No. ___

IN THE

Supreme Court of the United States

DANA MARIE BERNHARDT, INDIVIDUALLY AND AS THE ADMINISTRATRIX OF THE ESTATE OF JEREMY WISE, ETHAN PRUSINKSI, MARY LEE WISE, MARY HEATHER WISE, MINDYLOU PARESI, INDIVIDUALLY AND AS THE ADMINISTRATRIX OF THE ESTATE OF DANE PARESI, ELIZABETH SANTINA PARESI, ALEXANDRA VANDENBROEK, JANET PARESI, TERRY PARESI AND SANTINA CARTISSER

Petitioners,

v.

HSBC HOLDINGS PLC, HSBC BANK PLC, HSBC BANK USA N.A. AND HSBC NORTH AMERICA HOLDINGS, INC.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DC CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under Section 2333 of the Anti-Terrorism Act, as amended by the Justice Against Sponsors of Terrorism Act ("JASTA"), U.S. nationals injured or killed by "an act of international terrorism" that is "committed, planned, or authorized by" a designated foreign terrorist organization may sue 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," and recover treble damages. 18 U.S.C. § 2333(a), (d)(2). The questions presented in this case are:

1. Whether a foreign defendant who knowingly, willfully, and illegally moved or permitted billions of dollars to be moved through the U.S. financial system on behalf of designated and sanctioned banks is subject to Rule 4(k)(2) personal jurisdiction for claims of aiding and abetting an act of international terrorism that arose out of the provision of such funds.

2. Under this Court's analysis in *Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206 (2023), does HSBC's intentional provision of more than nineteen billion dollars in illegal banking services to high risk and sanctioned banks, with known ties to al-Qaeda, support a JASTA cause of action for sophisticated attacks committed by al-Qaeda during the time of the illegal banking activities?

PARTIES INVOLVED

The parties involved in this case are Respondents HSBC Holdings PLC ("HSBC"), HSBC Bank PLC ("HBEU"), HSBC Bank USA N.A. ("HBUS"), and HSBC North America Holdings, Inc. ("HBNA"), who were the appellees below, and Petitioners Dana Marie Bernhardt, Individually, and as the Administratrix of The Estate of Jeremy Wise, Ethan Prusinksi, Mary Lee Wise, Mary Heather Wise, Mindylou Paresi, Individually, and as the Administratrix Of The Estate Of Dane Paresi, Elizabeth Santina Paresi, Alexandra Vandenbroek, Janet Paresi, Terry Paresi, and Santina Cartisser (collectively referred to as "Petitioners"), who were the appellants below.

The Islamic Republic of Iran ("Iran") was also a defendant before the trial court in this matter but is not party to this appeal. *See* Fed. R. Civ. P. 54(b).

RELATED PROCEEDINGS

Bernhardt v. Islamic Republic of Iran, *et al.*, No. 21-7018, U.S. Court of Appeals for the District of Columbia Circuit. Judgment entered September 6, 2022.

Bernhardt v. Islamic Republic of Iran, *et al.*, No. 18-2739 (TJK), U.S. District Court for the District of Columbia. Judgment entered March 22, 2023.

Bernhardt v. Islamic Republic of Iran, *et al.*, No. 18-2739 (TJK), U.S. District Court for the District of Columbia. Judgment entered November 16, 2020.

Bernhardt v. Islamic Republic of Iran, *et al.*, No. 21-7018, U.S. Court of Appeals for the District of Columbia Circuit. Judgment entered February 2, 2023.

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JURISDICTION

The D.C. Circuit entered judgment on September 6, 2022. It then denied Petitioners' request for rehearing *en banc* on February 2, 2023. Chief Justice Roberts granted Petitioners' application to extend the time for filing a petition for writ of certiorari, making the deadline fall on Sunday, July 2, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2333 provides in relevant part:

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

* * *

(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.

STATEMENT OF THE CASE

1. *Factual Background.* In early 2009, Jordanian intelligence officers arrested Humam Khalil al-Balawi ("Balawi"), a Jordanian doctor, for jihadist content he shared online. App.69a. After his arrest and interrogation, Jordanian agents and their CIA counterparts concluded that Balawi could become an informant for them and

infiltrate al-Qaeda's network, a significant step in the ongoing hunt for Osama bin Laden. App.50a–51a. In furtherance of that plan, Balawi journeyed to the mountains of northwest Pakistan in March of 2009, under the guise of providing medical services to al-Qaeda and its allies. App.69a; *see* Court of Appeals Joint Appendix, hereinafter "CA JA," 56 ¶ 213. In reality, Balawi instead trained as a triple agent there, working against his Jordanian handlers and the CIA, and with al-Qaeda, to prepare for a terrorist attack against the Americans. App.51a. The training camp there "existed, in large part, through funding and material support provided by Iran." App.36a.

Over the next several months, Balawi reported to the Jordanians and the CIA that he had infiltrated al-Qaeda's inner circle, including several of Osama bin Laden's close associates. CA JA 56–57 ¶¶ 214, 219. As bait, Balawi first sent his Jordanian handler a video of Atiyah abd al-Rahman, a wanted terrorist whose whereabouts had evaded American intelligence officers for eight years. CA JA 57 ¶¶ 216–20. Then, in November 2009, Balawi informed his handlers that he was now the personal doctor for Ayman al-Zawahiri, al-Qaeda's second-in-command. CA JA 58 ¶ 222.

Enthralled, the CIA quickly put together a plan to meet Balawi at Camp Chapman. *Id.* ¶ 223. There, they would supply him with technology needed to locate and kill al-Zawahiri. *Id.* On December 30, 2009, an Afghan driver working for the CIA picked up Balawi at the Pakistan-Afghanistan border. CA JA 60 ¶ 235. Upon arrival at Camp Chapman, security waved Balawi through three levels of checkpoints until he arrived before a team of sixteen

people waiting to debrief him. *Id.* ¶ 236. Dane Paresi ("Paresi") and Jeremy Wise ("Wise") were among this group and tasked with providing security for the meeting. *Id.* They were both former military special ops veterans and had voiced their disagreement with the decreased security measures planned for the prior checkpoints. CA JA 59 ¶ 228.

As Jeremy Wise stepped forward to open the car door, Balawi slid across the seat to exit from the other side of the vehicle. CA JA 60 ¶ 237. Noting that Balawi had one hand hidden inside his clothing, Paresi and Wise both raised their weapons, ordering Balawi to raise his hands. *Id.* Upon realizing Balawi's intention to detonate a suicide bomb, Paresi and Wise rushed toward him. *Id.* ¶ 238. Before they could reach him, Balawi detonated over thirty pounds of C-4 explosives, killing himself, the decedents in this litigation, and seven others. App.50a, 67a.

The Camp Chapman attack was the culmination of months of planning, directed by al-Qaeda's former "emissary" to Iran, Atiyah abd al-Rahman, enabled by Iran's provision of financing and sophisticated explosives, and hatched in the northwest Pakistan training grounds equipped and protected by Iran. The attack was not an isolated event, but part of a broader terrorism strategy whereby Iran provided funds and weapons to terrorist groups like al-Qaeda to carry out attacks against American interests.

2. *Financing of the Camp Chapman Attack.* There is now no question as to Iran's involvement in the commission, planning, and authorization of the Camp Chapman attack. Since the 1990s, "al-Qaeda has leveraged

Iran's support . . . to help it carry out terrorism across the globe," App.52a, 94a, and Iran has historically served as the "core pipeline through which [al Qaeda] move[d] money, facilitators, and operatives." App.52a. The Camp Chapman suicide bombing was a "sophisticated attack requiring a significant amount of time, money, and logistics" to succeed. *See* App.37a. As the District Court held in the adjacent litigation against Iran, decided on March 22, 2023, Iran provided al-Qaeda with "the ability to move funds internationally . . . and the funding necessary to establish and maintain the communications and execution of the [Camp Chapman] attack." App.52a. Thus, Iran's aid to al-Qaeda and its allies constituted a concrete and "definite connection to the attack on Camp Chapman." App.53a. Moreover, Iran's channels of support were "crucial ingredients of the Camp Chapman attack," because Balawi's mission "relied on extensive financial, material, and logistical assistance from Iran." App.52a.

HSBC and its affiliates were one such channel of support. In total, HSBC entities conducted $19.4 *billion* in financial transactions with sanctioned Iranian national banks, Bank Saderat and Bank Melli, and a Saudi bank, Al Rajhi Bank, known for explicit connections to terrorism and Al Qaeda. App.34a–35a. As the D.C. Circuit concluded below, "[i]t cannot be disputed that the HSBC Defendants knowingly assisted sanctioned entities Bank Melli and Bank Saderat in evading U.S. sanctions and providing Al Rajhi Bank with access to U.S. Banknotes despite its knowledge of Al Rajhi Bank's ties to al-Qaeda." App.43a. Bank Saderat is controlled by the Iranian Government and has been censured by the United States as a Specially Designated Global Terrorist for transferring hundreds of millions of dollars to terrorist organizations.

App.34a; CA JA 34 ¶¶ 102–03. Likewise, Bank Melli is a nationalized agency of the Iranian Government and has been designated as a Specially Designated National and Blocked Person for its support of Iranian-based terrorist organizations. App.34a; CA JA 34 ¶ 107.

According to the 9/11 Commission, al-Qaeda relied on a financial support network known as the "Golden Chain," benefactors primarily made up of financiers in Saudia Arabia and the Persian Gulf. CA JA 36 ¶ 114. Documents seized from al-Qaeda named these donors, and the Treasury Department based their OFAC Designations on this list. CA JA ¶¶ 115–17. Among those listed was Sulaiman bin Abdulaziz Al Rajhi, the founder of Al Rajhi Bank and former Chief Executive Office and Chairman of the Board. CA JA 36 ¶ 118. Islamic extremists have used Al Rajhi bank since the 1990s, and Al Rajhi also managed accounts for many of al Qaeda's charity fronts, including advertising and soliciting donations for these charities throughout the Muslim world. CA JA 36–37 ¶¶ 119–20, 122.

By 2005, the HSBC Compliance Department terminated its relationship with Al Rajhi Bank due to mounting evidence of Al Rajhi's terrorism connections from the Golden Chain document, 9/11 Commission Reports, OFAC Designations, and scrutiny from U.S. Law Enforcement. CA JA 37–38, 49 ¶¶ 122–23, 176–77. But within a year, and despite evidence of Al Rajhi's continuing connections to terrorism and documented ties to al-Qaeda, HSBC resumed its relationship with the Saudi bank. CA JA 50 ¶ 178; App.36a. Between the years 2006 and 2010, the critical timeframe for the Camp Chapman attack, HBUS provided al Rajhi with nearly one billion worth of bulk U.S. cash in a variety of physical currencies, a

business that HBUS called its "Banknotes" business. CA JA 48 ¶ 167, 50 ¶ 182. But HBUS only purchased back $8 million in hard currency. CA JA 50 ¶ 182.

3. HSBC's Malign Activities. In a national effort to eliminate the threat of global terrorism following the attacks of September 11, 2001, U.S. administrations imposed a swathe of sanctions on banks and other financiers of terrorist activities. The purpose of these sanctions was to shut off the flow of hard currency and financial transactions to terror organizations and was primarily aimed at crippling Iran's financial conduits and its ongoing support of malign activities. The Department of Justice pursued violations of these sanctions, including violations by HSBC for its purposeful whitewashing of more than 25,000 financial transactions to exclude any mention of Iran. App.5a–6a. In 2012, after a series of federal investigations, HSBC was found to have overseen roughly 20 billion dollars' worth of inappropriate transactions with Iran through U.S. financial institutions, and admitted that its actions had "undermined U.S. national security, foreign policy, and other objectives of U.S. sanctions programs." App.6a.

4. *Background of JASTA.* To further its goal in a complementary civil scheme, Congress passed JASTA in 2016, with the intent of giving "full access to the court system" to victims of terrorism. JASTA § 2(a)(7). JASTA imposed both "direct and indirect" liability and was intended to be liberally construed, providing litigants with "the broadest possible basis . . . to seek relief." *Id.* at § 2(b).

Despite JASTA's intentionally broad construction, and despite the shocking dollar amounts funneled by HSBC through the sanctioned banks, the district court applied

a narrow interpretation of JASTA requiring Plaintiffs to show that the HSBC Defendants had the specific intent of advancing terrorist acts and that HSBC directly funded al-Qaeda. App.108a, 114a–16a, 121a. On November 16, 2020, the district court dismissed the two foreign HSBC affiliates[1] for lack of personal jurisdiction and dismissed Plaintiffs' substantive claims against the two American HSBC entities for failure to state a claim. App.99a–100a.

Although rejecting some of the trial court's reasoning, *see* App.25a, 28a, the D.C. Circuit upheld the lower court's outcome in a 2-1 majority opinion, with Judge Wilkins dissenting in part.[2] Judge Wilkins argued that the panel's decision created confusion within the D.C. Circuit and others, frustrated Congressional intent, and deprived the plaintiffs of their right to present this case to a jury. App.48a. Consistent with the concerns raised in his dissent, Petitioners sought for rehearing en banc, which was denied on February 2, 2023. App.122a–23a.

On March 22, 2023, the district court granted Plaintiff's Motion for Default Judgment against Iran in the ongoing bifurcated litigation below, finding that "the Camp Chapman Attack was a reasonably foreseeable consequence of Iran's support of al-Qaeda and its allies." App.79a.

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1. Plaintiffs' suit names as defendants four HSBC-affiliated entities—two based in the United States and two foreign corporations. App.101a.

2. Judge Wilkins was part of the unanimous majority in the D.C. Circuit's previous case addressing some of these same issues, which also has a petition for certiorari pending before this Court. *See Atchley v. AstraZeneca UK Ltd.*, 22 F.4th 204 (D.C. Cir. 2022).

REASONS FOR GRANTING THE PETITION

Money is the lifeblood of terrorism. *See Antiterrorism Act of 1990: Hearing on S. 2465 Before the Subcomm. on Courts and Administrative Practice of the S. Judiciary Comm.,* 101st Cong. 34 (1990) (the Antiterrorism Act, "by its provisions for compensatory damages, treble damages, and the imposition of liability at any point along the causal chain of terrorism, it would interrupt, or at least imperil, the flow of terrorism's lifeblood: money"). For that reason alone, a significant percentage of anti-terrorism cases involve the direct or indirect provision of financial resources to terrorist organizations. And, as this Court has now ruled, culpable conduct is the heart of a JASTA aiding-and-abetting case. This case combines those two elements—a complex financing scheme and culpable conduct—presenting this Court with an opportunity to address the contours of JASTA in the context of banks that confessed to perpetuating a scheme designed to undercut U.S. terrorism sanctions by dealing with sanctioned and high-risk banks with known ties to al-Qaeda. Further, the present case concerns one of the most sophisticated and extensive plots in al-Qaeda's history, resulting in the deaths of nine individuals at a CIA base in northern Afghanistan. Absent the Court's ruling on this case, lower courts will continue to apply diverse and inconsistent standards to JASTA bank litigation, resulting in arbitrary results for victims of terrorism and murky guidance for international banks.

I. THE D.C. CIRCUIT INCORRECTLY DISMISSED HSBC AND HBEU FOR LACK OF PERSONAL JURISDICTION EVEN THOUGH HSBC ADMITTED THAT ITS ACTIONS UNDERMINED U.S. NATIONAL SECURITY

Unlike the trial court below, the D.C. Circuit correctly identified the principles articulated through this Court's ruling in *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021), by stating, for the purposes of personal jurisdiction, that Petitioners need not allege either that their damages were "caused" by HSBC and HSBU's illegal activities or that any "specific dollars" were used in the Camp Chapman attack. App.14a (citing *Ford Motor Co.*, 141 S. Ct. at 1026). Instead, the D.C. Circuit clarified that Petitioners must merely allege "some relation between the sanctions evasion by the foreign defendants and the injuries suffered in the terrorist attack." *Id.*

However, despite correctly identifying the applicable framework, the D.C. Circuit fell short in its analysis. Its erroneous analysis hinged on the singularly crucial statement that "Bernhardt does not allege that al-Qaeda's funding for terrorism *depended on* transactions with specific foreign banks who would then work with HSBC to evade U.S. sanctions." *Id.* (emphasis added).

With this assertion, the D.C. Circuit effectively replaced this Court's standard with yet another causation-related requirement for personal jurisdiction—namely, that a plaintiff's damages must have "depended on" the alleged tortious acts. In fact, such a rule is essentially the same as the *Ford Motor Co.* defendant's proposed test that was soundly rejected by this Court. 141 S. Ct.

at 1026 (defendant suggested in its briefing that personal jurisdiction should attach "only if the defendant's forum conduct *gave rise* to the plaintiff 's claims" (emphasis in original)). Both "depended on" and "gave rise to" are different ways of inserting a causation requirement into a test that this Court has insisted it has "never framed . . . as always requiring proof of causation." *Id.* This Court should reject this approach, just as it did in *Ford Motor Co.*

When determining whether Petitioners' damages *relate to* HSBC and HBEU's conduct, this Court need look no further than HSBC's own admissions as quoted in the First Amended Complaint. In a deferred prosecution agreement, HSBC agreed that its sanctions evading conduct "undermined U.S. national security, foreign policy, and other objectives of U.S. sanctions programs." CA JA 55 ¶ 202. The head of HSBC's own anti-money laundering section termed these acts "as a deliberate and calculated method to avoid US OFAC sanctions." CA JA 41 ¶ 140. The company's head of compliance also acknowledged that its behavior "could provide the basis for an action against [HSBC] Group for breach of sanctions." CA JA 45 ¶ 157. Moreover, the entities for which these transactions were being completed included Iranian banks who were publicly designated for their financial support of terrorism on behalf of Iran, a designated state sponsor of terrorism. CA JA 33–35 ¶¶ 98–110.

The heart of Petitioners' substantive allegations are that HSBC and its affiliates actively and knowingly participated in a long-standing terrorism-financing enterprise that supported and increased al-Qaeda's ability to execute sophisticated terrorist attacks like the Camp Chapman attack. Critical to this arrangement was

HSBC's use of the American financial system. However, the advantages of that financial system could not legally be accessed for these purposes, so HSBC instructed its employees to take a variety of actions to conceal the true reason for and/or source of the banking transactions it carried out for the benefit of known designated terrorism sponsors. CA JA 40–43 ¶¶ 134–50. HSBC admits that these acts of concealment, which were purposefully directed at the United States, had a negative impact on "U.S. national security." CA JA 55 ¶ 202. Certainly, one aspect of U.S. national security is the ability to protect American personnel on American bases overseas. HSBC, by its own admission, degraded that ability. Such a specific relationship to Petitioners' allegations is sufficient to establish personal jurisdiction pursuant to Rule 4(k)(2).

II. THIS CASE PRESENTS AN OPPORTUNITY FOR THE COURT TO DEFINE THE PARAMETERS OF JASTA FOR A SOPHISTICATED TERRORIST ATTACK AIDED AND ABETTED BY DEFENDANTS' PROVIDING BILLIONS OF DOLLARS OF ILLEGAL BANKING TRANSACTIONS TO HIGH-RISK AND SANCTIONED BANKS WITH KNOWN TIES TO AL QAEDA

The D.C. Circuit's decision in this case, decided prior to *Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206 (2023), is at odds with this Court's inaugural JASTA ruling in at least two ways. First, the D.C. Circuit's opinion failed to adequately consider the lynchpin of this Court's aiding and abetting analysis—the culpable conduct of the defendants. As a result, the Circuit Court failed to apply this Court's common-sense sliding-scale approach

to aiding and abetting—that less substantial assistance is required in a case with greater scienter. And second, the D.C. Circuit's opinion failed to consider the possibility raised by this Court—that a defendant's conscious illegal conduct over the course of more than a decade could give rise to liability for "some definable subset of terrorist acts." *Taamneh*, 143 S. Ct. at 1228. Instead, the Circuit Court required Plaintiffs to show that the intermediaries involved in this case were so intertwined with al-Qaeda that defendants would be responsible for all terrorist acts of al-Qaeda. This all-or-nothing approach is not in line with this Court's analysis in *Taamneh.*

In *Taamneh*, this Court considered JASTA in the context of a defendant whose conduct "rests less on affirmative misconduct" and more on "passive nonfeasance"—the alleged failure to stop ISIS from using the Twitter platform. *Id.* at 1227. That was not enough to impose aiding and abetting liability under §2333(d)(2), liability which should be reserved for those defendants who engage in "conscious, voluntary and culpable participation in another's wrongdoing." *Id.* at 1223. The instant case has no shortage of such culpable conduct. It therefore presents an opportunity for this Court, for the first time, to define the parameters of JASTA in the context of defendants who have admitted to "conscious, voluntary and culpable" violations of U.S. sanctions designed to stop the kind of terrorist attacks directly at issue here.

A. HSBC's culpable conduct allowed financial institutions with known ties to al-Qaeda to process more than $19 billion in illegal banking transactions.

In *Taamneh,* this Court noted that JASTA's aiding and abetting liability is premised on common law terms that "'brin[g] the old soil' with them." *Id.* at 1218 (quoting *Sekhar v. United States*, 570 U.S. 729, 733 (2013)). Thus, the phrase "aid[ing] and abet[ing], by knowingly providing substantial assistance," requires "some level of blameworthiness" or culpable conduct. *Id.* at 1221. "[O]ur legal system generally does not impose liability for mere omissions, inactions, or non-feasance," *id.* at 1220–21, "both criminal and tort law typically sanction only 'wrongful conduct,' bad acts, and misfeasance, *id.* (quoting J. Goldberg, A. Sebok, and B. Zipursky, Tort Law: Responsibilities and Redress 31 (2004)). "For these reasons, courts have long recognized the need to cabin aiding-and-abetting liability to cases of truly culpable conduct." *Id.* at 1221.

Respondents' conduct certainly qualifies. Beginning in the 1990s, HBEU instituted a new practice through which it solicited business from sanctioned and high-risk financial institutions by helping those banned entities illegally transact business in American markets. CA JA 40 ¶ 135. HBEU told sanctioned clients to put secret notes in the payment messages—including things like "do not mention our name in NY" or "do not mention Iran." *Id.* ¶ 136. These notes would trigger bank employees to whitewash the transactions so as not to draw attention from American regulators. *Id.* ¶¶ 136–37.

In 2001, this practice was further refined, with HSBC entities now directly instructing sanctioned customers about how to better avoid regulatory detection. CA JA 42–43 ¶¶ 146–47. Respondents deceptively processed billions of dollars-worth of banking transactions through this scheme. CA JA 43 ¶ 149.

Around the same time, HBEU developed a second method for helping its designated and sanctioned customers illegally evade U.S. sanctions through the use of bank-to-bank transfers known as "cover payments." CA JA 41–42 ¶¶ 138–42. HBEU would process these "cover payments" between itself and HBUS without disclosing that the funds actually originated from a sanctioned entity in Iran. CA JA 42 ¶ 142; CA JA 45 ¶¶ 156–57.

HSBC and HBUS were well aware of these illegal practices since at least 2000. CA JA 41–42 ¶¶ 140–44. Their executives promoted the bank's business with sanctioned and high-risk customers because of the "significant business opportunities" and "substantial untapped potential" they had to offer. CA JA 45–46 ¶¶ 156–57. HBUS actively participated in both the false payment messages and the cover payment schemes despite viewing them "as a deliberate and calculated method to avoid US OFAC sanctions." CA JA 41 ¶ 140. In November 2009, HBUS intentionally turned off a verification step in the OFAC filter for thirteen days, allowing it to bypass that system altogether. CA JA 46 ¶ 159. HBNA was presented with direct evidence of the ongoing illegal transactions and did nothing to intervene. CA JA 54 ¶¶ 197–201.

HSBC and its affiliates' reckless actions are all the more shocking when viewed in the context of the widely-

known role of its illegal customers as terrorist financiers. Three of those entities deserve special mention. Bank Melli is an Iranian nationalized bank and a Specially Designated National and Blocked Person. App.34a; CA JA 34 ¶ 107. Bank Saderat is an Iranian nationalized bank and a Specially Designated Global Terrorist. App.34a; CA JA ¶ 102. Al Rajhi Bank is operated by individuals known to "have long supported Islamic extremists" and HSBC was aware that Al Rajhi Bank was widely used by terrorist organizations, including al-Qaeda. App.7a; 43a. Notwithstanding these concerns, in the four years prior to the Camp Chapman attack, the HSBC affiliates provided Al Rajhi Bank with nearly one billion dollars in hard U.S. currency (a business known as "Banknotes"), making money laundering for terrorist organizations easier. CA JA 50 ¶ 182. These Banknotes were provided even though HBUS's own "Know Your Customer" database flagged the Al Rajhi Bank founders for their known sponsorship of terrorists. *Id.* ¶ 180.

Nor can Respondents claim that they were unaware of the role these banks played in terrorist attacks. Bank Saderat and Bank Melli were formally designated as entities with ties to terrorism in 2007, but their intimate connections to terrorists were well-known before those designations. CA JA 33–35 ¶¶ 102–10. Al Rajhi Bank's connections to al-Qaeda and specifically the 9/11 attacks were common knowledge within the financial sector by March 2002. CA JA 49 ¶ 175. All this information was readily available to Respondents when they designed, maintained, and advanced their bootlegging schemes to evade American financial sanctions in the decade leading up to the Camp Chapman attack. Respondents also knew that the purpose for implementing those sanctions was to

stem the flow of money to violent terrorist organizations, thereby lessening the size and regularity of terrorist acts. *Id.* ¶¶ 174–76. When HSBC and its affiliates volunteered to help known terrorist financiers evade economic sanctions designed to prevent terrorist financing, a jury could easily infer that they had a general awareness of the role they played in supporting violent terroristic acts.

None of this conduct is in question. Under a deferred prosecution agreement with the Department of Justice, HSBC and HBUS admitted that their illegal conduct caused U.S. banks to process financial transactions that would have otherwise been subject to increased scrutiny. CA JA 54 ¶ 200. They also admitted to preventing American banks from filing reports and recording transactions in the manner required by U.S. law and causing false information to be recorded. *Id.* ¶ 201. Additionally, they admitted that this conduct "undermined U.S. national security, foreign policy, and other objectives of U.S. sanctions programs." CA JA 55 ¶ 202.

Thus, in stark contrast to the defendants in *Taamneh*, HSBC and its affiliates engaged in "truly culpable conduct," thus satisfying the common law's requirement that "some sort [of culpability] is necessary to justify punishment of a secondary actor, lest mostly passive actors like banks become liable for all of their customers' crimes by virtue of carrying out routine transactions." 143 S. Ct. at 1222 (internal quotation marks omitted). Respondents were not passive actors. They designed, implemented, and carried out a scheme for the sole purpose of evading U.S. terrorism sanctions so they could do business with sanctioned and high-risk banks with known ties to al-Qaeda. Permitting JASTA liability to

attach here presents no risk of opening the floodgates of litigation against passive banks, but does fit this Court's desire to "cabin aiding and abetting liability to cases of truly culpable conduct." *Id.* at 1221.

