel funds to terrorist groups that killed or injured U.S. service members. The district court (Chen, *J.*) dismissed Plaintiffs' JASTA conspiracy claims primarily because Plaintiffs failed to plausibly plead a direct connection between the Banks and the terrorist groups. The district court also declined to consider Plaintiffs' JASTA aiding-and-abetting claims because they were raised for the first time in Plaintiffs' motion for reconsideration.

Although we disagree with the district court's primary reason for dismissing Plaintiffs' JASTA

[†] Judge Gary R. Brown, of the United States District Court for the Eastern District of New York, sitting by designation.

conspiracy claims, we AFFIRM the district court's judgment because Plaintiffs failed to adequately allege that the Banks conspired – either directly or indirectly – with the terrorist groups, or that the terrorist attacks that killed or injured the service members were in furtherance of the alleged conspiracy to circumvent U.S. sanctions. We agree with the district court that Plaintiffs forfeited their JASTA aiding-and-abetting claims by raising them for the first time in a motion for reconsideration.

Judge Jacobs concurs in a separate opinion.

AFFIRMED.

PETER RAVEN-HANSEN, George Washington University Law School, Washington, DC (Gary M. Osen, Ari Ungar, Michael Radine, Dina Gielchinsky, Aaron A. Schlanger, Osen LLC, Hackensack, NJ, *on the brief*), *for Plaintiffs-Appellants*.

ANDREW J. PINCUS, Mayer Brown LLP, Washington, DC (Mark G. Hanchet, Robert W. Hamburg, Mayer Brown LLP, New York, NY, *on the brief*), *for Defendants-Appellees HSBC Holdings PLC, HSBC Bank PLC, HSBC Bank Middle East Limited, and HSBC Bank USA, N.A.*

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Michael T. Tomaino, Jr., Jeffrey T. Scott, Sullivan & Cromwell LLP, New York, NY, *for Defendant-Appellee Barclays Bank PLC*.

Sharon L. Nelles, Andrew J. Finn, Bradley P. Smith, Sullivan & Cromwell LLP, New York, NY, *for Defendant-Appellee Standard Chartered Bank*.

Robert G. Houck, Clifford Chance US LLP, New York, NY, *for Defendant-Appellee Royal Bank of Scotland, N.V.*

Stephen I. Vladeck, Austin, TX, *for Amici Curiae Law Professors in support of Plaintiffs-Appellants*.

Michael A. Petrino, Jonathan E. Missner, Stein Mitchell Beato & Missner LLP, Washington, DC, *for Amici Curiae Eight United States Senators in support of Plaintiffs-Appellants*.

Arthur H. Bryant, Bailey & Glasser LLP, Oakland, CA; Joshua I. Hammack, Bailey & Glasser LLP, Washington, DC, *for Amici Curiae Retired Generals of the U.S. Armed Forces in support of Plaintiffs-Appellants.*

Marc J. Gottridge, Lisa J. Fried, Benjamin A. Fleming, Hogan Lovells US LLP, New York, NY, *for Amici Curiae the Institute of International Bankers, the American Bankers Association, the Chamber of Commerce of the United States of America, and the European Banking Federation in support of Defendants-Appellees*.

RICHARD J. SULLIVAN, *Circuit Judge*:

Plaintiffs-Appellants – U.S. service members wounded in terrorist attacks in Iraq and the families and estates of service members killed in such attacks – appeal from a judgment of the district court (Chen, *J.*) dismissing their claims under the Antiterrorism Act (the "ATA"), Pub. L. No. 101-519, 104 Stat. 2250–53 (1990), as amended by the Justice Against Sponsors of Terrorism Act (the "JASTA"), Pub. L. No. 114-222,

130 Stat. 852–56 (2016). As relevant to this appeal, Plaintiffs allege that Defendants-Appellees, which are U.S. and international financial institutions (collectively, the "Banks"), are liable under JASTA's conspiracy and aiding-and-abetting provisions, Pub. L. No. 114-222, § 4, 130 Stat. at 854, codified at 18 U.S.C. § 2333(d)(2), for helping Iranian banks and institutions circumvent U.S. sanctions against Iran.[1] The district court dismissed Plaintiffs' JASTA conspiracy claims primarily because Plaintiffs failed to plausibly plead a direct connection between the Banks and the terrorist groups responsible for killing or injuring Plaintiffs. The district court also declined to consider Plaintiffs' JASTA aiding-and-abetting claims because they were raised for the first time in Plaintiffs' motion for reconsideration.

Although we disagree with the district court's primary reason for dismissing the Plaintiffs' JASTA conspiracy claims, we AFFIRM the district court's judgment because Plaintiffs failed to adequately allege that the Banks conspired – either directly or indirectly – with the terrorist groups, or that the terrorist attacks that killed or injured the service members were in furtherance of the conspiracy to circumvent U.S. sanctions. We agree with the district court that Plaintiffs forfeited their JASTA aiding-and-abetting claims by raising them for the first time in a motion for reconsideration.

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[1] The Banks include HSBC Holdings PLC, HSBC Bank PLC, HSBC Bank Middle East Limited, HSBC Bank USA, N.A. (collectively, "HSBC"); Barclays Bank PLC ("Barclays"); Standard Chartered Bank ("Standard Chartered"); Royal Bank of Scotland, N.V. ("RBS"); Credit Suisse; and Commerzbank AG ("Commerzbank").

I. BACKGROUND

In their operative pleading (the "Complaint"), Plaintiffs identify ninety-two terrorist attacks – all carried out by Iraqi Shi'a militias – that killed or injured U.S. service members, including Plaintiffs. The Complaint alleges that these Iraqi militias were trained and armed by U.S.-designated Foreign Terrorist Organizations ("FTOs"), including Hezbollah and the Islamic Revolutionary Guard Corps (the "IRGC"). According to the Complaint, Hezbollah and the IRGC, in turn, were supported with funding and weapons by the Iranian government through various state-controlled entities. These Iranian entities included the Islamic Republic of Iran Shipping Lines ("IRISL"), a state-owned shipping company that Plaintiffs allege has "a long history of facilitating arms shipments on behalf of the IRGC," J. App'x at 373 ¶ 197; the National Iranian Oil Company ("NIOC"), a state-owned oil company that provided support to the IRGC – including by using its own helicopters to conduct surveillance on U.S. forces and allies along the Iranian border; and Mahan Air, a privately-operated Iranian airline that the U.S. Treasury Department designated as a Specially Designated Global Terrorist ("SDGT") in 2011 for transporting personnel, weapons, and goods for Hezbollah and the IRGC.

Plaintiffs allege that, because of the weakness of Iran's domestic currency, the Iranian government relied on access to U.S. dollars to finance its terrorism network. Since 1995, the United States has enacted a series of sanctions designed to prevent Iran from using U.S. dollars to finance terrorism. *See, e.g.*, Exec. Order No. 12,959, 60 Fed. Reg. 24,757 (May 6, 1995). Nevertheless, to avoid crippling Iran's legitimate economic activities, the U.S. government established the so-called

"U-Turn exemption," which permitted U.S. banks to process transactions to and from Iran so long as (1) non-U.S., non-Iranian banks acted as intermediaries between the U.S. banks and Iranian counterparties; (2) none of the Iranian counterparties were sanctioned entities; and (3) the payment information was transparent, so that the transactions could be readily monitored by U.S. banks and regulators. *See* 31 C.F.R. § 560.516 (1995); *see also Kemper v. Deutsche Bank AG*, 911 F.3d 383, 387–88 (7th Cir. 2018) (describing the U-Turn exemption).[2] Aside from limiting Iran's access to U.S. dollars, the United States also established regulations prohibiting trade with Iran involving certain types of military articles, such as nuclear weapons, conventional-weapons systems, and dual-use products (collectively, the "Iran Trade Regulations").

The Complaint alleges two principal types of activity that furthered Iran's financial support of terrorism. First, Plaintiffs allege that the Banks helped conceal identifying information from wire transfers to and from several Iranian banks, including Bank Saderat PLC ("Saderat"),[3] by (1) "stripping" identifying information from the wire transfer messages of the Society for Worldwide Interbank Financial Telecommunications ("SWIFT"), the medium used for most international

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[2] In 2008, the U.S. government revoked the U-Turn exemption because it suspected Iran of using the exemption to finance its nuclear-weapons and missile programs. *See* 73 Fed. Reg. 66,541 (Nov. 10, 2008).

[3] Saderat was named as a defendant in the Complaint and initially joined this appeal. However, Saderat's attorneys subsequently withdrew from their representation on appeal. On January 10, 2020, Saderat, as a pro se corporation, was deemed in default of this appeal and was precluded from submitting a brief. *See* Doc. No. 30 (citing *Berrios v. N.Y. City Hous. Auth.*, 564 F. 3d 130, 132–33 (2d Cir. 2009)).

money transfers; and (2) using an alternate form of SWIFT message that contained less information about the counterparties than the standard message used for international money transfers. According to the Complaint, these practices allowed Iranian banks to transfer hundreds of millions of dollars to terrorist organizations without detection by U.S. banks and bank regulators. Second, Plaintiffs allege that the Banks helped various Iranian entities such as IRISL, NIOC, and Mahan Air obtain letters of credit that concealed their identity, thereby allowing them to circumvent the Iran Trade Regulations and acquire prohibited goods, technologies, and weapons.

Plaintiffs claim that the Banks undertook these transactions despite being aware of, or deliberately indifferent to, the fact that the Iranian banks and entities "engaged in money laundering on behalf of a State Sponsor of Terrorism," J. App'x at 347 ¶ 49, and "assisted Iran, the IRGC, IRISL, Mahan Air, Hezbollah, and/or the [Iraqi militias] in committing the acts of international terrorism," *id.* at 402 ¶ 360.

On November 10, 2014, Plaintiffs commenced this action under the ATA, asserting claims under 18 U.S.C. § 2333(a) on a theory of primary liability. On September 28, 2016, Congress passed JASTA, which amended the ATA to permit claims against third parties that aided and abetted an act of international terrorism or conspired with a person who committed an act of international terrorism. *See* Pub. L. No. 114-222, § 4, 130 Stat. at 854, codified at 18 U.S.C. § 2333(d)(2). Congress made JASTA's secondary-liability provision retroactive to all cases pending at the time of the enactment. *See* Pub. L. No. 114-222, § 7, 130 Stat. at 855.

Nevertheless, Plaintiffs did not seek to amend the Complaint after the passage of JASTA. Rather, in response to the Banks' renewed motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, Plaintiffs argued that JASTA's secondary liability for conspiracy provided an alternative ground of relief for the Complaint's allegations under section 2333(a). The district court referred the motion to Magistrate Judge Cheryl L. Pollak, who recommended denying the motion in its entirety. Judge Pollak concluded that with respect to Plaintiffs' conspiracy claims, the Complaint adequately alleges that the Banks joined a conspiracy to finance and enrich Iranian terror proxies, and that the ninety-two terrorist attacks that injured or killed Plaintiffs were both within the scope and foreseeable risks of the conspiracy.

The district court declined to adopt Judge Pollak's report and recommendation, and instead granted the Banks' motion to dismiss. The district court explained that "the plain text of JASTA's conspiracy[-]liability provision requires that a defendant conspire directly with the person or entity that committed the act of international terrorism that injured the plaintiff." *Freeman v. HSBC Holdings PLC* (*Freeman I*), 413 F. Supp. 3d 67, 99 n.41 (E.D.N.Y. 2019). According to the district court, the Complaint merely alleges that Hezbollah and the IRGC, "acting through agents and proxies, are the entities responsible for committing the acts of international terrorism that injured Plaintiffs." *Id.* at 97–98. Finding "not a single allegation in the [Complaint] that any of the [Banks] *directly* conspired with Hezbollah or the IRGC" or "that any of [the Banks'] alleged coconspirators, *e.g.*, the Iranian banks, IRISL, NIOC, or Mahan Air, directly participated in the attacks that injured Plaintiffs," the district court

concluded that "Plaintiffs have failed to adequately allege the threshold requirements" for their secondary-liability claims.[4] *Id*. Plaintiffs then moved for reconsideration, arguing, among other things, that the district court failed to analyze Plaintiffs' claims under JASTA's aiding-and-abetting theory. The district court denied Plaintiffs' motion, explaining that "[n]owhere in any of [Plaintiffs'] submissions" did they assert a claim under an aiding-and-abetting theory, even after the passage of JASTA. Sp. App'x. at 92. This appeal followed.[5]

II. STANDARD OF REVIEW

"We review de novo a district court's dismissal of a complaint under Rule 12(b)(6)," *Honickman v. BLOM Bank SAL*, 6 F.4th 487, 495 (2d Cir. 2021), and may affirm the district court's dismissal "on any ground that finds support in the record," *Dettelis v. Sharbaugh*, 919 F.3d 161, 163 (2d Cir. 2019). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted).

III. DISCUSSION

Plaintiffs challenge the district court's dismissal of their JASTA conspiracy claims and its decision to not consider their JASTA aiding-and-abetting claims. We address each challenge in turn.

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[4] The district court also stated in a footnote "that the [Complaint] fails to sufficiently allege a JASTA conspiracy for the same reasons discussed earlier in the primary[-]liability section." *Freeman I*, 413 F. Supp. 3d at 96 n.36.

[5] On appeal, Plaintiffs do not challenge the district court's dismissal of their primary-liability claims.

A. Plaintiffs Failed to Plausibly State a JASTA Conspiracy Claim

The district court dismissed Plaintiffs' JASTA conspiracy claims primarily because the Complaint failed to plausibly allege that the Banks conspired directly with the terrorist groups that killed or injured U.S. service members. Although we disagree with the district court's primary reason for dismissal, we affirm its decision because Plaintiffs have not adequately alleged that the Banks conspired – either directly or indirectly – with the terrorist groups that carried out the attacks, or that the terrorist attacks that killed or injured the service members were in furtherance of the Banks' alleged conspiracy with Iranian entities to circumvent U.S. sanctions.

1. JASTA's Secondary-Liability Provision Extends Liability to Any Person Who Conspires with a Person Who Commits an Act of International Terrorism

In 1992, Congress enacted the core provisions of the ATA. *See* Pub. L. No. 102-572, § 1003, 106 Stat. 4521–24 (1992), codified at 18 U.S.C. §§ 2331–2338. As relevant to this appeal, the ATA added 18 U.S.C. § 2333(a), which provides:

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

18 U.S.C. § 2333(a). The ATA further defines "international terrorism" as 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 . . . ;
>
> (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.

Id. § 2331(1)(A)–(C). This original version of the ATA established primary liability for those who committed an act of international terrorism. But it did not expressly provide for secondary liability – liability for those who aided and abetted or conspired with the primary wrongdoers. *See Rothstein v. UBS AG*, 708 F.3d 82, 98 (2d Cir. 2013).

This changed in 2016, when Congress amended the ATA through JASTA. *See* Pub. L. No. 114-222, 130 Stat. at 852–56. The JASTA amendments added a new provision, codified at 18 U.S.C. § 2333(d)(2), that explicitly recognized secondary liability – aiding-and-abetting and conspiracy – for a claim brought under section 2333(a). Specifically, JASTA's secondary-liability provision states:

> In an action under [section 2333(a)] for an injury arising from an act of international terrorism committed, planned, or authorized by an organization that has 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). A "person" who commits an act of international terrorism – as used in this provision – can "include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1; *see also* 18 U.S.C. § 2333(d)(1) (incorporating this definition of "person").

In JASTA's "Purpose" section, Congress explained that the purpose of the amendments was "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 . . . that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States." Pub. L. 114-222 § 2(b), 130 Stat. at 853. Congress also took the unusual step of specifying a decision from the D.C. Circuit, *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), as one that provides "the proper legal framework for how [civil aiding-and-abetting and conspiracy] liability should function in the context of" the ATA as amended by JASTA. Pub. L. 114-222, § 2(a)(5), 130 Stat. at 852. As Congress indicated, *Halberstam* has been recognized as a "leading case regarding [f]ederal civil aiding[-]and[-]abetting and conspiracy liability, including by the Supreme Court of the United States" and this Court.

Id.; *see, e.g.*, *Beck v. Prupis*, 529 U.S. 494, 503 (2000); *Hecht v. Com. Clearing House, Inc.*, 897 F.2d 21, 25 n.3 (2d Cir. 1990).

Halberstam addressed whether the defendant, Linda Hamilton, could be held civilly liable, under a theory of aiding and abetting or as a coconspirator, for the killing of Michael Halberstam by Hamilton's long-term business and romantic partner, Bernard Welch. *See* 705 F.2d at 474. Welch killed Halberstam during a burglary – one of many burglaries that Welch had committed over the course of five years. *See id.* But while Hamilton was not present during the burglary, and was not even aware of the burglary at the time it took place, she had helped Welch fence and manage his inventory of stolen goods over the years and "knew full well the purpose of Welch's evening forays and the means by which she and Welch had risen from rags to riches in a relatively short period of time," "clos[ing] neither her eyes nor her pocketbook to the reality of the life she and Welch were living." *Id.* (alteration and internal quotation marks omitted). One of the primary issues before the court in *Halberstam* was therefore "to what extent . . . [a] secondary defendant [can] be liable for another tortious act (murder) committed by the primary tortfeasor while pursuing the underlying tortious activity." *Id. at 476.*

In an opinion by Judge Wald, for a panel that included Judge Bork and then-Judge Scalia, the D.C. Circuit held that Hamilton could be held civilly liable for Halberstam's murder, both on a theory of aiding and abetting and as a coconspirator. *Id*. at 487–89. With respect to conspiracy, the court explained that the elements required to establish civil liability for a conspiracy are:

> (1) an agreement between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; (4) which overt act was done pursuant to and in furtherance of the common scheme.

Id. at 477. The court went on to explain that, in contrast to a criminal conspiracy, "the agreement in a civil conspiracy does not assume the same importance it does in a criminal action," and that "[p]roof of a tacit, as opposed to explicit, understanding is sufficient to show agreement." *Id*. As such, a civil conspirator "can be liable even if he neither planned nor knew about the particular overt act that caused injury, so long as the purpose of the act was to advance the overall object of the conspiracy." *Id*. at 487.

The *Halberstam* court affirmed the district court's conclusion that Hamilton could be held civilly liable for Halberstam's murder as a coconspirator because (1) "Hamilton and Welch agreed to undertake an illegal enterprise to acquire stolen property," and (2) "Welch's killing of Halberstam during a burglary was an overt act in furtherance of the agreement." *Id*. In reaching this conclusion, the court emphasized that "Welch was trying to further the conspiracy by escaping after an attempted burglary, and he killed Halberstam in his attempt to do so." *Id*. Because "[t]he use of violence to escape apprehension was certainly not outside the scope of a conspiracy to obtain stolen goods through regular nighttime forays and then to dispose of them," the court concluded that Hamilton was civilly liable for that violence. *Id*.

2. The District Court Erred in Concluding That JASTA Required Plaintiffs to Allege that the Banks Conspired Directly with Terrorist Organizations

Applying *Halberstam* to this case, the district court found that the Complaint failed to state a JASTA conspiracy claim because it did not contain "a single allegation . . . that any of the [Banks] *directly* conspired with Hezbollah or the IRGC," the two entities "responsible for committing the acts of international terrorism that injured Plaintiffs." *Freeman I*, 413 F. Supp. 3d at 98. The district court explained that although JASTA added conspiracy liability to the ATA, "Congress significantly limited that secondary liability to defendants who conspired *with*" the person who committed an act of international terrorism. *Id.* at 94 n.35. The Banks press this interpretation of section 2333(d)(2) on appeal, arguing that the phrase "conspires with" demands "that the defendant interact with the terrorist attacker." Banks' Br. at 14–15. We conclude that this narrow construction of section 2333(d)(2) is unsupported by the text and structure of JASTA and runs counter to basic principles of conspiracy liability.

First, the word "directly" is absent from JASTA. The text of the statute plainly provides that "liability may be asserted as to any person . . . who *conspires with* the person who committed such an act of international terrorism," without requiring a direct connection between the Banks and terrorist attackers. 18 U.S.C. § 2333(d)(2) (emphasis added). The Banks attempt to shoehorn the "proximity requirement" into the word "with." Banks' Br. at 18. But from a linguistic standpoint, it is difficult to attach great significance to Congress's use of the preposition "with" after "conspires." In the

context of section 2333(d)(2), the terms "aids" and "abets" are both transitive verbs, which do not require a preposition to link them to the phrase "the person who committed such an act of international terrorism." *See* Bryan A. Garner, *Garner's Modern English Usage* 1035 (4th ed. 2016). By contrast, the term "conspires" – as used in the statute – is an intransitive verb, after which a preposition is necessary. *See id.* at 1034. The word "with," therefore, does not circumscribe the scope of JASTA conspiracy liability; it is simply the natural way of linking the verb "conspires" to the remainder of the text. As Justice Cardozo observed nearly a century ago, "[i]t is impossible in the nature of things for a man to conspire with himself," since one necessarily conspires *with* other people. *Morrison v. California*, 291 U.S. 82, 92 (1934).

Second, under well-settled principles of conspiracy law, "[t]here is no requirement that each member of a conspiracy conspire directly with every other member of it, or be aware of all acts committed in furtherance of the conspiracy, or even know every other member." *United States v. Rooney*, 866 F.2d 28, 32 (2d Cir. 1989) (citation omitted). Indeed, a standard formulation of the jury instruction for such crimes makes clear that "to become a member of the conspiracy, the defendant need not have known the identities of each and every other member, nor need he have been apprised of all of their activities." 2 Leonard B. Sand et al., *Modern Federal Jury Instructions – Criminal* ¶ 19.01 (2021). That is also the law of this Circuit. *See United States v. Labat*, 905 F.2d 18, 21 (2d Cir. 1990) ("The defendant need not know the identities of all of the other conspirators.").

By way of example, in *United States v. Bicaksiz*, 194 F.3d 390 (2d Cir. 1999), we upheld the sufficiency of a

defendant's conviction for conspiring to commit a murder for hire, even though the defendant never met his coconspirators and coordinated through an intermediary who turned out to be a non-conspiring government informant. *See id.* at 400. We explained that even though the defendant and one of his coconspirators "were unaware of each other's identity, there [was] sufficient evidence in the record for the jury to have reasonably found that each was aware of an unknown participant playing an assigned and understood role in furtherance of the criminal venture." *Id*.

This same rationale applies to a JASTA conspiracy claim. So long as the defendant and the "person" – which can include an entity or association – carrying out the act of international terrorism are part of a common conspiracy, there is nothing in the text or structure of JASTA requiring that they meet, communicate, or interact for the defendant to be held liable for his coconspirator's actions. This conclusion is further reinforced by the fact that the elements of civil conspiracy articulated in *Halberstam* – "(1) an agreement between two or more persons; (2) to participate in an unlawful act . . . ; (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; (4) which overt act was done pursuant to and in furtherance of the common scheme" – make no mention of directness. 705 F.2d at 477.

The Concurrence agrees with the district court and would hold that JASTA requires a direct link between the Banks and the terrorist groups. After surveying statutes in the United States Code that contain the phrases "conspire with" or "conspire to," the Concurrence observes that "JASTA stands alone as the only statute

that prohibits defendants from conspiring 'with' a specific person or category of persons." Concurrence at 3.

But this is a distinction without a difference. The fact that JASTA limits its reach to conspiracies that include a specified "category of persons" does not suggest that a defendant must interact *directly* with such "category of persons." *Id*. Again, "directly" is nowhere to be found on the face of the statute, and well-established principles of conspiracy law do not require "that each member of a conspiracy conspire directly with every other member of it." *Rooney*, 866 F.2d at 32. Indeed, by ignoring JASTA's text and black-letter conspiracy law, the Concurrence's narrow construction would absolve terrorist facilitators from liability as long as they interact with terrorist perpetrators through an intermediary. That result would be a drastic distortion of JASTA, as Congress made clear in enacting the statute that its purpose was to provide civil litigants with the "*broadest possible basis* . . . to seek relief against persons, entities, and foreign countries . . . that have provided material support, *directly or indirectly*, to foreign organizations or persons that engage in terrorist activities against the United States." Pub. L. 114-222, § 2(b), 130 Stat. at 853 (emphasis added).[6]

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[6] Contrary to the Banks' position in their Rule 28(j) letter, this Court's opinion in *Kaplan v. Lebanese Canadian Bank*, 999 F.3d 842 (2d Cir. 2021), does not compel us to adopt the district court's narrow reading of JASTA. While it is true that *Kaplan* makes a passing reference to the word "with" in assessing the language of the aiding-and-abetting provision of section 2333(d)(2), *id.* at 855, *Kaplan* did not involve a JASTA conspiracy claim. To the extent that *Kaplan* purported to interpret the term "conspires with," it was pure dicta. Moreover, *Kaplan* recognized that JASTA has the statutorily codified purpose of "provid[ing] civil litigants with the broadest possible basis" to seek damages against organizations

We therefore see no reason to conclude that a JASTA conspiracy claim requires a direct connection between the defendant and the person who commits an act of international terrorism. To hold otherwise would require us to read "directly" into the plain text of the statute, defy well-established principles of conspiracy law, and risk shielding avowed terrorists and terrorist facilitators from liability simply because they did not have direct dealings with those who detonated explosive devices – something that is clearly inconsistent with JASTA's stated purpose.

3. Plaintiffs Failed to Allege That the Banks Conspired with Terrorist Organizations

Although the district court erred in requiring Plaintiffs to allege a "direct" connection between the Banks and the terrorist organizations that perpetrated the acts of violence in question, we nevertheless find that Plaintiffs have not sufficiently alleged a JASTA conspiracy claim because the Complaint is devoid of any fact suggesting that the Banks conspired – either *directly or indirectly* – with the terrorist perpetrators. As discussed, to assert a conspiracy claim under JASTA, a plaintiff must plead "an *agreement* between two or more persons . . . to participate in an unlawful act" and an "injury caused by an unlawful overt act performed by one of the parties to the *agreement*." *Halberstam*, 705 F.2d at 477 (emphasis added). While courts may "infer an agreement from indirect evidence in most civil conspiracy cases," *id.* at 486, a complaint must nonetheless allege that the coconspirators were

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responsible for "terrorist activities against the United States, whether directly or indirectly." *Id.* (internal quotation marks omitted) (citing JASTA, Pub. L. No. 114-222, § 2(b), 130 Stat. at 853). Surely, that purpose was not limited to the aiding-and-abetting prong of section 2333(d)(2).

