UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROBERT BARTLETT, *et al.*, Plaintiffs, -against- SOCIETE GENERALE DE BANQUE AU LIBAN SAL, *et al.*, Defendants.	No. 19-cv-00007 (CBA) (TAM)

AMENDED JOINT MEMORANDUM OF LAW IN SUPPORT OF MOVING DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

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The analysis and application of the pleading requirements under the Justice Against Sponsors of Terrorism Act, 18 U.S.C. § 2333(d)(2) ("JASTA") in *Kaplan v. Lebanese Canadian Bank, SAL*, 999 F.3d 842 (2d Cir. 2021) and *Honickman v. BLOM Bank, SAL*, No. 20-575, 2021 WL 3197188 (2d Cir. July 29, 2021) ("*Honickman*") require dismissal of the remaining claims against the Moving Defendants in the Second Amended Complaint ("SAC").[1]

I. The SAC's Conspiracy Claim Fails Because a JASTA Conspiracy Requires an Agreement with the Person Who Committed the Terrorist Act

As explained in the Moving Defendants' motion to dismiss the FAC, incorporated by reference here, Plaintiffs have not met any of the requirements for a conspiracy claim. *See* ECF No. 139-1 at 44-49 (Jan. 31, 2020); ECF No. 140 at 19-24 (Jan. 31, 2020). In *Kaplan*, the Second Circuit confirmed (as Moving Defendants had argued) that the text of § 2333(d) requires JASTA conspiracy claims to allege that a defendant "'conspire[d] *with*' the principal" who "committed" the relevant acts of international terrorism. *Kaplan*, 999 F.3d at 855 (emphasis added). The court contrasted JASTA's text on aiding-and-abetting—which it held encompasses indirect assistance to the principal—with the text on conspiracy, which requires that the defendant conspire "*with* the person who committed such an act of international terrorism." *Id.*

The SAC does not allege that any Moving Defendant conspired "with the person who committed" any alleged act of international terrorism. *See* 18 U.S.C. § 2333(d)(2). As this Court held with respect to the FAC, the SAC alleges (at most) that the Moving Defendants provided banking services to entities associated with Hezbollah, and that Hezbollah "trained" the Iraqi militias, "designed" weapons used by Iraqi militias in the alleged acts of international terrorism (the "Attacks"), or "planned the Attacks." *See Bartlett v. Société Générale de Banque Au Liban*

[1] The eleven Moving Defendants are: Banque Libano Française SAL ("BLF"), Bank Audi SAL ("Bank Audi"), Byblos Bank SAL, Bank of Beirut and the Arab Countries SAL, Lebanon and Gulf Bank SAL, BLOM Bank SAL ("BLOM"), Fransabank SAL ("Fransabank"), MEAB Bank s.a.l. ("MEAB"), Fenicia Bank s.a.l. ("Fenicia"), Bank of Beirut SAL ("Bank of Beirut"), and Société Générale de Banque au Liban S.A.L. ("SGBL"). The Moving Defendants reserve all defenses asserted in their motion to dismiss the First Amended Complaint ("FAC").

SAL, No. 19-cv-00007, 2020 WL 7089448, at *8 (E.D.N.Y. Nov. 25, 2020) ("Op."). To be sure, the SAC maintains that the Attacks were "committed" by Hezbollah, *see, e.g.*, SAC ¶ 1, but such conclusory allegations are belied by the SAC's detailed descriptions of each Attack, which spell out that bombs were "emplaced," or otherwise launched, by Iraqi militia operatives.[2] It is not enough to allege that a Moving Defendant conspired with an intermediary that assisted Hezbollah, which in turn assisted the "person who committed" a terrorist act. 18 U.S.C. § 2333(d)(2). A conspiracy "with" the "person who committed" the act—and not merely "planned" or "authorized" it—is required. *See* ECF No. 140 at 24 (discussing 18 U.S.C. § 2333(d)(2)). Because the SAC does not allege that Moving Defendants conspired with the person that "committed" the Attacks—whether that person is an Iraqi militia or Hezbollah—it does not state a claim for conspiracy.