Granting certiorari in this case would also address a split in the circuits caused by the failure of the court below to apply the appropriate weight to the talisman of this Court's *Taamneh* ruling—the culpability of the defendant. By contrast, the United States Court of Appeals for the Second Circuit found a claim had been stated against the Lebanese Canadian Bank ("LCB") because of its unusual and illegal transactions with certain customers that had known ties to Hezbollah. *See Kaplan v. Lebanese Canadian Bank, SAL*, 999 F.3d 842, 864 (2d Cir. 2021). Though there was no specific connection between the financial services provided and the specific terrorist act that injured the plaintiffs, the Second Circuit emphasized that the wire transactions and other services provided by LCB to certain customers had violated regional banking rules requiring banks to know their customers and perform due diligence to keep from providing banking services to terrorist organizations. *Id.* at 849. Importantly, LCB gave the customers at issue special treatment, exempting them from submitting documents that would be filed with the Central Bank of Lebanon to report cash deposits over $10,000. *Id.* Thus,

> given that LCB's special treatment of the Customers allowed them to deposit large sums in various accounts at different LCB branches . . . without disclosing their source, thereby circumventing sanctions imposed in order to hinder terrorist activity, the [Second Amended

> Complaint] adequately pleaded that LCB knowingly gave the Customers assistance that both aided Hizbollah and was qualitatively and quantitatively substantial.

Id. at 866.

Though it predates *Taamneh*, the Second Circuit's ruling comports with this Court's admonition that "'[c]ulpability of some sort is necessary to justify punishment of a secondary actor." *Taamneh*, 143 S. Ct. at 1222. But the *Kaplan* court also honored this Court's caution that "aiding and abetting does not require the defendant to have known all particulars of the primary actor's plan." *Id.* at 1224 (internal quotation marks omitted). Indeed, "[a]s *Halberstam* makes clear, people who aid and abet a tort can be liable for other torts that were 'a foreseeable risk' of the intended tort." *Id.* at 1225 (*quoting Halberstam*, 705 F.2d, at 488). And here, as the district court found in this matter's bifurcated litigation against Iran, "the Camp Chapman Attack was a reasonably foreseeable consequence of Iran's support of al-Qaeda and its allies." App.79a.

In short, Respondents engaged in a decades-long conspiracy to provide more than 25,000 illegal financial transactions to Iranian banks that had been sanctioned for supporting terrorists. In addition, HSBC and its affiliates provided nearly a billion dollars in hard currency to a Saudi bank with known and extensive ties to Al Qaeda. Consistent with this Court's decision in *Taamneh*, these allegations of culpable conduct create an issue of foreseeability for a jury.

B. As a result of their culpable conduct, Respondents should be liable for a definable subset of sophisticated terrorist attacks by al-Qaeda.

In *Taamneh,* this Court established two "guideposts" for analyzing liability under JASTA: the culpability of the defendant and the nexus between the defendant's aid and the terrorist act. 143 S. Ct. at 1222. These "twin requirements" "work[] in tandem, with a lesser showing of one demanding a greater showing of the other." *Id.* (citing *Woodward v. Metro Bank of Dallas,* 522 F.2d 84, 97 (5th Cir. 1975), *Woods v. Barnette Bank of Ft. Lauderdale,* 765 F.2d 1004, 1010 (11th Cir. 1985)). "In other words, less substantial assistance requires more scienter before a court could infer conscious and culpable assistance." *Id.* (citing *Woodward*, 522 F.2d at 97).

The appellate court decisions cited by this Court emphasize the high level of scienter at issue in the instant matter as compared to most other bank cases. Both *Woodward* and *Woods* were securities fraud cases against banks for aiding and abetting liability. In deciding those cases, the Eleventh Circuit distinguished between cases where the bank's actions were common practices for a bank, "the daily grist of the mill," and those where the bank's actions were "atypical." *Woods*, 765 F.2d at 1004 (quoting *Woodward*, 522 F.2d at 97). Thus, while the bank in *Woodward* may have engaged in "sharp dealing" by its silence at key points in the transaction, it followed its normal and legal business practices and would not be liable. *Woodward,* 522 F.2d at 100. The bank in *Woods,* on the other hand, issued an atypical letter of recommendation to assure another bank of the

underwriting firm's trustworthy character. Though the purpose of the letter was to "curry favor with the client," not to defraud investors, the circumstances of the letter fell outside the daily grist of the mill and the bank was found liable. *Woods*, 765 F.2d at 1012–13.

The same line of demarcation can be drawn in terrorism cases, and Respondents are on the outer edges of the culpability spectrum. Unlike the Google and Twitter defendants recently before this Court, who provided their platform of legal services "to the public writ large," 143 S. Ct. at 1226, HSBC and its affiliates consciously and illegally provided billions of dollars of services to banks who were prohibited from receiving those services precisely because they were known to finance terrorists.

Accordingly, under this Court's analysis in *Taamneh*, as well as the stated purpose of JASTA which calls for accountability for both direct and indirect aid, "more remote support" can suffice in cases like this. 143 S. Ct. at 1225. That is particularly true when the remote or indirect support takes place over a substantial period of time (in excess of ten years preceding the attacks) and constitutes billions of dollars in transactions.

As the dissent noted below, the connection between Respondents' illegal schemes to avoid sanctions and al-Qaeda is strong. Two of the Iranian banks in question had been sanctioned for financing terrorist activities, and yet HSBC did business with them, willfully and fraudulently hiding the origin of the transactions from American regulators. A third bank, Al Rajhi bank, had extensive, documented ties to al-Qaeda, including channeling money to members of al-Qaeda that committed prior

terrorist attacks. Respondents knew of these connections through their own "know your customer" database yet provided Al Rajhi with a truly extraordinary amount of "banknotes"[3]—hard currency that could easily be used to launder money and fund terrorist attacks. As this Court noted, providing routine services in an unusual way or providing dangerous wares may give rise to JASTA liability. 143 S. Ct. at 1228. As an example, this Court cited a prior opinion in a different context, *Direct Sales Co. v. United States,* 319 U.S. 703, 707, 711–12, 714–15 (1943), in which a registered morphine distributor was liable when it legally mailed morphine far in excess of normal amounts to a small-town physician. *Id.* Here, Respondents provided hard currency, which can obviously be used to launder funds, far in excess of normal amounts to Al Rajhi.

As the dissent noted, these atypical activities, combined with Al Rajhi's long-standing and well-known support of al-Qaeda, should have been enough to satisfy JASTA's general awareness standard:

> Undaunted by these allegations, the majority maintains that even if the HSBC Defendants were aware of these connections, the Plaintiffs fail[] to allege that those connections were so close that HSBC had to be aware it was assuming a role in al-Qaeda's terrorist activities by working with Al Rajhi Bank." Maj. Slip Op. at 19. In the majority's view, because Al Rajhi Bank engaged in "extensive legitimate

3. HSBC funneled nearly $1 billion in U.S. Banknotes to Al Rajhi Bank leading up to the Camp Chapman Attack. App.44a.

> operations," the Plaintiffs had to allege "that a substantial part of those operations involved al-Qaeda" and that "Al Rajhi Bank was so closely intertwined with al-Qaeda that we can infer HSBC was aware it was assuming a role in al-Qaeda's terrorist activities simply by doing business with Al Rajhi Bank." *Id.* at 20. The Plaintiffs alleged that "Al Rajhi Bank advertised the existence and numerical designation of the accounts it maintained for [al-Qaeda-front charities] throughout the Muslim world, providing a mechanism for al-Qaeda supporters to deposit funds directly into those accounts." Am. Compl. ¶120. The majority therefore holds that a bank that literally advertises how members of the public can give money to al-Qaeda (and enables them to do so) is not sufficiently "closely intertwined" with al-Qaeda to satisfy the general awareness requirement. The majority's reasoning appears to be that the HSBC defendants were only generally aware that its customer, Al Rahji Bank, supported al-Qaeda's "legitimate" charitable activities, rather than al-Qaeda's terrorism. As we have said in a different context, "[t]his finding is quite extraordinary, because it totally defies both logic and common sense."

App.41a–42a [internal citations omitted].

In light of HSBC's culpable conduct, this "concrete nexus" should be enough to impose liability for a "definable subset of terrorist acts," *Taamneh*, 143 S. Ct. at 1228,

based on the sophistication, timing, and expense of the underlying acts.

As this Court noted, there may be some cases where the aid provided by the defendant is so direct, active, and substantial that the aider and abettor becomes liable for all the attacks of the terrorist group. That need not be the case here. Instead, in keeping with this Court's "definable subset" language, Respondents should be responsible for those attacks of al-Qaeda that require large amounts of funding, are concomitant with the period of time during or immediately after HSBC's illegal conduct, and that require a level of sophistication and planning that distinguish the attacks from those that can be carried out by a small group of individuals on relatively little funding.

The mastermind of the Camp Chapman attack, Atiyah Abd al-Rahman, served as al-Qaeda's emissary in Iran who worked directly with Iranian officials to deepen strategic partnerships between Iran and al-Qaeda. App.72a. These same partnerships provided the funding, weapons, explosives, and training that allowed for the successful execution of the elaborate Camp Chapman attack. App.72a–74a.

Balawi trained for weeks prior to the Camp Chapman attack at established joint training facilities in Pakistan. App.69a. These facilities existed because of the funding and support provided by Iran. App.74a. Iran served as the "core pipeline" and "critical transit point" by which al-Qaeda was able to move and receive money in this area. *Id.* Indeed, the District Court in this case, after considering Plaintiff's evidence, concluded that the Camp Chapman attack was a foreseeable consequence of Iran's

support of al-Qaeda. App.79a. And the Respondents "directly facilitated this process by providing Iran with American currency and access to U.S. financial markets. CA JA 61 ¶ 242.

Balawi's suicide vest was produced by a top al-Qaeda bomb maker, a man known as "al-Qaeda's Tailor." CA JA 59 ¶ 230. It was armed with C-4, a powerful military grade plastic explosive that is more expensive and difficult to obtain than the explosives commonly used in suicide vests. CA JA 59–60 ¶¶ 232–33. The primary avenue for al-Qaeda to acquire C-4 was through Iran. CA JA 60 ¶ 233.

The Camp Chapman attack, and its extensive pre-attack ruse, was among the most complex terrorist acts in al-Qaeda's history. CA JA 24 ¶ 53. Its successful execution required highly sophisticated funding, coordination, training, and materials. Each of those elements in turn relied upon the ability of al-Qaeda and its financiers to access and transfer the same vital resource—cash. CA JA 24–25 ¶¶ 52–54. Respondents infused funds into al-Qaeda's and Iran's pipelines by facilitating their access to physical currency easily laundered and used to equip, train, and pay terrorist operators. CA JA 43 ¶ 150. This infusion predictably and substantially enhanced al-Qaeda's capacity to commit sophisticated attacks and increased the devastation and lethality of those attacks. *See* CA JA 24–25 ¶¶ 52–54. The Camp Chapman attack, which occurred after a decade of Respondents' illegal transactions with Iranian national banks and after providing a core al-Qaeda funding institution with nearly a billion dollars of hard currency, is a prime example of the type of sophisticated attack that was most directly facilitated by HSBC and its affiliates' financial misdeeds.

By cabining aiding and abetting conduct in this way—through the requirement of conscious, culpable conduct and through a nexus analysis that filters out all but the most sophisticated and costly attacks during the time period of the culpable conduct—this Court can avoid the type of unlimited liability that "would run roughshod over the typical limits on tort liability and take aiding and abetting far beyond its essential culpability moorings." *Taamneh*, 143 S. Ct. at 1229. Respecting these appropriate limits erected by this Court, Respondents should be held accountable for their reprehensible and attack-enabling conduct.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, DATED SEPTEMBER 6, 2022

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

October 18, 2021, Argued;
September 6, 2022, Decided

No. 21-7018

DANA MARIE BERNHARDT, *et al.*,

Appellants,

v.

ISLAMIC REPUBLIC OF IRAN, *et al.*,

Appellees.

Appeal from the United States District Court
for the District of Columbia.
(No. 1:18-cv-02739).

Before: WILKINS and RAO, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge.*

Opinion for the Court filed by *Circuit Judge* RAO.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* WILKINS.

Appendix A

RAO, *Circuit Judge*: An al-Qaeda suicide bomber killed nine people at Camp Chapman, a secret CIA base in Afghanistan. Dana Bernhardt and other family members of the bombing victims ("Bernhardt") sued HSBC Holdings PLC and several of its foreign and domestic affiliates under the Antiterrorism Act. Bernhardt alleges that HSBC helped foreign banks evade U.S. sanctions and thereby provided material support to al-Qaeda's terrorist activities. Bernhardt claims that HSBC is liable for aiding and abetting and conspiring to bring about al-Qaeda's terrorist attack on Camp Chapman.

The district court dismissed the claims against the foreign HSBC defendants for lack of personal jurisdiction and dismissed Bernhardt's aiding and abetting and conspiracy claims for failure to state a claim. We affirm.

I.

A.

Bernhardt's claims arise under the Antiterrorism Act of 1990 ("ATA"), Pub. L. No. 101-519, 104 Stat. 2250, as amended by the Justice Against Sponsors of Terrorism Act ("JASTA"), Pub. L. No. 114-222, § 4, 130 Stat. 852, 854 (2016) (codified at 18 U.S.C. § 2333(d)). A plaintiff injured by "an act of international terrorism committed, planned, or authorized by" a designated foreign terrorist organization can assert liability against those who aided and abetted the act of terrorism, or who conspired with the person who committed the act of terrorism. 18 U.S.C.

§ 2333(d)(2).[1] This liability extends to those who "provided material support, directly or indirectly" to terrorists or terrorist organizations. JASTA § 2(b), 130 Stat. at 853.[2]

B.

Since Bernhardt appeals the district court's dismissal of her claims, "we accept as true all of the complaint's factual allegations and draw all reasonable inferences in

1. The full text provides:

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

18 U.S.C. § 2333(d)(2).

2. JASTA substantially expanded civil remedies for victims of international terrorism. Initially, the ATA created a civil cause of action for the victims of international terrorism. *See* ATA, § 132(b), 104 Stat. at 2251 (codified as amended at 18 U.S.C. § 2333(a)). The ATA established principal liability for defendants who proximately caused a plaintiff's injury, but not secondary liability for those who facilitated or aided, yet did not themselves commit, terrorist acts. *Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 270, 276-78, 437 U.S. App. D.C. 413 (D.C. Cir. 2018).

favor of the plaintiffs." *Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 272, 437 U.S. App. D.C. 413 (D.C. Cir. 2018). The following facts are drawn from the amended complaint unless otherwise noted.

On December 30, 2009, al-Qaeda operative Humam Khalil al-Balawi detonated more than thirty pounds of C-4 explosives and shrapnel strapped to his chest shortly after entering Camp Chapman, a secret CIA base in Afghanistan. In the months leading up to the attack, Balawi had been captured and agreed to infiltrate al-Qaeda and become an informant for the CIA. The CIA planned to meet with Balawi at Camp Chapman to strategize about locating and killing al-Qaeda leadership. Unbeknownst to the CIA, Balawi had continued his allegiance to al-Qaeda and was feeding information to the CIA while training to execute the attack. At the direction of al-Qaeda and donning an al-Qaeda-made suicide vest, Balawi took the lives of nine people at Camp Chapman, including private security officers Dane Paresi and Jeremy Wise.

Paresi and Wise were survived by Dana Bernhardt and the other plaintiffs, who sued under the ATA. Bernhardt alleged that four HSBC-affiliated financial institutions[3] ("HSBC") violated U.S. sanctions and

3. The defendants include HSBC Holdings PLC ("HSBC Holdings"), a company incorporated in the United Kingdom that owns the U.K.-based HSBC Bank PLC ("HSBC Bank UK") and indirectly owns HSBC North American Holdings Inc. ("HSBC Holdings NA"). HSBC Holdings NA indirectly owns and controls the fourth defendant, the U.S.-based HSBC Bank USA, N.A. ("HSBC Bank US"). Although Bernhardt also named the Islamic Republic of Iran as a defendant, the claims against Iran are still pending

thereby provided material support to al-Qaeda's terrorist activities. These sanctions restrict the flow of money to individuals, entities, and countries on the Office of Foreign Assets Control's ("OFAC") list of "specially designated nationals and blocked persons." The OFAC list includes state sponsors of terrorism like Iran and "specially designated global terrorists," such as al-Qaeda. The list also includes entities who finance terrorism-related organizations.[4] U.S. financial institutions must use this "OFAC filter" to identify and block financial transactions involving sanctioned parties. *See* Exec. Order No. 13,224, §§ 1, 5-7, 66 Fed. Reg. 49,079, 49,079-81 (Sept. 25, 2001) (authorizing the Department of the Treasury to regulate and designate who should be sanctioned).

Bernhardt alleges that HSBC evaded the OFAC filter beginning in the early 1990s and continuing through 2009. HSBC Bank UK implemented procedures to help sanctioned entities access and benefit from U.S. financial services. For instance, such entities would include a "cautionary note" in their transactions, such as "care sanctioned country," "do not mention our name in NY," or "do not mention Iran." Based on these notes, HSBC Bank UK would manually scrub all references to Iran or a sanctioned entity, which would allow otherwise illegal transactions to pass through to HSBC Bank US. This system allowed HSBC Bank US to "process[] thousands of 'repaired' transactions worth

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before the district court and therefore are not before us. *See* FED. R. CIV. P. 54(b).

4. *See* U.S. Dep't of State, *Terrorism Designations FAQs* (Feb. 27, 2018), https://2017-2021.state.gov/terrorism-designations-faqs/index.html.

billions of dollars." HSBC Bank UK would also use "cover payments," or bank-to-bank transfers, to avoid disclosing the identity of its customers. Moreover, HSBC Holdings and HSBC Bank US understaffed their compliance group and failed to "conduct due diligence on HSBC affiliates." HSBC continued these practices, "mesmerized by the potential profits."

Facing a series of federal investigations, HSBC Bank US hired an outside auditor, who discovered over 25,000 deceptive transactions involving Iran that moved more than $19.4 billion through U.S. financial institutions. HSBC Holdings eventually settled with the Department of the Treasury for almost $900 million in penalties and admitted it had processed over $164 million "for the benefit of Iran and/or persons in Iran, through a financial institution located in the United States in apparent violation of [U.S. sanctions]."[5] HSBC also admitted that its actions had "undermined U.S. national security, foreign policy, and other objectives of U.S. sanctions programs." In a separate deferred prosecution agreement with the Department of Justice, HSBC Holdings and HSBC Bank US agreed to forfeit over $1 billion dollars and admitted that their conduct caused U.S. financial institutions "to process payments that otherwise should have been held for investigation, rejected, or blocked pursuant to sanctions regulations administered by OFAC."[6]

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5. *See* U.S. Dep't of the Treasury, *Treasury Department Reaches Landmark Settlement with HSBC* (Dec. 11, 2012), https://home.treasury.gov/news/press-releases/tg1799.

6. The deferred prosecution agreement focused on drug money transfers but also mentioned the facilitation of terrorism. *See* U.S.

According to Bernhardt, HSBC's evasion of sanctions benefitted several HSBC customers with terrorism ties: Bank Melli, Bank Saderat, and Al Rajhi Bank. Bank Melli, a bank operated and controlled by the government of Iran, was placed on OFAC's list for providing banking services to groups in Iran's military that supported "terrorist organizations like Hezbollah and al-Qaeda." Bank Saderat is also an Iranian nationalized bank, listed since 2007 as a specially designated global terrorist for "facilitat[ing] Iran's transfer of hundreds of millions of dollars to Hezbollah and other terrorist organizations each year."

HSBC also did substantial business with Al Rajhi Bank, "one of the largest banks in Saudi Arabia" with over "500 branches and assets totaling $59 billion." It is primarily owned by the Al Rajhi family, one member of which was a key financial contributor to al-Qaeda. In 2003, the CIA reported that "Islamic extremists have used [Al Rajhi Bank] since at least the mid-1990s as a conduit for terrorist transactions," and "[s]enior Al Rajhi family members have long supported Islamic extremists and probably know that terrorists use their bank." HSBC Holdings ended its relationship with Al Rajhi Bank in 2005 due to Al Rajhi's connections with the September 11 and other terrorist attacks, but HSBC Bank US reestablished relations a year later. A database that HSBC Bank US

Dep't of Justice, *HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations* (Dec. 11, 2012), https://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations.

relied on for its due diligence "identified Al Rajhi Bank's most senior official as having links to terrorism." HSBC Bank US nonetheless provided "nearly one billion in US dollars" to Al Rajhi Bank from 2006 to 2010 and "allowed Al Rajhi Bank to raise funds and launder money for terrorist organizations." Al Rajhi Bank also oversaw the accounts of al-Qaeda charity fronts.

In sum, Bernhardt maintains the Camp Chapman bombing was orchestrated, authorized, and executed by al-Qaeda, and that HSBC aided and abetted the attack "by providing substantial assistance to al-Qaeda through the countries, institutions, and entities that formed part of a terrorism financing and support network." In addition, HSBC joined a "group of conspirators" providing material support to a conspiracy between al-Qaeda, Iran, and others aimed at harming the United States through terrorist acts.

C.

The district court dismissed the suit. *Bernhardt v. Islamic Republic of Iran*, No. 18-2739, 2020 U.S. Dist. LEXIS 214185, 2020 WL 6743066 (D.D.C. Nov. 16, 2020). It held there was no specific personal jurisdiction over the foreign HSBC defendants because Bernhardt's injuries from the Camp Chapman bombing did not sufficiently arise out of or relate to the evasion of sanctions. Bernhardt failed to link HSBC's financial malfeasance to al-Qaeda's suicide attack on Camp Chapman. The district court also dismissed the ATA claims against HSBC for failure to state a claim. As to aiding and abetting, Bernhardt had

not adequately alleged that HSBC was "aware [it was] supporting al-Qaeda, much less 'assuming a role' in al-Qaeda's violent activities." 2020 U.S. Dist. LEXIS 214185, [WL] at *5. Because HSBC had no "direct relationship with al-Qaeda or Balawi" and was merely "mesmerized by the potential profits," the court could not plausibly infer the necessary substantial assistance either. 2020 U.S. Dist. LEXIS 214185, [WL] at *6. The district court also held that Bernhardt failed to state a claim for conspiracy. Bernhardt had alleged at most that HSBC conspired to evade the OFAC filter, not that it had conspired with al-Qaeda to perpetuate terrorist acts. Bernhardt appealed.

II.

We first consider whether the district court could exercise personal jurisdiction over the foreign HSBC defendants. A dismissal for lack of personal jurisdiction is reviewed de novo. *Atchley v. AstraZeneca UK Ltd.*, 22 F.4th 204, 214, 455 U.S. App. D.C. 228 (D.C. Cir. 2022).

Bernhardt alleges only specific personal jurisdiction over the foreign HSBC defendants based on Federal Rule of Civil Procedure 4(k)(2).[7] Such jurisdiction requires: (1) the defendant has either been served a summons or waived service; (2) the claim "arises under federal law"; (3) "the

7. Bernhardt has not alleged general personal jurisdiction over the foreign HSBC defendants, which would require demonstrating that the defendants' contacts "are so continuous and systematic as to render them essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011) (cleaned up).

defendant is not subject to jurisdiction in any state's courts of general jurisdiction"; and (4) "exercising jurisdiction is consistent with the United States Constitution and laws." FED. R. CIV. P. 4(k)(2); *see also Mwani v. bin Laden*, 417 F.3d 1, 10, 368 U.S. App. D.C. 1 (D.C. Cir. 2005). The parties do not dispute that the first three requirements are met. HSBC Holdings and HSBC Bank UK were properly served, Bernhardt's claims arise under the ATA, and the foreign HSBC defendants are not subject to any state court's jurisdiction. The only dispute is whether exercising jurisdiction would be consistent with the Constitution, namely whether the foreign HSBC defendants have "sufficient contacts with the United States as a whole to justify the exercise of personal jurisdiction under the Due Process Clause of the Fifth Amendment." *Mwani*, 417 F.3d at 11.

Pleading specific personal jurisdiction under Rule 4(k)(2) requires demonstrating a close nexus between the United States, the foreign defendant's conduct, and the plaintiff's claim. The plaintiff must show that the foreign defendant "has purposefully directed his activities at residents of the forum," and that the alleged injuries "arise out of or relate to those activities." *Id.* at 12 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)) (cleaned up); *see also Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319, 66 S. Ct. 154, 90 L. Ed. 95 (1945). This test ensures that a district court exercises specific personal jurisdiction only over those foreign defendants who had "fair warning that a particular activity may subject them" to U.S. jurisdiction. *Mwani*, 417 F.3d at 11 (cleaned up). The Supreme Court

recently explained it is not necessary to demonstrate "a strict causal relationship between the defendant's [domestic] activity and the litigation." *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1026, 209 L. Ed. 2d 225 (2021). Because it is sufficient for the injuries to "relate to" the defendant's activities, "some relationships will support jurisdiction without a causal showing." *Id.* (cleaned up).

Bernhardt alleges the foreign HSBC defendants purposefully directed their conduct at U.S. markets by coordinating with HSBC domestic affiliates to evade the OFAC filter and to facilitate financial transactions in violation of U.S. sanctions. We assume that was enough for the first prong of the specific personal jurisdiction inquiry.

Bernhardt's allegations do not, however, support an inference that the injuries from the Camp Chapman bombing arose out of or related to the foreign HSBC defendants' sanctions evasion. *See Atchley*, 22 F.4th at 233 (a plaintiff must allege a "relatedness between the contacts and the claim"). As we further explain below, *see infra* Part III.A, Bernhardt tries to connect the Camp Chapman bombing to HSBC's sanctions evasion on behalf of several intermediary banks. For Banks Melli and Saderat, Bernhardt primarily relies on their OFAC designations and affiliation with Iran. The complaint alleges that Bank Melli was listed as a specially designated national and blocked person in October 2007 because it provided "a variety of financial services" to a special division of an Iranian military group "that promotes terrorism abroad." Bank Saderat was similarly listed as a specially

designated global terrorist because of its "transfer of hundreds of millions of dollars to Hezbollah and other terrorist organizations each year." These allegations show possible connections between Banks Melli and Saderat and terrorism generally, yet they are not enough to allow us to infer the necessary connection to al-Qaeda specifically, or that the foreign HSBC defendants' conduct was related to Bernhardt's injuries at al-Qaeda's hand.

The dissent tries to close this gap by emphasizing the banks' ties to Iran and Iran's ties to al-Qaeda. *See* Dissenting Op. 3. But neither Iran's ownership of Bank Melli and Bank Saderat nor the HSBC transactions connected to Iran and its entities are enough to connect HSBC's conduct to Bernhardt's injuries. We have made clear in a similar context that "when an intermediary is a sovereign state with many legitimate agencies, operations, and programs," the country's designation as a "state sponsor of terrorism does not reduce the need for evidence of a substantial connection between the defendant and a terrorist act or organization." *Owens*, 897 F.3d at 276 (cleaned up). Pleading Iran's involvement does not support an inference that Bernhardt's injuries sufficiently related to HSBC's conduct because aid to Iran could just as plausibly benefit its otherwise legitimate operations rather than al-Qaeda.[8]

8. The dissent emphasizes that *Ford* treated "'isolated or sporadic transactions differently from continuous ones' for personal jurisdiction purposes." Dissenting Op. 3 (quoting 141 S. Ct. at 1028 n.4). But *Ford* did not hold that *any* pattern of repeated transactions in the forum is sufficient to establish specific personal jurisdiction: rather, the repeated transactions must also relate to the specific

The allegations tying Al Rajhi Bank to al-Qaeda are also insufficient. Bernhardt alleges that Al Rajhi Bank's founder was one of al-Qaeda's key financial contributors and that the bank maintained accounts for al-Qaeda's charity fronts. These connections show some connection between Al Rajhi Bank and al-Qaeda. But the bank's vast and otherwise legitimate operations make it impossible to infer that HSBC's conduct was connected to al-Qaeda's attack on Camp Chapman through Al Rajhi Bank. And as we explain below, Bernhardt fails to allege any aid flowing indirectly through these intermediary banks to al-Qaeda, further undercutting the necessary inference. *See infra* Part III.A.2.

