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,

(*Caption continued on inside cover*)

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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

GARY M. OSEN
ARI UNGAR
MICHAEL RADINE
DINA GIELCHINSKY
AARON A. SCHLANGER
OSEN LLC
2 University Plaza, Suite 402
Hackensack, New Jersey 07601
(201) 265-6400

PETER RAVEN-HANSEN
GEORGE WASHINGTON UNIVERSITY
LAW SCHOOL
Burns 411
720 20th Street, NW
Washington, District of Columbia 20052
(202) 994-8171

Attorneys for Plaintiffs-Appellants

SHAWN BARTLETT, LISA RAMACI, ISABELL VINCENT, CHARLES VINCENT, GWENDOLYN MORIN-MARENTES, FOR THE ESTATE OF STEVE MORIN, JR., E.M., A MINOR, AUDREY MORIN, STEVE MORIN, AMY LYNN ROBINSON, FLOYD BURTON ROBINSON, FOR THE ESTATE OF JEREMIAH ROBINSON, DEBORAH NOBLE, FOR THE ESTATE OF CHARLES E. MATHENY, IV, CHARLES E. MATHENY, III, SILVER FARR, PATRICK FARR, FOR THE ESTATE OF CLAY P. FARR, RAYANNE HUNTER, W.H., A MINOR, T.H., A MINOR, FABERSHA FLYNT LEWIS, LORENZO SANDOVAL, SR., FOR THE ESTATE OF ISRAEL DEVORA-GARCIA, LORENZO SANDOVAL, JR., H. JOSEPH BANDHOLD, DONALD C. BANDHOLD, NANETTE SAENZ, FOR THE ESTATE OF CARLOS N. SAENZ, JUAN SAENZ, JOHN VACHO, FOR THE ESTATE OF CAROL VACHO, FOR THE ESTATE OF NATHAN J. VACHO, ASHLEY VACHO, JEANETTE WEST, FOR THE ESTATE OF ROBERT H. WEST, SHELBY WEST, DONNA ENGEMAN, SUZZETTEE LAWSON, FOR THE ESTATE OF ISAAC S. LAWSON, C.L., A MINOR, JUDY ANN CRABTREE, RONALD WAYNE CRABTREE, DEBRA WIGBELS, RONALD WILLIAM CRABTREE, JUDY HUENINK, SEAN SLAVEN, CHASTITY DAWN SLAVEN, NICOLE LANDON, MISTI FISHER, FRED FRIGO, LYNN FOREHAND, LANCE HAUPT, RHONDA HAUPT, TIFANY HAUPT, SABRINA CUMBE, DAVID W. HAINES, DAWN HAINES, C.H., A MINOR, SANGSOON KIM, MICHELLE KIM, SEOP STEVE KIM, FOR THE ESTATE OF JANG H. KIM, HELEN FRASER, RICHARD FRASER, FOR THE ESTATE OF DAVID M. FRASER, TRICIA ENGLISH, N.W.E., A MINOR, N.C.E., A MINOR, A.S.E., A MINOR, TODD DAILY, FOR THE ESTATE OF SHAWN L. ENGLISH, PHILIP S. FORD, LINDA GIBSON, JOHN GIBSON, DENISE BLOHM, JEREMY BLOHM, JOANNE GUTCHER, TRACY ANDERSON, JEFFREY ANDERSON, ANASTASIA FULLER, A.F., A MINOR, ANNE F. HARRIS, PAUL D. HARRIS, HYUNJUNG GLAWSON, YOLANDA M. BROOKS, CURTIS GLAWSON, SR., RYAN SABINISH, ANN CHRISTOPHER, FOR THE ESTATE OF KWESI CHRISTOPHER, D.J.F., A MINOR, AVA TOMSON, FOR THE ESTATE OF LUCAS V. STARCEVICH, RICHARD TOMSON, BRADLEY STARCEVICH, GLENDA STARCEVICH, ARIANA REYES, TRENTON STARCEVICH, KAREN FUNCHEON, FOR THE ESTATE OF ALEXANDER J. FUNCHEON, ROBERT FUNCHEON, HOLLY BURSON-GILPIN, FOR THE ESTATE OF JEROME POTTER, NANCY UMBRELL, MARK UMBRELL, NANCY AND MARK UMBRELL FOR THE ESTATE OF COLBY J. UMBRELL, ILENE DIXON, SHELLEY ANN SMITH, WILLIAM FARRAR, SR., FOR THE ESTATE OF WILLIAM A. FARRAR, TONYA K. DRESSLER, ARDITH CECIL DRESSLER, MELISSA DRESSLER, ELIZABETH BROWN, FOR THE ESTATE OF JOSHUA D. BROWN, MARIAN BROWN, WAYNE BROWN, DANIELLE SWEET, FOR THE ESTATE OF RYAN A. BALMER, A.B., A MINOR, G.B., A MINOR, DONNA KUGLICS, FOR THE ESTATE OF MATTHEW J. KUGLICS, LES KUGLICS, EMILY KUGLICS, SYLVIA JOHNSON SPENCER, RAYMOND NIGEL SPENCER, SR., JOHN D. LAMIE, PAULA C. BOBB-MILES, FOR THE ESTATE OF BRANDON K. BOBB, JOHNNY JAVIER MILES, SR., J.J.M., JR., A MINOR, RACQUEL ARNAE BOBB MILES, URSULA ANN JOSHUA, BRITTANY MARIONIQUE JOSHUA, ASHLEY GUDRIDGE, MARION CRIMENS, TIMOTHY W. ELLEDGE, CHRISTOPHER LEVI, BRENDA HABSIEGER, MICHAEL HABSIEGER, JACOB MICHAEL HABSIEGER, KELLI D. HAKE, FOR THE ESTATE OF CHRISTOPHER M. HAKE, DENICE YORK, RUSSEL YORK, JILL HAKE, PETER HAKE, G.H., A MINOR, MARIA E. CALLE, KIM MILLER, WALTER BAILEY, CASSANDRA BAILEY, KACEY GILMORE, TERRELL GILMORE, JR., MICHELLE KLEMENSBERG, FOR THE ESTATE OF LARRY R. BOWMAN, HARRY PICKETT, E.C.R., A MINOR, RACHEL M. GILLETTE, KOUSAY