II. The SAC's Aiding-and-Abetting Claim Does Not Adequately Allege the General Awareness and Substantial Assistance Elements of *Halberstam*

Honickman and *Kaplan* demonstrate that the aiding-and-abetting claims against the Moving Defendants are fatally defective. First, the "general awareness" prong of *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), requires allegations that a bank defendant was generally aware of its role in acts of international terrorism "at the time that it provided banking services" to a customer "closely intertwined" with such acts. *Honickman* at *10. Additionally, *Halberstam*'s "substantial assistance" prong requires pleading of specific facts giving rise to an inference that the defendant had "actual knowledge" that it was assisting the "principal violation," *i.e.*, the "wrongful act that caused injury," directly or indirectly. *Kaplan*, 999 F.3d at 863–64; *Honickman* at *12 n.16. The SAC does not meet either requirement with respect to any Moving Defendant.

[2] *See, e.g.*, SAC ¶¶ 2088, 2103, 2111, 2126, 2132, 2142, 2148, 2160, 2170, 2179, 2200, 2212, 2222, 2234, 2240, 2248-49, 2256-57, 2265, 2271, 2280, 2290, 2295, 2304, 2320, 2329, 2335, 2346, 2356, 2366, 2379, 2385.

A. Undated Assertions About Alleged Banking Services to the Three Customers Alleged to Be "Closely Intertwined" with Terrorist Activities Do Not Satisfy the General Awareness Requirement

In *Honickman*, the Second Circuit identified the two steps needed to plead "general awareness" where a bank is accused of aiding and abetting an act of international terrorism committed, planned or authorized by an FTO: the complaint must plausibly allege "as a threshold requirement" that the bank was generally aware of its customer's connection to the principal tortfeasor "at the time that it provided banking services" and next, that the customer was "closely intertwined with" the principal's violent terrorist activities. *Honickman* at *10. Conversely, providing financial services to customers that are not "closely intertwined" with the principal's terrorist activities does not suffice to allege "general awareness." *Id*. at *12 n.21. *Honickman* rejects the view, advanced by Plaintiffs here, *see* ECF No. 142 at 61, 68, that the "fungibility" of money can replace their obligation to show the customer's link to violent terrorist acts. *Honickman* at *8.

The SAC's allegations about the Moving Defendants do not satisfy this element.

No "general awareness" of links to Hezbollah or Iraqi militias. *Honickman* affirmed the dismissal of claims against BLOM because the complaint in that case did "not plausibly support an inference that BLOM Bank had the requisite general awareness at the time that it provided banking services to the Three Customers." *Honickman* at *10. The same is true here. As noted in the Court's November 25 opinion, the SAC alleges that each Moving Defendant (except Bank of Beirut)[3] provided financial services to one or more entities publicly identified as a "Specially

[3] SGBL should also be excluded because the SDGTs identified in the Court's opinion as its alleged customers migrated from Lebanese Canadian Bank ("LCB") in the asset and liability purchase. *See* Op. at *2 (chart relying on FAC ¶ 5690); *see also* SAC ¶ 5730. This Court has ruled that there is no personal jurisdiction for successor liability claims against SGBL, Op. at *16-18, and the SAC does not allege SGBL independently provided services to any SDGTs before the asset sale, *see* SAC ¶¶ 1499-1518, or *after* the sale of assets was completed and *before* the last Attack. *See* SAC ¶ 1495 (SGBL investigation and alleged subsequent LCB customer migration in 2011-2012); ¶¶ 5730, 5732, 5734 (SGBL liability based on acts of LCB).

Designated Global Terrorist" ("SDGT") for their support to Hezbollah—*not* to Iraqi militias—some time before the last Attack on November 14, 2011. Op. at *2. But the SAC's allegations about the Moving Defendants' purported services for SDGTs that supported Hezbollah say nothing about *when* those services were provided,[4] and cannot generate a valid inference of "general awareness." *See Honickman* at *10 (holding inference of general awareness could not be drawn from "undated" press coverage connecting alleged customers to Hezbollah).

