19-3970

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

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

(*Caption continued on inside cover*)

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

BRIEF FOR PLAINTIFFS-APPELLANTS

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Plaintiffs-Appellants,

—against—

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

Defendants-Appellees.

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JURISDICTIONAL STATEMENT

The District Court had exclusive jurisdiction over this action under 18 U.S.C. §2338. It entered final judgment on its grant of Appellees-Defendants' ("Defendants") motions to dismiss on September 18, 2019. Appellants-Plaintiffs ("Plaintiffs") filed a timely notice of appeal on November 26, 2019, of the District Court's September 16, 2019, decision granting Defendants' motions to dismiss; September 18, 2019, judgment dismissing Plaintiffs' claims; and October 28, 2019, Order denying Plaintiffs' motion for partial reconsideration. This Court has jurisdiction over this appeal under 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

1. Whether the District Court erred by applying the criminal conspiracy law standard of intent to support terrorism to decide whether the Second Amended Complaint ("SAC") stated a claim for conspiracy under §2333(d)(2), instead of the civil conspiracy standard set forth in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983) that Congress identified as the proper legal framework for how §2333(d) liability should function.

2. Whether the District Court erred by construing §2333(d)(2) to override universal conspiracy law principles and §2333(d)(2)'s statutory language by requiring that Defendants conspire "directly" with a Foreign Terrorist Organization ("FTO").

3. Whether the District Court erred by applying the "substantial factor" standard for proximate cause from *Rothstein v. UBS AG*, 708 F.3d 82 (2d Cir. 2013) to the SAC's conspiracy allegations instead of the "foreseeability" standard set out in *Halberstam*, and by holding that *Rothstein* was not satisfied because none of the Iranian entities (including the Islamic Revolutionary Guards Corps ("IRGC")) for which Defendants laundered funds "solely

exist for" or use "all" of the disguised funds for "terrorist purposes," and therefore have exculpatory "legitimate functions."

4. Whether the District Court erred by applying *Rothstein*'s "substantial factor" standard for proximate cause to Defendants' own conduct, instead of *Halberstam*'s "substantial assistance" standard, for the SAC's aiding and abetting claims.

STATEMENT OF THE CASE

A. Parties

Plaintiffs are primarily family members and estates of U.S. service members who were killed or wounded in terrorist attacks in Iraq between 2004 and 2011 ("Attacks") that were jointly directed and committed by the FTOs Hezbollah and the IRGC. They seek damages pursuant to the civil provisions of the Anti-Terrorism Act ("ATA"), as amended by the Justice Against Sponsors of Terrorism Act ("JASTA"), SPA-253-58, against ten financial institutions that conspired with Iran and its agents and instrumentalities, including Hezbollah and the IRGC.

Defendants are HSBC Holdings PLC, HSBC Bank PLC, HSBC Bank Middle East Ltd., HSBC Bank USA, N.A. ("HBUS") (collectively, "HSBC"), Barclays Bank PLC ("Barclays"), Standard Chartered Bank ("SCB"), Royal Bank of Scotland, N.V. ("RBS"), Credit Suisse AG ("Credit Suisse"), Commerzbank AG ("Commerzbank") and Bank Saderat PLC ("Saderat"). Apart from HBUS, they are all foreign financial institutions headquartered in the United Kingdom, Germany or Switzerland. All but Saderat and two HSBC subsidiaries have previously entered

into Deferred Prosecution Agreements ("DPAs"), admitting that they knowingly and unlawfully laundered enormous sums in U.S. dollars ("USD") through the United States on behalf of Iranian agencies and instrumentalities. Saderat has not admitted to any wrongdoing but was designated by the U.S. Department of the Treasury ("Treasury") as a Specially Designated Global Terrorist ("SDGT") pursuant to Executive Order 13,224, 66 Fed. Reg. 490708 (Sept. 23, 2001), in 2007 for channeling millions of USD to Hezbollah and other terrorists.

B. Procedural History

Plaintiffs filed their original Complaint on November 10, 2014, a First Amended Complaint on April 2, 2015, and the SAC[1] on August 17, 2016, adding additional Plaintiffs and further factual allegations, and attaching a copy of an internal report prepared for SCB (referred to as the *Promontory Report* herein), which had been disclosed to Plaintiffs by an anonymous whistleblower. The SAC stated seven claims for relief under 18 U.S.C. §2333(a). The first and second claims were directed against all Defendants and predicated on conspiracy to provide material support in violation of 18 U.S.C. §§2339A and 2339B, respectively. The third and fourth claims (directed against HBUS, and SCB, RBS and Commerzbank, respectively) were predicated on violations of 18 U.S.C. §2332d(a). The fifth and

[1] References to the SAC, the operative complaint, A-318-927, are by paragraph number ("¶__").

sixth claims were directed against Commerzbank for providing material support in violation of §§2339A and 2339B, respectively. The seventh claim was directed at SCB for providing material support in violation of §2339A. All seven §2333(a) claims were set forth as so-called "primary liability" claims. *See Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 691-92 (7th Cir. 2008) (*en banc*) ("*Boim III*").

On September 14, 2016, Defendants filed motions to dismiss the SAC. Two weeks later, on September 28, 2016, Congress enacted JASTA. In so doing, it affirmed its intent "to provide civil litigants with the broadest possible basis [under the ATA] … to seek relief against persons, entities, and foreign countries, wherever acting and wherever they may be found, that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States." SPA-255, §2(b). It therefore broadened the basis for relief by adding §2333(d)(2), establishing secondary civil liability under the ATA for aiding and abetting and conspiracy. *See Linde v. Arab Bank, PLC*, 882 F.3d 314, 328 (2d Cir. 2018) (describing JASTA as an "expansion" of the ATA).

Because §2333(d) operates retroactively, *id.* at 328, when Plaintiffs filed their Opposition to the motions to dismiss on October 11, 2016, they re-asserted each of their primary liability claims and the alternative theories of civil conspiracy liability under §2333(d) for their first and second claims against all Defendants, and civil

aiding and abetting liability under §2333(d)(2) for their fifth, sixth and seventh claims.

On July 11, 2017, District Judge Dora L. Irizarry referred Defendants' pending motions to dismiss to Magistrate Judge Cheryl L. Pollak. On July 27, 2018, Judge Pollak issued a lengthy and detailed Report & Recommendation ("R&R") finding, *inter alia*, that the SAC plausibly pleaded the elements of §2333(d)(2) and recommending that Defendants' motions to dismiss be denied in their entirety. *Freeman v. HSBC Holdings PLC*, No. 14-cv-6601, 2018 WL 3616845 (E.D.N.Y. July 27, 2018). On August 31, 2018, Defendants filed objections to the R&R.

On May 8, 2019, the case was reassigned to District Judge Pamela K. Chen. On September 16, 2019, Judge Chen issued a Memorandum & Order noting Judge Pollak's "exceedingly thorough R&R," SPA-3, but rejecting the Recommendations in deference to what she characterized as a "decided trend toward disallowing ATA claims against defendants who did not deal directly with a terrorist organization or its proxy." *Id.* at SPA-2, n.2. She therefore dismissed all the claims in their entirety, and on September 18, 2018, the Clerk of Court entered judgment for Defendants.

On September 26, 2019, Plaintiffs filed a motion for partial reconsideration of the dismissal, limited to their §2333(d)(2) aiding and abetting and conspiracy claims against SCB and their §2333(d)(2) conspiracy claim against Saderat. Saderat did not respond to Plaintiffs' motion. On October 28, 2019, the District Court held

oral argument on Plaintiffs' motion and issued a bench ruling denying Plaintiffs' motion as to both SCB and Saderat. On November 26, 2019, Plaintiffs timely filed the instant appeal, challenging only the District Court's dismissal of their civil conspiracy and civil aiding and abetting claims under §2333(d)(2).[2]

C. Statement of Facts

1. The Iranian Regime Conducted a Terror Campaign Against U.S. Forces in Iraq.

Hezbollah has been a designated FTO since 1997, ¶11, and the IRGC was designated an FTO in 2019, in part for its role in attacks of the kind described in this case: "[t]he Iranian regime is responsible for the deaths of at least 603 American service members in Iraq since 2003 … in addition to the many thousands of Iraqis killed by the IRGC's proxies." State Dep't Press Release, "Designation of the Islamic Revolutionary Guard Corps," cited in A-1072 ("IRGC Designation").[3] The U.S. government found that the IRGC "has engaged in terrorist activity or terrorism

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[2] The District Court dismissed Plaintiffs' allegations against Commerzbank (Plaintiffs' sixth claim for relief) based on a finding of lack of pendent personal jurisdiction over that claim, because it dismissed Plaintiffs' conspiracy claims against Commerzbank. Assuming that this Court reverses dismissal of both Plaintiffs' §2333(d)(2) conspiracy and aiding and abetting claims and orders remand, Plaintiffs will file a motion for reconsideration of the District Court's jurisdictional ruling and request reinstatement of their §2333(d)(2) aiding and abetting claim against Commerzbank.

[3] Note the URL in A-1072 n.21 is incorrect; the correct link is https://www.state.gov/designation-of-the-islamic-revolutionary-guard-corps/.

since its inception 40 years ago," and that its "support for terrorism is *foundational and institutional*." *Id*. (emphasis added). The IRGC's external covert operations directorate, the IRGC-Qods Force ("IRGC-QF"), was designated an SDGT in 2007, ¶16, and an FTO in 2019, as part of the IRGC's designation.[4]

From 2004-2011, the Iranian regime waged a terror campaign against U.S. and other peacekeeping forces in Iraq ("Coalition Forces"), directing the IRGC-QF (commanded by the late Qassem Soleimani) and Hezbollah to orchestrate attacks on Coalition Forces, including all of the Attacks alleged here, in order to "thwart U.S. policy objectives in Iraq." ¶34. The IRGC and Hezbollah established, trained and financed networks of local proxies, provided them with, *inter alia*, Hezbollah-designed and Iranian-manufactured Explosively Formed Penetrators ("EFPs"), a weapon that inflicted devastating damage on American armored vehicles. ¶¶257-81. IRGC and Hezbollah-directed attacks included not only hundreds of EFP strikes, but also the 2007 coordinated attack on the Provincial Joint Coordination Center ("PJCC") in Karbala, Iraq, ¶¶1041-80, and the shelling of U.S. bases with powerful Improvised Rocket-Assisted Munitions ("IRAMs"). *See* ¶¶1961, 1969, 2139, 2151.

