

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

CHARLOTTE FREEMAN, et al.,	:	14-CV-6601 (PKC)
Plaintiffs,	:	
	:	United States Courthouse
-against-	:	Brooklyn, New York
	:	October 28, 2019
	:	2:00 p.m.
HSBC HOLDINGS, PLLC, et al.	:	
Defendants.	:	

----- X

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

A P P E A R A N C E S:

For the Plaintiffs: OSEN LLC
2 University Plaza, Suite 402
Hackensack, New Jersey 07601
BY: GARY M. OSEN, ESQ.
CINDY SCHLANGER, ESQ.

For the Defendants: SULLIVAN & CROMWELL, LLP
125 Broad Street
New York, New York 10004
BY: ANDREW FINN, ESQ.
BRADLEY SMITH, ESQ.
ALLYSA HILL, ESQ.

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

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

1 THE COURTROOM DEPUTY: All rise.

2 THE COURT: Have a seat everyone.

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

6 Will the parties please state your appearances for
7 the record.

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

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

12 THE COURT: Good afternoon to both of you.

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

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

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

23 Plaintiffs have filed a partial request for
24 reconsideration related to defendant's Bank Saderat PLC, as
25 well Standard Commerzbank -- sorry, Standard Chartered Bank,

1 which I will refer to as SCB just to save words and time.

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

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

21 MR. FINN: Your Honor, we did see the filing at the
22 ECF system just about two hours ago and it is a rather lengthy
23 document. I was able to review it briefly before, but we are
24 not really sure what relevance it has to the pending motion.

25 THE COURT: Let's start with that, Mr. Osen, explain

1 why it is you felt the need to file that today just a few
2 hours before the argument and then what relevance you think it
3 has.

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

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

8 THE COURT: Right.

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

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

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

1 say?

2 MR. OSEN: I don't think it's particularly germane
3 to the argument today, per se, because we proceed under the
4 premise that Your Honor's ruling has not been reconsidered in
5 its entirety, particularly with respect to the question of
6 whether sanctions evasion is materially different from terror
7 financing and the like, but we do feel for the ultimate record
8 that the close link identified by the United States Government
9 between the very conduct that is at issue in this case and
10 terrorism financing by Iran is germane ultimately to the
11 Appellate record.

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

20 MR. FINN: Your Honor, if I may, given that for
21 Standard Chartered Bank most of the claims were not challenged
22 in reconsideration that we would object to the plaintiffs
23 putting in any sort of additional material on already
24 dismissed claims that they are not seeking reconsideration on
25 and, you know, I recognize this just came out on Thursday or

1 Friday of last week, but I'm not sure that this is the proper
2 vehicle to put it into the record particularly if at some
3 future point the plaintiffs may argue that it is relevant and
4 we wouldn't -- we are not waiving any obligation that, you
5 know, whatever may be argued about this was properly brought
6 before the District Court on motion to dismiss.

7 THE COURT: Yeah, I think that's fair. I don't want
8 to get hung up on this point, but I think, Mr. Osen, you may
9 have a fight later with the defense, a legitimate one, that if
10 you try to raise this as part of the record on appeal, the
11 Court of Appeals may say that it wasn't really squarely before
12 me or it wasn't allegations or evidence that the defense was
13 given an opportunity to dispute or address in some way. But
14 like I said before, I don't find that it adds much to what I
15 have already considered and I think what, as I believe you
16 correctly observed, drove my prior decision. So, for now, I
17 consider it a nullity or maybe not even relevant. What future
18 use it could have as part of the record or not is not
19 something I want to discuss today or decide, because it's not
20 really an issue for me. It may be, at some point, an issue
21 for the Court of Appeals.

22 MR. OSEN: Yes, Your Honor. First of all, obviously
23 the defendant would waive its rights with respect to the
24 document. I would only note that the Court of Appeals can
25 also take judicial note of Government findings and

1 declarations whenever they occur.

2 To us, it is just an additional reiteration of a
3 longstanding and evolving recognition by the United States
4 Government that the invasions, both described in prior
5 findings and described in the Complaint, ultimately facilitate
6 Iran's terrorism.

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

10 MR. OSEN: Correct.

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

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

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

18 So here's how we are going to proceed now. We only
19 have one of the two defendants implicated by the
20 reconsideration motion here today. As everyone knows from
21 what has been filed on the docket, it appears that Bank
22 Saderat PLC is foregoing any opportunity or right to respond
23 to the motion for reconsideration. Counsel for Bank Saderat
24 PLC indicated, at least to me, that it was not intending to
25 respond to the motion. I gather from what was filed by you,

1 Mr. Osen, that they were not nearly as transparent about what
2 their intent was and I agree with you that they, by omission,
3 gave the impression that they were going to file something
4 timely, but that was not the case. I question how they dealt
5 with even communicating with the Court, which was via a phone
6 call to chambers, that they did not intend to respond; but
7 nonetheless they are not here, they have not filed anything,
8 although I still must consider the merits of the
9 reconsideration motion in the absence of their response.

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

15 So, Ms. Schlanger or Mr. Osen, you can proceed.

16 MR. OSEN: Thank you, Your Honor.

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

1 forward in terms of the elements required.

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

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

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

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

16 Our central view is that Your Honor's decision, or,
17 at least, the lynchpin of that decision hinges on the finding
18 at page 44, beginning of page 45, where Your Honor wrote: Yet
19 there is not a single allegation in the SAC, that's the Second
20 Amended Complaint, that any of the defendant's directly
21 conspired with Hezbollah or the IRGC. And that's the quote.
22 And we contend that the Complaint clearly alleges that Bank
23 Saderat directly conspired with Hezbollah and that Standard
24 Chartered Bank directly conspired with the IRGC through its
25 agent the National Iranian Oil Company, NIOC. And the

1 principal overlooked facts we contend are, one, the IRGC's
2 designation in April of 2019 as a foreign terrorist
3 organization, FTO for short. And that, in conjunction with
4 that, the Court therefore overlooked the significance of the
5 fact that the National Iranian Oil Company was designated as a
6 specially designated national by the United States because it
7 was an agent of the IRGC during the relevant period. Those
8 facts, in tandem, are what we contend is the central lynchpin
9 of the reconsideration.