To illustrate the point, consider a Moving Defendant that stopped providing services to a customer *before* its designation as an SDGT. In the absence of other alleged facts or events known to the Moving Defendant that would connect the customer to illegal or tortious acts "at the time that it provided banking services," any assistance would have been provided innocently. *Id.* at *10. A *post hoc* designation cannot be the sole basis for inferring that a Moving Defendant had "general awareness" that it was involved in illegal or tortious activity. *See id.* at *11 (holding inference of general awareness could not be drawn from customers' *post hoc* designations).

In its November 25, 2020 opinion, the Court held that, in addition to SDGT designations, several "report[s] and events publicly connected the Bank Customers to Hezbollah." Op. at *2; *see also id*. at *10. But *none* of those allegations connects the alleged customer to illegal or tortious acts *at the time* a Moving Defendant allegedly provided it with banking services:

- A 2006 news report that Hezbollah used Lebanese TV to solicit donations to an account held at BLF, SAC ¶ 427, also reported that the account "shows insignificant movements and balances" and that upon receiving the reporter's inquiry, BLF's "Compliance Unit has closed the said account." *See* Ex. A (ECF No. 209-3) (quoting a BLF employee).[5]

[4] *See, e.g.*, SAC ¶¶ 1497, 1519, 1548, 1593, 1624, 1663, 1697–98, 1726–28, 1731–33, 1805, 1808, 1854.

[5] On this motion to dismiss, the Court may consider documents incorporated by reference in the SAC, such as Exhibits A and B (ECF Nos. 209-3 and 209-4). *See Kleinman v. Elan Corp., plc*, 706 F.3d 145, 152 (2d Cir. 2013); *Daniel v. Mondelez Int'l, Inc.*, 287 F. Supp. 3d 177, 183 (E.D.N.Y. 2018).

- A 2009 seizure warrant served on a U.S. correspondent bank for Bank Audi did not, as the SAC contends, "expressly state[]" that an alleged customer of Bank Audi "had been charged with providing material support to an FTO under 18 U.S.C. § 2339B." SAC ¶ 1206. In fact, the warrant was silent about the reason for the seizure. *See* Ex. B (ECF No. 209-4) (warrant and FBI cover letter explaining correspondent bank's obligations).
- Reports that Israeli jets bombed the offices of Fransabank and MEAB in 2006 did not link those events to any particular bank customer. SAC ¶¶ 1524, 1590. While one of the bombings allegedly was provoked by Hezbollah's public solicitation for donations to a "specific account" at MEAB, SAC ¶ 1590, the SAC does not allege that MEAB continued to service that unnamed account after the public solicitation or the bombing.
- A 1986 newspaper article and a 2002 U.N. report referred to accounts at Jammal Trust Bank and LCB, neither of which is a Moving Defendant. *See* SAC ¶¶ 426, 912.

Honickman rejected the use of similar "limited public sources" as the basis for "general awareness," holding that they "pale in comparison to the detailed, numerous sources that sufficed in *Kaplan*," such as Hezbollah's public statements about LCB's customers. *Honickman* at *11.[6] Nor can Plaintiffs rely upon the alleged migration of "[c]ertain LCB accounts held by individuals and entities associated with Hezbollah," Op. at *3, to certain Moving Defendants because the SAC does not plausibly allege that any Moving Defendant provided banking services to those accounts *before* the last Attack *and* was generally aware at the time of any services that the customers had accounts at LCB that had been forcibly closed. *See* Amended Bank of Beirut Brief (adopted by reference here). Indeed, the SAC avers that some of the alleged "migration" did not occur until 2012. SAC ¶ 105 (LCB accounts "migrated to other Defendants in 2011-2012").