The allegations here thus stand in stark contrast to those in *Atchley*, where we found personal jurisdiction over foreign corporations. The defendants in that case had allegedly provided goods to a terrorist group that had overrun the Iraqi Ministry of Health, and the plaintiffs' injuries directly related to the monetization of those goods to promote acts of terrorism. 22 F.4th at 234-36; *see also id.* at 237 (explaining that the goods "used to bribe Jaysh al-Mahdi[] were an instrument to achieve the very wrong alleged") (cleaned up).

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claim at issue. In other words, the relatedness inquiry under *Ford* "does not mean anything goes." 141 S. Ct. at 1026. "In the sphere of specific jurisdiction, the phrase 'relate to' incorporates real limits, as it must to adequately protect defendants foreign to a forum." *Id.* Such limits are necessary to preserve the distinction between specific and general jurisdiction "since, as many a curbstone philosopher has observed, everything is related to everything else." *Cal. Div. of Lab. Standards Enf't v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 335, 117 S. Ct. 832, 136 L. Ed. 2d 791 (Scalia, J., concurring).

We agree with Bernhardt that she did not need to allege the OFAC filter evasion *caused* the Camp Chapman bombing. *See Ford*, 141 S. Ct. at 1026. Nor was she required to identify specific dollars spent on the terrorist attack.[9] Nonetheless, she was required to allege some relation between the sanctions evasion by the foreign defendants and the injuries suffered in the terrorist attack. But no such inference is supported by the complaint. And without allegations supporting a closer connection between the sanctions evasion and al-Qaeda's activities, allowing Bernhardt to sue the foreign HSBC defendants would collapse the core distinction between general and specific personal jurisdiction. *See Ford*, 141 S. Ct. at 1024-25.

The dissent speculates that if the foreign HSBC defendants "had properly observed the sanctions ... it would have significantly hindered al-Qaeda's ability to successfully carry out terrorist attacks like the Camp Chapman bombing." Dissenting Op. 5. Yet Bernhardt does not allege that al-Qaeda's funding for terrorism depended on transactions with specific foreign banks who would then work with HSBC to evade U.S. sanctions. The fact that money is fungible works in both directions. Given the allegations of al-Qaeda's extensive access to foreign banks, a more reasonable inference is that al-Qaeda could

9. The Supreme Court has recognized that "[m]oney is fungible" and that foreign terrorist organizations "do not maintain legitimate financial firewalls between those funds raised for civil, nonviolent activities, and those ultimately used to support violent, terrorist operations." *Holder v. Humanitarian L. Project*, 561 U.S. 1, 31, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010) (cleaned up).

have secured terrorism funding from another avenue, irrespective of whether HSBC evaded U.S. sanctions. Certainly nothing in the complaint supports the dissent's conjecture.

Because it would exceed the limits of specific personal jurisdiction to conclude the foreign HSBC defendants had "fair warning" that evading the OFAC filter would subject them to liability under the ATA for aiding and abetting or conspiring with al-Qaeda to bomb a secret CIA base in Afghanistan, *Mwani*, 417 F.3d at 12, we affirm the district court's dismissal of claims against the foreign HSBC defendants for lack of personal jurisdiction.

III.

The district court also dismissed Bernhardt's ATA aiding and abetting and conspiracy claims against the remaining HSBC defendants for failure to state a claim. We review the district court's dismissal de novo. *Atchley*, 22 F.4th at 214. Assuming the truth of Bernhardt's factual allegations, we consider whether she has stated a "plausible claim"—that is, whether the allegations lead to "the reasonable inference that the defendant is liable for the misconduct alleged." *Owens*, 897 F.3d at 272 (cleaned up). A plaintiff's claim must rise "above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A claim cannot survive a motion to dismiss if based on inferences "unsupported by facts" or legal conclusions disguised as factual allegations. *Owens*, 897 F.3d at 272 (cleaned up). We affirm the dismissal of both claims.

Appendix A

A.

To adequately plead an ATA aiding and abetting claim, a plaintiff must allege: (1) "an injury arising from an act of international terrorism"; (2) the act was "committed, planned, or authorized by" a designated foreign terrorist organization; and (3) the defendant "aid[ed] and abet[ted], by knowingly providing substantial assistance" to an "act of international terrorism. 18 U.S.C. § 2333(d)(2); *see also Atchley*, 22 F.4th at 216. The parties do not dispute that the Camp Chapman bombing was an act of international terrorism; that Bernhardt and the other plaintiffs were injured by the bombing; or that al-Qaeda, a designated foreign terrorist organization, was responsible for the attack.[10] Therefore, we evaluate whether Bernhardt's allegations demonstrate that HSBC aided and abetted the bombing by providing substantial assistance to al-Qaeda.

The ATA does not provide a definition of aiding and abetting liability, but instead incorporates the analysis in *Halberstam v. Welch*, 705 F.2d 472, 227 U.S. App. D.C. 167 (D.C. Cir. 1983), as "provid[ing] the proper legal framework for how such liability should function." JASTA § 2(a)(5), 130 Stat. at 852. *Halberstam* stated that aiding and abetting includes three elements: "(1) the party whom the defendant aids must perform a wrongful act that causes

10. Although Balawi detonated the suicide vest, no one disputes he was acting as an agent of al-Qaeda and that al-Qaeda is "the person who committed" the Camp Chapman bombing. *See Atchley*, 22 F.4th at 217 (explaining that a foreign terrorist organization often "stands behind the fighters who pull the trigger or detonate the device").

an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation." 705 F.2d at 477. It is undisputed that the Camp Chapman bombing caused Bernhardt's injuries. We consider whether the allegations in the complaint allow us to infer that HSBC was generally aware it played a role in al-Qaeda's terrorist activities and that HSBC knowingly and substantially assisted those activities.

1.

In the ATA context, aiding and abetting liability requires a defendant be "generally aware of its role in an overall illegal activity from which an act of international terrorism was a foreseeable risk." *Atchley*, 22 F.4th at 220 (cleaned up). To allege that defendants had such awareness, plaintiffs "must plead ... allegations of the facts or events they claim give rise to an inference that defendants acted with the requisite mental state." *Id.* at 220-21 (cleaned up). Knowledge and other mental states may be alleged generally but must at least support a plausible inference of general awareness. *See Ashcroft v. Iqbal*, 556 U.S. 662, 686-87, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing FED. R. CIV. P. 8, 9(b)). Because there is rarely direct evidence of a defendant's mental state, the fact finder often must draw inferences from circumstantial evidence.[11] *See Halberstam*, 705 F.2d at 486 (inferring

11. We reject Bernhardt's argument that "extreme recklessness" satisfies the standard. Because actual awareness is required, the inquiry is not whether a defendant should have been aware of its role.

knowledge absent direct evidence because "it defie[d] credulity that [the defendant] did not know that something illegal was afoot"); *see also Huddleston v. United States*, 485 U.S. 681, 685, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988) (explaining that "[e]xtrinsic acts evidence may be critical to the establishment of" a defendant's mental state).

Bernhardt alleges HSBC aided and abetted the Camp Chapman bombing through its relationship with intermediary banks that facilitated al-Qaeda's terrorist activities. When a plaintiff's ATA aiding and abetting claim depends on aid flowing through an intermediary, the general awareness requirement is satisfied if (1) the defendant was aware of the intermediary's connection to the terrorist organization, and (2) the intermediary is "so closely intertwined" with the terrorist organization's illegal activities as to give rise to an inference that the defendant was generally aware of its role in the organization's terrorist activities.[12] *Honickman v. BLOM Bank SAL*, 6 F.4th 487, 501 (2d Cir. 2021).

Applying these standards, Bernhardt fails to plausibly allege HSBC was generally aware that its financial dealings with intermediary banks supported al-Qaeda's terrorist acts.

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12. There is no requirement of specific intent, and a defendant does not have to "wish[] to bring about" an act of terrorism or "kn[ow] of the specific attacks at issue." *Linde v. Arab Bank, PLC*, 882 F.3d 314, 329 (2d Cir. 2018); *see also Atchley*, 22 F.4th at 220. Contrary to Bernhardt's contentions, the district court applied the correct standard and did not require a heightened standard of specific intent.

With respect to Bank Melli and Bank Saderat, Bernhardt alleges neither that HSBC was aware of their connections to al-Qaeda nor that these banks were so closely intertwined with al-Qaeda to infer HSBC's general awareness. The complaint focuses on the fact that these banks were on OFAC's list of sanctioned entities. But that alone is insufficient. "[A]iding and abetting an *act* of international terrorism requires more than the provision of material support to a designated terrorist *organization*." *Linde v. Arab Bank, PLC*, 882 F.3d 314, 329 (2d Cir. 2018); *see also Honickman*, 6 F.4th at 491-92, 501 (finding no general awareness despite defendant bank having clients who were specially designated global terrorists). According to the complaint, Bank Melli was listed in 2007 for providing banking services to a terrorist-affiliated group of Iran's military. Bank Saderat was designated for "facilitat[ing] Iran's transfer of hundreds of millions of dollars to Hezbollah and other terrorist organizations." These allegations connect the intermediary banks to terrorism generally but fail to support an inference that HSBC had general awareness it was playing a role in *al-Qaeda's* terrorist acts.[13]

Bernhardt also relies on the fact that Bank Melli and Bank Saderat are nationalized Iranian banks and that Iran has historically supported terrorist groups, including

13. For the same reasons, Bernhardt's vague allegation that HSBC Bank US "supplied U.S. dollars to ... Islami Bank Bangladesh Ltd. and Social Islami Bank, despite evidence linking those banks to terrorism" is not enough to connect HSBC to al-Qaeda. Nor is the allegation of Al Rajhi Bank smuggling money to Chechnian extremists relevant to HSBC's al-Qaeda connections.

al-Qaeda. But as explained above, sovereign nations invariably maintain legitimate government activities. Iran's support for terrorism is not enough to demonstrate HSBC's general awareness that its transactions with Iranian banks would support al-Qaeda's terrorist acts without some "additional allegations" more closely connecting these intermediary banks to the "terrorist act or organization." *Owens*, 897 F.3d at 276.

Bernhardt's allegations regarding Al Rajhi Bank come closer to demonstrating general awareness but still fall short. Bernhardt alleges that Al Rajhi Bank was founded by a key financial contributor to al-Qaeda; "maintained accounts for many of al-Qaeda's charity fronts"; advertised the existence of those accounts to provide al-Qaeda a fundraising mechanism; and facilitated transactions for terrorists who "provided the al-Qaeda cell of 9/11 hijackers with financial and logistical support." Bernhardt also alleged that members of the Al Rajhi family were aware their bank served as a conduit for al-Qaeda to move its money around. Taken together, we can plausibly infer that Al Rajhi Bank maintained connections to al-Qaeda.

Nevertheless, the complaint falls short because Bernhardt does not allege that HSBC was aware of these connections. The complaint states that an HSBC senior manager in 2002 expressed concern that "Al Rajhi Bank's account may have been used by terrorists," and that HSBC Bank US in 2006 flagged "Al Rajhi Bank's most senior official as having links to terrorism." These statements are not sufficient to show HSBC's awareness because they express only the possibility of a terrorist connection, say

nothing about al-Qaeda specifically, and focus on conduct occurring years before the bombing. Therefore, they cannot support the dissent's inference that HSBC "had *actual* knowledge" of any connection between Al Rajhi Bank and al-Qaeda. Dissenting Op. 8.

Even if we could infer that HSBC was aware of Al Rajhi Bank's connections to al-Qaeda, Bernhardt fails to allege that those connections were so close that HSBC had to be aware it was assuming a role in al-Qaeda's terrorist activities by working with Al Rajhi Bank. *See Honickman*, 6 F.4th at 501; *see also Siegel*, 933 F.3d at 224 (explaining that even when defendants were "aware that [Al Rajhi Bank] was believed by some to have links to [al-Qaeda] and other terrorist organizations," plaintiffs still had to allege defendants' awareness that they were "assuming a role in terrorist activities") (cleaned up). As the complaint notes, Al Rajhi Bank has substantial operations and "is one of the largest banks in Saudi Arabia, with more than 8,400 employees, 500 branches and assets totaling $59 billion."

Given the extensive legitimate operations of Al Rajhi Bank—with assets totaling $59 billion—and the absence of any allegation that a substantial part of these operations involved al-Qaeda, "HSBC had little reason to suspect that it was assuming a role in [al-Qaeda's] terrorist activities." *Siegel*, 933 F.3d at 224; *cf. Kemper v. Deutsche Bank AG*, 911 F.3d 383, 390 (7th Cir. 2018) ("While giving fungible dollars to a terrorist organization may be dangerous to human life, doing business with companies and countries that have significant legitimate operations is not necessarily so. That these business dealings may violate

U.S. sanctions does not convert them into terrorist acts.") (cleaned up). The pleadings do not adequately allege that Al Rajhi Bank was so closely intertwined with al-Qaeda that we can infer HSBC was aware it was assuming a role in al-Qaeda's terrorist activities simply by doing business with Al Rajhi Bank.[14]

Bernhardt's allegations also fall far short of what we have previously found adequate in the ATA context. In *Atchley*, for instance, the plaintiffs alleged the defendants knew the Iraqi Ministry of Health was "notoriously corrupt" and "under the control of a terrorist group." 22 F.4th at 221. Aside from ubiquitous media reports, the defendants finalized deals with the Ministry in offices where "armed terrorist fighters circulated openly and anyone who entered could see [the terrorist group's] distinctive flag, weapons, Sadr posters, and 'Death to America' slogans on display." *Id.* We inferred general awareness by the defendants because the plaintiffs plausibly alleged the Ministry was controlled by the terrorist group and so closely intertwined with it that they were effectively the same entity. *Id.* at 224.

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14. This conclusion is not affected by the fact that Al Rajhi Bank publicly advertised its connections to Al-Qaeda charity fronts. *Cf.* Dissenting Op. 9. The question of HSBC's general awareness is context dependent and turns on the identity of Al Rajhi Bank considered in the round. Bernhardt alleges some public connection between Al Rajhi Bank and Al-Qaeda, but her allegations are not sufficient to demonstrate that Al Rajhi Bank's transactions with Al-Qaeda were so pervasive that HSBC should have known that by doing business with Al Rajhi Bank it was financing terrorism.

Finding general awareness on the facts here would mark an extension of aiding and abetting liability not supported by the ATA or our precedent. The general awareness element is particularly important in indirect aiding and abetting claims to "avoid subjecting ... incidental participants to harsh penalties or damages." *Halberstam*, 705 F.2d at 485 n.14. Under the ATA, liability is cabined to defendants who aid and abet "an act of international terrorism." 18 U.S.C. § 2333(d)(2). HSBC had client banks with ties to terrorist organizations and has admitted to helping those banks evade U.S. sanctions. But that is not sufficient for aiding and abetting liability under the ATA. While the amendments to the ATA expanded liability for indirect aid to terrorism, they did not equate the evasion of sanctions with terrorism liability.[15] Bernhardt's allegations failed to make the necessary connection to support an inference that HSBC was generally aware it was playing a role in al-Qaeda's terrorist activities.

2.

Bernhardt's aiding and abetting claim also fails because she did not plausibly allege that HSBC "knowingly and substantially assist[ed] the principal violation." *Halberstam*, 705 F.2d at 477.

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15. Under the dissent's expansive interpretation, virtually any bank that violates U.S. sanctions against an entity with some ties to terrorism will be liable under the ATA for any subsequent acts of terrorism. The government has already prosecuted HSBC for evading sanctions in its transactions with banks having terrorist ties. But simply alleging knowledge of a bank's ties to terrorism is not sufficient to make out liability under the ATA.

The ATA states that a defendant "aids and abets" by "*knowingly* providing substantial assistance." 18 U.S.C. § 2333(d)(2) (emphasis added). There is significant overlap between the requirement that the assistance be "knowing" and the general awareness required by *Halberstam*. A defendant who lacks general awareness cannot be said to have knowingly assisted a foreign terrorist organization. *See Honickman*, 6 F.4th at 500 (explaining that a defendant need not "know anything more ... than what she knew for the general awareness element"). Thus, having failed to allege the requisite general awareness, Bernhardt's complaint also fails to allege knowing assistance. Because HSBC's assistance must be knowing and substantial, lack of knowing assistance is sufficient to dismiss Bernhardt's claim.

It is an independent and alternative ground for affirming the dismissal that Bernhardt also failed to allege that HSBC provided "substantial assistance." Six factors are relevant in determining substantiality: (1) "the nature of the act encouraged"; (2) "the amount and kind of assistance given"; (3) "the defendant's absence or presence at the time of the tort"; (4) the defendant's "relationship to the tortious actor"; (5) "the defendant's state of mind"; and (6) the "length of time an alleged aider-abettor has been involved." *Halberstam*, 705 F.2d at 483-84 (cleaned up); *see also Atchley*, 22 F.4th at 221. "No factor alone is dispositive, and the weight of each varies with the circumstances of the particular claim. What is required is that, on balance, the relevant considerations show that defendants substantially assisted the acts of terrorism." *Atchley*, 22 F.4th at 221. Taken together,

these factors lead us to conclude that Bernhardt failed to adequately plead that HSBC substantially assisted al-Qaeda's terrorist acts.

The first factor identifies the "nature of the act encouraged" and "dictates what aid might matter." *Halberstam*, 705 F.2d at 483, 484. Greater access to capital—the alleged aid—is important to al-Qaeda's terrorist efforts, which depend on depositing, transferring, and expending money. *See Gonzalez v. Google LLC*, 2 F.4th 871, 905 (9th Cir. 2021) ("Financial support is indisputably important to the operation of a terrorist organization, and any money provided to the organization may aid its unlawful goals.") (cleaned up). This factor weighs in favor of finding substantial assistance.

The second factor is "significant" and requires considering the quantity and quality of aid. *Halberstam*, 705 F.2d at 484. A plaintiff need not allege that a defendant assisted a foreign terrorist organization directly. *See* JASTA § 2(b), 130 Stat. at 853; *Atchley*, 22 F.4th at 225 ("The statute imposes no directness requirement."). It is enough to provide "[f]actual allegations that permit a reasonable inference that the defendant recognized the money it transferred to its customers would be received by the [foreign terrorist organization]." *Honickman*, 6 F.4th at 500. The district court thus erred in requiring Bernhardt to allege that assistance was directed to the Camp Chapman attack or that HSBC was involved in transactions that directly benefitted al-Qaeda. *See Bernhardt*, 2020 U.S. Dist. LEXIS 214185, 2020 WL 6743066, at *6.

The district court's error was harmless, however, because even applying the correct standard, the aid was not significant. Bernhardt alleged that HSBC facilitated over $19 billion in transactions with Iranian institutions and provided almost $1 billion in currency sales to Al Rajhi Bank. Yet she fails to allege how much (if any) of that money indirectly flowed to al-Qaeda. *Cf. Siegel*, 933 F.3d at 225 (although plaintiffs alleged the provision of "hundreds of millions of dollars" to an intermediary, "they did not advance any non-conclusory allegation that [al-Qaeda] received any of those funds"); *Gonzalez*, 2 F.4th at 907 (explaining that the substantiality of assistance is indeterminable when a complaint is "devoid of any allegations about how much assistance [the defendant] provided"). In light of Bernhardt's failure to allege a close connection between the foreign banks and al-Qaeda, we cannot reasonably infer that HSBC provided any aid to al-Qaeda.[16] This factor thus severely undermines a finding of substantiality.

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16. We are in accord with the dissent regarding the proper legal standard, although we disagree about whether Bernhardt's allegations were sufficient. *See* Dissenting Op. 11 (citing *Honickman*). Bernhardt had to allege "[f]actual allegations that permit a reasonable inference" that the "money ... transferred to [an intermediary] would be received by" al-Qaeda. *Honickman*, 6 F.4th at 500; *see also* 18 U.S.C. § 2333(d)(2) (requiring a plaintiff to show a defendant, in fact, "provid[ed] substantial assistance" to a terrorist organization). "[A]lleg[ing] the general awareness element" can support that inference, but only if a plaintiff alleges that the intermediary was "so closely intertwined" with a terrorist organization that doing business with one was like doing business with the other. *Honickman*, 6 F.4th at 499, 500. Bernhardt has not alleged this closeness or any other form of aid "received by" al-Qaeda, and thus this factor weighs against Bernhardt.

The third factor looks at the defendant's presence at the time of the plaintiff's injury. *Halberstam* focused on a person's physical presence in the murder and burglary context. *See Halberstam*, 705 F.2d at 488. HSBC was not physically present at the terrorist attack on Camp Chapman, which may be sufficient for this factor to weigh against Bernhardt. *See Atchley*, 22 F.4th at 223.

Other courts, however, have read *Halberstam*'s presence requirement more broadly in light of the ATA's context, which attaches liability to all "persons," including "corporations, companies, associations, firms, partnerships, societies, and joint stock companies." 18 U.S.C. § 2333(d)(1); 1 U.S.C. § 1. These entities cannot be physically present for an act of international terrorism, and so presence may be understood in a transactional sense, such as a bank's business relations with a terrorist organization. *See Siegel*, 933 F.3d at 225 (finding "presence" to cut against liability when the defendant banks had cut ties with the intermediary bank ten months before the relevant terrorist attack). Even from a transactional perspective, however, we are unable to infer from Bernhardt's complaint any HSBC involvement with al-Qaeda before and leading up to the Camp Chapman bombing.

The fourth factor considers the closeness of any relationship between the defendant and the terrorist organization. Bernhardt does not allege a connection between the foreign banks and al-Qaeda sufficient to infer any relationship, much less a close one, between HSBC and al-Qaeda. *Cf. Brill v. Chevron Corp.*, 804 F. App'x 630,

632 (9th Cir. 2020) (per curiam) (no relationship where Chevron had only "a contractual relationship with a third party that sold Iraqi crude oil on the open market," but did not know "its kickbacks would be used to provide financial support to the terrorist organization perpetrating the terrorist activity in Israel"). This factor also cuts against finding substantiality.

The fifth factor looks to the defendant's state of mind, which requires "[k]nowledge of one's own actions and general awareness of their foreseeable results." *Atchley*, 22 F.4th at 223. While "this factor more powerfully supports aiding-and-abetting liability of defendants who share the same goals as the principal or specifically intend the principal's tort, ... such intent is not required." *Id.* The district court thus erred in requiring Bernhardt to show that HSBC and al-Qaeda were "one in spirit." *Bernhardt*, 2020 U.S. Dist. LEXIS 214185, 2020 WL 6743066, at *6; *see also Atchley*, 22 F.4th at 223-224 (explaining that a specific intent or "one in spirit" requirement is contrary to *Halberstam*). Even applying the correct standard, however, this factor cuts against Bernhardt because, as already discussed, Bernhardt fails to allege that HSBC provided knowing assistance or was generally aware that acts of terrorism were the foreseeable result of its actions.

The final factor looks to the duration of a defendant's assistance, which can influence the quality and quantity of aid and "may afford evidence of the defendant's state of mind." *Halberstam*, 705 F.2d at 484. Bernhardt alleges a years-long relationship between HSBC and the foreign banks. But a lengthy financial relationship does not terrorism assistance make. *Cf. Siegel*, 933 F.3d at 225.

Because the foreign banks are global financial institutions with legitimate operations and uncertain ties to al-Qaeda, we cannot infer substantial assistance to al-Qaeda from HSBC's lengthy business relationships with the foreign banks.

Considering the relevant factors, only the type of monetary aid alleged supports Bernhardt's claims, and therefore, "on balance," Bernhardt did not adequately plead that HSBC substantially assisted al-Qaeda's terrorist acts. *Atchley*, 22 F.4th at 221.

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While Bernhardt alleges financial wrongdoing and serious violations of U.S. sanctions, she fails to plausibly allege that HSBC was generally aware of its role in, or knowingly and substantially assisted, al-Qaeda's overall terrorist activities. We therefore affirm the district court's dismissal of Bernhardt's aiding and abetting claim.

B.

We next analyze the sufficiency of Bernhardt's ATA conspiracy claim. To plead a civil conspiracy, a plaintiff must allege: "(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." *Halberstam*, 705 F.2d at 477. Bernhardt's conspiracy claim fails because she has not adequately alleged an agreement between HSBC and al-Qaeda, nor a relevant overt act.

An "agreement" in the context of an ATA conspiracy requires that the defendant "conspire[] with the person who committed" the terrorist act. 18 U.S.C. § 2333(d)(2). Therefore, Bernhardt had to allege that HSBC was "pursuing the same object" as al-Qaeda. *Halberstam*, 705 F.2d at 487; *cf. United States v. Tarantino*, 846 F.2d 1384, 1392, 269 U.S. App. D.C. 398 (D.C. Cir. 1988) (proving a conspiracy requires evidence "each conspirator had the specific intent to further the common unlawful objective"). The shared objective can be "inferred from circumstantial evidence," but the inference must still "reveal[] a common intent." *Halberstam*, 705 F.2d at 480.

Bernhardt alleges no common objective between HSBC and al-Qaeda. The 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"; "use long wars to financially bleed the U.S. while inflaming anti-American sentiment"; "defend the rights of Muslims"; and "obtain global domination through a violent Islamic caliphate." These objectives are wholly orthogonal to one another. Bernhardt's allegations similarly do not support an inference that HSBC evaded sanctions with the object of funding terrorism. In the absence of any alleged concordance between HSBC's and al-Qaeda's objectives, Bernhardt's conspiracy claim is inadequate. *Cf. Gonzalez*, 2 F.4th at 881-82, 907 (rejecting conspiracy claim absent allegations that "Google tacitly agreed to commit homicidal terrorist acts with ISIS").

Bernhardt also fails to allege an overt act in furtherance of a conspiracy. Under the ATA, the overt act

must be the act of international terrorism that injures the plaintiff. *See* 18 U.S.C. § 2333(d)(2) (providing a cause of action "for an injury arising from an act of international terrorism"); *Halberstam*, 705 F.2d at 477 (explaining that civil conspiracy liability requires "an unlawful overt act" to have "produced an injury and damages"). Bernhardt's injury arose from the Camp Chapman bombing, and therefore Bernhardt had to allege the bombing was the overt act that furthered a conspiracy between HSBC and al-Qaeda. But Bernhardt makes no such allegation, nor is it 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. *Cf. Adams v. Alcolac, Inc.*, 974 F.3d 540, 545-46 (5th Cir. 2020) (per curiam) (plaintiffs failed to allege a conspiracy where the overt act—the use of mustard gas—was not done in furtherance of a broader conspiracy to evade U.S. export controls for a profit motive). Instead, Bernhardt's complaint consistently identifies HSBC's sanctions evasion as the relevant overt acts. That conduct is not, however, an overt act of international terrorism or the source of Bernhardt's injury under the ATA.