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

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

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

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

9 We would submit that even arguendo, if that were the
10 case that there were, in fact, two conspiracies and we,
11 obviously, will argue at some point that that's a fact
12 question, but to the extent we are following the Court's
13 rubric, we contend that both Bank Saderat and Standard
14 Chartered Bank were in the second conspiracy because they were
15 dealing with on the one hand Hezbollah and on the other hand
16 the IRGC.

17 Now, as I understand SCB's arguments, and obviously
18 opposing counsel give their own gloss on it, but as I read it
19 there were basically three arguments that they made. The
20 first was that NIOC, notwithstanding being an agent of an FTO,
21 was still one of the, quote/unquote, legitimate agencies of
22 Iran, that it still fit within the safe harbor, if you will,
23 of the *Rothstein* paradigm as a legitimate agency of Iran that
24 may engage in some other illegitimate activities, but falls
25 within that safe harbor. We do agree with the defendant that

1 if agents of FTOs can be deemed legally as a matter of law to
2 be legitimate agencies then we lose, but we would suggest that
3 that's a bridge further than the Court's decision suggests and
4 certainly quite a bit farther than *Rothstein* actually held.

5 THE COURT: Can I stop you for a second?

6 MR. OSEN: Sure.

7 THE COURT: You use the term "safe harbor," which
8 suggests that there may be some kind of exclusion for
9 legitimate or quasi-legitimate agencies, but really the
10 question is causation. At least, that's one main question.
11 So I'd like you to address that directly, because I think
12 still the problem with your argument with respect to SCB is
13 that you are suggesting or arguing that the agency
14 relationship between NIOC and IRGC and then the relationship
15 between IRGC and Hezbollah is enough, even at this stage, at
16 the stage of the allegations for purposes of some plausible
17 inference, enough to satisfy causation. And that's where I
18 think the argument, certainly at a minimum, falls apart
19 because I think you are requiring way too many inferential
20 leaps from NIOC, which has many, many different purposes,
21 besides accepting the fact that it is an agent, being an agent
22 of IRGC, and then from there you go from IRGC to sponsoring
23 Hezbollah, and then from Hezbollah who ordered or authorized
24 these attacks or planned them. The causation is really what
25 still remains very problematic, even accepting that NIOC has

1 been designated as an agent of IRGC.

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

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

23 MR. OSEN: The only part of that I think would be
24 accurate is the term "governmental." In the case of *Boim*, the
25 Holy Land Foundation, among others, was the donor in the

1 United States. They were sending money principally to
2 so-called Zakat Committees in the Palestinian territories.
3 These included hospitals. These included the Dar Al-Salam
4 Hospital, for example, but also the Al Razi Hospital in Jenin.
5 In fairness, they were not governmental agents, but that's the
6 nature of different terrorist organizations. The IRGC is, to
7 my knowledge, the only quasi-governmental organization that's
8 ever been designated as an FTO of a recognized sovereign
9 state.

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

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

1 MR. OSEN: That's precisely what Congress found when
2 they enacted 18 U.S.C. 2339B. The history of *Boim* is actually
3 instructive on this point, Your Honor, because David *Boim* was
4 killed in 1994; the statute of 2339B, the material support
5 statute, was enacted in 1996. Hamas was not even designated
6 until 1997, after the passage of the statute, which created
7 FTO designations. So, at the time in which the defendants in
8 *Boim* were giving support to Hamas, it was not only not
9 designated an FTO, there was no such thing as an FTO
10 designation. The Court, therefore, focused on whether Hamas
11 committed violent acts, terrorist acts, and whether the
12 defendants in those cases knew of that conduct when they gave
13 knowing support to Hamas.

14 THE COURT: Okay. Go ahead.

15 MR. OSEN: The same, Your Honor, is true of
16 virtually every terrorist organization that maintains
17 commercial operations. Those commercial operations are not,
18 as is commonly assumed, simply fronts that do not engage in
19 financial -- real financial transactions. In fact,
20 organizations like NIOC are a cash-cow for the IRGC; it's
21 precisely because they actually do produce and sell oil that
22 funds the IRGC's operations, and the same is true, albeit in a
23 different form, when Hamas raises charitable donations that
24 are sent to its more legitimate-appearing operations. It's
25 certainly true of other terrorist organizations, whether they

1 are engaged in commercial activity. If you look at the list
2 of designations over the last five to ten years, Your Honor,
3 you will see that Hezbollah, for example, routinely has
4 organizations designated that are commercial in nature. One
5 that comes easily to mind is Car Care Center, which runs a
6 motor pool which is controlled and owned by Hezbollah. Part
7 of that, of course, is that they use it to provide
8 transportation of vehicles to Hezbollah, but part of it, like
9 many of their other businesses, include travel, construction
10 and other activities. That's the nature of 21st century
11 terrorism.

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

15 MR. OSEN: The last -- I'm sorry, Your Honor, the
16 second argument that we deduce from the defendants' brief is
17 that, even if NIOC is an agent of an FTO and they work with an
18 FTO, NIOC itself did not commit the terrorist attacks; it was
19 a different agent of the FTO. And, of course, that's almost
20 always the case. I'm not saying it could never be otherwise,
21 but nearly all significant funding of terrorist organizations
22 comes through fundraisers and commercial operations that are
23 separate from the part of the terrorist organizations that
24 actually runs the cells that kill people and that's almost
25 axiomatic. And so, if one were to read JASTA to limit aiding

1 and abetting and conspiracy to those who actually work
2 directly with the so-called killers or terrorists on the
3 ground, the statute would be a nullity. I would rush to add
4 that the statute itself is pretty clear on this point, because
5 if you look at the language of JASTA and we made this argument
6 previously, albeit in letter form in our various exchanges,
7 the statute speaks of providing substantial assistance or
8 conspiring with the person who committed such an attack. It's
9 with the person, and obviously as Your Honor noted, person is
10 the widest definition available under the U.S. Code. There
11 are other statutes, including on conspiracy that -- including
12 I will add Section 2339A, that use the term "conspire to
13 commit." That is an instance, reading it again in whole, if
14 you were to take that view, it would be a person who aids and
15 abets by knowingly providing substantial assistance or who
16 conspires to commit. That's not what JASTA says; it says to
17 conspire with the person. So we submit, Your Honor, that
18 there's absolutely nothing in the statutory language, it's
19 plain meaning, let alone the findings and purpose, that would
20 submit that SCB would have to aid or abet or conspire to
21 commit the attacks, or to conspire with the person in the
22 literal sense of the person on the ground who commits the
23 attack. It's a question of whether they conspire, in this
24 case, with the FTO that committed the attack.