[4] These executive orders, agency determinations, and agency press releases are all judicially noticeable on this appeal. *See Kramer v. Time Warner Inc*., 937 F.2d 767, 773-74 (2d Cir. 1991); *Fornalik v. Perryman*, 223 F.3d 523, 529 (7th Cir. 2000) ("it is well-established that executive and agency determinations are subject to judicial notice.").

The District Court found that the SAC plausibly alleged that Hezbollah planned, authorized, or committed the Attacks and that they were committed jointly by Hezbollah, the IRGC and the IRGC-QF, using the local proxies that they established, recruited, trained, equipped, and directed. SPA-42.

2. The Iranian Regime Used the U.S. Financial System to Fund Terrorism.

These Attacks were part of "Iran's use of terrorism as a central tool of its statecraft and an essential element of its foreign policy." IRGC Designation, *supra* at 6 & n.3. *See also* ¶¶102, 132 (describing Iran's "foreign policy goal of furthering its Islamic Revolution through the financing of terrorism"). Since it designated Iran a State Sponsor of Terrorism in 1984, the U.S. has attempted to constrain Iran's ability to commit and sponsor acts of terrorism (and develop weapons of mass destruction ("WMD")), by imposing a wide variety of economic sanctions intended to reduce the flow of financial resources, especially USD-denominated assets, for Iran's support of such activities. ¶104. These sanctions were publicly intended from their inception "to deny Iran the ability to support international acts of terrorism" and weapons proliferation. Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, §3(a), 110 Stat 1541.

Because Iran's chief sources of revenue, oil and natural gas, were overwhelmingly purchased in USD ("petrodollars") on the global market, ¶110, the U.S. financial system played a central role in the global movement of Iran's USD-

denominated assets. Nearly all USD transactions are processed through payment systems in the United States that are subject to monitoring by domestic clearing banks, regulators and law enforcement agencies, and to screening against blacklists promulgated by Treasury's Office of Foreign Assets Control ("OFAC"). ¶¶138-45, 353-55. As a result, U.S. laws and regulations posed a significant obstacle to Iran's terror financing – provided that the financial institutions that conducted business with Iranian agencies and instrumentalities adhered to those laws and regulations. *See, e.g.*, ¶¶140-45.

Given Iran's dependence on petrodollars, the United States did not want to cripple the Iranian economy by completely prohibiting Iranian access to USD clearing and settlement. It therefore authorized a means by which Iran could transfer dollars for its *legitimate* agencies, operations, and programs – the so-called "U-Turn exemption." ¶140. The narrowly tailored exemption permitted Iranian parties indirect access to USD funds, provided that these transactions were *fully disclosed* to U.S. correspondent banks (and thus U.S. authorities) and did not involve any sanctioned entities. Specifically, Defendants could process transactions for Iranian parties if they were initiated by and for the benefit of non-Iranian banks, none of the transaction parties were Specially Designated Nationals ("SDNs"), and the payment

messages were transparent so that they could be electronically-monitored by U.S. financial institutions. ¶¶141-42, 145.[5]

Because the transparency requirements for U-Turn payments significantly impaired Iran's ability to finance its terror organizations, Iran needed a means to effect USD transfers through the U.S. that concealed these transactions from New York clearing banks and U.S. law enforcement authorities. Iran therefore orchestrated a conspiracy by which its Central Bank ("CBI"), Bank Melli, and Saderat worked closely with the other Defendants to develop a series of covert and deceptive means for moving enormous sums of money through the USD-clearing system undetected. As the U.S. government later explained in declaring Iran a "Jurisdiction of Primary Money Laundering Concern":

> Iran has developed covert methods for accessing the international financial system and pursuing its malign activities, including misusing banks and exchange houses, operating procurement networks that utilize front or shell companies, exploiting commercial shipping, and masking illicit transactions using senior officials, including those at the Central Bank of Iran…. These efforts often serve to fund the Islamic Revolutionary Guard Corps (IRGC), its Islamic Revolutionary Guard Corps Qods Force (IRGC-QF), Lebanese Hizballah … and other terrorist groups.

A-1068.

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[5] Iran's abuse of this system—actively facilitated by Defendants—caused the U.S. government first to bar Saderat from access to the U.S. financial system in 2006, ¶364, then Bank Melli in 2007, ¶421, and eventually to revoke the U-Turn exemption altogether in 2008. ¶163.

Together with the IRGC, National Iranian Oil Company ("NIOC"), and other instrumentalities of the Iranian regime's terror apparatus, the CBI,[6] Bank Melli, and Saderat served at the center of Iran's conspiracy, using this "deceptive conduct" to funnel money to the IRGC and Hezbollah at Iran's direction. In designating Bank Melli in 2007, Treasury found:

> Bank Melli also provides banking services to the IRGC and the Qods Force. Entities owned or controlled by the IRGC or the Qods Force use Bank Melli for a variety of financial services. From 2002 to 2006, Bank Melli was used to send at least $100 million to the Qods Force. When handling financial transactions on behalf of the IRGC, Bank Melli has employed ***deceptive banking practices*** to obscure its involvement from the international banking system. For example, Bank Melli has requested that its name be removed from financial transactions.

¶422 (emphasis added).

In designating Saderat and its branches and subsidiaries as SDGTs in 2007, Treasury found:

> Bank Saderat … has been used by the Government of Iran to channel funds to terrorist organizations, including Hezbollah…. For example, from 2001 to 2006, Bank Saderat transferred $50 million from the Central Bank of Iran through its subsidiary in London [Defendant Bank Saderat PLC] to its branch in Beirut for the benefit of Hezbollah fronts in Lebanon that support acts of violence.

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[6] The CBI was designated an SDGT on September 20, 2019. *See* https://home.treasury.gov/news/press-releases/sm780.

¶18. In fact, Treasury reported in 2006 that "Bank Saderat facilitates Iran's transfer of *hundreds of millions of dollars* to Hezbollah and other terrorist organizations each year." ¶366 (emphasis added).

Defendants also used these deceptive methods on behalf of Iran's "procurement networks that utilize front or shell companies." For example, Treasury designated the Islamic Republic of Iran Shipping Lines ("IRISL") as an SDN in 2008 in part for shipping military cargo for IRGC affiliates, ¶¶50-51, 204, and using "a web of subsidiary entities and front companies … to deceive U.S. financial institutions and maintain their access to the U.S. financial system," according to a June 2011 indictment. ¶218. The cargo included components for the kinds of EFPs used in the Attacks. ¶¶50-51. In 2019, Treasury designated a worldwide Iranian petroleum shipping network originating with NIOC for "financially support[ing] [the IRGC-QF] and its terror proxy Hizballah" in a "vast oil-for-terror shipping network."[7] It found that the shipping network "*is directed by* and financially supports [the IRGC-QF] and its terrorist proxy Hizballah," and declared "that those purchasing Iranian oil *are directly supporting Iran's militant and terrorist arm*, [the IRGC-QF]." *Id.* (emphasis added).

[7] Treasury Press Release, "Treasury Designates Vast Iranian Petroleum Shipping Network That Supports IRGC-QF and Terror Proxies" (Sept. 4, 2019), *available at* https://home.treasury.gov/news/press-releases/sm767.

Treasury also designated Iran's Mahan Air in 2011 because it used its aircraft to "facilitate[] the covert travel of suspected IRGC-QF officers into and out of Iraq," "facilitated IRGC-QF arms shipments," and "transported personnel, weapons and goods on behalf of Hezbollah." ¶686. "Funds were also transferred via Mahan Air for the procurement of controlled goods by the IRGC-QF." *Id.* And according to the Justice Department, Mahan Air transported *thousands* of radio frequency modules to Iran that were later recovered from devices connected to improvised explosive devices used to target Coalition Forces in Iraq. ¶¶687-88.

Finally, Iran's Ministry of Defense and Armed Forces Logistics ("MODAFL," sanctioned in 2000 and designated in 2007, ¶713 & n.36) acted as the IRGC's weapons and equipment procurement affiliate and conspired with SCB and other Defendants to acquire export-controlled materials through various subsidiaries. ¶¶15, 679, 713-93.

On October 24, 2019, Treasury's Financial Crimes Enforcement Network ("FinCEN") again confirmed that "[t]he IRGC is integrally woven into the Iranian economy, operating institutions and front companies worldwide, so that the *profits from seemingly legitimate business deals may actually fund Iranian terrorism*." A-1072-73 (emphasis added). Treasury emphasized the IRGC's "support for terrorism" and "history of attempting to circumvent sanctions by maintaining a

complex network of *front companies*."[8] It confirmed that the IRGC-QF "uses several front companies to mask its role in selling the crude oil, condensate, and gas oil … [that] are overseen by Hizballah officials … both of whom were designated … in 2018 in connection with another oil-for-terror scheme."[9] Treasury explained that "*Iran's exportation of oil directly funds acts of terrorism by Iranian proxies*."[10] NIOC is an IRGC "agent or affiliate," according to Treasury. ¶¶152, 400, 516. More recently, Treasury reaffirmed that NIOC "helps to finance Iran's [IRGC-QF] *and its terrorist proxies*."[11]

3. Defendants Played a Vital Role in Iran's Conspiracy to Access the U.S. Financial System to Fund Terrorism.

Defendants conspired directly with Iranian banks at the center of Iran's conspiracy, including Bank Melli, Saderat, and the CBI, and with IRGC agents and affiliates NIOC, IRISL, Mahan Air, and MODAFL, to develop and employ deceptive techniques for laundering the proceeds of USD-denominated transactions

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[8] Treasury Press Release, "Treasury Submits Report To Congress On NIOC And NITC" (Sept. 24, 2012), *available at* https://www.treasury.gov/press-center/press-releases/Pages/tg1718.aspx (emphasis added).

[9] *See* Press Release, *supra* at 12 n.7. *See also* Press Release, A-1071 n.19.

[10] *See* Press Release, *supra* at 12 n.7 (emphasis added).

[11] Treasury Press Release, "Treasury Targets International Network Supporting Iran's Petrochemical and Petroleum Industries" (Jan. 23, 2020), *available at* https://home.treasury.gov/news/press-releases/sm885 (emphasis added).

during the relevant time period. ¶¶6, 22, 23, 340. During that period, Bank Melli worked closely with HSBC (¶¶426, 446, 478), Barclays (¶¶426-27, 576), SCB (¶¶426, 431-32, 623, 668), RBS (¶¶426, 430, 874), Credit Suisse (¶¶426, 442-43, 932-33), and Commerzbank (¶¶426, 444, 994, 1001), to launder enormous sums of USD through the U.S.