Because Bernhardt fails to allege an agreement between HSBC and al-Qaeda or an overt act in furtherance thereof, we affirm the dismissal of Bernhardt's ATA conspiracy claim.[17]

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17. Bernhardt's arguments that a jury should have the opportunity to identify single or multiple conspiracies is beside the point. The burden of pleading a plausible conspiracy rests squarely on Bernhardt, and that burden is not met here. Claims "shy of a plausible entitlement to relief" cannot avoid dismissal simply because a jury

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Bernhardt and the other plaintiffs lost family members in an al-Qaeda suicide bombing. They seek to recover damages from HSBC, which has admitted to evading sanctions to benefit foreign banks with ties to terrorist organizations. While the ATA creates liability for those who materially assist acts of terrorism, a successful claim requires a plausible connection between HSBC and al-Qaeda. We cannot infer from the complaint the necessary connection to maintain the ATA aiding and abetting and conspiracy claims. Therefore, we affirm the decision of the district court.

So ordered.

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could rely on evidence deduced at later stages of trial. *Twombly*, 550 U.S. at 559.

WILKINS, *Circuit Judge*, concurring in part and dissenting in part: Although I concur in the dismissal of the conspiracy claim,[1] I respectfully dissent from the majority's affirmance of the dismissal of the foreign HSBC defendants for lack of personal jurisdiction as well as the dismissal of the aiding-and-abetting claim. When reviewing the dismissal of a complaint under the Federal Rule of Civil Procedure 12(b)(6), we must "accept all the well-pleaded factual allegations of the complaint as true and draw all reasonable inferences from those allegations in the plaintiff's favor." *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129, 418 U.S. App. D.C. 398 (D.C. Cir. 2015). The majority acts in contravention of this standard by failing to grapple sufficiently with all of the facts alleged in the complaint, which support exercising personal jurisdiction over the foreign HSBC defendants and upholding the aiding-and-abetting claim.

I.

Turning first to the issue of personal jurisdiction over the foreign HSBC defendants, the essential foundation of specific jurisdiction is a "relationship among the defendant, the forum, and the litigation." *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1028, 209 L. Ed. 2d 225 (2021) (internal quotation marks and citation omitted). Such a relationship is present here. The majority seems to acknowledge that the Plaintiffs adequately pled that "the foreign HSBC defendants

1. In my view, because the Plaintiffs have not adequately pled an unlawful agreement, we need not decide whether the Plaintiffs adequately pled an overt act in furtherance of the conspiracy.

purposefully directed their conduct at U.S. markets by coordinating with HSBC domestic affiliates to evade the OFAC filter and to facilitate financial transactions in violation of U.S. sanctions." Maj. Slip Op. at 10-11. Yet the majority opines that the Plaintiffs failed to allege that this conduct related to al-Qaeda's terrorist activities. Nor did they, in the majority's view, allege that this sanction evasion "benefited or even impacted al-Qaeda." *Id.* at 11. This contention ignores specific facts that were alleged in the Amended Complaint.

Specifically, the Plaintiffs pled that Bank Saderat, Bank Melli, and Al Rajhi Bank were all subject to strict economic sanctions due to their ties to terrorism and their provision of financial support to terrorist organizations. Am. Compl. ¶¶ 102-26. For example, the U.S. Under-Secretary for Terrorism and Financial Intelligence found in 2006 that Bank Saderat was responsible for facilitating Iran's transfer of hundreds of millions of dollars to terrorist organizations each year and announced sanctions against Bank Saderat, which was also designated as a specially designed global terrorist. *Id.* ¶¶ 103-04. Accordingly, the U.S. Under-Secretary announced that the U.S. would "no longer allow a bank like Saderat to do business in the American financial system, even indirectly." *Id.* ¶ 103 (internal quotation marks omitted). Likewise, the Amended Complaint provides that Bank Melli was designated as a Specially Designated Nationals and Blocked Persons after being found to have provided financial services to terrorist groups in Iran. *Id.* ¶ 109. "From 2002 to 2006, Bank Melli was used [by terrorist organizations] to send at least $100 million to the [Iranian-based terrorist organizations]." *Id.*

The Plaintiffs further allege that the founder of Al Rajhi Bank was identified as a key financial contributor to al-Qaeda in the "Golden Chain Document," an authenticated al-Qaeda document that identifies al-Qaeda's most important financial benefactors. *Id.* ¶¶ 115-19. Al Rajhi Bank maintained accounts for many of al-Qaeda's charity fronts and as early as 2003, the CIA warned that Al Rajhi Bank served as a conduit for terrorist transactions. *Id.* ¶¶ 119-23. Indeed, HSBC's internal compliance officials raised concerns about Al Rajhi Bank being used by terrorists and this prompted HSBC to temporarily end its relationship with Al Rajhi Bank. *Id.* ¶¶ 175-77. All in all, the HSBC Defendants conducted nearly 25,000 transactions with Iran and Iranian entities (including Bank Melli and Bank Saderat) valued at approximately $19.4 billion. *Id.* ¶ 161. Additionally, one of the HSBC Defendants' largest Banknotes' customers was Al Rajhi Bank, whom the HSBC Defendants provided with nearly $1 billion U.S. dollars. *Id.* ¶¶ 172, 182.

Drawing all reasonable inferences from the allegations in the Plaintiffs' favor, they are sufficient to show that the activities of the HSBC Defendants related to al-Qaeda and benefited al-Qaeda. Iran is cited by the State Department as the most active state sponsor of terrorism in the world, and since the 1990s "has been operating under an alliance with al Qaeda . . . by which Iran provides material support for terrorism including financing, facilitation of travel, training, safe havens and operational support." *Id.* ¶¶ 98-100. Under this alliance, Iran is a "critical transit point for funding" al-Qaeda activities and Iran's network "serves as the core pipeline through which [al-Qaeda] moves money."

Id. ¶ 95; *see also id.* ¶ 93 (letter from Osama bin Laden, founder of al-Qaeda, describing Iran as al-Qaeda's "main artery for funds"). The majority contends these allegations are insufficient to show relatedness, "because aid to Iran could just as plausibly benefit its otherwise legitimate operations rather than al-Qaeda." Maj. Slip Op. at 11. In so ruling, the majority effectively backtracks from its concession that *Ford* does not equate relatedness with causation, and it ignores *Ford's* admonition that "[w]e have long treated isolated or sporadic transactions differently from continuous ones" for personal jurisdiction purposes. 141 S. Ct. at 1028 n.4.

Additionally, according to a report from the Treasury Department, the terrorist who engineered the Camp Chapman attack was al-Qaeda's emissary in Iran, was provided safe haven in Iran, and was allowed to travel freely in and out of the country with the permission of Iranian officials. *Id.* ¶ 96-97. Balawi, the al-Qaeda agent who committed the Camp Chapman suicide bombing, trained for his mission at a training camp in Pakistan, which "existed, in large part, through the funding and material support provided by Iran." *Id.* ¶ 229-31; *see also generally id.* ¶¶ 65-101 (describing the various ways Iran has materially supported al-Qaeda). Additionally, and perhaps most importantly, Al Rajhi Bank has documented ties with al-Qaeda and the HSBC Defendants were aware of these ties. *Id.* ¶¶ 115-26, 175-77.

The Plaintiffs have also pled allegations plausibly demonstrating that al-Qaeda's ability to secure funding impacted the success of its terrorist attacks. Specifically,

the Plaintiffs allege that al-Qaeda's ability to plan and commit terrorist attacks required the use of a "global financing and logistics infrastructure," and that the Camp Chapman bombing in particular was a sophisticated attack requiring significant amounts of time, money, and logistics in order to be successful. *Id.* ¶¶ 50-53. The U.S. Under-Secretary of Terrorism and Financial Intelligence stated:

> The maintenance of those terrorist networks, like al Qaeda, which threaten our national security, is expensive — even if a particular attack does not cost much to carry out. As the 9/11 Commission explained, groups like al Qaeda must spend money for many purposes — to recruit, train, plan operations and bribe corrupt officials for example. If we can eliminate or even reduce their sources and conduits of money, we can degrade their ability to do all of these things, and thus can make them less dangerous. *Id.* ¶ 54.

As the majority concedes—a point which bears repeating—the Plaintiffs are not "required to identify specific dollars spent on the [Camp Chapman] terrorist attack." Maj. Slip Op. at 13. Nor could they. Because as the majority notes, "'[m]oney is fungible[,]'" Maj. Slip Op. at 13 n.9 (quoting *Holder v. Humanitarian L. Project*, 561 U.S. 1, 31, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010)), and "there is reason to believe that foreign terrorist organizations do not maintain legitimate financial firewalls between those funds raised for civil, nonviolent activities, and those ultimately used to support violent, terrorist operations."

Humanitarian L. Project, 561 U.S. at 31 (internal quotation marks, citation, and emphasis omitted).

Simply put, the Plaintiffs' factual allegations are entitled to a reasonable inference that there is a sufficient relatedness between the foreign HSBC Defendants' contacts with the United States and the Camp Chapman terrorist attack. If the foreign HSBC Defendants had properly observed the sanctions against these banks, it would have significantly hindered al-Qaeda's ability to successfully carry out terrorist attacks like the Camp Chapman bombing. Let this sink in for a moment: the majority holds that where HSBC regularly did business with a bank founded and run by one of al-Qaeda's largest financial supporters, Am. Compl. ¶¶ 114-120, and where the 9/11 Commission found that al-Qaeda hijackers used this same bank to facilitate their terrorist attacks, *id.* ¶ 121, and where this bank advertised how people could deposit funds into al-Qaeda-front charity accounts held at the bank, *id.* ¶ 120, we cannot conclude that doing business with this bank "relates to" any of al-Qaeda's subsequent terrorist acts, including at Camp Chapman. Maj. Op. at 11-12. This is supposedly because the bank has "vast and otherwise legitimate operations," *id.* at 12, but this reasoning ignores the conceded fungibility of money, the role that financial support and access to U.S. banknotes play in supporting terrorist activities, and this bank's specific record of funneling money to al-Qaeda.

As such, the foreign HSBC Defendants indeed had "fair warning" that evading U.S. sanctions and allowing sanctioned entities that funded terrorist organizations to

access the U.S. financial markets and procure funds to carry out terrorist attacks would subject them to liability in the United States for attacks committed against its citizens. *Mwani v. Osama Bin Laden*, 417 F.3d 1, 11, 368 U.S. App. D.C. 1 (D.C. Cir. 2005) (internal quotation marks and citation omitted).

Accordingly, I would find that the Plaintiffs sufficiently pled a basis for exercising personal jurisdiction over the foreign HSBC Defendants.

II.

Now turning to the ATA aiding-and-abetting claim, the only relevant issues in dispute are whether the complaint would allow us to infer that the HSBC Defendants were generally aware that they played a role in al-Qaeda's terrorist activities and that the HSBC Defendants knowingly and substantially assisted those activities. I would find that it does.

In *Atchley v. AstraZeneca UK Ltd.*, we explained that a "'defendant need not be generally aware of its role in the specific act that caused the plaintiff's injury; instead, it must be generally aware of its role in an overall illegal activity from which the act that caused the plaintiff's injury was *foreseeable*.'" 22 F.4th 204, 220, 455 U.S. App. D.C. 228 (D.C. Cir. 2022) (quoting *Honickman v. BLOM Bank SAL*, 6 F.4th 487, 496 (2d Cir. 2021)). "[B]ear[ing] in mind the challenges of establishing a defendant's state of mind without the benefit of discovery[,]" *Atchley*, 22 F.4th at 220, the Plaintiffs have sufficiently pled allegations

that give rise to an inference that the HSBC Defendants were generally aware of their role in al-Qaeda's terrorist activities.

It cannot be disputed that the complaint sufficiently pleads that at least one of the sanctioned entities, Al Rajhi Bank, had extensive, documented ties to al-Qaeda. The Final Report of the National Commission on Terrorist Attacks Upon the United States ("9/11 Commission Report"), which was published in 2004,[2] revealed the existence of a "Golden Chain" document that identified al-Qaeda's most important financial benefactors, one of which was Sulaiman bin Abdulaziz Al Rajhi ("Sulaiman"), a founder of Al Rajhi Bank and former Chief Executive Officer and Chairman of the Board. Am. Compl. ¶¶ 114-18. Under the leadership of Sulaiman, Al Rajhi Bank "maintained accounts for many of al-Qaeda's charity fronts" thereby "providing a mechanism for al-Qaeda supporters to deposit funds directly into those accounts." *Id.* ¶¶ 119-20; *see also id.* ¶ 122 (CIA detailing Sulaiman's control over "the bank's most important decisions"). The complaint went on to allege specific examples of Al Rajhi Bank funneling money to members of al-Qaeda that committed terrorist attacks:

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2. While the complaint does not contain this publication date, we may take judicial notice of such date pursuant to FED. R. EVID. 201. *See Kaspersky Lab, Inc. v. U.S. Dep't of Homeland Sec.*, 909 F.3d 446, 464, 439 U.S. App. D.C. 20 (D.C. Cir. 2018) ("Among the information a court may consider on a motion to dismiss are public records subject to judicial notice.") (internal quotation marks and citation omitted); *see also* National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (2004), https://www.ojp.gov/ncjrs/virtual-library/abstracts/911-commission-report (last visited July 11, 2022).

> For example, money was funneled through Al Rajhi Bank to an al-Qaeda cell in Hamburg, Germany, through businessmen Mahmood Darkazanli and Abdul Fattah Zammar, who in turn provided the al-Qaeda cell of 9/11 hijackers with financial and logistical support. One of the 9/11 hijackers, Abdul Aziz al Omari, utilized a credit card drawn on Al Rajhi Bank when planning the attacks and, just four days before the attacks, received a wire transfer from Al Rajhi Bank into a SunTrust bank account.

Id. ¶ 121. The majority concedes that these allegations allow us to "plausibly infer that Al Rajhi Bank maintained connections to al-Qaeda," yet holds that the complaint does not allege that the HSBC Defendants were aware of these connections. Maj. Slip Op. at 18. This contention ignores altogether the allegations in the complaint from which we can reasonably infer that the HSBC Defendants had *actual* knowledge of these connections. For instance, the Golden Chain document, which established Al Rajhi Bank's ties to al-Qaeda, became public in 2004. Further information about these ties came to light in the 9/11 Commission Report and Congressional hearings. Am. Compl. ¶¶ 174-77. We can infer that the HSBC Defendants were aware of this information because "public sources such as media articles . . . plausibly suggest a defendant's knowledge which can be confirmed during discovery." *Honickman*, 6 F.4th at 502 n.18.

Undaunted by these allegations, the majority maintains that even if the HSBC Defendants were aware

of these connections, the Plaintiffs "fail[] to allege that those connections were so close that HSBC had to be aware it was assuming a role in al-Qaeda's terrorist activities by working with Al Rajhi Bank." Maj. Slip Op. at 19. In the majority's view, because Al Rajhi Bank engaged in "extensive legitimate operations," the Plaintiffs had to allege "that a substantial part of these operations involved al-Qaeda" and that "Al Rajhi Bank was so closely intertwined with al-Qaeda that we can infer HSBC was aware it was assuming a role in al-Qaeda's terrorist activities simply by doing business with Al Rajhi Bank." *Id.* at 20. The Plaintiffs alleged that "Al Rajhi Bank advertised the existence and numerical designation of the accounts it maintained for [al-Qaeda-front charities] throughout the Muslim world, providing a mechanism for al-Qaeda supporters to deposit funds directly into those accounts." Am. Compl. ¶ 120. The majority therefore holds that a bank that literally advertises how members of the public can give money to al-Qaeda (and enables them to do so) is not sufficiently "closely intertwined" with al-Qaeda to satisfy the general awareness requirement. The majority's reasoning appears to be that the HSBC defendants were only generally aware that its customer, Al Rahji Bank, supported al-Qaeda's "legitimate" charitable activities, rather than al-Qaeda's terrorism. As we have said in a different context, "[t]his finding is quite extraordinary, because it totally defies both logic and common sense." *Georgetown Hotel v. N.L.R.B.*, 835 F.2d 1467, 1471, 266 U.S. App. D.C. 371 (D.C. Cir. 1987).

Turning to the last element for aiding-and-abetting liability, the Plaintiffs must allege that the HSBC

Defendants knowingly provided substantial assistance to the Camp Chapman attack. The knowledge component is satisfied "[i]f the defendant knowingly—and not innocently or inadvertently—gave assistance, directly or indirectly." *Atchley*, 22 F.4th at 222 (internal quotation marks and citation omitted). It cannot be disputed that the HSBC Defendants knowingly assisted sanctioned entities Bank Melli and Bank Saderat in evading U.S. sanctions and providing Al Rajhi Bank with access to U.S. Banknotes despite its knowledge of Al Rajhi Bank's ties to al-Qaeda. *See* Am. Compl. ¶¶ 37, 200-02 (the HSBC Defendants accepting criminal responsibility for its conduct in the Deferred Prosecution Agreement); *see also Honickman*, 6 F.4th at 500 (noting that the "knowledge" component does "not require [a defendant] to 'know' anything more . . . than what she knew for the general awareness element").

The Plaintiffs have also sufficiently pled that the HSBC Defendants provided substantial assistance. In determining whether a defendant has provided substantial assistance, we consider six factors: "(i) the nature of the act assisted, (ii) the amount and kind of assistance, (iii) the defendants' presence at the time of the tort, (iv) the defendants' relationship to the tortious actor, (v) the defendants' state of mind, and (vi) the duration of assistance." *Atchley*, 22 F.4th at 221. Bearing in mind that "[n]o factor alone is dispositive, and the weight of each varies with the circumstances of the particular claim[,]" *id.*, I address each of these factors in turn.

Factors 1 and 2: Nature of Act & Amount and Kind of Assistance. The *Halberstam* Court noted that

"the nature of the act involved dictates what aid might matter, *i.e.*, be substantial." *Halberstam v. Welch*, 705 F.2d 472, 484, 227 U.S. App. D.C. 167 (D.C. Cir. 1983) (first emphasis omitted). Therefore, a court may "apply a proportionality test to particularly bad or opprobrious acts, *i.e.*, a defendant's responsibility for the same amount of assistance increases with the blameworthiness of the tortious act or the seriousness of the foreseeable consequences." *Id.* at 484 n.13. "The particularly offensive nature of an underlying offense might also factor" on the defendant's state of mind. *Id.*

The nature of the act alleged here is terrorism that resulted in the deaths of nine people. There can be no dispute as to the severity and heinous nature of terrorist attacks. *See* Pub. L. No. 114-122, 130 Stat. 852 § 2(a)(1) ("International terrorism is a serious and deadly problem that threatens the vital interests of the United States."). The amount and kind of assistance that was provided is also significant. As we already noted in *Atchley*, "[f]inancial support is indisputably important to the operation of a terrorist organization, and any money provided to the organization may aid its unlawful goals." 22 F.4th at 222 (internal quotation marks and citations omitted). As aforementioned, here, the Plaintiffs allege that the HSBC Defendants devised fraudulent schemes to evade U.S. sanctions and processed 25,000 deceptive transactions for sanctioned banks connected to Iran, valued at more than $19.4 billion. Am. Compl. ¶¶ 148-50. The Plaintiffs also allege that despite actual knowledge of Al Rajhi Bank's ties to al-Qaeda, the HSBC Defendants provided nearly $1 billion in U.S. Banknotes to Al Rajhi Bank leading up to the Camp Chapman attack. *Id.* ¶¶ 178-82.

Nevertheless, the majority contends that these allegations are insufficient because the Plaintiffs failed "to allege how much (if any) of that money indirectly flowed to al-Qaeda." Maj. Slip Op. at 22. The majority's position contradicts well-reasoned authority, including our own precedent. "[I]f a plaintiff plausibly alleges the general awareness element, she does not need to also allege the [foreign terrorist organization] actually received the funds." *Honickman*, 6 F.4th at 500. Rather, "[f]actual allegations that permit a reasonable inference that the defendant recognized the money it transferred to its customers would be received by the [foreign terrorist organization] would suffice." *Id.* As already outlined above, the Plaintiffs have pled that the HSBC Defendants provided Al Rajhi Bank—despite actual knowledge of its ties to al-Qaeda—with nearly one billion U.S. dollars leading up to the time of the Camp Chapman attack. As such, the complaint plausibly alleges that the HSBC Defendants recognized this money would be used to fund, at least in part, al-Qaeda operations.

Moreover, even if one considers this assistance to be relatively trivial, compared to the "extraordinary blameworthiness" of al-Qaeda's terrorist attacks, "even relatively trivial aid could count as substantial." *Atchley*, 22 F.4th at 222 (internal quotation marks and citation omitted); *see also Halberstam*, 705 F.2d at 488 (explaining the importance of evaluating acts of assistance "in the context of the enterprise they aided" rather than in isolation because although the defendant's assistance "may not have been overwhelming as to any given" act in the "five-year life of this criminal operation," such assistance

"added up over time to an essential part of the pattern"); Restatement (Third) of Torts § 28 cmt. d (2020) ("[A] clear understanding of wrongdoing can make a small act of assistance more blameworthy than it would seem if the defendant's knowledge were less certain or precise."); *id.* ("[T]he enormity of a wrong . . . or the intimacy of a defendant's knowledge of it may appropriately cause such lesser acts to be considered aiding and abetting."). Therefore, these factors support substantiality.

Factor 3: Presence or Absence at the Time of the Tort. Because the HSBC Defendants were not physically present at the scene, this factor may undermine the Plaintiffs' position. *See Atchley*, 22 F.4th at 223 (noting that because the "defendants were not physically present at the attacks on plaintiffs[,] [t]his factor cuts against counting" the defendants' assistance as substantial). However, as the majority notes, presence could be understood in a transactional sense and the HSBC Defendants were alleged to have ongoing business relations with sanctioned entities, particularly Al Rajhi Bank, before and leading up to the Camp Chapman attack. *See* Am. Compl. ¶¶ 161, 182. Thus, I would find that this factor neither supports nor weighs against substantiality.

Factor 4: Relationship to Principal. Because "there is no special relationship here between [the HSBC] defendants and the principal tortfeasors" I would also "treat this factor as neither supporting nor detracting from substantiality." *Atchley*, 22 F4th at 223.

Factor 5: State of Mind. This factor favors finding substantiality because Plaintiffs have sufficiently alleged

that the HSBC Defendants provided knowing assistance and such assistance "evidences a deliberate long-term intention to participate in an ongoing illicit enterprise." *Halberstam*, 705 F.2d at 488. As we have explained, "[a]iding-and-abetting liability reaches actors . . . who may seek only financial gain but pursue it with a general awareness of aiding some type of tort or crime." *Atchley*, 22 F.4th at 224. Here, the Plaintiffs allege the HSBC Defendants wanted to increase its business and purposefully devised a scheme to evade U.S. sanctions and engage in illicit transactions with entities that were sanctioned explicitly for their ties to terrorism. Therefore, the HSBC Defendants' alleged state of mind supports a finding of substantiality.

Factor 6: Duration of Assistance. The *Halberstam* Court considered this factor to be particularly "important" because "[t]he length of time an alleged aider-abettor has been involved with a tortfeasor almost certainly affects the quality and extent of their relationship and probably influences the amount of aid provided as well; additionally, it may afford evidence of the defendant's state of mind." *Halberstam*, 705 F.2d at 484. Here, the HSBC Defendants' alleged aid spanned more than a decade. Am. Compl. ¶¶ 31-36. Accordingly, this factor weighs strongly in favor of substantiality.

In sum, four of the six *Halberstam* factors weigh strongly in favor of finding substantial assistance, and the majority errs by concluding otherwise.

* * *

When Congress amended the ATA in 2016, its purpose 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.

Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 2(b), 130 Stat. 852, 853 (2016) (Amendment). Through its combination of "too stingy a reading of the complaint," *Maljack Prods., Inc. v. Motion Picture Ass'n of Am., Inc.*, 52 F.3d 373, 376, 311 U.S. App. D.C. 224 (D.C. Cir. 1995) (reversing dismissal), and too stingy a reading of precedent and relevant authorities, the majority has frustrated Congress's intent. Just as importantly, the majority has unfairly deprived these Plaintiffs of their rightful opportunity to prove their well-pleaded allegations in court. I respectfully dissent.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED MARCH 22, 2023

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 18-2739 (TJK)

DANA MARIE BERNHARDT *et al.*,

Plaintiffs,

v.

ISLAMIC REPUBLIC OF IRAN,

Defendant.

March 22, 2023, Decided
March 22, 2023, Filed

MEMORANDUM OPINION

Almost 15 years ago, a Jordanian doctor with ties to al-Qaeda detonated his suicide vest at Camp Chapman, a covert American military installation in Afghanistan. The deadliest attack on the Central Intelligence Agency in recent history took the lives of nine persons at the base, including American contractors Jeremy Wise and Dane Paresi. Plaintiffs—the two contractors' estates and family members—allege that the Islamic Republic of Iran provided al-Qaeda with material support for the attack.

Thus, they allege, Iran should be held liable for it under the Foreign Sovereign Immunities Act. For the reasons explained below, the Court agrees, and will grant their pending Motion for Default Judgment, enter judgment against Iran, and award damages of $268,553,684.

I. Background

A. Factual Background

On December 30, 2009, Humam Khalil al-Balawi, a Jordanian doctor affiliated with al-Qaeda, detonated a vest containing over thirty pounds of C-4 explosives and shrapnel shortly after arriving at Forward Operating Base Chapman ("Camp Chapman").[1] ECF No. 48 at 1; ECF No. 48-1 at 39, 41; ECF No. 48-2 at 1-2.[2] Camp Chapman was a clandestine Central Intelligence Agency ("CIA") installation in Khost, Afghanistan. ECF No. 48 at 1; ECF No. 48-1 at 40. The American intelligence community had believed al-Balawi was a double agent

1. Founded in the late-1980s during the final days of the Afghan-Soviet War, al-Qaeda rapidly gained international notoriety as a broad-based militant Islamic organization involved in the planning and execution of terrorist acts worldwide, including the bombing of two American embassies in East Africa and the September 11, 2001 attacks in the United States. ECF No. 48-1 at 16-18, 20-25.

2. In resolving this Motion, the Court relies on the uncontroverted factual assertions in Plaintiffs' Amended Complaint, ECF No. 10, Plaintiffs' Memorandum in Support of their Motion for Default Judgment, ECF No. 48, evidence attached to that Memorandum, ECF Nos. 48-1 to -12, and other facts of which the Court takes judicial notice.

embedded within al-Qaeda's top leadership in northwest Pakistan who could help the United States and Jordan infiltrate al-Qaeda. ECF No. 48-1 at 39-40. Al-Balawi had represented to CIA operatives that he had access al-Qaeda's second-in-command, Ayman al-Zawahiri. *Id.* at 40. On that understanding, CIA officials arranged for a meeting with al-Balawi at Camp Chapman. *Id.* at 39-41.