25 THE COURT: But even if the idea is that you only

1 have to conspire with the person and it's not grammatically
2 made clear that you have to conspire to commit the goal of the
3 conspiracy, the legislative history does indicate that the
4 standards from *Halberstam v. Welch* apply. And there, as with
5 all conspiracies, you can't enter into a conspiracy without
6 knowing the goal of it, or having some agreement on what the
7 goal is, so I don't think arguing that linguistic anomaly, I
8 would call it, in terms of how it is phrased, that you can
9 conspire with someone, but you don't have to conspire with
10 that person to commit a common goal makes any sense. I think
11 clearly, if nothing else reflective in the legislative history
12 it says apply, *Halberstam* and traditional conspiracy elements
13 and a doctrine make clear, I think, what's a commonsense
14 reading of the statute that you have to conspire with the
15 person who is committing the terrorist act. That's meant to
16 restrict or limit the range of liability or the chain of
17 liability, if you will, but you still have to conspire, which
18 in and of itself means you have to agree on a common goal.

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

21 MR. OSEN: No, Your Honor, actually, I don't
22 disagree with that. I will go into the *Halberstam* conspiracy
23 standard in a moment. Our point is simply that this has
24 nothing to do with the question of what the nature of the
25 objective is of the conspiracy or anything like that; it has

1 to do with the question of whether you can conspire with
2 someone who is not the actual --

3 THE COURT: FT0.

4 MR. OSEN: No -- well, there are two ends of this,
5 right. There is the first end, which is the -- in this case,
6 there is the part of the FT0 that raises the money and then
7 there is the part of the FT0 or the agent of FT0 that commits
8 the physical act that causes injury. And we submit, Your
9 Honor, that in the case of FT0s the point of contact is almost
10 always going to be on the front end with the fundraising or
11 funding side and that the other side of it is going to be a
12 different agent and that the statute contemplates that.

13 That's all we are saying at this juncture.

14 The last point, which I think goes to Your Honor's
15 point, is the defendants' view that even if SCB can be said to
16 have directly aided and abetted or conspired with the person,
17 the IRGC in this case that committed the attacks, it couldn't
18 have known that it was assisting terrorism because it was
19 quote/unquote merely evading sanctions. And NIOC wasn't
20 designated until 2012 and the IRGC wasn't designated until
21 2019, so it lacks the sufficient requisite state of mind. I
22 think that's the core issue more than it is, we would argue,
23 the proximate cause part because the IRGC is in fact using
24 NIOC, as the Government has repeatedly found, for the funding
25 of terrorism. They are in that conspiracy. The question

1 really is whether they knew it at the time or they had reason
2 to know from the context, which I will get to in a moment.

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

8 THE COURT: Okay.

9 MR. OSEN: So with respect to SCB's knowledge, the
10 first thing we would point to is the nature of the act itself
11 and that's where, Your Honor, we directed the Court to what is
12 sort of a paradigmatic case, *Direct Sales Co. v. United*
13 *States*, and that is because during the entire period here SCB
14 knew that Iran was a state sponsor of terrorism and they knew
15 that dollar clearing was restricted into a certain safe
16 harbor, so-called U-turn Exception, which was put in place to
17 prevent terror financing. And we have cited in Complaint
18 paragraph 642 to 666, in the interest of time I won't go
19 through all the steps, but clearly throughout the early period
20 2003, 2004, 2005, they had many notice events indicating to
21 them the purpose of Iran's activities and the purpose -- and
22 warnings that they received from the New York Banking
23 Department, from the Federal Reserve Board. I won't go into
24 all of it.

25 The second point is that, in addition to stripping

1 transactions and making cover payments to convert transactions
2 to a non-transparent form, they did an additional step with
3 respect to letters of credit. But before I jump to letters of
4 credit, I just want to go back to *Direct Sales* for a moment to
5 highlight why we think this is significant. I think Your
6 Honor would agree that if a person lawfully sells a firearm to
7 another person, it is still potentially foreseeable that that
8 firearm will be used in an act of violence, but because a
9 person who complies with the registration requirements and,
10 you know, adheres to the waiting period and lawfully sells the
11 firearm enjoys a certain safe harbor, what the *Halberstam*
12 court would term a lawful activity that might be used in an
13 unlawful manner, and that's, in fact, what happened in
14 *Halberstam*. The conduct itself in that case standing by
15 itself, bookkeeping and banking, was neutral the Court said.
16 But then there is a second kind of conduct, and to use my
17 example again, if you sell someone a firearm illegally and you
18 scratch off the serial number of the gun, then it is a lot
19 harder for you -- not impossible, it is still a fact question,
20 but it is a lot harder to say that it was not a foreseeable
21 outcome that it would be used in the commission of a crime.
22 And that's where *Direct Sales* came in, because it dealt with
23 the sale of narcotics, I believe it was morphine by a
24 pharmacist, which unlike moonshine in the prior Supreme Court
25 cases where sugar -- they knew it was probably being used for

1 illegal purposes, but their own conduct looked at was legal --
2 when you are selling morphine or when you are selling guns
3 that the serial numbers are removed, or when you are engaged
4 in conduct with a state sponsor of terrorism that you know can
5 be done legally in certain parameters but chose to engage in a
6 criminal conspiracy to facilitate, you don't get the same
7 benefit of lack of foreseeability of your conduct.

8 Turning for a moment to the letters of credit, not
9 only were these letters of credit, in some instances -- over
10 1,300 of them, but in some instances expressly used for
11 embargoed items that were prohibited because of their
12 expressed prohibition being terrorism, but it is also
13 important to note that in many of these cases SCB was acting
14 as the negotiating bank, which means that they were
15 essentially the escrow agent between the parties, which also
16 means that they had transparency that the other participants
17 didn't have as to who was really financing the transaction,
18 where it was going, what the nature of the goods were, et
19 cetera.