Saderat also worked closely with HSBC (¶¶478, 521), Barclays (¶¶576, 614), SCB (¶¶623, 645, 660, 668), RBS (¶874), Credit Suisse (¶¶932-33), and Commerzbank (¶¶994, 1001) to launder enormous sums of USD-denominated transactions through the U.S. In fact, Barclays, HSBC, Commerzbank, SCB, and Credit Suisse continued to facilitate transactions on behalf of Saderat even after Saderat was designated an SDGT for, *inter alia*, sending $50 million to Hezbollah. ¶¶385-87.

Defendants and their Iranian counterparties jointly developed the "deceptive banking practices" that facilitated Iran's clandestine access to the U.S. financial system:

1. removing or altering identifying information in the payment messages they sent through U.S. correspondent banks (commonly referred to as "stripping"). HSBC (¶¶479-82), Barclays (¶¶576, 581-83, 592-95), SCB (¶¶619-22, 629-32), RBS (¶¶871-73, 876-78, 893), Credit Suisse (¶¶930-31, 936-40, 960), and Commerzbank (¶¶992-94, 1011);

2. converting SWIFT payment messages[12] through U.S. banks from ones that disclosed Iranian parties to the transactions into ones that did not (called "cover payments"). HSBC (¶¶482-84), Barclays (¶¶581, 586-90, 593-94), SCB (¶¶628-32, 636-39, 644), RBS (¶¶895-96), Credit Suisse (¶¶931, 957-60), and Commerzbank (¶¶994, 997-99, 1007-08, 1011);

3. altering or otherwise facilitating Iranian-financed letters of credit to evade compliance with OFAC, the State Department's U.S. Munitions List ("USML") of defense-related export controlled items, the Bureau of Industry and Security's Commerce Control List ("CCL") of dual-use export controlled items, and Denied Persons List ("DPL") of export denied entities (¶¶673-838);[13] and

4. facilitating the laundering of the proceeds of Iranian petroleum sales for IRGC agent NIOC and other sanctioned Iranian entities, providing Iran with illegal and clandestine access to *billions* of dollars, *directly* funding the IRGC and its network of front companies through Defendants. ¶¶25, 157-59, 400-05, 624-26.

Iran's objective to obtain concealed access to the U.S. financial system to support and commit terrorism was evident from the nature and purposes of the sanctions Defendants agreed to violate—and from Iran's insistence that Defendants undertake these transactions in a manner that purposefully bypassed the *lawful* means for doing so under the U-Turn exemption. Defendants also discussed internally the potential legal and moral ramifications of their illegal conduct. For

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[12] SWIFT, the Society for Worldwide Interbank Financial Telecommunication, provides a global private network that enables financial institutions to send and receive information about financial transactions in a standardized message format. ¶22.

[13] *See* ¶¶173-96 regarding letters of credit and the regulatory architecture the U.S. employed in furtherance of its trade embargo against Iran.

instance, RBS's Senior Relationship Banker for Iranian Banks wrote in 2003 that evading "[t]wenty-four years of US sanctions" on Iran should be seen "as an opportunity," dismissing OFAC regulations as "a tool of broader US policy" on "AML/anti-Terrorism." ¶907. In 2001, a senior HSBC official noted that USD-denominated Iranian transactions the bank altered might prove to be "connected to terrorism." ¶512. In 2006, a senior HSBC compliance official explained that the United States was considering "withdrawing the U-Turn exemption from all Iranian banks .... on the basis that, whilst having *direct evidence against Bank Saderat particularly in relation to the alleged funding of Hezbollah*, they suspected all major Iranian State owned banks of involvement in terrorist funding and WMD procurement." ¶518 (emphasis added). In 2006, an SCB executive was warned by an American colleague that illegally laundering USD for Iranian instrumentalities could subject the bank to "catastrophic reputational damage" and its executives to "serious criminal liability." ¶665. In 2006, a Commerzbank employee warned the new Chief Compliance Officer of "[p]ersistent disregarding of OFAC rules by foreign branches. Hamburg is notorious for it." ¶1030. A Barclays memo acknowledged that "[m]oral risk exists if we carry on using cover payments but that is what the industry does." ¶611.

Defendants worked closely with the Iranian banks to develop and improve their money laundering techniques. For instance, RBS instructed Iranian banks to

include the code word "SPARE" in their payment messages so it could segregate them from normal processing. ¶887. *See also* ¶¶963-67 (Credit Suisse developed deceptive practices in coordination with Iranian banks); ¶¶1004-05 (Commerzbank explained money laundering methods to Iranian banks); ¶¶909-11 (RBS meetings with Iranian bank representatives to establish money laundering techniques).

Defendants also communicated with each other in furtherance of the conspiracy—for instance, in 2004, a senior RBS officer met with an HSBC officer in Tehran and concluded that RBS's procedures to conceal Iranian transactions were in line with the unlawful practices of HSBC and other banks. ¶917. Furthermore, Defendants circulated internal memoranda and employee manuals explaining how illegally to process transactions for Iran. ¶882 (RBS manual); ¶¶938, 944-50, 955, 961 (Credit Suisse internal instructions); ¶¶997, 1001 (Commerzbank email telling employees that, "under no circumstances may anyone mention that there is a connection to the clearing of Iranian banks!!!!!!!!!!!!"); ¶¶584-99 (Barclays instructions). Credit Suisse also provided materials to Iranian banks to train *other* banks how to structure payment messages to evade OFAC filters. ¶967.

Remarkably, Defendants continued to participate in the conspiracy even after receiving express industry and governmental warnings that Iran was using "deceptive practices" to fund its terrorism and weapons proliferation. Beginning in September 2006, they were briefed by Treasury on the dangers of doing business

with Iranian banks. ¶¶30-31, 520. Soon afterward, an industry group issued recommendations (in support of "global … anti-terrorist financing programs") to address the increasing risk inherent in "cover payments" – one of the very methods Defendants used to conceal USD transfers on behalf of Iran. *See supra* at 16. FinCEN also issued an "advisory to U.S. financial institutions so that they may guard against threats of illicit Iranian activity related to money laundering, [and] terrorist financing …."[14] Finally, when it revoked the U-turn exemption in 2008, Treasury explicitly found that "Iran's access to the international financial system enables the Iranian regime to facilitate its support for terrorism and proliferation." ¶172. Yet, many Defendants, including HSBC and SCB, continued to participate in the conspiracy.

Defendants also illegally laundered money directly for IRGC agents. For example, SCB, Credit Suisse, RBS N.V. and HSBC illicitly laundered *billions* of dollars for NIOC through the conspiracy. ¶¶152, 158, 400, 404, 505 n.27, 516, 516 n.28, 624. SCB also illegally provided letters of credit for NIOC and its subsidiaries, ¶¶811-24 (assisted by Saderat and Bank Melli) and knowingly altered letters of credit enabling Mahan Air to illegally purchase more than $120 million in U.S.

[14] *Available at* https://www.fincen.gov/sites/default/files/guidance/guidance_fi_increasing_mlt_iranian.pdf.

aircraft and aircraft parts prohibited by the CCL. ¶¶685, 692-93. Credit Suisse also participated in some of these illicit letters of credit. ¶697.

SCB also provided extensive, illegal services for MODAFL worth well over $100 million. ¶¶675, 825-33. This included facilitating MODAFL's acquisition of restricted components for the type of hydraulic presses used to manufacture EFPs. *Id.* Relying on the *Promontory Report*, Plaintiffs alleged in granular detail that between 2001 and 2007, SCB also facilitated more than 1,300 letters of credit using methods designed to conceal the participation of Iranian parties, including the IRGC, MODAFL, and Mahan Air. ¶¶673-79.

Several Defendants also facilitated illegal funds transfers totaling more than $60 million through the United States on behalf of IRISL and its affiliates *after its designation as an SDN*. ¶¶23, 50, 346, 1022. Commerzbank facilitated $40 million of the post-designation transfers alone, even after one of its officers noted U.S. allegations "that IRISL as Iranian government carrier systematically circumvents the Iranian arms embargo." ¶¶1022-38. *See also* ¶568 (HSBC); ¶671 (SCB), ¶918 (RBS).

SCB's conduct was particularly egregious. In early 2001, it was asked by the CBI to act as the conduit for USD proceeds from daily oil sales that the IRGC's agent, NIOC, made in the Eurodollar market. ¶¶624-25. Despite repeated warnings

that its conduct was potentially financing terrorism, SCB continued to launder money for NIOC and other Iranian instrumentalities. ¶¶163, 172, 647-48.

In October 2004, SCB consented to a formal enforcement action with the Federal Reserve Board of New York and the New York State Department of Financial Services ("DFS-NY"), requiring it to adopt regulatory compliance and anti-money laundering measures with respect to foreign correspondent accounts. ¶¶647-48. SCB retained Deloitte to conduct a compliance review. But SCB then directed Deloitte to delete from its report any reference to certain payments that would reveal its Iranian-related practices because "this is too much and too politically sensitive for both SCB and Deloitte." ¶¶653-58. In September 2006, in response to a request from state regulators for statistics on the number of Iranian U-Turn transactions it handled, SCB identified 2,626 transactions totaling over $16 billion. ¶¶661-63. However, it intentionally disclosed only four days' worth of transactions "masquerading as a log covering two-years of transaction data." ¶664.

In October 2006, when the CEO for SCB's U.S. Operations warned of possible "*serious criminal liability*" "for its continuing deceptive practices on behalf of Iranian counterparties, ¶665 (emphasis added), the Group Executive Director responded: "'You f---ing Americans. Who are you to tell us, the rest of the world, that we're not going to deal with Iranians.'" ¶666. Finally, even while this litigation was pending before the District Court, on April 9, 2019, SCB entered into a *new*

consent order with DFS-NY, acknowledging that between 2008 and 2014, it illegally processed an additional $600 million for Iranian instrumentalities.[15]

Because Defendants knowingly subverted laws and regulations expressly intended to prevent Iranian terror financing, federal and state regulators levied massive fines against them and required them to admit at least some of their wrongdoing. *See* ¶523 (HSBC); ¶616 (Barclays); ¶¶841, 854 (SCB); ¶919, A-1045-59 (RBS); ¶¶987-91 (Credit Suisse) ¶¶992, 996, A-929-1044 (Commerzbank). Fittingly, in its 2012 Consent Order with SCB, DFS-NY concluded that "SCB operated as a rogue institution." ¶¶839-40. The same epithet would fit SCB's co-conspirators.