But tragically, al-Balawi was a triple agent who had conspired with al-Qaeda to plan a suicide attack. ECF No. 48-1 at 40-41. After he arrived at Camp Chapman, Wise and Paresi approached him and noticed one of his hands was concealed. *Id.* at 41. They ordered him to show his hands, but al-Balawi detonated his vest. *Id.; see also* ECF No. 48 at 10, 12 (citing Joby Warrick, *The Triple Agent: The Al-Qaeda Mole Who Infiltrated the CIA* 8 (2012)). Along with al-Balawi's own life, the explosion took nine others, including Paresi and Wise, and wounded several more. ECF No. 48-1 at 41. The attack was the "single deadliest episode" for the CIA since September 11, 2001. ECF No. 48 at 2 (quoting Alissa J. Rubin & Mark Mazzetti, *Suicide Bomber Killed C.I.A. Operatives*, N.Y. Times (Dec. 30, 2009), https://www.nytimes.com/2009/12/31/world/asia/31khost.html).

According to Plaintiffs, the suicide bombing at Camp Chapman was a part of a broader conspiracy between al-Qaeda, Tehrik-e-Taliban Pakistan ("TTP"), and Iran to attack the United States and its allies.[3] *See* ECF No.

3. The TTP, also known as the Movement of the Taliban in Pakistan, is a Pakistan-based militant group founded in 2007. ECF No. 48-1 at 31.

48 at 1-2, 17-21. Iran has supported al-Qaeda since the early 1990s. ECF No. 48-1 at 21-31. According to the Treasury Department, Iran has historically "serve[d] as the core pipeline through which [al Qaeda] move[d] money, facilitators, and operatives from across the Middle East to South Asia." ECF No. 48 at 2 & n.4 (alterations in original) (quoting U.S. Dep't of Treasury, *Treasury Targets Key al-Qa'ida Funding and Support Network Using Iran as a Critical Transit Point* (July 28, 2011), https://home.treasury.gov/news/press-releases/tg1261); ECF No. 48-1 at 27-29, 50. In addition, the Treasury Department has described Iran as a "critical transit point for funding to support [al-Qaeda's] activities in Afghanistan and Pakistan." ECF No. 48 at 16 & n.22 (citation omitted); *see also* ECF No. 48-1 at 50 & n.221. Iran's support extended to the TTP, too. According to the State Department, the TTP has a "symbiotic relationship" with al-Qaeda, providing al-Qaeda "safe haven" in exchange for "ideological guidance." ECF No. 48-1 at 17, 33. Iran indirectly supported the TTP by providing sanctuary and cross-border mobility to Atiyah Abd al-Rahman—an al-Qaeda leader with close ties to Osama bin-Laden—who "played a central role in [al-Qaeda and the TTP's] alliance." *Id.* at 28, 35, 48-49.

These channels of support, according to Plaintiffs' expert, were crucial ingredients of the Camp Chapman attack, because the success of the mission relied on extensive financial, material, and logistical assistance from Iran. ECF No. 48-1 at 21-31, 47-50; ECF No. 48 at 2. Specifically, according to Plaintiffs' expert, before the Camp Chapman bombing, Iran provided al-Qaeda with the ability to move funds internationally; the opportunity

to travel without hindrance across its borders into Afghanistan and Pakistan; and the funding necessary to establish and maintain the communications and training networks that facilitated the planning and execution of the attack. *See* ECF No. 48-1 at 21, 24, 27-29, 47-50; ECF No. 48 at 2, 16-17. The sanctuary and mobility Iran gave al-Rahman proved particularly important. Al-Rahman helped forge the alliance between al-Qaeda and the TTP. ECF No. 48-1 at 35-37, 49-50. Al-Balawi's "first point of contact with Islamist militant groups was with the TTP." *Id.* at 50. And as described in more detail below, al-Rahman himself helped "engineer[]" the attack. *Id.* at 48-49. Thus, Plaintiffs' expert concluded that Iran's aid to al-Qaeda and others bore a "definite connection to the attack on Camp Chapman." *See id.* at 51.

Because Wise and Paresi were killed in the attack, they could not fulfill their professional aspirations after leaving their positions as CIA contractors. ECF No. 48-1 at 41; ECF No. 48-2 at 1-2. Upon completion of his 90-day security contract with the CIA, Wise had intended to return to the United States to continue medical school, which he had put on pause so that he could enlist in the Navy following September 11. *See* ECF No. 48 at 29; *see also* ECF No. 48-3 at 2. Likewise, Paresi had planned to pursue employment at home after concluding his final stint as a CIA contractor. *See* ECF No. 48 at 29-30; *see also* ECF No. 48-4 at 2.

Wise's and Paresi's families have and will continue to suffer profoundly as a result of their deaths. Wise's sudden passing has taken an immense physical, mental,

and emotional toll on his close family members. His widow, Dana Bernhardt, and his stepson, Ethan Prusinski, have been left without the emotional and financial support for which they once depended on Wise. ECF No. 48-5 ¶¶ 9-10. Bernhardt recounts losing her "best friend" and the "one constant" in her life. *Id.* ¶ 4. She has sought counseling and treatment for depression, elevated stress, and anxiety. *Id.* ¶¶ 26-27. And she continues to grieve his loss and suffers from panic attacks, regular night terrors, and symptoms consistent with post-traumatic stress disorder ("PTSD"). *Id.* ¶¶ 27-28. Prusinski had an "inseparable" father-son bond with Wise. *Id.* ¶ 41. After the loss of his only father figure at age six, he struggled to cope with his grief, struggled to trust others, and was "in and out of trouble in school." *Id.* ¶¶ 49-50. As a result, he attended counseling throughout his childhood. *Id.* ¶ 49. Later as a young adult, he harbored "frustrations with the purpose of his life," which he attributes to Wise's death. *Id.* ¶ 52.

Wise's parents and siblings have suffered, too. Wise's father's health "rapidly declined" following the attack, leading to such frequent crying that he had broken blood vessels under his eyes. ECF No. 48-6 ¶¶ 23-24. He passed away from Parkinson's disease in 2016. *Id.* ¶ 27. Wise's mother Mary Lee Wise also experienced a sharp decline in health after her son's death. *Id.* ¶ 35. She became violently ill with migraines, had vomiting episodes, refused to leave her bed for days, and many years later suffered a life-threatening stroke and hemorrhage that rendered her bedridden, mentally scattered, and partially immobilized. *Id.* ¶¶ 25-32. Those close to Wise›s mother "know the grief claimed" her health. *Id.* ¶ 35. Finally, Wise's sister

Mary Heather Wise suffered from chronic insomnia and an accelerated heart rate because of her brother's death. *Id.* ¶¶ 14-16. As the months went on, her grief strained her marriage, and she struggled to care for her young daughter who is on the autism spectrum. *Id.* ¶ 16. At one point, Mary Heather Wise became so physically weak that she went into stage-four adrenal exhaustion. *Id.* ¶¶ 14-19. Later, she was diagnosed with PTSD. *Id.* ¶ 20. Her own grief was exacerbated by having to watch and support her parents as they mourned the loss of their son. *Id.* ¶¶ 22, 24, 28, 33. She now relies on anti-anxiety and sleeping medication. *Id.* ¶ 15.

Paresi's family members have also experienced severe physical and emotional pain in the wake of the attack. Paresi's widow, Mindylou Paresi, suffers from intense bouts of grief having lost her "husband, best friend, confidant, hero, protector, and soul mate," and she has attended therapy to learn how to better cope with his passing. ECF No. 48-7 ¶¶ 4, 14. Since her husband's death, she has struggled to regain her sense of normalcy and goes through life "feeling empty," "without direction," and "in freefall." *Id.* ¶¶ 10-12. Paresi's death also brought "trauma" to his stepdaughter, Alexandra VandenBroek, and daughter, Elizabeth Santina Paresi, who have been plagued by mental distress over the past decade. ECF No. 48-8 ¶¶ 13-14, 24; ECF No. 48-9 ¶¶ 11-23. VandenBroek, for her part, suffered an indescribable emotional toll processing the loss of her "heart and cornerstone of [her] family" and "superhero." ECF No. 48-8 ¶¶ 10-11. She had to leave her job to help support her incomplete family unit, and, perhaps most painful, she had to watch her mother

"crumble from the pain of this loss." *Id.* ¶ 13. The great deal of press coverage of her father's death—much of it, she says, incorrect—compounded her and her family's grieving process. *Id.* ¶ 15; *see also id.* ¶ 20 (describing her harrowing experience inadvertently watching the movie *Zero Dark Thirty*, which depicts the Camp Chapman bombing). For Elizabeth Santina Paresi, the mental distress has manifested itself in persistent psychological struggles and suicidal ideations. ECF No. 48-9 ¶¶ 16-18. She yearned for a father "more than anything" but "knew that wish would never come true." *Id.* ¶ 16. Once "adventurous," and "confident," she says she is now "very secluded and quiet" and is "unsure of a lot of things, hesitant, and anxious to perform and complete tasks." *Id.* ¶ 23. As with her stepsister, the onslaught of press compounded her grief. *Id.* ¶¶ 27-28.

Paresi's parents suffered the pain of losing their firstborn son. Janet Paresi, Paresi's mother, underwent a "drawn out and incredibly difficult" grieving process, ECF 48-10 ¶ 11, and has been retraumatized watching her husband with dementia struggle to cope with recurring realizations of his son's death, *id.* ¶¶ 12-13. Paresi's brother Terry Paresi was "wrecked" upon learning of his lifelong mentor's sudden passing. ECF No. 48-11 ¶¶ 4, 6. He now sees a specialist and takes medication daily to treat his anxiety. *Id.* ¶¶ 7-8. Lastly, Paresi's sister Santina Cartisser comments how "difficult [it is] to convey the absolute shock that went through [her] brain" when she learned her brother had been killed. ECF No. 48-12 ¶ 14. She notes that relationships within their family have deteriorated because her brother was the "glue to [their]

dysfunctional family." *Id.* ¶¶ 11, 16.

B. Procedural Background

In 2018, Plaintiffs filed suit against Iran. ECF No. 1. They sought relief under the Foreign Sovereign Immunities Act ("FSIA") for Wise's and Paresi's extrajudicial killings in connection with the Camp Chapman attack and the families' resulting injuries. *See id.* Plaintiffs later filed an Amended Complaint that added four HSBC-affiliated financial institutions as Defendants along with Iran. *See* ECF No. 10. The Court dismissed the claims against the HSBC Defendants for lack of personal jurisdiction, as well as for Plaintiffs' failure to state a claim under the Justice Against Sponsors of Terrorism Act, and the Circuit affirmed. *See Bernhardt v. Islamic Republic of Iran*, No. 18-cv-2739 (TJK), 2020 U.S. Dist. LEXIS 214185, 2020 WL 6743066 (D.D.C. Nov. 16, 2020), *aff'd*, 47 F.4th 856 (D.C. Cir. 2022). Thus, Iran remains as the sole Defendant.

After Plaintiffs amended their complaint, the Court reissued summons as to Iran, ECF No. 13, and Plaintiffs initiated service via registered mail under 28 U.S.C. § 1608(a)(3). ECF No. 21. Plaintiffs then waited thirty days under 28 U.S.C. § 1608(a)(4), before requesting that the State Department help serve Iran by diplomatic means. ECF No. 29. In July 2020, Iran was served with, and refused to accept, a copy of the summons, Amended Complaint, and notice of suit through the embassy of Switzerland in Tehran, Iran. *See* ECF No. 36. Iran never responded to the Amended Complaint or otherwise appeared. Thus, the clerk entered default against Iran,

ECF No. 46, and Plaintiffs promptly moved for default judgment.[4] ECF No. 48.

II. Legal Standard

Under Federal Rule of Civil Procedure 55, a court may consider entering a default judgment when a party applies for that relief. *See* Fed. R. Civ. P. 55(b)(2). "[S]trong policies favor resolution of disputes on their merits," and so "'[t]he default judgment must normally be viewed as available only when the adversary process has been halted because of an essentially unresponsive party.'" *Jackson v. Beech*, 636 F.2d 831, 836, 205 U.S. App. D.C. 84 (D.C. Cir. 1980) (quoting *H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689, 691, 139 U.S. App. D.C. 256 (D.C. Cir. 1970)). The "determination of whether a default judgment is appropriate is committed to the discretion of the trial court." *Hanley-Wood LLC v. Hanley Wood LLC*, 783 F. Supp. 2d. 147, 150 (D.D.C. 2011) (citing *Jackson*, 636 F.2d at 836).

4. In their proposed order and memorandum in support of their Motion, Plaintiffs separated their claims for the Wise family into "Count I" and for the Paresi family into "Count II." ECF No. 47-1; ECF No. 48 at 43-44. But as already mentioned, the Court dismissed from the Amended Complaint the counts brought against the HSBC Defendants, Counts II and III. *See* ECF No. 10 ¶¶ 254-80. Only Count I of the Amended Complaint is brought against Iran. *See id.* ¶¶ 244-53. Thus, despite Plaintiffs' requesting judgment against Iran on "Count I" *and "Count II*," the Court construes Plaintiffs' Motion as requesting judgment only on Count I.

Even if a party fails to respond or refuses to participate in the litigation, "entry of a default judgment is not automatic." *Mwani v. bin Laden*, 417 F.3d 1, 6, 368 U.S. App. D.C. 1 (D.C. Cir. 2005) (footnote omitted). Rather, a court retains its "affirmative obligation" to determine whether it has subject-matter jurisdiction over the action. *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1092, 317 U.S. App. D.C. 281 (D.C. Cir. 1996). Additionally, "a court should satisfy itself that it has personal jurisdiction before entering judgment against an absent defendant." *Mwani*, 417 F.3d at 6. "The party seeking default judgment has the burden of establishing both subject matter jurisdiction over the claims and personal jurisdiction over the defendants." *Thuneibat v. Syrian Arab Republic*, 167 F. Supp. 3d 22, 33 (D.D.C. 2016). With no evidentiary hearing, the burden to show personal jurisdiction can be satisfied "with a *prima facie* showing." *Mwani*, 417 F.3d at 7. And in providing such a showing, "[the party] may rest their argument on their pleadings, bolstered by such affidavits and other written materials as they can otherwise obtain." *Id.*

"When default judgment is sought under the FSIA, a claimant must 'establish[] his claim or right to relief by evidence satisfactory to the court.'" *Warmbier v. Democratic People's Republic of Korea*, 356 F. Supp. 3d 30, 42 (D.D.C. 2018) (quoting 28 U.S.C. § 1608(e)); *see Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 232, 357 U.S. App. D.C. 107 (D.C. Cir. 2003) ("The court . . . has an obligation to satisfy itself that plaintiffs have established a right to relief."). And courts must apply that standard mindful that "Congress enacted the terrorism exception expressly

to bring state sponsors of terrorism . . . to account for their repressive practices," *Kim v. Democratic People's Republic of Korea*, 774 F.3d 1044, 1048, 413 U.S. App. D.C. 356 (D.C. Cir. 2014), and to "punish foreign states who have committed or sponsored such acts and deter them from doing so in the future," *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 88-89, 352 U.S. App. D.C. 284 (D.C. Cir. 2002).

As a result, the D.C. Circuit has instructed that "courts have the authority—indeed . . . the obligation—to 'adjust evidentiary requirements to . . . differing situations.'" *Kim*, 774 F.3d at 1048 (quoting *Bundy v. Jackson*, 641 F.2d 934, 951, 205 U.S. App. D.C. 444 (D.C. Cir. 1981)). To be sure, courts must draw their "findings of fact and conclusions of law from admissible testimony in accordance with the Federal Rules of Evidence." *Id.* at 1049 (quoting *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 21 n.1 (D.D.C. 2001)). But "uncontroverted factual allegations" supported by admissible evidence may be taken as true. *See Roth v. Islamic Republic of Iran*, 78 F. Supp. 3d 379, 386 (D.D.C. 2015). A court may also "take judicial notice of any fact 'not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 59 (D.D.C. 2010) (quoting Fed. R. Evid. 201(b)); *see also Detroit Int'l Bridge Co. v. Gov't of Can.*, 133 F. Supp. 3d 70, 85 (D.D.C. 2015) ("[J]udicial notice may be taken of public records and government documents available from reliable sources."). And 28 U.S.C. § 1608(e) "does not require a court to step into the shoes of the defaulting party and pursue every

possible evidentiary challenge." *Owens v. Republic of Sudan*, 864 F.3d 751, 785, 431 U.S. App. D.C. 163 (D.C. Cir. 2017), *vacated & remanded on other grounds sub nom. Opati v. Republic of Sudan*, 140 S. Ct. 1601, 206 L. Ed. 2d 904 (2020). Ultimately, "the FSIA leaves it to the court to determine precisely how much and what kinds of evidence the plaintiff must provide." *Kim*, 774 F.3d at 1047.

In an FSIA default proceeding, a court can find that the evidence presented is satisfactory "when the plaintiff shows 'her claim has some factual basis,' . . . even if she might not have prevailed in a contested proceeding." *Owens*, 864 F.3d at 785 (citation omitted). "This lenient standard is particularly appropriate for [an] FSIA terrorism case, for which firsthand evidence and eyewitness testimony is difficult or impossible to obtain from an absent and likely hostile sovereign." *Id.* Thus, courts are given "an unusual degree of discretion over evidentiary rulings in [an] FSIA case against a defaulting state sponsor of terrorism." *Id.* And this discretion extends to the admission of expert testimony, often "of crucial importance in terrorism cases . . . because firsthand evidence of terrorist activities is difficult, if not impossible, to obtain," "[v]ictims of terrorist attacks . . . are often . . . unable to testify about their experiences," and "[p]erpetrators of terrorism typically lie beyond the reach of the courts and go to great lengths to avoid detection." *Id.* at 787 (citations omitted). Moreover, "[e]yewitnesses in a state that sponsors terrorism are similarly difficult to locate," and "[t]he sovereigns themselves often fail to appear and to participate in discovery." *Id.* For these reasons, the Circuit has recognized that "reliance upon

secondary materials and the opinions of experts is often critical in order to establish the factual basis of a claim under the FSIA terrorism exception." *Id.*

III. Analysis

A court may enter a default judgment in an FSIA case "when (1) the Court has subject matter jurisdiction over the claims, (2) personal jurisdiction is properly exercised over the defendants, (3) the plaintiffs have presented satisfactory evidence to establish their claims against the defendants, and (4) the plaintiffs have satisfactorily proven that they are entitled to the monetary damages that they seek." *Braun v. Islamic Republic of Iran*, 228 F. Supp. 3d 64, 75 (D.D.C. 2017); *accord Akins v. Islamic Republic of Iran*, 332 F. Supp. 3d 1, 32 (D.D.C. 2018). The Court addresses each in turn.

A. Subject-Matter Jurisdiction

"The FSIA provides a basis for asserting jurisdiction over foreign nations in the United States." *Price*, 294 F.3d at 87 (citing *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443, 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989)). Under the FSIA, a federal court has original jurisdiction over "(1) nonjury civil actions (2) for claims seeking relief *in personam* (3) against a foreign state (4) when the foreign state is not entitled to immunity either under sections 1605 to 1607 of [this title] or under any applicable international agreement." *Shoham v. Islamic Republic of Iran*, No. 12-cv-508 (RCL), 2017 U.S. Dist. LEXIS 84119, 2017 WL 2399454, at *10 (D.D.C. June

1, 2017); 28 U.S.C. § 1330(a). The first three prerequisites are easily met here.

First, even though Plaintiffs' Amended Complaint (which included the HSBC Defendants) demanded a jury trial, ECF No. 10 at 1, 61, the FSIA does not permit such a proceeding against a foreign state, *see Doe v. Democratic People's Republic of Korea Ministry of Foreign Affs. Jungsong-Dong*, 414 F. Supp. 3d 109, 123 (D.D.C. 2019) (All "federal appellate courts which have considered the issue . . . have held that jury trials are not available in suits brought under the [FSIA]." (citation omitted) (alterations in original)). Now that the Court has dismissed the HSBC Defendants, *Bernhardt*, 2020 U.S. Dist. LEXIS 214185, 2020 WL 6743066, at *8, this action is a "nonjury civil action," as Plaintiffs acknowledge, s*ee* ECF No. 48 at 10. *See also* Fed. R. Civ. P. 39(a)(2) (permitting a court to dispense with jury-trial demand when it finds, "on motion or on its own, . . . that on some or all of those issues [for which a jury trial is demanded] there is no federal right to a jury trial"). Second, this is an action seeking relief *in personam* not *in rem. See Shoham*, 2017 U.S. Dist. LEXIS 84119, 2017 WL 2399454, at *10 (explaining that suing defendants as "legal persons" rather than "property" means that the claims "seek relief *in personam*"); *Thuneibat*, 167 F. Supp. 3d at 34 (holding that a lawsuit seeking damages from Syria to compensate for a suicide bombing sought *in personam* relief). Third, Iran "is plainly a foreign state." *Shoham*, 2017 U.S. Dist. LEXIS 84119, 2017 WL 2399454, at *10. Thus, the only outstanding subject-matter-jurisdiction question is whether the FSIA or another international agreement entitles Iran to immunity.

"A foreign state is typically immune from jurisdiction in [United States] courts," but the FSIA provides a narrow set of exceptions to that immunity. *Colvin v. Syrian Arab Republic*, 363 F. Supp. 3d 141, 152 (D.D.C. 2019) (citing 28 U.S.C. § 1604); *see also Amerada Hess*, 488 U.S. at 439 ("[T]he FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court[.]"). Plaintiffs here invoke the FSIA terrorism exception, which provides federal courts with subject-matter jurisdiction over cases "in which money damages are sought against a foreign state for personal injury or death that was caused" by an enumerated act of terrorism. 28 U.S.C. § 1605A(a)(1); *see also* 28 U.S.C. § 1330. Plaintiffs must prove three elements to establish subject-matter jurisdiction under the terrorism exception: (1) the foreign state was designated as a state sponsor of terrorism when the act of terrorism occurred and when this action was filed; (2) the claimant or victim was a national of the United States at the time of the act; and (3) the damages sought are for personal injury or death caused by the act of terrorism.[5] *See Akins*, 332 F. Supp. 3d at 32; 28 U.S.C. § 1605A. Plaintiffs have met their burden at this stage on each of these elements.

5. The statute also requires a plaintiff to offer to arbitrate a claim against a foreign state in that foreign state when the acts causing injury occurred there. But here, the acts occurred in Afghanistan, not Iran. Thus, Plaintiffs need not have offered arbitration to establish subject-matter jurisdiction. *See* 28 U.S.C. § 1605A(a)(2)(A)(iii); ECF No. 10 ¶ 22; *Winternitz v. Syrian Arab Republic*, No. 17-cv-2104 (TJK), 2022 U.S. Dist. LEXIS 60961, 2022 WL 971328, at *4 n.1 (D.D.C. Mar. 31, 2022).

Appendix B

1. Iran Was Timely Designated a State Sponsor of Terrorism

The State Department designated Iran a state sponsor of terrorism in 1984, and the country has remained so designated since. *See Hamen v. Islamic Republic of Iran*, 401 F. Supp. 3d 85, 100 (D.D.C. 2019) (first citing Determination Pursuant to Section 6(i) of the Export Administration Act of 1979—Iran, 49 Fed. Reg. 2836-02 (Jan. 23, 1984); and then citing U.S. Dep't of State, *State Sponsors of Terrorism*, https://www.state.gov/j/ct/list/c14151.htm (last visited Mar. 21, 2023)). The State Department even declared that "Iran remained the most active state sponsor of terrorism" in 2009, the same year as the Camp Chapman attack. U.S. Dep't of State, *Country Reports on Terrorism 2008: Chapter 3: State Sponsors of Terrorism* (Apr. 30, 2009), https://2009-2017.state.gov/j/ct/rls/crt/2008/122436.htm .

2. Plaintiffs Are U.S. Nationals

Wise, Paresi, and Plaintiffs were all United States citizens at the time of the Camp Chapman attack. *See* ECF No. 48 at 11; ECF No. 48-2 at 4-5; ECF No. 48-5 ¶¶ 2-3; ECF No. 48-6 ¶ 2; ECF No. 48-7 ¶¶ 2-3; ECF No. 48-8 ¶ 2; ECF No. 48-9 ¶ 2; ECF No. 48-10 ¶ 2; ECF No. 48-11 ¶ 2; ECF No. 48-12 ¶ 2; *see also* 28 U.S.C. § 1605A(c)(4) (A "legal representative," like an estate, can bring suit on behalf of a United States national under the FSIA terrorism exception.). And United States citizens are nationals for FSIA purposes. 28 U.S.C. § 1605A(h)(5); 8 U.S.C. § 1101(a)(22).

3. Iran's Actions Qualify for the Terrorism Exception

The final element of the subject-matter jurisdiction inquiry requires that Plaintiffs seek damages for personal injury or death caused by the foreign state's commission of at least one terrorist act enumerated in the statute, including "torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act." 28 U.S.C. § 1605A(a)(1). As described below, Plaintiffs have met their burden by showing that: (1) Wise and Paresi were the victims of the extrajudicial killing at Camp Chapman and (2) Iran's provision of financial, material, and logistical support to al-Qaeda was a legally sufficient cause of the attack. *See* ECF No. 10 at 10-21.

a. The Camp Chapman Attack Was an Extrajudicial Killing

An "extrajudicial killing" for purposes of the FSIA is defined via the Torture Victim Protection Act of 1991 as "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any killing that, under international law, is lawfully carried out under the authority of a foreign nation." Torture Victim Protection Act, Pub. L. No. 102-256, § 3(a), 106 Stat. 73, 73 (1991) (codified at 28 U.S.C. § 1350 note § 3A); 28 U.S.C. § 1605A(h)(7). The D.C. Circuit has interpreted this text to include three elements: "(1) a

killing; (2) that is deliberated; and (3) is not authorized by a previous judgment pronounced by a constituted court." *Hamen*, 401 F. Supp. 3d at 101 (citing *Owens*, 864 F.3d at 770).

The attack at Camp Chapman satisfies all three elements for an "extrajudicial killing" under the FSIA. First, al-Balawi detonated a suicide vest at Camp Chapman, killing Wise, Paresi, and seven others. ECF No. 48-2 at 4. Second, the attack was deliberated; that is, it was "undertaken with careful consideration, not on a sudden impulse." *Hamen*, 401 F. Supp. 3d at 101. Working with top al-Qaeda operatives, al-Balawi portrayed himself as a double agent for the United States embedded within the organization, although he was really a triple agent. ECF No. 48-1 at 40, 42. With al-Qaeda's assistance, he produced credible evidence that "signal[led] to Western intelligence that he had succeeded in penetrating the group." *Id.* at 40. He then parlayed the CIA's trust in him into a meeting at Camp Chapman, where he planned to (and did) detonate his suicide vest. *Id.* at 41. Al-Balawi even recorded videos that al-Qaeda and others would distribute upon the anticipated attack. *Id.* at 42. Third, there is no evidence that the suicide bombing was authorized by a judgment of a "regularly constituted court or [was] lawfully carried out under the authority of a foreign nation." *Lee v. Islamic Republic of Iran*, 518 F. Supp. 3d 475, 492 (D.D.C. 2021). Thus, the Camp Chapman attack constitutes an extrajudicial killing under the FSIA.[6]

6. Courts regularly find that suicide bombings, like the one at issue, are extrajudicial killings. *See, e.g., Wultz v. Islamic Republic of Iran*, 864 F. Supp. 2d 24, 34 (D.D.C. 2012) (suicide attack at an

b. Iran's Material Support Caused the Camp Chapman Attack

Next, to "establish the court's jurisdiction, the plaintiffs in this case must show (1) [Iran] provided material support to al-Qaeda and (2) its material support was a legally sufficient cause of the [Camp Chapman attack]." *Owens*, 864 F.3d at 778; *see, e.g., W.A. v. Islamic Republic of Iran*, 427 F. Supp. 3d 117, 135-36 (D.D.C. 2019).

i. Plaintiffs Have Presented Evidence Sufficient to Show that Iran Provided Material Support to al-Qaeda and Related Organizations

Under the relevant statute, material support or resources is "any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel . . . and transportation, except medicine or religious materials." 18 U.S.C. § 2339A(b)(1); *see* 28 U.S.C. § 1605A(h)(3) (defining "material support or resources" under the FSIA to have the "meaning given that term in section 2339A of title 18").