[6] In addition, none of the Moving Defendants is alleged to have "violated banking regulations" or to have "disregarded its own internal policies" in serving their alleged customers, critical factors in the ruling that general awareness had been adequately pled in *Kaplan*, 999 F.3d at 858.

The SAC's consistent ambiguity on the determinative fact of *when* the Moving Defendants allegedly provided services to SDGTs cannot be accidental. Plaintiffs amended their complaint twice after the Moving Defendants' first Fed. R. Civ. P. 12(b)(6) motion identified this missing element of their aiding-and-abetting claim. Although the SAC pleads the account numbers[7] for some alleged SDGT customers, and granular details[8] for transactions of customers that were *not* SDGTs at the relevant time, it shies from making the crucial allegation that any Moving Defendant performed a transaction for an alleged customer *after* its SDGT designation.

In this context, no Moving Defendant can validly be inferred to have provided services to an SDGT after its designation. *Honickman* refused to rely on an "undated" allegation of a connection to an FTO. *Honickman* at *10. As *Kaplan* reminds us, "[i]f the facts alleged are ambiguous, the applicable substantive law defines the range of inferences that are permissible." *Kaplan*, 999 F.3d at 854 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)). *Honickman* requires that a plaintiff plead general awareness *at the time* alleged services were provided. It is not plausible to infer that any Moving Defendant provided (or continued to provide) bank services to an entity *after* it was designated as an SDGT in the absence of *any* supporting factual evidence in the SAC's 5,735 paragraphs. The SAC belies any such an inference because it alleges that most Moving Defendants maintained compliance departments to track, among other things, SDGT designations.[9] This would have been a self-defeating exercise if those Moving Defendants habitually ignored what they tracked. *Kaplan* reminds us that courts must use

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[7] *See, e.g.*, SAC ¶¶ 426, 603, 1519, 1699, 1726, 1727.

[8] *See* SAC ¶¶ 570 (account maintained in 2001); 648 (transaction on December 1, 2007); 863 (transactions between January and May, 2001); 1154 (transactions between 2007 and 2011); 1244 (transactions from August 2006 through February 2008); 1331 n.109 (transactions on January 28-29, 2003). Other allegations in the SAC describe purported accounts held by the Defendant Banks, services provided, transactions and amounts, and counterparties. *See, e.g.*, SAC ¶¶ 1501-06, 1512, 1516, 1517, 1519, 1527-33, 1551-53, 1559, 1560, 1564-66, 1594-99, 1631, 1634, 1639, 1641, 1644, 1646, 1649, 1666, 1667, 1670, 1675, 1680, 1681, 1683, 1693, 1700, 1703, 1704, 1705, 1714, 1718, 1730-34, 1761, 1781, 1782-1791, 1793, 1807-10, 1815, 1816, 1821, 1846, 1847.

[9] *See, e.g.*, SAC ¶¶ 154, 170, 187-190, 202, 214-216, 229, 240-241, 253-255, 267, 299.

"common sense" in determining which inferences may be drawn on a motion to dismiss. *Kaplan*, 999 F.3d at 854. Here, common sense does not support inferring that the Moving Defendants provided banking services to *any* customer *after* it was designated as an SDGT where the copiously detailed (and exceptionally long) SAC makes no such allegation.

Virtually all of the alleged customers are not alleged to be "closely intertwined" with acts of terrorism. As this Court recognizes, only three of the 200-plus alleged customers identified in the SAC (IRSO, Martyrs Foundation, and IKRC) are purported to have been "closely intertwined" with Hezbollah's acts of terrorism, Op. at *2, and none of them is alleged to be linked to terrorist acts by Iraqi militias. Five of the Moving Defendants—Bank Audi, Bank of Beirut, BLOM, Fenicia and SGBL[10]—are not alleged to have provided banking services to *any* of these alleged customers. *See id*. Under *Honickman*, *Kaplan*, and this Court's November 25 ruling, this is yet another reason that the SAC fails to allege "general awareness" with respect to these five Moving Defendants. And, as discussed above, the SAC's undated allegations about *when* the other six Moving Defendants allegedly maintained accounts for these three SDGTs do not establish "general awareness" of the customers' alleged links to illegal or tortious acts.