4. Iran's Conspiracy to Access the U.S. Financial System to Fund Terrorism Was Extremely Successful.

The conspiracy succeeded to an astonishing degree. Using the techniques for which the U.S. government designated Saderat, Bank Melli, and numerous other Iranian instrumentalities, Defendants illegally and knowingly laundered hundreds of billions of dollars for those Iranian instrumentalities (and the IRGC) clandestinely through the U.S. financial system. For instance, SCB *admitted* that, from at least 2001 through 2007, it illegally processed approximately 59,000 transactions through its New York branch for Iranian customers, totaling approximately *$250 billion*.

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[15] *Available at* https://www.dfs.ny.gov/system/files/documents/2019/04/ea190409_standard_chartered_bank.pdf.

¶839. HBUS identified more than 25,000 illegal Iranian transactions it effected, worth more than *$19.4 billion*. ¶¶485-86. According to Treasury, "[a]s of 2018, the equivalent of *billions of USD* in funds had transited IRGC-QF controlled accounts at Bank Melli." A-1073 (emphasis added). Moreover, with Defendants' assistance, Bank Melli enabled the IRGC and its affiliates to move funds into and out of Iran, and the IRGC-QF used Bank Melli's branches in Iraq to "dispense funds to Iraqi Shia militant groups."[16]

Even USD payments that Defendants could have processed lawfully through the U-turn exemption but instead transferred clandestinely made it easier for Iran to conceal its unlawful funds transfers for terrorist groups and their agents and fronts within the mass of unscreened and unfiltered transactions.

Treasury summarized the operation and foreseeable consequence of Defendants' conspiracy, when it revoked the U-turn exemption:

> Iran's access to the international financial system enables the Iranian regime to facilitate its support for terrorism and proliferation. The Iranian regime disguises its involvement in these illicit activities through the use of a wide array of deceptive techniques, specifically designed to avoid suspicion and evade detection by responsible financial institutions and companies.

¶172. Defendants' cooperation in deceiving "responsible financial institutions" through these "deceptive techniques," "facilitate[d] [Iran's] support for terrorism,"

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16 Press Release, A-1073 n.24.

including Iran's support for Hezbollah and the IRGC and their successful terror campaign in Iraq.

SUMMARY OF ARGUMENT

All Defendants except Saderat and two HSBC subsidiaries have entered into DPAs admitting that they conspired with Iran and Iranian instrumentalities to provide Iran clandestine and unlawful "access to the international financial system [that] enables Iran to facilitate its support for terrorism and proliferation," as Treasury put it. ¶ 172. The principal issue on this appeal is whether the admitted conspiracy is cognizable under §2333(d)(2).

As noted above, JASTA was created to provide "the broadest possible basis" for civil liability for those who "directly or indirectly" provide material support for terrorists. To expand liability under the ATA, Congress created an express cause of action for civil aiding and abetting and conspiracy. In JASTA's Findings and Purpose, Congress made clear that this new cause of action:

- targets terror financing (SPA-254, §2(a)(3)) (finding that "[s]ome foreign terrorist organizations, acting through affiliated groups or individuals, raise significant funds outside of the United States for conduct directed and targeted at the United States");

- reaches "[p]ersons entities, or countries that *knowingly or recklessly* contribute material support or resources, *directly or indirectly*, to persons or organizations that pose a significant risk of committing acts of terrorism…." (*id.* §2(a)(6)) (emphasis added); and

- must be construed under the "proper legal framework" set out in *Halberstam*. (*id*. §2(a)(5)).

In contrast to their criminal counterparts, civil conspiracy and aiding and abetting premise liability on the foreseeability of a wrong, not the intent to cause it. As Judge Learned Hand famously observed in *United States v. Falcone*, whereas a criminal aider and abettor or conspirator "must in some sense promote [the unlawful] venture himself, make it his own, have a stake in its outcome," a defendant's *civil* liability "extends to any injuries which he should have apprehended to be likely to follow from his acts." 109 F.2d 579, 581 (2d Cir. 1940) (citing *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938)).

Forty years after *Falcone*, *Halberstam* articulated the elements required to establish a civil conspiracy under §2333(d): (1) an agreement (2) to do an unlawful act or a lawful act in an unlawful manner; (3) an overt act in furtherance of the agreement by someone participating in it; and (4) injury caused by the act. 705 F.2d at 487.

Halberstam echoes *Falcone*. The defendant, Linda Hamilton, was found civilly liable for aiding and abetting the murder of Michael Halberstam by her boyfriend, Bernard Welch, during a botched burglary. *Id.* at 474 ("[Ms. Hamilton is] civilly liable, as a joint venturer ... for the killing of Michael Halberstam"). However,

Hamilton, who assisted what she claimed was her boyfriend's antiques business, did not know about, let alone intend, the murder—or even the burglary:

> It was not necessary that Hamilton knew specifically that Welch was committing burglaries. Rather, when she assisted him, it was enough that she knew he was involved in some type of personal property crime at night—whether as a fence, burglar, or armed robber made no difference—because violence and killing is a *foreseeable* risk in any of these enterprises.

Id. at 488 (emphasis added).

Although Hamilton did not intend that her co-conspirator commit murder (or even burglary), the fact that she "agreed to participate in an unlawful course of action and that Welch's murder of Halberstam was a reasonably foreseeable consequence of the scheme are a sufficient basis for imposing tort liability on Hamilton according to the law on civil conspiracy." *Id*. at 487.

The District Court, however, erroneously applied "essentially … the same" conspiracy elements to Plaintiffs' §2333(d)(2) civil conspiracy claims as it did in analyzing Plaintiffs' primary liability claims predicated on *criminal* conspiracy. SPA-106:21-25.

First, it held that §2333(d)(2) requires that Defendants *intended* to provide material support for terrorism as the object of the conspiracy. Conceding that the SAC sufficiently alleged that Iran orchestrated a conspiracy with that object, involving the same Defendants and the same Iranian banks and commercial entities (including IRGC fronts and agents), using the same unlawful "deceptive banking

techniques" specifically identified by Treasury to evade U.S. counter-terror financing controls, over the same time period, the District Court nevertheless found, as a matter of law, that this was a "separate and distinct conspiracy" that Defendants' conspiracy only "incidentally" benefited.

But under the correct legal standard for *civil* conspiracy liability, Plaintiffs did not have to allege that Defendants shared Iran's intent to support terrorism. It is sufficient that they plausibly alleged that Defendants agreed to unlawfully provide Iranian instrumentalities with concealed access to the U.S. financial system, knowing that Iran would (or likely would) use that access to help it fund terrorism. Defendants agreed to illegally launder funds through the United States for Iran despite the availability of the U-Turn exemption that, until November 2008, permitted Iranian instrumentalities access to the U.S. financial system for lawful, transparent transactions for *legitimate* purposes. The plausible, if not inescapable, inference is that Defendants knew Iran was using its clandestine access to the U.S. financial system for the *illegitimate* purposes of funding and committing terrorism.

Second, the District Court also held that the "plain words" of §2333(d)(2) required that a defendant conspire "directly" with the FTO (or its agents) that planned, authorized, or committed the acts of international terrorism at issue. SPA-45 n.41. However, §2333(d)(2)'s text does not contain the word "directly" (or its equivalent). The District Court's importation of "directly" into the statute is

contrary to the long-established principle that a conspirator need not interact directly with each co-conspirator (or even know each co-conspirator's identity) to "conspire with" that co-conspirator. It also ignores JASTA's express purpose to broaden liability to encompass defendants who even "indirectly" provide material support. Thus, Defendants need only have joined in a conspiracy in which the "person who committed" the act of terrorism is a co-conspirator and the Plaintiffs' injuries were a reasonably foreseeable consequence of the conspiracy.

Furthermore, that "person" with whom Defendants conspired does not have to be the FTO that "committed, planned, or authorized" the attack, as described in §2333(d)(2)'s threshold requirement. Had Congress so intended, it would simply have repeated that description. Instead, it defined the term "person" in §2333(d)(1) even more broadly than it is defined for the rest of the ATA in §2331(3). JASTA recognizes that in certain circumstances, an FTO that planned or authorized an attack may work jointly with another FTO, other terrorist groups, local criminal gangs, or even unaffiliated individuals to commit it.

Third, the District Court erred by applying the proximate cause standard for primary liability under §2333(a) articulated in *Rothstein* to Plaintiffs' secondary liability claims under §2333(d)(2). It held that Defendants' unlawful laundering of billions of dollars for various Iranian co-conspirators could not have been a "substantial factor" in the "sequence of responsible causation" leading to Plaintiffs'

injuries because the Iranian counterparties with which Defendants transacted and conspired did not "solely exist for terrorist purposes," and also had "significant legitimate operations.…" This was both legally and factually wrong.

Neither civil conspiracy law nor civil aiding and abetting law requires the SAC to plead that a secondary defendant's *own* acts proximately caused the Attacks. Instead, "a conspirator is liable for acts pursuant to, in furtherance of, or within the scope of the conspiracy," *Halberstam*, 705 F.2d at 484, whether or not that conspirator itself caused them. Here, Iran's money laundering conspiracy included the IRGC (particularly through its agent, NIOC), which, together with Hezbollah, committed, and thus proximately caused, the Attacks. The SAC plausibly alleges that Hezbollah and the IRGC's unlawful conduct was a reasonably foreseeable result of the conspiracy to launder vast sums through the U.S. financial system that enabled Iran's support for terrorism.

Similarly, an aider and abettor need not itself proximately cause the injury from the principal tort. When the injury is proximately caused by the principal tortfeasor, it is sufficient that the aider and abettor knowingly provided substantial assistance to that principal tortfeasor (and hence to the principal tort) and was generally aware of playing a role in the principal tortfeasor's unlawful enterprise. Because the District Court erroneously applied *Rothstein*'s proximate causation standard in dismissing Plaintiffs' civil aiding and abetting claim against SCB, it

never reached the question of whether SCB was "generally aware" of playing a role in the IRGC's criminal enterprise, which Treasury found "directly funds acts of terrorism by Iranian proxies."

Finally, civil conspiracy under §2333(d)(2) does not requires a court to weigh the "legitimate" activities of a defendant's co-conspirators (that are purportedly outside the scope of the conspiracy) to determine whether the co-conspirator devoted most of its time or resources (let alone "all") to criminal conduct—*especially* on a motion to dismiss. The same is true for civil aiding and abetting claims. Contrary to the District Court's implication, no FTO "solely exist[s] for terrorist purposes," and as the U.S. government found, the IRGC's support for terrorism is "foundational and institutional."