Israeli restaurant); *Owens v. Republic of Sudan*, 826 F. Supp. 2d 128, 149-50 (D.D.C. 2011) (suicide bombings at two U.S. embassies); *Bodoff v. Islamic Republic of Iran*, 424 F. Supp. 2d 74, 80 (D.D.C. 2006) (suicide bombing of an Israeli passenger bus).

To start, Plaintiffs have presented sufficient evidence that al-Qaeda and its allies were responsible for the attack at Camp Chapman. They have established a clear link between al-Balawi—the person who actually carried out the suicide bombing—and various organizations, including al-Qaeda and the TTP. In early 2009, the Jordanian General Intelligence Directorate ("GID") arrested, held captive, and interrogated al-Balawi for jihadist sympathies he shared online. ECF No. 48 at 9; ECF No. 48-1 at 39. Afterward, the GID continued to monitor al-Balawi and ended up recruiting him to help the GID and the CIA with their search for terrorists, including al-Qaeda's first-in-command, bin Laden, and second-in-command, al-Zawahiri. ECF No. 48-1 at 39-40. At the GID's directive, al-Balawi began to cultivate a relationship with the TTP and prominent al-Qaeda leaders, such as al-Zawahiri. *Id.* at 40. By the summer of 2009, al-Balawi had moved to Pakistan to live and meet with top TTP and al-Qaeda officials on TTP members' invitation. *Id.* By ingratiating himself within these groups, al-Balawi successfully convinced Jordanian and United States intelligence officials that he was an asset with access to critical information about al-Qaeda. *Id.* at 40-41.

Despite appearances to the CIA and the GID, however, al-Balawi's "allegiance to al-Qaeda and the TTP never wavered." ECF No. 48-1 at 39. While in Pakistan, according to statements issued by al-Qaeda and the TTP after the attack, al-Balawi participated in the careful planning of the suicide bombing, engaged in extensive training with al-Qaeda and TTP militants, and recorded videos about the anticipated attack designed

for distribution on several jihadist media networks. *Id.* at 40-41, 44. Indeed, al-Qaeda also gave al-Balawi the evidence—a staged video of al-Balawi next to senior al-Qaeda leaders, including al-Rahman—that he provided to the GID and that ultimately enabled him to earn the GID's and the CIA's trust. *Id.* at 40.

The week after the Camp Chapman attack, both al-Qaeda and the TTP claimed responsibility on jihadist web forums via their media affiliates. ECF No. 48-1 at 42-45. Information corroborating these claims emerged through open-source reporting, credible statements by the organizations' media representatives, and the release of other pieces of propaganda after the attack, such as the videos taken of al-Balawi with the groups' leaders just days before the suicide bombing. *Id.* Ultimately, the State and Justice Departments concluded that the TTP participated in the planning of the attack. *Id.* at 44 & nn.196-98. And based on a review of all this information, Plaintiffs' expert Dr. Daveed Gartenstein-Ross concludes that, in his "expert opinion," "[a]l-Qaeda and the TTP [were] directly responsible for the attack."[7] ECF No. 48-1 at 3.

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7. Gartenstein-Ross's report is based on his extensive knowledge, experience, training, and education concerning violent non-state actors, *see* ECF No. 48-1 at 4-15, and his comprehensive review of the relevant primary and secondary sources on the matter, *id.* at 15-16. Consistent with the well-established practice of courts in this Circuit, and "[c]onsidering the requirements of Federal Rule of Evidence 702, the Court [finds] Dr. Gartenstein-Ross qualified to offer the opinions relied upon herein as an expert on Iranian support for violent non-state actors . . . ." *See Neiberger v. Islamic Republic of Iran*, No. 16-cv-2193 (EGS/ZMF), 2022 U.S. Dist. LEXIS 218169, 2022 WL 17370239, at *3 n.2 (D.D.C. Sept. 8, 2022)

Plaintiffs have also provided sufficient evidence that Iran provided financial, material, and logistical support to al-Qaeda and its allies—including support used by al-Qaeda in its planning and execution of the Camp Chapman attack. Plaintiffs rely on Gartenstein-Ross's report detailing several causal connections between Iranian support for these militant groups and the attack at Camp Chapman. *See* ECF No. 48 at 18-20; ECF No. 48-1 at 47-50. He concludes that Iran's material support of violent non-state actors was a cause of the Camp Chapman attack. *See id.* at 51.

First, Gartenstein-Ross describes Iran's earlier support of al-Qaeda following the attacks on September 11, 2001. He notes that Iran provided safe passage and sanctuary to militants fleeing Afghanistan, including many high-ranking al-Qaeda operatives, after the United States overthrew the Taliban government in Afghanistan. ECF No. 48-1 at 47. The promise of safe passage and sanctuary gave al-Qaeda "the time and space it required to recover, regroup, and rebuild its organization." *Id.* Under Iran's tutelage, al-Qaeda leaders formed an Iran-based management council to provide strategic assistance to the

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(collecting cases), *report and recommendation adopted*, 2022 U.S. Dist. LEXIS 219188, 2022 WL 17370160 (D.D.C. Sept. 30, 2022); *see also, e.g., Fritz v. Islamic Republic of Iran*, 320 F. Supp. 3d 48, 63 (D.D.C. 2018) ("credit[ing] Dr. Gartenstein-Ross's expert opinion that Iran provided significant material support" (citation omitted)); *Foley v. Syrian Arab Republic*, 249 F. Supp. 3d 186, 193 (D.D.C. 2017) ("qualif[ying] Daveed Gartenstein-Ross as an expert in the evolution of the history of terrorist organizations and their claims of responsibility for acts of terrorism").

group's central leadership in Pakistan. *Id.* This council also executed several attacks across the region during the leaders' prolonged stay in the country. *Id.* As recent as 2021, the State Department identified several senior al-Qaeda officials continuing to use Iran as a refuge. *Id.* at 29-31.

Second, Iran provided al-Rahman, who played a key role in the attack, with considerable support and freedom that paved the way for the attack. ECF No. 48-1 at 48-49. Specifically, Iran provided al-Rahman with both protection and the ability to move across its borders freely. As to the former, in the wake of September 11, Iran gave al-Rahman sanctuary in the country, where he climbed al-Qaeda's ranks and eventually assumed a position of significant authority. *Id.* at 48. After five years under Iranian protection, al-Rahman became recognized as "one of al-Qaeda's top strategic thinkers and spiritual advisors." *Id.* (quoting Warrick, *supra*, at 115-16). And Iran allowed al-Rahman to travel back and forth between Pakistan—where the planning for the Camp Chapman attack took place—and Iran. ECF No. 48-1 at 48-49. Indeed, the Treasury Department later reported that bin Laden had appointed al-Rahman to be "al-Qaeda's emissary to Iran." *Id.* at 49. In this role, he could travel liberally to and from Iran "with the permission of Iran officials," a "very rare" privilege for al-Qaeda's Iran-based leadership. *Id.*

In the end, al-Qaeda leveraged al-Rahman's high-ranking status and freedom of movement, made possible by Iran, to pull off the Camp Chapman attack. Al-Qaeda

had al-Rahman appear in the staged video with al-Balawi that al-Balawi sent to the GID to signal that he had successfully penetrated the group. ECF No. 48-1 at 40, 49. The video served as the "bait to lure" CIA operatives into arranging a meeting with al-Balawi, as al-Rahman was "one of the closest associates of al-Qaeda leader Osama bin Laden known to be alive." *Id.* at 39, 48 (quoting Warrick, *supra*, at 115-16). The ploy worked: when CIA and GID officials saw the video, al-Rahman's face—unseen by American intelligence officers for over eight years—was "instantly recognizable." *Id.* at 48 (quoting Warrick, *supra*, at 115-16).

Third, by providing al-Qaeda leaders, including al-Rahman, with the ability to operate unhindered in its territory after September 11, Iran created the environment that fostered al-Qaeda and the TTP's relationship. ECF No. 48-1 at 35-37, 49-50. Al-Rahman "played a central role" in facilitating al-Qaeda's alliance with the TTP, as he advised TTP leaders during its nascency. *Id.* at 35. He served as al-Qaeda's "interlocutor with affiliate organizations" and allies in 2007. *Id.* In that role, he "reviewed and provided critical feedback on TTP's charter," marking the beginning of a close relationship between al-Qaeda and the TTP. *Id.* And until his death, al-Rahman provided the TTP with "ideological, legal, and theological guidance" in exchange for safe haven for al-Qaeda members and leaders "in the Pashtun areas along the Afghan-Pakistani border" (where Camp Chapman was). *Id.* at 31, 33, 50. In addition, between 2007 and 2009, the two organizations conducted several joint terrorist attacks, including a 2008 hotel bombing that killed 50 people and wounded 300 others. *Id.* at 38-39.

Ultimately, the close connection between al-Qaeda and the TTP led to the joint planning and execution of the Camp Chapman attack, for which both groups publicly claimed responsibility. *See* ECF No. 48-1 at 42-46, 49-50. Before connecting with al-Qaeda leaders, al-Balawi connected with the TTP, his first point of contact with Islamist militant groups. *Id.* at 50. And as al-Balawi developed a strong rapport with al-Rahman and the plans for the attack began to take shape, he continued to live with TTP members in TTP-controlled territory. *Id.* at 44. Furthermore, al-Balawi worked and trained with TTP militants for "an extended period before executing his suicide bombing." *Id.* at 44, 50. Although "the consensus remains that al-Qaeda masterminded and perpetrated the attack," the TTP was also "culpable in the attack." *Id.* at 42, 44. And Iran's facilitation of the two organizations' strong relationship—through al-Rahman and Iran's gifts of sanctuary and free passage after September 11—was crucial to the successful execution of the Camp Chapman bombing.

Finally, Gartenstein-Ross shows that Iran functioned as al-Qaeda's "'core pipeline' to move funds and personnel from the Middle East to South Asia." ECF No 48-1 at 27-29, 49 (citation omitted). As early as 1992, Iran had developed an informal alliance with al-Qaeda, which allowed the group to funnel funds and operatives through Iranian territory without obstacle. *Id.* at 21. In 2007, bin Laden himself recognized the critical role that Iran played in supporting al-Qaeda's operations, writing that Iran was al-Qaeda's "main artery for funds, personnel, and communication." *Id.* at 28, 50 (citation omitted). Indeed,

Iran had reached a "secret deal" with al-Qaeda in the years before the Camp Chapman attack that "allowed the militant group's operatives to transit money, supplies, weapons, and recruits through Iran to al-Qaeda members in Pakistan." *Id.* at 28-29, 50; *see also* U.S. Dep't of Treasury, *supra* (noting that, by 2005, a formal agreement had been reached between Iran and al-Qaeda, in which a bin-Laden-appointed al-Qaeda facilitator worked with Iran to secure logistical support for al-Qaeda). According to Gartenstein-Ross, this "critical transit network" was operational "before, during, and after [al-Qaeda's] involvement in the execution of the Camp Chapman bombing." *Id.* at 28.

In sum, Gartenstein-Ross determined that "[g]iven the nature and extent of Iranian material support to al-Qaeda, which among other things helped al-Qaeda to forge its cooperative relationship with the TTP, Iran's assistance bore a definite connection to the attack on Camp Chapman." ECF No. 48-1 at 3, 51. Gartenstein-Ross's report is on par with the evidence found sufficient in other FSIA cases to show Iran's material support for al-Qaeda. *See, e.g., Flanagan v. Islamic Republic of Iran*, 87 F. Supp. 3d 93, 105-08, 115 (D.D.C. 2015) (relying on expert testimony to conclude Iran materially supported al-Qaeda by providing access to financial channels, training operatives, and granting safe passage to its members); *see also Thuneibat*, 167 F. Supp. 3d at 36 (finding satisfactory proof based on expert declaration that Syria materially supported al-Qaeda in Iraq through establishing a transit pipeline for foreign fighters and allowing the group to operate unmolested within Syria). In addition, courts

have repeatedly found that Iran has provided al-Qaeda with the material support necessary to commit terrorist attacks against the United States around the world, like the attack on Camp Chapman. *See Flanagan*, 87 F. Supp. 3d at 105-08 (Iran materially supported al-Qaeda in the 2000 bombing of the *USS Cole*); *Owens*, 826 F. Supp. 2d at 150 (Iran materially supported al-Qaeda in the 1998 embassy bombings in East Africa). And here, too, Plaintiffs have produced enough evidence to establish that Iran materially supported al-Qaeda in its efforts to plan and execute the Camp Chapman attack.

ii. Plaintiffs Have Presented Evidence Sufficient to Show that Iran's Material Support Was a Proximate Cause of the Camp Chapman Attack

Plaintiffs have also shown that Iran's material support for al-Qaeda was a legally sufficient cause of the Camp Chapman attack. *See Owens*, 864 F.3d at 778 (requiring the plaintiffs show that the foreign sovereign's material support is a legally sufficient cause of the terrorist attack at issue). Plaintiffs need not show that Iran specifically intended to cause the attack; they need only demonstrate proximate cause. That is, they must show "some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1128-29, 363 U.S. App. D.C. 87 (D.C. Cir. 2004) (quoting Prosser & Keeton on the Law of Torts 263 (5th ed. 1984)). To establish this causal connection, a defendant's actions need only have been a

"substantial factor" in the sequence of events that caused the plaintiff's injury, and the injury must be a "reasonably foreseeable . . . consequence" of the defendant's conduct. *Owens*, 864 F.3d at 794. In other FSIA cases, evidence found to meet this standard included financial support for the terrorist organization, logistical support for insurgent training, the provision of weapons, and the bolstering of operational capacity. *See, e.g., Frost v. Islamic Republic of Iran*, 383 F. Supp. 3d 33, 48 (D.D.C. 2019). Less direct forms of support also suffice to establish proximate causation in FSIA cases. *See Foley*, 249 F. Supp. 3d at 204 ("Syria provided material support to the Zarqawi Terrorist Organization by, among other things, allowing that organization to operate within Syria with impunity, giving its members safe haven, and allowing its members and supporters to pass freely through its borders to other countries" in order to commit acts of terrorism against the United States and its allies in the region.).

As noted above, Plaintiffs have adequately shown that Iran has a history of providing material support to al-Qaeda. Gartenstein-Ross explains that Iran played a key role in the recovery, regrouping, and rebuilding of al-Qaeda in the years following September 11. ECF No. 48-1 at 47. And more specifically, for all the reasons explained above, Gartenstein-Ross also concluded that "Iran's assistance bore a definite connection to the attack on Camp Chapman." *Id.* at 3, 51. The most direct example of this connection is Iran's protection of and relationship with al-Rahman. *See id.* at 33-38, 44-48. Through Iran's support, al-Rahman rose to the top level of al-Qaeda leadership and his stature was used to bait the CIA to

arrange a meeting with al-Balawi. *Id.* at 48-50. Thus, Iran's provision of sanctuary, free passage across its borders, and other support to al-Qaeda militants were critical factors in the orchestration of the Camp Chapman attack and is enough to show proximate causation in the FSIA context. *See Foley*, 249 F. Supp. 3d at 204.

Plaintiffs' injuries were also a reasonably foreseeable consequence of Iran's support for al-Qaeda. *See Roth*, 78 F. Supp. 3d at 394 (FSIA sets a low bar for proximate cause). In other cases, courts have found that backing the organization despite knowledge of its violent tactics and encouraging the escalation of terrorism constituted sufficient evidence of foreseeability. *See id.* (injuries stemming from a bombing were a foreseeable result of Iran's material support of a terrorist organization because Iran encouraged an increase in terrorist activities); *Est. of Parhamovich v. Syrian Arab Republic*, No. 17-cv-61 (GMH), 2022 U.S. Dist. LEXIS 234282, 2022 WL 18071921, at *9 (D.D.C. Dec. 28, 2022) (murder caused by the Zarqawi group was a foreseeable consequence of Iran's support of the group because Iran continued to provide support to the group even though "Iran certainly knew" of the group's attacks); *Owens*, 864 F.3d at 798 (Sudan's "general awareness of the group's terrorist aims" satisfies the causation element of a FSIA terrorism claim). Despite their ideological differences, Iran has supported al-Qaeda's goals since the 1990s, when al-Qaeda leaders reached out to Iran and Hezbollah—"Iran's chief terrorist proxy"—for assistance. ECF No. 48-1 at 21. Before the Camp Chapman attack, Iran and Hezbollah had provided al-Qaeda with the training, tactical expertise, and

weapons necessary to carry out acts of terrorism against the United States, such as the East African Embassy bombings in 1998, the suicide bombing aboard the *USS Cole* in 2000, and the September 11, 2001 attacks in the United States. *Id.* at 22-25; *see also Est. of Parhamovich*, 2022 U.S. Dist. LEXIS 234282, 2022 WL 18071921, at *6. Following these attacks, Iran continued to materially support al-Qaeda, and supported attacks by other groups across the Middle East. ECF No. 48-1 at 23-27. Thus, Iran well understood al-Qaeda's aims at the time of the Camp Chapman attack and nonetheless maintained its support. Such evidence is enough to show that the Camp Chapman attack was a reasonably foreseeable consequence of Iran's support of al-Qaeda and its allies.

* * *

For these reasons, the Court finds that it has subject-matter jurisdiction.

B. Personal Jurisdiction

To impose judgment on a foreign state under the FSIA, this Court must also have personal jurisdiction over Iran. Personal jurisdiction over a foreign government turns on a showing of (1) subject-matter jurisdiction under the FSIA; and (2) proper service under the FSIA. 28 U.S.C. § 1330(b). As Plaintiffs have already satisfied the first requirement, the Court now turns to the second.

28 U.S.C. § 1608(a) lists four methods of serving a foreign government, in the order in which plaintiffs must attempt them:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign

> state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

28 U.S.C. § 1608(a); *see also Fritz*, 320 F. Supp. 3d at 87 ("Section 1608(a) provides four methods of service in descending order of preference" (internal quotation marks omitted)).

Taking Section 1608(a)'s methods of service in order, because Iran does not have a special arrangement for service with Plaintiffs, and it is not a party to an international convention on service, Plaintiffs did not need to attempt service in accordance with Section 1608(a)(1) or (a)(2). *See Force v. Islamic Republic of Iran*, 464 F. Supp. 3d 323, 370 (D.D.C. 2020) ("No 'special arrangement' governs service between the United States and Iran . . . , and [Iran] is [not] party to an international convention on service of judicial documents."). Plaintiffs thus tried to serve Iran under Section 1608(a)(3). ECF No. 21. They received no response from Iran within the requisite thirty-day waiting period, so they then pursued service through diplomatic channels under Section 1608(a)(4), namely, by diplomatic note forwarded by the State Department to the American Interests Section of the Swiss Embassy in Tehran, Iran. ECF Nos. 29, 31, 36. Although Iran refused to accept delivery of the documents, service was still proper. *See Fritz*, 320 F. Supp. 3d at 89; *Ben-Rafael v. Islamic Republic of Iran*, 540 F. Supp. 2d 39, 52-53 (D.D.C. 2008). Thus, because the Court has subject-matter jurisdiction over Plaintiffs' claims and Iran was properly served under 28 U.S.C. § 1608(a)(4), the Court has personal jurisdiction over Iran.

C. Liability

Given the Court's conclusion that is has subject-matter jurisdiction, little else is needed to show that Iran is liable to Plaintiffs for their injuries. *See* 28 U.S.C. § 1605A(c). The private right of action in the FSIA terrorism exception provides that a foreign government is liable to a United States citizen "for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act." 28 U.S.C. § 1605A(a)(1), (c). So, "a plaintiff that offers proof sufficient to establish a waiver of foreign sovereign immunity under § 1605A(a) has also established entitlement to relief as a matter of federal law" if the plaintiff is a citizen of the United States. *Fritz*, 320 F. Supp. 3d at 86-87. "Essentially, liability under § 1605A(c) will exist whenever the jurisdictional requirements of § 1605A(a)(1) are met." *Hekmati v. Islamic Republic of Iran*, 278 F. Supp. 3d 145, 163 (D.D.C. 2017) (collecting cases).

As already mentioned, Wise, Paresi, and their family members are U.S. citizens. 28 U.S.C. § 1605A(h)(5); 8 U.S.C. § 1101(a)(22). As a result, and for all the reasons already explained, they may rely on the cause of action in the terrorism exception to establish Iran's liability.[8] *See Owens*, 864 F.3d at 809.

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8. Some courts in this district have held that Section 1605A(c) provides a cause of action but "does not itself provide the 'substantive basis' for claims brought under the FSIA." *Force*, 464 F. Supp. 3d at 361. Thus, those courts say, FSIA plaintiffs must "prove a [specific] theory of liability." *Valore*, 700 F. Supp. 2d at 73. Such theories of liability are based on "well-established principles of law, such as

D. Damages

Under the FSIA, a foreign state is liable to victims of state-sponsored terrorism for money damages including "economic damages, solatium, pain and suffering, and punitive damages." 28 U.S.C. § 1605A(c). Thus, "deceased plaintiffs' estates can recover economic losses stemming from wrongful death of the decedent; family members can recover solatium for their emotional injury; and all plaintiffs can recover punitive damages." *Roth*, 78 F. Supp. 3d at 401-02 (citing *Valore*, 700 F. Supp. 2d at 83). "To obtain damages against a non-immune foreign state under the FSIA, a plaintiff must prove that the consequences of the foreign state's conduct were 'reasonably certain' (i.e., more likely than not) to occur, and must prove the amount of damages by a 'reasonable estimate' consistent with this [Circuit]'s application of the American rule on damages."

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those found in the Restatement (Second) of Torts and other leading treatises." *Maalouf v. Islamic Republic of Iran*, No. 16-cv-0280, 2020 U.S. Dist. LEXIS 27067, 2020 WL 805726, at *5 (D.D.C. Feb. 18, 2020). Though not also in the Amended Complaint, Plaintiffs contend in their Motion that Iran is liable for their injuries under the tort claims of assault, battery, and intentional infliction of emotional distress. ECF No. 48 at 23-27. Thus, if such a showing is required, Plaintiffs have met their burden. Even without such an articulation of a "theory of liability" in their Amended Complaint, "[t]he Court . . . will not exalt form over substance to dismiss [their] action." *Rimkus*, 750 F. Supp. 2d at 176. The facts Plaintiffs have pled and established show liability under the theories of battery, assault, and intentional infliction of emotional distress. *See Doe v. Syrian Arab Republic*, No. 18-cv-66 (KBJ), 2020 U.S. Dist. LEXIS 165649, 2020 WL 5422844, at *13-14 (D.D.C. Sept. 10, 2020); *see, e.g., Winternitz*, 2022 U.S. Dist. LEXIS 60961, 2022 WL 971328, at *9 n.8. Thus, they have properly established Iran's liability.

Salazar v. Islamic Republic of Iran, 370 F. Supp. 2d 105, 115-16 (D.D.C. 2005) (some internal quotation marks omitted) (alteration in original); *accord Kim v. Democratic People's Republic of Korea*, 87 F. Supp. 3d 286, 289 (D.D.C. 2015). In determining the "reasonable estimate," courts may look to expert testimony and prior awards for comparable injuries. *See Reed v. Islamic Republic of Iran*, 845 F. Supp. 2d 204, 213-14 (D.D.C. 2012). But in a default case, the Court may not exceed the amount demanded by the plaintiff. *See* Fed. R. Civ. P. 54(c). As discussed below, Plaintiffs request and the Court will award both compensatory and punitive damages.

1. Compensatory Damages

In their Amended Complaint, Plaintiffs sought damages for pain and suffering, economic loss, and solatium. ECF No. 10 at 58-61. But Plaintiffs rescinded their request for pain-and-suffering damages in their Motion, conceding that the circumstances of Wise's and Paresi's deaths do not warrant such damages. *See* ECF No. 48 at 28. Thus, the Court considers, and will award, economic-loss damages as explained below.

a. The Estate Plaintiffs

The estates of Wise and Paresi seek damages only for economic losses accruing to the estates. "The report of a forensic economist may provide a reasonable basis for determining the amount of economic damages in an FSIA case." *Reed*, 845 F. Supp. 2d at 214. Thus, in support of their requests for economic-loss damages, Plaintiffs

have submitted the expert reports of Chad L. Staller and Stephen M. Dripps—respectively, the President and Senior Economist/Manager at the Center for Forensic Economics Studies. *See* ECF No. 48-3; ECF No. 48-4. Using reasonable assumptions and reliable calculations, these reports provide estimates of the net economic loss accruing to each estate.

The report for the Wise Estate estimated that Wise's net economic loss—his lost earnings, retirement benefits, and household services, less amounts for personal maintenance and taxes—is $3,677,674. ECF No. 48-3 at 6-9. Based on statements received from Wise's wife, Bernhardt, the report assumes that Wise would have returned to medical school, completed a residency program, and found employment as a physician after his 90-day security contract with the CIA. *Id.* at 1-3; *see also* ECF No. 48-5 ¶ 11. The Court finds this assumption reasonable and thus will award the Wise Estate economic damages of $3,677,674.

The report for the Paresi Estate estimated that Paresi's total economic loss—his lost earnings, military pension benefits, VA disability benefits, retirement benefits, and household services, less amounts for personal maintenance and taxes—is between $2,525,321 and $2,835,747. ECF No. 48-4 at 6. The difference between the two figures results from a lack of certainty over when Paresi would have retired, with the lesser amount assuming retirement at the point of eligibility for retirement benefits and the greater amount assuming retirement at the average age an American man leaves the workforce. *Compare id.* at

7, *with id.* at 8. The Court finds that, because the record shows that Paresi was searching diligently for employment in the United States around the time of his death, he is entitled to a presumption that he would have obtained a job and worked for at least as long as the average American man. *Id.* at 2; *see, e.g., Winternitz*, 2022 U.S. Dist. LEXIS 60961, 2022 WL 971328, at *10. Thus, the Court will award the Paresi Estate economic damages of $2,835,747.

b. The Family Plaintiffs

The remaining Plaintiffs are Wise and Paresi family members who were not present for the attack but have suffered severe emotional distress because of the death of their loved ones. Courts often award damages for solatium or intentional infliction of emotional distress in such cases. *Pennington v. Islamic Republic of Iran*, No. 19-cv-796 (JEB), 2021 U.S. Dist. LEXIS 117666, 2021 WL 2592910, at *4 (D.D.C. June 24, 2021) ("[I]mmediate family members of terrorism victims may state a claim for IIED even if they were not present at the site of the attack."). Such awards are "functionally identical" and meant to "compensate persons for 'mental anguish, bereavement and grief that those with a close personal relationship to a decedent experience . . . as well as the harm caused by the loss of the decedent's society and comfort.'" *See Roth*, 78 F. Supp. 3d at 402-03 (citing *Oveissi v. Islamic Republic of Iran*, 768 F. Supp. 2d 16, 25 (D.D.C. 2011)). "Courts may presume that those in direct lineal relationships with victims of terrorism suffer compensable mental anguish." *Id.* at 403.