B. Undated Assertions About Alleged Banking Services Do Not Satisfy the "Actual Knowledge" Requirement for Substantial Assistance

In *Kaplan*, the Second Circuit held that the third prong of *Halberstam*—whether the defendant has "knowingly and substantially assist[ed] the principal violation"—means that the defendant must "'know[]' that it is providing 'assistance,' whether directly to the FTO [*i.e.*, the party that committed the attack][11] or indirectly through an intermediary." *Kaplan*, 999 F.3d at

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[10] The SAC alleges that "phantom" customer accounts of Martyrs Foundation migrated from LCB to SGBL by virtue of the asset purchase, but does not allege SGBL provided any services to that entity. *See* n.3, above.

[11] In *Kaplan* and *Honickman*, the FTO and the perpetrator of the "principal violation" were alleged to be one and the same, and accordingly, both cases use the shorthand "the FTO" to refer to the "principal violator." *See, e.g.*, *Honickman* at *10 (referring to "the relationship between the defendant and the FTO" instead of the "principal violator" in discussing substantial assistance). In this case, the SAC's allegations fail to establish substantial assistance whether Iraqi militias or Hezbollah are considered to be the "principal."

863–64 (citations omitted). Assistance that is given "innocently or inadvertently" does not meet this prong. *Id*. at 864. Critically, while a complaint may contain "general allegations" of a defendant's "actual knowledge" that it is assisting in the principal violation, plaintiffs are "*required* to include allegations of the facts or events they claim give rise to an inference of knowledge" in order to plead knowing and substantial assistance. *Id*. at 863–864 (emphasis added). Moreover, because an "actual knowledge" analysis entails an individualized assessment of the state of mind allegations against each Moving Defendant, the Court must separately consider the "facts or events" alleged with respect to each of them.[12]

Unlike in *Halberstam*, where the defendant Hamilton directly assisted the principal violator Welch, in this case, the SAC alleges indirect assistance in the Attacks via (a) the Moving Defendants' alleged customers in Lebanon, to (b) Hezbollah, to (c) the Iraqi militias. Thus, to establish a Moving Defendant's "actual knowledge" that it was assisting an Attack, the SAC must allege "facts or events" supporting an inference that the defendant had "actual knowledge" of each intermediary's contribution to "the principal violation" when the assistance was given. *Kaplan*, 999 F.3d at 863–64.[13] The SAC does not meet the "actual knowledge" prong of substantial assistance because it *never* alleges facts or events leading to a plausible inference that *any* Moving Defendant provided financial services to an entity *after* learning *both* (1) that the entity was connected to Hezbollah; *and* (2) that Hezbollah was using funds from those customers to provide training or other assistance for Attacks committed by militias in Iraq.

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[12] *See In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 831 (S.D.N.Y. 2005) ("[I]n light of 'the extreme nature of the charge of terrorism, fairness requires extra-careful scrutiny of Plaintiffs' allegations as to any particular defendant. . . .'"). On this motion, the Court should not attribute to any Moving Defendant the allegations made against LCB, which has defaulted. *See* ECF No. 203 (July 7, 2021).

[13] *Honickman* notes that *Kaplan* does not expressly address the separate components of "actual knowledge" where assistance is alleged to have been given "indirectly through an intermediary." *Honickman* at *12 n.16. But these components are implicit when an "actual knowledge" requirement is applied in the context of indirect assistance. Logically, one cannot know that one is assisting Party C by providing services to Party A unless one knows the chain of connections (1) from Party A to Party B and (2) from Party B to Party C.

No "actual knowledge" that any alleged customer was connected to Hezbollah. As discussed above, the SAC's failure to allege that any Moving Defendant provided services to an SDGT *after* its designation is fatal to any assertion of "actual knowledge."