20 The third element of knowledge from our perspective
21 is the unusual events of 2006, when the U.S. Department of the
22 Treasury began to actually brief foreign banks, big commercial
23 banks like SCB, to tell them of the rising risk posed by
24 Iranian invasion and the tools that they were using; namely
25 the same tools of stripping transactions, converting them to

1 cover payments to avoid detection by U.S. law enforcement, and
2 they specifically went almost door to door in an unprecedented
3 fashion to notify them.

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

20 Lastly, looking at this in totality, the regulatory
21 fines, the Treasury Department briefings, the U-turn Exemption
22 revocation in 2008, criminal prosecutions and court-ordered
23 monitors imposed, there is no question at least that
24 plaintiffs have plausibly set forth that the New York
25 Department of Financial Services was right. SCB, over the

1 course of time, had become a rogue bank, a rogue institution,
2 that's the phrase used by the regulator, which, of course, we
3 cite to and adopt.

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

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

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

1 flow of funds for the IRGC's illicit funding and procurement
2 networks.

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

15 So, going back to where Your Honor started about
16 proximate cause in *Rothstein, Rothstein*, I think,
17 respectfully, has been a little bit overused or over-extended
18 because of the degree to which it fits the pleadings of that
19 case. Very briefly, in that particular case, UBS was working
20 as sort of a, if you will, foreign agent of the Federal
21 Reserve Bank. They were hosting and servicing the Federal
22 Reserve as an offsite repository for U.S. bank notes, and UBS
23 was caught giving those bank notes to Iran. It's not entirely
24 clear to me whether it was the Central Bank of Iran or some
25 other entity, but an Iranian entity. And UBS falsified -- or,

1 at least, so the Government I always want to say alleged --
2 falsified some of its records so that the Federal Reserve
3 Board wouldn't realize what was going on. The plaintiffs in
4 *Rothstein* had a theory that they didn't have to prove
5 proximate cause because once a violation was admitted, albeit
6 a civil violation in that case, they therefore could enjoy the
7 presumption that any bank notes that went to Iran would
8 therefore at least contribute to what Iran did in donating
9 monies to Hezbollah or Hamas, which were the terrorist
10 organizations that injured the plaintiffs in those cases. The
11 Court therefore, I think quite reasonably, said that, number
12 one, there's no sort of built-in presumption of proximate
13 cause, you have to plead it. And we agree with that. And
14 number two, the Court did not want to go as far as it would
15 for a foreign terrorist organization, an FTO, where Congress
16 made and the executive branch both made findings about the
17 degree to which FTOs are so tainted by their unlawful conduct
18 that any support to them is necessarily furthering their
19 unlawful activities. It didn't want to extend that as far to
20 a state sponsor of terrorism. So, *Rothstein* points to the
21 fact that, number one, there was no allegation that UBS
22 provided money to Hezbollah or Hamas, and number two, no
23 allegation that the U.S. currency UBS transferred to Iran was
24 given to Hezbollah or Hamas.

25 Here, however, we have a situation where the IRGC is

1 actually factually, at least for purposes of Rule 8 based on
2 the U.S. Government's own findings, it was factually in the
3 middle of this because it used NIOC as its agent to fund the
4 IRGC.

5 THE COURT: I do have to stop you only because I
6 think your constant conflation of IRGC and NIOC, because of
7 this agency finding, is the problem. I mean, again, and I
8 understand how you argue that *Boim* may provide some support,
9 but I still don't see it because the case law all around this
10 issue has consistently held that when you have a state sponsor
11 of terrorism, such as Iran or its affiliate agencies, or it's
12 agencies, and they have multiple functions, the causal
13 connection is too attenuated. Because here, even though NIOC
14 was designated as an agent of IRGC, it's in your Complaint
15 that NIOC also engages in other activities relating to the
16 running of the Iranian Government and the support for the
17 country, including daily oil sales. And so that is, I think,
18 the fundamental problem with the causation; that the only
19 connection between SCB is with NIOC and it's not directly with
20 IRGC, but you argue that because of the finding of agency that
21 it must necessarily be so for purposes of causation that the
22 money that was managed for NIOC through or by SCB has to have
23 caused the terrorist acts ultimately committed by Hezbollah,
24 even if working with IRGC. And that's I think the problem you
25 can't quite argue around factually, based on your own

1 Complaint and based on the facts as they exist; even if NIOC
2 was an agent, it certainly doesn't mean all of their money
3 went to IRGC, and that you would have to acknowledge; correct?

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

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

22 MR. OSEN: No, as an FTO. Any time an FTO -- in
23 this case right here, the IRGC, operates everything from
24 airlines to construction companies to all manner of things,
25 that really genuinely do mix cement and fly airplanes and

1 drill oil, but that doesn't change the fact that it is all
2 done on behalf of an FT0.

3 THE COURT: But it is not all done on behalf of an
4 FT0. I mean I think that is a fundamental problem. I'm not
5 saying that -- or rather the Complaint clearly shows that some
6 of the money could well have been used for exactly the purpose
7 you say, and certainly the Federal Government has found it
8 appropriate to designate them as SDN or state sponsors of
9 terror, but for purposes of legal causation, you still have
10 too many links that diffuse or interrupt or sever the causal
11 connection because you have to show that it is a substantial
12 factor in the sequence of responsible causation, and I think
13 that's the problem that the cases before and after my decision
14 have all found to be problematic. That's why I think with
15 respect to SCB, for example, you are going to have the -- more
16 so than even I would say Saderat, more the problem with
17 causation. In other words, you can't get around the fact that
18 NIOC is the only entity they were dealing with.

19 MR. OSEN: Well, that's actually not entirely
20 accurate in the sense that, first of all, they were acting
21 both with NIOC and MODAFL, M-O-D-A-F-L, I believe, which is
22 the military procurement arm of the Iranian military/IRGC, and
23 we lay out in the Complaint the work chart between them, and,
24 of course, with other NIOC subsidiaries. So it is definitely
25 true, Your Honor, that if the requirement, even for an FT0, is

1 that it go exclusively or even primarily to the perpetration
2 of terrorism then not only do we lose in this case but almost
3 every plaintiff in every case loses because there is no such
4 thing, at least in civil ATA cases, of funding and financial
5 services to an FTO; that is purely to the FTOs military or
6 terrorist purposes.