Appendix B

In *Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229 (D.D.C. 2006), the court surveyed past awards to family members of victims of terrorism and developed a standardized approach for evaluating solatium claims. *Id.* at 269. The *Heiser* court found that, on average, "[s]pouses typically receive greater damage awards than parents, who, in turn, typically receive greater awards than siblings." *Id.* Specifically, the *Heiser* court found that "courts typically award between $8 million and $12 million for pain and suffering resulting from the death of a spouse[,] approximately $5 million to a parent whose child was killed[,] and approximately $2.5 million to a plaintiff whose sibling was killed." *Id.* (footnotes omitted). Children of deceased victims are generally awarded $5 million because "children who lose parents are likely to suffer as much as parents who lose children." *W.A. v. Islamic Republic of Iran*, No. 18-cv-1883 (CKK/GMH), 2020 U.S. Dist. LEXIS 247083, 2020 WL 7869218, at *15 (D.D.C. Mar. 23, 2020) (citation omitted), *report and recommendation adopted*, No. 18-cv-1883 (CKK), 2020 U.S. Dist. LEXIS 246982, 2020 WL 7869211 (D.D.C. Apr. 11, 2020).

In applying the *Heiser* framework, however, courts must appreciate that "[t]hese numbers . . . are not set in stone." *Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51, 79 (D.D.C. 2010). While the framework "provides a starting point for a court, it is simply that—a starting point." *Oveissi*, 768 F. Supp. 2d at 26-27. The *Heiser* valuations "act as a center of gravity for solatium awards, around which a court may vary the final amount based on the facts and circumstances of a particular case." *Id.*

A court may deviate either upward or downward from the *Heiser* framework, and ultimately, such a decision is committed to the court's discretion. *See id.* at 26-27 ("[I]t is th[e] court's duty to analyze the nature of the claimant's injury and the deviation—if any—that is appropriate to compensate for such losses, while also bearing in mind the general precept that similar awards should be given in similar cases."). Deviations may be warranted when "evidence establish[es] an especially close relationship between the plaintiff and decedent, particularly in comparison to the normal interactions to be expected given the familial relationship; medical proof of severe pain, grief or suffering on behalf of the claimant [is presented]; and circumstances surrounding the terrorist attack [rendered] the suffering particularly more acute or agonizing." *Id.* at 26-27. Courts have also recognized the "sudden and unexpected" death of a victim as a factor that contributes to an upward enhancement of solatium damages. *Stethem v. Islamic Republic of Iran*, 201 F. Supp. 2d 78, 90 (D.D.C. 2002). For the reasons explained below, the Court finds that the *Heiser*-damages baselines, with 25% upward enhancements, are appropriate under these circumstances.[9]

9. Although Plaintiffs seek a 50% upward departure, *see* ECF No. 48 at 35-36, 40-41, the Court finds that such a large deviation is not warranted here. Generally, "departures [from the *Heiser* baseline damages awards] are . . . relatively small." *Valore*, 700 F. Supp. 2d at 86. Based on other FSIA cases decided in this Circuit, larger departures of fifty percent or more have been reserved for the most intense cases of suffering. *See, e.g., Oveissi*, 768 F. Supp. 2d at 30 (finding 50% upward deviation from the *Heiser* baseline warranted because minor plaintiff was forced to go into hiding with armed guards after his grandfather's death); *Valore*, 700 F. Supp.

As for Wise's family members, Wise's widow, Bernhardt, suffered from severe mental distress because of her husband's death and was later exposed to graphic depictions of the attack. ECF No. 48-5 ¶¶ 26-37. The Court will accordingly award her a 25% upward enhancement from the baseline award of $8 million, for a total of $10 million. Wise's stepson Prusinski[10] and mother have also

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2d at 84 (finding 50% upward departure from analogous baseline appropriate to compensate a *victim* who sustained severe injuries). Thus, without diminishing the pain and suffering experienced by Plaintiffs, the Court finds an enhancement of 25% is more in line with awards "given in similar cases." *Oveissi*, 768 F. Supp. 2d at 26-27; *see, e.g., Thuneibat*, 167 F. Supp. 3d at 52-53 (25% upward departure for younger siblings of victim because their development was impaired by the victim's death); *Flanagan*, 87 F. Supp. 3d at 118 (25% upward departure because the decedent was the center of the family and the plaintiffs submitted medical evidence relating to their emotional distress); *Baker v. Socialist People's Libyan Arab Jamahirya*, 775 F. Supp. 2d 48, 83 (D.D.C. 2011) (25% upward departure for siblings who "turned to self-destructive behavior" and "battled depression" after the loss of their sister); *Valore*, 700 F. Supp. 2d at 86 (25% upward departure for victim's sister because of evidence of nervous breakdowns).

10. One requirement to bring an intentional inflection of emotional distress claim in the FSIA context, as family-member Plaintiffs do here, is that the claim be brought by "immediate family members." *Valore*, 700 F. Supp. 2d at 78. The D.C. Circuit has, however, "reasoned that where claimants 'were members of the victim's household' such that they were 'viewed as the functional equivalents of family members,' the immediate-family requirement could potentially be stretched to include . . . non-adopted stepchildren[.]" *Id.* at 79 (quoting *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 337, 354 U.S. App. D.C. 244 (D.C. Cir. 2003)); *see also Stearns v. Islamic Republic of Iran*, No. 17-cv-131 (RCL), 2022 U.S. Dist. LEXIS 180971, 2022 WL 4764905, at *54 n.44 (D.D.C. Oct. 3,

suffered severe mental distress. ECF No. 48-5 ¶¶ 45-53; ECF No. 48-6 ¶¶ 25-35. In particular, Prusinski's childhood development and young adulthood have been significantly harmed by Wise's death. ECF No. 48-5 ¶¶ 47-52. And he has been subjected to media stories and depictions about the attack, forcing him to "relive[] the tragedy of [his stepfather's] death." *Id.* ¶ 32. Likewise, Wise's death had a profound impact on the health of his mother Mary Lee Wise. ECF No. 48-6 ¶¶ 25-35. Thus, an upward departure of 25% from the baseline award of $5 million, or $6.25 million, is suitable for both of them. And finally, because Wise's sister Mary Heather Wise suffered from adrenal exhaustion and now suffers from PTSD, ECF No. 48-6 ¶¶ 10-20, she is also entitled to a 25% increase from the baseline award of $2.5 million, for a total of $3.125 million.

Paresi's family members are entitled to awards of compensatory damages similar to those awarded to the Wise family. Because Paresi's widow Mindylou Paresi has experienced intense mental anguish from the sudden death of her husband, ECF No. 48-7 ¶¶ 6-16, she is entitled to a 25% upward departure from the baseline award of $8 million in solatium damages, for a total of $10 million.

2022); *Ackley v. Islamic Republic of Iran*, No. 20-cv-621 (BAH), 2022 U.S. Dist. LEXIS 144779, 2022 WL 3354720, at *48-49 (D.D.C. Aug. 12, 2022). Prusinski, though not adopted by Wise, was "the functional equivalent of [Wise's] son." ECF No. 10 ¶ 2. Prusinski called Wise "Dad," and their "bond was inseparable." ECF No. 48-5 ¶ 41. Wise also provided for "[Prusinski] and [Bernhardt] completely," listing Prusinski as his "dependent." *Id.* ¶ 44. Thus, Prusinski may properly bring a claim here.

Likewise, Paresi's stepdaughter Alexandra VandenBroek[11] and daughter Elizabeth Santina Paresi continue to suffer immensely from the death of their father. ECF No. 48-8 ¶¶ 10-20; ECF No. 48-9 ¶¶ 8-21. Paresi's stepdaughter left her job for months after his death and encountered repeated media depictions and news stories relating to the attack. ECF No. 48-8 ¶¶ 10-20. As for his daughter, she began to experience bullying at school, developed severe anxiety and depression, and even contemplated taking her own life following her father's death. ECF No. 48-9 ¶¶ 15-18; ECF No. 48-7 ¶ 13. Thus, an upward departure of 25% above the baseline award of $5 million, or $6.25 million, is proper for each of them. Paresi's mother Janet Paresi has undergone similar trauma, enduring a "drawn out and incredibly difficult" grieving process. ECF No. 48-10 ¶¶ 8-16. The Court will therefore award her a 25% enhancement from the baseline award of $5 million, for a total of $6.25 million. Lastly, Paresi's two siblings continue to struggle with the pain of his loss. His brother Terry Paresi was "wrecked" after Paresi's death and now takes medication for anxiety. ECF No. 48-11 ¶¶ 7-8. His sister Santina Cartisser struggles to "convey the absolute shock that went through [her] brain" when she learned of his death, and she notes the breakdown of her family without

11. Like Prusinski, VandenBroek was not adopted, but her stepfather "treated [her] as the functional equivalent of his daughter in every way." ECF No. 48-8 ¶ 3; ECF No. 10 ¶ 6. They had a "very close parent-child relationship." ECF No. 48-8 ¶ 4. VandenBroek says he "was a true head of the household," and "[f]inancially, he provided, food, shelter, and everything in between for [her] family." *Id.* ¶ 9. Thus, the Court finds she can properly bring a claim here. *See Valore*, 700 F. Supp. 2d at 79.

Paresi to "keep [them] together." ECF No. 48-12 ¶¶ 4-12. They too are each entitled to a 25% increase above the *Heiser* baseline of $2.5 million, for a total of $3.125 million each.

The Court also notes that the 25% upward enhancement for all the family-member Plaintiffs is buttressed by the "circumstances surrounding the terrorist attack," which here rendered "the suffering particularly more acute or agonizing." *Oveissi*, 768 F. Supp. 2d at 26-27. Wise and Paresi were killed in a most violent, "sudden and unexpected" manner. *See Stethem*, 201 F. Supp. 2d at 90; *see, e.g.*, ECF No. 48-1 at 41; ECF No. 48-5 ¶ 28 (Bernhardt noting the "traumatic way that [Wise] died"); ECF No. 48-9 ¶ 14 (Elizabeth Santina Paresi noting how, at his funeral, Paresi's body "had been damaged so badly in the blast that his entire form was covered in wraps and bandages"). Not only did the event itself shock the family-member Plaintiffs, but given its high-profile nature, they have in various forms been subjected to repeated reminders of the tragedy, including through the film *Zero Dark Thirty. See, e.g.*, ECF No. 48-5 ¶ 31; ECF No. 48-8 ¶¶ 15-16, 20; ECF No. 48-9 ¶ 27.

For these reasons, the Court will award a total of $60,625,000[12] in compensatory damages to the family-member Plaintiffs.

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12. To sum up, the awards of solatium damages to the family-member Plaintiffs is as follows: (1) Dana Bernhardt: $10 million; (2) Ethan Prusinski: $6.25 million; (3) Mary Lee Wise: $6.25 million; (4) Mary Heather Wise: $3.125 million; (5) Mindylou Paresi: $10 million; (6) Alexandra VandenBroek: $6.25 million; (7) Elizabeth Santina Paresi: $6.25 million; (8) Janet Paresi: $6.25 million; (9) Terry Paresi: $3.125 million; and (10) Santina Cartisser: $3.125 million.

2. Punitive Damages

Under the FSIA, a foreign sovereign who is a state sponsor of terrorism may be held liable for punitive damages. 28 U.S.C. § 1605A(c). Punitive damages are awarded not to compensate the victim but to punish and deter future "outrageous conduct" by the foreign state. *Oveissi v. Islamic Republic of Iran*, 879 F. Supp. 2d 44, 56 (D.D.C. 2012); *see Est. of Heiser v. Islamic Republic of Iran*, 659 F. Supp. 2d 20, 27, 29-30 (D.D.C. 2009) ("All acts of terrorism are by their very definition extreme and outrageous and intended to cause the highest degree of emotional distress, literally, terror, in their targeted audience." (citation omitted)). In deciding whether to award punitive damages, courts look to four factors: "(1) the character of the defendants' act, (2) the nature and extent of harm to the plaintiffs that the defendants caused or intended to cause, (3) the need for deterrence, and (4) the wealth of the defendants." *Doe v. Syrian Arab Republic*, 2020 U.S. Dist. LEXIS 165649, 2020 WL 5422844, at *17 (quoting *Acosta v. Islamic Republic of Iran*, 574 F. Supp. 2d 15, 30 (D.D.C. 2008)). Courts have found these factors satisfied when a defendant has provided material support to a terrorist organization in carrying out an act of terrorism. *See, e.g.*, *Baker*, 775 F. Supp. 2d at 85 (finding that an award of punitive damages warranted where "defendants supported, protected, harbored, aided, abetted, enabled, sponsored, conspired with, and subsidized a known terrorist organization whose *modus operandi* included the targeting, brutalization, and murder of American citizens and others").

Upon consideration of these four factors, the Court finds that a substantial award of punitive damages is justified here, as courts have similarly concluded in other FSIA cases against Iran for acts of terrorism.[13] As for the first factor, the Camp Chapman attack—made possible by Iran's provision of material support to al-Qaeda—was nothing short of horrific. *See Bodoff*, 424 F. Supp. 2d at 88 (finding bus bombing, for which Iran was liable, to be "extremely heinous"); *Valore*, 700 F. Supp. 2d at 87-89 (finding marine-barracks bombing in Lebanon, for which Iran was found liable, "among the most heinous [acts] the Court [could] fathom"). And al-Qaeda has leveraged Iran's support since the 1990s to help it carry out terrorism around the globe. *See* ECF No. 48-1 at 20-30. The second factor also points to a substantial award. As already discussed, Iran's support led to Wise's and Paresi's violent and sudden deaths, devastating their families in the process. As for deterrence under the third factor, several courts have determined that the need to deter sovereign states, like Iran, from committing terrorist acts in the future is great. *See Flanagan*, 87 F. Supp. 3d at 119-20 (collecting cases). That is clearly so in the case of the Camp Chapman attack, which caused such a dramatic loss to the U.S. intelligence community. ECF No. 48 at 2 (labelling the attack as the "single deadliest episode" for the CIA since September 11, 2001 (quoting Rubin & Mazzetti, *supra*); ECF No. 48-2 at 1, 5 (Congressman

13. *See, e.g., Roth*, 78 F. Supp. 3d at 407 (awarding $112,500,000 in punitive damages for restaurant bombing); *Valore*, 700 F. Supp. 2d at 89-90 (awarding $1 billion in punitive damages for bombing of a marine barracks); *Heiser*, 659 F. Supp. 2d at 31 (awarding $300 million in punitive damages for bombing of a residential complex).

Silvestre Reyes calling the Camp Chapman attack the "deadliest day for the CIA since the bombing of the Beirut Embassy in 1983"). Finally, Iran's significant wealth supports an award of punitive damages. *See Gross Domestic Product for Islamic Republic of Iran*, Fed. Reserve of St. Louis (Dec. 27, 2022) (noting Iran's GDP of $359.71 billion in 2021), https://fred.stlouisfed.org/series/MKTGDPIRA646NWDB. Punitive damages are thus warranted in this case.

The amount of punitive damages is another question, and courts have used several methodologies to calculate them. Some courts award punitive damages in an amount three to five times the defendant's "annual expenditure on terrorism." *Acosta*, 574 F. Supp. 2d at 31; *Valore*, 700 F. Supp. 2d at 89-90. Because of rising annual expenditures by state sponsors of terrorism, this approach is "considered more appropriate for cases involving 'exceptionally deadly' attacks." *Doe v. Syrian Arab Republic*, 2020 U.S. Dist. LEXIS 165649, 2020 WL 5422844, at *17 (citation omitted). Plaintiffs, however, presented no evidence of Iran's annual expenditure on terrorism. Instead, they concede that the Camp Chapman attack—although tragic to the victims and their families—"[does] not rise to the 'exceptionally deadly' level . . . to merit a multiplier of Iranian expenditures on terrorism." *See* ECF No. 48 at 43.

Other courts have simply awarded $150 million for each victim's family. *See Baker*, 775 F. Supp. 2d at 85-86. But that approach is usually reserved for "the most repugnant and premeditated attacks." *Neiberger*, 2022 U.S. Dist. LEXIS 218169, 2022 WL 17370239, at *19; *see,*

e.g., *Gates v. Syrian Arab Republic*, 580 F. Supp. 2d 53, 75 (D.D.C. 2008) (finding that the recording, publication, and distribution of video footage of the torture and murder of two civilian contractors "glorified cruelty and fanned the flames of hatred," warranting an award of $150 million in punitive damages per family).

The third approach "is to multiply the total compensatory-damages award by a factor of between one and five." *Doe v. Syrian Arab Republic*, 2020 U.S. Dist. LEXIS 165649, 2020 WL 5422844, at *18; *see also Fritz v. Islamic Republic of Iran*, 324 F. Supp. 3d 54, 65 (D.D.C. 2018). Several courts in this District have adopted this approach in other FSIA cases, and Plaintiffs agree it makes sense to use it here too. ECF No. 48 at 43. Courts choose the multiplier by weighing several "factors, including, among other things, whether the case involved exceptional circumstances, the perceived deterrence effect, the nexus between the defendant and the injurious acts, and the evidence plaintiffs presented regarding the defendant's funding of terrorist activities." *Hamen v. Islamic Republic of Iran*, 407 F. Supp. 3d 1, 10 (D.D.C. 2019). Though not without exception, generally the "[t]he multiplier has ranged between three and, in exceptional cases, five." *See Roth v. Syrian Arab Republic*, No. 14-cv-1946 (RCL), 2018 U.S. Dist. LEXIS 168244, 2018 WL 4680270, at *17 (D.D.C. Sept. 28, 2018).

The Court will apply a multiplier of three to the compensatory damages to determine the punitive damages award, as other courts have when addressing attacks of similar degree and kind. *See Roth*, 2018 U.S.

Dist. LEXIS 168244, 2018 WL 4680270, at *17; *see also, e.g., Harrison v. Republic of Sudan*, 882 F. Supp. 2d 23, 50-51 (D.D.C. 2012) (determining that there were no exceptional circumstances present in the bombing on the *USS Cole*, which claimed the lives of seventeen servicemen and women, and injured another forty-two), *vacated on other grounds*, No. 10-cv-1689 (RCL), 2019 U.S. Dist. LEXIS 228047, 2019 WL 8060796 (D.D.C. Sept. 11, 2019). Thus, applying a multiplier of three to the total amount of compensatory damages, $67,138,421,[14] the resulting punitive-damages award will be $201,415,263, to be apportioned to Plaintiffs based on their relative share of the compensatory-damages award.

3. Interest, Attorneys' Fees, and Costs

Plaintiffs also requested in their Amended Complaint prejudgment interest, an award of attorneys' fees, and reasonable costs and expenses. ECF No. 10 at 58-60. But in their Motion, Plaintiffs have opted to withdraw their requests for prejudgment interest. ECF No. 48 at 43 n.27. They do not mention whether they still intend on recovering attorneys' fees or reasonable costs and expenses. *See id.* at 43-44. But in any event, the Court cannot award them now, because Plaintiffs "have not provided any information regarding the fees and costs sought." *Schooley v. Islamic Republic of Iran*, No. 17-cv-1376, 2019 U.S. Dist. LEXIS 108011, 2019 WL 2717888,

14. This is the sum of the $3,677,674 award of economic damages to the Wise Estate; $2,835,747 award of economic damages to the Paresi Estate; and $60,625,000 award of solatium damages to the family-member Plaintiffs.

at *79 (D.D.C. June 27, 2019). The request, to the extent it remains, is therefore denied without prejudice. Of course, Plaintiffs "may file a post-judgment motion for attorneys' fees in accordance with Federal Rule of Civil Procedure 54(d)(2)(B), and for costs in accordance with Federal Rule of Civil Procedure 54(d)(1)." *Id.*

IV. Conclusion

For all these reasons, the Court will grant Plaintiffs' Motion for Default Judgment, ECF No. 47, and award damages in the total amount of $268,553,684. A separate order will issue.

/s/ Timothy J. Kelly
TIMOTHY J. KELLY
United States District Judge

Date: March 22, 2023

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED NOVEMBER 16, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 18-2739 (TJK)

DANA MARIE BERNHARDT *et al.*,

Plaintiffs,

v.

ISLAMIC REPUBLIC OF IRAN *et al.*,

Defendants.

November 16, 2020, Decided;
November 16, 2020, Filed

MEMORANDUM OPINION

The families of two deceased American contractors sue Iran and four related financial institutions—the HSBC Defendants—for their alleged roles in an al-Qaeda terrorist's 2009 suicide attack at a military installation in Afghanistan. Before the Court is the HSBC Defendants' motion to dismiss the claims against them, asserted under the Justice Against Sponsors of Terrorism Act, for (1) lack of personal jurisdiction over the non-U.S. HSBC

Defendants and (2) failure to state a claim as to all the HSBC Defendants. For the reasons explained below, the Court will grant the motion and dismiss the claims against the HSBC Defendants.

I. Background

According to the Amended Complaint, on December 30, 2009, Humam Khalil al-Balawi, a suicide bomber, attacked personnel at Camp Chapman, a "secret CIA base" in Afghanistan, killing nine, including Dane Paresi, a former Green Beret, and Jeremy Wise, a former Navy SEAL. ECF No. 10 ("Am. Compl.") ¶¶ 22-23, 227. The Central Intelligence Agency (CIA) allegedly thought that Balawi was a double agent working for the United States by infiltrating al-Qaeda's leadership in Northwest Pakistan. *Id.* ¶ 24. Instead, tragically, he was a triple agent loyal to al-Qaeda. *Id.* ¶ 25.

But according to Plaintiffs, the Camp Chapman suicide attack was part of a broader conspiracy by al-Qaeda and its allies, including the Islamic Republic of Iran ("Iran"), to attack the United States and its allies with acts of international terrorism. *Id.* ¶ 26. Plaintiffs allege that Iran has long supported al-Qaeda, *id.* ¶¶ 56-101, and, relevant here, served as a "critical transit point for funding to support [al-Qaeda's] activities in Afghanistan and Pakistan," *id.* ¶ 27. Plaintiffs further allege that the conspiracy was facilitated by a larger group of co-conspirators who "willingly provided material support and resources to the conspirators, including financial services, while knowing that such services would facilitate terrorist

attacks" like the one at Camp Chapman, including Bank Melli Iran ("Bank Melli"), Bank Saderat PLC in Iran ("Bank Saderat") and Al Rajhi Bank in Saudi Arabia. *Id.* ¶ 29.

One step further, Plaintiffs allege that the four related financial institutions at issue here—HSBC Holdings PLC ("HSBC"), HSBC Bank PLC ("HBEU"), HSBC Bank USA, N.A. ("HBUS"), and HSBC North America Holdings Inc. ("HBNA") (collectively, the "HSBC Defendants")—funded and facilitated this conspiracy by laundering funds and engaging in other illicit financial transactions with Iran and these other co-conspirators. *Id.* ¶ 29. HSBC is a United Kingdom bank holding company with its principal place of business in London, which "owns and/or controls" HBEU, HBNA, and HBUS. *Id.* ¶ 12; ECF No. 32 ("MTD") at 4. HBEU is a financial institution organized under the laws of England and Wales, also headquartered in London. Am. Compl. ¶ 13; MTD at 4. HBNA is a holding company located in New York City that owns HBUS, a nationally chartered bank that operates more than 240 bank branches throughout the United States. Am. Compl. ¶¶ 14-15; MTD at 4.

According to Plaintiffs, the HSBC Defendants joined a financial conspiracy to provide material support for these acts of terrorism by, among other things, over "the course of nearly ten years . . . purposely, knowingly, and/or recklessly violat[ing] the [anti-money laundering] statutes and other economic sanctions levied against Iran and various Iranian banking institutions, *id.* ¶ 31, and providing "substantial assistance to banks known

to be connected to the same terrorist financial network, such as Al Rajhi Bank, *id.* at 36. In particular, Plaintiffs allege that the HSBC Defendants—in particular HBUS and HBEU—joined the financial conspiracy by devising fraudulent schemes in which they "stripped" or "repaired" transactions with Iranian banks, including Bank Melli and Bank Saderat ("the Iranian Banks"), to hide the true nature of transactions that originated in Iran or were otherwise associated with Iran or Specially Designated Nationals and Blocked Persons (SDNs). *Id.* ¶¶ 32, 134-37. Thus, Plaintiffs say, they allowed those transactions to avoid detection by the Treasury Department's Office of Foreign Assets Control (OFAC), thereby intentionally violating U.S. law.[1] *Id.* ¶ 32. Similarly, Plaintiffs assert that the HSBC Defendants, especially HBUS and HBEU, engaged in fraudulent schemes to avoid OFAC detection, including one in which they would style transactions as bank-to-bank "cover" transactions to hide the identity of the transaction originator, also in violation of U.S. law. *Id.* ¶¶ 33, 138-50. According to Plaintiffs, in 2010, HBUS hired Deloitte LLP as an outside auditor to identify OFAC-sensitive transactions that the HSBC Defendants had illegally conducted. *Id.* ¶ 34. That review identified more than 25,000 illegal transactions involving Iran, valued at more than $19.4 billion. *Id.* On top of these alleged violations, according to Plaintiffs, the HSBC Defendants assisted banks with connections to al-Qaeda, such as Al Rajhi Bank, which was widely known to serve

1. According to the Amended Complaint, in 2006, OFAC announced sanctions against Bank Saderat, and a year later, listed Bank Saderat as a specially designated global terrorist (SDGT). *Id.* ¶ 103-04. In 2007, OFAC named Bank Melli as an SDN. *Id.* ¶ 109.

as a conduit for terrorist transactions.[2] *Id.* ¶¶ 35, 151-185. Despite pressure from HBUS's own in-house compliance department to end the affiliation, they say, it provided Al Rajhi Bank access to nearly one billion dollars in U.S. banknotes through 2010. *Id.* ¶ 177-182. Finally, Plaintiffs accuse the HSBC Defendants of advancing the conspiracy by maintaining intentionally weak anti-money laundering policies and failing to perform adequate due diligence in various ways, including relating to its correspondent bank relationships. *Id.* ¶¶ 186-202.

The Amended Complaint asserts two counts against the HSBC Defendants under the Justice Against Sponsors of Terrorism Act (JASTA), 18 U.S.C. § 2333(d): one for aiding and abetting the extrajudicial killings of Paresi and Wise (Count II), and the other for participating in a conspiracy that caused their deaths (Count III). Earlier this year, the HSBC Defendants moved to dismiss these counts, asserting that (1) the Court lacks personal jurisdiction over the two non-U.S. HSBC Defendants, HSBC and HBEU,[3] and (2) the Amended Complaint must be dismissed as to all HSBC Defendants because Plaintiffs have failed to state a claim against them under JASTA's secondary liability provisions. ECF No. 32.