AL-TAIE, FOR THE ESTATE OF AHMED AL-TAIE, ADAM G. STOUT, REBEKAH A. COLDEWE, SCOTT HOOD, PATRICIA SMITH, KATHY STILLWELL, FOR THE ESTATE OF DANIEL CRABTREE, MICHAEL SMITH, CHAD FARR, JACQUELINE A. SMITH, R.J.S., A MINOR, DAVID HARTLEY, FOR THE ESTATE OF JEFFREY HARTLEY, LINDA PRITCHETT, ALLEN SWINTON, DANIEL FRITZ, TEMIKA SWINTON, MARLYNN GONZALES, T.S., A MINOR, JULIE CHISM, T.B., A MINOR, KARI CAROSELLA, MARY JANE VANDEGRIFT, WILLIAM PARKER, SCOTT LILLEY, PAM MARION, KYSHIA SUTTON, DONNIE MARION, JASON SACKETT, PAULA MENKE, ROBERT CANINE, DANIEL MENKE, S.J.S., A MINOR, MATTHEW MENKE, ADAM WOOD, NICHOLE LOHRING, ROSEMARIE ALFONSO, ANNA KARCHER, K.B., A MINOR, ANASTASIA FULLER, FOR THE ESTATE OF ALEXANDER H. FULLER, MICHELLE BENAVIDEZ, FOR THE ESTATE OF KENNITH W. MAYNE, DAN DIXON, FOR THE ESTATE OF ILENE DIXON, DANIEL BENAVIDEZ, SR., DAN DIXON, FOR THE ESTATE OF ROBERT J. DIXON, CHRISTINA BIEDERMAN, CYNTHIA DELGADO, DANIEL BENAVIDEZ, JR., KYNESHA DHANOOLAL, JENNIFER MORMAN, MERLESE PICKETT, CHRISTOPHER MILLER, JOHN VANDEGRIFT, ANGIE JACKSON, MEGAN MARIE RICE, TRINA JACKSON, NANCY FUENTES, FOR THE ESTATE OF DANIEL A. FUENTES, S.J., A MINOR, NOALA FRITZ FOR THE ESTATE OF LYLE FRITZ, GREGORY BAUER, NOALA FRITZ, THERESA DAVIS, TIFFANY M. LITTLE, LINDA DAVID, FOR THE ESTATE OF TIMOTHY A. DAVID, MICHELLE KLEMENSBERG, MICHAEL DAVID, KOUSAY AL-TAIE, DONNA LEWIS, TIMOTHY KARCHER, KENNETH J. DREVNICK, ELIZABETH CHISM, FOR THE ESTATE OF JONATHAN B. CHISM, TONYA LOTTO, TABITHA MCCOY, FOR THE ESTATE OF STEVE A. MCCOY, JERRY L. MYERS, KATHY STILLWELL, THERESA HART, ROBERTO ANDRADE, SR., WAYNE NEWBY, ROBI ANN GALINDO, VERONICA HICKMAN, RYANNE HUNTER, FOR THE ESTATE OF WESLEY HUNTER, DAVID EUGENE HICKMAN, DEBRA LEVI, DEVON FLETCHER HICKMAN, CORTEZ GLAWSON, REBECCA J. OLIVER, LINDA JONES, J.L., A MINOR, ARMANDO FUENTES, WOOD MEGAN, SEAN ELLIOTT, GILBERT ARSIAGA, JR., EDNA LUZ BURGOS, ADRIAN MCCANN, ERIK ROBERTS, FRANK LILLEY, N.T., A MINOR, HARRY RILEY BOCK, COLIN ROBERTS, JILL ANN BOCK, ROBIN ROBERTS, BRETT COKE, CHASTITY DAWN LAFLIN, M.C., A MINOR, T.M., A MINOR, MEGHAN PARKER-CROCKETT, KERI COTTON, JANET JONES, JULIO FUENTES, WESLEY WILLIAMSON, DANIEL C. OLIVER, J.L., A MINOR, TRAVIS GIBSON, DEBBIE BEAVERS, GEORGE J. WHITE, ERIC LEVI, JOHNNY WASHBURN, DAN DIXON, DAKOTA SMITH-LIZOTTE, R.N.R., A MINOR, GEORGE ARSIAGA, JOHN MCCULLY, HATHAL K. TAIE, JAMES SMITH, C.F., A MINOR, ANTHONY ALDERETE, AMANDA B. ADAIR, MICHAEL J. MILLER, NICHOLAS BAUMHOER, STEVE MORIN, SR., KIMBERLEY VESEY, ZACHARY HAKE, CASSIE COLLINS, GEORGE D. WHITE, CARA ROBERTS, M.T., A MINOR, STEPHANIE MCCULLY, T.F., A MINOR, TERREL CHARLES BARTLETT, CORY SMITH, A.B., A MINOR, EVAN KIRBY, JUDY HUENINK, FOR THE ESTATE OF BENJAMIN J. SLAVEN, CARROL ALDERETE, B.D., A MINOR, NANCY FUENTES, JOHN VANDEGRIFT, FOR THE ESTATE OF MATTHEW R. VANDEGRIFT, D.J.F., A MINOR, CYNTHIA DELGADO, FOR THE ESTATE OF GEORGE DELGADO, MACKENZIE HAINES, NATALIA WHITE, CYNTHIA THORNSBERRY, K.W., A MINOR, MEGAN MARIE RICE, FOR THE ESTATE OF ZACHARY T. MYERS, R.M., A MINOR, STEPHANIE GIBSON WEBSTER, CHRISTINA SMITH, DEBBIE SMITH, JEFFREY D. PRICE, CASSIE SMITH, HARRY CROMITY, JAMES CRAIG ROBERTS, MARVIN THORNSBERRY, L.T., A

MINOR, SKYLAR HAKE, VIVIAN PICKETT, ANDREW TOMSON, FLORA HOOD, PATRICIA MONTGOMERY, PATRICIA ARSIAGA, FOR THE ESTATE OF JEREMY ARSIAGA, DON JASON STONE, MATTHEW ARSIAGA, ALESIA KARCHER, LAWRENCE KRUGER, AUDREY KARCHER, THOMAS SMITH, SHAYLYN C. REECE, ANDREW LUCAS, JOHN SACKETT, SHAULA SHAFFER, NOALA FRITZ, FOR THE ESTATE OF JACOB FRITZ, SHYANNE SMITH-LIZOTTE, MEGAN PEOPLE, NATHAN NEWBY, R.M., A MINOR, TONY GONZALES, KATHERINE MCRILL-FELLINI, VICTORIA DENISSE ANDRADE, KRISTY KRUGER, JOEDI WOOD, AUSTIN WALLACE, TAMMY VANDERWAAL, ANGELICA ANDRADE, BRIAN NEUMAN, ESTHER WOLFER, SAMANTHA TOMSON, MATTHEW LILLEY, BRYAN MONTGOMERY, ANGEL MUNOZ, KEMELY PICKETT, MARIAH SIMONEAUX, JAMES CANINE, VANESSA CHISM, A.K., A MINOR, RAYMOND MONTGOMERY, DONNA ENGEMAN, FOR THE ESTATE OF JOHN W. ENGEMAN, CAROL KRUGER, NAWAL AL-TAIE, MEGAN SMITH, LEONARD WOLFER, TIM LUCAS, DAVID NOBLE, MARSHA NOVAK, EMILY LEVI, TONY WOOD, E.C.R., A MINOR, DONNA LEWIS, FOR THE ESTATE OF JASON DALE LEWIS, KIERRA GLAWSON, ETHAN FRITZ, STEPHANIE HOWARD, RUSSELL C. FALTER, KYNESHA DHANOOLAL, FOR THE ESTATE OF DAYNE D. DHANOOLAL, DOUGLAS KRUGER, L.M., A MINOR, BRIAN COKE, PRESTON SHANE REECE, JEAN MARIANO, A.L.R., A MINOR, CASSIE COLLINS, FOR THE ESTATE OF SHANNON M. SMITH, G.L., A MINOR, ERIKA NEUMAN, MICHAEL LUCAS, CALVIN CANINE, DIXIE FLAGG, BASHAR AL-TAIE, MARJORIE FALTER, JOLENE LILLEY, VICTORIA PENA ANDRADE, TIFFANY M. LITTLE, FOR THE ESTATE OF KYLE A. LITTLE, ELIZABETH CHISM, TAMARA RUNZEL, K.L., A MINOR, MARLEN PICKETT, TABITHA MCCOY, SHILYN JACKSON, KIMBERLEE AUSTIN-OLIVER, SYLVIA MACIAS, MERLESE PICKETT, FOR THE ESTATE OF EMMANUEL PICKETT, DAVID LUCAS,

Plaintiffs-Appellants,

—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.