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The District Court explained that a purported "trend" of court rulings against imposing JASTA liability on "defendants who did not deal directly with a terrorist organization" justified overruling the R&R and finding the SAC's allegations implausible, but a "trend" is not an appropriate substitute for analyzing the specific allegations in a complaint. Moreover, this approach overlooks the legally more significant statutory "trend" of steadily expanding ATA civil liability, led by multiple statutory amendments, including JASTA itself, and the growing statutory and regulatory structure that prohibits terror financing and prescribes "when, and

how, *banks* should be held liable for the financing of terrorism." *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1405 (2018) (emphasis added). Nothing in *that* trend justifies overriding longstanding civil conspiracy and aiding and abetting principles and imposing heightened standards that are not compelled by the statute's plain words. Well aware of ATA suits against "rogue" banks like SCB that have admitted to conspiring with, and undertaking extensive criminal conduct on behalf of, State Sponsors of Terrorism, Congress has consistently chosen to broaden plaintiffs' access to relief under the ATA and to broaden the liability of those that provide material support, "knowingly or recklessly" and "directly or indirectly," for terrorism.

Blocking Plaintiffs at the threshold of their lawsuit for the reasons given by the District Court – before any discovery and in the midst of almost-daily U.S. government affirmations of the illegitimate purposes of the very Iranian instrumentalities at issue – denies the deference due the national security findings of the political branches, rewrites §2333(d), and frustrates congressional intent.

STANDARD OF REVIEW

This Courts reviews *de novo* the District Court's dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), accepting all well-pleaded factual allegations in the SAC as true and drawing all inferences in favor of Plaintiffs. *Palin v. N.Y. Times Co.,* 940 F.3d 804, 809 (2d Cir. 2019). "To survive a

motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Palin*, 940 F.3d at 810 (citing *Iqbal*, 556 U.S. at 678). Disputes about "a tortfeasor's state of mind" are usually reserved for the jury rather than the court. *Linde*, 882 F.3d at 330. *See also Weiss v. Nat'l Westminster Bank PLC,* 768 F.3d 202, 211 (2d Cir. 2014).

ARGUMENT

I. THE DISTRICT COURT ERRED BY APPLYING THE SCIENTER REQUIRED FOR CRIMINAL CONSPIRACY TO PLAINTIFFS' CIVIL CONSPIRACY CLAIMS UNDER 18 U.S.C. §2333(d)(2).

A. Under the Proper Legal Framework Set Out in *Halberstam*, the SAC Must Plausibly Satisfy the Elements of *Civil*, Not Criminal, Secondary Liability.

By finding that the SAC failed to plausibly plead a §2333(d)(2) conspiracy for "the same reasons" that it failed to plead a predicate §2333(a) conspiracy, SPA-41 n.36, the District Court erroneously assumed that the elements of civil conspiracy under §2333(d)(2) are identical to those for criminal conspiracy under §§2339A and 2339B. *See also* SPA-106:21-25 ("[t]hose elements essentially being the same, at least in terms of a conspiracy"). It therefore held that Plaintiffs had to

allege that Defendants shared Iran's *intent* to support terrorism and to "ultimately benefit a terrorist organization," SPA-28, and that Defendants' "separate and distinct" conspiracy was only *intended* to evade sanctions. SPA-39 n.35.

But *civil* secondary liability is premised on the foreseeability of a wrong, not the intent to cause it. While a criminal aider and abettor or conspirator "must in some sense promote [the unlawful] venture himself, make it his own, have a stake in its outcome," a defendant's *civil* secondary liability "extends to any injuries which he should have apprehended to be likely to follow from his acts." *Falcone*, 109 F.2d at 581; *Peoni*, 100 F. 2d at 402 (civil aiding and abetting requires only that the wrong be "a natural consequence of [the aider's] original act"). *See also Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 251 (4th Cir. 1997) ("the intent standard in the civil tort context requires only that the criminal conduct be the 'natural consequence of [one's] original act,' whereas criminal intent to aid and abet requires that the defendant have a 'purposive attitude' toward the commission of the offense.") (citing *Peoni*, 100 F.2d at 402).

Forty years after *Falcone*, the D.C. Circuit's opinion in *Halberstam* articulated the elements required to establish civil aiding and abetting and conspiracy. *Halberstam* found that it was enough to make Hamilton liable for murder that she agreed to "undertake an illegal enterprise to acquire stolen property" from which violence was merely a *foreseeable* consequence. She did not have to

intend that her boyfriend commit the underlying offense of murder. 705 F.2d at 487. By adopting *Halberstam* as the proper legal framework for §2333(d)(2) liability, Congress affirmed its intent that the class of secondary tortfeasors who could be held civilly liable would include defendants whose own conduct was not itself violent or dangerous to human life and who did not specifically intend violence to occur as a result of their tortious conduct.

Relying instead on the *criminal* conspiracies to provide material support for terrorism created in §§2339A and 2339B (which serve as predicates for primary liability under §2333(a)), the District Court erroneously required that Defendants share Iran's object to provide that material support. Like the general federal conspiracy statute, 18 U.S.C. §371 (penalizing "conspir[acy] … *to commit any offense against the United States*…") (emphasis added), the predicate §2339A and §2339B conspiracies are limited to specific offenses or objects. They show that when Congress means "conspire to commit [a specific offense]," it knows how to say so. But in JASTA, Congress did not create liability for conspiring "to commit" *any* specific criminal offense. Instead, it created liability for conspiring "*with* the person who committed" an act of terrorism.

The object of a civil conspiracy helps determine the "reasonably foreseeable consequence[s] of the scheme," *Halberstam*, 705 F.2d at 487, but those consequences need not be the object. In *Halberstam*, the object was to "conduct the

illicit burglary enterprise," not the (unplanned) murder. And while "[t]he use of violence to escape apprehension was certainly not outside the scope of that conspiracy," the court never suggested that Hamilton and Welch discussed, let alone *agreed* to the use of violence.

For their civil conspiracy claims, Plaintiffs were therefore not required to plead that Defendants intended to support terrorism, let alone that they joined in Iran's object of "facilitat[ing] acts of terrorism in Iraq." SPA-28. JASTA establishes liability for defendants who conspire with individuals or entities engaged in terrorism, rather than just those who conspire to commit acts of terrorism or provide material support for terrorism. This is not only consistent with the statute's plain language, but also affirmed by its stated purpose to "provide the broadest possible … relief" not just against persons who "directly," but also those who "indirectly" provide material support to persons who engage in terrorist activities against the United States. SPA-255, §2(b). This is also entirely sensible considering the variable and unpredictable forms that indirect support can take. The Senate Report on the original §2333(a) explained that "[t]he substance of such an action is not defined by statute, because the fact patterns giving rise to such suits will be as varied and numerous as those found in the law of torts," S. Rep. No. 102-342 (1992) at 45, emphasizing that "imposition of liability at *any* point along the causal chain of

terrorism … would interrupt, or at least imperil, the flow of money." *Id.* at 22 (emphasis added).

At a minimum, the SAC plausibly alleges that Defendants agreed to circumvent counter-terror financing sanctions by laundering billions of dollars clandestinely through the U.S. financial system, with the foreseeable consequence of enabling the Iranian regime's support for terrorist groups and terrorism, as the U.S. government found the enterprise in fact did. ¶¶172, 357, 419-23.

Furthermore, even the law of *criminal* conspiracy does not require that conspirators share all the same objectives in order to be liable for the conspiracy's consequences. The government need not prove that a criminal conspirator "knew all of the unlawful aims and objectives of the scheme charged," just that it "had *some* knowledge of its unlawful aims." *United States v. Lanza*, 790 F.2d 1015, 1017, 1022-23 (2d Cir. 1986) (emphasis in original). *See id.* at 1023 (approving a jury instruction that "*the defendant was aware of a high probability that such a scheme was in existence*….") (emphasis in original). This is because "[o]ften the defendant will say that he agreed with someone else to do something but did not know the scope of the agreement," *United States v. Kehm*, 799 F.2d 354, 362 (7th Cir. 1986).[17]

[17] In any event, the question is for the jury: "Whether the government has proved a single conspiracy or has instead proved multiple other independent conspiracies is a question of fact for a properly instructed jury." *United States v. Aracri*, 968 F.2d 1512, 1519 (2d Cir. 1992) (internal quotation marks and citation omitted).

Here, the very illegality of the systematic money laundering in which Defendants engaged similarly raises a plausible (if not inescapable) inference that they were at the very least aware of the "high probability" that Iran and its instrumentalities would use some of the funds Defendants secretly laundered on their behalf to finance terrorism. As the R&R concluded, it "'def[ies] credulity' that the bank defendants did not know that, at a minimum, '*something illegal*' was afoot with their Iranian co-conspirators"—beyond skirting regulations for mere convenience—"particularly given that the banks intentionally sought ways to surreptitiously arrange for funding and U.S. dollar transfers that did not identify Iranian connections even though legitimate means were available." SPA-170-71 (quoting *Halberstam*, 705 F.2d at 486, which held that similar knowledge was sufficient to support secondary liability).

Finally, it was the *Kemper* panel's application of *criminal* conspiracy law that makes *Kemper v. Deutsche Bank AG*, 911 F.3d 383 (7th Cir. 2018), on which the District Court heavily relied, SPA-2 n.2, 20-25, 28-29, 32, 34, inapposite. *Kemper* held that the complaint in that case failed to plausibly allege that the defendant had "the *specific intent*" to support terrorism or "to provide material support *for terrorism*." 911 F.3d at 395 (emphasis in original). But *Kemper* was addressing conspiracy claims predicated on primary liability under §2333(a), *id.* at 396 (although it did not explain how its "specific intent" requirement is consistent with

the "knowing" scienter standards of §§2339A and 2339B, which it does not mention). *Kemper* never addressed civil conspiracy under §2333(d)(2) (except to note that co-conspirators are liable for acts that are a "'reasonably foreseeable consequence of the scheme,'" (*citing Halberstam*, 705 F.2d at 487) as discussed *infra* Part IV-A). The District Court therefore erred in relying upon *Kemper*'s reasoning to dismiss Plaintiffs' §2333(d)(2) civil conspiracy claim here.

B. Funding Iranian-Directed Terrorists and the Resulting Attacks Were Foreseeable Consequences of the Conspiracy Defendants Joined.

Civil conspiracy law holds conspirators "liable for injuries caused by acts pursuant to or in furtherance of the conspiracy." *Halberstam*, 705 F.2d at 481.[18] Here the conspiracy was to provide Iran and its instrumentalities clandestine access to the U.S. financial system enabling Iran "to facilitate its support for terrorism and proliferation," using the "deceptive techniques" "specifically designed to avoid suspicion and evade detection by responsible financial institutions and companies," according to Treasury Department findings. ¶172.