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

25 MR. OSEN: But, Your Honor, the United States

1 Government has itself found that. They might be wrong about
2 it, but they --

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

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

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

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

16 THE COURT: Hezbollah?

17 MR. OSEN: No, IRGC.

18 THE COURT: In 2019.

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

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

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

1 Your Honor recognized, has two prongs. The first is the
2 standing requirement, I call it, but it's just the first prong
3 which Your Honor identified that the plaintiff be injured by
4 an act of international terrorism committed, planned or
5 authorized by an FT0. But then there's the second prong,
6 which is the liability prong. The first one establishes what
7 category a plaintiff may sue; those who are injured in an
8 attack, planned, committed or authorized by an FT0. The
9 second prong simply speaks about people who aid and abet or
10 conspire with the person who committed the attack. That
11 doesn't have an FT0 requirement and it doesn't track the
12 language of the FT0 requirement.

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

21 MR. OSEN: Right. So from our standpoint, the first
22 prong of JASTA, which Your Honor acknowledged in your opinion,
23 is satisfied by Hezbollah being an FT0 at the time and having
24 committed, planned or authorized. We submit, Your Honor, that
25 on the second prong is satisfied if SCB aided and abetted or

1 conspired with the person who committed the attack and that
2 the IRGC satisfies that second prong. It doesn't have to be
3 Hezbollah. It can be the IRGC or an individual or a company
4 or an association unrelated to Hezbollah as long as it meets
5 the *Halberstam* standard that the conduct involved involved
6 wrongful conduct that foreseeably could lead to injury.

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

13 MR. OSEN: There is, but Your Honor actually cited
14 before a substantial factor which is the correct standard for
15 2333(a) liability. The standard, as I mentioned a moment ago,
16 under *Halberstam* is slightly different, which is substantial
17 assistance. And the question --

18 THE COURT: Well, that is for aiding and abetting.

19 MR. OSEN: Yes.

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

23 MR. OSEN: Right. So causation is obviously, as
24 Your Honor knows, a different analysis for aiding and abetting
25 than it is for conspiracy. They are mirror images of each

1 other; aiding and abetting focuses on the substantial
2 assistance and the directness and conspiracy focuses on the
3 agreement part because it is necessarily the case that the
4 conspiracy causes the injury. The question is whether the
5 defendant joined in the agreement that led to that. So they
6 are mirror images -- I see Your Honor is frowning.

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

11 MR. OSEN: We agree.

12 THE COURT: -- the standard is substantial cause for
13 the -- in the responsible causation chain. The language is a
14 little bit cumbersome, but that's where I think you're still
15 having a problem because the bank here, SCB, was only dealing
16 with NIOC and then NIOC in turn is an agent, according to the
17 Government, for IRGC. But NIOC, itself, is a vast agency
18 whose funds are used for multiple purposes and so the
19 causation in each step becomes less and less, but certainly at
20 the very first step is where it goes into this vast pool of
21 money, some of which one reasonably could infer went to the
22 IRGC and then maybe some of that you could reasonably infer
23 supported Hezbollah in its effort to commit the acts of
24 terrorism that are alleged here. But you really have so
25 diminished the causal chain that that's, I think, the problem

1 I'm having with your argument still.

2 MR. OSEN: I understand that. Let me say two
3 things: First of all, with respect to the actual fact,
4 obviously, that's ultimately a factual determination, but for
5 pleading purposes, as I pointed out to Your Honor, the
6 Treasury Department itself in revoking the U-turn Exception --
7 or Exemption, in 2008, found that the conduct we're talking
8 about, which is stripping transactions, taking money and
9 converting it to cover payments so that the law enforcement
10 and intelligence services wouldn't be able to detect it, was,
11 in fact, being used to support terrorist groups. That's the
12 reason the Government revoked the exemption, because it found
13 as a factual matter -- one defendant is free to contest, but
14 the Government found that this conduct, not just by SCB or by
15 any one Iranian bank or NIOC, but by all of them was, in fact,
16 supporting terrorist groups and nuclear and missile
17 proliferation. We don't think the plaintiffs' should be
18 penalized because the amount of money moved by the Iranian
19 Government was so vast, and the amount of money that was
20 laundered was so vast, that it dilutes the causation factor
21 here. The bottom-line is that the IRGC was -- although not
22 designated as an FTO until 2019 -- it was, as the Government
23 itself found, a terrorist organization from its foundation in
24 1979. So, the idea that it has legitimate functions, I don't
25 dispute any more than that the NIOC sells oil or that that oil

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

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

1 So let me just stop you for one second, because in
2 my decision I did make much of, which is where you started,
3 the fact that -- or that there was no allegation that
4 Defendant SCB had any direct contact with the FT0 that
5 committed the crime -- sorry, the international act of
6 terrorism, Hezbollah or the IRGC. And in that context, what I
7 was talking about was what you are trying to then say about
8 NIOC, which is that IRGC is arguably, at least based on the
9 Complaint, some kind of proxy for Hezbollah. So if there was
10 evidence or an allegation that the bank had dealt directly
11 with IRGC, perhaps this would be a situation where the case
12 could go forward, but you are trying to establish another
13 link, which is NIOC to IRGC and then IRGC to Hezbollah. And,
14 again -- and, quite frankly, I still think there might be an
15 issue with IRGC because of what you said, which I think is
16 true based on the pleadings, which is that these are very
17 large agencies that have multiple functions, some of which are
18 legitimate and some of which are not.

19 I don't agree with you that Congress sought to
20 address or in any way change the requirement that you at least
21 show that the organization that it would be problematic to
22 deal with is an FT0, or at least so closely aligned with an
23 FT0 to be some kind of front or money-raising operation when
24 it passed JASTA. I think, if anything, it confirmed that you
25 at least have to have a very tight nexus or a reasonably tight

1 nexus between the potentially liable party under the ATA or
2 under JASTA. That I think is true; they didn't make it wide
3 open as you suggest, but rather still tied into some kind of
4 designated terrorist organization.