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INTRODUCTION

This appeal poses a straightforward question: Does the Justice Against Sponsors of Terrorism Act ("JASTA") expand the Anti-Terrorism Act ("ATA") to provide "the broadest possible basis … to seek relief" and incorporate *Halberstam v. Welch*'s distillation of common law secondary liability or, as the District Court ruled, does JASTA *narrow* ATA liability, impose *heightened* scienter and pleading standards, and render the ATA a legislative artifact of vanishingly narrow practical application.[1]

Plaintiffs' Second Amended Complaint ("SAC")[2] — based largely on U.S. government findings and a voluminous historical record — documents Iran's decade-long conspiracy to launder hundreds of billions of dollars through the U.S. financial system to "support [] terrorist groups and nuclear and missile proliferation," in the words of the U.S. Treasury Department. Every Defendant but

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[1] *Freeman v. HSBC Holdings PLC*, No. 18-cv-7359-PKC-CLP (E.D.N.Y.) and *Bowman v. HSBC Holdings PLC*, No. 19-cv-2146-PKC-CLP (E.D.N.Y.), are sister cases to this case, involving the same defendants. The parties and the District Court anticipated that this case might be consolidated for appeal with those cases. *See* SPA-109-113. However, they were dismissed by *Freeman v. HSBC Holdings PLC*, No. 18-cv-7359-PKC-CLP, 2020 WL 3035067 (E.D.N.Y. June 5, 2020) ("*Freeman II*"), just 48 hours before the deadline for this Reply. Because the District Court's discussion of JASTA aiding and abetting liability in *Freeman II* is relevant to the instant appeal, however, Plaintiffs address its holdings in Section V, *infra*.

[2] As in the Brief for Plaintiffs-Appellants ("Opening Br."), all paragraph citations herein are to the SAC, A318 to A670.

Bank Saderat PLC ("Saderat") (a Specially Designated Global Terrorist ("SDGT")), has admitted that it actively assisted Iran's conspiracy to launder funds through the U.S. financial system to purposefully evade counter-terrorism and weapons proliferation sanctions.

Because acts of terrorism are a foreseeable, if not inevitable, consequence of laundering billions of dollars for a State Sponsor of Terrorism like Iran, and because the SAC plausibly alleges that Hezbollah, the Islamic Revolutionary Guards Corps ("IRGC"), and their proxies jointly committed the attacks that caused Plaintiffs' injuries ("the Attacks") (as both the District Court and the Magistrate Judge's Report & Recommendation ("R&R") found), Defendants ask this Court to disregard the SAC's well-pleaded allegations and to override the basic tenets of secondary liability articulated in *Halberstam*, 705 F.2d 472 (D.C. Cir. 1983).[3] Defendants argue that:

1. This Court should find as a matter of law that Shi'a militia (so-called "Special Groups") were the only parties responsible for committing the Attacks and reject the District Court's conclusion that Plaintiffs had plausibly alleged the IRGC and Hezbollah are "the entities responsible for committing the acts of international terrorism that injured Plaintiffs," SPA-44;

2. Defendants cannot be liable for conspiracy under JASTA unless they "interacted directly" with the Shi'a militia that they claim exclusively committed the Attacks;

[3] Defendants concede that through *Halberstam*, "Congress thus referenced a specific set of standards for courts to use in fleshing out the elements of conspiracy and aiding and abetting liability." Brief for Defendants-Appellees ("Opp.") 6. They then proceed to disregard those elements at every turn.

3. Defendants cannot be liable for conspiracy under JASTA unless they shared the Shi'a militia's intent to commit acts of terrorism;

4. Defendants cannot be liable under JASTA for even the most inevitable and foreseeable consequences of a conspiracy, if those consequences only result from and are pursuant to, but do not literally "further," the conspiracy; and

5. SCB is not liable for aiding and abetting the Attacks because it did not directly interact with Shi'a militia and could have believed it was laundering billions of dollars, and facilitating the illegal purchase of export-controlled goods, as part of an ordinary "business relationship" with Iranian entities supporting only the *legitimate* operations of a designated State Sponsor of Terrorism.

The first argument raises a factual issue.

The next two arguments discard the traditional civil conspiracy law adopted by a statute expressly intended to provide the "broadest possible basis" for relief, JASTA §§2(a)(5) & 2(b), in favor of the wholly-invented principle that a defendant that did not "interact directly" with local terrorists or terror cells cannot be subject to §2333(d)(2) liability. By this principle, even a defendant that knowingly shipped explosives for profit to the IRGC or Hezbollah would escape liability as long as that defendant either did not interact directly with the local triggermen who detonated the explosives or share their "terrorist goals." In fact, the District Court applied this principle to excuse even *Saderat* from conspiracy liability, despite its designation as an SDGT for its role in transferring large sums from the Central Bank of Iran to

Hezbollah fronts that the U.S. government found "support acts of violence." SPA-14 n.18, 27 n.28.[4]

Defendants' fourth argument truncates *Halberstam*'s holding that members of a conspiracy are liable for injuries caused by acts "pursuant to, in furtherance of, *or* within the scope of the conspiracy," 705 F.2d at 484 (emphasis added), to read as if they have no liability unless the Attacks were "in furtherance of"' the conspiracy to evade sanctions. Opp. 37.

Defendants' fifth argument asserts that SCB never *directly* aided the IRGC's local terror proxies in Iraq and was unaware of its role in terrorist activities because its admitted crimes were only for customers that had "legitimate functions" in addition to funding terrorism and "did not solely exist for terrorist purposes." But even knowing support to ISIS would fail this impossible standard (because ISIS engages in more than terrorism), and it contradicts the U.S. government's findings about the IRGC's proxies and the scope of National Iranian Oil Company's ("NIOC") agency. The capacity in which Defendants illegally assisted NIOC is clearly a disputed issue of fact. Furthermore, not only does SCB's internal correspondence support the plausibility of its general awareness of its role in terrorist activities, but so does its facilitation of 1,300 illegal letters of credit it knew were

[4] Understandably, Defendants bury their defense of this insupportable holding in a single footnote. Opp. 33 n.17.

being used to finance Iran's purchase and transport of export-controlled items restricted for terrorism (including components used to manufacture Explosively Formed Penetrators ("EFPs")) and to transport IRGC and Hezbollah operatives and weapons. Finally, SCB's rote disputation of whether hundreds of billions of dollars constitute *substantial* assistance is just that: a dispute of fact that cannot support dismissal of the SAC.

This Court should decline that invitation to nullify JASTA and should, instead, apply it as written and as it is unambiguously intended, and reverse and remand this case for discovery.

I. THE IRGC, HEZBOLLAH AND THEIR IRAQI PROXY GROUPS JOINTLY COMMITTED THE ATTACKS.

Defendants repeatedly insist that "Iraqi Shia militias" alone committed the Attacks (e.g., Opp. 1-3, 10),[5] using this characterization both to argue that Defendants never "interacted" with these local terror cells for purposes of the conspiracy claim and to artificially stretch the chain of causation by disaggregating the instrumentalities of the Iranian regime that jointly committed the Attacks.