No "actual knowledge" that Hezbollah assisted terrorist acts by Iraqi militias. The SAC itself avers that the work of Hezbollah's "terror cells" is "conducted clandestinely." SAC ¶ 632. The SAC's chief sources connecting Hezbollah to terrorist activities committed by Iraqi militias are government intelligence reports that only became "publicly disclosed over the past few years." SAC ¶ 1954. The SAC does not identify any public sources, such as media articles, asserting that Hezbollah provided training or weapons to Iraqi militias using funding from the Moving Defendants' alleged customers.[14] *See Honickman* at *12 n.18 ("public sources such as media articles" rather than information that is merely "publicly available" are needed to "plausibly suggest a defendant's knowledge"). The SAC's failure to identify "public sources" that could support a plausible inference that any Moving Defendant had "actual knowledge" that Hezbollah was using its banking services to assist Iraqi militias is also fatal to Plaintiffs' claims.

Because the SAC does not allege "facts or events" leading to a plausible inference that any Moving Defendant had "actual knowledge" that it was assisting Iraqi militias' terrorist acts, it does not allege the "substantial assistance" prong of a JASTA aiding-and-abetting claim.

III. The Attacks by Iraqi Militias Were Not a Reasonably Foreseeable Result of the Alleged Banking Services

Honickman explains that while foreseeability is "central to the *Halberstam* framework, and as a result, to JASTA aiding-and-abetting liability," it is not specifically attached to either *Halberstam's* "general awareness" or "knowing and substantial assistance" elements. *Honickman*

[14] The SAC alleges that in 2005, the BBC reported that Iran denied the U.K.'s accusation that it was supplying weapons to Iraqi insurgents via Hezbollah. SAC ¶ 1959. This denial is akin to the reports that ARB was "believed by some to have links to AQI" that failed to establish "general awareness" in *Siegel v. HSBC N. Am. Holdings Inc.*, 933 F.3d 217, 224 (2d Cir. 2019).

at *6, *12 n.10. Rather, foreseeability limits the "extent of liability under an aiding and abetting theory." *Id*. at *12 n.10. Critically, the "foreseeability principle" requires that "the act that caused the plaintiff's injury" be foreseeable. *Honickman* at *5; *see id*. at *9 ("the 'principal violation' must be foreseeable from the illegal activity that the defendant assisted.").

Here, the "principal violations" are the Attacks, committed by Iraqi militias, which present an even more "attenuated" relationship between defendant and principal than in *Kaplan*, *Honickman* or even *Siegel*. *Id*. at *10. Nothing in the SAC suggests that *those* attacks were a foreseeable consequence of the Moving Defendants' alleged financial services in Lebanon. The foreseeability of the murder in *Halberstam* is not instructive because in *Halberstam*, unlike in this case, the alleged aider-and-abettor directly assisted Welch, the person who "performed the injury-causing act." *Honickman* at *10. *Halberstam* would be analogous *only* if Welch (the bank customer) gave some of the proceeds of his burglaries to a third party (Hezbollah), who then gave a gun to a fourth party (Iraqi militias), who then used it to commit a murder. Nor can any useful analogy be drawn from *American Family Mut. Ins. Co. v. Grim*, 440 P.2d 621 (Kan. 1968), discussed in *Honickman*, because the defendant there could reasonably foresee that a church break-in "at night" might require illumination. *Honickman* at *12 n.9. Nothing in the SAC's allegations concerning banking services in Lebanon similarly requires that Hezbollah train or design weapons for Iraqi militias. Because the SAC does not plausibly allege that any Attack in Iraq reasonably could be foreseen from the banking services allegedly provided to Hezbollah in Lebanon via the Moving Defendants' alleged customers, Moving Defendants cannot be held liable to Plaintiffs under JASTA.

Conclusion

For the reasons stated above, *Honickman* and *Kaplan* require the dismissal of the SAC's conspiracy and aiding-and-abetting claims as a matter of law.

Respectfully submitted,

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