"pursuing the same object," *id.* at 487; *see also N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 39 (2d Cir. 2018) ("Proof of a conspiracy" requires "direct or circumstantial evidence that reasonably tends to prove a conscious commitment to a common scheme designed to achieve an unlawful objective." (alteration and internal quotation marks omitted)); *United States v. Parker*, 554 F.3d 230, 234 (2d Cir. 2009) ("[U]nless at least two persons have a *shared* purpose or stake in the promotion of an illegal objective, there is no conspiracy."); *Int'l Distrib. Ctrs., Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 793 (2d Cir. 1987) ("[C]onspirators [must have] a unity of purpose or a common design and understanding.").

Here, the Complaint fails to allege that the Banks and the terrorist groups shared any "common intent." *Halberstam*, 705 F.2d at 480. As to the Banks, the Complaint states that they "shared the common goal of . . . providing Iran and the Iranian [b]ank[s] . . . the ability to illegally transfer billions of dollars (undetected) through the United States." J. App'x at 398 ¶ 344. With respect to the terrorist groups, the Complaint asserts that they "actively engaged in planning and perpetrating the murder and maiming of hundreds of Americans in Iraq." *Id.* at 403 ¶ 359. Nowhere in the Complaint, however, do Plaintiffs plead that the Banks intended to kill or injure U.S. service members in Iraq, or that the terrorist groups agreed to help the Banks and Iranian entities evade U.S. sanctions. In the absence of any allegation that the Banks and the terrorist groups "engaged in a common pursuit," *Halberstam*, 705 F.2d at 481, we cannot identify "an[y] agreement" that could form the basis of a JASTA conspiracy between the Banks and the terrorist groups, whether they conspired directly or indirectly with one another, *id.* at 477; *see also Bernhardt v.*

Islamic Republic of Iran, 47 F.4th 856, 873 (D.C. Cir. 2022) (holding that "Bernhardt's conspiracy claim [against HSBC] is inadequate" because "[t]he complaint states that HSBC was trying to make substantial profits by evading sanctions, whereas al-Qaeda sought to terrorize the U.S. into retreating from the world stage" (internal quotation marks omitted)).

4. Plaintiffs Likewise Failed to Allege an Overt Act in Furtherance of the Common Scheme

Aside from Plaintiffs' failure to adequately allege an agreement between the Banks and the terrorist groups, we also cannot find that the ninety-two terrorist attacks alleged in the Complaint furthered a conspiracy in which the Banks were participants. Under *Halberstam*, a plaintiff asserting a civil conspiracy claim must adequately plead that their injuries were caused by "an unlawful overt act" done "in furtherance of the [coconspirators'] common scheme." *Halberstam*, 705 F.2d at 477. In this case, the Complaint defines "the Conspiracy" as "six Western international banks . . . knowingly conspir[ing] with Iran and its banking agents . . . to evade U.S. economic sanctions, conduct illicit trade-finance transactions, and disguise financial payments to and from U.S. dollar-denominated accounts." J. App'x at 335 ¶ 6. The Complaint also alleges that Plaintiffs were "killed and injured by reason of acts of international terrorism perpetrated by Iran through its agents." *Id.* at 403 ¶ 361. Notably absent from the Complaint, however, are allegations of ways by which the "acts of international terrorism" furthered "the Conspiracy." Rather, the Complaint alleges only that "[t]he Conspiracy was . . . a significant factor in the chain of events leading to Plaintiffs' deaths and injuries," *id.* at 402 ¶ 360, without explaining how the terrorist attacks

"advance[d] the overall object of the conspiracy" – the evasion of U.S. sanctions against Iran, *Halberstam*, 705 F.2d at 487.

On appeal, Plaintiffs do not contend that the ninety-two terrorist attacks furthered the conspiracy to evade U.S. sanctions; instead, they argue that civil conspiracy liability under *Halberstam* reaches not only acts "in furtherance of" the conspiracy but also any conduct that might "foreseeably result from it." Reply Br. at 19. The crux of Plaintiffs' argument is that, because the Iraqi militias' "terror campaign" was "the foreseeable result" of the Banks' conspiracy with Iranian entities to circumvent U.S. sanctions, the Banks should be liable for the terrorist attacks. *Id*. at 19–20. In making this argument, Plaintiffs rely principally on *American Family Mutual Ins. Co. v. Grim*, 201 Kan. 340 (1968), a case discussed in *Halberstam*, 705 F.2d at 482–83.

The facts in *Grim* are certainly a far cry from those at issue here. In *Grim*, a boy broke into a local church with three companions at night to search for soft drinks. 201 Kan. 341. Because the doors to the kitchen were locked, several of the boys attempted to gain entry through the attic. *Id.* at 341–42. While the boy in question remained in a storeroom behind the sanctuary, two of his companions proceeded to the attic, but failed to completely extinguish the torches they used to illuminate their way. *Id.* at 342–43. After the boys obtained the soft drinks and left, the church caught fire from the torches and was severely damaged. *Id.* at 343–44. Although the defendant in question neither entered the attic, knew about the torches, nor was near the church when the fire started, *id.*, the court nonetheless found him liable for the fire damage, "invoking both civil conspiracy and aiding-abetting theories," *Halberstam*, 705 F.2d at 483.

Drawing on the restatement's section on aiding and abetting, the court pointed out that "a person who encourages another to commit a tortious act may also be responsible for other foreseeable acts done by such other person in connection with the intended act." *Grim*, 201 Kan. at 346. The court also relied on a theory of conspiracy, reasoning that despite the boy's lack of involvement with the torches, he was liable for the fire because "the torches were used in the four boys' attempt to carry out their original unlawful plan." *Id*. at 345.

As Plaintiffs acknowledge, the *Halberstam* court identified *Grim* as an example of "judicial merger" of civil conspiracy and aiding and abetting, *Halberstam*, 705 F.2d at 482; *see also* Reply Br. at 19, without "distinguish[ing] the elements and proof of civil conspiracy and aiding-abetting," *Halberstam*, 705 F.2d at 489. But the *Halberstam* court noted that "[t]here is a qualitative difference between proving an agreement to participate in a tortious line of conduct [– in the case of conspiracy –] and proving knowing action that substantially aids tortious conduct [– in the case of aiding and abetting]." *Id.* at 478. The *Halberstam* court therefore found "it important to keep the distinctions [between conspiracy and aiding and abetting] clearly in mind" because "the distinctions can make a difference." *Id.*; *see also id.* at 489 ("Our effort to distinguish the elements and proof of civil conspiracy and aiding-abetting may appear formalistic, but it is motivated by our desire to move cautiously in cases like this one.").

Keeping the distinctions "clearly in mind," *id.* at 483, we are unpersuaded by Plaintiffs' contention that civil conspiracy liability reaches any coconspirator conduct that "foreseeably" results from the conspiracy, Reply Br. at 19. Plaintiffs put great emphasis on the

fact that foreseeability is discussed in *Halberstam*. *See id.* (citing *Halberstam*, 705 F.2d at 482–83). But that discussion pertains to aiding-and-abetting liability – not conspiracy. *See, e.g.*, *Halberstam*, 705 F.2d at 483 ("[T]he principle to apply in assigning liability under the *aiding-abetting* theory was: '[a] person who encourages another to commit a tortious act may also be responsible for other *foreseeable* acts done by such other person in connection with the intended act.'" (quoting *Grim*, 201 Kan. at 346) (emphasis added)); *id.* at 485 ("As for the second issue in *aiding-abetting*, the extent of liability, the test from *Cobb* and *Grim* appears to be that a person who assists a tortious act may be liable for other reasonably *foreseeable* acts done in connection with it." (emphasis added)); *id.* at 488 ("Similarly, under an *aiding-abetting* theory, it was a *natural and foreseeable* consequence of the activity Hamilton helped Welch to undertake." (emphasis added)). Given *Halberstam*'s repeated admonition to keep the two theories separate, we see no reason to inject the foreseeability requirement pertinent to aiding-and-abetting liability into the "in-furtherance-of" requirement that exists for conspiracy.

Halberstam's requirement of an overt act to further the "*overall object*" of the conspiracy, 705 F.2d at 487 (emphasis added), is grounded in the very core of conspiracy liability, which is "an *agreement* between the defendant and the primary wrongdoer to commit a wrong," Restatement (Third) of Torts: Liability for Economic Harm § 27 (Am. L. Inst. 2020) (emphasis added). The mere fact that certain conduct may be the "natural and foreseeable consequence" of the conspiracy is therefore not enough to meet the in-furtherance-of requirement at the heart of a conspiracy claim. *Halberstam*, 705 F.2d at 488. For instance, in a conspiracy between *A* and *B* to smuggle firearms into

the United States, it may well be foreseeable to *A* that *B* might use the smuggled firearms to commit a robbery; but, without more, there is no basis for concluding that *B*'s use of the firearm in the robbery would somehow further *A* and *B*'s firearms-smuggling conspiracy. To hold a defendant liable for a coconspirator's actions merely because they are foreseeable – even though wholly detached from the shared conspiratorial plan – would stretch the concept of civil conspiracy too far beyond its origin. *See Halberstam*, 705 F.2d at 484–85 *(*explaining that the overt act causing the plaintiff's injury must be "in furtherance of the agreement"); *Bernhardt*, 47 F.4th at 873 ("[I]t [is not] plausible to infer that an attack on a secret CIA base in Afghanistan would further HSBC's alleged objective of maximizing profits through the evasion of U.S. sanctions."); *Adams v. Alcolac, Inc.*, 974 F.3d 540, 545 (5th Cir. 2020) ("The question is not whether the plaintiffs' battery was a foreseeable result of the alleged conspiracy but whether the battery was done in pursuance of the common purpose of the conspiracy." (internal quotation marks omitted)).

When read in context, *Halberstam* makes clear that a coconspirator's overt act must further the objects of a conspiracy for another coconspirator to be held civilly liable for that act. After upholding "the district court's finding that Hamilton and Welch agreed to undertake an illegal enterprise to acquire stolen property," the court explained that "[t]he only remaining issue, then, is whether Welch's killing of Halberstam during a burglary was an overt act *in furtherance of* the agreement." *Halberstam*, 705 F.2d at 487 (emphasis added). The court concluded that it was, noting that "a conspirator can be liable even if he neither planned nor knew about the particular overt act that caused injury, so long as the purpose of the act

was to advance the *overall object* of the conspiracy." *Id.* (emphasis added). In this case, Plaintiffs simply have not explained how the ninety-two terrorist attacks furthered the Banks' conspiracy with Iranian entities to circumvent U.S. sanctions. We therefore affirm the district court's dismissal of Plaintiffs' JASTA conspiracy claims also on this ground. *See Bernhardt*, 47 F.4th at 873 (holding that Bernhardt "fail[ed]to allege an overt act in furtherance of a conspiracy," as "HSBC's sanctions evasion . . . is not . . . an overt act of international terrorism or the source of Bernhardt's injury under the ATA.").

B. Plaintiffs Forfeited Their JASTA Aiding-and-Abetting Claims

Plaintiffs also urge us to consider their JASTA aiding-and-abetting claims, which they raised for the first time in their motion for reconsideration. As a general rule, we "will not consider an argument on appeal that was raised for the first time below in a motion for reconsideration." *Off. Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 159 (2d Cir. 2003). While we have discretion to consider untimely arguments, we frequently decline to do so when the party asserting the argument presents no persuasive excuse. *See, e.g.*, *Phillips v. City of New York*, 775 F.3d 538, 544 (2d Cir. 2015); *Sompo Japan Ins. Co. of Am. v. Norfolk S. Ry. Co.*, 762 F.3d 165, 188–19 (2d Cir. 2014); *Analytical Survs., Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52–53 (2d Cir. 2012). In this case, Plaintiffs have not articulated any excuse that would warrant the exercise of our discretion. Instead, Plaintiffs cherry-pick certain statements made by the district court during a hearing to show that they did not forfeit their aiding-and-abetting claims. But conveniently omitted from

Plaintiffs' excerpt of the transcript are the following remarks from the district court:

> Nowhere in any of your submissions have you actually used the words, ["]We are alleging aiding[-]and[-]abetting liability under JASTA,["] and even in your briefing now, you simply say that one of the elements is met, namely, a general awareness of the terrorist activities of some of these entities that they provided banking services for[.] [B]ut . . . I find it a little disingenuous, to be perfectly frank, because you never declared in this case that you were advancing an aiding[-]and[-]abetting theory.

Sp. App'x at 92–93. The district court therefore emphatically rejected Plaintiffs' suggestion that they had raised their aiding-and-abetting arguments prior to the motion for reconsideration or that it ever considered them. The district court's conclusion is also supported by the record: Plaintiffs never asserted JASTA aiding-and-abetting liability in their opposition to the Banks' motion to dismiss or in their response to the Banks' objections to the Report and Recommendation, despite ample opportunity to do so. *See* Dist. Ct. Doc. Nos. 125 at 26, 31–32; 183 at 2–21.

Plaintiffs point us to the Supreme Court's decision in *Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014), to suggest that "the [Complaint] can be sustained on any legal theory that its allegations, fairly construed, support." Reply Br. at 21. But this case hardly resembles *Johnson*, in which the plaintiffs had simply failed to identify 42 U.S.C. § 1983 in an action asserting violations of their constitutional rights. *Johnson*, 574 U.S. at 10. Here, the Complaint does not merely articulate an "imperfect statement of the legal theory supporting the claim asserted," *id*. at 11; it

asserts only a conspiracy theory, with no reference to aiding and abetting whatsoever, *see generally* J. App'x at 318–927. Plaintiffs' subsequent briefs before the district court do the same. *See, e.g.*, Dist. Ct. Doc. No. 125. Indeed, Plaintiffs themselves concede that they did not assert a claim under an aiding-and-abetting theory until they commenced a second lawsuit in 2018. *See* Reply Br. at 21 n.21 ("[C]laims for aiding and abetting were first pleaded as such in *Freeman* [*v. HSBC Holdings PLC (Freeman II)*, No. 18-cv-7359 (PKC) (E.D.N.Y. 2018)]."). The fact that Plaintiffs ultimately filed an entirely separate action asserting JASTA aiding-and-abetting liability only reinforces the fact that they failed to raise those arguments here.

On this record, we find that the district court acted within its discretion in declining to consider Plaintiffs' untimely JASTA aiding-and-abetting claims. We also decline to do so on appeal.

IV. CONCLUSION

Although we disagree with the district court's conclusion that a JASTA conspiracy claim requires a direct connection between the defendant and the person who commits an act of international terrorism, we AFFIRM the district court's judgment because Plaintiffs failed to adequately allege that the Banks conspired either directly or indirectly with the terrorist groups, or that the terrorist attacks that killed or injured U.S. service members furthered the Banks' conspiracy with Iranian entities to circumvent U.S. sanctions. We agree with the district court that Plaintiffs forfeited their aiding-and-abetting claims by raising them for the first time in a motion for reconsideration.

DENNIS JACOBS, *Circuit Judge*, concurring:

The majority opinion observes that JASTA does not require a direct relationship between the Banks and the terrorist attackers. This observation is dicta because, as we all agree, it does not affect the result. I would let the dicta pass, except that it is wrong.

JASTA requires that a defendant conspire "*with* the person who committed" acts of terrorism. 18 U.S.C. § 2333(d)(2) (emphasis added). That intimate little preposition requires that there be a direct link between a defendant bank and a terrorist.

The use of "with" is particular, and unusual. The United States Code is full of statutes that sweep up defendants who "conspire[] to" commit certain acts, without reference to the person or category of persons with whom the defendant must conspire. Examples are in the margin.[1] The phrase "conspires with" appears in that Code far less often.[2] Where it does appear, the object of the preposition "with" is not particular: that is, the conspirator is prohibited from conspiring with anybody at all. *See, e.g.*, 18 U.S.C. § 956(a)(1) ("Whoever, within the jurisdiction of the United States, *conspires with one or more other persons* . . . to commit . . . the offense of murder, kidnapping, or maiming [overseas] . . . shall . . . be punished as

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[1] *See, e.g.*, 18 U.S.C. § 115(a)(2) ("Whoever assaults, kidnaps, or murders, or attempts or *conspires to* kidnap or murder . . . shall be punished as provided in subsection (b)." (emphasis added)); 18 U.S.C. § 832(c) ("Whoever without lawful authority develops, possesses, or attempts or *conspires to* develop or possess a radiological weapon . . . shall be imprisoned for any term of years or for life." (emphasis added)).

[2] By my count, the phrase "conspires to" appears 125 times in the United States Code, while the phrase "conspires with" appears only 19 times.

provided in subsection (a)(2)." (emphasis added)); 18 U.S.C. § 1594(c) ("Whoever *conspires with another* to violate section 1581 . . . shall be punished in the same manner as a completed violation of such section." (emphasis added)).

The requirement that the defendant conspire "with another" or "with one or more other persons" does not amount to a limitation because "[i]t is impossible in the nature of things for [one] to conspire with [one]self." *Morison v. California*, 291 U.S. 82, 92 (1934). Rather, these statutes prohibit conspiracy in its broadest terms, whereby each member must conspire directly with another member of the conspiracy, but not necessarily "with every other member of it." *United States v. Rooney*, 866 F.2d 28, 32 (2d Cir. 1989). Application of these statutes does not depend on whether the defendant conspires directly with any defined person. "With" requires a direct linkage, even if it is promiscuous.[3]

So far as I can tell, JASTA stands alone as the only statute that prohibits defendants from conspiring "with" a specific person or category of persons: "the person who committed such an act of international terrorism." 18 U.S.C. § 2333(d)(2).

This substantive and grammatical difference between JASTA and other statutes must be given meaning. *See Marx v. General Revenue Corp.*, 568 U.S. 371, 384 (2013) ("Finally, the language in § 1692k(a)(3) sharply contrasts with other statutes in which Congress has

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[3] The Majority acknowledges that in *Kaplan v. Lebanese Canadian Bank*, 999 F.3d 842 (2d Cir. 2021) we emphasized that "JASTA states that to be liable for conspiracy a defendant would have to be shown to have 'conspire[d] with' the principal," *id.* at 855.

placed conditions on awarding costs to prevailing defendants."); *Orff v. United States*, 545 U.S. 596, 604 (2005)("Our conclusion draws force from . . . the broader phrasing of [other] statutes . . . ."); *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 245 (1989) ("Moreover, Congress' approach in RICO can be contrasted with its decision to enact explicit limitations to organized crime in other statutes.").

The only reasonable reading of JASTA is that it requires proof of a direct link between a defendant bank and a terrorist. A holding on that issue must await a case in which it affects the outcome.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

14-CV-6601 (PKC) (CLP)

CHARLOTTE FREEMAN, *et al.*,

Plaintiffs,

-against-

HSBC HOLDINGS PLC, HSBC BANK PLC, HSBC BANK MIDDLE EAST LIMITED, HSBC BANK USA, N.A., BARCLAYS, STANDARD CHARTERED BANK, ROYAL BANK OF SCOTLAND, N.V., CREDIT SUISSE, BANK SADERAT PLC, COMMERZBANK AG, *and* JOHN DOES 1-50,

Defendants.

MEMORANDUM & ORDER

PAMELA K. CHEN, United States District Judge:

Plaintiffs, a group of American citizens killed or injured by terrorist attacks in Iraq, and/or their families, filed this action in November 2014 against ten banking institutions—HSBC Holdings, PLC, HSBC Bank PLC, HSBC Bank Middle East Ltd., HSBC Bank USA, N.A. (collectively, "HSBC"), Barclays Bank PLC ("Barclays"), Standard Chartered Bank ("SCB"), Royal Bank of Scotland, N.V. ("RBS"), Credit Suisse AG ("Credit Suisse"), Bank Saderat PLC ("Bank Saderat"), and Commerzbank AG ("Commerzbank")—as well as John Does 1–50, seeking damages pursuant to the Antiterrorism Act (the "ATA"), 18 U.S.C. § 2333, as now amended by the Justice Against State Sponsors of

Terrorism Act ("JASTA"), Pub. L. No. 114-222, 130 Stat. 852 (2016).[1] Defendants moved to dismiss the Second Amended Complaint, which is the operative complaint, on various grounds, including: (1) failure to plead primary liability under 18 U.S.C. § 2333(a); (2) failure to allege facts establishing that Defendants' actions were the proximate cause of Plaintiffs' injuries; (3) failure to allege that the U.S. branches of certain Defendants are "United States persons" who engaged in a financial transaction with the government of Iran; and (4) as to the Iranian bank, Bank Saderat, lack of personal jurisdiction and a statutory exception to liability under the ATA for acts of war. The Honorable Cheryl L. Pollak, Magistrate Judge, issued a Report and Recommendation ("R&R") on July 27, 2018 regarding Defendants' respective motions to dismiss, recommending that they be denied in their entirety. *Freeman v. HSBC Holdings PLC*, No. 14-CV-6601 (PKC) (CLP), 2018 WL 3616845 (E.D.N.Y. July 27, 2018) ("*Freeman I*"). For the reasons set forth herein, the Court declines to adopt the R&R and grants Defendants' motions to dismiss.[2]

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[1] JASTA was enacted during the pendency of this case. *See* Pub. L. No. 114-222, 130 Stat. at 854 (Sept. 28, 2016). JASTA applies to pending civil actions "arising out of an injury to a person, property, or business on or after September 11, 2001." *See* JASTA § 7(2), 130 Stat. at 855. Because Plaintiffs' First and Second Claims for Relief assert primary liability based on an alleged conspiracy to provide material support for terrorism, the Court construes Plaintiffs' First and Second Claims for Relief to also assert that Defendants are liable under the secondary conspiracy liability provisions added to the ATA by JASTA.

[2] As Judge Pollak observed in her R&R, the law in this area was "unclear" at the time she issued her R&R, and, indeed, has continued to evolve. *Freeman I*, at *48. This Court has had the benefit of further clarification in this area since the issuance of

BACKGROUND

I. SAC's Factual Allegations

As described in detail by Judge Pollak's exceedingly thorough R&R,[3] Plaintiffs allege a wide-ranging con-

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the R&R in cases presenting facts similar to this one. *See, e.g.*, *Kemper v. Deutsche Bank*, 911 F.3d 383 (7th Cir. Jan. 10, 2019); *O'Sullivan v. Deutsche Bank*, 17-CV-8709 (LTS) (GWG), 2019 WL 1409446 (S.D.N.Y. Mar. 28, 2019); *Siegel v. HSBC N. Am. Holdings, Inc.*, 933 F.3d 217 (2d Cir. Aug. 8, 2019). The Court finds that these decisions, in combination with pre-R&R case law, signal a decided trend toward disallowing ATA claims against defendants who did not deal directly with a terrorist organization or its proxy. Even post-JASTA, courts have continued to recognize a distinction between ATA claims based on a defendant's provision of support or services to a state sponsor of terrorism, such as Iran, and those alleging the direct provision of support and services to a terrorist organization or its fundraising affiliate. *Compare O'Sullivan*, 2019 WL 1409446 (dismissing post-JASTA ATA claim alleging that U.S.-based bank conspired with Iranian banks to fund terrorist organizations) *and Kemper*, 911 F.3d 383 (dismissing ATA claim alleging material support conspiracy between western banks and Iranian governmental entities), *with Weiss v. Nat'l Westminster Bank*, 768 F.3d 202 (2d Cir. 2014) (holding that defendant bank could be liable under ATA for maintaining bank account and providing services to Interpal, which engaged in "terrorist activity" by soliciting funds and providing support to Hamas); *see also Siegel*, 933 F.3d 217 (dismissing post-JASTA ATA complaint alleging aiding and abetting liability against HSBC for providing financial services to a foreign bank with links to terrorist organizations). It is this consistent trend, more discernable post-R&R, that informs the Court's decision not to adopt the well-considered recommendations of Judge Pollak's R&R and to dismiss this matter.

[3] The Court adopts the R&R's summary of the allegations in this action and incorporates it herein, though the Court briefly recounts certain facts for the sake of clarity and ease of reference. The Court assumes the truth of the SAC's non-conclusory factual allegations. *Arar v. Ashcroft*, 585 F.3d 559, 567 (2d Cir. 2009) (*en banc*).

spiracy, first formed in 1987, to evade U.S. sanctions on financial and business dealings with Iran, conduct illicit trade-finance transactions, conceal the involvement of Iranian agents in financial payments to and from U.S. dollar-denominated accounts, and facilitate Iran's provision of material support to support terrorist activities and organizations, including Hezbollah. (Second Amended Complaint ("SAC"), Dkt. 115, ¶¶ 22–23.) The members of the alleged conspiracy include Defendants, the Government of Iran, and multiple state-affiliated and private Iranian entities that, at times, operate as financial[4] and logistical[5] conduits for the Islamic Revolutionary Guard Corps's ("IRGC") and Hezbollah's terrorist activities. (*Id.* ¶ 22.)

As members of the alleged conspiracy, Defendants agreed to engage in, among other things, "stripping," whereby the banks removed or otherwise altered information on payment messages sent through U.S. correspondent banks that might have alerted the banks and American authorities to the involvement of Iranian agents in the transaction. (*E.g.*, *id.* 11 25, 372, 482, 673, 1011.) Similarly, Defendants concealed the involvement of Iranian banks in Letters of Credit used to facilitate the purchase of export-controlled goods, technologies, and weapons. (*E.g.*, *id.* 11 25, 173–88, 195, 685–99, 719–21.) Defendants participated in this conspiracy despite knowing of Iran's status as a state

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[4] The Iranian bank co-conspirators are Bank Saderat Iran, the Central Bank of Iran (also known as Bank Markazi), Bank Melli Iran, Bank Mellat, Bank Tejarat, Bank Refah, and Bank Sepah. (SAC, Dkt. 115, ¶ 22.)

[5] Among the Iranian commercial actors involved in the alleged conspiracy are the Islamic Republic of Iran Shipping Lines ("IRISL"), the National Iranian Oil Company ("NIOC"), and Mahan Air. (SAC, Dkt. 115, ¶ 22.)

sponsor and supporter of foreign terrorist organizations[6] ("FTOs") and Iran's associations with Specially Designated Global Terrorists[7] ("SDGTs"). (*Id. 11* 40, 42–45.) Many of the FTOs and SDGTs affiliated with Iran, including Hezbollah,[8] the IRGC, and an IRGC directorate known as the Islamic Revolutionary Guard Corps-Qods Force[9] ("IRGC-QF"), developed improvised explosive devices ("IEDs") that were used to kill or maim American citizens in Iraq from 2004 to 2011. (*Id.* 11 7, 196, 259–66, 347–350.)