Iran's local proxies executed the last stage of the Attacks, but they did not commit them alone. The SAC clearly alleges that the Attacks were committed jointly by the IRGC, Hezbollah, and the Special Groups they established, recruited,

[5] Lest the Court miss their point, they repeat the phrase "Shia militia" more than 30 times and the term "attackers" 27 times in fewer than 60 pages.

financed, trained, equipped, guided, and directed to effectuate these Attacks. *E.g.*, ¶¶112, 154, 237-41, 246-58, 269-73, 291.[6] Iran ordered a terror campaign against Coalition Forces in Iraq, coordinated by its IRGC-Qods Force ("IRGC-QF") under the direction of the late Qassem Soleimani and the IRGC's Arab-speaking proxy and agent in the region, the designated Foreign Terrorist Organization ("FTO") Hezbollah (*e.g.*, ¶¶154, 226, 255, 269-71), which directed their local factotums to carry out the Attacks. ¶¶248, 250. For example, the SAC describes a 22-page memorandum on a computer seized from a Hezbollah commander in Iraq "that detailed the planning, preparation, approval process and *conduct of the operation* that resulted in five of our soldiers being killed in Karbala." ¶1079 (emphasis added). In 82 of the 92 attacks described in the SAC, the local Iraqi emplacers were provided with sophisticated Hezbollah-designed and Iranian-manufactured and -supplied EFPs, which they could not independently obtain or alone effectively deploy. ¶¶16, 240-41, 278, 319.

The District Court found that "JASTA's inclusion of societies and associations within its definition of 'person' clearly indicates that the 'person' committing an act of terrorism need not be the literal triggerman, as Defendants appear to suggest." SPA-43. It also held that the SAC plausibly alleged "that FTOs

[6] Defendants do not challenge the sufficiency of the SAC's allegations satisfying §2333(d)(2)'s threshold requirement that an FTO (Hezbollah) committed, planned, or authorized the Attacks. Opp. 43 n.19.

Hezbollah and Kata'ib Hezbollah and the IRGC (an SDGT), acting through agents and proxies, are the entities responsible for *committing* the acts of international terrorism that injured Plaintiffs." SPA-44 (emphasis added). Defendants airily dismiss that finding in a footnote as "not plausibly supported," without explaining why. Opp. 22 n.10. But that plausibility is confirmed by the commanders in the field at the time, facing the very attacks at issue: "While the selection of a specific location or vehicle may have been the result of independent decisions made by individual terrorists or a local cell commander [i.e., the Special Groups], the IRGC's terror campaign as a whole was the result of a single, unified design, jointly executed by the IRGC, IRGC-QF, and Hezbollah, under the ultimate direction of the late Qassem Soleimani." Brief of Retired Generals at 7. The U.S. government, too, found "[t]he Iranian regime is responsible for the deaths of at least 603 American service members in Iraq since 2003," *see* Plaintiffs' Opening Br. 6.

II. JASTA DOES NOT REQUIRE THAT EACH DEFENDANT DIRECTLY "INTERACT" WITH THE CO-CONSPIRATOR THAT COMMITTED THE ATTACKS.

Defendants repeatedly argue that §2333(d)(2) conspiracy liability requires that a defendant must "interact" directly with the co-conspirators that committed the attack, who they insist are limited to the local "Shia militias." Opp. 3, 11, 15, 17, 20. They cite no case authority for their novel "interaction" requirement. In fact, all of the case authority runs the other way, affirming the universal principle that a

conspirator need not directly "interact," meet, communicate, or otherwise deal directly with, or even know the identity of, a co-conspirator as long as the conspirator knows that such co-conspirators exist. *See, e.g.*, *United States v. Rooney*, 866 F.2d 28, 32 (2d Cir. 1989) ("There is no requirement that each member of a conspiracy conspire directly with every other member of it, or be aware of all acts committed in furtherance of the conspiracy, or even know every other member.") (internal citations omitted).[7]

Defendants locate their wholesale departure from fundamental conspiracy law entirely in the phrase "conspires with." Opp. 19.[8] Yet nothing in that plain text *sub silentio* overrides this bedrock common law principle or adds the restrictive modifier "directly." The text simply requires that the "person" (broadly defined to include "associations" and "societies," per §2333(d)(1)) who commits the wrongful act that causes injury be a party to the conspiracy. "Person" thus includes the IRGC and

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[7] Defendants assert that *Halberstam* supports their "direct interaction" requirement because Hamilton and Welch "interacted directly." Opp. 18 n.6. But the conspiracy in *Halberstam* involved just two people, who necessarily dealt only with each other.

[8] Defendants argue that other conspiracy statutes lack the word "with" and therefore do not require that conspirators directly interact with each other—a proposition for which they also cite no case authority. *But see, e.g.,* 18 U.S.C. §1594(c) ("whoever *conspires with* another"), construed in *United States v. Hood*, 767 F. App'x 456, 461 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 329 (2019) ("[t]here is no requirement that every member of a single overall conspiracy know or communicate with each other," *or* "*dealt directly*" with each other) (emphasis added).

Hezbollah. The phrase in §2333(d)(2) unambiguously identifies *who* must be in the conspiracy, not whether all the conspirators must "interact," or, for that matter, whether "conspires" has some different meaning than it universally carries in conspiracy case law.

Even if §2333(d)(2) were somehow ambiguous, the Court could consider its stated purpose. *See United States v. Kozeny*, 541 F.3d 166, 171 (2d Cir. 2008). JASTA's clear and explicit purpose is to broaden relief against entities that provide material support "directly *or indirectly*, to foreign organizations or persons that engage in terrorist activities," JASTA §2(b) (emphasis added),[9] as this Court recognized in *Siegel v. HSBC N. Am. Holdings, Inc.*, 933 F.3d 217, 223 n.5 (2d Cir. 2019). Congress's logic is no less clear: Material supporters are inherently secondary defendants, who often, if not typically, provide support indirectly to terrorist organizations that operate "through affiliated groups or individuals." JASTA §2(a)(3).

The ATA reflects Congress's "careful deliberation" about "when, and how, *banks* should be held liable for the financing of terrorism." *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1405 (2018) (emphasis added). Under Defendants' reading, ATA liability for material support would be limited to just the improbable and

[9] Defendants' assertion that this statement of purpose "has nothing to do with the scope of liability" (Opp. 21 n.9) confuses JASTA's findings, §§2(a)(6)-(7), with its declared purpose, §2(b).

certainly exceedingly rare bank or donor that "interacted" directly with the triggerman or terror cell involved in emplacing or detonating the weapon used. Consistent with Congress's actual expressed intent, §2333(d)(2)'s "plain text" does *not* state (or require), as the District Court erroneously read it, that "a defendant conspire *directly*" with anyone. SPA-45 n.41 (emphasis added).

Defendants therefore argue that the SAC never places the IRGC in the conspiracy by providing an *incomplete* block quote of ¶22, asserting that it sets forth the entirety of the "parties to, and the aims of, this alleged conspiracy." Opp. 7-8. But without so much as an ellipsis, Defendants' brief omits the final fourteen words of the paragraph: "***that serve as financial and logistical conduits for the IRGC and its terrorist activities***." ¶22 (emphasis added).