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[18] The same principle obtains in criminal law: "If, in the course of the conspiracy, there occur other illegal acts not specifically contemplated by an individual conspirator but reasonably akin to the anticipated illegality and in furtherance *or in consequence of the scheme*, the conspirator may not on that account escape liability for participation in the conspiracy." *United States v. Gleason*, 616 F.2d 2, 16-17 (2d Cir. 1979). *See also Callahan v. United States*, 364 U.S. 587, 594 (1961) ("The danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.").

The District Court, however, held that "any acts of promoting terrorism engaged in by the Iranian entities, even if done with funds transferred by Defendants, would not be an act 'in furtherance of' [Defendants'] much more limited conspiracy, so as to make Defendants liable for that conduct." SPA-27 n.28. But the applicable standard is "pursuant to or in furtherance of," *Halberstam*, 705 F.2d at 481, or, as phrased by this Court in the criminal context, "in furtherance of or in consequence of the scheme," *Gleason*, 616 F.2d at 17.

The U.S. government found, and the SAC thereby plausibly alleges, that Saderat provided at least $50 million to Hezbollah, and that Bank Melli provided at least $100 million to the IRGC, ¶¶18, 357, 419 (and more recently, that the IRGC-QF "has used Bank Melli to dispense funds to Iraqi Shia militant groups, and Bank Melli's presence in Iraq was part of this scheme," Press Release, A-1073 n.24). Terror financing was a direct and foreseeable consequence of Defendants' conduct in joining and participating in the conspiracy.[19] SPA-175-77 (emphasizing that foreseeability in *Halberstam* was reviewed on a full trial record, and finding that

[19] Terrorist acts do not "further" material support so much as result from it, just as the distribution of illegal drugs does not "further" a crooked lawyer's preparation of false documentation to lease the plane used to transport the drugs. Distribution is one natural *consequence* of his work. *See, e.g., Kehm*, 799 F.2d at 362.

here the SAC plausibly pleads that use of laundered funds for violent acts was a foreseeable risk, at the pleading stage of this case).[20]

II. SECTION 2333(d)(2) DOES NOT REQUIRE THAT DEFENDANTS CONSPIRED "DIRECTLY" WITH THE PERSON WHO COMMITTED THE ATTACKS OR THAT THE PERSON BE AN FTO OR ITS AGENT.

A. The District Court Erred by Holding That Conspiracy Liability Under §2333(d)(2) Requires That a Defendant Conspire "Directly" With the Person Who Committed the Terrorist Attacks.

Not only did the District Court erroneously apply a criminal conspiracy framework to Plaintiffs' §2333(d)(2) claims, but it then held that even that framework was superseded by "the plain text of JASTA's *conspiracy* liability provision [which] requires that a defendant conspire directly with the person or entity that committed the act of international terrorism." SPA-45 n.41 (emphasis in original).[21] *See also* SPA-44 (Plaintiffs have a "duty" to allege a "direct" conspiracy).

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[20] "Whether a particular substantive crime is foreseeable and in furtherance of the conspiracy is a factual question to be determined by the jury." *United States v. Bruno*, 873 F.2d 555, 560 (2d Cir. 1989) (citing *Nye & Nissen v. United States*, 336 U.S. 613, 618 (1949)).

[21] The same erroneous conclusion – that §2333(d)(2) requires a defendant to conspire "directly" – permeates the District Court's causation analysis as well, as it acknowledged. SPA-59:7-60:1.

However, the "plain text" of §2333(d)(2) ("conspires with the person") nowhere imports the limiting modifier "directly." On the contrary, the District Court's reading is inconsistent with the plain text and its stated purpose: to broaden liability for relief against those that provide material support "directly *or indirectly*." SPA-255, §2(b) (emphasis added). In *Siegel v. HSBC North America Holdings, Inc.*, 933 F.3d 217 (2d Cir. 2019), this Court, without ultimately deciding the issue, noted that the statute "does not, by its terms," limit aiding-and-abetting liability to those who provide direct support, and quoted the same language from JASTA's stated purpose that is italicized above. *Id.* at 223 n.5.[22] The statute does not, by its terms, so limit conspiracy liability either.

Even under the more stringent principles of criminal conspiracy law, "there is no requirement that each member of a conspiracy conspire directly with every other member of the conspiracy." *United States v. Friedman*, 854 F.2d 535, 562 (2d Cir. 1988). The members of the conspiracy do not have to "conspire directly with every other member of it or be aware of all acts committed in furtherance of the conspiracy, or even know every other member." *United States v. Rooney*, 866 F.2d 28, 32 (2d Cir. 1989) (quoting *Friedman* at 562 and *United States v. Alessi*, 638 F.2d 466, 473

[22] While a statute's Findings and Purpose cannot override its plain text, where a statute's Findings and Purpose is consistent with its plain text, courts should employ them to provide context and framework for the law's application. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 589 (2004).

(2d Cir. 1980)). *See also United States v. Bicaksiz*, 194 F.3d 390, 399 (2d Cir. 1999) (holding that a defendant can conspire with others "through" third parties).

In *Halberstam*, the two conspirators necessarily interacted directly because there were no other conspirators, but its fact pattern does not logically foreclose application of this traditional principle of conspiracy law. Nor can Congress be presumed to have displaced it *sub silentio*. But that is precisely what the District Court's importation of "directly" into §2333(d)(2) does, improperly narrowing the application of civil conspiracy liability. That displacement effectively nullifies civil conspiracy liability even for a defendant who conspired with arms traffickers to supply weapons to terrorists but did not deal "directly" with the terrorists. That cannot be the law, and it is not.

B. A Defendant Need Not Conspire With the FTO That Satisfies §2333(d)(2)'s Threshold Requirement That the Injury Was Caused by an Act of Terrorism "Committed, Planned or Authorized" by an FTO.

The District Court also held that the "person" with whom defendant conspires must be an FTO or agent of an FTO, apparently assuming that it must be the same FTO that satisfied §2333(d)(2)'s threshold requirement for secondary liability. *See* SPA-29 (characterizing "a separate conspiracy to provide material support to Hezbollah"); SPA-74:17-24 (indicating that the SAC was deficient because SCB's support had to cause "the terrorist acts ultimately committed by Hezbollah"); SPA-81:17-25 (indicating that funding that went to the IRGC would have to have

"supported Hezbollah in its effort to commit the acts of terrorism that are alleged here"). However, the District Court confused §2333(d)(2)'s threshold requirement with the object of its "conspires with" language thereby holding that Plaintiffs were required to plead that Defendants conspired directly with Hezbollah. While the SAC plausibly alleges that Hezbollah was a participant in the conspiracy, it is even more clear that Defendants actively conspired with the IRGC through its various agents.

The threshold requirement for §2333(d)(2) liability is that an FTO committed, planned or authorized the act of international terrorism at issue. It then provides for liability for a defendant who "aids and abets" or "conspires with" "the person that committed such an act," not "the FTO." The "person" with whom a defendant has to conspire is defined by §2333(d)(1), in which Congress passed over the existing definition of "person" in §2331(3) to incorporate the much broader definition set forth in 1 U.S.C. §1. "Person" therefore includes not just individuals or corporations, but also associations and societies. It thus includes FTOs, their fronts, alter egos, and agents, and is not limited to the specific individual who fired the weapon or detonated the bomb, as the District Court correctly held. SPA-43 n.38. *See Nat'l Council of Resistance of Iran v. Dep't of State,* 373 F.3d 152, 157-58 (D.C. Cir. 2004) (treating FTOs and their agents the same).[23]

[23] That conclusion is also consistent with Congress's finding that "[s]ome foreign terrorist organizations *act* [] *through affiliated groups or individuals*." SPA-254, §2(a)(3) (emphasis added).

But nothing in the definition limits "person" to an FTO either, let alone the *same* FTO that satisfied the threshold requirement for §2333(d)(2) liability (here, Hezbollah). Had Congress intended to so-limit the "conspires with" provision, it could simply have repeated or cross-referenced the term "foreign terrorist organization." Its choice instead to use a broad definition of "person" makes good policy sense considering how acts of international terrorism are often committed. Congress understood that a terrorist act that is planned or authorized by an FTO (thus satisfying the threshold requirement for §2333(d)(2) civil liability), is frequently committed by an agent, an "independent contractor" hired for the purpose, an associated force, or another FTO, working jointly with the FTO that planned or authorized the act. *See, e.g., Calderon-Cardona v. Democratic People's Republic of Korea*, 723 F. Supp. 2d 441, 446 (D.P.R. 2010) (finding that the Japanese Red Army carried out the 1972 attack at Lod Airport in conjunction with the Popular Front for the Liberation of Palestine).

That is what the SAC plausibly alleges based on numerous U.S. government findings: the FTO Hezbollah committed, planned or authorized the Attacks (as the District Court found, SPA-42), and they were committed jointly by Hezbollah and the IRGC and the Iraqi proxies they recruited, trained, equipped, funded and directed. ¶¶233-34, 246-58, 266, 270, 273-78, 293, 310.

The District Court's repeated assumption that Defendants had to conspire with Hezbollah (or "the FTO that 'committed' the act of terrorism," SPA-42 n.38), not only misapprehended §2333(d)(2)'s definition of "person," but also failed to appreciate how acts of terrorism are actually often committed. Its misreading would immunize from civil liability even a defendant who conspired directly *with the triggerman or suicide bomber* in the attack, if that triggerman or bomber was not an operative or an agent of the FTO that satisfied §2333(d)(2)'s threshold requirement. Again, that cannot be the law, and it is not.

C. The SAC Plausibly Alleges that SCB, Credit Suisse, RBS N.V. and the HSBC Defendants Conspired "Directly" With the IRGC—the "person who committed" the Attacks.

While, as explained above, all of the Defendants joined in the conspiracy with the IRGC and other Iranian regime instrumentalities, the District Court erroneously required plausible allegations that Defendants "*directly* conspired with Hezbollah *or the IRGC*," SPA-44-45 (second emphasis added).

Even if §2333(d)(2) required that a defendant conspire "directly" with the person that committed the attack, or its agent, the SAC plausibly alleges that SCB, Credit Suisse, RBS N.V. and HSBC conspired *directly* with the IRGC's agent, NIOC, and that the IRGC was *itself* responsible for jointly committing, planning, and authorizing the Attacks. ¶¶ 52, 158, 400, 404, 516 & n.28, 624.