II. Plaintiffs' Claims

The majority of Plaintiffs are American citizens who served as part of the Coalition Forces in Iraq from

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[6] The Secretary of State is authorized to designate foreign organizations as FTOs under Section 219 of the Immigration and Nationality Act. 8 U.S.C. § 1189(a)(1).

[7] The United States Department of the Treasury designates SDGTs pursuant to Executive Order 13224. *See* 31 C.F.R. § 594.310 ("The term specially designated global terrorist or SDGT means any person whose property and interests in property are blocked pursuant to § 594.201(a)") (referring to entities listed in the Annex of the Executive Order). The United States may block the property of, and prohibit transactions with, any entity designated as an SDGT. *Freeman I*, at *4 n.10.

[8] Hezbollah is a terrorist organization and political party based in Lebanon that Plaintiffs allege to have used, both directly and through its agents and auxiliaries, IEDs to maim and kill Americans in Iraq. It was designated an FTO in 1997. (SAC, Dkt. 115, 1 229.)

[9] The IRGC-QF was designated as an SDGT in October 2007 based on its long history of supporting terrorist activities by Hezbollah, operating training camps and supplying guidance, funding, weapons, intelligence and logistical support. (SAC, Dkt. 115, 11 16, 249–50.) The United States government has specifically linked the IRGC-QF to terrorists in Iraq who targeted and killed Americans. (*Id.* 1 16.)

2004 to 2011 and were injured or killed by terrorist attacks in Iraq during that time. (SAC, Dkt. 115, ¶¶ 6–9.)[10] Plaintiffs claim injury as a result of the alleged conspirators' direct and indirect provision of material support for terrorism. Plaintiffs assert seven claims for relief under the ATA. Plaintiffs' First Claim for Relief asserts that all Defendants are liable for predicate violations of 18 U.S.C. § 2339A. (*Id*. ¶¶ 2179–2200.) Similarly, Plaintiffs' Second Claim for Relief seeks to impose liability against all Defendants for predicate violations of 18 U.S.C. § 2339B.[11] (*Id*. ¶¶ 2201–17.) Plaintiffs' Third Claim for Relief seeks to impose liability only against HSBC Bank USA, N.A. ("HSBC-US") for predicate violations of 18 U.S.C. § 2332d. (*Id*. ¶¶ 2218–40.) The Fourth Claim for Relief is brought against Standard Chartered, RBS, and Commerzbank for predicate violations of 18 U.S.C. § 2332d. (*Id*. ¶¶ 2241–53.) The Fifth and Sixth Claims for Relief are brought against Commerzbank for predicate violations of 18 U.S.C. § 2339A and 18 U.S.C. § 2339B. (*Id.* ¶¶ 2254–63, 2264–73.) The Seventh Claim for Relief is brought against SCB based on predicate violations of 18 U.S.C. § 2339A. (*Id.* ¶¶ 2274–93.)

PROCEDURAL HISTORY

Plaintiffs filed this action on November 10, 2014, and the case was initially assigned to the Honorable Dora L. Irizarry, Chief Judge. (Complaint, Dkt. 1.) In response to motions to dismiss filed by a subset of the

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[10] Plaintiffs include several non-military members, such as Steven Vincent, a reporter covering the Iraq War, and a translator, Ahmed Al-Taie. *Freeman I*, at *1 n.4 (citing SAC, Dkt. 115, ¶¶ 1232–40, 1388–1400).

[11] As discussed *infra*, Plaintiffs claim that Defendants may be held liable for violations of § 2339A and § 2339B under theories of both primary and secondary liability.

current Defendants (Dkts. 70, 71), Plaintiffs filed an amended complaint on April 2, 2015 (Dkt. 77). The First Amended Complaint added new Plaintiffs to the action, added Commerzbank as a Defendant, and expanded on the factual allegations from the initial complaint. (*See generally id.*) In response to renewed motions to dismiss (Dkts. 89, 91), Plaintiffs filed their corrected Second Amended Complaint on August 17, 2016 (Dkt. 115). The Second Amended Complaint added 108 new Plaintiffs, incorporated details from an anonymously obtained "Report on Iranian Trade Finance Transactions" prepared by Promontory Financial Group, LLC ("Promontory") for SCB, and added new claims for relief against Commerzbank and SCB. (*See generally* SAC, Dkt. 115; *see also* Motion to Amend, Dkt. 108-1.) In response, HSBC, Barclays, SCB, RBS, Credit Suisse, and Commerzbank (the "Moving Banks") filed a third motion to dismiss for failure to state a claim on November 10, 2016. (*See* Moving Banks' Motion to Dismiss, Dkt. 119.) The same day, Bank Saderat filed a separate motion to dismiss. (*See* Bank Saderat's Motion to Dismiss, Dkt. 116.)

On July 11, 2017, Chief Judge Irizarry referred the pending motions to dismiss to Magistrate Judge Pollak for the preparation of a report and recommendation. On July 27, 2018, Judge Pollak issued the R&R currently before the Court, recommending that Defendants' respective motions to dismiss be denied in their entirety. (Report & Recommendation, Dkt. 165.) Defendants filed objections to the R&R on August 31, 2018. (Bank Saderat's Objections ("Bank Saderat's Objs."), Dkt. 173; Moving Banks' Objections ("Mov. Banks' Objs."), Dkt. 174.) Subsequently, Plaintiffs sought leave to file a Third Amended Complaint, which would have added 450 additional plaintiffs to the action. (Dkt. 199.) Before that motion to amend was resolved, however,

Plaintiffs' counsel opted to file additional related cases in this district, which were assigned to the undersigned. (*See* Dkt. 202.) *See also Freeman et al. v. HSBC Holdings, et al.*, No. 18-CV-7359 (PKC) (CLP); *Bowman et al. v. HSBC Holdings, et al.*, No. 19-CV-2146 (PKC) (CLP). On May 8, 2019, this case was reassigned to the undersigned.

STANDARD OF REVIEW

A district court reviewing a magistrate judge's recommendations "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). With respect to a magistrate judge's recommendation on a dispositive matter, the district court must review *de novo* all aspects of the recommendation to which a party has specifically objected. *See id.* ("A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made."); Fed. R. Civ. P. 72(b)(3) ("The district judge must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to.").

"[O]bjections that are merely perfunctory responses argued in an attempt to engage the district court in a rehashing of the same arguments set forth in the original papers will not suffice to invoke *de novo* review." *Frankel v. New York City*, Nos. 06-CV-5450 (LTS) (DFE) & 07-CV-3436 (LTS) (DFE), 2009 WL 465645, at *2 (S.D.N.Y. Feb. 25, 2009) (quotation and brackets omitted); *see also Colvin v. Berryhill*, 734 F. App'x 756, 758 (2d Cir. 2018) (summary order) ("[M]erely referring the court to previously filed papers or arguments does not constitute an adequate objection under . . . [Federal Rule of Civil Procedure] 72(b)." (quoting *Mario v. P & C Food Mkts., Inc.*, 313 F.3d 758, 766 (2d

Cir. 2002))). Accordingly, "[g]eneral or conclusory objections, or objections which merely recite the same arguments presented to the magistrate judge, are reviewed for clear error." *Chime v. Peak Sec. Plus, Inc*., 137 F. Supp. 3d 183, 187 (E.D.N.Y. 2015) (quotation omitted). A responsive objection, however, may establish entitlement to *de novo* review if it asserts that the magistrate judge committed legal error in failing to adopt a previously presented argument. *See Watson v. Geithner*, No. 11-CV-9527 (AJN), 2013 WL 5441748, at *2 (S.D.N.Y. Sept. 27, 2013) ("[A]n objection that a magistrate's purely legal ruling was faulty may require convincing the district judge of an argument that the magistrate rejected; the only way for a party to raise such arguments is to reiterate them."); *see also Moss v. Colvin*, 845 F.3d 516, 519 n.2 (2d Cir. 2017) (quoting *Watson* approvingly). Even if neither party objects to the magistrate's recommendation, the district court may, in its discretion, *sua sponte* conduct *de novo* review as to any issues that the recommendation addresses. *See Moss*, 845 F.3d at 519 n.2 (quoting *Grassia v. Scully*, 892 F.2d 16, 19 (2d Cir. 1989)); *see also Thomas v. Arn*, 474 U.S. 140, 154 (1985) ("[W]hile [28 U.S.C. § 636] does not require the judge to review an issue *de novo* if no objections are filed, it does not preclude further review by the district judge, *sua sponte* or at the request of a party, under a *de novo* or any other standard."); *In re Holocaust Victim Assets Litig.*, 528 F. Supp. 2d 109, 116 (E.D.N.Y. 2007).

DISCUSSION

I. Relevant Legal Standards

A. Rule 12(b)(2)

On a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2), the plaintiff has the burden

of demonstrating personal jurisdiction. *Troma Entm't, Inc. v. Centennial Pictures Inc.*, 729 F.3d 215, 217 (2d Cir. 2013) (citing *Penguin Grp. (USA) Inc. v. Am. Buddha*, 609 F.3d 30, 34 (2d Cir. 2010)). "[W]hen the issue of personal jurisdiction 'is decided initially on the pleadings and without discovery, the plaintiff need show only a *prima facie* case.'" *King Cty., Wash. v. IKB Deutsche Industriebank, AG*, 769 F. Supp. 2d 309, 313 (S.D.N.Y. 2011) (citing *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp*., 751 F.2d 117, 120 (2d Cir. 1984)). In deciding whether the plaintiff has met this burden, the pleadings and affidavits must be viewed in the light most favorable to the plaintiff, with all doubts resolved in its favor. *See, e.g.*, *DiStefano v. Carozzi N. Am., Inc*., 286 F.3d 81, 84 (2d Cir. 2001); *Whitaker v. Am. Telecasting, Inc*., 261 F.3d 196, 208 (2d Cir. 2001).

B. Rule 12(b)(6)

To survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual allegations, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A "claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (quoting *Twombly*, 550 U.S. at 556). The "plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. (citation omitted). Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id*. at 679 (citation omitted).

In addressing the sufficiency of a complaint, courts must "accept as true the factual allegations of the complaint, and construe all reasonable inferences that can be drawn from the complaint in the light most favorable to the plaintiff." *Arar*, 585 F.3d at 567. Nevertheless, a court "need not credit conclusory statements unsupported by assertions of facts or legal conclusions . . . presented as factual allegations." *In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 404 (S.D.N.Y. 2001) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). At the pleadings stage, the Court must limit its inquiry to the facts alleged in the complaint, the documents attached to the complaint or incorporated therein by reference, and "documents that, while not explicitly incorporated into the complaint, are 'integral' to plaintiff's claims and were relied upon in drafting the complaint." *Id.* (citing *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 44 (2d Cir. 1991)).

II. Defendants' Motions to Dismiss and Objections to the R&R

The R&R submitted by Magistrate Judge Pollak recommends that Defendants' pending motions to dismiss, based on Rules 12(b)(2) and 12(b)(6), be denied in their entirety. *See Freeman I*, at *1. Defendants have filed timely objections to the R&R. (Bank Saderat's Objs., Dkt. 173; Mov. Banks' Objs., Dkt. 174.) Two Defendants, Bank Saderat and Commerzbank, re-assert their personal jurisdiction arguments as to certain claims against them.[12] (Bank Saderat's Objs., Dkt.

[12] Bank Saderat also objects to the R&R's finding that Plaintiffs' claims are not barred by the act-of-war exception to liability under the ATA, which for the reasons discussed *infra*, the Court does not address. (Bank Saderat's Objs., Dkt. 173, at 1–5.)

173, at 6–8 (asserting that there is no basis for the Court to exercise personal jurisdiction over Bank Saderat in relation to Plaintiffs' conspiracy claims); Mov. Banks' Objs., Dkt. 174, 36–37 (arguing that the Court cannot assert personal jurisdiction over Commerzbank with respect to Plaintiffs' Sixth Claim for Relief).) All Defendants re-assert their arguments that Plaintiffs have failed to plausibly allege that: (1) Defendants' actions satisfy the definition of an act of international terrorism set forth in 18 U.S.C. § 2331(1) for purposes of their primary liability claims under § 2333(a); (2) Defendants' actions were a proximate cause of Plaintiffs' injuries, as required by 18 U.S.C. § 2333(a); and (3) Defendants' actions meet the threshold statutory requirements for their JASTA secondary liability conspiracy claims under 18 U.S.C. § 2333(d)(2).[13] (Bank Saderat's Objs., Dkt. 173, at 1 (joining the Moving Banks' defenses to liability under

[13] The Moving Banks characterize their objections as follows: (1) the R&R misapplied § 2333(d)(2)'s requirement that the act of international terrorism must be "committed, planned, or authorized" by an FTO; (2) the R&R failed to apply § 2333(d)(2)'s requirement that the defendant have "conspire[d] with the person who committed the act of international terrorism"; (3) the R&R erroneously applied *Halberstam* to override § 2333(d)(2)'s statutory requirements; (4) the R&R failed to analyze Plaintiffs' primary liability claims in light of the ATA's proximate causation requirement; (5) the R&R failed to consider whether the Defendants' alleged actions met § 2331(1)'s independent statutory definition of an international act of terrorism; and (6) the R&R erroneously applied the definitional requirements of § 2332d in evaluating Plaintiffs' Third and Fourth Claims for Relief. (Mov. Banks. Objs, Dkt. 174, at i–ii.) For their Seventh and Eighth Objections, the Moving Banks argue that Plaintiffs have failed to plead proximate causation and the definitional requirements of § 2331(1) with respect to their Fifth and Sixth Claims for Relief as to Commerzbank, and their Seventh Claim for Relief as to SCB. (*Id.* at ii.)

Plaintiffs' First and Second Claims for Relief); Mov. Banks' Objs., Dkt. 174, 8, 22–23 (asserting these defenses as to all relevant claims for relief).)[14] Defendants also raised in their objections the argument that Defendants' alleged conduct does not satisfy the elements of a JASTA conspiracy claim under § 2333(d)(2).[15]

Because Defendants' objections rest largely on questions of controlling law, the Court conducts a *de novo* review of the issues presented in Defendants' motions to dismiss and objections to the R&R. *See Watson*, 2013 WL 5441748, at *2.

A. Bank Saderat's and Commerzbank's Personal Jurisdiction Defenses

The Court first addresses Bank Saderat's and Commerzbank's jurisdictional arguments. *See Morgan Stanley & Co. v. Seghers*, No. 10-CV-5378 (DLC), 2010 WL 3952851, at *3 (S.D.N.Y. Oct. 8, 2010); *see also Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999) ("[J]urisdiction generally must precede merits in dispositional order . . . .").

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[14] While Defendants' objections were pending, the parties submitted supplemental letter briefs alerting the Court to relevant cases decided after the close of the objections briefing. (*See, e.g.*, Dkts. 234, 235 (analyzing the Second Circuit's August 2019 decision in *Siegel*, 933 F.3d 217).)

[15] JASTA was passed after Plaintiffs filed the Second Amended Complaint but before Defendants filed their motions to dismiss. Because the R&R analyzed Plaintiffs' conspiracy claims as JASTA secondary liability claims under 18 U.S.C. § 2333(d)(2), Defendants objected to the R&R's denial of their motions to dismiss with respect to both Plaintiffs' § 2333(a) primary liability conspiracy claims and their § 2333(d)(2) secondary liability conspiracy claims.

1. Bank Saderat's Personal Jurisdiction Defense to the First and Second Claims for Relief

Bank Saderat argues[16] that it is not subject to personal jurisdiction in New York. Specifically, Bank Saderat argues that the theory of conspiracy jurisdiction relied upon by Plaintiffs was rejected by the Supreme Court in *Walden v. Fiore*, 571 U.S. 277 (2014), and accordingly, that the SAC lacks sufficient allegations of contact with New York to establish specific personal jurisdiction over Bank Saderat. (*See* Bank Saderat Objs., Dkt. 173, at 6–8.) The Court finds that Bank Saderat's jurisdictional arguments are without merit.[17]

2. Basis for Personal Jurisdiction

Under New York CPLR § 302(a)(1), "a court may exercise personal jurisdiction over any non-domiciliary who . . . in person or through an agent . . . transacts any business within the state or contracts anywhere to supply goods or services in the state." N.Y. C.P.L.R. § 302(a)(1). It is well established under this long-arm statute that "activities of a co-conspirator may . . . be imputed to an out-of-state tortfeasor for jurisdictional purposes under an agency rational." *In re N. Sea Brent Crude Oil Futures Litig.*, No. 13-MD-2475 (ALC), 2017 WL 2535731, at *9 (S.D.N.Y. June 8, 2017) (quotation omitted). Even without the existence of an agency relationship, courts in this Circuit have held that jurisdiction over out-of-state members of a conspiracy comports with due process where the out-of-state

[16] As previously noted, all parties re-assert in their objections the same arguments they made in their original motion briefing.

[17] The R&R reached the same conclusion, which the Court adopts. *Freeman I*, at *60–62.

conspirators "should reasonably anticipate being haled into court there," *Contant v. Bank of Am. Corp.*, 385 F. Supp. 3d 284, 292 (S.D.N.Y. 2019) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)), based on the well-established principle that "a defendant's contacts with the forum State may be intertwined with his transactions or interactions with . . . other parties," *Walden*, 571 U.S. at 286.

3. Application of *Walden*

In *Walden*, on which Bank Saderat's objection relies, the Supreme Court considered whether a court in Nevada could exercise personal jurisdiction over a DEA agent working at the Atlanta Hartsfield-Jackson Airport. 571 U.S. at 279. Two professional gamblers, who had flown in from Puerto Rico with cash proceeds from gambling at a casino, were waiting for a flight to Las Vegas when the agent approached them for questioning. *Id.* at 280. After using a drug-sniffing dog, the agent seized the gamblers' proceeds, advising them that the funds would be returned if they could later prove the cash was derived from a legitimate source. *Id.* Following this encounter, the gamblers boarded their plane to Las Vegas. *Id.* Subsequently, the agent moved the cash to a secure location and allegedly drafted a false and misleading affidavit intended to show probable cause for forfeiture of the funds. *Id.* at 280–81. The gamblers later sued the agent for damages in the District of Nevada. *Id.* at 281.

Evaluating these factual circumstances, the Supreme Court held that the DEA agent did not have the "minimum contacts" with Nevada necessary to create specific jurisdiction. *Id*. at 282; *see also Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (stating that specific jurisdiction "depends on an affiliation between the forum and the underlying

controversy") (quotation omitted). Such minimum contacts "must arise out of contacts that the defendant *himself* creates with the forum," not the "'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with" the forum. *Walden*, 571 U.S. at 284, 286 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

The facts of *Walden* are materially distinguishable from the facts alleged in the SAC. The defendant in *Walden* had no apparent intent to interact with Nevada; rather, he "random[ly]" interacted with two gamblers who "fortuitous[ly]" resided in Nevada and resided there when the agent prepared an allegedly false affidavit. By contrast, here, Plaintiffs have alleged that Bank Saderat engaged in affirmative acts aimed at New York, directing its co-conspirators to illegally clear and settle dollar-denominated transactions through correspondent accounts in New York. (*See, e.g.*, SAC, Dkt. 115, ¶ 387.) The SAC is replete with allegations that Bank Saderat entered into a conspiracy with the Moving Banks intending that they operate as Bank Saderat's agents in transferring U.S. dollars through correspondent accounts in New York, and that Bank Saderat took steps to ensure that such transfers were accomplished. (*See, e.g.*, SAC, Dkt. 115, ¶¶ 375–81, 387.) Bank Saderat's conduct was not simply directed at international banks with their headquarters in foreign countries; it was purposefully targeted at obtaining benefits available to it only by using agents in New York. It is no defense that Bank Saderat was not *itself* transacting business in New York. *See Peterson v. Islamic Republic of Iran*, No. 10-CV-4518 (KBF), 2013 WL 1155576, at *17 (S.D.N.Y. Mar. 13, 2013) ("Even if UBAE itself was not transacting business in New York, its agents most certainly were.").

Accordingly, the Court finds that, at the pleading stage, Plaintiffs have met their burden to establish specific jurisdiction over Bank Saderat for claims arising from the alleged conspiracy in this action under New York CPLR § 302(a)(1).[18]

B. Commerzbank's Personal Jurisdiction Defense to the Sixth Claim for Relief

Commerzbank argues that Plaintiffs' Sixth Claim for Relief must be dismissed for lack of personal jurisdiction because the claim lacks any apparent connection to the United States and the Court therefore cannot exercise specific jurisdiction over Commerzbank with respect to the claim. (*See* Commerzbank's Supplemental Memorandum, Dkt. 124, at 10; Mov. Banks' Objs., Dkt. 174, at 36–37.) The Court agrees, and finds that there is no basis for the Court to exercise jurisdiction over the Sixth Claim for Relief.

In this claim, Plaintiffs allege that Commerzbank provided material support for terrorism by maintaining an account in Germany for, and processing transactions on behalf of, Waisenkinderprojekt Libanon e.V. ("the Orphans Project"). (SAC, Dkt. 115, ¶¶ 1039, 2265.) The Orphans Project allegedly provided material support to Hezbollah by transferring funds from its Commerzbank account in Germany to the Martyrs Foundation, which was designated as an SDGT in 2007 for its role in channeling financial support from Iran to terrorist organizations, including Hezbollah. (*Id.* ¶ 1040.) *See also* U.S. Dep't of the Treas. Press Center, *Twin Treasury Actions Take Aim at Hizballah's Support Network* (July 24, 2007), https://www.treasu

[18] For the reasons stated *infra*, however, the Court finds that Plaintiffs' conspiracy claims against Bank Saderat fail on their merits.

ry.gov/press-center/press-releases/Pages/hp503.aspx. None of the transactions Commerzbank allegedly executed for the Orphans Project were processed through the United States banking system or banks in New York.

Plaintiffs argue that the Court could exercise "pendent personal jurisdiction" over this claim because it "arises from the same common nucleus of fact as another claim for which the court properly has jurisdiction over the defendant[,]" *i.e.*, the material support conspiracy claim under § 2333. *Freeman I*, at *49 n.69 (citing, *inter alia*, *Strauss v. Credit Lyonnais*, 175 F. Supp. 3d 3, 20 (E.D.N.Y. 2016)).[19] However, even assuming that pendent jurisdiction can be asserted over a foreign claim where the Court has jurisdiction over a related claim, the Court declines to do so here, because, as discussed *infra*, the Court finds that Plaintiffs have failed to allege a conspiracy to provide material

[19] While acknowledging that this doctrine is typically used to permit the adjudication of state law claims that arise from the same factual circumstances as a federal claim, the R&R noted that other courts have used the doctrine to assert jurisdiction over related federal and foreign claims. *Id*. (citing *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 35 (D.D.C. 2010)). Finding that Commerzbank's alleged actions in providing services to the Orphans Project were based on the same nucleus of fact as Plaintiffs First and Second Claims for relief, *i.e.*, the provision of material support directly or indirectly to terrorist entities, the R&R recommended that the Court assert pendent jurisdiction over Plaintiffs' Sixth Claim for Relief. *Id*. The Court declines to adopt this recommendation for the reasons discussed *infra*. The Court further notes, as also discussed later, that the R&R's recommendation regarding the exercise of pendent jurisdiction is bound up in its determination that Plaintiffs have sufficiently alleged Defendants' participation in a conspiracy to provide material support for terrorism, including facilitating funding to Hezbollah—a conclusion with which the Court disagrees.

support. Rather, the conspiracy alleged in the SAC appears to have been limited to the evasion of U.S. sanctions on Iran. The unifying theme of Plaintiffs' allegations is a conspiracy to conceal and facilitate financial transactions in New York on behalf of various Iranian commercial entities—conduct that bears no connection or relationship to Commerzbank's maintenance of a bank account in Germany for an organization that is an alleged fundraising front for Hezbollah and the bank's transfer of funds from Germany to the organization in Lebanon. Thus, there is no common nucleus of facts that warrants the exercise of pendant jurisdiction over the Sixth Claim of Relief. *See Miller v. Arab Bank, PLC*, 372 F. Supp. 3d 33, 42–43 (E.D.N.Y. 2019) ("To exercise specific jurisdiction over a defendant consistent with the defendant's due process rights, 'the defendant's suit-related conduct must create a substantial connection with the forum State.'" (quoting *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 335 (2d Cir. 2016))).

This lack of jurisdiction operates as a bar to the Court's consideration of the merits of Plaintiffs' claim. *See Ruhrgas AG*, 526 U.S. at 577 (1999) ("Jurisdiction to resolve cases on the merits requires both authority over the category of claim in suit (subject-matter jurisdiction) and authority over the parties (personal jurisdiction), so that the court's decision will bind them."); *see also Kaplan v. Cent. Bank of the Islamic Republic of Iran*, 896 F.3d 501, 510 (D.C. Cir. 2018). Accordingly, Plaintiffs' Sixth Claim for Relief is dismissed for lack of personal jurisdiction.

C. Plaintiffs' Claims of Primary Liability Under Section 2333(a)

Each of Plaintiffs' claims for relief is brought pursuant to 18 U.S.C. § 2333(a), which 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 . . . ." 18 U.S.C. § 2333(a). The Second Circuit has interpreted § 2333(a) as creating only primary liability. *See In re Terrorist Attacks on Sept. 11, 2001* ("*Al-Rajhi*"), 714 F.3d 118, 123 (2d Cir. 2013); *Linde v. Arab Bank, PLC*, 882 F.3d 314, 319 (2d Cir. 2018). In other words, § 2333(a) creates a cause of action against "the principal perpetrators of acts of international terrorism . . . , [but] not against secondary actors who facilitate[] such acts by others." *Lelchook v. Islamic Republic of Iran*, __ F. Supp. 3d __, 2019 WL 2647998, at *3 (E.D.N.Y. June 27, 2019); *see also Siegel*, 933 F.3d at 222 ("In its original form, the ATA afforded relief only against the perpetrators of the terrorist attacks, not against secondary, supporting actors.").