This omission alone signals Defendants' awareness that the SAC, fairly read, alleges that the IRGC and Hezbollah were part of the conspiracy whose ultimate goal – and successful outcome – was to provide Iran with the ability to move enormous sums of money undetected through the financial system that would reach them to fund terrorism. *See* ¶23 (aims of the conspiracy included facilitating at least $50 million for Hezbollah and at least $100 million "for the direct benefit of the IRGC" and billions for NIOC, "then controlled by the IRGC"), ¶25 (Defendants acted in concert with the Iranian bank co-conspirators and the IRGC), ¶26 (Defendants' conspiratorial conduct with Iran, the IRGC, other agents, and the

Iranian banks successfully hid the volume of illegally cleared funds), ¶27 (the IRGC and IRGC-QF used co-conspirator Bank Melli to disguise funds channeled to Iraqi militant groups to kill Coalition Forces), ¶48 (transfers of funds to the IRGC and Hezbollah were within the scope of the conspiracy), ¶169 (conspiracy helped Iran surreptitiously transfer funds for the benefit of the IRGC and Hezbollah), ¶280 (fund transfers were "on behalf of, and for the benefit of, the IRGC, Hezbollah and IRISL as part of the Conspiracy set forth in detail herein").

Furthermore, even under Defendants' invented "interaction" requirement, the SAC plausibly alleges that Saderat "interacted" directly with Hezbollah through "fronts in Lebanon that support acts of violence," ¶18, and that SCB and HSBC "interacted" with the IRGC through its agent, NIOC,[10] which operated what the U.S. Treasury called the IRGC-QF's "oil-for-terror" scheme.[11] Defendants try to avoid the implications by dismissing the allegation of NIOC's agency[12] as a "naked legal conclusion … 'masquerading as [fact].'" Opp. 25 (citing ¶400, even though that paragraph expressly alleges that NIOC "was designated as an SDN by the United

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[10] Defendants' dismissal of NIOC as just "a client of Iranian banks," Opp. 26, simply disputes the SAC's allegations. *See* ¶¶516 n.28 (HSBC), 811-24 (SCB).

[11] *See* Opening Br. 12 & n.7, 14 & n.11.

[12] *See* ¶¶23(c), 26, 52, 152, 346(b), 516. Citing government findings, the SAC also alleges that NIOC provided significant financial support to the IRGC. *See* ¶¶401-03, 671, and 817.

States because it was an IRGC agent during the relevant time period"). The allegation is expressly based on the Treasury's public finding required by the Iran Threat Reduction and Syria Human Rights Act of 2012. *See* ¶¶152, 402, 516.

The District Court recognized that "entities can operate as fronts or alter egos of FTOs," but then declined to apply the agency standard correctly to the IRGC. *See* SPA-88:6-17 ("NIOC … has billions of dollars or millions of dollars that are used for all sorts of purposes, some of which according to the U.S. Government are used to support IRGC and to the extent that IRGC is working with Hezbollah, in turn, to Hezbollah, but you haven't convinced me that they meet the second requirement of JASTA as a person working … working with the entity that was responsible for the act of terrorism alleged here and, more fundamentally, causation."). Unlike the District Court, however, the U.S. government *was* convinced, finding not only that NIOC is the IRGC's agent, but that NIOC "helps to finance Iran's [IRGC-QF] *and its terrorist proxies.*"[13]

III. JASTA DOES NOT REQUIRE THAT DEFENDANTS SHARE EVERY OBJECT OF THE CONSPIRACY OR INTEND "TO FURTHER TERRORISM."

Defendants argue that JASTA *sub silentio* requires that they "agreed with the terroristic goals of the person who committed the act of terror." Opp. 26. But, unlike many conspiracy statutes, JASTA does not state what conspirators must conspire to

[13] Opening Br. 14 n.11. (emphasis added).

do. Whereas 18 U.S.C. §§2339A and 2339B penalize those who "conspire[] *to*" conceal or provide material support for terrorist purposes or to an FTO,[14] JASTA does not limit the object of the conspiracy, much less require intent to "benefit a terrorist organization" or "*to further the act of terrorism that harmed the plaintiffs here*," as the District Court erroneously required, SPA-28, SPA-96:10-15 (emphasis added), let alone, as Defendants contend, that they share goals "with the terrorist attackers" or "the Iraqi Shia militias," and that their object must be "the terrorist act that injured plaintiff," Opp. 27, 30-32.[15]

In *Halberstam*, the court did not require that the defendant agree or intend to commit an unplanned murder, the tortious act that caused the injury. It was enough that she agreed "to do an unlawful act or a lawful act in an unlawful manner" (there "an illegal enterprise to acquire stolen property") because violence was "a

[14] When Plaintiffs filed the SAC in August 2016, before the enactment of JASTA, they asserted primary liability claims under §2333(a), that framed their conspiracy allegations accordingly, focusing on the specific predicate conspiracies identified by §§2339A and 2339B.

[15] Tellingly, Defendants quote *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990), for this proposition, quoting its statement that RICO's purpose "is to target RICO activities, and not other conduct." Opp. 29. But *unlike* JASTA, RICO specifically penalizes "*conspir*[*acy*] *to* violate any of the provisions of subsection (a), (b), or (c) of this section." 18 U.S.C. §1962(d) (emphasis added).

reasonably foreseeable consequence of the scheme." 705 F.2d at 487.[16] *See* §IV, *infra.* The District Court held that the SAC plausibly alleged that Defendants conspired with Iranian counterparties (and each other) to evade counter-terror financing sanctions. SPA-27. It also found that the SAC plausibly pleaded that Iran conspired to fund terrorism. SPA-28. However, it erroneously concluded that they were "separate and distinct conspiracies" sharing no common purpose. SPA-24-27, 27 n.28.

But money laundering always has a purpose — either to hide an illegal source of the funds or to help conceal an illegal *destination or intended use* of the money. The source of the concealed funds in this case was primarily lawful oil sales. But because of the U.S. sanctions, Iran could not transparently move U.S. dollar-denominated funds to use for the illicit activities of financing terrorism and weapons proliferation. By conspiring with Iran and its instrumentalities to evade those sanctions, Defendants knowingly facilitated Iran's ability to conceal the flow of funds for those activities, as the Treasury Department found when it revoked the U-Turn exemption in 2008: "Iran's access to the international financial system enables

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[16] The District Court in *Freeman II* approvingly quoted *Honickman for Estate of Goldstein v. BLOM Bank SAL*, 19-cv-00008-KAM-SMG, 2020 WL 224552, at *7-8 (E.D.N.Y. Jan. 14, 2020), for the proposition that the standard directly adapted from *Halberstam* – that a defendant must be "'generally aware of [its] role' [sic] in 'terrorist activities,' from which terrorist attacks were a natural and foreseeable consequence" – does not satisfy JASTA's *mens rea* requirement. *Freeman II*, 2020 WL 3035067, at *7.

the Iranian regime to facilitate its support for terrorism and proliferation," and it "disguises its involvement *in these illicit activitie*s through the use of a wide array of deceptive techniques" – the very techniques on which it and Defendants agreed.[17]

The District Court never properly considered the obvious question: *why* did Iran ask banks to circumvent terror financing controls when it had full access to the U.S. financial system until November 2008 for its *legitimate* activities? Evading counter-terrorism sanctions was the *method* Iran employed to gain clandestine access to the funds it used to finance the conspiracy, but obviously not its ultimate *object*. Just as the object of a narcotics trafficking conspiracy is not to transport drugs for its own sake, but to sell those drugs for profit, Iran did not conspire to evade counter-terrorism sanctions as an end in itself. The common purpose (one that overlapped any putatively "separate" conspiracies) was hiding Iran's use of the financial system to fund the illicit activities of "support for terrorism and proliferation," as made clear by the purpose of the sanctions Defendants evaded.[18] That common purpose is

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[17] In fact, in *Freeman II* the District Court acknowledged that a plausible inference from Plaintiffs' allegations is that Defendants assisted the Iranian entities in violating sanctions "designed principally to prevent terrorist activity," 2020 WL 3035067, at *7, "despite knowing or having reason to believe that these entities provided some financial support to Hezbollah and other terrorist organizations for purposes of committing terrorist acts in Iraq during the relevant time frame." *Id.* at *8.

[18] *See, e.g.*, Iran and Libya Sanctions Act, Pub. L. No. 104-172, §3(a), 110 Stat. 1541 (Aug. 5, 1996) ("*it is the policy of the United States to deny Iran the ability to*

plausibly and repeatedly alleged in the SAC, *e.g.*, ¶¶23, 25, 49-53, 172, 195-96, 338-49,[19] and can at least be reasonably inferred from Defendants' conspiratorial conduct with Iranian counter-parties.[20] The District Court erred in drawing a competing inference.

Furthermore, that common purpose was sufficient. Even in the context of *criminal* conspiracy, "[w]here a conspiracy has multiple objectives, a conviction will be upheld so long as evidence is sufficient to show that an appellant agreed to accomplish at least one of the criminal objectives." *United States v. Papadakis*, 510 F.2d 287, 297 (2d Cir. 1975). "A single conspiracy, rather than multiple

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support acts of international terrorism … by limiting the development of … [the] petroleum resources of Iran") (emphasis added); Exec. Order No. 13,224, 66 Fed. Reg. 49079 (Sept. 23, 2001) ("I … find that because of the pervasiveness and expansiveness of the financial foundation of foreign terrorists, financial sanctions may be appropriate for those foreign persons that support or otherwise associate with these foreign terrorists."); State Dept., *Executive Order 13224* (Dec. 20, 2002) ("[T]he Order provides a means to disrupt the financial support network for terrorists and terrorist organizations," including support for "*their subsidiaries, front organizations, agents, and associates*.") (emphasis added), *available at* https://2001-2009.state.gov/s/ct/rls/fs/2002/16181.htm.

[19] Contrary to Defendants' unsupported counter-factual claim that the IRGC's and Hezbollah's "objectives were only terroristic," Opp. 33 n.16, both the SAC and common sense make plain that the IRGC and Hezbollah require (and therefore desire) funding, and that they rely significantly upon laundered funds for their "terroristic" purposes. E.g., ¶¶27 (the IRGC used Bank Melli and its deceptive practices to move funds that were channeled to militants who attacked Coalition Forces), 52, 163, 280, 357.

[20] So the Magistrate Judge reasoned. *See* SPA-170-71.

conspiracies, may be found where the coconspirators had a 'common purpose,'" but "the participants' goals need not be congruent for a single conspiracy to exist, so long as their goals are not at 'cross purposes.'" *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1191-92 (2d Cir. 1989) (internal citations omitted). Indisputably, Defendants' purpose of helping Iran disguise its use of dollars for illicit activities was not at cross-purposes with Iran's financing of its campaign of terror against U.S. service members in Iraq. *It was the mechanism of such financing.*

And Defendants knew it. As Plaintiffs set forth in their opening brief (at 16-19), HSBC officials expressed concern as early as 2001 that "avoid[ing] … US OFAC sanctions" incurred the risk of processing "a payment which turns out to be *connected to terrorism*." ¶¶510-12 (emphasis added). It kept processing transactions by deceptive methods anyway. In 2003, RBS saw OFAC's restrictions on dollar transfers as "an opportunity," dismissing the "US foreign policy" view that "AML/anti-Terrorism" "*are closely linked*." ¶907 (emphasis added). In 2004, Credit Suisse changed its labeling of Iranian transactions to avoid a Swiss ordinance issued to implement the Financial Action Task Force "Special Recommendation *on Terrorist Financing*." ¶¶973-80 (emphasis added). In 2006, after the Treasury Department cut off Saderat's access because it had transferred $50 million to FTO Hezbollah since 2001, HSBC's regional head of compliance emailed that the United States had "direct evidence against Bank Saderat particularly *in relation to the*

alleged funding of Hezbollah," but his bank still continued engaging in deceptive practices for Saderat. ¶383 (emphasis added).

Defendants also knew that they were serving as the means of financing Iranian terrorism, because the U.S. government told them so. In 2006, the Treasury Department specifically briefed Defendants about the risk of financial transactions that could benefit the IRGC. ¶¶30-31. FinCEN further warned that "[t]hrough state-owned banks, the Government of Iran *disguises its involvement in proliferation and terrorism activities* through an array of deceptive practices specifically designed to evade detection." ¶24 (emphasis added). These were the practices in which Defendants engaged with their Iranian co-conspirators.

At a minimum, whether there were two entirely "separate and distinct conspiracies," despite their multiple overlaps, presents a question of fact that this Court has consistently left to the jury to decide. *See* Opening Br. 36 n.17. The District Court erred by deciding that question itself as a matter of law.

IV. UNDER *HALBERSTAM*, A CONSPIRATOR IS LIABLE FOR "ACTS PURSUANT TO, IN FURTHERANCE OF, OR WITHIN THE SCOPE OF THE CONSPIRACY."

Defendants attempt to rewrite the *Halberstam* framework by claiming that it limits conspiracy liability just to those injurious acts committed "in furtherance of"' the conspiracy they joined. Opp. 37. While it is true that in murdering Dr. Halberstam, co-conspirator "Welch was trying to further the conspiracy by escaping

after an attempted burglary," 705 F.2d at 487, *Halberstam* did not limit liability just to acts "in furtherance of." It explained that "a conspirator is liable for acts pursuant to, in furtherance of, *or* within the scope of the conspiracy." *Id.* at 484 (emphasis added).

That explanation makes good sense. While some overt acts literally further a conspiracy, others are acts pursuant to the conspiracy that foreseeably result from it. *Halberstam* gives the example of *American Family Mutual Ins. Co. v. Grim*, 201 Kan. 340, 440 P.2d 621 (1968), involving the liability of a thirteen-year-old boy for fire damage done to a church. *Halberstam*, 705 F.2d at 482-83. The boy and his companions agreed to break into the church at night in search of soft drinks in the kitchen. Unknown to the boy, his companions used torches to light their way. They tried to extinguish them as they left, but lingering embers set fire to the church. Even though the fire was not intended to conceal their crime or therefore to further their conspiracy to steal soft drinks (indeed, it was not intended at all), and even though the defendant did not know or even expect that his companions would use torches, he was found liable for the resulting fire because "the employment [of torches] was foreseeable." *Halberstam*, 705 F.2d at 483 (noting that "the *Grim* court was invoking both civil conspiracy and aiding-abetting theories").

The IRGC's terror campaign in Iraq was far more foreseeable than the church fire in *Grim*. Under Defendants' truncated reading of *Halberstam*, even arms dealers

who conspire to supply components for EFPs to local emplacers in Iraq would escape liability because the ensuing attacks would not be committed *in furtherance* of the conspiracy to supply weapons, even though they are the foreseeable result of that conspiracy. Instead, as the Senate Amici observed, "*Halberstam* provides the leading discussion and example of secondary liability for conduct that is not *intended* or even expected to result in violence—but that knowingly supports illicit conduct, the foreseeable consequences of which include violence." Brief of Senators at 16.

V. SCB AIDED AND ABETTED THE IRGC THROUGH THE IRGC'S AGENTS AND KNOWINGLY PROVIDED IT WITH SUBSTANTIAL ASSISTANCE.

A. Plaintiffs Did Not Waive Their JASTA Aiding and Abetting Claim.

Because it was filed before JASTA was enacted, the SAC based the Seventh Claim against SCB (A665-A669) on the theory of primary liability, premised on SCB's violations of the non-conspiracy provisions of §2339A for providing "foreseeable, substantial assistance to the IRGC, Hezbollah and the Special Groups…." ¶2288. *See also* ¶¶683, 838. In a lengthy colloquy with the Court, Plaintiffs' counsel explained:

> [T]wo of [the claims], one against SCB and one against Commerzbank, were what I would call aiding and abetting claims, but they were not secondary liability aiding and abetting; they were, if you will, *Boim* or primary liability with the elements of aiding and abetting. That was as to Commerzbank. I think it was claim No. 6 and SCB Claim no. 7….

SPA-104:22-105:5.[21]

Defendants now argue that because this claim did not recite JASTA's subsequently enacted "aids and abets" language, Plaintiffs waived it, and that the District Court so found. Opp. 43-45 & n.20. But the SAC can be sustained on any legal theory that its allegations, fairly construed, support, *Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 12 (2014) (per curiam), and, just as in *Linde*, Plaintiffs "are entitled to the benefits of JASTA's expansion of the ATA to aiders and abettors on this appeal." *Linde v. Arab Bank, PLC*, 882 F.3d 314, 328 (2d Cir. 2018).

Thus, the R&R correctly found that "[w]hile plaintiffs here did not plead aiding and abetting claims, many of their claims would also fall under an aiding-abetting theory as well." SPA-166 n.42. In their Motion for Reconsideration, Plaintiffs articulated the legal basis for their §2333(d)(2) aiding and abetting claim against SCB. ECF Nos. 239-1 at 11-12, 18-22; 243 at 8-10. While the District Court expressed concern whether Plaintiffs had consistently maintained that their claims should also be treated as secondary liability claims, SPA-44:18-46:2; *Freeman II*, 2020 WL 3035067, at *2 n.6, at the end of the colloquy referenced above it, too, declared: "I did accept the allegations in the Complaint which demonstrated or could

[21] Secondary liability claims for aiding and abetting were first pleaded as such in *Freeman II*, as the District Court there noted. 2020 WL 3035067, at *2 n.6. During a May 30, 2019 conference in *Freeman I*, Defendants agreed with the District Court that "all the claims" were now "being brought under JASTA as well." *See* Transcript, filed in *Freeman II* ECF No. 66 at 19:22-20:7.

be construed as demonstrating a number of facts that the plaintiff still rely on in alleging or saying that a claim for conspiracy, *or even aiding and abetting*, should go forward either under – as primary liability under the ATA *or secondary liability under JASTA*." SPA-108:8-14 (emphasis added). *See also* SPA-93:15-19 ("I would not preclude you and I still consider your arguments now in consideration *under a theory of aiding and abetting liability and I'm aware that your other cases do, in fact, and expressly state an aiding and abetting liability theory*.") (emphasis added).

B. Defendants Erroneously Assert That JASTA Precludes Liability if a Defendant Aids an FTO Through an Agent.

Defendants' aiding and abetting arguments fare no better on the merits. First, they largely repeat their "direct interaction" reading of JASTA, arguing that their invented conspiracy standard compels the same result for aiding and abetting liability. In support of their "direct interaction" theory, Defendants cite *Crosby v. Twitter, Inc.*, 303 F. Supp. 3d 564 (E.D. Mich. 2018), which dismissed a complaint that Twitter was liable for aiding and abetting ISIS in committing the Pulse Night Club attack. But *Crosby* involved a "lone wolf" gunman, Omar Mateen, and the plaintiffs did not even plausibly allege that ISIS ever "claimed that it had any contact with Mateen or instructed him to shoot up the Pulse Night Club." *Id.* at 573. The Sixth Circuit found "insufficient facts to allege that ISIS 'committed, planned, or authorized,'" the shooting; "Mateen is the person who 'committed' the shooting—not ISIS." 921 F.3d 617, 626 (6th Cir. 2019). The only other case on which

Defendants rely, *Brill v. Chevron Corp.*, 804 F. App'x 630 (9th Cir. 2020) (cited at Opp. 46), affirmed dismissal of an aiding and abetting claim because it found no plausible allegation that Chevron "had any relation to the terrorist organization that executed the attacks in Israel." *Id.* at 632.

In sharp contrast, the SAC plausibly and abundantly pleads the allegations missing in *Crosby* and *Brill*. It alleges – as the District Court found and the U.S. government has concluded – that the IRGC and Hezbollah jointly committed the Attacks, *see supra* at 5-7, and that SCB *directly* assisted the IRGC's agent, NIOC.[22]

C. Defendants' Disputation of NIOC's Role as an Agent of the IRGC and SCB's Knowing Assistance to NIOC Creates Genuine Issues of Fact.

The SAC provides detailed allegations showing that SCB was generally aware of its role in the criminal enterprise that included the IRGC's agent NIOC, but nevertheless continued its illicit conduct despite multiple warnings and regulatory actions. *See* Opening Br. 19-22; SPA-195-203.

[22] Defendants' argument thus fails even under their reading of §2333(d)(2) to require that they must assist "the person who committed" the Attacks. Opp. 46. It is even less convincing adopting the punctuation used by this Court in *Siegel*: "substantial assistance [to], or who conspires with the person who committed[,] such an act of international terrorism," *Siegel*, 933 F.3d at 223 (alterations in original). A defendant can, of course, assist such an act through the person who committed it, but can also provide assistance for it through others, including agents, affiliates, and fronts.

As explained above, *Halberstam* held that it was enough to make defendant Hamilton liable for aiding and abetting murder that she "had a general awareness of her role in a continuing criminal enterprise," *not* a role in the principal tort of murder (or even burglary). 705 F.2d at 488. Here, too, as the R&R found, "given all of the publicly available information at the time and the conscious efforts SCB undertook to conceal its conduct, an inference could be drawn that SCB knew that it was engaging in unlawful activity that could assist or lead to enabling a terrorist attack." SPA-204.