As noted above, the Department of State designated the IRGC an FTO on April 15, 2019. *Supra* at 6 & n.3. Although SCB, RBS N.V. and HSBC could not have known (in 2003 to 2011) that the IRGC would be formally designated an FTO in 2019, the designation and press release make clear that "the IRGC, part of Iran's official military, has engaged in terrorist activity or terrorism *since its inception 40 years ago.*"[24] The SAC details the IRGC's terrorist activities. *See, e.g.*, ¶¶ 246, 248, 250, 254-55, 257, 259, 266, 270, 273. Specifically, it plausibly alleges that the IRGC and Hezbollah, jointly and in concert, planned, authorized, committed, and directed the Attacks, ¶¶234, 246-58, 266, 270, 273-78, 293, 310, as the District Court noted. SPA-42 (describing Hezbollah as working with and on behalf of the IRGC in committing Iran's "extensive campaign of terrorist activity against American citizens in Iraq").

The SAC also plausibly alleges that SCB, RBS N.V., Credit Suisse and HSBC laundered funds for NIOC at a time that it "was not only controlled by the IRGC but also served as the lifeblood of the Iranian regime's illicit financing activities, providing it with access to billions of dollars in oil and natural gas revenues that enabled the IRGC to gain access (through the Conspiracy) to the global financial system." ¶¶52, 400, 682. Treasury emphasized the IRGC's "support for terrorism" and "history of attempting to circumvent sanctions by maintaining a complex

[24] *See* IRGC Designation, *supra* at 6 & n.3.

network of *front companies.*"[25] (emphasis added). In fact, Treasury has recently confirmed that the IRGC's directorate for foreign attacks "uses several front companies to mask its role in selling the crude oil, condensate, and gas oil … [that] are overseen by Hizballah officials … who[] were designated pursuant to E.O. 13224 in 2018 in connection with another oil-for-terror scheme."[26] It explained that "*Iran's exportation of oil directly funds acts of terrorism by Iranian proxies*."[27] Defendants' knowledge that NIOC was acting on behalf of Iran's terror apparatus is inferable from the illegal nature of the assistance NIOC and other Iranian regime instrumentalities requested, as discussed above.

In sum, far from being a "legitimate" agency of Iran, NIOC was and is an agent and instrumentality of the IRGC that the IRGC has used to fund terrorism, and the SAC plausibly alleges that SCB, RBS N.V., Credit Suisse and HSBC conspired with it *directly*. Nevertheless, the District Court determined, as a matter of law, that because not all of NIOC's oil revenues were used to fund terrorism, Defendants were conspiring with an ostensibly "legitimate" intermediary of the IRGC. In *Boim III*, the Seventh Circuit cautioned that "escap[ing] liability because terrorists and their supporters launder donations through a chain of intermediate organizations .... would

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25 Press Release, *supra* at 14 n.8 (emphasis added).

26 Press Release, *supra* at 12 n.7. *See also* Press Release, A-1071 n.19.

27 Press Release, *supra* at 12 n.7 (emphasis added).

be to invite money laundering." 549 F.2d at 701-02. Here, exempting Defendants from liability because the unlawful transactions were processed by the IRGC's agent would *validate* money laundering.

D. The SAC Plausibly Alleges That Saderat Conspired Directly With Hezbollah.

Insisting on its invented "directness" requirement, the District Court held that "Plaintiffs' arguments would be sound if they could identify a direct connection between the financial services provided by Defendants and an organization directly involved in acts of terrorism." SPA-31. But even though this is not required, the SAC *does* plausibly allege that Saderat *directly* transferred at least $50 million to Hezbollah, an FTO that the District Court found the SAC plausibly alleged "was responsible for committing, planning, or, at the very least, authorizing the attacks that injured Plaintiffs." SPA-42. The allegations are not conclusory; they rest on Treasury findings that "Bank Saderat transferred $50 million from the Central Bank of Iran through its subsidiary in London to its branch in Beirut for the benefit of Hezbollah fronts in Lebanon that support acts of violence," ¶18, that "Bank Saderat has been a significant facilitator of Hezbollah's financial activities and has served as a conduit between the Government of Iran and Hezbollah," ¶365, SPA-179, and that it "facilitates Iran's transfer of hundreds of millions of dollars to Hezbollah and other terrorist organizations each year." ¶366.

Nevertheless, the District Court found that these government findings did not "meet[] the standard for establishing conspiracy," SPA-103, later adding that the Treasury's findings were not "sufficient for purposes of establishing conspiracy under §2339A or §2339B for purposes of an ATA claim, nor … sufficient for conspiracy under JASTA." SPA-106:4-24. But Saderat's conduct clearly satisfies the elements required for civil conspiracy by agreeing to transfer large sums of money to Hezbollah that facilitated Hezbollah's terrorism, resulting in the Attacks. *Halberstam*, 705 F.2d at 487. Agreement can be shown circumstantially and inferred from the parties' interactions. *Id.* at 477, 480 ("where two or more persons jointly commit an onsite burglary, a court will infer that there has been a prior agreement to do so…."). The District Court never addressed why Saderat's role as a "conduit" and "facilitator" for Hezbollah did not plausibly suggest the existence of some prior agreement.[28]

The District Court's refusal to credit allegations that Saderat – which the United States designated an SDGT – joined a conspiracy with FTO Hezbollah exemplifies the infirmity of its entire analysis of JASTA conspiracy and its repeated failure to give due deference to U.S. government findings, particularly at the pleading stage.

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[28] As explained above, the object of that conspiracy need not have been the provision of material support (although the SAC supports that inference as well).

III. THE DISTRICT COURT ERRONEOUSLY APPLIED *ROTHSTEIN*'S PROXIMATE CAUSE STANDARD TO PLAINTIFFS' CIVIL CONSPIRACY CLAIMS UNDER §2333(d)(2).

A. The SAC Plausibly Alleges That the Attacks Were Proximately Caused by the IRGC and Hezbollah and That Terrorism Was a Foreseeable Consequence of the Conspiracy.

In *Rothstein*, this Court held that to prove proximate causation for a primary liability claim under §2333(a), the plaintiffs had to show that the defendant's acts "were a substantial factor in the sequence of responsible causation and [their] injury was reasonably foreseeable or anticipated as a natural consequence." 708 F.3d at 91. The District Court erroneously applied the same causation standard to the SAC's civil conspiracy allegations. For civil conspiracy, the "injury" must be "caused by an unlawful overt act performed by *one* of the parties to the agreement." *Halberstam*, 705 F.2d at 477 (emphasis added). This requirement was easily satisfied in *Linde*, where there was no serious dispute that Hamas committed the acts of international terrorism at issue, 882 F.3d at 332 ("on a theory of aiding and abetting liability, there can be no question that Hamas acts of terrorism satisfy both the proximate cause and but-for causation standards"). Here, too, the SAC plausibly alleges that Hezbollah, the IRGC, and their proxies jointly committed the Attacks and caused Plaintiffs' injuries, as both the District Court and the R&R found. SPA-42 and 177-78.

A conspirator thus need not itself proximately cause the injury and "need not participate actively in or benefit from the wrongful action in order to be found

liable." *Halberstam*, 705 F.2d at 481. It is enough that the injuries are caused by acts pursuant to or in furtherance of the conspiracy, *id*., that the defendant "helped to create a danger; it was immaterial that the effect of [its] help could not be determined—that [its] acts could not be found to be either a necessary or a sufficient condition of the injury." *Boim III*, 549 F.3d at 697 (analogizing from *Keel v. Hainline*, 331 P.2d 397 (Okla. 1958)).

B. JASTA Causation Does Not Require That the Iranian Entities for Which Defendants Laundered Money "Exist Solely" for, or Use "All" Their Funds for, Terrorist Purposes.

The District Court further misread *Rothstein* to suggest that entities that did not "solely exist for terrorist purposes" (including the entities that the U.S. government has designated as agents of the IRGC, an FTO), SPA-38, qualify as "legitimate agencies, operations, and programs," within the meaning of *Rothstein*. *See* 708 F.3d at 97. It found that *even the FTO* IRGC has "multiple functions, some of which are legitimate and some of which are not," so that clandestinely funding it does not satisfy *Rothstein*'s substantial factor test. SPA-84:1-18.

The Executive Branch and Congress take a different and better-informed view. The government found that the IRGC "engaged in terrorist activity or terrorism since its inception 40 years ago," was "directly involved in terrorist plotting," and was responsible for the deaths of hundreds of Americans in Iraq during

the relevant period.[29] It found that the IRGC's support for terrorism is "foundational and institutional" – not some ill-defined mix of legitimate and illegitimate – and ascribed to it the "greatest role among Iran's actors in directing and carrying out a global terrorist campaign" using "proxies and terrorist groups abroad." *Id*.

The District Court held, however, that even massive assistance provided to the IRGC could not, as a matter of law, proximately cause injuries inflicted by the IRGC because it has many "legitimate" functions" that weaken the causal chain between support to the IRGC and its terrorist acts. Yet, FTOs "do not maintain *legitimate financial* firewalls between those funds raised for civil, nonviolent activities, and those ultimately used to support violent, terrorist operations." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 31 (2010) (quoting the State Department's views) (first emphasis added; second in original).

Moreover, in restating traditional elements of proximate cause, *Rothstein* did not (and could not) abrogate Congress's finding that that "*any* contribution to [an FTO] facilitates its criminal conduct." Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, §301(a)(7), 110 Stat. 1247, note following 18 U.S.C. §2339B (Findings and Purpose) (emphasis added). Nor did *Rothstein* take issue with the Executive Branch's view that, "'[g]iven the purposes, organizational structure, and clandestine nature of foreign terrorist organizations, it

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[29] *See* IRGC Designation, *supra* at 6 & n.3.

is highly likely that any material support to these organizations will ultimately inure to the benefit of their criminal, terrorist functions—*regardless of whether such support was ostensibly intended to support non-violent, non-terrorist activities*'" – that is, regardless of whether it goes to what the District Court believed to be "legitimate functions." *Holder*, 561 U.S. at 33 (quoting a declaration submitted by the State Department) (emphasis added).

Instead, this Court's observation in *Rothstein* that Iran has "many legitimate agencies, operations, and programs" was a response to the plaintiffs' novel theory that causation could be presumptively established when a defendant knowingly provided material support to a State Sponsor of Terrorism (which theory the Court described as a "*post hoc, ergo propter hoc* proposition" that would make *any* material support to a State Sponsor of Terrorism a proximate cause of terrorism backed by that state). 708 F.3d at 96.[30] This uncontroversial conclusion transmogrified in the District Court's opinion into a requirement that proximate cause can only be plausibly alleged when a defendant aids and abets entities that "solely exist for terrorist purposes." SPA-38.