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

11 THE COURT: Which is Hezbollah.

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

18 (Continued on following page.)
19
20
21
22
23
24
25

1 THE COURT: Let me stop you there. You keep calling
2 it a terrorist agency. It wasn't designated as such back in
3 2004 to '11.

4 MR. OSEN: Correct.

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

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

20 What they were trying to do was to avoid the
21 politically more problematic circumstance where someone can
22 bring a claim based on what would meet the definition of
23 terrorism from the standpoint of 2331, an act of international
24 terrorism, but one that wasn't committed by a designated FTO.
25 They wanted to limit the field to those attacks that would not

1 give rise to any other complications because there were
2 clearly an FTO involved. And that we agree with completely.

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

16 THE COURT: I am going to stop you.

17 Everything you are saying was argued before and I
18 did consider it and just as you said in the beginning, at page
19 44, I think, at least I meant to address exactly the argument
20 you're making about the second element, that given the most
21 generous meaning possible, the second amended complaint
22 alleges that FTO Hezbollah -- and I'm not going to pronounce
23 it correctly -- Kata'ib Hezbollah and the IRGC, which is an
24 SDGT, acting through agents and proxies, are the agencies
25 responsible for committing the acts of international

1 terrorism.

2 So, yes, I am agreeing with everything that you're
3 saying and that is what I applied. You and I just disagree
4 about how I applied it when you then say that NIOC comes under
5 the same umbrella. There I said no because the allegation is
6 only that the defendant SCB worked with NIOC. Okay? And
7 that's why I said you've gone perhaps a bridge too far which
8 may be the best expression because NIOC is a vast agency, and
9 I know I'm repeating myself, that has billions of dollars or
10 millions of dollars that are used for all sorts of purposes,
11 some of which according to the U.S. Government are used to
12 support IRGC and to the extent that IRGC is working with
13 Hezbollah, in turn, to Hezbollah, but you haven't, A,
14 convinced me that they meet the second requirement of JASTA as
15 a person working with the person, sorry, working with the
16 entity that was responsible for the act of terrorism alleged
17 here and, more fundamentally, causation.

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

25 MR. OSEN: Right. I think, Your Honor, maybe I

1 misheard you, but I think you said SCB and I think you meant
2 NIOC.

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

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

8 MR. OSEN: Well, that might not be.

9 THE COURT: Right. I understand what you're saying.
10 I am not sure I agree because my ruling is slightly different
11 because even accepting, as I did, that NIOC has been found to
12 financially support IRGC or, in some ways, engage in financial
13 transactions that may benefit terrorists such as Hezbollah, I
14 still don't think you've met the burden or have sufficiently
15 alleged for purposes of JASTA that they qualify as a person
16 working with the party or the entity that carried out the act
17 of terrorism nor do I think you've met the standard for
18 causation which is a substantial factor in the reasonable
19 chain of causation.

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

1 objections or motions for reconsideration.

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

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

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

18 THE COURT: Yes.

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

24 THE COURT: Yes, you said that. I don't agree with
25 that either. Remember, for primary liability, you're relying,

1 for conspiracy primary liability, which is a bit oxymoronic
2 but I understand what the case law says, you're applying the
3 criminal statute so the standard that should apply is
4 conspiracy for purposes of establishing a 2339A or B
5 violation.

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

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

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

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

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

1 second part of the letter, but the letter seemed to stake out
2 the position at least to my mind that the plaintiffs were
3 relying on the conspiracy theory both for purposes of primary
4 liability under the ATA and then also under JASTA. That
5 certainly was the focus of the briefing thereafter.

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

18 Nowhere in any of your submissions have you actually
19 used the words, We are alleging aiding and abetting liability
20 under JASTA, and even in your briefing now, you simply say
21 that one of the elements is met, namely, a general awareness
22 of the terrorist activities of some of these entities that
23 they provided banking services for, but I just think the way
24 you proceeded is not exactly or I find it a little
25 disingenuous, to be perfectly frank, because you never

1 declared in this case that you were advancing an aiding and
2 abetting theory.

3 There's been so much briefing for the last year and
4 a half or two years, that it seemed to me at some point, post
5 JASTA, and I realize the briefing started before JASTA, that
6 in these many submissions that I've received, that you would
7 have clarified that you were actually claiming aiding and
8 abetting liability or to Judge Irizarry, Chief Judge Irizarry
9 who had the case before me. I think the defense has a theory
10 as to why you didn't do that, because of some of the decisions
11 Judge Irizarry wrote, but nonetheless, I wanted to be clear
12 that I didn't actually believe or interpret your cases
13 alleging aiding and abetting liability under JASTA even after
14 the statute was passed.

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

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

22 Go ahead.

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

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

9 The only other thing that they've pointed to is, as
10 Your Honor pointed out, the allegations with respect to NIOC,
11 the National Iranian Oil Company, and its connection, its
12 alleged connections to the IRGC. I think with respect to
13 that, and before you even get to a causation problem, you run
14 into all the other grounds that Your Honor found were
15 insufficient to plead a claim.

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

22 The fact that there were transactions conducted
23 prior to 2012, in effect, prior to 2008, 2007, for the benefit
24 of the National Oil Company in Iran, really doesn't change
25 that calculus of whether there's factual allegations

1 suggesting that Standard Chartered or any of the other banks
2 entered into an agreement, just focusing on the conspiracy
3 theory here, an agreement to either support terrorism for
4 primary liability purposes or to conspire with, as JASTA says,
5 the person who committed the act of terrorism that injured the
6 plaintiffs here. You know, so that's the first ground, I
7 think, that nothing that has been pointed to in the papers
8 under reconsideration or today really changed that finding or
9 put that finding into doubt.

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

16 That part, really, Your Honor I don't think was
17 reconsidering or changing its ruling with respect to the fact
18 that there hadn't been any conspiracy to support any sort of
19 terrorism in the first part of the opinion. It was simply
20 looking at the statutory language of JASTA which requires,
21 number one, there to be an FTO designated at the time of the
22 relevant attacks that injured the plaintiffs here, so not
23 IRGC, certainly not NIOC but certainly not IRGC which was only
24 designated in 2019, and then you gave the allegations that a
25 defendant either aided or abetted or conspired with the person

1 who committed that act of terrorism, meaning that act of
2 terrorism that was either planned, authorized or carried out,
3 committed by the FTO designated at the time of the attached.