In response, Defendants argue that this Court's decision in *Siegel* precludes SCB's aiding-and-abetting liability. According to Defendants, in *Siegel*, "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,'" and they argue these insufficient allegations are "indistinguishable" from those made against SCB. Opp. 50-51.[23]

In *Siegel*, the plaintiffs relied on a *negligence* theory, which is not cognizable under the ATA, alleging "that the defendants failed to take reasonable steps to ensure that HBUS [HSBC Bank U.S.A., N.A.] was not dealing with banks that may have

[23] *Freeman II*, 2020 WL 3035067, at *5 shows that the District Court accepted Defendants' characterization.

links to or that facilitate terrorist financing. HBUS opened U.S. correspondent accounts for high risk affiliates without conducting due diligence, thereby facilitating transactions that hindered U.S. efforts to stop terrorists." *Siegel v. HSBC Bank USA, N.A.*, No. 17-cv-6593-DLC, 2018 WL 3611967, at *1 (S.D.N.Y. July 27, 2018) ("[the complaint] accuses the defendants of adopting slipshod banking practices"), *aff'd*, 933 F.3d 217 (2d Cir. 2019). Moreover, the U.S. government never found that ARB was an agent of al Qaeda and never designated it, unlike NIOC and MODAFL. *See* Opening Br. 13-14, 20, 57. Nor had the U.S. government found that ARB or any entity that controlled it engaged in a "wide array of deceptive techniques" with HSBC that enabled it to "facilitate its support for terrorism," unlike this case. *Compare* ¶172 *with Siegel*, 2018 WL 3611967, at *1 n.1 (complaint and government sources provided no "basis to allege that ARB and the defendants" agreed on "stripping" transactions or "that any of the defendants' transactions with ARB were subject to stripping").

In the face of U.S. government findings that NIOC was an agent of the IRGC in its oil-for-terror scheme, Defendants next weakly assert (without case authority) that "even if NIOC and MODAFL were agents of IRGC, Plaintiffs fail to adequately allege that SCB dealt with them in that capacity," Opp. 49, and that SCB only "provided services to Iranian banks, whose clients allegedly were controlled by the IRGC." Opp. 52. This argument simply disputes the SAC's detailed account of

SCB's efforts to facilitate illegal transactions *specifically* involving NIOC. ¶¶157-58 (SCB "agreed to participate in the Conspiracy and deliberately removed identifying data on NIOC's payment orders … for these and other wire transfers."), ¶¶624, 675, 682, 811-24.

Defendants' last-ditch arguments are that SCB assisted only Iran's "legitimate petroleum business"[24] in a mere "business relationship with Iranian entities," and that NIOC was first designated in 2012 by the United States. Opp. 51-53. But one objective of SCB's conspiracy with its Iranian counterparties was to *conceal* illicit transactions with NIOC from U.S. counter-terror-financing authorities. SCB did so for years in the face of repeated warnings that its conduct was potentially financing terrorism. ¶¶163, 172, 647-48.

Moreover, U.S. designations are necessarily based on historical facts, as they often expressly state. Thus, Treasury emphasized the IRGC's "history of attempting to circumvent sanctions by maintaining a complex network of front companies" and prior sanctions for its "activities related to … support for terrorism," when it identified NIOC as one of those fronts and the IRGC's agent.[25] It also found that the

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[24] That "legitimate" business included acquiring goods it knew the U.S. government sought to deny Iran for, according to the blacklists' statutory language, "anti-terrorism reasons." ¶831 n.60.

[25] *See* Opening Br. 14 n.8.

IRGC "has engaged in terrorist activity since its inception 40 years ago,"[26] that Iran's "exportation of oil directly funds acts of terrorism by Iranian proxies," and that the "IRGC-QF ["oil-for-terror"] network originates with the National Iranian Oil Company (NOIC)," when it designated Iran's petroleum shipping network.[27]

D. SCB Provided Substantial Assistance to the IRGC, the Person Who Committed the Acts of International Terrorism.

SCB half-heartedly asserts that its assistance to the IRGC was not substantial, an argument Plaintiffs addressed at length in their Opening Brief at 56-59. But, again, when SCB concealed billions of dollars for NIOC that Iran used for illicit purposes, Plaintiffs need not allege that it also intended for the IRGC to succeed in those purposes, or specifically intended to bring about terrorist attacks. *Linde*, 882 F.3d at 329. What *is* required and the SAC plausibly alleges is that SCB knowingly provided *unlawful* substantial assistance to an Iranian customer (controlled by the IRGC) that was *integral* to Iran's unlawful enterprise to evade counter-terrorism sanctions in order to finance the IRGC's terror campaign, and that the at least plausible, if not certain, foreseeable result was the flood of IRGC-coordinated Attacks that injured Plaintiffs. *See Halberstam*, 705 F.2d at 484 n.13 ("a defendant's

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26 *See id.* at 6-7 & n.3.

27 *See id.* at 12 & n.7.

responsibility … increases with the blameworthiness of the tortious act or the *seriousness of the foreseeable consequences*") (emphasis added).

Defendants also argue (Opp. 54-55) and the District Court agreed that the first factor in substantial assistance requires that Defendants "encouraged … committing acts of terrorism." 2020 WL 3035067 at *10. But *Halberstam* clearly describes that factor as "substantial assistance *or* encouragement," *Halberstam*, 705 F.2d at 481 (emphasis added), and it "looked first at the *nature of the act assisted*, … a long-running burglary enterprise," *id.*, at 488 (emphasis in original), *not* at any act "encouraged" by Hamilton, let alone the act of murdering Dr. Halberstam. There was no evidence that Hamilton "encouraged" the unplanned murder. None was required.

Finally, the District Court has now made clear in *Freeman II* that its dismissal of aiding and abetting claims is also erroneously premised on requiring allegations that Defendants' "state of mind … involved an intent to finance or otherwise promote or carry out terrorist acts." 2020 WL 3035067 at *10. This is contrary to both *Halberstam* and *Linde.* 882 F.3d at 329.

CONCLUSION

For the reasons set forth above, the District Court's order granting Defendants' motions to dismiss the SAC should be vacated and reversed.[28]

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Hackensack, NJ

Respectfully submitted,

/s/ Peter Raven-Hansen

OSEN LLC
Peter Raven-Hansen
Gary M. Osen
Ari Ungar
Michael Radine
Dina Gielchinsky
Aaron A. Schlanger
2 University Plaza, Suite 402
Hackensack, New Jersey 07601
(201) 265-6400

[28] The District Court's dismissal of the non-conspiracy Sixth Claim against Commerzbank depended on its dismissal of the conspiracy claim based on the same nucleus of operative fact. *See* Opening Br. 6 n.2. Defendants cite *Strauss v. Crédit Lyonnais, S.A.* to argue that pendent personal jurisdiction does not apply where "claims are brought under a single federal statute," Opp. 57 (citing 175 F. Supp. 3d 3, 32 (E.D.N.Y. 2016)), but *Strauss* only noted that pendent subject matter jurisdiction has been invoked for mixed state and federal law claims, not that pendent personal jurisdiction is limited to them. *See* R&R at SPA-222 n.69 (citing extra-Circuit authority in absence of any contrary Circuit case and finding the "same nucleus of fact as the conspiracy claims").

TURNER & ASSOCIATES, P.A.
C. Tab Turner
4705 Somers Avenue, Suite 100
North Little Rock, AR 72116
(501) 791-2277

Attorneys for Plaintiffs-Appellants

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Dated: June 8, 2020

/s/ Aaron A. Schlanger
Attorney for Plaintiffs-Appellants