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2. Plaintiffs allege that the Treasury Department identified Sulaiman bin Abdulaziz Al Rajhi, a founder of Al Rajhi Bank and its former Chief Executive Officer and Chairman of the Board, as a key financial contributor to al-Qaeda. *Id.* ¶ 118-19. And they assert that as early as 2003, the CIA designated Al Rajhi Bank as a conduit for extremist financing. *Id.* ¶ 122.

3. The HSBC Defendants do not contest personal jurisdiction over HBUS and HBNA. MTD at 7 n.3.

II. Legal Standards

To survive a motion to dismiss for lack of personal jurisdiction, a plaintiff bears the burden of making "a *prima facie* showing of the pertinent jurisdictional facts." *Livnat v. Palestinian Auth.*, 851 F.3d 45, 56-7, 428 U.S. App. D.C. 140 (D.C. Cir. 2017) (internal quotes omitted). A plaintiff "must allege specific acts connecting [each] defendant with the forum." *IMAPizza, LLC v. At Pizza Ltd.*, 334 F. Supp. 3d 95, 108 (D.D.C. 2018) (quoting *Second Amendment Found. v. U.S. Conf. of Mayors*, 274 F.3d 521, 524, 348 U.S. App. D.C. 238 (D.C. Cir. 2001)). Factual disputes must be resolved in favor of the plaintiff, but the Court need not accept unsupported inferences. *Livnat*, 851 F.3d at 57.

"To survive a motion to dismiss [for failure to state a claim], 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, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (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.* The Court should consider only well-pleaded factual allegations and ignore mere conclusory legal statements. *Id.*

III. Analysis

A. Personal Jurisdiction

Plaintiffs argue that this court has specific personal jurisdiction over HSBC and HBEU under Rule 4(k)(2) of the Federal Rules of Civil Procedure.[4] That Rule permits a federal court to exercise jurisdiction over (1) a claim arising under federal law, (2) against a defendant served by a summons, (3) that is not subject to the jurisdiction of any single state court, (4) provided that the exercise of federal jurisdiction is consistent with the Constitution (and laws) of the United States. *Mwani v. bin Laden*, 417 F.3d 1, 10, 368 U.S. App. D.C. 1 (D.C. Cir. 2005). The parties do not dispute that first three elements are satisfied: (1) Plaintiffs' claims arise out of federal law, 18 U.S.C. § 2333(d), Am. Compl. ¶¶ 254-80; (2) HSBC and HBEU formally agreed to waive service, ECF Nos. 14-15; and (3) HSBC and HBEU assert that they "are not subject to jurisdiction in any state's court of general jurisdiction,"[5] MTD at 9.

Thus, the Court's personal jurisdiction over HSBC and HBEU turns on the final element. "Whether the exercise

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4. In their motion, Defendants note that "Plaintiffs do not appear to advance a theory of general jurisdiction, nor could they," MTD at 9 n.4, and Plaintiffs do not quarrel with this proposition in their opposition, ECF No. 33.

5. When "the defendant contends that he cannot be sued in the forum state and refuses to identify any other [forum] where suit is possible, then the federal court is entitled to use Rule 4(k)(2)." *Mwani*, 417 F.3d at 11.

of jurisdiction is 'consistent with the Constitution' for purposes of Rule 4(k)(2) depends on whether a defendant has sufficient contacts with the United States as a whole to justify the exercise of personal jurisdiction under the Due Process Clause of the Fifth Amendment." *Mwani*, 417 F.3d at 11. This requires the Court to determine "if the defendant has purposefully directed his activities at residents of the forum and [if] the litigation results from alleged injuries that arise out of or relate to those activities." *Id.* at 12 (cleaned up). The Court concludes that even if HSBC and HBEU purposefully directed their activities at the United States, Plaintiffs have not shown that their injuries arise out of or relate to those activities. Thus, the Court cannot exercise personal jurisdiction over HSBC and HBEU.

Plaintiffs allege that these entities—that represent that they have no "representative offices, direct subsidiaries, or branches in the United States," MTD at 9—directed their activities at financial markets and institutions in this country in various ways during the purported financial conspiracy outlined above. They assert that HBEU had contact with the United States through the various schemes that it undertook with HBUS, which operates in the United States. *See* Am. Compl. ¶¶ 136-37, 139, 153. They allege that HBEU and HBUS communicated directly about those schemes. *See id.* ¶¶ 143, 153. And their allegations make clear that these schemes were directed at circumventing United States law, *id.* ¶¶ 146, 147, 153, and some were referred to as U.S. dollar clearing services, emphasizing the role of U.S. currency, *id.* ¶¶ 153, 156, 164.

Plaintiffs similarly allege that HSBC directed its activities at the United States. They assert that HSBC also communicated directly with HBUS—again, which operates here—to pressure or direct it to restore its banknotes business with Al Rajhi Bank, *see* Am. Compl. ¶¶ 177-79. They allege that in 2003, HSBC's head of compliance warned that amending payment messages "could provide the basis for an action against [HSBC] Group for breach of sanctions." Am. Compl. ¶ 157. Despite this concern, they assert that several times HSBC provided the approval necessary for HBEU to continue its U.S. sanctions-evading program. *Id.* ¶¶ 156-57. And they allege that HSBC, in connection with a deferred prosecution agreement, admitted that through these schemes it had violated U.S. law and undermined U.S. national security, foreign policy, and sanctions programs. *Id.* ¶¶ 37, 202.

But even assuming these contacts show that HSBC and HBEU purposely directed their activities at the United States, Plaintiffs must also show that "the litigation results from alleged injuries that arise out of or relate to those activities." *Mwani*, 417 F.3d at 12 (cleaned up). To satisfy this prong, "the plaintiff must show some sort of causal relationship between a defendant's U.S. contacts and the episode in suit." *Triple Up Ltd. v. Youku Tudou Inc.*, 235 F. Supp. 3d 15, 27 (D.D.C. 2017)). Plaintiffs do not show that their injuries, caused by the tragic suicide attack at Camp Chapman, "arose out of" or "relate to" HSBC and HBEU's contacts with the United States so as to support this Court's personal jurisdiction over them.

Plaintiffs simply do not explain how these alleged activities link up to al-Qaeda's suicide attack on Camp Chapman. They do not, for example, allege that HSBC and HBEU executed any of the transactions at issue for the benefit of al-Qaeda or that the transactions played any role in the attack itself. And while Plaintiffs allege that the Banks had ties to Iran and terrorist organizations,[6] and that HSBC and HBEU should have known about those connections, they do not assert that the Banks were involved in the attack or even that they had ties to al-Qaeda at the time of the attack. At most, they allege that, simply because HSBC and HBEU helped the Banks avoid U.S. sanctions, they "should have known" that their banking services were being used "to facilitate the laundering of funds needed for groups like al-Qaeda to operate." Am. Compl. ¶ 150; *see also* ¶ 38 (alleging that it should have been reasonably foreseeable to the HSBC Defendants that their activities would have facilitated attacks like the one at Camp Chapman). But Plaintiffs point to no case in which a court has found specific personal jurisdiction over a foreign bank for its involvement in an alleged terrorist attack based on similar allegations. Indeed, as the HSBC Defendants note, three courts have

6. *See generally* Am. Compl. ¶¶ 102-05 (In 2006, Under-Secretary for Terrorism and Financial Intelligence stated that "Bank Saderat facilitates Iran's transfer of hundreds of millions of dollars to Hezbollah and other terrorist organizations each year"); *id.* ¶¶ 106-10 (In 2007, the Department of the Treasury found that Bank Melli "provides banking services to the IRGC and the *quds* force."); *id.* ¶¶ 111-26 (In 2003, the CIA concluded that Al Rajhi Bank was a "[c]onduit for extremist financing" and identified its former CEO as a "key financial contributor[]" for al-Qaeda).

already declined to exercise personal jurisdiction over HSBC on allegations similar to those here. *See Siegel v. HSBC Holdings*, No. 17-cv-6593 (DLC), 2018 U.S. Dist. LEXIS 8986, 2018 WL 501610 at *2 (S.D.N.Y. Jan. 19, 2018); *Zapata v. HSBC Holdings*, No. 1:16-CV-030 (ASH), 2017 U.S. Dist. LEXIS 215358, 2017 WL 6939209, at *4 (S.D. Tex. Sept. 14, 2017); *Siegel v. HSBC Holdings*, 283 F. Supp. 3d 722, 727-29 (N.D. Ill. 2017). As one court put it, allegations "that a bank provides financial services to clients that associate with al-Qaeda, thereby aiding al-Qaeda, are not enough" to show that a claim "arises out of those contacts . . . for personal jurisdiction purposes." *Siegel*, 2018 U.S. Dist. LEXIS 8986, 2018 WL 501610, at *4 (cleaned up). *See also In re Terrorist Attacks*, 718 F. Supp. 2d 456, 480 (S.D.N.Y. 2010) ("The due process rights of a foreign defendant protects him from being subject to the jurisdiction of the American courts based solely on allegations that he provided . . . financial services to entities with al-Qaeda ties.").

Finally, Plaintiffs find no support in *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1 (D.D.C. 2010), the key case they cite in support of personal jurisdiction over HSBC and HBUS. In that case, as they assert, the court found that "the alleged jurisdictional fact that [the Bank of China] knowingly performed a wire transfer for [Palestinian Islamic Jihad] through one of its U.S. branches support[ed] a finding of specific personal jurisdiction." 755 F. Supp. 2d at 34. But there, the bank was alleged to have executed financial transactions directly on behalf of the terrorist organization that committed the attack in question, and the bank was alleged to have been told by

Chinese authorities that the specific transactions at issue were enabling the terrorist activities of the organization. *Id.* Thus, where "a bank has knowledge that it is funding terrorists . . . contacts created by such funding can support such a finding [of specific jurisdiction]." *Id.* No similar jurisdictional facts are pled here.

Because Plaintiffs have failed to plead that their injuries caused by the suicide attack at Camp Chapman "arose out of" or "relate to" HSBC and HBEU's contacts with the United States, this Court must dismiss the claims against them for lack of personal jurisdiction.

B. Failure to State a Claim

Plaintiffs bring aiding-and-abetting and conspiracy claims against the remaining HSBC Defendants, HBUS and HBNA,[7] under JASTA's secondary liability provision, 18 U.S.C. § 2333(d)(2). This provision provides that:

> 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,

7. Because the Court finds it lacks personal jurisdiction over HSBC and HBEU, the Court only addresses the HSBC Defendants' arguments that Plaintiffs fail to state a claim against HBUS and HBNA.

> 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.

Id. Subsection (a) creates a civil cause of action for U.S. nationals "injured . . . by reason of an act of international terrorism." 18 U.S.C. § 2333(a). Acts of "international terrorism," as defined in 18 U.S.C. § 2331(a), 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 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.

While the D.C. Circuit has not directly addressed JASTA claims for aiding-and-abetting or conspiracy, in that statute Congress identified *Halberstam v. Welch*,

705 F.2d 472, 227 U.S. App. D.C. 167 (D.C. Cir. 1983) as "the proper legal framework" for how its "Federal civil aiding and abetting and conspiracy liability" claims should function. Pub. L. No. 114-222, § 2(a)(5), 130 Stat. 852; *see Freeman v. HSBC Holdings*, 18-CF-7359 (PKC) (CLP), 19-CV-2146 (PKC) (CLP), 465 F. Supp. 3d 220, 2020 U.S. Dist. LEXIS 99370, 2020 WL 3035067 at *5 (E.D.N.Y. June 5, 2020) (quoting *Siegel v. HSBC N. Am. Holdings*, 933 F.3d 217, 223 (2d Cir. 2019)); *cf. Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 277, 437 U.S. App. D.C. 413 (D.C. Cir. 2018). Thus, courts that have considered JASTA secondary-liability claims use the *Halberstam* framework. *See, e.g., Linde v. Arab Bank*, 882 F.3d 314 (2d Cir. 2018); *Atchley v. AstraZeneca UK Ltd.*, 17-2136 (RJL), 474 F. Supp. 3d 194, 2020 U.S. Dist. LEXIS 126469, 2020 WL 4040345 (D.D.C. July 17, 2020) (appeal filed).

As a threshold matter, to state a claim for liability under JASTA a plaintiff must plausibly allege that an injury arose "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." 18 U.S.C. § 2333(d)(2). Plaintiffs allege, and the HSBC Defendants do not contest, that (1) Plaintiffs suffered injuries (the deaths of Wise and Paresi), (2) al-Qaeda, a designated Foreign Terrorist Organization (FTO), was responsible for the suicide attack at Camp Chapman, and (3) the attack was an act of international terrorism. The Court thus moves on to consider each claim of secondary liability under JASTA.

Appendix C

1. Aiding-and-abetting (Count II)

There are three elements to a JASTA aiding-and-abetting claim: (1) the defendant-aided party must perform a wrongful act causing injury, (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity when he provides the assistance, and (3) the defendant must knowingly and substantially assist the principal act. *Halberstam*, 705 F.2d at 477. Failure to allege all three *Halberstam* elements requires dismissal. *See, e.g., Siegel*, 933 F.3d at 224 (dismissing aiding-and-abetting claim because the plaintiffs failed to allege two of the three *Halberstam* elements).

Plaintiffs fail to plausibly allege the second and third *Halberstam* elements. The second element requires an allegation that HBUS and HBNA were "aware" that, by assisting the Banks, they themselves were "assuming a role in terrorist activities." *Linde*, 882 F.3d at 329 (quoting *Halberstam*, 705 F.2d at 477). "Thus, although a defendant need not know of or intend to bring about the specific attacks at issue, the Complaint must allege plausibly that, in providing financial services, Defendants were 'generally aware' that they were thereby playing a 'role' in an FTO's violent or life-endangering activities." *O'Sullivan v. Deutsche Bank*, 1:17-cv-8709 (LTS) (GWG), 2019 U.S. Dist. LEXIS 53134, 2019 WL 1409446, at *10 (S.D.N.Y. Mar. 28, 2019) (quoting *Linde*, 882 F.3d at 329). Moreover, "failure . . . to adhere to sanctions and counter-terrorism laws do not, on their own, equate to knowingly playing a role in terrorist activities." *Kaplan v. Lebanese Canadian Bank*, 405 F. Supp. 3d 525, 535 (S.D.N.Y. 2019).

Instead, a plaintiff must plead that a defendant was "aware that through its own conduct . . . it [was] assuming a role in actual terrorist activity." *Freeman*, 2020 U.S. Dist. LEXIS 99370, 2020 WL 3035067, at *7.

The allegations in the Amended Complaint come up well short of this high bar. Plaintiffs fail to allege that HBUS and HBNA were aware they were supporting al-Qaeda, much less "assuming a role" in al-Qaeda's violent activities. For the most part, Plaintiffs allege that HBUS and HBNA may or should have known about the Banks' connections to terrorist financing because of well-known public information.[8] But that is not enough to establish that Defendants were aware of any role of their own in terrorist activities. *See Linde*, 882 F.3d at 329–30 (distinguishing the awareness necessary to sustain an aiding-and-abetting claim from the mens rea for material support "which requires only knowledge of the organization's

8. *See* Am. Compl. ¶ 57 (designation of Iran as a foreign state sponsor of terrorism since 1984); *id.* ¶ 104 (Bank Saderat an SDGT as of 2007); *id.* ¶ 109 (Bank Melli designated an SDN as of October 2007); *id.* ¶ 174 ("The Golden Chain document, which identified Al Rajhi's founder and former Chief Executive Officer and Chairman of its Board as a key financier of al-Qaeda, was highly publicized and well-known among the banking community."); *id.* ¶ 176 ("9/11 Commission Report documented the fact that the hijackers used Al Rajhi Bank, the United States designated several Saudi-based nonprofit organizations that were clients of Al Rajhi Bank as terrorist organizations, and Congressional hearings publicized these ties."); *see also id.* ¶ 181 (referencing 2005 indictment alleging that senior officials from al-Haramain Foundation Inc. had cashed $130,000 in American travelers checks at Al Rajhi Bank and then smuggled the money to violent extremists in Chechnya).

connection to terrorism, not intent to further its terrorist activities or awareness that one is playing a role in those activities."). Plaintiffs also make two specific allegations that HBUS had *actual* knowledge of Al Rajhi Bank's connections to terrorism. Am. Compl. ¶¶ 175, 180. But even those allegations do not meet this standard; they fall well short of asserting that HBUS and HBNA knew they had assumed a role in al-Qaeda's violent activities. *See Strauss v. Credit Lyonnais, S.A.*, 379 F. Supp. 3d 148, 164 (E.D.N.Y. 2019) (appeal filed). Finally, Plaintiffs also allege that, simply because HBUS and HBNA helped the Banks avoid U.S. sanctions, they "should have known" that their banking services were being used "to facilitate the laundering of funds needed for groups like al-Qaeda to operate." Am. Compl. ¶ 150; *see also* ¶ 38 (alleging that it should have been reasonably foreseeable to the HSBC Defendants that their activities would have facilitated attacks like the one at Camp Chapman). But again, these allegations do not contain facts that plausibly suggest that HBUS and HBNA knew they had assumed a role in terrorism.

But even if Plaintiffs had met the second *Halberstam* element, they do not meet the third. To fulfill the third *Halberstam* element, Plaintiffs must plausibly allege is that HBUS and HBNA "knowingly and substantially assist[ed] the principal violation." 705 F.2d at 477. "As a threshold matter, *Halberstam*'s substantial assistance element requires that [defendants'] assistance be *knowing*." *Honickman ex rel. Goldstein v. BLOM Bank*, 432 F. Supp. 3d 253, 268 (E.D.N.Y. 2020) (emphasis in original). For all the reasons already explained, the

Amended Complaint fails to plausibly allege that HBUS and HBNA provided knowing assistance to the suicide attack at Camp Chapman. Plaintiffs allege, at most, that years before the attack, HBUS believed that the Al-Rajhi accounts at issue "may have been used by terrorists." Am. Compl. ¶ 175. This is hardly a claim that they knowingly assisted in this attack, carried out by al-Qaeda, by facilitating the transactions at issue.

Finally, even if HBUS and HBNA had the requisite "knowledge," Plaintiffs fail to allege that they "substantially" assisted the Camp Chapman suicide attack. In analyzing this element, the Court considers (1) the nature of the act encouraged, (2) the amount and kind of assistance given, (3) the defendant's absence or presence at the time of the tort, (4) the defendant's relation to the tortious actor, (5) the defendant's state of mind, and the (6) duration of the assistance provided. *Halberstam*, 705 F.2d at 484. Because most of the factors strongly favor HBUS and HBNA, the Court finds Plaintiffs have failed to satisfy the "substantial assistance" element.

The nature of the act encouraged. The Court first considers the act encouraged to determine "what aid might matter, *i.e.*, be substantial." *Id.* Here, Plaintiffs allege that the relevant act is the suicide attack at Camp Chapman. Am. Compl. ¶ 259.

The amount and kind of assistance given. Second, Plaintiffs fail to point to any "assistance" that HBUS and HBNA gave to the Camp Chapman attack. For example, they do not allege that they had any involvement in

transactions that the Banks performed directly for, or that directly benefitted, al-Qaeda or others involved in the attack. Although Plaintiffs assert that HBUS and HBNA helped the Iranian Banks circumvent U.S. sanctions and that HBUS provided hundreds of millions of dollars to Al Rajhi Bank, they "do not plausibly allege that [al-Qaeda] received any of those funds or that Defendants knew or intended that [al-Qaeda] would receive the funds." *Kaplan*, 405 F. Supp. 3d at 536. Once again, the closest possible link comes from a 2002 email, in which HBUS posits that the Al-Rajhi accounts "may have been used by terrorists." Am. Compl. ¶ 175. But because the attack did not occur for another seven years, this allegation is too far removed to plausibly assert that HBUS or HBNA used these accounts to finance the Camp Chapman attack or that its assistance caused Plaintiffs' injuries.

The defendant's absence or presence at the time of the tort. Third, the parties agree that HBUS and HBNA were not physically present at the suicide attack at Camp Chapman. Still, they were "present" in the sense that, around the time of the attack, HBUS was actively providing financial services to Al Rajhi Bank. *See* Am. Compl. ¶ 161; *Honickman*, 432 F. Supp. 3d at 268-69 (construing the term "presence" broadly to consider whether bank defendant was involved in ongoing business transactions with the banks with alleged ties to terrorism).

The defendant's relation to the tortious actor. Fourth, Plaintiffs make no allegations that HBUS and HBNA had any direct relationship with al-Qaeda or Balawi.

The defendant's state of mind. Fifth, Plaintiffs make no allegations that HBUS and HBNA knowingly assumed a role in terrorist financing or al-Qaeda's activities generally. In considering this element, the Court should ask if "the defendant was 'one in spirit' with the tortfeasor or 'desire[d] to make the venture succeed.'" *Atchley*, 2020 U.S. Dist. LEXIS 126469, 2020 WL 4040345, at *12 (quoting *Halberstam*, 705 F.2d at 484, 488). Even if Plaintiffs' allegations are enough to plead that HBUS and HBNA knew of the Banks' ties to terrorism and even to al-Qaeda more specifically, they do not allege that HBUS and HBNA had "any intent to further [al-Qaeda's] terrorism." *Taamneh v. Twitter, Inc.*, 343 F. Supp. 3d 904, 918 (N.D. Cal. 2018). In fact, Plaintiffs undermine any such inference by also alleging that the HSBC Defendants were simply "mesmerized by the potential profits," suggesting that money—and not extremism—was the motivation behind defendants' actions. Am. Compl. ¶ 144.

Duration of the assistance provided. Sixth, while Plaintiffs allege that the HSBC Defendants provided banking services in violation of U.S. sanctions beginning in the 1990s and throughout the relevant time in this case, Am. Compl. ¶¶ 133, 161, and that HBUS knew that it was accepting transactions from sanctioned entities as early as June 2000, *id.* ¶ 140, Plaintiffs do not suggest that the length of this banking relationship aided terrorism.

Thus, because Plaintiffs have not adequately pled that (1) HBUS and HBNA knew that by providing financial services to the Banks they were assuming a role in al-Qaeda's terrorism, and (2) their provision of financial

services to the Banks knowingly and substantially assisted al-Qaeda's suicide attack at Camp Chapman, the aiding-and-abetting liability claims against them must be dismissed.

2. Conspiracy (Count III)

JASTA creates conspiracy liability "for an injury arising from an act of international terrorism," only for "any person . . . who conspires with the person who committed such an act." 18 U.S.C. § 2333(d)(2); *O'Sullivan*, 2019 U.S. Dist. LEXIS 53134, 2019 WL 1409446, at *9. Thus, JASTA liability exists only where "the secondary tortfeasor [conspired with] the principal tortfeasor in committing '*such an act* of international terrorism.'" *Id.* (quoting *Taamneh*, 343 F. Supp. 3d at 916 (emphasis in original)). Plaintiffs do not allege that HBUS or HBNA conspired with al-Qaeda or Balawi—"the person[s] who committed such an act of international terrorism." *Freeman v. HSBC Holdings plc*, 413 F. Supp. 3d 67, 95 (E.D.N.Y 2019). Nor do they allege that those entities that allegedly conspired with HBUS and HBNA—the Banks—had any role in the Camp Chapman suicide attack. Thus, the Amended Complaint fails to plead a JASTA conspiracy claim. *See id.* at 97-99 (dismissing conspiracy claim because plaintiffs' allegations failed to satisfy the threshold statutory requirement that the HSBC defendants conspired with the person who committed the act of international terrorism). For this reason alone, Plaintiffs' conspiracy claims must be dismissed against HBUS and HBNA.

But even if Plaintiffs' conspiracy claims could survive this threshold issue, the Amended Complaint fails to allege all the elements of a *Halberstam* conspiracy: (1) an agreement between two or more parties; (2) to participate in an unlawful act; and (3) an injury caused by an unlawful overt act performed by one of the parties; (4) to advance the common scheme. 705 F.2d at 477. In short, "to be subject to secondary liability under JASTA on the basis of a conspiracy, a defendant must have conspired to commit an act of international terrorism." *O'Sullivan*, 2019 U.S. Dist. LEXIS 53134, 2019 WL 1409446, at *9. And a plaintiff must allege a factual basis "that would lead one to infer that Defendant[s] shared a[] common goal of committing an act of international terrorism." *Kaplan*, 405 F. Supp. 3d at 534.

Plaintiffs argue that these elements are satisfied because HBUS and HBNA allegedly entered into a "terrorist financing" agreement with al-Qaeda. But courts have consistently held that a financial institution's provision of financial services to banks with alleged ties to terrorism is too thin a reed on which to base a claim that the institution "shared the common goal of committing an act of international terrorism." *Id.; see also Ofisi v. BNP Paribas, S.A.*, 278 F. Supp. 3d 84, 110 (D.D.C. 2017) (finding that the plaintiffs failed to plead a bank acted in furtherance of a "common scheme" with al-Qaeda to cause tortious harm to them because "[t]he only conspiracy alleged in the complaint is a conspiracy . . . to defeat U.S. sanctions"), *vacated on other grounds*, 285 F. Supp. 3d 240.

At most, Plaintiffs allege that by illegally providing financial services for the Iranian Banks, HBUS and HBNA

joined a conspiracy to evade U.S. sanctions. But "no facts [alleged in the complaint] suggest that [HBUS and HBNA] agreed to facilitate any wrongful conduct beyond this." *Kemper v. Deutsche Bank AG*, 911 F.3d 383, 395 (7th Cir. 2018). And even assuming that HBUS and HBNA knew that the United States imposed sanctions against Iran and Al Rajhi Bank because of their connections to terrorism, "Defendants' knowledge of the animating purpose behind U.S. sanctions [does not] support Plaintiffs' assertion that the attacks were a foreseeable consequence of any alleged agreement to evade U.S. sanctions." *O'Sullivan*, 2019 U.S. Dist. LEXIS 53134, 2019 WL 1409446, at *9. At bottom, Plaintiffs do not allege any facts supporting a conclusion that HBUS and HBNA's provision of financial services to the Banks, and those entities' connections to al-Qaeda, "was so coordinated or monolithic that Defendants shared a common purpose or plan with [al-Qaeda]." *Id.* Thus, because the Amended Complaint fails to plausibly allege an agreement to commit an act of international terrorism, Plaintiffs' conspiracy liability claims against HBUS and HBNA must be dismissed as well.

IV. Conclusion

For all the reasons set forth above, the HSBC Defendants' motion to dismiss will be granted. A separate order will issue.

/s/ Timothy J. Kelly
TIMOTHY J. KELLY
United States District Judge

Date: November 16, 2020

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, DATED FEBRUARY 2, 2023

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-7018

September Term, 2022

1:18-cv-02739-TJK

DANA MARIE BERNHARDT, PERSONALLY AND AS THE ADMINISTRATRIX OF THE ESTATE OF JEREMY WISE, *et al.*,

Appellants,

v.

ISLAMIC REPUBLIC OF IRAN, *et al.*,

Appellees.

Filed On: February 2, 2023

BEFORE: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs, and Pan, Circuit Judges; and Randolph, Senior Circuit Judge.

Appendix D

ORDER

Upon consideration of appellants' petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk