19-3970

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CHARLOTTE FREEMAN, FOR THE ESTATE OF BRIAN S. FREEMAN, KATHLEEN SNYDER, RANDOLPH FREEMAN, G.F., A MINOR, I.F., A MINOR, DANNY CHISM, LINDA FALTER, RUSSELL FALTER, FOR THE ESTATE OF SHAWN O. FALTER, SHANNON MILLICAN, FOR THE ESTATE OF JOHNATHON M. MILLICAN, MITCHELL MILLICAN, BILLY WALLACE, STEFANIE WALLACE, D.W., A MINOR, C.W, A.W., A MINOR, TRACIE ARSIAGA, CEDRIC HUNT, SR., ROBERT BARTLETT, SHAWN BARTLETT, LISA RAMACI, ISABELL VINCENT, CHARLES VINCENT,

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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Plaintiffs-Appellants,

—against—

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

Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendants-Appellees state as follows:

HSBC Holdings plc states that it has no parent corporation and no public company owns 10% of the shares in HSBC Holdings plc. HSBC Bank USA N.A. states that it is a national banking association, organized and existing under the laws of the United States of America and is not a publicly held company. HSBC Bank USA N.A. is wholly owned by HSBC USA Inc., which is directly owned by HSBC North America Holdings Inc., which is indirectly owned by HSBC Holdings plc. HSBC Bank plc, a company incorporated with limited liability in England, is not a publicly held company. HSBC Bank plc is wholly owned by HSBC Holdings plc. HSBC Bank Middle East Limited, a company incorporated in Jersey, is not a publicly held company. HSBC Bank Middle East Limited is 99.968% owned by HSBC Middle East Holding B.V. and 0.032% owned by HSBC Holdings plc. HSBC Middle East Holding B.V. is, in turn, wholly owned by HSBC Holdings plc.

Barclays Bank PLC states that it is a wholly-owned subsidiary of Barclays PLC, which is a publicly held company, and no other publicly held corporation owns 10% or more of Barclays PLC's stock.

Commerzbank AG states that it is a publicly traded company organized under the laws of Germany and has no parent corporation. The government of the Federal

Republic of Germany, through its SoFFin (Sonderfonds Finanzmarktstabilisierung) agency, indirectly owns above 10% of Commerzbank AG.

Standard Chartered Bank states that it is a subsidiary of Standard Chartered Holdings Limited, which, in turn, operates as a subsidiary of Standard Chartered PLC, a publicly held company. No publicly held corporation owns 10% or more of Standard Chartered PLC's shares.

Credit Suisse AG states that it is a wholly-owned subsidiary of Credit Suisse Group AG, which is a corporation organized under the laws of the Country of Switzerland and whose shares are publicly traded on the Swiss Stock Exchange and are also listed on the New York Stock Exchange in the form of American Depositary Shares. No publicly held company owns 10% or more of Credit Suisse Group AG.

The Royal Bank of Scotland N.V. (now known as NatWest Markets N.V.) states that it is wholly owned by NatWest Markets Plc, which is wholly owned by The Royal Bank of Scotland Group plc. The Royal Bank of Scotland Group plc is a publicly held company, and no other publicly held company owns 10% or more of The Royal Bank of Scotland Group plc's stock.

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INTRODUCTION[1]

Plaintiffs-Appellants ("Plaintiffs") are U.S. military personnel who served in Iraq and were killed or injured there in attacks between 2004 and 2011, as well as their families and estates. The Corrected Second Amended Complaint ("SAC") alleges horrific harm suffered by Plaintiffs at the hands of Iraqi Shia militias, with support of other terrorist organizations, and those terrorists should be held responsible for their crimes. But Defendants are not liable for these acts.

The SAC asserts primary liability claims under the Anti-Terrorism Act ("ATA"), 18 U.S.C. § 2333(a), based on allegations that Defendants—six international financial institutions and affiliates[2]—conspired with certain Iranian banks and commercial entities to evade U.S. sanctions against Iran. In particular, the SAC alleges that: (1) Defendants facilitated wire transactions and letter of credit transactions involving Iranian banks and other Iranian entities that evaded monitoring related to U.S. sanctions; (2) some of those Iranian banks and entities

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[1] This brief cites Plaintiffs' opening brief as "Br. __"; the Special Appendix as "SPA __"; the operative Second Amended Complaint (Dkt. 115) as "SAC __"; and other entries on the district court docket, No. 1:14-cv-06601-DLI-CLP (E.D.N.Y.), by docket number ("Dkt. __").

[2] "Defendants" include: (1) Barclays Bank PLC; (2) Commerzbank AG; (3)Credit Suisse AG; (4) HSBC Holdings Plc, HSBC Bank Plc, HSBC Bank Middle-East Ltd., and HSBC Bank USA, N.A.; (5) Standard Chartered Bank; and (6) Royal Bank of Scotland, N.V. It does not include defendant Bank Saderat Plc, a United Kingdom subsidiary of an Iranian bank.

supported the Iranian government and the IRGC, a wing of the Iranian armed forces; (3) the Iranian government supported Hezbollah, a Lebanon-based entity designated by the U.S. government as a Foreign Terrorist Organization ("FTO") at the time of the attacks; (4) Hezbollah trained Iraqi Shia militias; and (5) the Iraqi Shia militias committed the terrorist attacks that killed and injured Plaintiffs.

While Defendants' motion to dismiss was pending in the district court, Congress enacted the Justice Against Sponsors of Terrorism Act ("JASTA"), which created new secondary liability causes of action under the ATA for conspiracy and aiding and abetting. 18 U.S.C. § 2333(d)(2). Plaintiffs did not amend the SAC, but rather asserted that the existing allegations stated secondary liability conspiracy claims under JASTA.

The district court (Chen, J.) dismissed all claims on multiple grounds. With respect to primary liability, the court held that the SAC failed to allege facts supporting the existence of a conspiracy between Defendants and any terrorist group, or that Defendants had engaged in an "act of international terrorism," as the ATA requires, 18 U.S.C. § 2331(1), or that Defendants' actions proximately caused Plaintiffs' injuries. SPA 22-38.

The court also held that the SAC could not support JASTA conspiracy claims because it did not plausibly allege that Defendants conspired directly with any person who committed the terrorist attacks, or that Defendants shared the terrorist

objective of the persons who committed the attacks, or that Defendants shared any conspiratorial objective with the terrorist attackers. SPA 43-45, 41 n.36.

On appeal, Plaintiffs have abandoned their primary liability claims. They contend that the district court erred in dismissing the JASTA conspiracy claims. But the SAC's allegations fall far short of what JASTA requires: (1) the plaintiff must establish that the defendant interacted with the party who committed the terrorist act, but Defendants here were complete strangers to the Iraqi Shia militias that committed the attacks; (2) the defendant must agree with the terrorist's goal of committing an act of terrorism, but the district court correctly held that the SAC alleges merely that "Defendants agreed to join a conspiracy with the sole purpose of evading U.S. sanctions," SPA 27 n.28; (3) to be liable as conspirators, the defendants must agree with other members of the conspiracy on *some* common goal, and JASTA requires that the conspiracy must include the person who commits the attacks—but the SAC fails to allege that the terrorist attackers shared Defendants' sanctions-evading goal or that Defendants shared any goal of the terrorist attackers; and (4) the overt acts that caused Plaintiffs' injuries—the terror attacks—were not done "in furtherance of"' the alleged sanctions-evading conspiracy, and thus under black-letter conspiracy principles cannot be imputed to Defendants.

The district court's opinion does not address any JASTA aiding and abetting claims because the SAC did not plead or assert such claims; Plaintiffs first attempted

to raise these claims in a motion for reconsideration of the dismissal of their claims against defendant Standard Chartered Bank ("SCB"). The district court correctly rejected that effort as untimely. In addition, the SAC fails to plead the elements of a JASTA aiding and abetting claim under *Siegel v. HSBC North America Holdings, Inc.*, 933 F.3d 217 (2d Cir. 2019).

COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court properly dismissed Plaintiffs' JASTA conspiracy claims where the SAC does not plausibly allege that (i) Defendants conspired with the persons who committed the acts of international terrorism that injured Plaintiffs; (ii) Defendants shared a terroristic goal with the perpetrators of the attacks that injured Plaintiffs; (iii) Defendants shared *any* common goals with such persons; or (iv)Plaintiffs were injured by an overt act in furtherance of the sanctions-evading banking conspiracy that Defendants allegedly joined.

2. Whether the district court correctly found that Plaintiffs had waived any JASTA aiding and abetting claim against SCB and even if they had not, the SAC fails to plausibly allege that SCB (i) aided *the persons who committed* the acts of international terrorism that injured Plaintiffs; (ii) did so *knowingly*, *i.e.*, was generally aware of its role in terrorist activities; or (iii) substantially assisted the perpetrators of the terrorist acts that injured Plaintiffs.

COUNTERSTATEMENT OF THE CASE

I. Statutory Background

Congress in 1992 created a private cause of action for damages from injuries "by reason of an act of international terrorism" in violation of U.S. law—building on previously enacted criminal prohibitions penalizing terrorist acts against U.S. nationals occurring outside of the United States. *See* Federal Courts Administration Act, Pub. L. No. 102-572, § 1003, 106 Stat. 4506, 4521-24 ("ATA," codified at 18

U.S.C. § 2333(a)). The statute targeted only primary violators and did not authorize claims for secondary liability. *Rothstein v. UBS*, 708 F.3d 82, 98 (2d Cir. 2013).

In 2016, Congress enacted JASTA, which, among other things, created a new cause of action under the ATA for secondary liability under specifically-prescribed circumstances. *See* Pub. L. No. 114-222 (Sept. 28, 2016). JASTA states:

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

18 U.S.C. § 2333(d).

Unlike other civil liability provisions that simply impose liability for "conspiracy" or "aiding and abetting"—leaving the details of secondary liability standards to judicial construction—Congress in JASTA delineated the scope of secondary liability in three specific ways.

First, Congress limited secondary liability to cases in which plaintiffs have suffered "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*" at the time of the attack. *Id*. (emphasis added).

Second, Congress required plaintiffs to establish a close connection between the secondary liability defendant and the party that committed the act of international terror injuring the plaintiff. It limited liability only to a 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*. (emphasis added).

Third, in JASTA's "[f]indings" section, Congress stated that "[t]he decision of the United States Court of Appeals for the District of Columbia in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), which has been widely recognized as the leading case regarding Federal civil aiding and abetting and conspiracy liability, . . . provides the proper legal framework for how such liability should function in the context of" JASTA. *See* 18 U.S.C. § 2333 note. Congress thus referenced a specific set of standards for courts to use in fleshing out the elements of conspiracy and aiding and abetting liability.

II. Plaintiffs' Claims

Plaintiffs filed the SAC on August 17, 2016. It asserts seven claims for relief, all grounded in 18 U.S.C. § 2333(a)—the ATA's provision creating primary liability—based upon allegations that Defendants engaged in a conspiracy to provide certain banking services to Iranian banks in violation of U.S. sanctions. The SAC contended that this purported conspiracy violated predicate criminal statutes

prohibiting the provision of material support to terrorists (18 U.S.C. § 2339A, Claim 1) and to FTOs (18 U.S.C. § 2339B, Claim 2).[3] SAC ¶¶ 2179-2217.

JASTA became law on September 28, 2016, two weeks after Defendants moved to dismiss the SAC. Plaintiffs did not seek to amend the SAC to add claims under JASTA's secondary liability provisions. Rather, in opposition to Defendants' motions to dismiss, Plaintiffs argued that the JASTA-created conspiracy claim provided an alternative ground for relief based upon the SAC's primary liability conspiracy allegations. Dkt. 125 at 26, 31.

A. Alleged Banking Conspiracy

The SAC alleges that Defendants entered into a conspiracy "beginning in 1987" with various Iranian banks to evade monitoring programs put into place as part of U.S. sanctions against Iran. SAC ¶¶ 7, 22; *see also* Br. 10 (alleging a conspiracy between Iran, the Iranian Central Bank, and other Iranian banks to move money "through the USD-clearing system" undetected). The SAC clearly delineates both the parties to, and the aims of, this alleged conspiracy:

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[3] The SAC also includes two claims against certain Defendants predicated on alleged violations of 18 U.S.C. § 2332d (Claims 3 & 4); two claims predicated on alleged § 2339A (Claim 5) and § 2339B (Claim 6) violations by Commerzbank; and one claim based on alleged § 2339A violations by SCB (Claim 7). SAC ¶¶ 2218-2293. Section 2332d prohibits financial transactions with the government of a country designated as a "state sponsor of terrorism" under the Export Administration Act of 1979. The underlying criminal statutes differ in certain respects, but those differences are not germane to this appeal.

> As used in this Complaint, "the Conspiracy" refers to an illegal criminal agreement, beginning in 1987 and, on information and belief, continuing to the present, ***between Iran, its banking agents and various international financial institutions*** by and through which Defendants knowingly participated in a criminal scheme in which they agreed *to* ***alter, falsify, or omit information from bank-to-bank payment orders*** sent on the SWIFT private financial messaging network ("SWIFT-NET") operated by the Society for Worldwide Interbank [Financial] Telecommunication ("SWIFT-Brussels") that involved Iran or Iranian parties (including several Iranian banks (referred to herein collectively as the "Iranian Bank Co-conspirators") such as Bank Melli Iran, Bank Saderat Iran, the [Central Bank of Iran], Bank Mellat, Bank Tejarat, Bank Refah and Bank Sepah, as well as the Islamic Republic of Iran Shipping Lines ("IRISL"), the National Iranian, Oil Company ("NIOC") and Mahan Air).

SAC ¶ 22 (emphasis added). The object of the conspiracy was "to alter, falsify, or omit information from bank-to-bank payment orders." *Id*. According to the SAC, Defendants provided two types of financial services pursuant to this conspiracy: wire stripping and trade finance.

First, the SAC alleges that Defendants agreed to process non-transparent funds transfers to and from seven Iranian banks: the Central Bank of Iran ("CBI"), Bank Melli Iran, Bank Saderat Iran, Bank Mellat, Bank Tejarat, Bank Refah, and Bank Sepah. SAC ¶¶ 52, 339. Until 2008, Defendants' U.S. dollar funds transfers were permissible under Treasury's "U-turn exemption." *Id*. ¶¶ 140-42, 171. Pursuant to this exemption, U.S. banks were permitted to process transactions to and from Iran, so long as (i) non-U.S., non-Iranian banks (such as Defendants, with the exception of HSBC Bank USA) acted as intermediaries, so that U.S. banks would

not have direct connection to Iranian banks, and (ii) none of the parties to the transaction was separately sanctioned. *See Kemper v. Deutsche Bank AG*, 911 F.3d 383, 387 (7th Cir. 2018).

As Plaintiffs explain, Treasury implemented the U-turn exemption to avoid "crippl[ing] the Iranian economy," especially by interfering with the flow of Iranian petrodollars, Br. 9, although the U-turn exemption was not limited to petrochemical transactions and applied to all funds transfers. Plaintiffs affirmatively alleged in their original Complaint that "most" of the transactions Defendants processed pursuant to this alleged scheme "could have been processed legally" (Dkt. 1 ¶ 775)—that is, the transactions themselves were perfectly legal, but they were processed non-transparently. Plaintiffs contend that by agreeing to make transactions non-transparent, Defendants made Iran's transactions "easier" to process. SAC ¶ 46; Br. 23.

Second, certain Defendants allegedly provided or facilitated letters of credit for various Iranian entities: the National Iranian Oil Company ("NIOC"); Mahan Air (a private airline); Iran's state shipping company, the Islamic Republic of Iran Shipping Lines ("IRISL"); and the Iranian defense procurement agency, the Ministry of Defense and Armed Forces Logistics ("MODAFL"). SAC ¶¶ 673-838.

Although the SAC calls the process "serpentine," *id*. ¶ 185, letters of credit are commonly used to facilitate international transactions by providing for payment

between distant counterparties upon the completion of a commercial contract. *Id*. ¶ 173. Several banks play a role in this process, including confirming delivery of goods, forwarding and examining appropriate documentation, and paying amounts due. *Id*. ¶¶ 178-88. The SAC alleges that Defendants removed information from payment orders to allow certain Iranian entities to evade U.S. sanctions and acquire prohibited components, equipment, and other "dual use" material. *Id*. ¶¶ 189-96, 673-75.

B. Plaintiffs' Injuries

Plaintiffs are U.S. service members injured in Iraq between 2004 and 2011 (the "relevant period"), and the families and estates of U.S. service members killed in Iraq. The SAC identifies 92 different attacks, all committed by Iraqi Shia militias. SAC ¶¶ 1041-2178.

The SAC alleges that these Iraqi Shia militias were supported by Hezbollah, a Lebanese group that has been designated as an FTO since October 1997 and that Hezbollah established a special unit, Unit 3800, to train Iraqi Shia militias sometime after 2003 and specifically trained or armed the Iraqi Shia militias that injured Plaintiffs. *See, e.g.*, *id*. ¶¶ 229, 237-40, 1162, 1898, 1963, 2028, 2106.

The SAC alleges that Hezbollah, in turn, was supported by the IRGC, a wing of the Iranian armed forces, and that a branch of IRGC known as "Department 2000" provided money, logistical support and weapons to Hezbollah. *Id*. ¶¶ 232, 248. The

SAC further contends that a branch of the IRGC known as the Islamic Revolutionary Guard Corp-Quds Force ("IRGC-QF") armed and trained various revolutionary groups in the Middle East. *Id*. ¶¶ 7, 289, 326.[4]

The SAC alleges that the IRGC, Hezbollah, and the Iraqi Shia militias worked together to accomplish acts of terrorism in Iraq, including those that gave rise to Plaintiffs' injuries. *See* SAC ¶ 226 ("Iran has had a long, deep, strategic partnership with the Lebanese-based Foreign Terrorist Organization Hezbollah, which historically has served as Iran's proxy and agent, enabling Iran to project extremist violence and terror throughout the Middle East"); *id.* ¶ 23(f) (the "IRGC, Hezbollah, and the Special Groups [*i.e.*, Shia militias] . . . plan[ned] for, conspire[d] to, and perpetrate[d] acts of international terrorism").

The SAC does not allege that Defendants had any interactions or dealings with the IRGC, Hezbollah, or the Iraqi Shia militias, let alone knowingly agreed to support or assist any acts of violence.

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[4] OFAC designated IRGC-QF as a Specially Designated Global Terrorist ("SDGT") in October 2007. SAC ¶¶ 16, 27. It designated the IRGC as an SDGT in 2017. Press Release, U.S. Dep't of the Treasury, Treasury Designates the IRGC under Terrorism Authority and Targets IRGC and Military Supporters under Counter-Proliferation Authority (Oct. 13, 2017), https://www.treasury.gov/press-center/press-releases/Pages/sm0177.aspx. The State Department designated the IRGC, including IRGC-QF, as an FTO in 2019, Br. 6 & n.3, roughly eight years after the latest incident identified in the SAC.

III. The Decision Below

On September 16, 2019, the district court dismissed all of Plaintiffs' claims, including those for primary and for secondary liability. SPA 1.[5]

The district court dismissed the primary liability claims on three independent grounds. First, it held that the SAC does not plausibly allege that Defendants conspired to provide material support for terrorism, the predicate criminal violations underlying Plaintiffs' primary liability claims. SPA 24-30. The SAC alleges only that Defendants joined a conspiracy to evade U.S. sanctions, which "is not the same as processing funds for a terrorist organization," even if "overt acts" in support of that alleged conspiracy "incidentally increased" Iran's ability to provide material support for terrorism. SPA 28-29.

Next, the court held that the SAC does not plausibly allege that Defendants engaged in "acts of international terrorism" because Defendants' conduct did not involve "violent acts or acts dangerous to human life," and "the factual allegations of the SAC cannot plausibly be read to suggest even the appearance" that Defendants acted with objective terroristic intent. SPA 30-36.

Finally, the court held that the SAC does not satisfy the proximate cause requirement, because "[t]here are no allegations that Defendants directly provided

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[5] The district court thus declined to adopt the Magistrate Judge's report and recommendation. SPA 118.

funds or services to a terrorist group, no non-conclusory allegations that the specific funds processed by Defendants were destined for a terrorist organization rather than some more benign or legitimate purpose . . . .” SPA 37-38.

The court also dismissed Plaintiffs’ secondary liability claims for JASTA conspiracy. SPA 39-45. It held that even though the SAC had adequately pleaded that the relevant acts of international terrorism were “committed, planned, or authorized” by an FTO, it did not allege that Defendants conspired with the person that committed those acts of international terrorism. *Id*.

Specifically, the court determined that “there is not a single allegation in the SAC that any of the Defendants *directly* conspired with Hezbollah or the IRGC,” “[a]nd there are no allegations that any of Defendants’ alleged co-conspirators, *e.g.*, the Iranian banks, IRISL, NIOC, or Mahan Air, directly participated in the attacks that injured Plaintiffs.” SPA 44-45.

The district court further explained that, even if the JASTA claims had satisfied that requirement, they would fail for the same reasons the court cited in rejecting the SAC’s allegations of a “material support conspiracy” in the context of primary liability, SPA 41 n.36—*i.e.*, that Defendants did not enter into a conspiracy with terrorist objectives, but rather one “to help Iranian financial and commercial entities evade American sanctions,” SPA 27, and that the SAC failed to allege that

"overt acts" of terrorist actors were "in furtherance" of the separate sanctions-evasion conspiracy that Defendants allegedly joined. SPA 28-29.

Following the district court's dismissal ruling, Plaintiffs moved for partial reconsideration, arguing for the first time that the SAC had stated a separate JASTA aiding and abetting claim against SCB. Dkt. 239-1 at 1. The court denied that motion, concluding that Plaintiffs had failed to timely raise, and in any event did not state, a claim for aiding and abetting under JASTA. SPA 92-93, 108.

SUMMARY OF ARGUMENT

Plaintiffs pleaded and principally litigated this case under the ATA's primary liability provision, 18 U.S.C. § 2333(a). The district court's careful opinion explained in detail why the SAC did not state a primary liability claim, correctly applying this Court's precedent, including *Linde v. Arab Bank, PLC*, 882 F.3d 314 (2d. Cir. 2018); and *Rothstein*, *supra*. Plaintiffs do not challenge any of these determinations and abandon the primary liability claims on appeal.

Plaintiffs' JASTA claims are just as deficient as their primary liability claims.

1. Plaintiffs urge the Court to expand conspiracy liability far beyond the limits Congress imposed when it enacted JASTA. That effort fails for four reasons.

First, under the plain text of the statute, JASTA creates liability only for a secondary actor that "*conspires with* the person who committed [the] act of international terrorism" that injured the plaintiff. 18 U.S.C. § 2333(d)(2) (emphasis

added). That language requires that the defendant interact with the terrorist attacker—and the SAC does not allege that Defendants interacted with the persons who committed the attacks that injured Plaintiffs.

Second, JASTA, like the ATA as a whole, is focused on *terrorism*-related wrongdoing. A complaint asserting a JASTA conspiracy claim must allege that the defendant agreed to further the *terroristic* goals of the person who committed the underlying terrorist act. The SAC here not only fails to allege facts to support that inference; it affirmatively alleges the opposite by asserting merely that Defendants joined a conspiracy to evade U.S. sanctions. Defendants never agreed to pursue the abhorrent terroristic objectives of those who committed the attacks that injured Plaintiffs.

Third, regardless of the nature of the objective, JASTA only imposes conspiracy liability on a defendant if that defendant shares *some* common objective with the terrorist attacker. There are no allegations that the attackers shared Defendants' alleged goal of evading U.S. sanctions. Likewise, there are no allegations that Defendants shared any goals whatsoever with those who committed the terrorist attacks.

Fourth, it is black-letter law that a member of a conspiracy is liable only for overt acts that are in furtherance of the conspiracy's common object. However, the attacks that injured Plaintiffs are not plausibly alleged to have been carried out for

the purpose of furthering Defendants' alleged banking conspiracy in any conceivable way.

2. Plaintiffs forfeited their JASTA aiding and abetting claim against Defendant SCB by waiting until their motion for reconsideration to raise it. Regardless, the SAC does not allege facts sufficient to state a claim.

First, like the statute's conspiracy provision (which follows immediately in the same sentence), JASTA imposes aiding and abetting liability only where there is a direct connection between the defendant and the person who committed the terrorist attacks. The SAC alleges no connection at all between SCB and the attackers.

Second, the SAC does not plausibly allege that by engaging in financial services that benefited seemingly legitimate Iranian entities, SCB *knowingly* assisted the terrorists attackers, *i.e.*, was generally aware that it was playing a role in terrorist activities—let alone in violent and life endangering terrorist attacks committed by other persons.

Finally, the SAC does not plausibly allege that by processing wire transfers or facilitating trade finance transactions, SCB provided *substantial assistance* to the terrorist attackers.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE SAC FAILS TO STATE A JASTA CONSPIRACY CLAIM.

The SAC does not state a JASTA conspiracy claim for four independent reasons: (1) failure to allege the required close connection between Defendants and the persons who committed the terrorist attacks that injured Plaintiffs; (2) failure to allege that Defendants entered into a conspiracy with a common terroristic object; (3) failure to allege that Defendants shared any common objective with the terrorists who injured Plaintiffs; and (4) failure to allege that Plaintiffs' injuries were caused by an act in furtherance of a conspiracy that included Defendants.

A. The SAC Does Not Allege the Required Close Nexus Between Defendants and the Terrorist Attackers.

JASTA limits conspiracy liability to a person "who *conspires with* the person who committed [the] act of international terrorism." 18 U.S.C. § 2333(d)(2) (emphasis added). That very specific statutory formulation requires a plaintiff to plausibly allege that the defendant interacted with the person that committed the act of international terrorism that injured the plaintiff. The SAC fails to satisfy that requirement.

1. The JASTA Defendant Must Interact with the Person Who Committed the Terrorist Act.

The district court correctly held that "the plain text of JASTA's conspiracy liability provision requires that a defendant conspire directly with the person or

entity that committed the act of international terrorism that injured the plaintiff." SPA 45 n.41; *see also id*. at 44 (JASTA imposes on a plaintiff the "duty to allege that a defendant conspired directly with" the "'person' who commits an act of international terrorism").[6] Plaintiffs' attempts to avoid the requirement mandated by the language chosen by Congress are unavailing.

First, Plaintiffs observe that JASTA does not use the word "directly" to modify the phrase "conspires with." Br. 41. But Congress needed no adjective to impose a proximity requirement. The requirement of a close connection between the defendant and the person or entity that committed the terrorist act rests on JASTA's plain language limiting liability to a person who "conspires with" the party committing the terrorist act.

JASTA's formulation differs significantly from other federal conspiracy laws. Those statutes impose liability generally on persons who "conspire" or who engage in a "conspiracy"—without specifying either the other participants in the conspiracy or the necessary nexus between those other participants and the defendant.[7]

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[6] *Halberstam* is consistent with this textual requirement. It explained that to infer a conspiracy, "courts must initially look to see if the alleged joint tortfeasors are . . . in contact with one another." 705 F.2d at 481. There the defendant and the person who committed the murder interacted directly; the defendant was not only the murderer's live-in girlfriend, she served as his "banker, bookkeeper, recordkeeper, and secretary." *Id*. at 487.

[7] *See, e.g*., 18 U.S.C. § 1962(d) (RICO) ("It shall be unlawful for any person to conspire to violate . . ."); 15 U.S.C. § 1 (Sherman Act) ("Every person who shall

Congress's use of the term "conspiracy" or "conspire" in other statutes, without specifying that the defendant must have conspired with a particular participant, might support liability on a conspiracy theory even when the defendant had no contact with—and even did not know—all of the other conspirators. *See, e.g.*, *United States v. Bicaksiz*, 194 F.3d 390, 399 (2d Cir. 1999). But Congress's use of a different, more restrictive, formulation in JASTA, identifying a particular party with whom the defendant must conspire—the terrorist attacker—requires plausible allegations that the defendant interacted with the person who committed the terrorist act.

The different wording Congress chose to use elsewhere in JASTA further confirms that conclusion. In establishing JASTA's separate requirement that a designated FTO be involved in the terrorist act, Congress stated that an action could be brought for an injury arising "from an act of international terrorism *committed, planned, or authorized* by" a designated FTO. 18 U.S.C. § 2333(d)(2) (emphasis added). But later in that same subsection, Congress specified that liability attaches

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make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony"); 31 U.S.C. § 3729(a)(1)(C) (False Claim Act).

Other provisions imposing civil or criminal conspiracy liability that use the "conspires with" formulation do not identify a specific person with whom the defendant must conspire, as JASTA does—making clear that Congress's inclusion of that requirement in JASTA imposes a specific limitation on the scope of liability. *See, e.g.,* 18 U.S.C. § 224.

only if the defendant "conspires with the person who *committed* [the] act of international terrorism." *Id*. (emphasis added).

Congress's decision to require that the defendant conspire "with" the person who "committed" the terrorist act, and not to impose liability for conspiring with those who planned or authorized it, makes clear that the "conspires with" requirement limits the scope of conspiracy liability. This Court should give meaning to that clear difference in language. *See Loughrin v. United States*, 573 U.S. 351, 358 (2014) ("We have often noted that when 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—this Court presumes that Congress intended a difference in meaning.").

Second, Plaintiffs err in relying on *Siegel v. HSBC North America Holdings, Inc.*, 933 F.3d 217 (2d Cir. 2019), to argue that JASTA does not require direct interaction with the party who committed the terrorist attack. Br. 41. *Siegel* discussed JASTA's directness requirement in the context of an aiding and abetting claim; and *Siegel* did not reach a conclusion regarding whether JASTA aiding and abetting liability requires direct support to the person committing the act of terrorism at issue. 933 F.3d at 223-24. As just discussed, the statutory text regarding conspiracy compels that conclusion.

Third, Plaintiffs cite various criminal cases, Br. 41-42, but none involves a statute with the particular language Congress chose for JASTA. Those cases serve only to confirm that JASTA's different text mandates a different result.

Fourth, Plaintiffs invoke JASTA's purpose declaration, citing its reference to "indirect[]" provision of material support. Br. 41.[8] However, as Plaintiffs themselves admit, *id.*, a statutory "purpose" cannot expand secondary liability beyond the statutory text. *See Sturgeon v. Frost*, 139 S. Ct. 1066, 1086 (2019) (statements of purpose "by their nature 'cannot override [a statute's] operative language"); *Honeycutt v. United States*, 137 S. Ct. 1626, 1635 n.2 (2017) (same). In addition, any objective of providing "relief . . . 'directly or *indirectly*,'" Br. 41 (Plaintiffs' emphasis), is achieved through JASTA's creation of secondary liability: JASTA supplemented the already-existing "direct" ATA liability for those who themselves commit acts of international terrorism, with "indirect" liability based on conspiracy and aiding and abetting, under circumstances that do not apply here, for those who do not themselves commit acts of international terrorism.[9]

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[8] The provision states: "The purpose of this Act is to provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against persons, entities, and foreign countries, wherever acting and wherever they may be found, that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States." Pub. L. No. 114-222, 130 Stat. 852, 853, § 2(b).

[9] The "directly or indirectly" language in JASTA's "purpose" provision has nothing to do with the scope of liability. The purpose provision is immediately

2. The SAC Does Not Allege That Defendants Interacted With the Persons Who Committed the Terror Attacks.

Plaintiffs do not even attempt to argue that Defendants had any connection with the Iraqi Shia militias that committed the terror attacks in question. That concession is dispositive, because the SAC alleges that the attacks were committed by these militias. SAC ¶¶ 7, 258.[10]

Plaintiffs attempt to satisfy the requirement that Defendants conspired with the persons who committed the attacks by asserting that Defendants conspired with Hezbollah or the IRGC. *See* Br. 43 (arguing that "Hezbollah was a participant in the conspiracy" and that "Defendants actively conspired with the IRGC through its various agents"). That contention fails for two reasons.

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preceded by statutory findings regarding U.S. courts' exercise of personal jurisdiction, which similarly refer to the provision of "material support or resources, directly or indirectly" (*see* Pub. L. No. 114-222, § 2(a)(6) & (7))—making clear that U.S. courts *could* exercise personal jurisdiction over foreign persons accused of terrorism. (Of course, Congress cannot override the due process limits on personal jurisdiction, and findings and purposes do not even have the force of law.) In addition, the separate finding addressing the scope of secondary liability references only the *Halberstam* decision (*id*. § (2)(a)(5)), and the subsequent statements regarding direct or indirect provision of material support have no relation to the liability standards set forth in that ruling.

[10] The district court determined that "the most generous reading possible of the complaint" was that Hezbollah and the IRGC, "acting through agents and proxies," were "the entities responsible" for the attacks. SPA 44. That conclusion is not plausibly supported by the SAC's allegations, as explained *infra* pp. 23-26. But the district court correctly concluded that even on its reading of the SAC, the conspiracy claims failed, because the SAC does not allege any direct interaction between Defendants and Hezbollah and the IRGC, *see infra* p. 23.

First, as the district court determined, "there is not a single allegation in the SAC that any of the Defendants *directly* conspired with Hezbollah or the IRGC." SPA 44-45. The SAC identifies the parties to the "Conspiracy" to include Defendants and Iranian banks, but not Hezbollah or the IRGC. SAC ¶¶ 6, 22. Indeed, Plaintiffs appear to concede the point on appeal. *See* Br. 48-49 (contending that only Bank Saderat "directly" conspired with Hezbollah, without any comparable assertion regarding Defendants).[11]

Second, even if the SAC could be interpreted to include an allegation that a Defendant conspired with Hezbollah or the IRGC—and there are no facts alleged that could support such a conclusion—the SAC still would fall short of what JASTA requires for civil liability. The statute mandates that a JASTA defendant *conspire with* the person who *committed* the attack that injured the plaintiff—parties who *planned*, *authorized*, or *aided* in the attacks do not qualify because, as explained above, Congress specifically omitted those verbs from this portion of the statute. The SAC does not allege that the IRGC or Hezbollah "committed" any attacks. It was "a

[11] Plaintiffs falsely assert, Br. 42-45, that the district court required them to allege plausibly that Defendants conspired with an FTO—but the court required only allegations that Defendants conspired with the person who committed the terrorist attacks. The court nowhere held that for JASTA liability, the actual attacks in question must have been committed by an FTO. SPA 43-44.

litany of Iraqi Shi'a militia terror groups," not the IRGC or Hezbollah, "who killed, injured or maimed the Plaintiffs." SAC ¶¶ 7, 258.

Plaintiffs contend in their brief that "Hezbollah, the IRGC, and their proxies *jointly committed* the attacks and caused Plaintiffs' injuries." Br. 50 (emphasis added). But that is not what the SAC alleges; it merely alleges that the IRGC and the IRGC-QF "channel funds to militant groups," that "terrorist operatives . . . were trained and equipped by the IRGC," SAC ¶¶ 27, 106, and that Hezbollah did the same, SAC ¶¶ 258, 1063. Those statements may plausibly allege "aid," but they do not allege that these entities "committed" the attacks at issue.

Third, Plaintiffs cannot rely on JASTA's definition of "person" to blur the lines between Hezbollah, the IRGC, and the Iraqi Shia militias. Br. 43. JASTA expressly adopts the Dictionary Act's definition of "person," *see* 18 U.S.C. §2333(d)(1), which includes "associations." 1 U.S.C. § 1. The Iraqi Shia militias, therefore, each are a "person" for purposes of JASTA. Hezbollah, and the IRGC are also each "person[s]"—separate persons. Certainly the United States treats such terrorist groups as separate persons, designating them (or not) under distinct designations (*e.g.*, FTO, SDGT) at different times—distinctions that Congress embraced when it imposed an FTO prerequisite on JASTA secondary liability.[12]

[12] Plaintiffs therefore get no benefit from the district court's observation that a defendant can be held liable for conspiring with the "person" who committed the terrorist attack even if it does not conspire directly with the "literal triggerman." SPA

Similarly, Plaintiffs cannot rely on conclusory allegations that the Shia militias were "agents" or "proxies" of Hezbollah or the IRGC. *See Siegel*, 933 F.3d at 222 ("conclusory allegations or legal conclusions masquerading as factual conclusions" are insufficient); *infra* pp. 25-26. They must plead facts plausibly establishing those conclusions, and there are no such allegations in the SAC.

Plaintiffs also cannot bridge this gap by arguing that Defendants "conspired directly with the IRGC's agent, NIOC." Br. 45. This argument fails for three independent reasons. To begin with, neither NIOC nor the IRGC is alleged to have committed the attacks in question. SPA 44-45.

Moreover, the SAC offers only the naked legal conclusions that NIOC was an "agent" of the IRGC. SAC ¶¶ 52, 400. That bare assertion fails to meet the plausible pleading requirement. *See Siegel*, 933 F.3d at 222 ("conclusory allegations or legal conclusions masquerading as factual conclusions" are insufficient); *Rothstein*, 708 F.3d at 94 (same); *cf. Sikhs for Justice, Inc. v. Indian Nat'l Congress Party*, 17 F. Supp. 3d 334, 344 (S.D.N.Y.), *aff'd*, 596 F. App'x 7, 9 (2d Cir. 2014) (rejecting conclusory allegation that corporate affiliate was the "agent" of an overseas entity responsible for acts of violence against Sikhs).

43-44. Here, there is no allegation that Defendants conspired with the individual attackers or with the Iraqi Shia militias in which they participated.

Finally, even if the SAC plausibly alleged NIOC to be an "agent" of the IRGC for some purposes, and it does not, NIOC remained a legitimate business with a broad range of activities wholly unrelated to the IRGC, including billions of dollars in petroleum sales recognized by the US government to be a legitimate facet of the Iranian economy, as the district court observed. *See* SPA 33 (describing NIOC's "many legitimate activities" including "daily oil sales"); SAC ¶ 624, Br. 9. The fact that NIOC, a client of the Iranian banks (not of Defendants), may have received funds via the Iranian banks wired through Defendants does not by itself establish that the Defendants interacted with NIOC in any capacity as an IRGC agent. *Cf. Siegel*, 933 F.3d at 224 (defendant did business with "large bank[s] with vast operations," not merely terrorist fronts); *Rothstein*, 708 F.3d at 97 ("Iran is a government, and as such it has many legitimate agencies, operations, and programs to fund.").

B. The SAC Does Not Allege That Defendants Agreed with the Terroristic Goals of the Persons Who Committed the Attacks Injuring Plaintiffs.

Even if JASTA did not require interaction between the defendant and the person committing the act of international terrorism, Plaintiffs still could not prevail on their conspiracy claims. JASTA's text also requires the plaintiff to plead and prove that the defendant agreed with the terroristic goals of the person who committed the act of terror. Thus, the district court correctly concluded that

Plaintiffs' conspiracy claims fail because the SAC "does not support an inference that Defendants themselves" agreed to a common terroristic object. SPA 28-29.[13]

JASTA imposes liability on a defendant "for an injury arising from an act of international terrorism" if the defendant "conspires with the person who committed such an act of international terrorism"—making clear that the provision imposes liability for *terrorism*-related wrongdoing. That language requires participation by the defendant in a conspiracy that had as an object the terrorist act that injured the plaintiff.

As another district court explained in rejecting similar JASTA conspiracy claims:

> The plain language of JASTA, "which creates liability 'in any action . . . arising from an act of international terrorism,' with respect to 'any person . . . who conspires with the person who committed such an act,'" suggests that JASTA liability lies "where 'the secondary tortfeasor conspired with the principal tortfeasor in committing '*such an act* of international terrorism.' In other words, to be subject to secondary

[13] Some of Plaintiffs' *amici* contend that Iran "was engaged in an extensive, but singular, conspiracy to fund terrorism in, among other places, Iraq," and used the IRGC and other entities to "achieve that singular aim." Br. of Ret. Generals 18. But Iran's supposed objective is not the relevant benchmark. What matters in this case is *Defendants*' objective, which as discussed above was not terroristic. Arguments about parties' motivation, Br. of Senators 25-26, are misplaced because, as the *amici*'s own authority recognizes, the "paramount" question in a conspiracy case is "whether the parties have agreed to advance a common goal." *United States v. Martin*, 618 F.3d 705, 736-37 (7th Cir. 2010). If they have not, then a conspiracy claim fails regardless of a defendant's motivation.

> liability under JASTA on the basis of a conspiracy, a defendant must have conspired to commit *an act of international terrorism*."

O'Sullivan v. Deutsche Bank, 2019 WL 1409446, at *9 (S.D.N.Y. Mar. 28, 2019) (quoting *Taamneh v. Twitter, Inc.*, 343 F. Supp. 3d 904, 916 (N.D. Cal. 2018)).

Courts have accordingly dismissed JASTA conspiracy claims that, like those here, fail to allege that the defendant joined a conspiracy that had a terroristic object. *See, e.g.*, *id*. ("Defendants' alleged provision of material support to Iranian entities is so far removed from the acts of terrorism that injured Plaintiffs that the Court cannot infer that Defendants shared the common *goal of committing an act of international terrorism*."); *Cain v. Twitter Inc*., 2018 WL 4657275, at *3 (N.D. Cal. Sept. 24, 2018) (dismissing JASTA conspiracy claim because "[n]othing in the [complaint] establishes an agreement, express or otherwise, between Twitter and ISIS *to commit terrorist attacks*" (emphasis added)).

Plaintiffs' contrary reading—that JASTA does not require a plaintiff to plead that a defendant's object was terroristic, only that the defendant and a co-conspirator conspire about *something* unlawful (Br. 34-35)—misinterprets the statute. If Congress had intended for anyone who helps a terrorist organization in any way to be liable for conspiracy under JASTA, it "could easily have used language similar

to that in [another provision of] the ATA, § 2339B,"[14] which criminalizes the provision of material support. *Taamneh*, 343 F. Supp. 3d at 916. But Congress did not include that language in JASTA.

This Court reached a similar conclusion when interpreting the RICO statute in *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21 (2d Cir. 1990). Concluding that RICO conspiracy liability required the plaintiff to prove that the plaintiff was injured by an overt act in furtherance of the conspiracy that constituted a RICO predicate act, this Court explained that "Congress did not deploy RICO as an instrument against all unlawful acts. . . . Its purpose . . . is to target RICO activities, and not other conduct." *Id*. at 25. Similarly, here, JASTA does not target activity that could be alleged somehow to have ultimately aided a terrorist organization; it targets activity with terrorist objectives.[15]

Plaintiffs' reliance on the legislative history of the pre-JASTA ATA is similarly misplaced. *See* Br. 35 (citing S. Rep. No. 102-342 (1992)). This Court has squarely held that Congress did not intend to impose secondary liability at all when

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[14] 18 U.S.C. § 2339B(a)(1) imposes criminal liability on "[w]hoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so."

[15] JASTA's claimed "purpose" does not change this conclusion. Br. 35. *Hecht* rejected expansive liability even though the RICO statute should be read broadly. 897 F.2d at 25.

it passed the ATA. *Rothstein*, 708 F.3d at 97-98. Congress's purposes when it enacted § 2333(a) therefore do not illuminate the scope of the secondary liability Congress created when it enacted JASTA more than two decades later.

As Plaintiffs concede (Br. 27, 36), the SAC does not allege that Defendants agreed to or otherwise shared the terroristic objectives of the persons who committed the attacks. Consequently, Plaintiffs' JASTA conspiracy claims fail.

C. The SAC Does Not Allege *Any* Common Goal Agreed to by Defendants and the Terrorist Attackers.

Even if JASTA did not require that a defendant and the terrorist attacker interact with each other and agree upon a terroristic purpose (it does), Plaintiffs still could not prevail on their conspiracy claims. Parties qualify as co-conspirators only if, among other things, they agree upon a common goal. Because the SAC does not allege that Defendants and the terrorist attackers had *any* common goal, Defendants and the attackers could not be co-conspirators, and Defendants therefore cannot be liable on a conspiracy theory for injuries caused by the terroristic attacks.

1. The SAC Alleges Only That Defendants Agreed To Join a Conspiracy To Evade U.S. Sanctions—and Does Not Allege That the Attackers Agreed to That Goal.

As the district court recognized, the SAC alleges that "Defendants agreed to join a conspiracy with the sole purpose of evading U.S. sanctions." SPA 25 n.28. Because the SAC does not allege that the terrorists had that objective, or that

Defendants had the goal of committing terrorist acts, there is no common objective and Plaintiffs' conspiracy claims fail.

Halberstam makes clear that conspiracy liability requires "(1) an agreement between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner." 705 F.2d at 477. The claimed co-conspirators must share a "common scheme"—agree to "pursue[] the same object." *Id*. at 477, 480; *see also id*. at 481 (explaining that courts "must initially look to see if the alleged joint tortfeasors are pursuing the same goal"); *accord Anderson News, L.L.C. v. Am. Media, Inc.*, 899 F.3d 87, 97 (2d Cir. 2018) (civil conspiracy requires "a conscious commitment to a common scheme"). The common, agreed-upon object also must be "unlawful." 705 F.2d at 477. In *Halberstam*, the common-object requirement was satisfied because the defendant and the principal (her co-habitating boyfriend) "agreed to undertake an illegal enterprise to acquire stolen property." 705 F.2d at 487.

Even if JASTA's statutory text did not require agreement upon a terroristic object, the defendant and the terrorist attacker must share *some* common object that results in the plaintiff's harm. That is because the statutory text provides that the defendant must "conspire[] with the person who committed" the underlying act of international terrorism for the agreement to be actionable. 18 U.S.C. § 2333(d). The

JASTA defendant and the terrorist attacker accordingly must have some common goal.

Courts therefore dismiss JASTA conspiracy claims when the plaintiffs do not plausibly allege a common object shared by the defendants and those who perpetrated the terrorist attacks. *See Kaplan v. Lebanese Canadian Bank, SAL*, 405 F. Supp. 3d 525, 534 (S.D.N.Y. 2019) ("fatal to Plaintiffs' claim for conspiracy liability [under JASTA] is their failure to sufficiently allege any unlawful agreement between Defendant and Hizbollah [the terrorist actor in that case]," because "[p]laintiffs provide no factual basis for these allegations that would lead one to infer that Defendant shared any common goal."); *Crosby v. Twitter, Inc.*, 303 F. Supp. 3d 564, 575 (E.D. Mich. 2018) (plaintiffs failed to plausibly allege a "discernible common plan or scheme" between Twitter and the terrorist who murdered 49 people at a nightclub in Orlando), *aff'd,* 921 F.3d 617 (6th Cir. 2019).

As in *Kaplan* and *Crosby*, Plaintiffs here cannot satisfy this bedrock requirement. Defendants and the groups that committed the terrorist acts that injured Plaintiffs—the Iraqi Shia militias—do not share any common goals. The SAC does not allege that Defendants had as their object terroristic attacks on U.S. service members in Iraq. At most, Plaintiffs allege that Defendants agreed to "a criminal scheme in which they agreed to alter, falsify, or omit information from bank-to-bank payment orders sent on the SWIFT private financial messaging network." SAC ¶ 22.

Moreover, the SAC alleges that the Iraqi Shia militias' objectives were terroristic, and only terroristic. SAC ¶¶ 282-329. The SAC does not allege that the Iraqi Shia militias knew of, much less agreed to anything regarding, how transactions between Iranian banks and Defendants would be processed. There thus is no allegation of a common object or goal.[16]

Plaintiffs try to satisfy this requirement with allegations regarding a supposed agreement with NIOC. But, as explained above, *supra* p. 25, NIOC is not the terrorist attacker, and facilitating transactions for the benefit of NIOC—an entity responsible for vast petroleum sales—does not support the inference that Defendants entered into a conspiracy with NIOC—let alone with the IRGC—to commit acts of terrorism.[17]

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[16] Even if Plaintiffs were correct that "Hezbollah, the IRGC, and their proxies jointly committed the attacks and caused Plaintiffs' injuries" (Br. 50)—and they are not, *supra* pp. 23-24—the SAC contains no allegations plausibly establishing that those entities were parties to the banking conspiracy that Defendants allegedly joined. Like the militias, their objectives were only terroristic. SAC ¶¶ 226-58.

[17] The district court did not impose any requirement that the "person" with whom a defendant conspires "exist solely" or "use 'all' funds for" terrorist purposes, as Plaintiffs contend, Br. 51-54—and the SAC's allegations are a far cry from the scenario Plaintiffs' *amici* posit in which a defendant seeks to avoid liability whenever "they operate through a co-conspirator that performs at least some 'legitimate' activities.'" Br. of Ret. Generals 23-29. Rather, the district court properly considered the SAC's allegations about the legitimate business activities of the Iranian banks and entities for whom Defendants allegedly provided services in determining that Defendants' services could not plausibly support a conclusion that Defendants conspired with the terrorist attackers, SPA 44-45 n.40, just as it

Plaintiffs' response to this failure is to argue that the district court erred by considering Defendants' intent and supposedly relying on criminal law precedents. Br. 32-38. But *Halberstam* itself specifically recognizes that parties qualify as co-conspirators only when they agree upon a common scheme or "goal." 705 F.2d at 481. And the presence or absence of the common object often may be based on what the facts (here, allegations) plausibly establish regarding the parties' intent. As *Halberstam* explains, "an agreement between conspirators must generally be inferred from circumstantial evidence revealing *a common intent*." *Id*. at 480; *see also Anderson News*, 899 F.3d at 110 (holding that there was insufficient evidence to infer civil conspiracy in violation of Sherman Act based on, among other things, evidence that "reflected an observation, not a declaration of common intent."); *Weishapl v. Sowers*, 771 A.2d 1014, 1024 (D.C. 2001) ("Where there is no direct evidence of an agreement between the alleged co-conspirators, there must be circumstantial evidence from which a common intent can be inferred.") (citing *Halberstam*).

The district court's conclusion that Defendants lacked a common goal with their alleged terrorist co-conspirators rested on the SAC's own allegations. The court

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considered those allegations in determining the sufficiency of the primary liability claims, SPA 28, 33, 36.

simply recited the SAC to distinguish Defendants' alleged actions from those of the terrorist actors:

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

SPA 25-27.

2. Because the SAC Does Not Plausibly Allege That Defendants Are Parties to a Terrorist Conspiracy, Defendants Cannot Be Liable for Harms Caused by the Terrorists.

Plaintiffs recognize (Br. 50) that *Halberstam* requires a plaintiff alleging a conspiracy to plead that he suffered "an injury caused by an unlawful overt act performed *by one of the parties to the agreement*." 705 F.2d at 477 (emphasis added). And for a JASTA conspiracy, the injury-causing "overt act" must be an "act of international terrorism." 18 U.S.C. § 2333(d)(2).

Here, as the district court recognized, the SAC does not plausibly allege that any of the parties to the banking conspiracy committed the "acts of international terrorism" that injured Plaintiffs. *See* SPA 45 ("there are no allegations that any of

Defendants' alleged co-conspirators . . . participated in the attacks that injured Plaintiffs."). The conspiracy claims therefore were properly dismissed.

Plaintiffs and their *amici* argue that the district court erred by applying the proximate cause standard set forth by this Court in *Rothstein*. Br. 50-54; *see also* Br. of Ret. Generals 26-27. That is wrong.

The district court held the SAC's primary liability claims deficient because the allegations did not plausibly plead proximate cause, SPA 36-38—which Plaintiffs do not challenge. The district court did not base its dismissal of the JASTA conspiracy claims on the SAC's failure to plead proximate cause (the discussion at SPA 38-39 n.35 relates to Plaintiffs' primary liability claims). Rather, in determining that the SAC fails to satisfy JASTA's requirements, the court simply relied on many of the same pleading gaps that required dismissal of the primary liability claims.[18] SPA 41 n.36.

D. The SAC Does Not Allege Injury From an Overt Act in Furtherance of the Alleged Conspiracy.

The SAC's conspiracy claims also fail because the overt acts that caused Plaintiffs' injuries—the "acts of international terrorism" committed by the Iraqi Shia

[18] That overlap is not surprising, because JASTA's limitations on conspiracy liability serve a function similar to the proximate cause requirement—cabining the scope of liability by requiring a direct connection between the defendant and the terrorist act. *Rothstein*, 708 F.3d at 96-97.

militias—were not done "in furtherance of"' the banking conspiracy that the SAC alleges Defendants joined, and therefore cannot be imputed to Defendants.

Halberstam specifically states that a plaintiff must prove that the overt act causing the plaintiff's injury "was done pursuant to and in furtherance of the common scheme." 705 F.2d at 477. Thus,

> once the conspiracy has been formed, all its members are liable for injuries caused by acts *pursuant to or in furtherance of the conspiracy*. A conspirator need not participate actively in or benefit from the wrongful action in order to be found liable. He need not even have planned or known about the injurious action, as in the case of the getaway driver in *Davidson*, *so long as the purpose of the tortious action was to advance the overall object of the conspiracy*.

705 F.2d at 481 (emphasis added); *accord Hecht*, 897 F.2d at 25 n.3; *Kaplan*, 405 F. Supp. 3d at 534 (same). Put another way: "If [the plaintiff] can establish that [one defendant] *participated in or induced the alleged wrongful actions* of [a second defendant] *pursuant to an agreement*, then [the first defendant] is liable as a conspirator for the damages proximately caused by these wrongs." *Halberstam*, 705 F.2d at 479 n.11 (internal citation omitted).

The essential nature of this inquiry is clear from the *Halberstam* court's analysis. The question there was whether a *murder* committed by the principal was in furtherance of the parties' *burglary* conspiracy, so that the murder could be imputed to a co-conspirator. *Halberstam*, 705 F.2d at 487. Because "Welch was trying to further the conspiracy by escaping after an attempted burglary, and he killed

Halberstam in his attempt to do so," his co-conspirator was subject to liability for the murder. *Id.*; *see also* Law Profs. Amicus at 16 (defendant was liable "because she had agreed with Welch to undertake an illegal enterprise to acquire stolen property, and the murder was an overt act *in furtherance* of that conspiracy.") (emphasis added); Br. of Senators 31-32 (recognizing similar "in furtherance" requirement).

Here, the 92 attacks by Iraqi Shia militias giving rise to Plaintiffs' injuries were not perpetrated to advance the objectives of the banking conspiracy that Defendants and Iranian banks and other Iranian commercial entities allegedly engaged in to evade sanctions.

1. The SAC alleges that Defendants joined a banking conspiracy to provide various financial services in a manner that evaded U.S. economic sanctions. SAC ¶ 22. As *Halberstam* made clear, conspiracy liability requires that the act that injured the plaintiff was done with the "purpose" of "advanc[ing] the overall object of the conspiracy" that the defendant joined. 705 F.2d at 487. There are no facts alleged plausibly demonstrating that the attacks by Iraqi Shia militias that injured Plaintiffs were "in furtherance of" or with the purpose of advancing the banking conspiracy to evade sanctions. This gap defeats Plaintiffs' JASTA conspiracy claims. As the district court put it, "any acts of promoting terrorism engaged in by the Iranian entities, even if done with funds transferred by Defendants, would not be an act 'in

furtherance of' that much more limited conspiracy [to evade U.S. sanctions], so as to make Defendants liable for that conduct." SPA 27, n. 28.

Plaintiffs admit, as they must, that the "[t]errorist acts" in this case "do not 'further' material support so much as result from it." Br. 39 n. 19. That is a critical distinction and a decisive admission. *Halberstam* expressly rejects the extension of conspiracy liability for overt acts that occur "as a result" of the conspiracy, as opposed to overt acts "in furtherance" of it. *See* 705 F.2d at 483.

2. Plaintiffs attempt to avoid the "in furtherance" requirement by arguing that it can be reduced to a "direct and foreseeable consequence" standard. Br. 39. But—as explained above—*Halberstam* expressly held that liability turns on whether the act injuring the plaintiff was in furtherance of a conspiracy that the defendant joined.

Plaintiffs try to justify their erroneous standard by plucking out of context a single reference to "foreseeable" in *Halberstam*'s conspiracy discussion. Br. 26. But, in the section of the opinion applying the relevant legal principles to the facts of the case, the court stated:

- "a conspiracy requires: an agreement to do an unlawful act or a lawful act in an unlawful manner; an overt act in furtherance of the agreement by someone participating in it; and injury caused by the act," 705 F.2d at 487;

- "The only remaining issue, then, is whether Welch's killing of Halberstam during a burglary was an overt act in furtherance of the agreement. We believe it was," *id.*;
- "a conspirator can be liable even if he neither planned nor knew about the particular overt act that caused injury, so long as the purpose of the act was to advance the overall object of the conspiracy," *id.*;
- "Welch was trying to further the conspiracy by escaping after an attempted burglary, and he killed Halberstam in his attempt to do so," *id*.

The court then summarized its conclusion by stating "[i]n sum, the district court's findings that Hamilton agreed to participate in an unlawful course of action and that Welch's murder of Halberstam was a reasonably foreseeable consequence of the scheme are a sufficient basis for imposing tort liability." *Id*.

The context of the latter statement makes clear that the court was not disclaiming all of its prior analysis and instead adopting a "foreseeability" test. It simply was summarizing its prior determinations, which rested entirely on the "overt act in furtherance standard," and holding that the totality of the conduct in *Halberstam* sufficed for liability. The court certainly did not rule that liability could be based on "foreseeability" alone where, as here, the acts injuring Plaintiffs were not in furtherance of a common scheme that Defendants joined.

Congress pointed courts to *Halberstam* for determining the elements of secondary liability not specified in the statutory text, because it was the "leading case" on the issues. JASTA § 2(a)(5); *Siegel*, 933 F.3d at 223. The absence of a "foreseeability" test in *Halberstam*'s standards for civil conspiracy is dispositive.

Tellingly, Plaintiffs ultimately rely upon only non-conspiracy cases to support their foreseeability argument—confirming that they are trying to import a principle that *Halberstam* does not adopt. *See* Br. 33 (citing *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 251 (4th Cir. 1997) ("natural consequence of [one's] original act" is the standard for civil aiding and abetting); *United States v. Peoni*, 100 F.2d 402 (2d Cir. 1948) (same)).

Plaintiffs rely particularly on *United States v. Falcone*, 109 F.2d 579 (2d Cir. 1940), but that decision does not distinguish between aiding and abetting and conspiracy, *id.* at 581 ("a conspirator with—or, what is in substance the same thing, an abettor of"), and therefore provides no authoritative support for the elements of either. *See Halberstam*, 705 F.2d at 478 ("Courts and commentators have frequently blurred the distinction between the two theories of concerted liability" and "we find it important to keep the distinctions clearly in mind").

Even if foreseeability could be used as a proxy for the "in furtherance" requirement, the SAC fails to plausibly allege that the violent acts by the Iraqi Shia militias that injured them were reasonably foreseeable to Defendants, who were

many steps removed from any acts of international terrorism and had no relationship with the persons that perpetrated them.

Where, as here, the conduct that injured the plaintiff is that of independent actors—with whom the defendants had no dealings and about whose actions the defendants were not aware—courts have declined to conclude that such conduct was foreseeable. *See, e.g.*, *Gaines-Tabb v. ICI Explosives USA, Inc.*, 995 F. Supp. 1304, 1310 n.6, 1313-14 (W.D. Okla. 1996) (holding that Oklahoma city bombing was not reasonably foreseeable to defendant, who sold explosive material directly to bombers, notwithstanding allegations that defendant received law enforcement warning that "AN fertilizer was so highly dangerous that it should not be manufactured without an additive [to reduce risk]" and knew or should have known of "a substantial record over the years of the use or attempted use of AN as an explosive by criminals."), *aff'd,* 160 F.3d 613 (10th Cir. 1998); *see also Port Auth. of N.Y. & N.J. v. Arcadian Corp.*, 189 F.3d 305, 318-19 (3d Cir. 1999) (same for 1993 World Trade Center bombing).[19]

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[19] There also is a strong argument that Plaintiffs' conspiracy claims fail to satisfy JASTA's threshold requirement that their injury must "aris[e] from an act of international terrorism committed, planned, or authorized by" an FTO. 18 U.S.C. § 2333(d)(2). The SAC alleges that all of the 92 attacks were committed by Iraqi Shia militias, and only two were "committed, planned, or authorized" by a then-designated FTO: Hezbollah, SAC ¶¶ 229, 1042 and Kata'ib Hezbollah, *id.* ¶¶ 302, 304, 2139. The district court held that this requirement was satisfied because an FTO—Hezbollah—"train[ed] and arm[ed]" terrorist groups that committed certain attacks, "provid[ed] advisors to Shi'a militants in Iraq," and sent personnel who

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE SAC DOES NOT STATE AN AIDING AND ABETTING CLAIM AGAINST SCB.

Plaintiffs assert that the district court erred in dismissing an aiding and abetting claim they purport to have asserted against SCB. Br. 2. But Plaintiffs forfeited any such claim by waiting until their motion for reconsideration to raise it. If the Court nevertheless chooses to reach this argument, the SAC fails to state a JASTA aiding and abetting claim.