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

16 So I think nothing that has been pointed to changes
17 that and I think that some of the argument is really about the
18 interpretation of the statute which was really not squarely
19 asked to be reconsidered on this motion and it's really not
20 the place to argue about it. I think that was argued for
21 years and there's been a lot of developments that the Court is
22 aware from the Second Circuit on what JASTA means and there's
23 been, since Your Honor's decision, another case that we have
24 cited, the *Kaplan* case from Judge Daniels in the Southern
25 District of New York.

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

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

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

23 Unless Your Honor has any questions --

24 THE COURT: No. That's fine actually and,
25 obviously, as you can tell from my comments toward the end,

1 I'm in agreement with what you are saying.

2 I did want to note another decision that came out of
3 this court in a slightly different context from Judge Garaufis
4 a few days after my decision. It was in the context of a drug
5 cartel and there, the plaintiffs were individuals who were
6 killed or harmed by members of the cartel and they brought it
7 under JASTA and I want to say the ATA. I'm looking at the
8 decision now. I'm sure you're all aware of it, but it's
9 *Zapata v. HSBC Holdings*, it's 2019 Westlaw 49118626, issued
10 September 30, 2019. Docket number 17-CV-6645.

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

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

20 At any rate, Judge Cogan adopted the same reasoning
21 about the issue with causation when you're talking about such
22 a large organization as a cartel and there, as I did, he found
23 that the amount of money, even though it was quite vast that
24 was allegedly handled by the bank for the cartel, was not
25 sufficient to meet the requirements for causation between the

1 conduct and the alleged injuries, meaning the conduct of the
2 bank.

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

5 The other thing I wanted to say was looking at *Boim*,
6 I think what's important about the case is that it stands for
7 the proposition that to give money to an organization that
8 commits terrorist acts is not intentional unless one either
9 knows that the organization engages in such acts or is
10 deliberately indifferent to whether it does not, meaning that
11 one knows that there is a substantial probability that the
12 organization engages in terrorism but one does not care.

13 Now, in that case, there is discussion about being a
14 knowing donor to Hamas and I too would have to go back and
15 look at the facts, but I don't think what you had said,
16 Mr. Osen, is quite right, but I imagine your memory of the
17 case is far better than mine right now, but this notion that
18 there were these intervening *zakats*, that could be likened to
19 NIOC in our scenario, because it was pretty clear as I recall
20 from the decision that *Boim* stands for the concept that where
21 you are knowingly assisting a terrorist organization or at
22 least alleged to have done that, you could be found liable as
23 matter of causation and also as matter of conspiracy or aiding
24 and abetting. Obviously, what *Boim* is best known for and
25 cited for is this notion of primary liability with the

1 secondary characteristic based on the 2339A and 2339B statutes
2 that are the predicate for the 2333(a) claim.

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

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

16 (Recess taken.)

17 (Continued on next page.)

18

19

20

21

22

23

24

25

1 THE COURTROOM DEPUTY: All rise.

2 THE COURT: Have a seat everyone.

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

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

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

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

20 There are, I think, two allegations essentially
21 against Bank Saderat that are interconnected. I believe in
22 2006 they were removed from the U-turn Exemption for the same
23 ostensible reasons that they were later designated, and so
24 they did not incidentally or unknowingly, but presumably
25 knowingly sent money on behalf of the Central Bank of Iran to

1 Hezbollah, or to agents of Hezbollah, along with Hamas and
2 other organizations as well. And they did so specifically,
3 the designation found, through Bank Saderat Iran's London
4 subsidiary, which is the defendant in this case, Bank Saderat
5 PLC.

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

11 MR. OSEN: With Hezbollah, yes.

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

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

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

25 THE COURT: But that is what was done in the

1 decision you cited, the *LeIchook* decision, which I was aware
2 of when I issued my prior decision, but they alleged an FSIA
3 claim there -- oh, no. Actually, they do not. I take that
4 back. Actually, they are awaiting, I think, a decision in the
5 D.C. District Court brought under the FSIA.

6 MR. OSEN: Yes. Because, generally speaking, the
7 Foreign Sovereign Immunities Act venue is District of
8 Colombia. For the subsidiaries of an instrumentality, it
9 would be brought under the ATA.

10 THE COURT: Yeah. Is there anything more you wanted
11 to add with respect to Bank Saderat? Because I will tell you,
12 though I find this particular allegation, and as I did before,
13 slightly closer to what might be sufficient for purposes of
14 JASTA, aiding and abetting, but I don't think it's enough to
15 establish any kind of conspiracy. But even so, I find still
16 there is a problem again with causation because it's quite
17 vague and I just don't think it meets the plausible standard
18 set forth by *Iqbal/Twombly*, though I acknowledge that this one
19 is slightly closer than any of the other defendants, including
20 SCB. But this is a very thin read for purposes of causation
21 and I don't think it suffices. I certainly don't find, as I
22 found for all the other defendants and all the other claims,
23 that it meets the standard for establishing conspiracy that
24 Saderat entered into, but the question I guess is more for
25 aiding and abetting liability. This is why I mentioned what I

1 did about the Complaint not having that claim, but at this
2 point construing it as having one with respect to with Bank
3 Saderat -- but I still just don't find it's enough.

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

6 MR. OSEN: Thank you, Your Honor.

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

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

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

19 THE COURT: Okay. Now you have lost me.

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

22 MR. OSEN: Yes, with respect -- and I recognize this
23 is a five-year saga, so let me take a step back and say that
24 there were seven claims for relief and two of them, one
25 against SCB and one against Commerzbank, were what I would

1 call aiding and abetting claims, but they were not secondary
2 liability aiding and abetting; they were, if you will, *Boim* or
3 primary liability with the elements of aiding and abetting.
4 That was as to Commerzbank, I think it was Claim No. 6 and SCB
5 Claim No. 7.