[30] The SAC, supported by U.S. government findings, also plausibly alleges that the conspiracy resulted in Hezbollah and the IRGC receiving hundreds of millions of dollars, which alone distinguishes it from the complaint in *Rothstein* – an aiding and abetting case predicated on primary liability under §2333(a) that conspicuously lacked non-conclusory allegations that any moneys defendant "transferred to Iran were in fact sent to Hezbollah or Hamas." 708 F.3d at 97.

Indeed, the District Court went even further, surmising that "even if NIOC was an agent [of the FTO IRGC], it certainly doesn't mean that all of their money went to [the] IRGC…." SPA-74:1-3. But causation under §2333(d)(2) does not, as a matter of law, require allegations that "all" of the funds SCB laundered for NIOC and other Iranian instrumentalities went to the IRGC. *All* of an FTO's funds potentially facilitate its criminal conduct, as both political branches have repeatedly determined, and NIOC's funds *are* the funds of its principal, the IRGC.[31]

Under the correct legal standard for civil conspiracy, Treasury's 2008 formal determination that Iran's "wide array of deceptive techniques" enabled it to "facilitate its support for terrorism," ¶172, renders the SAC's allegations that Plaintiffs' injuries were caused by acts pursuant to or in furtherance of the conspiracy highly plausible. The District Court erred in applying the wrong legal standard and substituting its own contrary judgment.

[31] As the Magistrate Judge found, SPA-152-53, and the District Court acknowledged, SPA-43 n.38, FTOs operate through such agents and alter egos. *See Nat'l Council of Resistance of Iran*, 373 F.3d at 157 ("ordinary principles of agency law are fairly encompassed by the alias concept under AEDPA.").

IV. THE DISTRICT COURT ERRONEOUSLY APPLIED *ROTHSTEIN*'S PROXIMATE CAUSE STANDARD TO PLAINTIFFS' CIVIL AIDING AND ABETTING CLAIMS UNDER §2333(d)(2).

A. The SAC Plausibly Alleges Defendant SCB Knowingly Provided Substantial Assistance by Laundering Funds That Enabled Iran and Its Instrumentalities to Support Terrorism.

Because JASTA was enacted while Defendants' motions to dismiss were pending, Plaintiffs argued, in the alternative, that their material support claims were supported on the theory of aiding and abetting liability under §2333(d)(2) and moved for partial reconsideration as to the dismissal of their aiding and abetting claim against SCB.[32] The District Court permitted this argument in the hearing on reconsideration. SPA-93:15-17 ("I still consider your arguments now in consideration under a theory of aiding and abetting liability ...."). However, it rejected that claim, holding that the SAC failed to plausibly plead proximate cause under *Rothstein* for the reasons it set out in its original opinion.

Civil aiding and abetting under §2333(d)(2) requires that (1) the party the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time he provides the assistance; and (3) the defendant must knowingly and substantially assist the principal violation. *Halberstam*, 705 F.2d at 487-88.

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[32] *See* SPA-166 n.42 (noting that the complaint did not plead aiding and abetting claims but "many of their claims would also fall under [a JASTA] aiding-abetting theory as well").

The District Court found that the SAC plausibly alleged that Hezbollah, the IRGC, and their terror proxies in Iraq committed the Attacks that caused Plaintiffs' injuries, satisfying the first element. SPA-42. But the District Court never determined whether SCB was "generally aware" of its role "as part of an overall illegal or tortious activity" because it found that the SAC failed to plausibly allege that SCB proximately caused Plaintiffs' injuries. As it did for civil conspiracy, it again erroneously substituted *Rothstein*'s substantial factor standard for the correct standard for a civil aiding and abetting under §2333(d)(2) and repeated its error in restricting liability to those who assist entities that "solely exist for terrorist purposes." SPA-38-39 and n.35.

Civil aiding and abetting requires that "*the party the defendant aids* must perform a wrongful act that causes an injury," not that the aider and abettor do so. *Halberstam*, 705 F.2d at 487-88 (emphasis added), *quoted with approval by Linde*, 882 F.3d at 329.

With respect to the second element, substantial assistance, *Halberstam* identified six factors relevant to determining "how much encouragement or assistance is substantial enough" to satisfy the requirement that the defendant "must knowingly and substantially assist the principal violation." 705 F.2d at 477-78, 483-84. Those six factors are: (1) the nature of the act encouraged, (2) the amount and kind of assistance given by defendant, (3) defendant's presence or absence at the

time of the tort, (4) defendant's relation to the principal, (5) defendant's state of mind, and (6) the period of defendant's assistance. *Id.* at 483-84. These factors strongly support Plaintiffs' claims.

Here, SCB provided substantial assistance to the IRGC (through its agent, NIOC, among others), which performed wrongful acts that caused Plaintiffs' injuries. First, the terrorist acts committed by the IRGC jointly with Hezbollah and their local proxies in Iraq are indisputably heinous. As *Halberstam* asserted, "a court might … apply a proportionality test to particularly bad or opprobrious acts, *i.e.*, a defendant's responsibility for the same amount of assistance increases with the blameworthiness of the tortious act or the seriousness of the foreseeable consequences." *Id.* at 484 n.13.

Second, the amount of assistance SCB provided the IRGC through its agents and affiliates was astronomical. *See supra* at 19-22. These allegations greatly outstrip Hamilton's service to Welch's "criminal enterprise involving stolen goods" (not murder) as banker, bookkeeper, recordkeeper, and secretary. 705 F.2d at 487.

Third, the SAC plausibly pleads that SCB was the most significant launderer of USD for the IRGC, serving as the CBI's "treasury" for NIOC "oil-for-terror" revenues, ¶¶ 404, 504, 505 n.27, 624-25, and also provided extensive, illegal money laundering services directly to IRGC agents, NIOC and MODAFL, and other Iranian

entities like Bank Melli and Mahan Air that the U.S. government has found supported Iranian-sponsored terrorism in Iraq.

Fourth, SCB laundered funds for the IRGC and helped it obtain banned weapon components for the entire period of the Attacks from 2004 to 2011. Unlike the defendant in *Siegel*, 933 F.3d 217, 225, SCB continued its illicit conduct long after it was twice sanctioned by U.S. regulators and after providing those regulators with false assurances that its conduct had improved (the DFS-NY found those assurances "unjustified" because from 2008 through 2014 SCB allowed "an additional $600 million in USD payments" for Iranian entities that violated OFAC regulations). *See supra* at 22 n.15.

Finally, SCB's support was knowing and continuous—it "was no passing fancy or impetuous act." *Halberstam*, 705 F.2d at 488. It is enough that the SAC plausibly alleges that SCB knowingly provided unlawful substantial assistance to entities that were *integral* to the IRGC's illicit enterprise and its financing of its terror campaigns, as the U.S. government has found. *See supra* at 12-14. And as *Halberstam* noted, "[t]he particular offensive nature of an underlying offense might also factor in … the 'state of mind' of the defendant" for purposes of assessing substantial assistance. *Halberstam*, 705 F.2d at 484 n.13. So, too, the duration of the assistance "may afford evidence of the defendant's state of mind." *Id.* at 484. Here

both factors support the plausibility of the SAC's allegations of knowing substantial assistance.

B. The SAC Plausibly Alleges That SCB Was Generally Aware of Its Role in a Criminal Enterprise.

As noted above, having erroneously applied *Rothstein*'s "substantial factor" test to dismiss Plaintiffs' aiding and abetting claim against SCB, the District Court never reached the question of whether the SAC plausibly alleged that SCB was "generally aware of [its] role as part of an overall illegal or tortious activity at the time [it] provide[d] the assistance." *Halberstam*, 705 F.2d at 487-88.

The SAC's detailed allegations, however, make clear that SCB was generally aware of its role in unlawfully laundering hundreds of billions of dollars through the U.S. financial system that enabled "the Iranian regime to facilitate its support for terrorism and proliferation." ¶¶172, 636-60.

In *Halberstam*, Hamilton was not aware that Welch would commit murder, and, indeed, the record did not show that she even knew he was engaged in burglaries. It was enough that she was aware of her bookkeeping role for the "overall illegal or tortious activity" of a "criminal enterprise" involving "some type of personal property crime at night" from which violence was a foreseeable risk. 705 F.2d at 487-48. *Halberstam* thus forecloses the argument that the secondary actor must be aware of its role in the principal tort – there murder.

Noting the sharp distinction between civil and criminal secondary liability, *Linde* observed that for civil aiding and abetting "[s]uch awareness may not require proof of the specific intent demanded for criminal aiding and abetting liability," or "proof that [the secondary actor] knew of the specific attacks at issue" when it provided the assistance. 882 F.3d at 329. This is consistent with Congress's stated intention that the statute's liability extend to those who "knowingly or recklessly contribute material support or resources." SPA-254, §2(a)(6).

Here the SAC alleges in detail that SCB was generally aware of its role in a criminal enterprise. ¶¶636-60, SPA-25-7 (noting that Plaintiffs alleged Defendants' role in the conspiracy "in significant and compelling detail"). Actively stripping transactions of identifying data and developing other money laundering techniques for the benefit of prohibited parties is a glaring departure from "routine" banking services. Rather, those services were performed "in an unusual way under unusual circumstances for a long period of time" and support the inference of awareness of a role in concealed funding of Iran's "terrorism and proliferation" activities. *See Halberstam,* 705 F.2d at 487.

And these deceptive techniques were only part of SCB's illicit efforts on behalf of Iran and its instrumentalities, including designated entities. Relying on the *Promontory Report*, the SAC also details SCB's facilitation between 2001 and 2007 of more than 1,300 letters of credit using methods designed to conceal the

participation of Iranian parties, including the IRGC, MODAFL, and Mahan Air. ¶¶673-79. These letters of credit financed the illegal acquisition of materials and technologies,[33] including components that could be used to manufacture EFPs deployed against Coalition Forces in Iraq. ¶¶674, 831-33. That the SCB's officers admitted that their conduct posed risk of "serious criminal liability" also plausibly suggests that SCB "had a general awareness of [its] role in a continuing criminal enterprise." 705 F.2d at 487-88.

Even at the pleading stage (*Halberstam* and *Linde* were post-trial decisions), the R&R was surely correct in observing that it "defies credulity" that SCB, like Hamilton in *Halberstam*, did not know "that something illegal was afoot," SPA-170-71, when it engaged in a decade-long criminal scheme to hide *hundreds of billions* of dollars that, until November 2008, could have been transferred transparently through the U.S. financial system had they been for lawful purposes.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court reverse the judgment below and remand the case for further proceedings.

[33] The SAC discusses the various U.S. government blacklists in detail, ¶¶189-94, 831 n.60 (discussing anti-terrorism basis of blacklist).

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Hackensack, NJ

Respectfully submitted,

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Dated: March 9, 2020

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