To state a claim for primary liability, a plaintiff must allege: "(1) an injury to a U.S. national, (2) an act of international terrorism, and (3) causation." *O'Sullivan*, 2019 WL 1409446, at *4 (quoting *Shaffer v. Deutsche Bank AG*, No. 16-CR-497 (MJR) (SCW), 2017 WL 8786497, at *3 (S.D. Ill. Dec. 7, 2017)). Defendants' motions and objections do not dispute that Plaintiffs suffered injuries due to terrorist attacks in Iraq, so only the second and third requirements are at issue here.

1. The Definitional Requirements of Section 2331(1)

In order to state a primary liability claim under the ATA, Plaintiffs must plausibly allege that Defendants' actions were, themselves, acts of international terrorism in order to give rise to primary liability under § 2333(a). The ATA provides a statutory definition of an

act of international terrorism in 18 U.S.C. § 2331(1). Pursuant to that provision, acts of international terrorism include:

> 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
> > >
> > > (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).

Criminal violations of 18 U.S.C. § 2332d,[20] 18 U.S.C. § 2339A,[21] and 18 U.S.C. § 2339B[22] can, under some circumstances, satisfy § 2331(1)'s definition of an act of international terrorism. *See, e.g.*, *Boim v. Holy Land Found. for Relief & Dev.* ("*Boim III*"), 549 F.3d 685, 689–94 (7th Cir. 2008) (*en banc*); *Weiss*, 768 F.3d at 209. But the Second Circuit has recently clarified that conduct that violates these provisions, such as the provision of banking services to members of a terrorist organization, does not necessarily satisfy that defini-

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[20] Section 2332d provides, in relevant part, that "whoever, being a United States person, knowing or having reasonable cause to know that a country is designated under section 6(j) of the Export Administration Act of 1979 . . . as a country supporting international terrorism, engages in a financial transaction with the government of that country, shall be fined under this title, imprisoned for not more than 10 years, or both." 18 U.S.C. § 2332d(a).

[21] Section 2339A provides, in relevant part, that "[w]hoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of [certain enumerated provisions,] or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts *or conspires to do such an act*, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life." 18 U.S.C. § 2339A(a) (emphasis added).

[22] Section 2339B provides, in relevant part that "[w]hoever 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." 18 U.S.C. § 2339B(a)(1). To violate § 2339B, a person must know 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. *Id.*

tion standing alone. *See Linde*, 882 F.3d at 325–26. Rather, a plaintiff must plausibly allege that a defendant's actions, while violating the ATA's prohibitions on material support for terrorism or financial transactions with state sponsors of terrorism, "*also* involve violence or endanger human life" and "appear to be intended to intimidate or coerce a civilian population or to influence or affect a government." *Id*. at 326.[23]

Thus, where a plaintiff fails to plausibly allege all of the elements of § 2331(1), he has not stated a claim for relief under § 2333(a).

2. The Proximate Causation Standard Under Section 2333(a)

As the Seventh Circuit has recently stated, "the ATA ultimately is a tort statute." *Kemper*, 911 F.3d at 390; *Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 474, 558 (E.D.N.Y. 2012) ("In enacting the ATA's civil remedy provision in 1992 Congress . . . 'intended to incorporate general principles of tort law . . . into the civil cause of action under the ATA.'" (quoting *Wultz*, 755 F. Supp. 2d at 55 (brackets omitted))). Accordingly, in addition to satisfying the definitional requirements of § 2331(1), an ATA plaintiff must prove a causal relationship between the defendant's acts and the plaintiff's injury in order to impose liability for that injury.

The Second Circuit's seminal case on the causal relationship necessary to impose liability under the ATA is *Rothstein v. UBS AG*. 708 F.3d 82 (2d Cir.

[23] The element required by § 2331(1)(C)—*i.e.*, that the conduct "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"—is not in dispute here.

2013). There, the Circuit distinguished Article III's standing requirement that a plaintiff's injury be "fairly traceable" to the defendant's conduct from the showing of causation required to impose liability under § 2333(a). *Id.* at 91–92. Whereas a plaintiff's burden in all cases to allege traceability is "relatively modest," ATA plaintiffs are held to a higher standard to show causation and must plausibly allege that a defendant's conduct was a "proximate cause" of their injury. *Id.* at 92. In defining § 2333(a)'s proximate cause requirement, the Circuit explained that

> [c]entral to the notion of proximate cause is the idea that a person is not liable to all those who may have been injured by his conduct, but only to those with respect to whom his *acts were a substantial factor in the sequence of responsible causation* and whose injury was reasonably foreseeable or anticipated as a natural consequence.

Id. at 91 (quoting *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 123 (2d Cir. 2003)). Other courts applying the ATA's proximate cause requirement have considered the directness of the link between a defendant's conduct and its alleged consequences. *See Kemper*, 911 F.3d at 392 (describing directness and foreseeability as inherently linked concepts); *see also Fields v. Twitter, Inc.*, 881 F.3d 739, 748 (9th Cir. 2018) ("[T]he relevant precedents analyzing the phrase 'by reason of' [in the ATA] dictate that it must require a showing of at least some direct relationship between a defendant's acts and a plaintiff's injuries.").

In light of *Rothstein*'s requirement that a plaintiff plead proximate causation, a plaintiff must plausibly allege that the defendant's actions were a "substantial factor in the sequence of responsible causation" leading

to the plaintiff's injury and that the plaintiff's injuries were "reasonably foreseeable" or "anticipated as a natural consequence" of those actions. *Rothstein*, 708 F.3d at 91. Accordingly, a court cannot allow a plaintiff to proceed under § 2333(a) where he or she alleges only a remote, purely contingent, or overly indirect causal connection.[24]

3. Defendants' Arguments Regarding Plaintiffs' Primary Liability Claims

Defendants argue that Plaintiffs' § 2333(a) claims fail to satisfy § 2331(1)'s definitional requirements or meet the proximate causation standard under *Rothstein*. The Court agrees as to both issues.

a. Plaintiffs Fail to Allege a Material Support Conspiracy[25]

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[24] Importantly, however, *Rothstein*'s proximate causation requirement does not require a plaintiff to allege that the defendant's conduct was a "but for" cause of his injuries. *See Gill*, 893 F. Supp. 2d at 507 ("'But for' caus[ation] cannot be required in the [S]ection 2333(a) context."). Such a requirement would, in light of the fungibility of money, eviscerate the cause of action for material support violations. *See Miller*, 372 F. Supp. 3d at 46 (citing *Linde*, 97 F. Supp. 3d at 324).

[25] Though Plaintiffs bring their First and Second Claims for Relief under *both* § 2333(a) and § 2333(d)(2), the R&R did not evaluate whether Plaintiffs' First and Second Claims for Relief plausibly stated claims of primary liability. *See Freeman I*, at *23 n.40 ("As an initial matter, the Court need not make a determination as to whether [P]laintiffs can establish primary liability under the First and Second Claims for Relief against all [D]efendants because of the availability of JASTA-based conspiracy."). The Court's review of Plaintiffs' conspiracy claims, to the extent that they assert a theory of primary liability, is conducted for the first time herein. Furthermore, the Court finds that, in this regard, the R&R erroneously elided the distinction between a conspiracy-predicated primary liability claim brought under § 2333(a) and a

Plaintiffs' First and Second Claims for Relief assert that Defendants violated 18 U.S.C. § 2339A and 18 U.S.C. § 2339B by conspiring to provide material support to Iran, despite knowing or being deliberately indifferent to the fact that Iran provides financial, material, and logistical support to terrorist organizations, including FTOs such as Hezbollah. As alleged in the SAC, Defendants agreed to and did, in fact, assist Iranian banks, airlines, shipping, and oil companies in evading American sanctions. As a result of Defendants' actions, Iran acquired hundreds of millions of dollars that it was legally barred from obtaining. Having obtained these illegal funds, Plaintiffs allege that Iran subsequently provided support to Hezbollah, the IRGC, and other terrorist groups, which later conducted the terrorist attacks in Iraq that injured Plaintiffs between 2004 and 2011.

(i) Conspiracy Liability Under Section 2333(a)

The theory of liability that Plaintiffs articulate in their First and Second Claims for Relief is drawn from the *en banc* Seventh Circuit's decision in *Boim III*. *See* 549 F.3d at 689. There, the Seventh Circuit reasoned that, notwithstanding the unavailability of purely *common law* secondary liability under the ATA, § 2333(a) creates a species of primary liability for certain acts of an inherently secondary nature, including conspiring to provide material support of terrorism. As the Seventh Circuit explained:

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secondary liability conspiracy claim brought under § 2333(d)(2), the latter of which imposes requirements that are distinct from those of a § 2339 material support conspiracy claim. (*See infra* at 39–45.)

> Section 2331(1)'s definition of international terrorism . . . includes not only violent acts but also "acts dangerous to human life that are a violation of the criminal laws of the United States." Giving money to Hamas, like giving a loaded gun to a child (which also is not a violent act), is an "act dangerous to human life." And it violates a federal criminal statute[,] . . . 18 U.S.C. § 2339A(a), which provides that "whoever provides material support or resources . . . , knowing or intending that they are to be used in preparation for, or in carrying out, a violation of [18 U.S.C. § 2332]," shall be guilty of a federal crime. So we go to 18 U.S.C. § 2332 and discover that it criminalizes the killing (whether classified as homicide, voluntary manslaughter, or involuntary manslaughter), conspiring to kill, or inflicting bodily injury on, any American citizen outside the United States.[26]

Id. at 690. Through this "chain of incorporations by reference," the Seventh Circuit found that the "financial angels" of terrorist organizations could be held liable under the ATA. *Id.* Judge Posner, writing for the majority, stated that the concepts of conspiracy and aiding and abetting "can be used to establish tort liability, and there is no impropriety in discussing them in reference to the liability of donors to terrorism under section 2333[a] just because that liability is primary. *Primary liability in the form of material support to terrorism has the character of secondary liability*." *Id.* at 691 (emphasis added). The *en banc* majority in *Boim III* then went on to "analyze the tort

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[26] Both 18 U.S.C. § 2339A(a) and 18 U.S.C. § 2339B(a) also make it a crime to conspire to provide material support for terrorism.

liability of providers of material support to terrorism under general principles of tort law."[27] *Id.* at 692.

Relying on *Boim III*, Plaintiffs argue that Defendants' actions, in conspiring to facilitate the transfer of billions of dollars to Iran despite that country's known support of terrorist activities, constitute violations of §§ 2339A and 2339B, were dangerous to human life, and, viewed objectively, appear intended to intimidate or coerce civilians or influence or affect the conduct of a government. Defendants respond that *Rothstein* forecloses primary liability for conspiring to provide material support for terrorism and, even if Plaintiffs may assert primary liability claims based on a theory of conspiracy liability, they have failed to allege the definitional requirements of § 2331(1) and proximate causation.

While the Court agrees with Plaintiffs that primary liability under § 2333(a) can be predicated on a material support conspiracy under §§ 2339A-C, *see, e.g.*, *Hussein v. Dahabshiil Transfer Servs. Ltd.*, 230 F. Supp. 3d 167, 175–76 (S.D.N.Y. 2017); *Gill*, 893 F. Supp. 2d at 502, Plaintiffs' primary liability claims

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[27] The Court notes that a panel of the Seventh Circuit has questioned *Boim III*'s reasoning in the wake of JASTA and its addition of an explicit textual basis for secondary liability under the ATA. *See Kemper*, 911 F.3d at 396. The *Kemper* panel's commentary, however, does not overrule *Boim III*, which remains the law of the Seventh Circuit. *See* 7th Cir. Rule 40(e) (detailing the process for a panel decision to overrule prior precedent and stating that any opinion doing so "shall contain a footnote" noting the decision's effect). Even assuming that *Boim III*'s reasoning as to primary liability based on conspiracy to provide material support for terrorism remains valid, for reasons discussed *infra*, the Court finds *Kemper*'s analysis of primary liability claims based on substantially similar allegations under § 2333(a) to be persuasive.

alleging conspiracy violations of § 2339A and § 2339B nonetheless fail because they do not satisfy the definitional elements of § 2331(1) and § 2333(a)'s proximate cause requirement.

(ii) The Predicate Criminal Violation for an Act of International Terrorism under Section 2331(1)

Plaintiffs' First and Second Claims for Relief are premised on predicate violations of 18 U.S.C. § 2339A and 18 U.S.C. § 2339B, which, *inter alia*, prohibit conspiring to provide material support for terrorism. *See* 18 U.S.C. § 2331(1)(A) (defining an act of international terrorism as including "acts dangerous to human life *that are a violation of the criminal laws of the United States*") (emphasis added); *see also Boim III*, 549 F.3d at 689, 694; *Weiss*, 768 F.3d at 209. Thus, to state the predicate violations in this case, Plaintiffs must allege facts from which it can be reasonably inferred that Defendants joined a conspiracy that had as its object the provision of material support. *See Shaffer*, 2017 WL 8786497, at *5 ("For [plaintiffs'] claim to be viable under the ATA, the object of the participants' conspiracy must be to provide material support for terrorism . . . .").

To plausibly plead the existence of a criminal conspiracy, a plaintiff must allege facts tending to show that the alleged co-conspirators "agreed 'on the essence of the underlying illegal objectives and the kind of criminal conduct in fact contemplated.'" *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 113 (2d Cir. 2008) (quoting *United States v. Salameh*, 152 F.3d 88, 151 (2d Cir. 1998) (alterations and internal quotation marks omitted)). Proof of an explicit agreement is not necessary, but the plaintiff must at least allege that the defendant "shared some

knowledge of the conspiracy's unlawful aims and objectives." *Id.* (internal quotation omitted). Provided that the co-conspirators have agreed on the object of the conspiracy, they may be held liable for injuries caused by overt acts of co-conspirators that are done pursuant to and in furtherance of the agreed-upon objective of the conspiracy. *See Halberstam v. Welch*, 705 F.2d 472, 481 (D.C. Cir. 1983) ("A conspirator need not participate actively in or benefit from the wrongful action in order to be found liable[,] . . . so long as the purpose of the tortious action was to advance the overall object of the conspiracy.").

Accepting the allegations of the SAC as true, the Court finds that they do not support a plausible inference that Defendants conspired to provide material support to Hezbollah or any other terrorist organizations, to support terrorism activities, or to conceal or disguise the nature, location, source, or ownership of funds that were to be used for these purposes.[28] Rather, the SAC only alleges, albeit in

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[28] This is where the Court disagrees with a critical conclusion in the R&R that drives much of the rest of the Report's analysis and conclusions. In finding that the SAC sufficiently alleges Defendants' participation in a material support conspiracy under §§ 2339A and 2339B, the R&R, in effect, applied a multi-object conspiracy analysis to conclude that Defendants did not need to actually *agree* to achieve the goal of providing material support, but only needed to "know or be deliberately indifferent" to the "conspiracy's criminal purposes and objectives," and to otherwise agree to achieve another goal of the conspiracy, *e.g.*, evading U.S. sanctions. *See Freeman I*, at *25 ("As with *Halberstam*, an interrelated concept from criminal conspiracy law is that the exact goal of the conspiracy need not be identical for each co-conspirator.") (citing *United States v. Maldonado-Rivera*, 922 F.2d 934, 963 (1980)); *id*. at *6 (describing Plaintiffs' conspiracy theory as alleging, *inter alia*, that Defendants "'knowingly agreed to join the Conspiracy, knowingly and willfully participated in the

Conspiracy; knew or [were] deliberately indifferent to the Conspiracy's criminal purposes and objectives; took initiatives to improve its workings,' and, further, that each was 'aware of the participation of many (if not all) of [the Conspiracy's] members.'") (quoting SAC, Dkt. 115, ¶¶ 347–49); *id*. at *40 ("The allegations that SCB agreed to participate in an agreement with Iranian banks and with other Iranian agencies, knowing that they were providing equipment and funding to Hezbollah, an FTO, satisfy the requirement under Section 2339B that SCB, knowingly or being deliberately indifferent, conspired with and provided material support to a designated terrorist organization.").) Seizing upon the language in *Maldonado-Rivera*, that "[t]he goals of all of the participants need not be congruent for a single conspiracy to exist, so long as their goals are not at cross-purposes," *Maldonado-Rivera*, 922 F.2d at 963 (citing *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1192 (2d Cir. 1989)), the R&R concluded that "where the object of the conspiracy is to provide material support for terrorism, even if the defendants' goal in participating in the conspiracy was based on greed and for financial gain, and not intentionally to fund terror, this goal is not at 'cross-purposes' from what the other members' goals might have been: the bank defendants gained business worth hundreds of millions of U.S. dollars, while the terrorist proxies were able to fund their attacks against U.S. and Coalition Force troops." *Freeman I*, at *25. From there, the R&R applied the well-established principle, confirmed in *Halberstam*, that any member of a conspiracy, *once established*, can be held responsible for any act committed *in furtherance of* the conspiracy. *Freeman I*, at *27–28.

While the Court agrees that Defendants could have joined a multi-object conspiracy that included the goals of promoting terrorism and making money by evading U.S. sanctions, it finds that the allegations in the SAC are insufficient to support that inference. Although a defendant's goals or motivations in joining a conspiracy need only be "not at cross-purposes" with his fellow co-conspirators, in order to show that a single (if multi-object) conspiracy existed at all, there needs to be a common underlying goal of the conspiracy that all co-conspirators are agreeing to further. "The gist of the crime of conspiracy . . . is the agreement . . . to commit one or more unlawful acts, and multiple agreements to commit separate crimes constitute multiple conspiracies." *United States v. Jones*, 482 F.3d 60, 72 (2d Cir. 2006) (quotation

omitted); *see also United States v. Broce*, 488 U.S. 563, 570–71 (1989) ("A single agreement to commit several crimes constitutes one conspiracy. By the same reasoning, multiple agreements to commit separate crimes constitute multiple conspiracies."). As *Maldonado-Rivera* also states, "[t]he essence of any conspiracy[,]" even a conspiracy with multiple objectives, "is, of course, agreement and in order to prove a single conspiracy, the government must show that each alleged member agreed to participate in what he knew to be a collective venture directed toward a common goal." 922 F.2d at 963; *see also Salameh*, 152 F.3d 88, 151 (2d Cir. 1998) ("To identify the essential nature of the [conspiracy] plan, we focus on the essence of the underlying illegal objectives, and the kind of criminal conduct in fact contemplated.") (quotation and alterations omitted). "A single conspiracy, rather than multiple conspiracies, may be found where the co[-]conspirators had a common purpose." *Beech-Nut Nutrition Corp.*, 871 F.2d at 1191 (quotation omitted).

Here, the SAC does not allege sufficient facts to support the inference that Defendants had such a common purpose to join a single multi-object conspiracy to both evade U.S. sanctions and provide material support to Hezbollah. Rather, at most, the SAC alleges that Defendants agreed to join a conspiracy with the sole purpose of evading U.S. sanctions and that some of the actors involved in this conspiracy were also members of a separate and distinct conspiracy to provide material support to Hezbollah. Contrary to Plaintiffs' theory and the R&R's conclusion, the Court does not find that Defendants' knowledge of, or deliberate indifference to, their Iranian coconspirators' involvement in funding terrorism is sufficient to make Defendants co-conspirators in those material support plots or efforts. Indeed, the consequence of this reasoning is that, in a § 2333(a) case such as this, it would allow for civil liability to be imposed on defendants who did not actually agree to participate in the predicate material support conspiracy, but were, at most, deliberately indifferent to that possibility. Finally, though the SAC sufficiently alleges Defendants' participation in a conspiracy with Iranian entities to evade U.S. sanctions, any acts of promoting terrorism engaged in by the Iranian entities, even if done with funds transferred by Defendants, would not be an act "in furtherance of" that much more

significant and compelling detail, a conspiracy to help Iranian financial and commercial entities evade American sanctions. Plaintiffs allege that Defendants "conspired with Iran and its banking agents (including Defendant Bank Saderat Plc, Bank Melli Iran, the Central Bank of Iran . . . , Bank Mellat, Bank Tejarat, Bank Refah and Bank Sepah) to evade U.S. economic sanctions, conduct illicit trade-finance transactions, and disguise financial payments to and from U.S. dollar-denominated accounts." (SAC, Dkt. 115, ¶ 6.) The actions taken by Defendants pursuant to this conspiracy allegedly "enabled Iran and its agents to provide a combination of funding, weapons, munitions, intelligence, logistics, and training" to Hezbollah and other terrorist groups. (*Id.* ¶ 7.) Those terrorist groups were subsequently involved in the terrorist attacks in Iraq that injured Plaintiffs. (*Id.*)

These allegations only indicate that *Iran* conspired with IRISIL, Mahan Air, and others to provide material support to Hezbollah and other terrorist organizations in order to facilitate acts of terrorism in Iraq. But the object of the conspiracy that Plaintiffs allege *Defendants* joined was more limited. As another district court has found, "[p]rocessing funds for Iranian financial institutions, even if done to evade U.S. sanctions, is not the same as processing funds for a terrorist organization." *Shaffer*, 2017 WL 8786497, at *5. Even assuming Defendants knew of Iran's myriad ties to, and history of, supporting terrorist organizations, including Hezbollah, the Court cannot infer from this fact that Defendants agreed to provide illegal financial services to Iranian financial and commercial entities, which have many legitimate interests and functions, with

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limited conspiracy, so as to make Defendants liable for that conduct. *Cf. United States v. Mulder*, 273 F.3d 91, 118 (2d Cir. 2001).

the intent that those services would ultimately benefit a terrorist organization. *See Salameh*, 152 F.3d at 151 ("To identify the essential nature of the [conspiracy] plan, we focus on the essence of the underlying illegal objectives, and the kind of criminal conduct in fact contemplated.") (quotation and alterations omitted); *see also O'Sullivan*, 2019 WL 1409446, at *9 (dismissing JASTA secondary liability conspiracy claims because defendant-banks' alleged provision of material support was so far removed from the alleged acts of terrorism that the court could not infer that defendants shared the "common goal" of committing the alleged act of terrorism). Nor is it enough for Defendants to have been deliberately indifferent to this possibility. *See Kemper*, 911 F.3d at 395 ("[O]ne cannot join a conspiracy through apathy . . . ."); *see also Maldonado-Rivera*, 922 F.2d at 963 ("[I]n order to prove a single conspiracy, the government must show that each alleged member agreed to participate in what he knew to be a collective venture directed toward a common goal.").

Moreover, the fact that overt acts taken by Defendants in furtherance of their more limited conspiracy may have incidentally increased Iran's ability to provide material support for terrorism does not support an inference that Defendants themselves agreed to provide material support for terrorism or knowingly agreed to join a conspiracy with that purpose as its object. *Cf. Kemper*, 911 F.3d at 395 ("The facts here suggest only that Deutsche Bank may have engaged in business dealings that incidentally assisted a separate terrorism-related conspiracy involving Iran; they do not suggest that Deutsche Bank ever agreed to join that conspiracy."). Nor can Defendants be held responsible for overt acts committed by the Iranian entities in furtherance of a separate conspiracy to provide

material support to Hezbollah. This case is distinguishable from cases where the defendant banks were alleged to have dealt directly with an FTO or a known FTO fundraiser or front organization. *See, e.g.*, *Linde*, 882 F.3d at 326 (finding that a § 2339B violation for providing material support for terrorism could constitute an act of terrorism under § 2331(1) where defendant bank allegedly provided financial services to Hamas and Hamas-controlled charities). It is also distinguishable from the situation presented in *Halberstam*, where the co-conspirators (one of whom played a "passive" role) "agreed to undertake an enterprise to acquire stolen property," and the passive co-conspirator, who was necessarily aware that her co-conspirator was stealing goods to be sold, was then found liable for a murder, an overt act committed during a burglary by the other co-conspirator in furtherance of their mutually-agreed upon conspiracy. *See Halberstam*, 705 F.2d at 486–87.

Even as to a § 2339A conspiracy to conceal or disguise the nature, location, source, or ownership of funds that were to be used for terrorism, the Court does not find that the SAC's allegations give rise to a plausible inference that Defendants joined such a conspiracy. While there can be no doubt that the SAC sufficiently alleges that Defendants knowingly and willfully conspired with and assisted the Iranian entities in concealing and disguising the source and location of the funds transmitted in violation of U.S. sanctions, these factual allegations are still not enough from which to plausibly infer that Defendants knew that these funds were intended to finance or facilitate Hezbollah's or any other terrorism activities or that Defendants joined a conspiracy to engage in this conduct *for* that purpose, which is what §2339A requires.

Because Plaintiffs have failed to plausibly allege that Defendants agreed to provide material support for terrorism or knowingly agreed to join a conspiracy having that common goal, they cannot establish the necessary element of a criminal conspiracy in violation of § 2339A and § 2339B to support their First and Second Claims for Relief. *Cf. Shaffer*, 2017 WL 8786497, at *5 ("For a claim to be viable under the ATA, the object of the participants' conspiracy must be to provide material support for terrorism . . . ."). Accordingly, those claims must be dismissed.

b. Plaintiffs Fail to Plausibly Allege that Defendants' Conduct Satisfies the Other Elements of Section 2331(1)

Even if the SAC sufficiently alleged that Defendants entered into a conspiracy whose object was to provide material support for terrorism, the Court would find that Plaintiffs fail to plausibly allege that Defendants' actions otherwise satisfy § 2331(1)'s definition of an act of international terrorism. As discussed *supra*, in addition to stating a predicate criminal act, § 2331(1) requires a showing that the criminal violation "involve[d] violent acts or acts dangerous to human life," *Linde*, 882 F.3d at 326, and "appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping[.]" 18 U.S.C. § 2331(1).