6 The other claims, and that's why that was always the
7 focus of the parties' exchanges were Claims One and Two for
8 relief, which focused on conspiracy, either for violations of
9 2339A or 2339B, and then there were subsequent claims for I
10 think it's Section 2332(d), as well, but we need not go down
11 that road today. So there was just no claim in the original
12 *Freeman* complaint for aiding and abetting against Bank
13 Saderat.

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

20 THE COURT: Okay.

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

22 THE COURT: All right. Well, that's actually a
23 helpful clarification. I don't find that it does meet the
24 elements for the reasons that I said in the decision when
25 speaking about all of the defendants and the primary liability

1 conspiracy claim and as well for purposes of the JASTA claim,
2 which would also require some finding of a conspiracy -- or,
3 I'm sorry, a sufficiently pled conspiracy.

4 I do want to note that, in your Amended Complaint,
5 what you alleged was in the Treasury Department press release
6 to me was relevant or was the main reason I think it's just
7 not enough to meet those elements, namely those for
8 conspiracy. Because even this press release, which is
9 obviously not findings in and of themselves, say that Bank
10 Saderat and its branches and subsidiaries, which includes
11 3,200 branch offices, has been used by the Government of Iran
12 to channel funds to terrorist organizations, including
13 Hezbollah and then other terrorist organizations, and then it
14 has a sentence that you focus on, which is: For example,
15 between 2001 and 2006, Bank Saderat transferred 50 million
16 from the Central Bank of Iran through its subsidiary in
17 London, which is a defendant here, to its branch in Beirut for
18 the benefit of Hezbollah fronts in Lebanon that support acts
19 of terrorism. And though that certainly was sufficient in the
20 Treasury Department's mind to take certain actions in
21 designating Bank Saderat PLC as an SDGT, I don't think it's
22 sufficient for purposes of establishing conspiracy under 2339A
23 or 2339B for purposes of an ATA claim, nor do I find it
24 sufficient for conspiracy under JASTA. Those elements
25 essentially being the same, at least in terms of a conspiracy.

1 So, I'm not altering my decision in that regard
2 either. I had mistakenly thought, coming in here, that might
3 be an aiding and abetting claim made on behalf or with respect
4 to Bank Saderat, as just as I said a moment ago perhaps under
5 JASTA that might be a closer call. But I think, as a result
6 of all this -- and let me just make formal my decision,
7 because I don't intend to write, given the longevity of this
8 case and even the pending motions -- I certainly respect the
9 views that have been expressed by the plaintiffs and the
10 efforts that has gone into bringing the case, to be sure. As
11 I said in my decision, the result may not be satisfactory from
12 a moral or policy point of view, but my belief is that I, as a
13 judge, must follow what I think the precedent is showing me in
14 terms of the path or the path that I think that is being lit
15 by the Second Circuit in other cases -- and other cases,
16 rather, so I am affirming my prior decision in denying the
17 reconsideration motion, or partial reconsideration motion. I
18 will note that the standard is strict with respect to
19 reconsideration and a motion for reconsideration is an
20 extraordinary request that is granted only in rare
21 circumstances, such as where the court failed to consider
22 evidence or binding authority. The standard for granting such
23 a motion is strict and reconsideration will generally be
24 denied unless the moving party can point to controlling
25 decisions or data that the Court overlooked; matters, in other

1 words, that might reasonably being expected to alter the
2 conclusion reached by the Court. And I am citing a 2019
3 decision from the circuit, *Van Buskirk v. The United Group of*
4 *Companies, Inc.*, 935 F.3d 49 at page 54.

5 Here, as I have said and obviously discussed with
6 Mr. Osen, I feel that I have considered both the facts and the
7 law that the plaintiffs are relying on for reconsideration.
8 As the defense has noted, I did accept the allegations in the
9 Complaint which demonstrated or could be construed as
10 demonstrating a number of the facts that the plaintiff still
11 rely on in alleging or saying that a claim for conspiracy, or
12 even aiding and abetting, should go forward either under -- as
13 primary liability under the ATA or a secondary liability under
14 JASTA. So I don't see and I'm not persuaded that the
15 extraordinary circumstances exist for me to change my
16 decision. Certainly the parties will have an opportunity to
17 take this up with a higher authority. As I said before, the
18 time under Federal Appellate Rule procedure for is tolled
19 until today and so now it begins to run for plaintiffs to
20 notice their appeal, which I assume they will.

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

23 MR. OSEN: Just two things, Your Honor.

24 THE COURT: Yes.

25 MR. OSEN: First, the process point. As Your Honor

1 knows, we have two additional cases.

2 THE COURT: Yes.

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

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

1 don't know if there are any.

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

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

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

22 THE COURT: Well, that is certainly an option. You
23 can agree to file an Amended Complaint and the only
24 counterfactual thing is that it wouldn't acknowledge the
25 plaintiffs in this case had been -- the claims have been

1 dismissed in this case. But if you wanted to do that and the
2 defense could go through the motions, so to speak, of moving
3 to dismiss, I could issue a ruling, but it seems to me better
4 to just come up with some agreement, and if it happens that my
5 decision is reversed in whole or in part, then you can file an
6 Amended Complaint at that time. It probably makes more sense
7 in terms of conserving your resources, I think.

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

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

18 MR. OSEN: Right.

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

25 THE COURT: Now given human nature, is giving you 30

1 days too long because you will use every bit of it or what
2 should we do?

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

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

14 THE COURTROOM DEPUTY: Right before Thanksgiving.

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

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

21 Just to give the mechanics, in the case that is not
22 yet dismissed that purports to be the consolidated complaint
23 for all these cases -- this is a strange creature, that's why
24 I was saying it is somewhat counterfactual because some of the
25 claims have already been dismissed, but I think it would make

1 the Second Circuit's job a little bit easier in terms of
2 focusing on the claims.

3 So if you bring me another case, we can consolidate
4 it that way. I leave that up to my deputy, she is much better
5 at figuring these things out in terms of what makes the most
6 sense in terms of mechanics.

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

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

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

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. OSEN: Thank you, Your Honor.

MR. FINN: Thank you.

(Matter concluded.)

* * * * *

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

/s/ Michele D. Lucchese

October 30, 2019

Michele D. Lucchese

DATE