A. Plaintiffs Waived Any JASTA Aiding and Abetting Claim.

Plaintiffs concede that, as the Magistrate Judge found below (SPA 166 n.42), the SAC "did not plead aiding and abetting claims" against any Defendant. Br. 55 n.32. Nor did Plaintiffs raise such a claim in their opposition to Defendants' motion to dismiss or in response to Defendants' objections to the R&R, even though they used that briefing to raise conspiracy claims under JASTA. Dkt. 125 at 26, 31-32.

Plaintiffs gloss over the fact that the first and only time that they "argued" that the SAC asserted a JASTA aiding and abetting claim was on their motion for partial

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"assist[ed] Iran in training its terrorist proxies in Iraq." SPA 42. But allegations that Hezbollah "trained" or "armed" Iraqi Shia militias do not plausibly allege that Hezbollah (or any other FTO) *authorized*—much less planned or committed—any specific violent incidents by those groups. Defendants do not press this argument on appeal because of the other multiple deficiencies in Plaintiffs' conspiracy claims.

reconsideration, which the district court denied.[20] As the district court stated when ruling from the bench during oral argument on that motion:

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

SPA 92-93.

Plaintiffs do not argue otherwise on appeal, and the district court was well within its discretion to deny Plaintiffs' motion for partial reconsideration. *Phillips v. City of New York*, 775 F.3d 538, 544 (2d Cir. 2015) (claims "raised for the first time in [a] motion for reconsideration" are "not properly presented to the district court" and, absent good cause, are waived); *Sompo Japan Ins. Co. of Am. v. Norfolk S. Ry. Co.*, 762 F.3d 165, 188 (2d Cir. 2014); *Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52-53 (2d Cir. 2012).

This Court generally "will not consider an argument on appeal that was raised for the first time below in a motion for reconsideration." *Official Comm. of*

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[20] The 338-page SAC included hundreds of references to an alleged "conspiracy," but only a single use of the word "aiding," and the term "abetting" did not appear in the SAC at all. SAC ¶ 872.

Unsecured Creditors of Color Tile, Inc. v. *Coopers & Lybrand, LLP*, 322 F.3d 147, 159 (2d Cir. 2003). There is no reason to depart from that rule here.

B. The Aiding and Abetting Claim Fails in Any Event.

Even if the Court were to overlook Plaintiffs' failure to properly raise a JASTA aiding and abetting claim, the claim is fundamentally deficient.

Like conspiracy liability, aiding and abetting liability under JASTA is carefully circumscribed. JASTA liability is limited to a 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).

Plaintiffs' purported JASTA aiding and abetting claim fails here because the SAC fails to allege that SCB (1) provided substantial assistance *to the person who committed* the acts of international terrorism; (2) *knowingly* provided substantial assistance to that person; and (3) *substantially assisted* the person who committed the acts of international terror.

1. The SAC Does Not Allege That SCB Knowingly Provided Substantial Assistance *to the Person Who Committed* the Act of International Terrorism.

JASTA requires a plaintiff to allege that the defendant knowingly provided "substantial assistance [to], or who conspires with the person who committed[,]" the underlying act of international terrorism. *Siegel*, 933 F. 3d at 223 (alterations in original) (quoting 18 U.S.C. § 2333(d)); *Linde*, 882 F.3d at 320 (same). Defendants

already have explained in detail why the statutory text requires interaction between an alleged conspirator and the person who commits the terrorist act. *See supra* pp. 17-22. The same nexus is required for aiding and abetting liability.

That conclusion has been endorsed by several courts of appeals, which have recently held that a defendant must provide substantial assistance to the person who committed the act of international terrorism to be subject to liability under § 2333(d)(2). In *Crosby*, *supra*, the district court dismissed JASTA aiding and abetting claims for failure to allege facts plausibly showing "that the defendants knowingly supplied support or encouragement *to Mateen* [the terrorist perpetrator] in any way that aided his commission of the shooting." 303 F. Supp. 3d at 574 (emphasis added). The Sixth Circuit affirmed, holding that "Mateen is the person who 'committed' the shooting," and "Plaintiffs do not allege that Defendants *directly* helped Mateen." 921 F.3d at 626-27 (emphasis added).

Similarly, in *Brill v. Chevron Corp.*, the Ninth Circuit affirmed dismissal of JASTA aiding and abetting claims because plaintiffs "must plausibly allege that [the defendant] aided and abetted persons who committed an act of international terrorism," but "[t]here is no allegation that Chevron had any relation to the terrorist organization that executed the attacks in Israel." — F. App'x —, 2020 WL 1200695, at *1 (9th Cir. Mar. 12, 2020).

This Court in *Siegel* left unanswered the question whether JASTA requires that a defendant provide substantial assistance directly to the terrorists whose acts injured the plaintiff. *Siegel*, 933 F.3d at 223-24 ("We need not here decide whether JASTA's reach is as limited as [Defendant] suggests because the plaintiffs claim fails even under their more expansive interpretation of the statute."). But the language and structure of the statute mandates that conclusion.

JASTA creates both conspiracy and aiding and abetting liability in a single phrase, imposing liability upon 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) (emphasis added). There is no basis for interpreting this phrase to apply the nexus requirement to conspiracy claims but not to aiding and abetting claims. *See, e.g.*, *Paroline v. United States*, 572 U.S. 434, 447 (2014) ("When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all."); *United States v. Bass*, 404 U.S. 336, 339 (1971) (holding that, in a statute making it a crime for a convicted felon to "receive [ ], possess[ ], or transport[ ] *in commerce or affecting commerce* . . . any firearm," the italicized phrase applies to all three antecedents).

That is particularly true because if the statute is not construed to require a defendant to have provided the assistance to the person who committed the act of international terrorism, then it would fail to specify the party whom the defendant must substantially assist. Interpreting the statute to impose liability for substantial assistance in a vacuum simply makes no sense.

Moreover, there is no reason why Congress would have required interaction between the JASTA defendant and the person who committed the terrorist act for conspiracy claims—requiring a defendant to conspire *with* the terrorist attacker—while, in the very same breath, omitting it for aiding and abetting claims. Congress made clear it was creating parallel forms of secondary liability—by, for example, applying the FTO requirement to both conspiracy and aiding and abetting claims.

Plaintiffs do not dispute this conclusion. *See* Br. 56 ("Civil aiding and abetting liability requires that '*the party the defendant aids* must perform the wrongful act that causes injury.") (quoting *Halberstam*, 705 F.2d at 487-88; emphasis added by Plaintiffs). Instead, Plaintiffs gloss over it in a single sentence, erroneously asserting that "Hezbollah, the IRGC, and their terror proxies in Iraq committed the Attacks that caused Plaintiffs' injuries, satisfying the first element." Br. 56.

Plaintiffs' casual assertion fails to satisfy the statutory requirement because the SAC alleges that the persons who *committed* the attacks are the Iraqi Shia militias. *See supra* p. 24. Plaintiffs do not allege that SCB provided any aid to those

persons. Rather, Plaintiffs allege that SCB provided services to Iranian banks and for the benefit of certain of those banks' customers; but none of these entities is alleged to have committed any acts of international terrorism.

As with their conspiracy claims, Plaintiffs try to obscure the gap between the Iranian banks and commercial entities (*e.g.*, NIOC and MODAFL) that benefited from transactions SCB allegedly facilitated and the Iraqi Shia militias who committed the attacks by arguing that: (1) the parties that benefited from the transactions are all "agents" of the IRGC; and (2) the Shia militias in Iraq are "local proxies" of the IRGC. Br. 57. These efforts to conflate separate "persons" do not satisfy JASTA. The first of these two arguments fails for the multiple reasons discussed in the context of conspiracy: the agency allegations are conclusory (SAC ¶¶ 15, 400); even if NIOC and MODAFL were agents of IRGC, Plaintiffs fail to adequately allege that SCB dealt with them in that capacity; and NIOC and MODAFL are not alleged to be the "persons" that committed the attacks, *see supra* pp. 24-26.

Second, and similarly, the SAC's conclusory assertion that the Iraqi Shia militias are IRGC "proxies" cannot support a plausible inference. And even if the militias were "proxies" of the IRGC, that establishes no link between SCB and the IRGC—for that, the SAC must plausibly allege a connection between the IRGC and the Iranian entities to which SCB, through various intermediary banks, provided

services. As explained above, the SAC fails do so. The Iraqi Shia militias are separate persons from the IRGC—and doubly (or more) removed from the Iranian entities to which SCB indirectly provided services.

2. The SAC Does Not Plausibly Allege That SCB *Knowingly* Provided Substantial Assistance.

In addition, to plead any JASTA aiding and abetting claim, "a plaintiff must plausibly allege that the defendant was aware that, by assisting the principal, it is itself assuming a role in terrorist activities." *Linde*, 882 F.3d at 329. Mere "knowledge of the [principal] organization's connection to terrorism" is not sufficient. *Id*. at 330; *see also Siegel*, 933 F.3d at 224.[21]

In *Siegel*, for example, the plaintiffs alleged that the defendant, HSBC, was "aware" that Al Rajhi Bank ("ARB"), for which HSBC allegedly provided wire transfer, trade financing, and other services, "was believed by some to have links to AQI [al Qaeda in Iraq] and other terrorist organizations." 933 F.3d at 224. But this Court held those allegations insufficient to establish that "HSBC was aware that by

[21] Plaintiffs do not dispute *Linde*'s clear holding, but some of their *amici* do. *See* Br. of Law Profs. 19 n.6; Br. of Senators 27-29. *Linde* and *Siegel* are binding precedents, and interaction with the terrorist attackers also is required by JASTA's plain text. *See supra* pp. 18-22. Moreover, requiring awareness of a nexus to terrorism follows from *Halberstam*. *Linde*, 88 F.3d at 329-30. That is because, to be liable for aiding and abetting, a defendant must be aware of its "role" in the "overall illegal or tortious activity," *Halberstam*, 705 F.2d at 477—here, the acts of international terrorism that injured plaintiffs.

providing banking services to ARB, it was supporting AQI, much less assuming a role in AQI's violent activities." *Id*.