All seven of Plaintiffs' Claims for Relief allege that some or all Defendants provided financial services to various Iranian banks, airlines, shipping, and oil companies. (*See, e.g.*, SAC, Dkt. 115, ¶¶ 532–575, 2227 (Plaintiffs' Third Claim for Relief detailing the HSBC Defendants' provision of financial services to

Iran through Bank Melli and others); 1012–1038, 2255 (Plaintiffs' Fifth Claim for Relief describing Commerzbank's facilitation of $40 million in transactions on behalf of IRISL subsidiaries).) As stated above, Plaintiffs bear the burden at the pleadings stage to plausibly allege that Defendants' actions giving rise to these claims constitute acts of international terrorism within the meaning of § 2331(1). *See Linde*, 882 F.3d at 326 (requiring that a jury find that a plaintiff has proved that the defendant's actions meet the definitional requirements of § 2331(1) to establish primary liability); *cf. Jucha v. City of N. Chicago*, 63 F. Supp. 3d 820, 831 (N.D. Ill. 2014) ("While [the plaintiff] bears no burden of proof at the motion to dismiss stage, he must plausibly allege the elements of each count in order to withstand a motion to dismiss."). Thus, Plaintiffs must plausibly allege, among other things, that Defendants' actions "involve violence or endanger human life" and "appear to be intended to intimidate or coerce a civilian population or to influence or affect a government." *Linde*, 882 F.3d at 326. While Plaintiffs acknowledge that the financial services Defendants provided to the various Iranian entities were not themselves inherently violent or dangerous to human life, they argue that "laundering hundreds of billions of dollars to a State Sponsor of Terrorism in calculated violation of those regulations so as to conceal the transactions was an 'act dangerous to human life' that foreseeably resulted" in the subsequent provision of funding to the terrorist entities responsible for Plaintiffs' injuries. (Plaintiffs' Opposition to Defendants' Motion to Dismiss., Dkt. 125, at 38 (emphasis omitted); *see also* Plaintiffs' Response to Defendants' R&R Objections ("Pls.' Resp."), Dkt. 183, at 30–31.)

Plaintiffs' arguments would be sound if they could identify a direct connection between the financial services provided by Defendants and an organization directly involved in acts of terrorism. But Plaintiffs have only alleged that Defendants dealt with Iranian intermediaries, all of whom have significant legitimate operations and are not merely fundraising fronts for terrorist organizations. *See O'Sullivan*, 2019 WL 1409446, at *7–8 (finding defendant-bank's provision of financial services to Iran and its "agents and proxies," including IRISL, to avoid U.S. sanctions did not satisfy § 2331(1)'s requirement that defendant's acts be "dangerous to human life"); *see also Kemper*, 911 F.3d at 390 (finding that defendant-banks' assistance to Iranian entities with terrorist connections in evading U.S. sanctions did not satisfy § 2331(1)'s requirements of conduct being "violent" or "dangerous to human life" and displaying "terroristic intent," and distinguishing defendant's conduct from that alleged in *Boim III*, which involved providing direct financial services to Hamas); *id*. ("While giving fungible dollars to a terrorist organization may be 'dangerous to human life,' doing business with companies that have significant legitimate operations is not necessarily so." (quoting § 2331(1))). And the Court has been unable to identify any non-conclusory allegations that any specific transaction facilitated by Defendants went directly to a terrorist organization or directly accrued to its benefit.[29]

At best, the SAC can be read to allege that Defendants' Iranian clients have engaged in acts dangerous to human life by transferring funds directly to Hezbollah and other terrorist organizations. This

[29] In this respect, the definitional requirements of § 2331(1) overlap with the causation element of a § 2333(a) claim. (*See infra* at 36–38.)

fact alone, however, is insufficient to make business dealings with such governmental and commercial organizations, even extensive and illegal ones, dangerous to human life as required by § 2331(1). Accepting Plaintiffs' logic under these circumstances would mean, in effect, that any dealings with these entities is dangerous to human life, which the Court finds would stretch the statutory definition of an act of terrorism too far. *Cf. Kemper*, 911 F.3d at 393– 94 (noting that the United Kingdom's governmental interactions with Bank Saderat Iran and IRISL "surely furthers Iran's ability to engage in terrorism," but that cannot possibly subject British regulators to ATA liability). For example, as Plaintiffs acknowledge, Mahan Air is a "commercial airline," which the Court infers to mean that it uses planes for more than simply transporting weapons for Hezbollah. (*See* SAC, Dkt. 115, ¶ 19.) Similarly, IRISL is Iran's national maritime carrier, with a "long history of facilitating arms shipments" on behalf of the Iranian military. (*Id.* ¶ 197.) And NIOC is involved in "daily oil sales" in addition to the activities it allegedly engages in on behalf of terrorist organizations. (*Id.* ¶ 624.) Given the many legitimate activities that these entities engage in, the mere act of providing financial services to them cannot be violent or dangerous. And even though Defendants were providing non-"routine" services, that amounted to violations of U.S. sanctions, this does not make Defendants' conduct dangerous in itself; the Iranian entities could still have used, and presumably did use, the illegally transferred funds for legitimate purposes. In short, without a more substantial or more direct connection between Defendants' corrupt banking practices on behalf of Iranian entities and dangerous and violent conduct, § 2331(1)(B) cannot be met and the Court cannot plausibly conclude that Defendants' actions were sufficiently life-endan-

gering to meet the statutory definition of an act of international terrorism. *See Linde*, 882 F.3d at 326. This finding alone requires the dismissal of all seven of Plaintiff's Claims for Relief.[30]

With respect to § 2331(1)'s intent requirement, Plaintiffs ask the Court to infer the requisite "appearance" of intent based on Defendants' "knowledge of the high probability (indeed, substantial certainty) that at least some of the funds they illegally provided, concealed, and disguised for Iran would be used for terrorist acts and by FTO Hezbollah to coerce and intimidate the United States into withdrawing from Iraq." (Pls.' Resp., Dkt. 183, at 32); *see also Boim III*, 549 F.3d at 694 (stating that § 2331(1)'s intent requirement "is a matter of external appearance rather than subjective intent"). Based on the Court's review of the SAC, however, Plaintiffs' allegations do not support such an inference. Rather, Defendants "appear" to have been purely motivated by the opportunity to make money. (*See, e.g.*, SAC, Dkt. 115, ¶¶ 534a–b ("We have been approached by the Central

[30] The factual allegations underlying Plaintiffs' "non-conspiracy" claims for relief, *i.e.*, the Fifth, Sixth, and Seventh Claims for Relief, and their Third and Fourth claims for violations of § 2332d, suffer from the same attenuation described with respect to the First and Second Claims for Relief. As to each, Plaintiffs allege that certain of the Defendants facilitated financial transactions on behalf of Iran and/or various Iranian commercial entities, which "provided foreseeable substantial assistance" to the IRGC, Hezbollah, and others. (*See, e.g.*, SAC, Dkt. 115, ¶¶ 2290–91 (describing SCB's facilitation of letters of credit used by Mahan Air to acquire certain materials in violation of U.S. sanctions).) Critically, however, there are no non-conclusory allegations that any of Defendants' illegal business activities were so closely linked to dangerous and violent conduct by terrorist organizations as to satisfy § 2331(1)'s definitional elements for the Third, Fourth, Fifth, Sixth, and Seventh Claims.

Bank of Iran to take back their USD clearing business from Natwest. In principal I am keen to do this but on the clear proviso that it can be done profitably and on a sustainable basis. . . . Obviously many foreign banks are chasing the same business and so we need to demonstrate some competitive or relational advantage.").) Plaintiffs' allegations that Defendants were deliberately indifferent to Iran's involvement with terrorism or the risk that the transferred funds would end up in the hands of FTOs like Hezbollah are insufficient to overcome this appearance. *Cf. Kemper*, 911 F.3d at 390. Indeed, some of Defendants' alleged co-conspirators were only designated as SDGTs after the attacks that injured Plaintiffs. (SAC, Dkt. 115, ¶¶ 685–86 (describing SCB's facilitation of letters of credit on behalf of Mahan Air between 2000 and 2006, while also noting that Mahan Air was designated as an SDGT in 2011).) This further weakens any inference that Defendants intended to intimidate civilians or influence a government by providing material support for terrorism.[31]

The allegations of the SAC are distinguishable from those in cases that have found a secondary actor's actions could satisfy § 2331(1)'s definition of an act of international terrorism, because those cases involved a financial institution dealing directly with an FTO or its proxy. In *Boim III*, the Seventh Circuit found

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[31] The R&R credited Plaintiffs' conclusory allegations that Defendants' actions constituted acts of international terrorism and treated § 2331(1)'s definitional requirements as a question for the jury. *See, e.g.*, *Freeman I*, at *41. While that approach may be appropriate where the defendants are alleged to have conspired directly with an FTO or front organization, as in *Boim III* and *Gill*, the Court finds that it is not appropriate here, where the complaint's allegations do not raise a plausible inference that the elements of § 2331(1) can be met.

that donors who gave money directly to Hamas with knowledge of the organization's aims and activities acted with the intent required of § 2331(1). *See* 549 F.3d at 693–94. And in *Linde*, the Second Circuit found that there was a triable issue of fact as to whether Arab Bank's actions met the standards of § 2331(1) where the plaintiffs had adduced evidence, *inter alia*, that Arab Bank held accounts for and processed monetary transfers on behalf of terrorist leaders and processed transfers that "were explicitly identified as payments for suicide bombings." 882 F.3d at 321–22, 326. The circumstances in those cases are so closely analogous to "giving a loaded gun to a child," *Boim III*, 549 F.3d at 690, that an inference of the requisite appearance of intent under § 2331(1) is possible. Crucially, however, there are intervening actors in this case, *i.e.*, Iran and its commercial entities, whose independent actions break that inferential chain.[32]

Though Defendants' actions in flouting U.S. sanctions are deplorable, the factual allegations of the SAC cannot plausibly be read to suggest even the appearance of intent required by § 2331(1). Because Plaintiffs have failed to plausibly allege that any of the Defendants engaged in acts of international terrorism as

[32] In fact, the circumstances alleged by Plaintiffs, whereby Defendants facilitated transfers on behalf of official Iranian entities who later provided support to terrorist organizations, are more akin to giving a loaded gun to the parent of a small child who then gives the gun to the child. The parent's decision to give the gun to the child is certainly dangerous and likely gives rise to an inference of malintent, but it constitutes an intervening act that attenuates any meaningful connection between the original gun donor and the consequences of the child pulling the gun's trigger. Here, again, the definitional elements of § 2331(1) overlap with the causation requirement of § 2333(a).

defined by § 2331(1), all of their primary liability claims in Claims for Relief One through Seven[33] must be dismissed.[34]

c. Plaintiffs Fail to Plausibly Allege that Defendants' Actions were a Proximate Cause of Their Injuries

Finally, even if Plaintiffs could overcome the definitional hurdles imposed by § 2331(1), the Court finds for substantially similar reasons that they have failed to plausibly allege that Defendants' actions proximately caused their injuries, which is fatal to all seven of Plaintiffs' Claims for Relief.

Critically, Plaintiffs cannot meaningfully distinguish their allegations from those presented to the Second

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[33] Though the claim against Commerzbank in the Sixth Claim of Relief, which alleges that the bank provided financial services to an organization that directly funds Hezbollah presents a closer question as to the violence and intent elements of § 2331(1), the Court does not further analyze that issue with respect to Commerzbank and the Sixth Claim, given the Court's dismissal of that claim for lack of personal jurisdiction. (*See supra* at 14–16.)

[34] The R&R declined to consider whether Plaintiffs' First and Second Claims for Relief, which it found were based on Defendants' membership in a conspiracy that had as at least one object the provision of material support to terrorist organizations, could satisfy § 2331(1)'s requirements, finding that Plaintiffs' could rely on either a primary or secondary liability theory at trial so long as either was established. *See Freeman I*, at *21 & n.40 (noting that the "court in *Linde* held that 'under an aiding and abetting theory of ATA liability, plaintiffs would not have to prove that the bank's *own acts* constitute international terrorism satisfying all the definitional requirements of § 2331(1).'" (emphasis in R&R) (citation omitted)). As to Plaintiffs' remaining claims, the R&R treated § 2331(1)'s requirements as a question for the jury. *See id.* at *41, *48. The Court does not adopt these recommendations.

Circuit in *Rothstein*. In *Rothstein*, the plaintiffs had alleged that UBS engaged in unlawful financial transactions with Iran, that Iran subsequently used various entities to transfer funds to Hezbollah and Hamas, and that those Iranian funds substantially increased Hezbollah's and Hamas's ability to carry out the terrorist attacks that injured the *Rothstein* plaintiffs. 708 F.3d at 85–87. Based on these allegations, the Second Circuit noted that it was "reasonable to infer that Iran's ability to amass U.S. currency was increased by UBS's transfers," that "the more U.S. currency Iran possessed, the greater its ability to fund H[e]zbollah and Hamas for the conduct of terrorism," and that "the greater the financial support H[e]zbollah and Hamas received, the more frequent and more violent the terrorist attacks they could conduct" would be. *Id.* at 93.

Nevertheless, applying the proximate causation requirement to state a claim under § 2333(a), the Circuit rejected the *Rothstein* plaintiffs' argument that UBS's violations of OFAC regulations were a proximate cause of their injuries, even though UBS knew of Iran's general connection to terrorist organizations and its status as a state sponsor of terrorism. *Id.* at 96–97. Specifically, it noted the absence of any nonconclusory allegations that "UBS provided money to H[e]zbollah or Hamas"; that "U.S. currency UBS transferred to Iran was given to H[e]zbollah or Hamas"; or that "if UBS had not transferred U.S. currency to Iran, Iran, with its billions of dollars in reserve, would not have funded the attacks in which plaintiffs were injured." *Id.* at 97; *see also Al-Rajhi*, 714 F.3d at 124 (2d Cir. 2013) (applying *Rothstein* and holding that the plaintiffs failed to plead proximate causation where there were no allegations that the "defendants participated in the September 11, 2001 attacks or that they provided money directly to al

Qaeda[,] . . . nor [were] there factual allegations that the money allegedly donated by the . . . defendants to the purported charities actually was transferred to al Qaeda and aided in the September 11, 2001 attacks").

Plaintiffs' allegations suffer from the same fatal causal gaps. There are no allegations that Defendants directly provided funds or services to a terrorist group, no non-conclusory allegations that the specific funds processed by Defendants were destined for a terrorist organization rather than some more benign or legitimate purpose, and no plausible allegations that the attacks in Iraq were only possible due to Defendants' actions. While Plaintiffs allege that Defendants provided services to Iranian financial institutions and commercial businesses, and that those entities have some association or relationship with Hezbollah and other terrorist organizations, they do not allege that these entities solely exist for terrorist purposes. As previously discussed, the Iranian government and commercial entities that Plaintiffs assisted engage in a myriad of legitimate functions and activities. (*See* SAC, Dkt. 115, ¶ 19 (noting that Mahan Air is a "commercial airline"); *id.* ¶ 197 (noting that IRISL is Iran's national maritime carrier with a "long history of facilitating arms shipments" on behalf of the Iranian military); *id.* ¶ 624 (noting that NIOC is involved in "daily oil sales" in addition to the activities it allegedly engages in on behalf of terrorist organizations).) Thus, given that Defendants' alleged Iranian clients are engaged in worldwide commerce, it strains credulity to assume or infer that any person or business that provides services to such organizations, even illegal services, becomes "a substantial factor in the sequence of responsible causation" for any terrorist attack that the Iranian organization later supports. *Rothstein*, 708

F.3d at 91; *Al-Rajhi*, 714 F.3d at 124; *see also Fields*, 881 F.3d at 748.

Without a more direct connection between Defendants' conduct and the attacks that injured Plaintiffs, the provision of financial services to Iran or various Iranian entities is insufficient on its own to support a plausible inference that the transactions facilitated by Defendants proximately caused the IED explosions in Iraq that injured Plaintiffs. Accordingly, Plaintiffs' primary liability claims in all seven Claims of Relief must be dismissed for failure to plead proximate causation.[35]

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[35] The R&R found causation to be sufficiently alleged. *Freeman I*, at *29, *45 n.65. In doing so, the R&R rejected Defendants' requests to apply *Rothstein* and *Al Rajhi*, finding that the causation standards in those cases were effectively superseded by the addition of secondary liability under JASTA. *Freeman I*, at *20 ("However, both *Rothstein* and *Al Rajhi* were decided before the enactment of JASTA, and prior to the Second Circuit's decision in *Linde*. The logic of both of these cases depends largely on the fact that secondary liability was not explicitly available under the ATA at that time."). From there, the R&R reasoned:

> Although *Linde* did not address causation in the context of a conspiracy claim, it follows that, in the context of a conspiracy claim, each of the conspirator's actions need not themselves constitute an act of international terrorism under Section 2331(1). Instead, the acts of international terrorism committed by another member of the conspiracy may be separate and distinct from the "overt acts" committed by the conspiring bank in support of the overarching conspiracy. Thus, the causation requirement would be satisfied if there was a connection between the act of international terrorism and the plaintiffs' injuries. The Second Circuit said as much when, as discussed above, it noted that to establish causation, the focus should be on the relationship *between the alleged act of international terrorism*

D. Plaintiffs' Claims of Secondary Conspiracy Liability Under Section 2333(d)(2)

Defendants also argue Plaintiffs' secondary conspiracy liability claims under JASTA's newly added secondary liability provision should be dismissed. *See* 18 U.S.C. § 2333(d)(2). These objections are only relevant to Plaintiffs' First and Second Claims for

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> *and the plaintiff's injury*. [*Rothstein*, 882 F.3d] at 330–31 (emphasis added).

Id. at *21. Once again, this finding is premised on the R&R's key determination that the SAC adequately pleads a material support conspiracy that includes Defendants, even if Defendants did not specifically agree to the goal of providing material support. Because the Court disagrees with that premise, it finds that the R&R's causation analysis was erroneous. Furthermore, even if JASTA could be viewed as superseding the causation principles applied in *Rothstein* and *Al Rajhi*—which this Court does not find—because Plaintiffs have pled their material support conspiracy claims as primary liability claims under § 2333(a) (as well as § 2333(d)(2) claims), any pre-JASTA case law would apply to those claims. As discussed *supra*, the Court has applied both *Rothstein* and *Al Rajhi* in assessing the sufficiency of the causation allegations in this case.

Lastly, although Congress enacted JASTA to provide "the broadest possible basis [for civil litigants] . . . to seek relief against persons, entities, and foreign countries" that have provided direct or indirect material support to terrorism, JASTA § 2(b), the Act's amendments themselves do not alter the applicable causation standard. Indeed, despite adding conspiracy and aiding and abetting secondary liability to the ATA, which allows for civil litigants to pursue claims against persons whose acts do not constitute acts of terrorism, Congress significantly limited that secondary liability to defendants who conspired *with* the FTO that committed the act of terrorism. 18 U.S.C. § 2333(d)(2). Furthermore, Congress's invocation of *Halberstam* as the governing causation standard does not alter the causation analysis in this case, given the absence of a conspiracy that Defendants joined to provide material support to Hezbollah or its affiliates.

Relief, through which Plaintiffs also assert a theory of secondary liability.

1. Conspiracy Liability Under JASTA

In September 2016, Congress amended the ATA by enacting JASTA. Without altering the ATA's pre-existing primary liability provision, JASTA provides that:

> In an action under [§ 2333(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 . . . 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). 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, 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).

Thus, in contrast to the primary liability provided for in § 2333(a), JASTA allows for plaintiffs to assert secondary liability against persons and entities whose own acts do not, themselves, meet the statutory definition of an act of international terrorism yet who have knowingly aided and abetted, or conspired with, terrorist organizations involved in acts of terrorism.

Plaintiffs argue that their First and Second Claims for Relief state claims for secondary conspiracy liability under the newly enacted § 2333(d)(2). (*See* SAC, Dkt. 115, ¶ 2189 (stating that Defendants "knowingly and purposefully agreed to provide material support and services to Iran in an illegal manner, knowing or deliberately indifferent to the fact that such illegal support and services facilitated Iran's clandestine support for the IRGC and Hezbollah"); *id.* ¶ 2202 (stating that Defendants "knowingly agree[d] to provide, and provide[d], material support to Iran in an illegal manner, and [knew], or [were] deliberately indifferent to the fact, that the objects and aims of the [alleged] [c]onspiracy were to provide material support to [FTOs], including Hezbollah and Kata'ib Hezbollah").)[36]

2. Defendants' Arguments Regarding Plaintiffs' JASTA Conspiracy Claims

a. JASTA's First Statutory Requirement

Defendants first argue that Plaintiffs' § 2333(d)(2) claim fails to plausibly allege that the acts of international terrorism that injured Plaintiffs were "committed, planned, or authorized" by an entity designated as an FTO "as of the date on which [the act] . . . was committed, planned, or authorized." 18 U.S.C. § 2333(d)(2). (*See also* Mov. Banks' Objs., Dkt. 174, at 8–11.) According to Defendants, only two of the 92 attacks identified in the SAC are directly alleged to have been

[36] In addition to the reasons discussed below for dismissing Plaintiffs' § 2333(d)(2) claim, the Court also finds that the SAC fails to sufficiently allege a JASTA conspiracy for the same reasons discussed earlier in the primary liability section. The Court therefore does not adopt the R&R's recommendation that a material support conspiracy under § 2333(d)(2) involving Defendants has been sufficiently alleged.

"committed, planned, or authorized" by an entity designated as an FTO at the time of the attack. (*See* SAC, Dkt. 115, ¶ 1042 (stating that the January 20, 2007 attack in Karbala was "largely planned by Hezbollah, under the direction of Ali Musa Daqduq, and carried out by the aforementioned [non-FTO] Iraqi Shi'a terrorist group known as Asa'ib Ahl al-Haq"); *id.* ¶ 2139 (describing a June 29, 2011 terrorist attack in Wasit Province by Kata'ib Hezbollah).) In light of Plaintiffs' failure to identify an FTO with respect to each alleged attack, Defendants argue that all JASTA claims related to the remaining 90 attacks must be dismissed.

The Court agrees with Defendants that the express terms of 18 U.S.C. § 2333(d)(2) require a JASTA plaintiff's injuries to arise from an act of international terrorism that was committed, planned, or authorized by an FTO that has been officially designated as such. *See* 18 U.S.C. § 2333(d)(2). Contrary to Defendants' assertions, however, the Court finds that Plaintiffs have adequately pleaded this statutory requirement.[37]

As explained in the R&R, the allegations of the SAC give rise to the reasonable inference that Hezbollah was responsible, at minimum, for authorizing the 92 attacks at issue in this case. *See Freeman I*, at *27 n.47 ("The Second Amended Complaint pleads numerous allegations showing that an FTO (Hezbollah) committed, planned, or authorized the attacks at issue . . . and that Hezbollah established, trained and supplied other terror organizations on behalf of Iran and the IRGC with funding and training, ordering and authorizing these other organizations to commit attacks on

[37] The R&R found the same, *Freeman I*, at *15 n.29, and the Court adopts that finding.

Americans."). The Court agrees with the R&R's characterization of Plaintiffs' allegations, which, taken as a whole, describe Hezbollah as deeply involved in supporting and coordinating an extensive campaign of terrorist activity against American citizens in Iraq. (*See, e.g.*, SAC, Dkt. 115, ¶¶ 278 (relaying State Department reports that Hezbollah provided advisors to Shi'a militants in Iraq); 1055, 1070 (alleging that Hezbollah leader Ali Musa Daqduq was directed in 2005 to assist Iran in training its terrorist proxies in Iraq); 2028 (describing Hezbollah and the IRGC-QF's role in training and arming the terrorist group involved in the October 16, 2008 attack in Baqubah).) Though Plaintiffs have not named the precise individuals clandestinely involved in committing each attack, a fair reading of the SAC points to the high-level involvement of Hezbollah and its affiliates. Drawing all reasonable inferences in Plaintiffs' favor, the Court may reasonably infer that a designated FTO, namely Hezbollah, was responsible for committing, planning, or, at the very least, authorizing the attacks that injured Plaintiffs. *See Chase Grp. Alliance LLC v. N.Y.C. Dep't of Fin.*, 620 F.3d 146, 150 (2d Cir. 2010) (stating that the court "construe[s] the complaint liberally, accept[s] all factual allegations in the complaint as true, and draw[s] all reasonable inferences in the plaintiff's favor" (quotation omitted)).

b. JASTA's Second Statutory Requirement

Next, Defendants argue that the SAC contains no allegations connecting them to the person or entity that committed the acts of international terrorism that injured Plaintiffs, as distinct from Iran or any of its banking agents. (*See* Mov. Banks' Objs., Dkt. 174, at 12.) As a result, Defendants contend, the SAC fails to state a claim of secondary conspiracy liability under

§ 2333(d). (*See id.* at 11.) Here, the Court agrees with Defendants.

JASTA provides that its use of the term "'person' has the meaning given" in 1 U.S.C. § 1." *See* 18 U.S.C. § 2333(d)(1). Thus, the term "person" in § 2333(d)(2) includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[38] 1 U.S.C. § 1.

JASTA's inclusion of societies and associations within its definition of "person" clearly indicates that the "person" committing an act of terrorism need not be the literal triggerman, as Defendants appear to suggest. *See* 1 U.S.C. § 1. Where Congress has expressed an intent to create a broad form of liability through JASTA and provided an expansive definition of the term "person," it would make little sense to relieve a financial institution of liability for conspiring with an FTO that happened to use agents or an alter ego to engage in acts of terrorism. *See* JASTA, § 2(b), 130 Stat. at 853.

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[38] The R&R considered this definition in light of pre-JASTA case law finding that primary liability may attach for violations of the material support statutes where a defendant provides material support to the alter ego or alias of an FTO. *Freeman I*, at *17 (citing *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 432 (E.D.N.Y. 2009) and *Gill*, 893 F. Supp. 2d at 555). Accordingly, the R&R concluded that a defendant may be liable under § 2333(d) even if it did not directly conspire with "the specific individual representative of the [FTO] who, for instance, actually planted the EFP that injured or killed a plaintiff." *Id*. at *17. The Court agrees with and adopts this conclusion. At the same time, however, the Court interprets § 2333(d)(2) as requiring the defendant to have conspired with the FTO that "committed" the act of terrorism.

Nevertheless, § 2333(d)'s expansive definition of the "person" who commits an act of international terrorism does not relieve Plaintiffs of their duty to allege that a defendant directly conspired with that "person." Given the most generous reading possible, the SAC alleges that FTOs Hezbollah and Kata'ib Hezbollah[39] and the IRGC (an SGDT), acting through agents and proxies, are the entities responsible for committing the acts of international terrorism that injured Plaintiffs.[40]

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[39] The SAC alleges that two attacks were committed by Asa'ib Ahl al-Haq and Kata'ib Hezbollah, while others were committed by unidentified terrorists or Iraqi insurgent groups such as the Mahdi Army.

[40] The R&R found that the SAC sufficiently alleges the "conspiring with" element of Plaintiffs' § 2333(d)(2) claim and that it is for the jury to determine whether the Iranian entities with which Defendants conspired were, in effect, Hezbollah-affiliated organizations so as to support the imposition of secondary liability under § 2333(d)(2). *Cf. Freeman I*, at *26 (endorsing Plaintiffs' characterization of the alleged conspiracy as a "hub-and-spoke conspiracy [with] Iran, Hezbollah, and Bank Saderat (as an agent of Hezbollah)—namely, the Iranian 'terror apparatus'—as the central actors in the conspiracy, and the Moving defendants as different spokes."). Relying on pre-JASTA case law, the R&R explained:

> This Court agrees with the reasoning of the court in *National Council of Resistance of Iran* and finds that it would be "silly" to enable an FTO to escape liability simply by creating a new front organization to fund-raise or engage in financial transactions on its behalf. By the same token, the public designation of an entity or organization as a SDGT can provide evidence of knowledge on the part of the defendant of the entity's unlawful acts and demonstrate defendant's knowing involvement in the conspiracy. Thus, the Court finds that not only would FTO Hezbollah, or FTO Kata'ib Hezbollah [which allegedly committed one of the two terrorist attacks], fall within the definition of a "person who committed an act of terrorism," but a *Hezbollah-*

Yet there is not a single allegation in the SAC that any of the Defendants *directly* conspired with Hezbollah or the IRGC. And there are no allegations that any of Defendants' alleged co-conspirators, *e.g.*, the Iranian banks, IRISL, NIOC, or Mahan Air, directly participated in the attacks that injured Plaintiffs. These omissions are fatal to Plaintiffs' First and Second Claims for Relief to the extent that they assert secondary liability under § 2333(d)(2).[41]

> *affiliated entity* would also fall within the definition of persons or entities that Congress was concerned with in enacting JASTA. *See O'Sullivan v. Deutsche Bank AG*, No. 17 CV 8709, 2018 WL 1989585, at *6 (S.D.N.Y. Apr. 26, 2018) (noting that "2333(d)(2) specifically requires a defendant to conspire with 'the person who committed [] an act of international terrorism,'" but providing no detailed discussion as to the definition of "person" as provided by Congress in this context).

Id. at *17 (emphasis added).

While the Court agrees that entities can operate as fronts or alter egos of FTOs, the Court does not find that the SAC sufficiently alleges a basis from which to plausibly infer that any of the Iranian financial or commercial entities with whom Defendants allegedly conspired qualify as such with respect to Hezbollah, Kata'ib Hezbollah, or Asa'ib Ahl al-Haq, so as to allow a finding that the SAC plausibly alleges that Defendants conspired with the FTOs that committed the alleged acts of terrorism that caused Plaintiffs' injury. The Court therefore does not adopt the R&R's recommendation to find that Plaintiffs have stated a § 2333(d)(2) conspiracy claim.

[41] The Court recognizes Congress's apparent intent to provide liability for actions that indirectly assist in the commission of acts of terrorism. The Second Circuit has also acknowledged this congressional intent and has suggested that the provision of indirect assistance may suffice to give rise to aiding-and-abetting liability under § 2333(d). *Siegel*, 933 F.3d at 223 n.5. Nevertheless, the plain text of JASTA's *conspiracy* liability provision requires that a defendant conspire directly with the person or entity that

* * *

Having found that Plaintiffs have failed to adequately allege the threshold requirements for both primary liability under § 2333(a) and secondary conspiracy liability under § 2333(d)(2), the Court must dismiss all of Plaintiffs' claims for relief.[42]

CONCLUSION

The tragedy of what happened to Plaintiffs and their families at the hands of terrorists in Iraq cannot be understated nor should their sacrifices for this country be forgotten. Unsatisfying as the Court's decision today may be from a moral or policy perspective, it is up to Congress, and not the judiciary, to authorize terrorism victims to recover damages for their injuries from financial institutions that conspire with state sponsors of terrorism like Iran to evade U.S. sanctions under circumstances such as those presented in this case. In its present form, however, the law does not provide for such recovery.

For the reasons stated herein, Defendants' motions to dismiss the SAC are granted pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6), and this action is dismissed. The Clerk of Court is respectfully directed to enter judgment and close this case accordingly.

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committed the act of international terrorism that injured the plaintiff. *See* 18 U.S.C. § 2333(d)(2). Notwithstanding Congress's apparent intent, the Court must give effect to the plain meaning of the statute that Congress enacted. *See Lockhart v. United States*, 546 U.S. 142, 146 (2005).

[42] Though Defendants' assert additional objections to the R&R's analysis of Plaintiffs' claims, *see supra* n.13, the Court need not address them in light of its finding that Plaintiffs have failed to make a *prima facia* claim of liability under the ATA.

SO ORDERED.

/s/ Pamela K. Chen
Pamela K. Chen
United States District Judge

Dated: September 16, 2019
Brooklyn, New York

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

14-CV-6601 (PKC) (CLP)

CHARLOTTE FREEMAN, *et al.*,
Plaintiffs,

v.

HSBC HOLDINGS PLC, HSBC BANK PLC, HSBC BANK MIDDLE EAST LIMITED, HSBC BANK USA, N.A., BARCLAYS, STANDARD CHARTERED BANK, ROYAL BANK OF SCOTLAND, N.V., CREDIT SUISSE, BANK SADERAT PLC, COMMERZBANK AG, and JOHN DOES 1- 50,
Defendants.

JUDGMENT

A Memorandum and Order of the Honorable Pamela K. Chen, United States District Judge, having been filed on September 16, 2019, granting defendants' motions to dismiss the SAC pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6); and dismissing this action; it is

ORDERED and ADJUDGED that defendants' motions to dismiss the SAC are granted pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6); and that this action is dismissed.

Dated: Brooklyn, New York
September 18, 2019

Douglas C. Palmer
Clerk of Court

By: */s/Jalitza Poveda*
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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 February, two thousand twenty-three.

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Docket No: 19-3970

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CHARLOTTE FREEMAN, FOR THE ESTATE OF BRIAN S. FREEMAN, ET AL.,

Plaintiffs-Appellants,

v.

HSBC HOLDINGS PLC, ET AL.,

Defendants-Appellees.

———

ORDER

Appellants filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

APPENDIX E

[1] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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14-CV-6601 (PKC)

———

CHARLOTTE FREEMAN, et al.,

Plaintiffs,

-against-

HSBC Holdings, PLLC, et al.

Defendants.

———

United States Courthouse
Brooklyn, New York

October 28, 2019
2:00 p.m.

———

TRANSCRIPT OF CIVIL CAUSE FOR
ORAL ARGUMENT BEFORE
THE HONORABLE PAMELA K. CHEN
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiffs:

OSEN LLC
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BY: GARY M. OSEN, ESQ.
CINDY SCHLANGER, ESQ.

For the Defendants:

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BY: ANDREW FINN, ESQ.
BRADLEY SMITH, ESQ.
ALLYSA HILL, ESQ.

Court Reporter: Michele D. Lucchese, RPR
Official Court Reporter
E-mail:
MLuccheseEDNY@gmail.com

Proceedings recorded by computerized stenography. Transcript produced by Computer-aided Transcription.

[2] THE COURTROOM DEPUTY: All rise.

THE COURT: Have a seat everyone.

THE COURTROOM DEPUTY: Civil cause for oral argument Docket No. 14-CV-6601, Freeman, et al. versus HSBC Holdings, PLLC, et al.

Will the parties please state your appearances for the record.

MR. OSEN: Good morning, Your Honor. Gary Osen, Osen, LLC for the plaintiffs.

MS. SCHLANGER: Cindy Schlanger, Osen, LLC for the plaintiffs.

THE COURT: Good afternoon to both of you.

MR. FINN: Good morning, Your Honor. Andrew Finn from Sullivan & Cromwell on behalf of Standard Chartered Bank. Also with me are Brad Smith and Allysa Hill, also from my firm.

THE COURT: Good afternoon to all of you as well.

So, as everyone knows, we are here in connection with a motion for reconsideration filed by plaintiffs with regard to my decision, in turn largely not adopting the report and recommendation of Judge Pollack on the original motion to dismiss in this case filed by all the Defendants.

Plaintiffs have filed a partial request for reconsideration related to defendant's Bank Saderat PLC, as well Standard Commerzbank -- sorry, Standard Chartered Bank, [3] which I will refer to as SCB just to save words and time.

A couple of housekeeping matters before I hear from the parties. One is there is a request from plaintiffs, which I will grant, to toll the time in which they can file their Notice of Appeal pursuant to Federal Rule of Appellate Procedure 4, and in particular, I do note that the case law does support that request. So that will be granted. Specifically, I am citing to *Roistacher v. Bondi*, a Second Circuit case from 2015 reported at 624 Federal Appendix 20 and specifically at page 22. It does suggest that that's an appropriate way to proceed in a case like this where there is a motion for reconsideration.

The second, I guess I will call it housekeeping, but I do want to have the plaintiffs explain perhaps, first of all, what the relevance is of the filing that it made yesterday -- or today, actually, I think. I'm sorry, I want to make sure the defense has seen it. Did you all see the letter that was filed today that included the latest governmental pronouncement about Iran and various entities involved here?

MR. FINN: Your Honor, we did see the filing at the ECF system just about two hours ago and it is a rather lengthy document. I was able to review it briefly

before, but we are not really sure what relevance it has to the pending motion.

THE COURT: Let's start with that, Mr. Osen, explain [4] why it is you felt the need to file that today just a few hours before the argument and then what relevance you think it has.

MR. OSEN: Sure. Thank you, Your Honor.

First of all, in fairness to the defendant, we weren't planning to argue it today. It was only issued on Friday.

THE COURT: Right.

MR. OSEN: We just wanted to make sure that the Court had it for purposes of the record. Without disadvantaging my opponent, I will just note for Your Honor briefly that the pages that we think are most salient here, excuse me, are page 8, which refers to findings regarding Iran's abuse of the international financial system and also the role of the Central Bank of Iran in facilitating terrorist financing.

And then, lastly, there is another reiteration on page 12 of the document concerning the Islamic Revolutionary Guard Corps, the IRGC, and it's role in the Iranian economy and connections to terrorism.

THE COURT: So let me ask you more specifically since I have had a chance to look at it, it doesn't necessarily say anything new or add much factually to what has already been presented at some length in your Complaint, as well as in the arguments between the parties. Is that fair to [5] say?

MR. OSEN: I don't think it's particularly germane to the argument today, per se, because we proceed under the premise that Your Honor's ruling has not been reconsidered in its entirety, particularly with

respect to the question of whether sanctions evasion is materially different from terror financing and the like, but we do feel for the ultimate record that the close link identified by the United States Government between the very conduct that is at issue in this case and terrorism financing by Iran is germane ultimately to the Appellate record.

THE COURT: Okay, fair enough. I had assumed that perhaps what you were doing was building up the record for the future to some extent. That makes some sense. For today's argument neither side needs to address it and obviously I recognize that would have put the defense at a distinct disadvantage, but Mr. Osen is acknowledging that they are not going to rely on that for purposes of the reconsideration motion.

MR. FINN: Your Honor, if I may, given that for Standard Chartered Bank most of the claims were not challenged in reconsideration that we would object to the plaintiffs putting in any sort of additional material on already dismissed claims that they are not seeking reconsideration on and, you know, I recognize this just came out on Thursday or [6] Friday of last week, but I'm not sure that this is the proper vehicle to put it into the record particularly if at some future point the plaintiffs may argue that it is relevant and we wouldn't -- we are not waiving any obligation that, you know, whatever may be argued about this was properly brought before the District Court on motion to dismiss.

THE COURT: Yeah, I think that's fair. I don't want to get hung up on this point, but I think, Mr. Osen, you may have a fight later with the defense, a legitimate one, that if you try to raise this as part of the record on appeal, the Court of Appeals may say that it wasn't really squarely before me or it wasn't allegations or

evidence that the defense was given an opportunity to dispute or address in some way. But like I said before, I don't find that it adds much to what I have already considered and I think what, as I believe you correctly observed, drove my prior decision. So, for now, I consider it a nullity or maybe not even relevant. What future use it could have as part of the record or not is not something I want to discuss today or decide, because it's not really an issue for me. It may be, at some point, an issue for the Court of Appeals.

MR. OSEN: Yes, Your Honor. First of all, obviously the defendant would waive its rights with respect to the document. I would only note that the Court of Appeals can also take judicial note of Government findings and [7] declarations whenever they occur.

To us, it is just an additional reiteration of a long-standing and evolving recognition by the United States Government that the invasions, both described in prior findings and described in the Complaint, ultimately facilitate Iran's terrorism.

THE COURT: I think you might have misspoke or I may have misheard you, I think you said the defendant is obviously not waiving its rights?

MR. OSEN: Correct.

THE COURT: It got transcribed differently and I heard it --

MR. OSEN: I'm sorry, Your Honor. We recognize that not only because of the timing of this, but just in general, nothing here is to be construed as them waiving their rights to object.

THE COURT: All right. That's all understood.

So here's how we are going to proceed now. We only have one of the two defendants implicated by the

reconsideration motion here today. As everyone knows from what has been filed on the docket, it appears that Bank Saderat PLC is foregoing any opportunity or right to respond to the motion for reconsideration. Counsel for Bank Saderat PLC indicated, at least to me, that it was not intending to respond to the motion. I gather from what was filed by you, [8] Mr. Osen, that they were not nearly as transparent about what their intent was and I agree with you that they, by omission, gave the impression that they were going to file something timely, but that was not the case. I question how they dealt with even communicating with the Court, which was via a phone call to chambers, that they did not intend to respond; but nonetheless they are not here, they have not filed anything, although I still must consider the merits of the reconsideration motion in the absence of their response.

But what I am going to do instead is hear first from the plaintiff, whose motion it is, and then from Standard Chartered Bank, SCB, and then I want to discuss with plaintiffs' counsel further the reconsideration motion against, as it relates to Saderat. Okay?

So, Ms. Schlanger or Mr. Osen, you can proceed. MR. OSEN: Thank you, Your Honor.

Just before I start, I just wanted to make clear on the record, as I indicated a moment ago, there are obviously aspects of the Court's decision in September that we agree with and, unsurprisingly, other aspects that we do not. We of course don't want to be in any way perceived as waiving our arguments down the road, but we are proceeding on the premise, or, at least, we hope we have articulated that our premise in filing a motion for partial reconsideration is based on an acceptance, at least arguendo, of the Court's

analysis going [9] forward in terms of the elements required.

The only other procedural issue which I guess goes partially to the defendant's response is that, as we read Your Honor's September 16th decision, it did not directly address aiding and abetting claims under Section 2333(d) or JASTA, for ease.

THE COURT: And that's J-A-S-T-A, all caps.

MR. OSEN: Right, and that's the Justice Against Sponsors of Terrorism Act.

So those claims, as we have also pointed out, are explicitly made in *Freeman II* and *Bowman*, the two other cases before Your Honor. So, if nothing else, we think it is beneficial for the record that that claim be addressed squarely. We, obviously, know Your Honor has written extensively about conspiracy under JASTA.

Our central view is that Your Honor's decision, or, at least, the lynchpin of that decision hinges on the finding at page 44, beginning of page 45, where Your Honor wrote: Yet there is not a single allegation in the SAC, that's the Second Amended Complaint, that any of the defendant's directly conspired with Hezbollah or the IRGC. And that's the quote. And we contend that the Complaint clearly alleges that Bank Saderat directly conspired with Hezbollah and that Standard Chartered Bank directly conspired with the IRGC through its agent the National Iranian Oil Company, NIOC. And the [10] principal overlooked facts we contend are, one, the IRGC's designation in April of 2019 as a foreign terrorist organization, FTO for short. And that, in conjunction with that, the Court therefore overlooked the significance of the fact that the National Iranian Oil Company was designated as a

specially designated national by the United States because it was an agent of the IRGC during the relevant period. Those facts, in tandem, are what we contend is the central lynchpin of the reconsideration.

SCB agrees that the Court has found that the Amended Complaint sufficiently pled that the IRGC, together with Hezbollah, committed the attacks and that's in their brief at page 2 and, of course, it is reflected in page 44 of the Court's opinion, which I am happy to quote, but it is clearly there.

SCB argues that the Court didn't overlook the fact that NIOC was the IRGC's agent because the Court noted that NIOC was involved in daily oil sales, as well as, quote, activities it allegedly engages in on behalf of terrorist organizations, end quote.

We contend that the key question before Your Honor is whether the Court overlooked the significance of the IRGC's designation as an FTO and, if so, whether that changes how the Court views both NIOC as the IRGC's agent and SCB's unlawful conduct on behalf of an FTOs agent.

[11] Now, as we understand it, Your Honor has posited that, as matter of law, the Complaint actually alleged two conspiracies; one conspiracy to evade sanctions, which SCB and the other defendants belong to, and then a separate but somewhat related conspiracy by some of SCB and other defendants, Iranian clients or customers, in which those customers conspired with Iran or Iranian agencies to fund terrorism.

We would submit that even arguendo, if that were the case that there were, in fact, two conspiracies and we, obviously, will argue at some point that that's a fact question, but to the extent we are following the

Court's rubric, we contend that both Bank Saderat and Standard Chartered Bank were in the second conspiracy because they were dealing with on the one hand Hezbollah and on the other hand the IRGC.

Now, as I understand SCB's arguments, and obviously opposing counsel give their own gloss on it, but as I read it there were basically three arguments that they made. The first was that NIOC, notwithstanding being an agent of an FTO, was still one of the, quote/unquote, legitimate agencies of Iran, that it still fit within the safe harbor, if you will, of the *Rothstein* paradigm as a legitimate agency of Iran that may engage in some other illegitimate activities, but falls within that safe harbor. We do agree with the defendant that [12] if agents of FTOs can be deemed legally as a matter of law to be legitimate agencies then we lose, but we would suggest that that's a bridge further than the Court's decision suggests and certainly quite a bit farther than *Rothstein* actually held.

THE COURT: Can I stop you for a second?

MR. OSEN: Sure.

THE COURT: You use the term "safe harbor," which suggests that there may be some kind of exclusion for legitimate or quasi-legitimate agencies, but really the question is causation. At least, that's one main question. So I'd like you to address that directly, because I think still the problem with your argument with respect to SCB is that you are suggesting or arguing that the agency relationship between NIOC and IRGC and then the relationship between IRGC and Hezbollah is enough, even at this stage, at the stage of the allegations for purposes of some plausible inference, enough to satisfy causation. And that's

where I think the argument, certainly at a minimum, falls apart because I think you are requiring way too many inferential leaps from NIOC, which has many, many different purposes, besides accepting the fact that it is an agent, being an agent of IRGC, and then from there you go from IRGC to sponsoring Hezbollah, and then from Hezbollah who ordered or authorized these attacks or planned them. The causation is really what still remains very problematic, even accepting that NIOC has [13] been designated as an agent of IRGC.

MR. OSEN: Sure, let me address that. I don't think the plaintiffs would dispute that the IRGC is the largest and most complex foreign terrorist organization in the world and it has, therefore, the largest number of agencies and commercial agents and so forth compared to Hamas or FARC, F-A-R-C, or others. However, the description Your Honor just gave is pretty much the same one that would apply to the circumstances in *Boim* III before the Seventh Circuit. *Boim* III involved donations that were made by various U.S. based charities to various agents of Hamas in the Palestinian territories, who in turn -- not those same agents, in turn went out and committed the terrorist attacks at issue. So, let me follow that along.

THE COURT: Wait. Let me stop you for a second, because I don't think I agree with the premise, although maybe you and I are using the terms differently. In *Boim* there was evidence that Holy Land Foundation and Interpal were two of the agencies for whom the defendant actually managed or facilitated monetary transfers, I think. But you didn't have, in between there, an actual agency, a governmental agency like NIOC which has a number of other legitimate purposes.

MR. OSEN: The only part of that I think would be accurate is the term "governmental." In the case of *Boim*, the Holy Land Foundation, among others, was the donor in the [14] United States. They were sending money principally to so-called Zakat Committees in the Palestinian territories. These included hospitals. These included the Dar Al-Salam Hospital, for example, but also the Al Razi Hospital in Jenin. In fairness, they were not governmental agents, but that's the nature of different terrorist organizations. The IRGC is, to my knowledge, the only quasi-governmental organization that's ever been designated as an FTO of a recognized sovereign state.

In the case of Hamas and Hezbollah, they operate governmental functions, but they have no standing under international law as a sovereign state. So when the *Boim* defendants sent money to a Zakat Committee, or to a hospital in Gaza, that the Court concluded factually was an agent of Hamas, there was no allegation -- and the Court did not find -- that the plaintiffs had to prove the so-called tracing of the funds from that first agent, which is to say the hospital or the charitable committee, to the actual people who planned the attack that killed David *Boim*. What they had to show was that it went to an FTO and then they obviously had to show that the FTO committed the attack.

THE COURT: If in this scenario the FTO was Hamas and I guess the analogy you are drawing though the hospitals are like NIOC here, which could have legitimate as well as illegitimate purposes.

[15] MR. OSEN: That's precisely what Congress found when they enacted 18 U.S.C. 2339B. The history of *Boim* is actually instructive on this point, Your Honor, because David *Boim* was killed in 1994; the

statute of 2339B, the material support statute, was enacted in 1996. Hamas was not even designated until 1997, after the passage of the statute, which created FTO designations. So, at the time in which the defendants in *Boim* were giving support to Hamas, it was not only not designated an FTO, there was no such thing as an FTO designation. The Court, therefore, focused on whether Hamas committed violent acts, terrorist acts, and whether the defendants in those cases knew of that conduct when they gave knowing support to Hamas.

THE COURT: Okay. Go ahead.

MR. OSEN: The same, Your Honor, is true of virtually every terrorist organization that maintains commercial operations. Those commercial operations are not, as is commonly assumed, simply fronts that do not engage in financial -- real financial transactions. In fact, organizations like NIOC are a cash-cow for the IRGC; it's precisely because they actually do produce and sell oil that funds the IRGC's operations, and the same is true, albeit in a different form, when Hamas raises charitable donations that are sent to its more legitimate-appearing operations. It's certainly true of other terrorist organizations, whether they [16] are engaged in commercial activity. If you look at the list of designations over the last five to ten years, Your Honor, you will see that Hezbollah, for example, routinely has organizations designated that are commercial in nature. One that comes easily to mind is Car Care Center, which runs a motor pool which is controlled and owned by Hezbollah. Part of that, of course, is that they use it to provide transportation of vehicles to Hezbollah, but part of it, like many of their other businesses, include travel, construction and

other activities. That's the nature of 21st century terrorism.

THE COURT: Yes. I am not going to interrupt you. Go ahead. I will hear from the defense on this particular argument about *Boim*.

MR. OSEN: The last -- I'm sorry, Your Honor, the second argument that we deduce from the defendants' brief is that, even if NIOC is an agent of an FTO and they work with an FTO, NIOC itself did not commit the terrorist attacks; it was a different agent of the FTO. And, of course, that's almost always the case. I'm not saying it could never be otherwise, but nearly all significant funding of terrorist organizations comes through fundraisers and commercial operations that are separate from the part of the terrorist organizations that actually runs the cells that kill people and that's almost axiomatic. And so, if one were to read JASTA to limit aiding [17] and abetting and conspiracy to those who actually work directly with the so-called killers or terrorists on the ground, the statute would be a nullity. I would rush to add that the statute itself is pretty clear on this point, because if you look at the language of JASTA and we made this argument previously, albeit in letter form in our various exchanges, the statute speaks of providing substantial assistance or conspiring with the person who committed such an attack. It's with the person, and obviously as Your Honor noted, person is the widest definition available under the U.S. Code. There are other statutes, including on conspiracy that -- including I will add Section 2339A, that use the term "conspire to commit." That is an instance, reading it again in whole, if you were to take that view, it would be a person who aids and abets by knowingly providing substantial assistance or who conspires to commit.

That's not what JASTA says; it says to conspire with the person. So we submit, Your Honor, that there's absolutely nothing in the statutory language, it's plain meaning, let alone the findings and purpose, that would submit that SCB would have to aid or abet or conspire to commit the attacks, or to conspire with the person in the literal sense of the person on the ground who commits the attack. It's a question of whether they conspire, in this case, with the FTO that committed the attack.

THE COURT: But even if the idea is that you only [18] have to conspire with the person and it's not grammatically made clear that you have to conspire to commit the goal of the conspiracy, the legislative history does indicate that the standards from *Halberstam v. Welch* apply. And there, as with all conspiracies, you can't enter into a conspiracy without knowing the goal of it, or having some agreement on what the goal is, so I don't think arguing that linguistic anomaly, I would call it, in terms of how it is phrased, that you can conspire with someone, but you don't have to conspire with that person to commit a common goal makes any sense. I think clearly, if nothing else reflective in the legislative history it says apply, *Halberstam* and traditional conspiracy elements and a doctrine make clear, I think, what's a commonsense reading of the statute that you have to conspire with the person who is committing the terrorist act. That's meant to restrict or limit the range of liability or the chain of liability, if you will, but you still have to conspire, which in and of itself means you have to agree on a common goal.

Maybe I misunderstood you, but it strikes me as an odd reading.

MR. OSEN: No, Your Honor, actually, I don't disagree with that. I will go into the *Halberstam* conspiracy standard in a moment. Our point is simply that this has nothing to do with the question of what the nature of the objective is of the conspiracy or anything like that; it has [19] to do with the question of whether you can conspire with someone who is not the actual --

THE COURT: FTO.

MR. OSEN: No -- well, there are two ends of this, right. There is the first end, which is the -- in this case, there is the part of the FTO that raises the money and then there is the part of the FTO or the agent of FTO that commits the physical act that causes injury. And we submit, Your Honor, that in the case of FTOs the point of contact is almost always going to be on the front end with the fundraising or funding side and that the other side of it is going to be a different agent and that the statute contemplates that. That's all we are saying at this juncture.

The last point, which I think goes to Your Honor's point, is the defendants' view that even if SCB can be said to have directly aided and abetted or conspired with the person, the IRGC in this case that committed the attacks, it couldn't have known that it was assisting terrorism because it was quote/unquote merely evading sanctions. And NIOC wasn't designated until 2012 and the IRGC wasn't designated until 2019, so it lacks the sufficient requisite state of mind. I think that's the core issue more than it is, we would argue, the proximate cause part because the IRGC is in fact using NIOC, as the Government has repeatedly found, for the funding of terrorism. They are in that conspiracy. The question [20] really is whether they knew it

at the time or they had reason to know from the context, which I will get to in a moment.

We contend that there are five basic elements in the Complaint that point to the defendants' knowledge and after I go through them, hopefully as briefly as I can, I then would like to walk the Court through how that applies to *Halberstam* aiding and abetting and *Halberstam* conspiracy.

THE COURT: Okay.

MR. OSEN: So with respect to SCB's knowledge, the first thing we would point to is the nature of the act itself and that's where, Your Honor, we directed the Court to what is sort of a paradigmatic case, *Direct Sales Co. v. United States*, and that is because during the entire period here SCB knew that Iran was a state sponsor of terrorism and they knew that dollar clearing was restricted into a certain safe harbor, so-called U-turn Exception, which was put in place to prevent terror financing. And we have cited in Complaint paragraph 642 to 666, in the interest of time I won't go through all the steps, but clearly throughout the early period 2003, 2004, 2005, they had many notice events indicating to them the purpose of Iran's activities and the purpose -- and warnings that they received from the New York Banking Department, from the Federal Reserve Board. I won't go into all of it.

The second point is that, in addition to stripping [21] transactions and making cover payments to convert transactions to a non-transparent form, they did an additional step with respect to letters of credit. But before I jump to letters of credit, I just want to go back to *Direct Sales* for a moment to highlight why we think this is significant. I think Your Honor would agree

that if a person lawfully sells a firearm to another person, it is still potentially foreseeable that that firearm will be used in an act of violence, but because a person who complies with the registration requirements and, you know, adheres to the waiting period and lawfully sells the firearm enjoys a certain safe harbor, what the *Halberstam* court would term a lawful activity that might be used in an unlawful manner, and that's, in fact, what happened in *Halberstam*. The conduct itself in that case standing by itself, bookkeeping and banking, was neutral the Court said. But then there is a second kind of conduct, and to use my example again, if you sell someone a firearm illegally and you scratch off the serial number of the gun, then it is a lot harder for you -- not impossible, it is still a fact question, but it is a lot harder to say that it was not a foreseeable outcome that it would be used in the commission of a crime. And that's where *Direct Sales* came in, because it dealt with the sale of narcotics, I believe it was morphine by a pharmacist, which unlike moonshine in the prior Supreme Court cases where sugar -- they knew it was probably being used for [22] illegal purposes, but their own conduct looked at was legal -- when you are selling morphine or when you are selling guns that the serial numbers are removed, or when you are engaged in conduct with a state sponsor of terrorism that you know can be done legally in certain parameters but chose to engage in a criminal conspiracy to facilitate, you don't get the same benefit of lack of foreseeability of your conduct.

Turning for a moment to the letters of credit, not only were these letters of credit, in some instances -- over 1,300 of them, but in some instances expressly used for embargoed items that were prohibited because of their expressed prohibition being terrorism,

but it is also important to note that in many of these cases SCB was acting as the negotiating bank, which means that they were essentially the escrow agent between the parties, which also means that they had transparency that the other participants didn't have as to who was really financing the transaction, where it was going, what the nature of the goods were, et cetera.

The third element of knowledge from our perspective is the unusual events of 2006, when the U.S. Department of the Treasury began to actually brief foreign banks, big commercial banks like SCB, to tell them of the rising risk posed by Iranian invasion and the tools that they were using; namely the same tools of stripping transactions, converting them to [23] cover payments to avoid detection by U.S. law enforcement, and they specifically went almost door to door in an unprecedented fashion to notify them.

But even if Your Honor were to say, well, all those steps up until now are circumstantial and I don't think it's sufficient even for pleading purposes under Rule 8, when we come to November 6, 2018, the United States Government actually revokes the U-turn Exemption and that's paragraph 172 of the Second Amended Complaint. There the Treasury Department specifically stated, in revoking this exemption, that as part of a series of U.S. Government actions to, quote, expose Iranian banks' involvement in the Iranian regime support to terrorist group and nuclear proliferation, end quote. So, at that point in time, any illusion that any bank in the western hemisphere could have that stripping transactions or moving money illicitly in violation of the U-turn Exemption was just, quote/unquote, sanctions evasion, was legally and formally negated by the U.S. Government's action.

Lastly, looking at this in totality, the regulatory fines, the Treasury Department briefings, the U-turn Exemption revocation in 2008, criminal prosecutions and court-ordered monitors imposed, there is no question at least that plaintiffs have plausibly set forth that the New York Department of Financial Services was right. SCB, over the [24] course of time, had become a rogue bank, a rogue institution, that's the phrase used by the regulator, which, of course, we cite to and adopt.

So that brings us now, Your Honor, to the two causes of action: Aiding and abetting and civil conspiracy under *Halberstam*. So the elements under *Halberstam*, if I may, Your Honor, are number one, that the party the defendant aids must perform a wrongful act that causes injury. In *Halberstam*, that was the burglar, Mr. Welch, who ultimately killed Dr. *Halberstam*. Here's it's the IRGC that ultimately, together with Hezbollah, committed the attacks in question.

The second element is that the defendant must generally be aware of his role as part of an overall illegal or tortious activity at the time he provides the assistance. In *Halberstam* that was money laundering, essentially bookkeeping and banking, but essentially hiding the proceeds of quote/unquote property crimes at night. And here, the tortious -- I'm sorry, the role is that of concealing billions of dollars for the IRGC and facilitating export control violations, including for goods banned for terrorism.

And the last part is that the defendant -- this is number three, that the defendant must knowingly and substantially assist the principal violation. Again, in *Halberstam*, that was bookkeeping and banking and here it's providing a critical, essential element of

concealment to the [25] flow of funds for the IRGC's illicit funding and procurement networks.

Now, the Court and Your Honor actually noted in describing *Halberstam* that the criminal enterprise involved was stolen goods. And that's entirely correct. The objective of the conspiracy and the aiding and abetting, both in that case, involved stolen goods and a plan to assist stolen goods. The evidence in the case in *Halberstam* didn't even support the inference that Ms. Hamilton, the defendant, knew her boyfriend was a burglar, let alone that she had any knowledge of murder. She knew he was involved in property crimes at night and it was foreseeable that, as a result of that activity, he might -- whether as a burglar or as a fence or other property crimes of that nature, might commit an act of violence.

So, going back to where Your Honor started about proximate cause in *Rothstein*, *Rothstein*, I think, respectfully, has been a little bit overused or over-extended because of the degree to which it fits the pleadings of that case. Very briefly, in that particular case, UBS was working as sort of a, if you will, foreign agent of the Federal Reserve Bank. They were hosting and servicing the Federal Reserve as an offsite repository for U.S. bank notes, and UBS was caught giving those bank notes to Iran. It's not entirely clear to me whether it was the Central Bank of Iran or some other entity but an Iranian entity. And UBS falsified – or [26] at least, so the Government I always want to say alleged -- falsified some of its records so that the Federal Reserve Board wouldn't realize what was going on. The plaintiffs in *Rothstein* had a theory that they didn't have to prove proximate cause because once a violation was admitted, albeit a civil violation in that case, they therefore could enjoy the presump-

tion that any bank notes that went to Iran would therefore at least contribute to what Iran did in donating monies to Hezbollah or Hamas, which were the terrorist organizations that injured the plaintiffs in those cases. The Court therefore, I think quite reasonably, said that, number one, there's no sort of built-in presumption of proximate cause, you have to plead it. And we agree with that. And number two, the Court did not want to go as far as it would for a foreign terrorist organization, an FTO, where Congress made and the executive branch both made findings about the degree to which FTOs are so tainted by their unlawful conduct that any support to them is necessarily furthering their unlawful activities. It didn't want to extend that as far to a state sponsor of terrorism. So, *Rothstein* points to the fact that, number one, there was no allegation that UBS provided money to Hezbollah or Hamas, and number two, no allegation that the U.S. currency UBS transferred to Iran was given to Hezbollah or Hamas.

Here, however, we have a situation where the IRGC is [27] actually factually, at least for purposes of Rule 8 based on the U.S. Government's own findings, it was factually in the middle of this because it used NIOC as its agent to fund the IRGC.

THE COURT: I do have to stop you only because I think your constant conflation of IRGC and NIOC, because of this agency finding, is the problem. I mean, again, and I understand how you argue that *Boim* may provide some support, but I still don't see it because the case law all around this issue has consistently held that when you have a state sponsor of terrorism, such as Iran or its affiliate agencies, or it's agencies, and they have multiple functions, the causal connection is too attenuated. Because here, even though NIOC was

designated as an agent of IRGC, it's in your Complaint that NIOC also engages in other activities relating to the running of the Iranian Government and the support for the country, including daily oil sales. And so that is, I think, the fundamental problem with the causation; that the only connection between SCB is with NIOC and it's not directly with IRGC, but you argue that because of the finding of agency that it must necessarily be so for purposes of causation that the money that was managed for NIOC through or by SCB has to have caused the terrorist acts ultimately committed by Hezbollah, even if working with IRGC. And that's I think the problem you can't quite argue around factually, based on your own [28] Complaint and based on the facts as they exist; even if NIOC was an agent, it certainly doesn't mean all of their money went to IRGC, and that you would have to acknowledge; correct?

MR. OSEN: I do, Your Honor. But to be clear, in almost -- maybe there is an exception I'm unaware of, but in almost every FTO case the vast majority of the money, NIOC might actually be the exception to some degree, in almost every case the FTO is receiving money that it doesn't use for terrorist purposes. They run their infrastructure. You actually pointed to it yourself a moment ago, Your Honor; the IRGC runs a substantial part of the Iranian Government, by no means all of it, but a substantial part of it. It's part of the problem, at least from the standpoint of the United States, and hence the result of numerous designations and findings. And that's precisely the point. Once there's a designation of the IRGC as an FTO then, at least for pleading purposes, anything that is controlled by the IRGC by an FTO is illegitimate and that is -- that is the fundamental issue here.

THE COURT: I'm sorry, anything that is controlled by the IRGC by an FTO?

MR. OSEN: No, as an FTO. Any time an FTO -- in this case right here, the IRGC, operates everything from airlines to construction companies to all manner of things, that really genuinely do mix cement and fly airplanes and [29] drill oil, but that doesn't change the fact that it is all done on behalf of an FTO.

THE COURT: But it is not all done on behalf of an FTO. I mean I think that is a fundamental problem. I'm not saying that -- or rather the Complaint clearly shows that some of the money could well have been used for exactly the purpose you say, and certainly the Federal Government has found it appropriate to designate them as SDN or state sponsors of terror, but for purposes of legal causation, you still have too many links that diffuse or interrupt or sever the causal connection because you have to show that it is a substantial factor in the sequence of responsible causation, and I think that's the problem that the cases before and after my decision have all found to be problematic. That's why I think with respect to SCB, for example, you are going to have the -- more so than even I would say Saderat, more the problem with causation. In other words, you can't get around the fact that NIOC is the only entity they were dealing with.

MR. OSEN: Well, that's actually not entirely accurate in the sense that, first of all, they were acting both with NIOC and MODAFL, M-O-D-A-F-L, I believe, which is the military procurement arm of the Iranian military/IRGC, and we lay out in the Complaint the work chart between them, and, of course, with other NIOC subsidiaries. So it is definitely true, Your Honor, that if the requirement, even for an FTO, is [30] that it go exclusively or even primarily to the perpetration

of terrorism then not only do we lose in this case but almost every plaintiff in every case loses because there is no such thing, at least in civil ATA cases, of funding and financial services to an FTO; that is purely to the FTOs military or terrorist purposes.

THE COURT: Well, I don't think that's correct. I mean, obviously JASTA is still being interpreted, but even under pre-JASTA law where you have a bank that is maintaining accounts for terrorist organizations or their proxies, their fundraising arms, then you will be able to establish liability. Your statement that plaintiffs will never be able to recover under the ATA or JASTA I think is just not true. In fact, there are many case, many of which you rely on, where liability, at least at the pleading stage, was acknowledged as a possibility. Here, though, there is a clear departure from those lines of cases in situations like these where the accounts were being held for state agencies -- when I say state, I mean countries, like NIOC, like MODFL, where they have so many other functions. You cannot meet your pleading requirement or burden to show that the actual monies maintained by the defendant banks were used to cause the terrorist acts that resulted in the injuries to the individuals in Iraq during 2004 to 2011.

MR. OSEN: But, Your Honor, the United States [31] Government has itself found that. They might be wrong about it, but they --

THE COURT: But found what? Yes, they found some of those funds did go there, but, again, we are talking about these massive multibillion-dollar state agencies that occupy a whole bunch of different roles just to fund the Iranian Government and not specifically dedicated to terrorism.

MR. OSEN: I agree with that, Your Honor, but if the state agency is an FTO, if it's been designated an FTO, it does not enjoy the presumption of legitimacy the way the Department of Motor Vehicle does.

THE COURT: But when was -- Iran was designated -- you are talking about the state sponsor of terrorism?

MR. OSEN: No, I am speaking about the FTO designation.

THE COURT: Hezbollah?

MR. OSEN: No, IRGC.

THE COURT: In 2019.

MR. OSEN: Correct. But the conduct for which it is designated is always retrospective.

THE COURT: Now you are mixing two different things. For the purposes of applying JASTA, they have to be an FTO and clearly IRGC was not until 2019. Correct?

MR. OSEN: Yes, but only for the first prong of JASTA, Your Honor, that's part of our argument. JASTA, as

[32] Your Honor recognized, has two prongs. The first is the standing requirement, I call it, but it's just the first prong which Your Honor identified that the plaintiff be injured by an act of international terrorism committed, planned or authorized by an FTO. But then there's the second prong, which is the liability prong. The first one establishes what category a plaintiff may sue; those who are injured in an attack, planned, committed or authorized by an FTO. The second prong simply speaks about people who aid and abet or conspire with the person who committed the

attack. That doesn't have an FTO requirement and it doesn't track the language of the FTO requirement.

THE COURT: All right. I will hear from the defense on that. I just -- again, I think, though, even accepting that, the problem still though is that SCB only dealt with NIOC. Again, I'm talking about causation here in terms of showing that NIOC, that connection to NIOC and that relationship with them, somehow then is enough to establish causation to the actual terrorist attacks committed by Hezbollah in theory working with IRGC.

MR. OSEN: Right. So from our standpoint, the first prong of JASTA, which Your Honor acknowledged in your opinion, is satisfied by Hezbollah being an FTO at the time and having committed, planned or authorized. We submit, Your Honor, that on the second prong is satisfied if SCB aided and abetted or [33] conspired with the person who committed the attack and that the IRGC satisfies that second prong. It doesn't have to be Hezbollah. It can be the IRGC or an individual or a company or an association unrelated to Hezbollah as long as it meets the *Halberstam* standard that the conduct involved involved wrongful conduct that foreseeably could lead to injury.

THE COURT: But still, even if it meets the definition, which I actually still don't agree that somehow SCB working with NIOC, which is in turn -- or has been designated as an agent of IRGC, who then in turn is working with Hezbollah even assuming that that satisfies JASTA, there still is a causation requirement, is there not?

MR. OSEN: There is, but Your Honor actually cited before a substantial factor which is the correct standard for 2333(a) liability. The standard, as I mentioned

a moment ago, under *Halberstam* is slightly different, which is substantial assistance. And the question --

THE COURT: Well, that is for aiding and abetting.
MR. OSEN: Yes.

THE COURT: But again, causation. We are still just talking about, as opposed to the elements of an aiding and abetting crime, we are talking about just causation.

MR. OSEN: Right. So causation is obviously, as Your Honor knows, a different analysis for aiding and abetting than it is for conspiracy. They are mirror images of each [34] other; aiding and abetting focuses on the substantial assistance and the directness and conspiracy focuses on the agreement part because it is necessarily the case that the conspiracy causes the injury. The question is whether the defendant joined in the agreement that led to that. So they are mirror images -- I see Your Honor is frowning.

THE COURT: I'm looking very puzzled because I don't see them as different. The bottom-line is you do have to show some connection, either between the conspiracy or the act that was aiding and abetting, to the injury being claimed and --

MR. OSEN: We agree.

THE COURT: -- the standard is substantial cause for the -- in the responsible causation chain. The language is a little bit cumbersome, but that's where I think you're still having a problem because the bank here, SCB, was only dealing with NIOC and then NIOC in turn is an agent, according to the Government, for IRGC. But NIOC, itself, is a vast agency whose funds are used for multiple purposes and so the causation in each step becomes less and less, but

certainly at the very first step is where it goes into this vast pool of money, some of which one reasonably could infer went to the IRGC and then maybe some of that you could reasonably infer supported Hezbollah in its effort to commit the acts of terrorism that are alleged here. But you really have so diminished the causal chain that that's, I think, the problem

[35] I'm having with your argument still.

MR. OSEN: I understand that. Let me say two things: First of all, with respect to the actual fact, obviously, that's ultimately a factual determination, but for pleading purposes, as I pointed out to Your Honor, the Treasury Department itself in revoking the U-turn Exception -- or Exemption, in 2008, found that the conduct we're talking about, which is stripping transactions, taking money and converting it to cover payments so that the law enforcement and intelligence services wouldn't be able to detect it, was, in fact, being used to support terrorist groups. That's the reason the Government revoked the exemption, because it found as a factual matter -- one defendant is free to contest, but the Government found that this conduct, not just by SCB or by any one Iranian bank or NIOC, but by all of them was, in fact, supporting terrorist groups and nuclear and missile proliferation. We don't think the plaintiffs' should be penalized because the amount of money moved by the Iranian Government was so vast, and the amount of money that was laundered was so vast, that it dilutes the causation factor here. The bottom-line is that the IRGC was -- although not designated as an FTO until 2019 -- it was, as the Government itself found, a terrorist organization from its foundation in 1979. So, the idea that it has legitimate functions, I don't dispute any more than that the NIOC sells oil or that

that oil [36] is used for many purposes, any more than I do that the hospital in Gaza actually sees patients or gives out medicine, or has real doctors, at least by local standards, who do actual medical work, or that the kindergartens in schools run by Hamas are not legitimate in the narrow sense that they actually do provide a service; they are real. They are not just a storefront that conceals purely illicit conduct. Sometimes, at least in movies, we see a mafia movie where it's just a storefront and really behind there they are running a casino or they are doing other activities. That's not the case here and we don't maintain that, but we don't maintain that with respect to the IRGC and, also, that was not the allegation or the findings in *Boim* or any of these other terrorism cases. In fact, the statute 2339B was enacted precisely because Congress recognized that there was a gap or loophole in 2339A. 2339A focused on commission of terrorist acts and Congress realized that people could get away with funding terrorism by characterizing it as charitable donations or other more benign conduct, and so they passed 2339B to make any contribution to -- knowing contribution or material support to a terrorist organization unlawful.

THE COURT: But JASTA is similar in that regard because it has a requirement that an FTO be the direct connection to whomever is going to be held secondarily liable, right?

[37] So let me just stop you for one second, because in my decision I did make much of, which is where you started, the fact that -- or that there was no allegation that Defendant SCB had any direct contact with the FTO that committed the crime -- sorry, the international act of terrorism, Hezbollah or the IRGC. And in that context, what I was talking about was what you

are trying to then say about NIOC, which is that IRGC is arguably, at least based on the Complaint, some kind of proxy for Hezbollah. So if there was evidence or an allegation that the bank had dealt directly with IRGC, perhaps this would be a situation where the case could go forward, but you are trying to establish another link, which is NIOC to IRGC and then IRGC to Hezbollah. And, again -- and, quite frankly, I still think there might be an issue with IRGC because of what you said, which I think is true based on the pleadings, which is that these are very large agencies that have multiple functions, some of which are legitimate and some of which are not.

I don't agree with you that Congress sought to address or in any way change the requirement that you at least show that the organization that it would be problematic to deal with is an FTO, or at least so closely aligned with an FTO to be some kind of front or money-raising operation when it passed JASTA. I think, if anything, it confirmed that you at least have to have a very tight nexus or a reasonably tight [38] nexus between the potentially liable party under the ATA or under JASTA. That I think is true; they didn't make it wide open as you suggest, but rather still tied into some kind of designated terrorist organization.

MR. OSEN: I think that's partially correct, Your Honor, but, again, if I can just go back to Your Honor's own analysis of the two prongs of JASTA requirement. The first prong is the one Your Honor is alluding to and that's where the injury has to arise from an act committed, planned or authorized by an organization that's been designated.

THE COURT: Which is Hezbollah.

MR. OSEN: Correct, and we agree with that. But, in this instance, and it's not the only instance, Your Honor, terrorist groups, specifically the IRGC and Hezbollah. Hezbollah is essentially a subagency of the IRGC, but it's true even in cases like the Taliban and the Haqqani Network is another example.

(Continued on following page.)

[39] THE COURT: Let me stop you there. You keep calling it a terrorist agency. It wasn't designated as such back in 2004 to '11.

MR. OSEN: Correct.

THE COURT: It only got designated as that in 2019 which aside from the history of the conduct, which I understand you may allege in terms of whether it shows some sort of conspiracy or aiding and abetting elements with respect to the defendants, but in terms of JASTA, JASTA says an FTO which has a very defined meaning.

MR. OSEN: We agree but that's for the first clause of JASTA. So the first clause is the clause that gives rise to the plaintiff's claim as Your Honor pointed out. The reason for that is to limit, and there's a very practical Congressional reason for it, Your Honor, which is the same that distinguishes 2339A from B, and why, for example, when Congress passed the Clarification, the ATA Clarification Act, it made a specific note that the act of war exception wouldn't apply to conduct committed by an FTO or an SDGT.

What they were trying to do was to avoid the politically more problematic circumstance where someone can bring a claim based on what would meet the definition of terrorism from the standpoint of 2331, an act of international terrorism, but one that wasn't

committed by a designated FTO. They wanted to limit the field to those attacks that would not [40] give rise to any other complications because there were clearly an FTO involved. And that we agree with completely.

Then it comes to the second prong where, as Your Honor pointed out in your decision, the Court did not repeat the language from the first section. It did not say that such an act of terrorism was committed, planned or authorized liability maybe asserted against that foreign terrorist organization. It says, again, as to any person who aids and abets. "Any person" is the widest possible phraseology and they went a step further and changed the definition of "person" that actually covers section, that title of the U.S. Code from 1 listed in 2331 to 1 USC 1. I mean, the cause, as Your Honor points out, they wanted to cover, as the purpose of the statute said, those who both directly and indirectly support terrorism.

THE COURT: I am going to stop you.

Everything you are saying was argued before and I did consider it and just as you said in the beginning, at page 44, I think, at least I meant to address exactly the argument you're making about the second element, that given the most generous meaning possible, the second amended complaint alleges that FTO Hezbollah -- and I'm not going to pronounce it correctly -- Kata'ib Hezbollah and the IRGC, which is an SDGT, acting through agents and proxies, are the agencies responsible for committing the acts of international [41] terrorism.

So, yes, I am agreeing with everything that you're saying and that is what I applied. You and I just disagree about how I applied it when you then say that NIOC comes under the same umbrella. There I said no

because the allegation is only that the defendant SCB worked with NIOC. Okay? And that's why I said you've gone perhaps a bridge too far which may be the best expression because NIOC is a vast agency, and I know I'm repeating myself, that has billions of dollars or millions of dollars that are used for all sorts of purposes, some of which according to the U.S. Government are used to support IRGC and to the extent that IRGC is working with Hezbollah, in turn, to Hezbollah, but you haven't, A, convinced me that they meet the second requirement of JASTA as a person working with the person, sorry, working with the entity that was responsible for the act of terrorism alleged here and, more fundamentally, causation.

So, again, I feel that we're going in circles because I am just disagreeing with you about this last point, whether or not SCB can qualify as a person for purposes of JASTA, whether aiding and abetting or conspiracy. I just don't find that to be the case given that the most that can be said about them is that they facilitated transactions for NIOC.

MR. OSEN: Right. I think, Your Honor, maybe I [42] misheard you, but I think you said SCB and I think you meant NIOC.

We agree that if Your Honor does not treat NIOC as the government did as an agent of an FTO, that is if it's not an agent of an FTO factually, we lose.

THE COURT: I think that -- I don't even know if I agree that that's the only way you lose. It seems to me –

MR. OSEN: Well, that might not be.

THE COURT: Right. I understand what you're saying. I am not sure I agree because my ruling is slightly different because even accepting, as I did, that NIOC has been found to financially support IRGC or, in some

ways, engage in financial transactions that may benefit terrorists such as Hezbollah, I still don't think you've met the burden or have sufficiently alleged for purposes of JASTA that they qualify as a person working with the party or the entity that carried out the act of terrorism nor do I think you've met the standard for causation which is a substantial factor in the reasonable chain of causation.

So for all those reasons, you haven't caused me to rethink or reconsider what I previously found. I also didn't find, as you know, that SCB's involvement with NIOC or its role in facilitating transactions for them was sufficient to establish conspiracy for purposes of primary liability under the ATA. So I understand you're making two separate [43] objections or motions for reconsideration.

So it hasn't changed my mind in that regard. Though I appreciate, I appreciate what you're arguing in a sense but as I said in the decision, it's really up to Congress to change the statute to address the situation that you're talking about and I also think the case law that I'm relying on -- and it's set forth in the decision so I won't rehash it -- doesn't support your argument.

I'm not convinced that your reading of *Rothstein* is correct in that I don't think Rothstein's been overread. I think everything in *Rothstein* seems to apply directly to the situation presented here, but we're rehashing, I think, arguments and issues and law and facts or factual allegations that I think I considered already with respect to SCB.

MR. OSEN: Yes. I won't belabor the point except to note that the *Rothstein*, of course, was applying primary liability.

THE COURT: Yes.

MR. OSEN: And the Court also cited on the conspiracy front *Kemper* which was also a primary liability case. The governing standard for civil conspiracy is *Halberstam* and that's really the controlling case here on civil conspiracy.

THE COURT: Yes, you said that. I don't agree with that either. Remember, for primary liability, you're relying, [44] for conspiracy primary liability, which is a bit oxymoronic but I understand what the case law says, you're applying the criminal statute so the standard that should apply is conspiracy for purposes of establishing a 2339A or B violation.

MR. OSEN: That is correct under primary liability. It's not correct for JASTA liability.

THE COURT: That I agree with you on. I think Congress was clear that *Halberstam*, that's the governing standard for conspiracy liability.

The other thing I wanted to say though before hearing from the defendant SCB is that you're saying now that it's been your claim under JASTA, not actually -- let me strike that. Sorry.

You are saying now that I should consider your claims as being aiding and abetting under JASTA. I think we should be clear on this.

To the extent that I said at the first meeting with all the parties that I'm assuming that the claims are being construed under JASTA as well or broader under JASTA as well, I was not in any way endorsing the theory that you were alleging aiding and abetting along with conspiracy under JASTA. In fact, I did not think that based on the letter that's been cited by SCB which was docketed as 222. I read that letter, and I

understand what you're saying about the [45] second part of the letter, but the letter seemed to stake out the position at least to my mind that the plaintiffs were relying on the conspiracy theory both for purposes of primary liability under the ATA and then also under JASTA. That certainly was the focus of the briefing thereafter.

That all being said, I am not going to preclude the plaintiffs from amending, if we get to that point, and I'll discuss that later, their complaint with respect to aiding and abetting liability under JASTA. But when you said that the decisions cited by defendants, which included *Weiss* and *Strauss*, had no legal relevance, one of your main points was that those cases talked about aiding and abetting liability and didn't talk about conspiracy. So that, to me, signaled the fact that your claims were about conspiracy, even though you suggested later that even if one considered them for purposes of their aiding and abetting relevance, they didn't preclude your claims.

Nowhere in any of your submissions have you actually used the words, We are alleging aiding and abetting liability under JASTA, and even in your briefing now, you simply say that one of the elements is met, namely, a general awareness of the terrorist activities of some of these entities that they provided banking services for, but I just think the way you proceeded is not exactly or I find it a little disingenuous, to be perfectly frank, because you never [46] declared in this case that you were advancing an aiding and abetting theory.

There's been so much briefing for the last year and a half or two years, that it seemed to me at some point, post JASTA, and I realize the briefing started before JASTA, that in these many submissions that I've

received, that you would have clarified that you were actually claiming aiding and abetting liability or to Judge Irizarry, Chief Judge Irizarry who had the case before me. I think the defense has a theory as to why you didn't do that, because of some of the decisions Judge Irizarry wrote, but nonetheless, I wanted to be clear that I didn't actually believe or interpret your cases alleging aiding and abetting liability under JASTA even after the statute was passed.

That being said, I would not preclude you and I still consider your arguments now in consideration under a theory of aiding and abetting liability and I'm aware that your other cases do, in fact, and expressly state an aiding and abetting liability theory.

Okay. So let's turn now to Mr. Finn who has been waiting very patiently.

Go ahead.

MR. FINN: Sure, Your Honor. And, you know, I think a lot has been argued already and so I won't rehash what's already been discussed.

[47] I think the key is to start with what the standard is for reconsideration, whether there's been any binding authority overlooked. The plaintiffs have not said that Your Honor, for purposes of this reconsideration motion, overlooked any binding law in this Circuit and whether the Court overlooked any allegations or facts -- there need to be factual allegations for a motion to dismiss -- that would have changed the outcome.

The only other thing that they've pointed to is, as Your Honor pointed out, the allegations with respect to NIOC, the National Iranian Oil Company, and its connection, its alleged connections to the IRGC. I

think with respect to that, and before you even get to a causation problem, you run into all the other grounds that Your Honor found were insufficient to plead a claim.

On the primary liability claims, Your Honor found that there were no allegations suggesting that any of the defendants, including Standard Chartered, entered into any conspiracy to provide material support to any terrorist organizations, FTOs or otherwise, and that is a gating issue, I think, here.

The fact that there were transactions conducted prior to 2012, in effect, prior to 2008, 2007, for the benefit of the National Oil Company in Iran, really doesn't change that calculus of whether there's factual allegations [48] suggesting that Standard Chartered or any of the other banks entered into an agreement, just focusing on the conspiracy theory here, an agreement to either support terrorism for primary liability purposes or to conspire with, as JASTA says, the person who committed the act of terrorism that injured the plaintiffs here. You know, so that's the first ground, I think, that nothing that has been pointed to in the papers under reconsideration or today really changed that finding or put that finding into doubt.

Secondly, I think there's still a fundamental statutory problem that they have with respect to JASTA which I think is the basis of what I think the plaintiff's counsel referred to as the lynchpin of the Court's ruling on the secondary liability piece which was at page 44 to 45 of Your Honor's September 16th opinion.

That part, really, Your Honor I don't think was reconsidering or changing its ruling with respect to the fact that there hadn't been any conspiracy to support any sort of terrorism in the first part of the opinion. It

was simply looking at the statutory language of JASTA which requires, number one, there to be an FTO designated at the time of the relevant attacks that injured the plaintiffs here, so not IRGC, certainly not NIOC but certainly not IRGC which was only designated in 2019, and then you gave the allegations that a defendant either aided or abetted or conspired with the person [49] who committed that act of terrorism, meaning that act of terrorism that was either planned, authorized or carried out, committed by the FTO designated at the time of the attached.

So pointing to IRGC here really doesn't help with the fact that, you know, whatever the case may be with respect to the links between IRGC and the National Oil Company in the time period relevant to the attacks here and the conduct by Standard Chartered and the other banks as alleged in the complaint really doesn't shed light on any relevant connections that might bring this within a JASTA claim or shed light on the knowledge requirements in order to enter into any conspiracy under JASTA or to enter into some sort of aiding and abetting relationship, both of which require intent, knowledge by the defendant that they are entering into, to further the act of terrorism that harmed the plaintiffs here.

So I think nothing that has been pointed to changes that and I think that some of the argument is really about the interpretation of the statute which was really not squarely asked to be reconsidered on this motion and it's really not the place to argue about it. I think that was argued for years and there's been a lot of developments that the Court is aware from the Second Circuit on what JASTA means and there's been, since Your Honor's decision, another case that

we have cited, the *Kaplan* case from Judge Daniels in the Southern District of New York.

[50] So I think there's a statutory problem before you even get to the proximate causation issue and, as Your Honor did rule and expressly rejected because it wasn't a point that was argued, it was a point that was argued and addressed by Judge Pollak, and that is whether, whether the *Rothstein* constructs of proximate causation still applies in a JASTA context. I think the Court dealt with that in footnote 35 of the opinion rejecting the idea that there's some sort of relaxed proximate causation requirement under JASTA.

So, you know, I guess the other question that came up specifically was about the Seventh Circuit decision in *Boim* III. To my knowledge, although I don't have it here, of all the cases that we've talked about, I don't have it in front of me, but looking back, I believe that that case did not involve the question of whether conspiring to provide materials and support to a terrorist group could lead to civil liability under Section 233(a).

So not only is it out of Circuit and I think no longer applicable in light of, in light of the *Rothstein* decision and in light of what we've seen more recently in the *Siegel* decision, I think it's not, it's not on force by any means with respect to the facts of that case.

Unless Your Honor has any questions --

THE COURT: No. That's fine actually and, obviously, as you can tell from my comments toward the end, [51] I'm in agreement with what you are saying.

I did want to note another decision that came out of this court in a slightly different context from Judge

Garaufis a few days after my decision. It was in the context of a drug cartel and there, the plaintiffs were individuals who were killed or harmed by members of the cartel and they brought it under JASTA and I want to say the ATA. I'm looking at the decision now. I'm sure you're all aware of it, but it's *Zapata v. HSBC Holdings*, it's 2019 Westlaw 49118626, issued September 30, 2019. Docket number 17-CV-6645.

This I say not out of any vanity at all, Judge Cogan does cite *Freeman* for generally the same proposition, that there is a causation issue because the cartel engages in all sorts of activities and a lot of violence that even HSBC's alleged assistance in laundering funds for the cartel would not satisfy the -- I'm sorry.

I might have made a mistake here. I think I added a number in the Westlaw cite, my law clerk is pointing out. Westlaw site is 2019 Westlaw 4918626.

At any rate, Judge Cogan adopted the same reasoning about the issue with causation when you're talking about such a large organization as a cartel and there, as I did, he found that the amount of money, even though it was quite vast that was allegedly handled by the bank for the cartel, was not sufficient to meet the requirements for causation between the [52] conduct and the alleged injuries, meaning the conduct of the bank.

So I did want to point that out in case you folks had not seen that.

The other thing I wanted to say was looking at *Boim*, I think what's important about the case is that it stands for the proposition that to give money to an organization that commits terrorist acts is not intentional unless one either knows that the organization engages in such acts or is deliberately indifferent to

whether it does not, meaning that one knows that there is a substantial probability that the organization engages in terrorism but one does not care.

Now, in that case, there is discussion about being a knowing donor to Hamas and I too would have to go back and look at the facts, but I don't think what you had said, Mr. Osen, is quite right, but I imagine your memory of the case is far better than mine right now, but this notion that there were these intervening *zakats,* that could be likened to NIOC in our scenario, because it was pretty clear as I recall from the decision that *Boim* stands for the concept that where you are knowingly assisting a terrorist organization or at least alleged to have done that, you could be found liable as matter of causation and also as matter of conspiracy or aiding and abetting. Obviously, what *Boim* is best known for and cited for is this notion of primary liability with the [53] secondary characteristic based on the 2339A and 2339B statutes that are the predicate for the 2333(a) claim.

At any rate, I'm not going to belabor this point. It doesn't change my mind in terms of the ruling, but I just wanted to mention that I am not quite sure that *Boim* is as distinguishable as you suggested, Mr. Osen. I also do think that *Rothstein* does, as I said in the opinion, establish the causation standard which is a considerable stumbling block in this case and I think *Rothstein* is still good law in the Circuit post JASTA.

I want to turn now -- although I will give everyone a five minute break, we have been talking for awhile now, I want to turn to Saderat for a moment which, obviously, is of less concern to you folks. So let's take five minutes. Come back at 10 of 4:00.

(Recess taken.)

(Continued on next page.)

[54] THE COURTROOM DEPUTY: All rise.

THE COURT: Have a seat everyone.

So, Mr. Osen, I want to turn to your motion for reconsideration with respect to the claims against Bank Saderat PLC.

Your argument focuses again on factual allegations that you say are overlooked in dismissing plaintiff's claims against -- I will just call them B.S. -- let's see, B.S. PLC, and the main one that seems to be the focus of your argument is the allegation that, in a Treasury press release, the Government said that it had found that Bank Saderat PLC had funneled funds to support or to bank accounts controlled by Hezbollah, and that, you say, is sufficient for purposes of stating a primary liability claim as well as a JASTA claim against Bank Saderat PLC.

So can you elaborate exactly? Because that is the only allegation about a connection between Bank Saderat and some supposed front organization for Hezbollah.

MR. OSEN: Yes, thank you, Your Honor.

There are, I think, two allegations essentially against Bank Saderat that are interconnected. I believe in 2006 they were removed from the U-turn Exemption for the same ostensible reasons that they were later designated, and so they did not incidentally or unknowingly, but presumably knowingly sent money on behalf of the Central Bank of Iran to

[55] Hezbollah, or to agents of Hezbollah, along with Hamas and other organizations as well. And they did so specifically, the designation found, through

Bank Saderat Iran's London subsidiary, which is the defendant in this case, Bank Saderat PLC.

THE COURT: But that's the allegation, not even identifying what the crime organizations are, just these two are the sole claims in the -- sorry, in the Second Amended Complaint with respect to Bank Saderat's involvement in actual direct contact with?

MR. OSEN: With Hezbollah, yes.

THE COURT: Is there a reason that only Bank Saderat PLC, which is the subsidiary in London, is the defendant and not Bank Saderat Iran, which I gather based on this statement it is the direct connection to the Central Bank of Iran?

MR. OSEN: No, Your Honor. As I understand the Treasury Department, the funds were routed from the Central Bank of Iran through Bank Saderat London and then to accounts at Bank Saderat Lebanon.

If you are asking why we didn't additionally sue Bank Saderat Iran, they are subject to suit under the Foreign Sovereign Immunities Act as a direct instrumentality of Iran, whereas the London subsidiary would fall outside of the Foreign Sovereign Immunities Act and into the ATA context.

THE COURT: But that is what was done in the [56] decision you cited, the *Lelchook* decision, which I was aware of when I issued my prior decision, but they alleged an FSIA claim there -- oh, no. Actually, they do not. I take that back. Actually, they are awaiting, I think, a decision in the D.C. District Court brought under the FSIA.

MR. OSEN: Yes. Because, generally speaking, the Foreign Sovereign Immunities Act venue is District of

Colombia. For the subsidiaries of an instrumentality, it would be brought under the ATA.

THE COURT: Yeah. Is there anything more you wanted to add with respect to Bank Saderat? Because I will tell you, though I find this particular allegation, and as I did before, slightly closer to what might be sufficient for purposes of JASTA, aiding and abetting, but I don't think it's enough to establish any kind of conspiracy. But even so, I find still there is a problem again with causation because it's quite vague and I just don't think it meets the plausible standard set forth by *Iqbal*/*Twombly*, though I acknowledge that this one is slightly closer than any of the other defendants, including SCB. But this is a very thin read for purposes of causation and I don't think it suffices. I certainly don't find, as I found for all the other defendants and all the other claims, that it meets the standard for establishing conspiracy that Saderat entered into, but the question I guess is more for aiding and abetting liability. This is why I mentioned what I [57] did about the Complaint not having that claim, but at this point construing it as having one with respect to with Bank Saderat -- but I still just don't find it's enough.

So tell me anything more you want to about your motion for reconsideration with respect to Saderat.

MR. OSEN: Thank you, Your Honor.

Just to be clear, unlike SCB for which there was this seventh claim for relief for primary liability, which is the -- again, to use Judge Posner's phrase, the secondary liability through primary liability theory, there is no equivalent claim for aiding and abetting in the Complaint with respect to Saderat and we have not maintained that there is one.

THE COURT: Oh, so you are not alleging aiding and abetting under JASTA with respect to Bank Saderat?

MR. OSEN: The way I would frame it, Your Honor, is that there is no such claim in the Complaint and, therefore, it wasn't the subject of reconsideration.

THE COURT: Okay. Now you have lost me.

But I thought that you were saying that SCB was wrong about your claims?

MR. OSEN: Yes, with respect -- and I recognize this is a five-year saga, so let me take a step back and say that there were seven claims for relief and two of them, one against SCB and one against Commerzbank, were what I would [58] call aiding and abetting claims, but they were not secondary liability aiding and abetting; they were, if you will, *Boim* or primary liability with the elements of aiding and abetting. That was as to Commerzbank, I think it was Claim No. 6 and SCB Claim No. 7.

The other claims, and that's why that was always the focus of the parties' exchanges were Claims One and Two for relief, which focused on conspiracy, either for violations of 2339A or 2339B, and then there were subsequent claims for I think it's Section 2332(d), as well, but we need not go down that road today. So there was just no claim in the original *Freeman* complaint for aiding and abetting against Bank Saderat.

We would contend that the allegations set forth by the Treasury Department that involved the Central Bank of Iran, Bank Saderat Iran, and Bank Saderat PLC, the defendant here, and obviously unnamed non-Iranian banks that did the dollar clearing for them, conspired to provide funding to Hezbollah.

THE COURT: Okay.

MR. OSEN: And that's the element of the claim.

THE COURT: All right. Well, that's actually a helpful clarification. I don't find that it does meet the elements for the reasons that I said in the decision when speaking about all of the defendants and the primary liability [59] conspiracy claim and as well for purposes of the JASTA claim, which would also require some finding of a conspiracy -- or, I'm sorry, a sufficiently pled conspiracy.

I do want to note that, in your Amended Complaint, what you alleged was in the Treasury Department press release to me was relevant or was the main reason I think it's just not enough to meet those elements, namely those for conspiracy. Because even this press release, which is obviously not findings in and of themselves, say that Bank Saderat and its branches and subsidiaries, which includes 3,200 branch offices, has been used by the Government of Iran to channel funds to terrorist organizations, including Hezbollah and then other terrorist organizations, and then it has a sentence that you focus on, which is: For example, between 2001 and 2006, Bank Saderat transferred 50 million from the Central Bank of Iran through its subsidiary in London, which is a defendant here, to its branch in Beirut for the benefit of Hezbollah fronts in Lebanon that support acts of terrorism. And though that certainly was sufficient in the Treasury Department's mind to take certain actions in designating Bank Saderat PLC as an SDGT, I don't think it's sufficient for purposes of establishing conspiracy under 2339A or 2339B for purposes of an ATA claim, nor do I find it sufficient for conspiracy under JASTA. Those elements essentially being the same, at least in terms of a conspiracy.

[60] So, I'm not altering my decision in that regard either. I had mistakenly thought, coming in here, that might be an aiding and abetting claim made on behalf or with respect to Bank Saderat, as just as I said a moment ago perhaps under JASTA that might be a closer call. But I think, as a result of all this -- and let me just make formal my decision, because I don't intend to write, given the longevity of this case and even the pending motions -- I certainly respect the views that have been expressed by the plaintiffs and the efforts that has gone into bringing the case, to be sure. As I said in my decision, the result may not be satisfactory from a moral or policy point of view, but my belief is that I, as a judge, must follow what I think the precedent is showing me in terms of the path or the path that I think that is being lit by the Second Circuit in other cases -- and other cases, rather, so I am affirming my prior decision in denying the reconsideration motion, or partial reconsideration motion. I will note that the standard is strict with respect to reconsideration and a motion for reconsideration is an extraordinary request that is granted only in rare circumstances, such as where the court failed to consider evidence or binding authority. The standard for granting such a motion is strict and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the Court overlooked; matters, in other [61] words, that might reasonably being expected to alter the conclusion reached by the Court. And I am citing a 2019 decision from the circuit, *Van Buskirk v. The United Group of Companies, Inc.*, 935 F.3d 49 at page 54.

Here, as I have said and obviously discussed with Mr. Osen, I feel that I have considered both the facts and the law that the plaintiffs are relying on for reconsideration. As the defense has noted, I did accept

the allegations in the Complaint which demonstrated or could be construed as demonstrating a number of the facts that the plaintiff still rely on in alleging or saying that a claim for conspiracy, or even aiding and abetting, should go forward either under -- as primary liability under the ATA or a secondary liability under JASTA. So I don't see and I'm not persuaded that the extraordinary circumstances exist for me to change my decision. Certainly the parties will have an opportunity to take this up with a higher authority. As I said before, the time under Federal Appellate Rule procedure for is tolled until today and so now it begins to run for plaintiffs to notice their appeal, which I assume they will.

I think that covers anything. Is there anything else that the plaintiffs want to state on the record?

MR. OSEN: Just two things, Your Honor.

THE COURT: Yes.

MR. OSEN: First, the process point. As Your Honor [62] knows, we have two additional cases.

THE COURT: Yes.

MR. OSEN: And I think it makes sense, after today's ruling, that we meet and confer with defense counsel and at least see if we can't figure out a way to sort of streamline the process. I think, from the plaintiffs' standpoint, we would probably favor a dismissal in those cases that could be consolidated in some form, but I haven't honestly thought through all of the permutations. So we will discuss that, and if there is something we need further from the Court, we would respectfully request the opportunity to come hopefully in a shorter conference for Your Honor to sort of just sort that last bit out in terms of the other cases.

THE COURT: That makes perfect sense. Based on my recollection, the claims are the same and part of the reasons one of the cases was brought, if not both of them, was the concern about the Statute of Limitations running in terms of trying to add these individuals to this case. I was going to mention that I think the cases should be consolidated and, obviously, if the parties can come to some agreement about a stipulated dismissal or asking me to dismiss it solely for purposes of allowing all three cases to go before the Circuit at the same time, I would certainly do that, without plaintiffs having to waive any arguments that they might otherwise have had that are unique to those cases. I just [63] don't know if there are any.

So why don't we give you folks 30 days to decide what you want to do and I will hold the time for you to notice your appeal until then; I mean, because it may effect obviously what you are noticing your appeal about or for.

I suspect the first thing we could do is simply consolidate these cases and then you only have one Notice of Appeal and I could, in summary fashion, say that my rulings apply to all the other plaintiffs in all the other cases, the two other cases that have now been combined.

MR. OSEN: Right. The complexity, I guess, Your Honor, is not with respect to Your Honor's rulings, which we understand, but to the extent that the other complaints elucidate the JASTA claims. The defense might have a different view of that. We will talk to them about it, but we might consider -- I haven't honestly given this enough thought, and I apologize for ruminating on it, but it might make sense to write a consolidated complaint that allows Your Honor then to issue an order as to that, but they may have their own

view on that. We will just discuss it with them and figure it out.

THE COURT: Well, that is certainly an option. You can agree to file an Amended Complaint and the only counterfactual thing is that it wouldn't acknowledge the plaintiffs in this case had been -- the claims have been [64] dismissed in this case. But if you wanted to do that and the defense could go through the motions, so to speak, of moving to dismiss, I could issue a ruling, but it seems to me better to just come up with some agreement, and if it happens that my decision is reversed in whole or in part, then you can file an Amended Complaint at that time. It probably makes more sense in terms of conserving your resources, I think.

MR. OSEN: I wasn't suggesting another briefing at all. I was just suggesting it might be easier for the circuit if they had an operative complaint to refer to. In any event, that's something we will discuss with defense counsel and try to come up with a formula that saves everyone as much time as possible.

THE COURT: I understand what you are saying; in other words, create a consolidated amended complaint that the circuit could use as its template for considering the appeals in the three cases once they are combined.

MR. OSEN: Right.

MR. FINN: Your Honor, obviously we can't speak for all the other defendants, I think there may be some variance in defendants in some of the other cases. So we want to obviously speak to them, but, of course, we will be happy to meet and confer with plaintiffs' counsel to discuss a possible way forward on those other cases.

THE COURT: Now given human nature, is giving you 30 [65] days too long because you will use every bit of it or what should we do?

MR. OSEN: I think 30 days is fine, Your Honor, but realistically, it would be -- today is Monday, I would hope to be in touch with Mr. Blackman this week; that's Mr. Blackman is counsel for Commerzbank but has spoken on behalf the defendants. And then we can take their temperature, collectively, as to how they want to proceed procedurally and see if there is any point of friction between us on some procedural aspect. Otherwise, we will come together and hopefully present a joint proposal to the Court.

THE COURT: Okay, so I will give you 30 days. Actually, we may end up falling --

THE COURTROOM DEPUTY: Right before Thanksgiving.

THE COURT: Okay, so it will be just before Thanksgiving. Perhaps we will motivate everyone to get it done, so it doesn't carry over.

So, November 27th, you will let me know either by way of letter in terms of a status or go ahead and tell me you want to file an amended complaint.

Just to give the mechanics, in the case that is not yet dismissed that purports to be the consolidated complaint for all these cases -- this is a strange creature, that's why I was saying it is somewhat counterfactual because some of the claims have already been dismissed, but I think it would make [66] the Second Circuit's job a little bit easier in terms of focusing on the claims.

So if you bring me another case, we can consolidate it that way. I leave that up to my deputy, she is much

better at figuring these things out in terms of what makes the most sense in terms of mechanics.

MR. OSEN: Just to be clear, we are not seeking to brief substantively those other claims.

The last point, Your Honor, is that recognizing that we are obviously and our clients are not happy with the outcome, we nonetheless want to thank Your Honor for both expediting the process of deciding and, honestly, also giving us quite a bit of time today to at least have our say in the matter. We very much appreciate that.

THE COURT: Not at all. This is a very important case and these are important issues. All cases are, but obviously this is an issue that is pending before a lot of different judges. Listen, I cannot say that the result will be exactly the one I have set down, and certainly Judge Pollack had a different view, and I thoroughly respect her view on that and the decision she wrote, so we will see what happens. All right?

So let me know in 30 days what we are doing. If you folks can creatively think of a way to pull this together, that would be great. All right. Thank you, everyone.

[67] MR. OSEN: Thank you, Your Honor.

MR. FINN: Thank you.

(Matter concluded.)

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Michele D. Lucchese — October 30, 2019
Michele D. Lucchese — DATE

APPENDIX F

JUSTICE AGAINST SPONSORS OF TERRORISM ACT, 114 P.L. 222

Enacted, September 28, 2016

Reporter

114 P.L. 222; 130 Stat. 852; 2016 Enacted S. 2040; 114 Enacted S. 2040

UNITED STATES PUBLIC LAWS > 114th Congress 2nd Session > PUBLIC LAW 114-222 > [S. 2040]

Synopsis

AN ACT

To deter terrorism, provide justice for victims, and for other purposes.

Text

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1.

Short title

This Act may be cited as the "Justice Against Sponsors of Terrorism Act".

SEC. 2.

Findings and purpose

(a) FINDINGS. Congress finds the following:

(1) International terrorism is a serious and deadly problem that threatens the vital interests of the United States.

(2) International terrorism affects the interstate and foreign commerce of the United States by harming international trade and market stability, and limiting international travel by United States citizens as well as foreign visitors to the United States.

(3) Some foreign terrorist organizations, acting through affiliated groups or individuals, raise significant funds outside of the United States for conduct directed and targeted at the United States.

(4) It is necessary to recognize the substantive causes of action for aiding and abetting and conspiracy liability under chapter 113B of title 18, United States Code.

(5) The decision of the United States Court of Appeals for the District of Columbia in Halberstam v. Welch, *705 F.2d 472 (D.C. Cir. 1983),* 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.

(6) Persons, entities, or countries that knowingly or recklessly contribute material support or resources, directly or indirectly, to persons or organizations that pose a significant risk of committing acts of terrorism that threaten the security of nationals of the United States or the national security, foreign policy, or economy of the United States, necessarily

direct their conduct at the United States, and should reasonably anticipate being brought to court in the United States to answer for such activities.

(7) The United States has a vital interest in providing persons and entities injured as a result of terrorist attacks committed within the United States with full access to the court system in order to pursue civil claims against persons, entities, or countries that have knowingly or recklessly provided material support or resources, directly or indirectly, to the persons or organizations responsible for their injuries.

(b) PURPOSE. The purpose of this Act is 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.

SEC. 3. [OMITTED AS IRRELEVANT]

SEC. 4.

Aiding and abetting liability for civil actions regarding terrorist acts

(a) IN GENERAL. *Section 2333 of title 18, United States Code*, is amended by adding at the end the following:

"(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.".

(b) Effect on Foreign Sovereign Immunities Act. Nothing in the amendment made by this section affects immunity of a foreign state, as that term is defined in *section 1603 of title 28, United States Code*, from jurisdiction under other law.

* * *

SEC. 7.

Effective date

The amendments made by this Act shall apply to any civil action—

(1) pending on, or commenced on or after, the date of enactment of this Act; and

(2) arising out of an injury to a person, property, or business on or after September 11, 2001.