Similarly, in *Brill*, the Ninth Circuit held that allegations that the defendant knew that kickbacks from its purchase of crude oil would be remitted to the Iraqi government (which allegedly funded terrorist activity in Israel) did not plausibly suggest that the defendant "knew that those funds were then provided to a terrorist organization and that those same funds were specifically used to finance the terrorist activity in Israel that resulted in the injuries to Appellants and their family members." 2020 WL 1200695, at *2.

The SAC here likewise fails to plausibly allege SCB's general awareness that it was "assuming a role" in terrorist activities by engaging in financial transactions with Iranian banks and/or that benefited certain Iranian commercial entities. Plaintiffs argue only that "SCB was generally aware of its role in unlawfully laundering hundreds of billions of dollars through the U.S. financial system that enabled the Iranian regime to facilitate its support for terrorism and proliferation." Br. 59. But that claim is indistinguishable from the allegation that this Court rejected in *Siegel*; it alleges a business relationship with Iranian entities, not a knowing role in acts of terroristic violence against Plaintiffs. 933 F.3d at 220-21.

Indeed, the supposed "connection" between SCB and the terrorist perpetrators in this case is significantly more attenuated than the one the Court deemed

insufficient in *Siegel*. *See id*. (allegations that HSBC provided financial services to ARB, whose clients sent money to terrorist actors, do not show general awareness). SCB allegedly provided services to Iranian banks, whose clients allegedly were controlled by the IRGC, which allegedly supported Hezbollah, which in turn armed and trained Iraqi Shia militias, and those militias carried out the attacks.

The SAC's allegations against SCB are especially deficient because, as the district court recognized, the parties that benefited from the transactions that SCB allegedly facilitated all had "significant legitimate operations and are not merely fundraising fronts for terrorist organizations." SPA 31-32; *see also* SPA 38. As in *Siegel*, the Iranian banks with which SCB did business had significant, legitimate operations, and were not merely terrorist fronts. 933 F.3d at 225; *see, e.g.*, SAC ¶¶ 90, 416, 458, 624. The same is true of government-affiliated entities like NIOC, which engaged in "daily oil sales" and other legitimate petroleum business. SAC ¶ 624. After-the-fact designations of NIOC (as an SDN from 2012 to 2016) (*see* SAC ¶ 152) or the even later determination by U.S. authorities that certain NIOC activities supported the IRGC (when Treasury re-designated NIOC in 2019) (Br. 12) do not alter this conclusion. Such designations have no bearing on SCB's awareness of any "role" in alleged terrorist activities at the time the complained-of financial transactions occurred or the attacks took place.

Finally, Plaintiffs' reliance on "SCB's facilitation between 2001 and 2007 of more than 1,300 letters of credit," Br. 60-61, is misplaced. These letters of credit are all alleged to have supported product purchases by various Iranian entities, such as NIOC and MODAFL "sub-agencies," SAC ¶¶ 375, 675, that Plaintiffs allege had links to the IRGC, which in turn allegedly had links to Iraqi Shia militias.[22] As discussed above, *Siegel* and *Brill* make clear that SCB's business dealings with entities such as NIOC and MODAFL, that engage in a wide array of lawful commercial activities, are insufficient to establish that SCB was "knowingly providing substantial assistance" to persons perpetrating remote terrorist attacks. *See* note 17, *supra*.

The inappropriateness of charging SCB with knowingly assuming a role in terroristic violence based upon its trade finance business is further underscored by the fact that the U.S. government, with its sophisticated intelligence apparatus, only determined *long after* the relevant period that the Iranian parties to these letters of credit transactions or their affiliates should be designated as having ties to terrorism (*e.g.*, SDN, SDGT, FTO).[23]

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[22] Plaintiffs contend that the IRGC "participat[ed]" in these trade financing transactions (Br. 61) but allege no facts to support this assertion. The SAC contains no well-pled allegations that the IRGC was a party to any of the transactions.

[23] *See, e.g.*, SAC ¶¶ 19, 685-86, 710 (alleging trade finance transactions from 2000–2006 involving Mahan Air and its front companies, designated in 2011); *id.* ¶¶ 714, 714 n.37, 715, 718, 719 (1998-2002 transactions involving MODAFL and

3. The SAC Does Not Allege That SCB Provided *Substantial Assistance* to the Person Who Committed the Acts of International Terrorism.

The SAC also fails to allege "substantial assistance" by SCB to the persons who perpetrated the acts of international terrorism. Six factors are relevant to determining whether this element of a JASTA aiding and abetting claim is satisfied: (i) the nature of the act encouraged, (ii) the amount of assistance given by defendant, (iii) defendant's presence or absence at the time of the tort, (iv) defendant's relation to the principal, (v) defendant's state of mind, and (vi) the period of defendant's assistance. *Siegel*, 933 F.3d at 225 (citing *Linde*, 882 F.3d at 329); *Halberstam*, 705 F.2d at 484-85. None support liability here.

(i) Nature of the Act Encouraged. The SAC does not allege that SCB "encouraged" any terrorist acts. Instead, Plaintiffs contend—and Defendants agree—that terrorist acts are "indisputably heinous." Br. 57. But that is not the governing legal standard. *Siegel*, 933 F.3d at 225 ("The plaintiffs here have not plausibly alleged that HSBC encouraged the heinous November 9 Attacks or

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its subsidiaries, designated in 2005 or later); *id*. ¶¶ 811 n.56, 816 (2002-2004 transactions by NIOC subsidiary Kala Naft, designated in 2010); *id*. ¶¶ 797 n.52, 798 (transactions involving Mapna International from 2001-2007, different subsidiary of parent company (Mobin Petrochemicals) designated in 2010); *cf. also*, *e.g.*, *id*. ¶ 802 & n.53 (2003-2004 transactions with Zenner Electronics Services, not designated but allegedly identified by the Commerce Department as failing to obtain required authorizations in 2014).

provided any funds to [the FTO].”). Encouragement to the terrorist attacker by the putative aider and abettor is required but is wholly lacking here.

(ii) Assistance Given. The SAC does not allege that SCB processed any transactions involving the IRGC, Hezbollah, or the Iraqi Shia militias, or even that these groups received any of the funds SCB processed. Nor do Plaintiffs allege that the IRGC, Hezbollah, or the Iraqi Shia militias were parties to the trade finance transactions that SCB allegedly facilitated. The mere fact that SCB processed large amounts for Iranian clients, Br. 57, falls far short of the “assistance” required to establish liability. *Siegel*, 933 F.3d at 225 (“[T]he plaintiffs did allege that HSBC provided hundreds of millions of dollars to ARB, but they did not advance any non-conclusory allegation that AQI received any of those funds or that HSBC knew or intended that AQI would receive the funds.”).

(iii) Defendant’s Presence or Absence. Plaintiffs do not allege or argue that SCB was “present” at any of the attacks alleged in the SAC.

(iv) Defendant’s Relation to the Principal. The SAC alleges that SCB processed transactions for the CBI and provided financial services to “IRGC agents” (including NIOC and MODAFL) and Iranian banks. Br. 57-58. But as discussed above, a relationship with Iranian banks or their customers is not the same as a relationship with the IRGC, much less a relationship with the Iraqi Shia militias that committed the attacks injuring Plaintiffs. *See supra* pp. 51-52; *Siegel*, 933 F.3d at

225 (no allegations that HSBC "had any relationship with AQI," the person that committed the attacks).

(v) State of Mind. The SAC does not allege that SCB knowingly assumed a role in terrorist activities in Iraq. *See supra* pp. 50-53; *Siegel*, 933 F.3d at 225 ("plaintiffs do not plausibly allege that HSBC knowingly assumed a role in AQI's terrorist activities or otherwise knowingly or intentionally supported AQI").

(vi) Period of Defendant's Assistance. Plaintiffs argue that SCB engaged in transactions for Iranian banks and other entities for "the entire period of the Attacks." Br. 58. As this Court has recognized, however, a "lengthy relationship" is not the same as lengthy "assistance in terrorism." *Siegel*, 933 F.3d at 225. In addition, Plaintiffs "do not allege—even conclusorily—that most, or even many—of [SCB's] services to [the Iranian banks and other Iranian parties] assisted terrorism." *Id*.

* * *

For all of the foregoing reasons, the SAC fails to state a JASTA aiding and abetting claim against SCB.

III. THE DISMISSAL OF COUNT VI AGAINST COMMERZBANK FOR LACK OF PERSONAL JURISDICTION SHOULD BE AFFIRMED.

The district court dismissed Count VI with prejudice for lack of personal jurisdiction over Commerzbank. SPA 15-16.

Plaintiffs do not even purport to challenge this on appeal, instead asserting in a footnote that *if* this Court reverses the district court's dismissal of *other* claims in

the SAC, Plaintiffs will seek reconsideration from the district court of its dismissal of Count VI. Br. 6 n.2. Regardless of Plaintiffs' future plans, their failure to challenge the dismissal of Count VI on this appeal constitutes a waiver, and this Court should affirm the dismissal of that claim. *See, e.g.*, *Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.*, 673 F.3d 84, 107 (2d Cir. 2012) (affirming dismissal where plaintiff "waived" issue by "fail[ing] to advance any non-perfunctory argument" challenging dismissal on appeal).

In any event, Plaintiffs are incorrect that a determination by this Court that Plaintiffs have sufficiently pleaded JASTA conspiracy claims would undermine the district court's dismissal of Count VI on personal jurisdiction grounds. *First*, the pendent personal jurisdiction doctrine on which Plaintiffs purport to rely does not apply where, as here, "all of plaintiffs' claims are brought under a single federal statute." *Strauss v. Crédit Lyonnais, S.A.*, 175 F. Supp. 3d 3, 32 (E.D.N.Y. 2016), *cross-appeal docketed*, No. 19-1285 (2d Cir. Apr. 26, 2019); *see also* SPA 15-16 & n.19.

Second, Count VI does *not* derive from the same common nucleus of operative fact as the conspiracy alleged in the SAC (involving dollar-clearing activities through the United States). As the district court correctly concluded, Count VI's allegations are distinct from the other claims because none of the transactions alleged in Count VI that Commerzbank executed for its German customer was "processed

through the United States banking system or banks in New York," and thus, "the claim lacks any apparent connection to the United States." SPA 14-15. Plaintiffs do not address either of these dispositive issues.

CONCLUSION

The judgment of the district court should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), counsel certifies that this brief:

(i) Complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 13,991 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) Complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in Times New Roman font in a size equivalent to 14 points or larger.