No. 18-1031

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RHONDA KEMPER,

Plaintiff-Appellant,

v.

DEUTSCHE BANK AG,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Illinois
The Honorable Michael J. Reagan
No. 3:16-CV-00497-MJR-SCW

BRIEF FOR DEFENDANT-APPELLEE DEUTSCHE BANK AG

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May 11, 2018

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-1031

Short Caption: Kemper v. Deutsche Bank AG

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Attorney's Signature: s/ John E. Hall Date: 5/11/2018

Attorney's Printed Name: John E. Hall

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Attorney's Signature: s/ Mark P. Gimbel Date: 5/11/2018

Attorney's Printed Name: Mark P. Gimbel

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INTRODUCTION

U.S. Army Specialist David Schaefer, Jr. fell serving his country in Iraq, killed by a roadside bomb. Rhonda Kemper, Spc. Schaefer's mother and the Plaintiff-Appellant here, is entitled to unreserved sympathy and respect for her loss.

Plaintiff does not, however, attempt to hold accountable the Shi'a militants that killed her son, the terrorist organization Hezbollah that trained those militants, the Government of Iran that funded Hezbollah, or the Iranian banks that allegedly helped Iran do so. This is instead a treble damages suit under the Anti-Terrorism Act, 18 U.S.C. § 2333, accusing Defendant-Appellee Deutsche Bank AG ("Deutsche Bank"), a German banking and financial services company, of perpetrating an "act of international terrorism" that caused Spc. Schaefer's death.

The strained interpretation of the ATA that underlies this legal theory has been rejected before and should not be accepted by this Court. Deutsche Bank's processing of U.S.-dollar transactions for Iranian banks was not an "act of international terrorism," and Spc. Schaefer's death did not occur "by reason of" Deutsche Bank's actions. 18 U.S.C. § 2333(a). The district court agreed, dismissing the Complaint for failure to plead either of these two independent elements of an ATA claim. That decision was correct and should be affirmed on any or all of the following grounds:

First, as the district court held, the ATA's "by reason of" language requires a showing of proximate cause, which Plaintiff fails to plead. Not a single transaction processed by Deutsche Bank is alleged to have been for the benefit of terrorists. Plaintiff instead claims that Deutsche Bank did business with Iranian banks, that Iran *separately* used those banks as a vehicle to transfer money to Hezbollah, that Hezbollah

trained and supplied Iraqi militias, and that one of those unidentified militias planted the roadside bomb that killed Spc. Schaefer. To say that this attenuated series of events sufficiently links Deutsche Bank's actions to Plaintiff's injuries would stretch the concept of proximate cause beyond recognition. It would also require this Court to diverge from the well-reasoned decisions of its sister circuits, including a Second Circuit case holding that the ATA's proximate-cause requirement was not met in a case where the defendant bank illegally provided currency directly to the Government of Iran. *See Rothstein v. UBS AG*, 708 F.3d 82 (2d Cir. 2013).

Second, as the district court also found, Plaintiff fails to allege facts sufficient to show that Deutsche Bank committed a predicate criminal act, one of several requirements to plead that the bank committed an "act of international terrorism" within the meaning of the ATA. 18 U.S.C. § 2331(1)(A). Plaintiff accuses Deutsche Bank of conspiring to provide or conceal material support to terrorists. *Id.* §§ 2339A, 2339B. But to support such a claim, Plaintiff would need to allege facts showing Deutsche Bank intentionally joined an agreement with the *objective* of materially supporting terrorism. As the district court found, the Complaint at most suggests Deutsche Bank conspired to evade sanctions—not to put money in the hands of terrorists.

Third, Plaintiff fails to plead another statutory requirement of an "act of international terrorism": that Deutsche Bank's actions appeared to be intended to intimidate or coerce a civilian population, or to influence a government through intimidation or coercion. *Id.* § 2331(1)(B). No objective observer could conclude on the facts alleged that Deutsche Bank's non-transparent banking practices reflected any such intent.

The ATA's treble damages cause of action is a potent remedy. In 2016, Congress carefully extended the statute's reach to allow secondary liability in certain circumstances. Plaintiff has rightly dropped her claim under these amendments, because Deutsche Bank plainly did not "conspire[] with the person who committed [the] act of international terrorism"—*i.e.*, the Shi'a militants that planted the roadside bomb that tragically killed her son. *Id.* § 2333(d)(2). Yet even though Congress did not intend for Deutsche Bank to be *secondarily* liable on these facts, Plaintiff maintains that the ATA allows a claim of *primary* liability, under which Deutsche Bank can be said to have committed an "act of international terrorism" that proximately caused battlefield injuries in Iraq. That is not the statute Congress enacted.

JURISDICTIONAL STATEMENT

Plaintiff's Amended Jurisdictional Statement is complete and correct.

STATEMENT OF THE ISSUES

1. Whether Deutsche Bank proximately caused a Shi'a militia's roadside bombing in Iraq, where Deutsche Bank processed U.S. dollar-clearing transactions for the benefit of Iranian banks, and the Government of Iran separately used those banks to transfer funds to Hezbollah and the Islamic Revolutionary Guard Corps.

2. Whether Deutsche Bank, by processing transactions for the benefit of Iranian banks in a non-transparent manner, intentionally joined a conspiracy that had as its objective providing, or concealing, material support for terrorism.

3. Whether an objective observer would view Deutsche Bank's processing of transactions that benefitted Iranian banks as manifesting an intent by Deutsche Bank to intimidate or coerce a civilian population or government.

STATEMENT OF THE CASE

Plaintiff Rhonda Kemper filed this civil action against Deutsche Bank under the Anti-Terrorism Act ("ATA"), 18 U.S.C. § 2333. Plaintiff's claim arises from the death of her son, Army Spc. David Schaefer, who was tragically killed by an explosive device in May 2009, while serving in Basra, Iraq. JA5 ¶¶ 27–30. Plaintiff alleges Deutsche Bank conspired to provide "material support to Iran" by processing U.S.-dollar transactions for Iranian banks in a manner meant to evade U.S. sanctions. JA1 ¶¶ 1–2; JA47 ¶ 240; JA53 ¶ 260. Those transactions allegedly provided Iran with greater access to U.S. currency, which it in turn used to fund terrorist proxies that trained Shi'a fighters to attack U.S. forces in Iraq. *See, e.g.*, JA1–2 ¶¶ 2, 5–7; JA29–30 ¶¶ 148–53. The district court dismissed the Complaint with prejudice, holding these allegations were insufficient to plead that Deutsche Bank proximately caused Plaintiff's injury or joined a conspiracy whose object was to materially support terrorism. A11–13.

A. Statutory Background: The ATA's Civil Remedy Provision

The ATA is largely comprised of criminal prohibitions related to terrorism. *See, e.g.*, 18 U.S.C. §§ 2339A, 2339B (criminalizing the provision of material support to terrorists, and, *inter alia*, conspiring to provide such support). Section 2333(a) of the ATA, however, creates a civil cause of action for U.S. nationals "injured . . . by reason of an act of international terrorism." For its first 24 years, the ATA limited such actions to primary liability claims—*i.e.*, claims against the person who committed the "act of international terrorism" that injured the plaintiff. *Id.*[1] As this Court explained,

[1] The full text of § 2333(a) and other relevant statutory provisions are set out in an addendum. *See* Fed. R. App. P. 28(f).

the ATA's "silence on the subject of secondary liability" meant plaintiffs could not bring civil aiding-and-abetting or conspiracy claims under § 2333(a). *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 689 (7th Cir. 2008) (en banc).

A claim for primary liability under § 2333(a) consists of several elements. A plaintiff must allege facts showing that the defendant directly committed an "act of international terrorism." 18 U.S.C. § 2333(a). The ATA explicitly defines "international terrorism" to require, *inter alia*, that the defendant's activities: (i) be "violent" or "dangerous to human life," *id.* § 2331(1)(A); (ii) "appear to be intended" to achieve the terroristic objectives of "intimidat[ion]" or "coerc[ion]," *id.* § 2331(1)(B); and (iii) violate some federal or state criminal law (or would do so if committed in the United States), *id.* § 2331(1)(A). The requirement of a predicate crime means a plaintiff must plead facts showing the defendant's conduct satisfies each element of a federal or state criminal offense. Often that predicate offense is the crime of materially supporting terrorism. *Id.* §§ 2339A, 2339B. Finally, in addition to alleging facts meeting all of the above requirements, a plaintiff must allege facts showing that he or she was injured "by reason of" the defendant's act of international terrorism. *Id.* § 2333(a).

While this case was pending, Congress enacted § 2333(d), which now permits secondary liability claims under the ATA in certain circumstances. *See* Justice Against Sponsors of Terrorism Act ("JASTA"), Pub. L. No. 114-222, § 4, 130 Stat. 852, 854 (2016). Under § 2333(d), a plaintiff must plead that her injury arose from an "act of international terrorism" that was "committed, planned, or authorized" by a group

that the Secretary of State had previously designated as a foreign terrorist organization ("FTO"). In such cases, a plaintiff may sue defendants who "aid[ed] and abet[ted]" or "conspire[d] with" the person who committed the act of international terrorism that injured her. 18 U.S.C. § 2333(d)(2). Congress made § 2333(d) retroactive to all injuries on or after September 11, 2001. JASTA, § 7, 130 Stat. 855.

B. Deutsche Bank's Non-Transparent Processing of Financial Transactions Involving Iranian Banks

The Complaint draws heavily on a consent order Deutsche Bank entered into with the New York State Department of Financial Services ("DFS") in November 2015 ("Consent Order"), in which Deutsche Bank admitted to not maintaining accurate books and records. *See* JA59–JA77. The Consent Order related to "non-transparent methods and practices" Deutsche Bank used in providing U.S. dollar-denominated correspondent banking services[2] to Iranian, Libyan, Syrian, Burmese, and Sudanese financial institutions and others from 1999 through 2006. JA59; JA60; JA61–62 ¶¶ 2–3. Specifically, Deutsche Bank employees stripped or omitted identifying information when routing wire transfers for customers from these countries through Deutsche

[2] Banks establish correspondent banking relationships to provide services to clients in countries where they lack a presence. A domestic "respondent" bank opens an account in its own name with a foreign bank (the "correspondent bank") that agrees to provide it with services for a fee. One common scenario involves international wire transfers: If the respondent bank is instructed to wire money to a foreign bank with which it lacks a relationship, it can enlist the services of a correspondent bank to act as an intermediary. When such transactions require the transfer of U.S. dollars, a bank with a U.S. presence often will act as the intermediary. *See generally Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 165 n.3 (2d Cir. 2013); JA60 n.1 ("U.S. dollar clearing is the process by which U.S. dollar-denominated payments between counterparties are made through a bank in the United States.").

Bank affiliates in the United States, thereby shielding the transfers from added scrutiny. JA60–62. In 2006, Deutsche Bank "instituted a series of policies" to end this practice and to "wind down business with U.S.-sanctioned entities." JA64 ¶ 9.

All five countries covered by these practices were at the time under U.S. sanctions regimes. In Iran's case, the United States imposed a broad embargo in 1995, making it illegal to export goods or services to Iran, or to import goods or services from Iran, unless licensed by the U.S. government. Exec. Order No. 12,959, 60 Fed. Reg. 24,757 (May 6, 1995); Exec. Order No. 13,059, 62 Fed. Reg. 44,531 (Aug. 19, 1997). Thus, providing financial services to an Iranian bank potentially raised sanctions issues.

But it was not automatically a sanctions violation. Until November 2008, the Office of Foreign Assets Control ("OFAC") authorized banks to process certain U.S. dollar-clearing transactions for the direct or indirect benefit of Iranian financial institutions, pursuant to a general license to the Iranian Transaction Regulations known as the "U-Turn License." JA23 ¶¶ 121–22; 31 C.F.R. § 560.516 (1995), *amended* 73 Fed. Reg. 66,541 (Nov. 10, 2008). As Plaintiff describes it, "[t]he purpose of the U-Turn [license] was to provide Iranian parties indirect access to U.S. dollar transactions for legitimate agencies, operations, and programs." JA23 ¶ 121.[3]

[3] Specifically, the U-Turn License authorized U.S. banks to process transactions for the benefit of the Iranian government, Iranian banks, and other Iranian persons provided they did not involve a specially designated national ("SDN") and the transactions originated from a non-U.S., non-Iranian bank and only passed through the U.S. financial system en route to another non-U.S., non-Iranian bank. *See* 31 C.F.R. § 560.516(a)(1) (1995), *as amended*. So, for example, the license would have permitted a U.S. bank to process a transfer of U.S. dollars from a European energy company, through a U.S. correspondent account, to the account of an Iranian oil company held at another foreign (non-Iranian) bank.

Bank Saderat, Bank Melli, and the Central Bank of Iran were each among the Iranian banks for whose benefit U.S. financial institutions could process dollar-clearing transactions under the U-Turn License. These banks were owned by the Government of Iran, *see* JA41–42 ¶¶ 206, 210; JA44 ¶¶ 219–20; JA45 ¶ 228, and each had legitimate operations, JA41 ¶ 205; JA46 ¶ 233; JA45 ¶ 229. Bank Saderat was permitted to benefit from U-Turn transactions until September 2006; Bank Melli and the Central Bank until October 2007. JA42 ¶ 209; JA44 ¶ 223.

Deutsche Bank would thus have been able to process covered transactions on behalf of Iranian financial institutions (including the above-mentioned banks) during the period covered by the Consent Order without violating U.S. sanctions. Indeed, 98% of the transactions identified in the Consent Order, or over 99% by dollar volume, did not involve sanctions violations. JA60 & n.2. In a separate settlement (referenced in the Complaint at JA39 ¶ 200), the Federal Reserve similarly found that Deutsche Bank's practices resulted in only "intermittent violations of OFAC [sanctions] Regulations." Order at 2, *Matter of Deutsche Bank AG*, No. 15-034-B-FB (Bd. Gov. Fed. Res. Sys. Nov. 4, 2015), http://tinyurl.com/FedResDB. Neither settlement suggests that any funds from these transactions were used to support terrorism.

Separate from the Iran embargo and the U-Turn exception to it, OFAC sanctions individuals and entities that have been designated as Specially Designated Nationals ("SDNs") or Specially Designated Global Terrorists ("SDGTs"). 31 C.F.R. ch. V, app. A. Bank Melli and Bank Saderat were designated (as an SDN and SDGT, respec-

tively) in October 2007, JA43–44 ¶¶ 215, 223, one year after Deutsche Bank instituted policies to end the non-transparent banking practices addressed in the Consent Order, JA64 ¶ 9. Plaintiff conflates these specific terrorism-related designations with the overall Iran embargo when she states that Deutsche Bank "admitted" to processing "more than 600 transactions . . . directly for [SDGTs or SDNs]." Appellant's Br. 2; *see also id.* at 47. Those 600 transactions involved not just Iranian banks, but also banks from Libya, Syria, Burma, and Sudan. And nothing in the Consent Order or the Complaint suggests that any of the 600 (out of 27,200) transactions determined to be sanctions violations involved an individually designated Iranian entity.[4]

Even though the Consent Order acknowledges that Deutsche Bank instituted policies in 2006 to stop these nontransparent banking practices and wind down its business with U.S.-sanctioned entities, JA64 ¶ 9, Plaintiff alleges that Deutsche Bank continued these activities through 2011. *See* JA33 ¶ 167; JA35 ¶ 176; Appellant's Br. 16–17. Plaintiff attempts to support this assertion in four ways.

First, Plaintiff refers to the Consent Order's statement that after 2006, "instances of resubmitting rejected payments or processing sanctions-related payments through New York persisted." Appellant's Br. 16 (quoting JA64 ¶ 9); *see* JA37 ¶ 182. Neither the Consent Order nor the Complaint specifies how many "instances," how long this persisted, whether any of these transactions related to Iran (as opposed to Libya, Syria, Burma, or Sudan), or whether any of these transactions resulted in sanctions

[4] Thus, Plaintiff is also incorrect in asserting that Deutsche Bank's "admitted intent" was "evading U.S. CTF [counter-terrorism financing] sanctions." Appellant's Br. 47.

violations (unlike 99% of the transactions that had been processed from 1999 to 2006).

Second, Plaintiff alleges that prior to 2007, Deutsche Bank entered into unspecified "financing arrangements" with the National Iranian Oil Company ("NIOC") and others. JA41 ¶ 202. Plaintiff does not identify NIOC as a member of the alleged "[c]onspiracy." *E.g.*, JA1 ¶ 1; JA27 ¶ 139. Nor does she allege that these "financing arrangements" involved U.S. dollars or violated U.S. sanctions.

Third, Plaintiff cites transactions Deutsche Bank allegedly "facilitate[d]" on behalf of the Islamic Republic of Iran Shipping Lines ("IRISL") between 2008 and 2010. JA31 ¶ 155; JA41 ¶ 203. On appeal, Plaintiff identifies a "New York indictment" as the basis of this allegation. Appellant's Br. 16. That indictment mentions not Deutsche Bank but a distinct corporate entity, Deutsche Bank Trust Company Americas ("DBTCA"), and, in fact, alleges that IRISL "deceive[d] U.S. financial institutions" like DBTCA. Indictment at 7, *People v. Islamic Republic of Iran Shipping Lines* (N.Y. Sup. Ct. June 20, 2011), https://tinyurl.com/IRISLIndict.

Fourth, Plaintiff asserts for the first time on appeal that DBTCA reached a civil settlement with OFAC in 2013 concerning two Iran-related transactions that DBTCA allegedly processed or failed to block in 2008 and 2009. *See* Appellant's Br. 17. That settlement does not indicate that Deutsche Bank had any involvement with these transactions. *See* Press Release, U.S. Dep't of the Treasury, Enforcement Information (Sept. 5, 2013), https://tinyurl.com/DBTCASettle. OFAC also concluded that these transactions "were not the result of willful or reckless conduct" by DBTCA, and "did not confer an economic benefit on a sanctioned entity." *Id.*

C. Iran's Sponsorship of Terrorism

Iran has been designated by the U.S. Government as a state sponsor of terrorism since 1984. JA7–8 ¶¶ 46–49. Iran allegedly finances groups such as Hezbollah, the Islamic Revolutionary Guard Corps ("IRGC"), and the IRGC's subdivision known as the Quds Force. JA1 ¶ 2. The Complaint alleges that these groups in turn provided support, including weapons and training, to groups of Shi'a militants, known as "Special Groups," who fought U.S. forces during the War in Iraq after 2003. JA 1–2 ¶ 2; JA11 ¶ 71; JA12 ¶ 75; JA13 ¶ 79; JA15 ¶ 91; JA16–18 ¶¶ 98–101. Plaintiff's son, Army Spc. David Schaefer, was killed by an explosive device in May 2009 while serving in Basra as part of that war effort. JA5 ¶¶ 28–30. The Complaint alleges that the explosive device was "Iranian-manufactured" and "provided to Iranian-funded and -trained terror operatives in Iraq," JA5 ¶ 28, though it does not contain any allegation of who specifically placed or detonated the device.

According to the Complaint, Iran used U.S. dollars to finance its proxy war in Iraq, both because of the weakness of its own currency, and because the economies of Iraq and Lebanon (where Hezbollah is based) were "dollarized." JA2 ¶¶ 5–6; JA12 ¶ 74; JA22 ¶¶ 117–18; JA25 ¶ 129. To obtain U.S. dollars, Iran purportedly required access to the U.S. dollar-clearing system, JA19–20 ¶ 108, access Plaintiff asserts was partially impeded by U.S. sanctions, JA25 ¶ 128. The Complaint alleges that Iran therefore conspired with its "banking agents," including Bank Saderat and Bank Melli, the IRGC, IRISL, and certain Western financial institutions, including Deutsche Bank, "to evade U.S. economic sanctions and disguise financial payments." JA1 ¶ 1; *see*

JA27 ¶ 139. Iran in turn allegedly drew on its reserves of U.S. dollars to fund "ordinary commercial" activities, JA19 ¶ 107, to establish charities and media companies in Iraq, JA10 ¶ 67, and finally to send money to the Quds Force and Hezbollah through its "banking agents." JA26 ¶ 135; JA33–34 ¶ 170; JA34 ¶ 171.

Plaintiff claims that as a result of this conspiracy, Iran was able to transfer $150 million to the IRGC, Hezbollah, and other terror groups. JA27 ¶ 141; JA34–35 ¶ 173. Iran allegedly sent $50 million of this sum to "a Hezbollah-controlled organization" through Bank Saderat. JA42 ¶ 212. Deutsche Bank is not alleged to have had any involvement in this transfer; the Complaint states that Bank Saderat sent this money through its London subsidiary to its Beirut branch. JA43 ¶ 215. Similarly, Deutsche Bank is not alleged to have had any involvement in the transfer of the remaining $100 million from Bank Melli to the Quds Force. JA44 ¶¶ 221, 223; JA45 ¶¶ 225, 226. In fact, Plaintiff does not allege that any of the transfers Deutsche Bank processed were used to fund terrorists. Nor does Plaintiff allege that Deutsche Bank processed any transaction on behalf of, or for the benefit of, any terrorist group.

D. Plaintiff's Causes of Action

The Complaint asserts two primary liability claims under § 2333(a). Because a primary liability claim under the ATA requires a predicate criminal offense, Plaintiff alleges that Deutsche Bank's transactions with Iranian banks violated 18 U.S.C. §§ 2339A and 2339B. JA1 ¶¶ 1–2; JA 47 ¶ 240; JA53 ¶ 260. Section 2339A criminalizes knowingly providing "material support or resources" to terrorists, or "conceal[ing] or "disguis[ing] the nature, location, source, or ownership" of such support, as well as "attempt[ing] or conspir[ing]" to do either such act. Section 2339B makes

it a crime to "knowingly provide[] material support or resources" to a designated FTO or to "attempt[] or conspire[] to do so." Plaintiff does not claim Deutsche Bank provided material support to terrorists in violation of these provisions. Rather, the sole basis of her claim is that Deutsche Bank violated the "express prohibition against *conspiring* to provide material support." JA47 ¶ 240; JA53 ¶ 260 (emphasis added).

Plaintiff also attempted to advance a secondary liability claim under § 2333(d) in the district court. Days after Congress enacted JASTA, Plaintiff brought the amendment to the district court's attention, arguing that JASTA "applies to the instant action," and that § 2333(d) "provides both an alternative and a dispositive statutory basis for the conspiracy claims in this case." Plaintiffs' Notice, Dkt. 51, pp. 1–4.

In her opening brief, Plaintiff asserts that she never pursued a JASTA claim under § 2333(d) in the district court, but only "advised the District Court that it confirm[ed] the proper legal framework for assessing [her] claims." Appellant's Br. 27 n.17. In fact, Plaintiff's Notice concerning JASTA was followed by a round of briefing in which she expressly argued that "the complaint satisfies § 2332(d)(2)'s requirement[s]," and that even though she had not amended her Complaint to add a specific JASTA count, "the Complaint can be sustained on any legal theory supported by the allegations, whether or not it was pleaded." Plaintiffs' Reply, Dkt. 54, pp. 1–3 & n.1.

E. The District Court's Ruling

On December 7, 2017, the district court granted Deutsche Bank's motion to dismiss, disposing of the Complaint on two grounds. A2. The court held that Plaintiff's conclusory allegations that Deutsche Bank should have foreseen that Iran would use U.S. currency to fund terrorism were insufficient to plead that the bank proximately

caused Plaintiff's injury. A11–12. Processing dollar-clearing transactions "for Iranian financial institutions, even if done to evade U.S. sanctions," was not akin to donating to or "processing funds for a terrorist organization." A12. And the "distance" or "degree of separation" between Deutsche Bank's business relationship with Iranian banks, and the roadside bombing that took the life of Spc. Schaefer in Iraq, was too great to plausibly say one caused the other. A11. The court further held that Plaintiff had not pled that Deutsche Bank conspired to materially support terrorism. A11–12. As the court explained, "the complaint does not establish that Deutsche Bank participated in any conspiracy other than perhaps to evade economic sanctions." A11.

The district court also held that Plaintiff had failed to plead a secondary liability claim under the ATA because her allegation of a "conspiracy with Iran" was insufficient to state a claim under the newly enacted § 2333(d)(2). A3 n.1. Plaintiff does not challenge this aspect of the district court's ruling on appeal.

SUMMARY OF THE ARGUMENT

Plaintiff fails to allege three essential elements of her primary liability claims under the ATA: proximate causation, 18 U.S.C. § 2333(a); a predicate criminal offense, *id.* § 2331(1)(A); and the objective appearance of terroristic intent, *id.* § 2331(1)(B).

1. The Complaint fails to allege that Plaintiff's injury occurred "by reason of"—*i.e.* was proximately caused by—Deutsche Bank's processing of U.S. dollar-transactions for Iranian banks. 18 U.S.C. § 2333(a). Proximate causation requires a direct relationship between a defendant's conduct and the plaintiff's injury. Here no such relationship is alleged. Deutsche Bank did not participate in the roadside bombing that killed Spc. Schaefer. Nor did it process transactions for any person who did. Instead,

Plaintiff's theory is that Deutsche Bank conspired to evade U.S. sanctions with Iran and "its banking agents." Plaintiff alleges that Deutsche Bank processed dollar-clearing transactions for Iranian banks in a non-transparent manner; separate and apart from those transactions, Iran used those banks as a vehicle to fund Hezbollah and the Quds Force; and those groups supported an array of Shi'a militias in Iraq, one of which planted the roadside bomb. This theory, and the attenuated and broken "causal chain" on which it relies, stretches proximate causation beyond any recognized limit.

The Second Circuit rejected a materially identical theory in *Rothstein v. UBS AG*, 708 F.3d 82 (2d Cir. 2013). As that court explained, doing business with a government, even a state sponsor of terrorism, is not akin to doing business with a terrorist organization. Governments have legitimate agencies, operations, and programs to fund. They decide how to spend their resources, to legitimate and illegitimate ends alike, and in exercising that independent judgment, they break the chain of responsible causation. A government that chooses to fund terrorist proxies thus can be said to proximately cause the acts those groups carry out. But a business that merely provides commercial services to a government (or its agencies) cannot be said to directly cause all acts of terrorism that the state might fund separately.

Plaintiff does not, and cannot, mount a substantial argument that Deutsche Bank's processing of dollar-clearing transactions for the benefit of Iranian banks directly caused roadside bombings in Iraq. Instead, she invokes principles of criminal and civil conspiracy law to argue that Deutsche Bank is liable under § 2333(a) be-

cause the attack on Spc. Schaefer's unit was a "foreseeable consequence of the [alleged] conspiracy." That is not how the ATA works. Directness, not foreseeability, is the measure of proximate causation. *Fields v. Twitter, Inc.*, 881 F.3d 739, 748 (9th Cir. 2018). And neither criminal nor civil conspiracy law relieves Plaintiff of her burden to satisfy § 2333(a)'s proximate cause requirement. Establishing that Deutsche Bank criminally conspired to provide material support to terrorists would satisfy a single element of the ATA's definition of "international terrorism." *See* 18 U.S.C. § 2331(1). Plaintiff would still need to plead the rest, *and* establish that her injury occurred "by reason of" that act of international terrorism. That is an essential requirement of a primary liability claim under the ATA—which is the only claim before this Court given that Plaintiff abandoned her § 2333(d) conspiracy claim on appeal.

2. Plaintiff also fails to allege that Deutsche Bank conspired to provide material support to terrorists—the only predicate offense she invokes as the basis for her ATA claims. *See* 18 U.S.C. § 2331(1)(A). The Complaint contains no factual content establishing Deutsche Bank intentionally joined a conspiracy whose objective was to support terrorism. Instead, Plaintiff repeatedly insists that while the objective of the "conspiracy" between Deutsche Bank and Iran was to evade economic sanctions, a conspiracy to evade sanctions on Iran is *per se* a conspiracy to support terrorism.

This mischaracterizes both the governing sanctions regime and Deutsche Bank's conduct. The transactions Deutsche Bank processed could have violated U.S. sanctions without having any connection to terrorism or to any individually designated terrorist entity, because the United States long ago placed a general embargo on Iran.

Only a small fraction of Deutsche Bank's non-transparent transactions actually violated U.S. sanctions, and even those had no necessary connection to *terrorism*-related sanctions on Iran; Bank Saderat and Bank Melli were designated for such sanctions only *after* Deutsche Bank wound down its non-transparent banking practices.

3. Nowhere does the Complaint allege facts establishing that Deutsche Bank's *own* actions "appear[ed] to be intended" to intimidate civilians or coerce government policy. 18 U.S.C. § 2331(1)(B). Rather, Plaintiff's allegations demonstrate to any objective observer that the employees who developed Deutsche Bank's non-transparent banking services, and marketed them to customers around the world, appeared to be motivated by a desire to develop a "'lucrative' U.S. dollar business" by helping customers avoid the added regulatory scrutiny that could delay even legal dollar transactions. This is not to excuse this practice or the apparent profit motive behind it; Deutsche Bank has paid fines for processing dollar-clearing transactions for Iranian, Syrian, Libyan, Burmese, and Sudanese customers in a manner that U.S. regulators deemed non-transparent. But nothing in the Complaint plausibly suggests that Deutsche Bank, by providing these services to Iranian banks, at a time when U.S. law permitted them to benefit from such transactions, exhibited an intent to promote attacks on U.S. forces in Iraq or to intimidate or coerce the U.S. or Iraqi Governments.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's order granting Deutsche Bank's motion to dismiss. *See Manistee Apartments, LLC v. City of Chicago*, 844 F.3d 630, 633 (7th Cir. 2016). To survive a Rule 12(b)(6) motion, 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)). Conclusory allegations unsupported by specific factual content, and allegations contradicted by other factual content in the Complaint or materials incorporated therein, are "not entitled to the assumption of truth." *Firestone Fin. Corp. v. Meyer*, 796 F.3d 822, 827 (7th Cir. 2015) (quoting *Iqbal*, 556 U.S. at 678); *see also Flannery v. Recording Indus. Ass'n of Am.*, 354 F.3d 632, 638 (7th Cir. 2004). To "plausibly suggest an entitlement to relief," the well-pleaded allegations in the Complaint must be more than "'merely consistent with' a defendant's liability," *Iqbal*, 556 U.S. at 677, 681; they must "raise a right to relief above the speculative level," *Twombly*, 550 U.S. at 555.

ARGUMENT

I. The Complaint Fails to Plead that Plaintiff's Injuries from a Roadside Bomb in Iraq Occurred "By Reason of" Deutsche Bank's Clearing of U.S.-Dollar Transactions for Iranian Banks.

To state a primary liability claim under 18 U.S.C. § 2333(a), Plaintiff must allege facts showing that her injuries occurred "by reason of" an "act of international terrorism" that Deutsche Bank committed. "By reason of" is a familiar standard, one the Supreme Court has repeatedly held requires proximate causation. *E.g.*, *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 8–9 (2010). Plaintiff does not, and cannot, plead that Deutsche Bank's processing of dollar-clearing transactions that benefitted Iranian banks proximately (*i.e.* directly) caused a roadside bombing carried out by an unidentified Shi'a militia during the Iraq War. As the Second Circuit has held, providing Iran access to U.S. dollars, even unlawfully, does not proximately cause terrorist

attacks committed by organizations supported by that country. *See Rothstein v. UBS AG*, 708 F.3d 82, 95–97 (2d Cir. 2013).

Although failure to plead proximate causation was one of two independent grounds for dismissal found by the district court, A10–12, Plaintiff's opening brief mentions proximate cause just twice, once in passing on page 44, and once more directly on the last page. Rather than mount a substantial argument that Deutsche Bank's banking practices proximately caused roadside bombings in Iraq, Plaintiff argues only that her injuries were a "foreseeable" result of a "conspiracy." Appellant's Br. 44–49. This attempt to displace proximate causation with concepts rooted in conspiracy law misunderstands that this is a *primary* liability claim. Pleading a conspiracy as a predicate crime underlying such a claim does not relieve Plaintiff of the need to allege facts showing that *Deutsche Bank*'s actions proximately caused her injuries.

Far from establishing the direct relationship the ATA requires, the Complaint contains no non-conclusory facts directly connecting Deutsche Bank's non-transparent banking practices to the unidentified Shi'a militants that planted the explosive device in Iraq that killed Spc. Schaefer. Not only are there many steps and intervening actors in the purported causal chain linking the two, there is a clear break in the chain: Plaintiff does not, and cannot, allege that Deutsche Bank processed a single transaction for the benefit of any terrorist group. All she can argue is that Deutsche Bank processed dollar-clearing transactions for the benefit of Iranian banks, and that Iran independently sent money through those banks—in transactions that are not alleged to have involved Deutsche Bank in any way—to terrorist groups that trained

and supported Shi'a militias in Iraq. The district court correctly held that the ATA's proximate causation requirement is not satisfied in such circumstances.

A. Section 2333(a)'s "by reason of" limitation requires Plaintiff to establish proximate causation, necessitating a "direct relationship" between Deutsche Bank's actions and Plaintiff's injury.

"It is a 'well-established principle of [the common] law that in all cases of loss, we are to attribute it to the proximate cause, and not to any remote cause.'" *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1305 (2017) (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014)). Courts presume "Congress 'is familiar with the common-law rule and does not mean to displace it *sub silentio*' in federal causes of action." *Id.* (quoting *Lexmark*, 134 S. Ct. at 1390).

Congress incorporated this principle into the ATA by requiring a plaintiff to establish that her injury occurred "by reason of" an act of international terrorism. Congress has used that phrase in other statutes,[5] and the Supreme Court has consistently held that it requires a showing that the defendant's conduct proximately caused the plaintiff's injury. *E.g.*, *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 267–68 (1992). Because Congress "used the same words" in the ATA, "we can only assume it intended them to have the same meaning that courts had already given them." *Id.*; *see also Rothstein*, 708 F.3d at 95 ("[I]f, in creating civil liability through § 2333, Congress had intended to allow recovery upon a showing lower than proximate cause, we think it either would have so stated expressly or would at least have chosen language that

[5] *Compare* 18 U.S.C. § 2333(a) (ATA), *with* Sherman Act, ch. 647, § 7, 26 Stat. 209, 210 (1890), 15 U.S.C. § 15(a) (the Clayton Act), *and* 18 U.S.C. § 1964(c) (Racketeer Influenced and Corrupt Organizations Act).

had not commonly been interpreted to require proximate cause for the prior 100 years."); *Fields v. Twitter, Inc.*, 881 F.3d 739, 744–46 (9th Cir. 2018) (agreeing ATA's "by reason of" limitation adheres to the traditional proximate cause requirement).

The purpose of proximate causation is to "bar[] suits for alleged harm that is 'too remote' from the defendant's [allegedly] unlawful conduct." *Lexmark*, 134 S. Ct. at 1390. In this way, proximate causation is "shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability." *CSX Transp., Inc. v. McBride,* 564 U.S. 685, 692 (2011).

Proximate cause supplies this limiting principle by requiring directness. As this Court has explained, proximate causation requires a "direct relation between [the] injury asserted and [the] injurious conduct alleged," and it excludes "links that are too remote, purely contingent, or indirect." *Nichols v. Mich. City Plant Planning Dep't*, 755 F.3d 594, 604 (7th Cir. 2014) (quoting *Staub v. Proctor Hosp.*, 562 U.S. 411, 419 (2011)). This directness principle applies equally to federal statutes requiring proximate causation. *See, e.g.*, *id.* As the Supreme Court has repeatedly explained, a plaintiff can satisfy a federal statute's "by reason of" standard only by showing "some *direct relation* between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268 (emphasis added); *accord Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457 (2006); *Hemi Grp.,* 559 U.S. at 8–12.

The same directness requirement applies to the ATA. Recently, the Ninth Circuit held that "to satisfy the ATA's 'by reason of' requirement, a plaintiff must show at least some direct relationship between the injuries that he or she suffered and the

defendant's acts." *Fields*, 881 F.3d at 744. The Second Circuit has reached the same conclusion, noting that the "central question" with respect to "proximate causation . . . is whether the alleged violation led directly to the plaintiff's injuries." *Rothstein*, 708 F.3d at 91–92 (quoting *Anza*, 547 U.S. at 461).

In her cursory response to the district court's proximate-cause ruling, Plaintiff never argues that Deutsche Bank's services led *directly* to a roadside bombing in Iraq. She focuses entirely on whether her injuries should have been "foreseeable" to Deutsche Bank. Appellant's Br. 44; *see also id.* at 46 ("The Complaint Plausibly Alleged that David Schaefer's Death from an EFP Was a Reasonably Foreseeable Consequence of Iran's Conspiracy to Provide Material Support to Terrorism.").

But the measure of proximate causation is directness, not foreseeability. As the Supreme Court explained, "foreseeability alone is not sufficient to establish proximate cause" under a federal statute—at least absent a clear indication "Congress intended to" deviate from common law principles and "provide a remedy wherever th[e] ripples [of harm] travel." *Bank of Am.*, 137 S. Ct. at 1305–06 (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 534 (1983)).

Nothing in the ATA gives any such indication. Instead, Congress placed in § 2333 a standard that the Supreme Court has long construed to require directness, not foreseeability. *E.g.*, *Hemi Grp.*, 559 U.S. at 12 (rejecting a foreseeability standard in favor of a focus "on the directness of the relationship between [defendant's] conduct and the harm"). Thus, the Ninth Circuit recently applied *Bank of America* to confirm the "insufficiency" of foreseeability as a measure of proximate causation: "[F]or purposes of

the ATA, it is a direct relationship, rather than foreseeability, that is required." *Fields*, 881 F.3d at 748; *see also id.* at 749 ("Congress intentionally used the 'by reason of' language to limit recovery" and avoid "the seemingly boundless litigation risks that would be posed by extending the ATA's bounds as far as foreseeability may reach."); *Rothstein*, 708 F.3d at 91 (foreseeability is not enough unless the defendant's actions also were a "substantial factor in the sequence of responsible causation").

B. A bank does not proximately cause acts of terrorism by doing business with an entity that separately funds terrorists.

Because proximate causation requires a "direct relationship" between the defendant's conduct and the plaintiff's injury, courts reject claims that "stretch[] the causal chain" "well beyond the first step." *Hemi Grp.*, 559 U.S. at 10–11. Applying this principle to the ATA, courts have consistently held that where a defendant engages in commercial transactions with an entity that has legitimate operations, which *in turn* provides resources to terrorists, that is "insufficient for proximate causation purposes." *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 118, 124 (2d Cir. 2013). In these cases, the intermediary's role acts as an intervening cause of the victim's injury that breaks the chain of responsible causation: If A does business with B, and B gives money to C, A does not directly cause the crimes of C, at least so long as B is not a wholly illegitimate pass-through. *See, e.g.*, *Rothstein*, 708 F.3d at 97; *Owens v. BNP Paribas S.A.*, 235 F. Supp. 3d 85, 97–99 (D.D.C. 2017).

The Second Circuit's decision in *Rothstein* is instructive. The plaintiffs in *Rothstein* sued UBS, a Swiss bank, for allegedly "facilitat[ing]" Hamas and Hezbollah bombings and rocket attacks in Israel. 708 F.3d at 84–85, 87. The plaintiffs' theory

was materially identical to (if anything, more direct than) the one Plaintiff advances here. UBS allegedly "furnish[ed] United States currency to Iran" in violation of OFAC sanctions, thereby bolstering Iran's cash reserves. *Id.* Iran, in turn, provided U.S. currency to terrorist groups like Hezbollah. *See id.* at 93. The plaintiffs in *Rothstein* alleged that UBS "knew full well" the cash it provided to Iran "would be used to cause and facilitate terrorist attacks by Iranian-sponsored terrorist organizations," because "receipt of cash dollars from Iran" would "substantially increase[]" the terrorists' ability to carry out attacks. *Id.* at 87, 97 (emphasis omitted). *Compare* JA30 ¶ 151 (alleging Deutsche Bank "knew or was deliberately indifferent to the foreseeable consequences of providing Iran . . . with access to hundreds of billions of dollars . . . and the resulting funding of Iranian-controlled organizations and terrorism proxies").

The Second Circuit held that these allegations failed to establish that UBS proximately caused bombings in Israel. *Rothstein*, 708 F.3d at 95–97. While "[t]he fact that the transfers were made to a state sponsor of terrorism of course made it more likely that the moneys would be used for terrorism," Congress did not intend to hold "any provider of U.S. currency to a state sponsor of terrorism . . . strictly liable for injuries subsequently caused by a terrorist organization associated with that state." *Id.* at 96–97. Instead, Congress required proof of a *direct* causal relationship between a defendant's conduct and plaintiff's injury. *Id.* at 91–92, 96. To state a claim under § 2333(a), plaintiffs thus had to offer "nonconclusory allegation[s]" "that the moneys UBS transferred to Iran *were in fact sent to Hizbollah or Hamas*," or that Iran, "with its billions of dollars in reserve," "would have been unable to fund the attacks by Hizbollah and

Hamas without the cash provided by UBS." *Id.* at 97. The plaintiffs in *Rothstein*, like the Plaintiff here, did not allege well-pled facts to support either theory.

Rothstein explained that foreign governments, even state sponsors of terrorism, have "legitimate agencies, operations, and programs to fund." *Rothstein*, 708 F.3d at 97. Another court elaborated that a bank that merely does business with a government like Iran "deal[s] with a truly independent intermediary," and is "thus one step further removed from the acts that caused the plaintiffs' injuries, separated by a sovereign state that was not simply a funnel to provide money to terrorists." *Owens*, 235 F. Supp. 3d at 97. "Processing funds for" a state that supports terrorism "is not the same as processing funds for a terrorist organization or a terrorist front." *Id.* at 99. These governments are "recognized sovereign nation[s] with a variety of responsibilities and pursuing a variety of interests." *Id.* (citation and internal quotation mark omitted). They exercise independent judgment and "use[] the funds" for many "legitimate purposes," creating a break in the causal chain. *Id.* at 97.

Thus in *Owens*, BNP Paribas did not directly cause al Qaeda's attacks on U.S. embassies by processing transactions for Sudan and its banks—even though they violated U.S. sanctions, and even though the bank allegedly knew Sudan supported al Qaeda. *See id.* at 87–89, 99. And in *In re Terrorist Attacks*, the defendant did not proximately cause the September 11th attacks by "provid[ing] funding to purported charity organizations known to support terrorism that, in turn, provided funding to al Qaeda." 714 F.3d at 124. Absent a showing that the defendant "provided money

directly to al Qaeda," or that the defendant's money "actually was transferred to al Qaeda," the direct connection required by the ATA was missing. *Id.*

The fact pattern of these cases is very different from this Court's *en banc* decision in *Boim v. Holy Land Foundation for Relief & Development*, 549 F.3d 685 (7th Cir. 2008) (en banc). There it was alleged that the defendant charities donated money directly to Hamas or its fronts, knowing Hamas carried out terrorist attacks in Israel. *Id.* at 691–94, 698; *id.* at 709 (Rovner, J., concurring in part and dissenting in part). In cases like *Boim*, where the defendant gives the ultimate terrorist actor the resources it needs to carry out attacks, knowing it would use them for that purpose, the defendant's conduct is immediately and directly linked to the plaintiff's injury. *See, e.g.*, *Strauss v. Credit Lyonnais, S.A.*, 925 F. Supp. 2d 414, 432 (E.D.N.Y. 2013) (bank transferred money to Hamas fronts and provided financial services to Hamas's primary fundraiser in France); *Weiss v. Nat'l Westminster Bank PLC*, 278 F. Supp. 3d 636, 643 (E.D.N.Y. 2017) (bank allegedly "provided funds to Hamas front-groups" during period in which Hamas carried out attacks); *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 53 (D.D.C. 2010) (bank "allegedly knew that it was providing financial services to an agent of the [Palestinian Islamic Jihad ("PIJ")], and that the PIJ would use those funds for the sole purpose of engaging in terroristic violence against Jewish civilians in Israel"). These "donor liability" cases, as this Court has described them, *Boim*, 549 F.3d at 702, are a direct and straightforward case of A gives to B, and B uses that support to engage in terrorism. There is no "independent intermediary," *Owens*, 235 F. Supp. 3d at 97, so no break in the causal chain.

Examining this body of case law as a whole, a sensible line emerges: Material support provided directly to a terrorist group may proximately cause attacks carried out by the group thereafter, as this Court concluded in *Boim*. But as other courts have held, engaging in a commercial activity with a foreign government entity having legitimate operations—even one that *also* supports terrorism—does not proximately cause everything that government separately funds. *See*, *e.g.*, *Strauss*, 925 F. Supp. 2d at 433 (The difference between donating to Hamas and engaging in business with "a government that performs myriad legitimate functions in addition to allegedly funding terroris[m]" is "meaningful," because while Congress has found that FTOs are so tainted that any contribution to them facilitates terrorism, "the same thing cannot be said about a government."); *Weiss*, 278 F. Supp. 3d at 642–43 (same).

C. Deutsche Bank did not process a single transaction for the benefit of any terrorist group.

This case is *Rothstein* redux, this time with an even less direct and more attenuated attempt to plead a causal chain. As in *Rothstein*, Plaintiff seeks to hold a bank liable for transactions with an intermediary that separately funded terrorism. And as in *Rothstein*, there is no allegation Deutsche Bank processed a transaction for, or gave money to, any terrorists responsible for Plaintiff's injury. Plaintiff does not suggest *Rothstein*'s analysis was wrong, focusing instead on three "facts" she believes sets her Complaint apart. Appellant's Br. 46–47. Not only do these attempts fail, they reinforce that Deutsche Bank's clearing of transactions for Iranian banks—many steps and actors removed from roadside bombings in Iraq—did not cause her injury.

1. Plaintiff argues that "the *Rothstein* complaint included no non-conclusory allegations that the bank notes UBS[] supplied to Iran . . . were ever provided to terrorists," whereas here "the criminal conspiracy . . . resulted in" "more than $150 million Eurodollars cleared through the U.S. being transferred to Hezbollah and the IRGC." *Id.* (citing JA42–44, ¶¶ 212, 215, 223); *see also* JA27 ¶ 141 (alleging in general terms that the "Conspiracy" netted $50 million for the benefit of Hezbollah and $100 million for the IRGC). But the Complaint never alleges facts showing that any "transfer[s] to Hezbollah and the IRGC" ever "cleared through the U.S," Appellant's Br. 46—much less that *Deutsche Bank* processed any such transfers. Rather, the paragraphs Plaintiff cites for this claim allege that *Iran* transferred $50 million through Bank Saderat to Hezbollah fronts, JA42 ¶ 212;[6] that *Bank Saderat* transferred this money through its London subsidiary to Beirut, JA43 ¶ 215;[7] and that the *IRGC* and *Quds Force* used Bank Melli's financial services to receive $100 million, JA44 ¶ 223.[8] As for Deutsche Bank, Plaintiff alleges only that it processed transactions on behalf of "Iran, IRISL, and the Iranian Bank Co-conspirators"—not any terrorist group. JA33 ¶ 166.

Indeed, Plaintiff's entire legal theory is tantamount to an admission that Deutsche Bank processed no transfers benefitting terrorist groups. If Plaintiff could have

[6] JA42 ¶ 212: "[A] Hezbollah-controlled organization [] has received $50 million directly from Iran through Bank Saderat since 2001."

[7] JA43 ¶ 215: "[F]rom 2001 to 2006, 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."

[8] JA44 ¶ 223: "From 2002 to 2006, Bank Melli was used to send at least $100 million to the Qods Force."

traced any Deutsche Bank transaction to terrorists (as *Rothstein* requires), she presumably would have claimed that Deutsche Bank provided material support to terrorists. Instead her theory is based entirely on Deutsche Bank joining a purported "conspiracy" to do so. JA47 ¶ 240; JA53 ¶ 260. By carefully stating that "the criminal conspiracy" resulted in transfers to terrorists, Appellant's Br. 46, Plaintiff acknowledges that she has no basis to connect *Deutsche Bank* to any transfer to terrorists.[9]

Far from distinguishing *Rothstein*, Plaintiff's claims share the same fundamental flaw. As in *Rothstein*, Deutsche Bank allegedly provided Iran with greater access to U.S. currency, *see, e.g.*, JA2 ¶ 5; JA19–20 ¶¶ 104–08, but it was *Iran* that separately drew on its reserves, without Deutsche Bank's involvement, to send money through Iranian banks to groups like Hezbollah and the Quds Force, *see, e.g.*, JA43 ¶ 217; JA45 ¶ 226. *Compare, e.g.*, JA34 ¶ 172 (alleging that without the access to U.S. dollars Deutsche Bank provided, Iran's ability to provide U.S. dollars to Hezbollah would have been diminished), *with Rothstein*, 708 F.3d at 87 (recounting allegations that Iran had trouble accessing U.S. dollars needed for Hamas and Hezbollah, and UBS "solved this problem . . . by illegally providing Iran with hundreds of millions of dollars in cash"). Those groups later trained others, who trained others still, who in turn

[9] When pressed on this point below, Plaintiff admitted that her contention is that Deutsche Bank's "*customers and co-conspirators*"—not Deutsche Bank itself—"sent $50 million to Hezbollah and $100 million to the IRGC." Plaintiff's Opp., Dkt. 44, p. 18 (emphasis added). Indeed, in a different suit, Plaintiff's counsel maintains that several *other* banks (but not Deutsche Bank) are responsible for those same transfers. *See* Pls.' Br. in Opp. to Mot. to Dismiss at 35, *Freeman v. HSBC Holdings Plc*, No. 14-cv-6601 (E.D.N.Y. July 10, 2015).

targeted U.S. forces in Iraq. JA13 ¶ 79; JA15 ¶ 91; JA16–17 ¶ 98. In essence, Plaintiff's theory is that A did business with B, who later provided funds to C, who in turn trained groups D through G, one of whom planted a bomb in Iraq. This is exactly the sort of attenuated and broken chain that does not suffice to establish proximate causation under § 2333(a). *Rothstein*, 708 F.3d at 97; *Owens*, 235 F. Supp. 3d at 97.[10]

2. Unable to draw any connection—let alone a direct one—between Deutsche Bank transactions and terrorists, Plaintiff next argues that this case is different because it involves "numerous transactions directly with Bank Saderat . . . and Bank Melli." Appellant's Br. 46–47. If that is any distinction, it makes Plaintiff's claim *weaker*.

Plaintiff emphasizes that these Iranian banks were "significant facilitator[s] of Hezbollah's financial activities." Appellant's Br. 46. That hardly distinguishes *Rothstein*, in which UBS provided U.S. dollars *directly to the Government of Iran*, which provided massive amounts of aid to Hezbollah and Hamas. *See* 708 F.3d at 85–86. That Iran was designated a state sponsor of terrorism did not change the fact that it also had "legitimate agencies, operations, and programs to fund." *Id.* at 97. There is likewise no dispute that Bank Saderat and Bank Melli had legitimate operations. *See, e.g.*, JA41 ¶ 205 (noting Bank Saderat's worldwide operations, including

[10] One of Plaintiff's *amici* argues that ATA "[l]iability should hinge on proof that the defendant and the terrorist entity worked together for a substantial period of time." Br. for Sen. Richard Blumenthal as *Amicus Curiae* 3–4. If that is the standard, then Plaintiff plainly cannot meet it. Plaintiff does not allege that Deutsche Bank processed a single transaction for Hezbollah or the Quds Force, let alone that it "worked together" with any "terrorist entity" "for a substantial period of time."

branches in London, Paris, and Frankfurt); JA23 ¶ 121 (U-Turn license provided "Iranian parties," including Bank Saderat and Bank Melli, "indirect access to U.S. dollar transactions for legitimate agencies, operations, and programs").[11]

That rationale applies with even greater force here, given the time period relevant to Plaintiff's claims. Plaintiff emphasizes Bank Saderat's designation as an SDGT and Bank Melli's designation as an SDN, Appellant's Br. 46–47, but OFAC made these designations *in October 2007*. JA43–44 ¶¶ 215, 223. U.S. banks were still licensed to process U-Turn payments for the benefit of these banks prior to their designation, in Bank Saderat's case until September 2006 and in Bank Melli's case until October 2007. JA42, 44 ¶¶ 209, 223. By 2006, however, Deutsche Bank had already "instituted a series of policies . . . to end [non-transparent banking] practices and wind down business with U.S.-sanctioned entities." JA64 ¶ 9. If Iran's legitimate operations were sufficient to defeat proximate causation even *after* it was designated a sponsor of terrorism, then certainly Bank Saderat's and Bank Melli's legitimate operations *before* they were subject to any terrorism-related designation must suffice.[12]

[11] So too with IRISL, which according to Plaintiff "provides a variety of maritime transport services." JA19 ¶ 103 n.2. Moreover, although Plaintiff refers to IRISL's 2008 "designation by the U.S. Treasury Department" (Appellant's Br. 16), Treasury designated IRISL for "proliferation activity" to Iran's Ministry of Defense; Treasury did not mention terrorism at all. *See* Press Release, U.S. Dep't of the Treasury, Major Iranian Shipping Company Designated for Proliferation Activity (Sept. 10, 2008), http://tinyurl.com/TreasIRISL.

[12] Plaintiff makes conclusory allegations that Deutsche Bank agreed to continue participating in the "conspiracy" later than 2006. *E.g.*, JA27 ¶ 140; JA41 ¶ 202. As noted above, *supra* pp. 9–10, these allegations are conclusory and contradicted by facts and materials incorporated into the Complaint, so they are not entitled to an assumption of truth. *See, e.g.*, *Flannery*, 354 F.3d at 638. Fundamentally for present purposes, these allegations never suggest that any of Deutsche Bank's post-2006 activities involved Bank Saderat or Bank Melli.

The only other difference posed by the role of Iranian banks in this case is that it makes the purported causal chain even longer and more attenuated. In *Rothstein*, the causal chain had three steps: UBS transferred cash to Iran; Iran funded Hezbollah and Hamas; and those groups carried out attacks in Israel. *See* 708 F.3d at 85–88. Here, Plaintiff alleges that (1) Deutsche Bank did business with Iranian banks, *see* JA28 ¶ 143; (2) Iran separately used those banks to fund the Quds Force and Hezbollah, *see* JA18 ¶¶ 103-04; JA34 ¶ 171; (3) Hezbollah and the Quds Force then fomented violence in Iraq, *see, e.g.*, JA9 ¶¶ 57–58, and trained Shi'a militias to construct and use sophisticated explosives, JA15 ¶ 91; (4) those militias in turn trained other fighters, *see id.*; JA16–17 ¶ 98; and (5) eventually some unidentified "terror operatives" attacked Spc. Schaefer's unit with a sophisticated explosive, JA5 ¶ 28.

That is far from a "direct relation[ship] between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268. Just as providing "banking services to organizations and individuals said to be affiliated with al Qaeda" did not "proximately cause[] the September 11, 2001 attacks," *In re Terrorist Attacks*, 714 F.3d at 124, providing banking services to Iranian banks said to separately facilitate Iran's transfers to the IRGC and Hezbollah did not proximately cause a roadside bombing by an unidentified "Special Group" in Iraq.

3. Finally, Plaintiff states that Deutsche Bank engaged in "600 admitted transactions valued at over $38 million for entities on the OFAC lists." Appellant's Br. 47. Plaintiff appears to refer to the Consent Order's finding that approximately 1% of the transactions that Deutsche Bank processed non-transparently amounted to sanctions

violations (a figure that covers not just Iran-related transactions but also Sudan, Libya, Syria, and Burma). JA60 & n.2; *see also* Order at 2, *Matter of Deutsche Bank AG*, No. 15-034-B-FB (Bd. Gov. Fed. Res. Sys. Nov. 4, 2015) (finding Deutsche Bank's non-transparent banking practices resulted in only "intermittent violations of OFAC Regulations") (referenced in JA39 ¶ 200).

If Plaintiff's reference to "OFAC lists" is meant to suggest these transactions involved Iranian entities subject to terrorism designations, that assertion is unsupported. Because the United States generally prohibited financial transactions with Iran not covered by the U-Turn or some other license, any such transaction would constitute a sanctions violation. *See supra* pp. 7–8. Of the small fraction of transactions that involved such violations, nothing in the Consent Order or the Complaint suggests they benefitted any Iranian entity on a terrorism designation list.

Again, the only distinction from *Rothstein* is that Plaintiff's case is weaker. In *Rothstein*, the entirety of UBS's transfer of hundreds of millions of dollars to Iran, a state sponsor of terrorism, was "forbidden by OFAC regulations." 708 F.3d at 87. Yet engaging in sanctioned transactions directly with Iran did not mean UBS proximately caused terrorist attacks. *Id.* at 96–97. The same conclusion follows *a fortiori* where Deutsche Bank transacted almost exclusively with Iranian banks, not with the Government of Iran itself, and 99% of the transactions Deutsche Bank processed for customers from Iran (Libya, Syria, Burma, and Sudan) did not violate U.S. sanctions.

D. Neither *Pinkerton* nor *Halberstam* helps Plaintiff avoid the traditional proximate cause requirement under § 2333(a).

In a testament to the impossibility of showing that Deutsche Bank proximately caused her injuries, Plaintiff largely avoids the topic. *See* Appellant Br. 44–49. Instead she draws on general principles of criminal and civil conspiracy law to argue that she adequately pled that the attack on Spc. Schaefer's unit was a "foreseeable consequence of the [alleged] conspiracy" between Iran and Deutsche Bank. *Id.* at 44.

This argument confuses one element of Plaintiff's primary liability claim (act of international terrorism) with another (proximate cause). Plaintiff does *not* advance a claim for civil conspiracy liability under the ATA: she lost her § 2333(d) conspiracy claim below and abandoned it on appeal. *See supra* pp. 13–14; *Bernard v. Sessions*, 881 F.3d 1042, 1048 (7th Cir. 2018) ("A party waives arguments that are not presented in the opening brief."). And § 2333(a) does not permit such a claim. *See Boim*, 549 F.3d at 689–90. The most Plaintiff's "conspiracy" allegation can do is establish one sub-element of her primary liability claims under § 2333(a).

Specifically, to establish that a defendant committed an act of international terrorism, a plaintiff must establish, among other things, that the defendant committed a crime. 18 U.S.C. § 2331(1)(A). Here, the predicate crimes Plaintiff invokes are 18 U.S.C. §§ 2339A and 2339B, specifically the portion of those laws that criminalize conspiring to provide material support to terrorists. JA47 ¶ 240; JA53 ¶ 260. To adapt *Boim*'s language, Plaintiff's primary liability claim is based on a "chain of incorporation by reference," that links "section 2333(a) to section 2331(1) to [the conspiracy prong of] section 2339A [and 2339B]." 549 F.3d at 690. Even assuming Plaintiff has

adequately pled these offenses (which she has not, *see infra* Part II), she has merely satisfied one of the many requirements to plead an "act of international terrorism." She must still satisfy the other requirements of that defined term, *and* she must allege facts sufficient to show that Deutsche Bank's "act of international terrorism" proximately caused her injuries. *See Linde v. Arab Bank, PLC*, 882 F.3d 314, 325–26 (2d Cir. 2018); *Fields*, 881 F.3d at 749.

Plaintiff's invocation of *Pinkerton* liability is thus entirely inapt. *Pinkerton* is a criminal law doctrine whereby a member of a conspiracy can be found guilty of substantive crimes foreseeably committed by his coconspirators in the course of the conspiracy. *See United States v. Diaz*, 864 F.2d 544, 549 (7th Cir. 1988). It has nothing to do with whether Deutsche Bank's actions proximately caused a bombing in Iraq.

The civil conspiracy principles set forth in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), are no more relevant. *Halberstam* is not, as Plaintiff suggests, an overarching "governing legal framework for ATA civil liability." Appellant's Br. 45. Rather, in providing for secondary ATA liability for the first time in JASTA, Congress considered *Halberstam* the appropriate framework for this "Federal civil aiding and abetting and conspiracy liability"—*i.e.*, the *new* claim under § 2333(d). JASTA § 2(a)(5), 130 Stat. 852.[13] Again, Plaintiff lost her § 2333(d) claim below, and does not

[13] At times, Plaintiff implies that JASTA's enactment confirmed that she may plead a civil conspiracy claim under § 2333(a) without meeting the added requirements of § 2333(d). That is plainly wrong. Secondary liability was not available under the ATA before JASTA, *Boim*, 549 F.3d at 689, and even now it is available only on the terms Congress set out in § 2333(d).

try to revive it on appeal. *See supra* pp. 13–14. All that remains are Plaintiff's *primary* liability claims under § 2333(a), to which *Halberstam* has no application.[14]

Plaintiff envisions both *Pinkerton* and *Halberstam* as a shortcut around the ATA's proximate cause requirement. As long as she invokes conspiracy as the predicate crime, Plaintiff suggests, a defendant can be held liable under § 2333(a) for any foreseeable act done in furtherance of the conspiracy, without proving that the defendant's actions had any direct relationship with the plaintiff's injury. That is not how a § 2333(a) primary liability claim works. Pleading that Deutsche Bank joined a criminal conspiracy satisfies at most one part of one element of her claim. Neither *Halberstam* nor *Pinkerton* relieves Plaintiff of the burden to plead the rest, including that *Deutsche Bank* (not someone else) directly caused her injuries. *See Linde*, 882 F.3d at 325–26; *Fields*, 881 F.3d at 749; *Rothstein*, 704 F.3d at 94–97.

* * *

Plaintiff's theory of Deutsche Bank's liability is that it processed transactions for Iranian banks; that Iran separately used those banks to transfer U.S. dollars to Hezbollah and the Quds Force; that Hezbollah and the Quds Force used those U.S. dollars to train Shi'a militants in Iraq; that those militants planted bombs targeting U.S.

[14] *Halberstam* would not have helped Plaintiff even if she had preserved her § 2333(d) claim. To state a conspiracy claim under § 2333(d), a plaintiff must allege an injury arising from "an act of international terrorism committed, planned, or authorized" by a designated FTO, *and* that the defendant "conspire[d] with the person who committed such an act of international terrorism." In the district court, Plaintiff argued Hezbollah, a designated FTO, "plan[ned]" the attacks carried out by "Special Groups." Plaintiffs' Reply, Dkt. 54, p. 2. Even if true, Plaintiff still needed to allege Deutsche Bank "conspired with" the Special Group that attacked Spc. Schaefer's unit—*i.e.*, the "person who committed such an act of international terrorism." She did not do so, instead alleging Deutsche Bank conspired with "Iran, the IRGC, several Iranian banks . . . IRISL, and various Western financial institutions." JA27 ¶ 139.

forces; and finally, that one of those bombs later killed Spc. Schaefer. In support of that theory, Plaintiff asks this Court to cast aside traditional notions of proximate causation, diverge from the ATA decisions of its sister circuits, and import inapposite conspiracy doctrines into what is unequivocally a claim of primary liability. If this effort is successful, the broader implications would be stark. As Plaintiff repeats throughout the Complaint, she believes Deutsche Bank is responsible for Iranian terrorism because it provided "material support," not to a terrorist group, but "to Iran," *e.g.*, JA40 ¶ 240; JA 53 ¶ 260—something that could be said of many others. The Court should not accept Plaintiff's invitation to stretch the concept of proximate cause and the ATA itself so far from their moorings.[15]

[15] Because Plaintiff fails to plead proximate causation, the Court need not address whether Deutsche Bank's actions were the cause-in-fact of Plaintiff's injury. *Boim* held that a relaxed showing, less than a but-for standard, suffices to establish actual causation under the ATA. 549 F.3d at 695–98. Subsequent Supreme Court decisions, however, have held that "the [statutory] phrase, 'by reason of,' requires at least a showing of 'but for' causation." *Burrage v. United States*, 134 S. Ct. 881, 889 (2014) (citation omitted); *see also id.* at 890 (rejecting argument that "by reason of" requires only a showing the act was a "substantial" or "contributing" factor); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346–51 (2013) (similar). Plaintiff cannot allege that Iran, with its billions in reserves and long history of funding terrorism, would not have funded Hezbollah and the Quds Force but for Deutsche Bank's processing of a small number of transactions that violated U.S. sanctions, let alone that a specific attack by an unidentified Special Group occurred only because of those transactions.

II. The Complaint Fails to Allege Facts Showing that Deutsche Bank Intentionally Joined an Agreement to Commit the Criminal Offense of Material Support for Terrorism.

Another element of Plaintiff's § 2333(a) claim is that Deutsche Bank must have committed an "act of international terrorism." As this Court has recognized, the ATA's definition of "international terrorism" requires a plaintiff to show the defendant engaged in a predicate criminal act. *Boim*, 549 F.3d at 690; 18 U.S.C. § 2331(1)(A). This element was easy to establish in *Boim*, where the defendants' conduct—"[g]iving money to Hamas"—straightforwardly "violate[d] a federal criminal statute," *i.e.*, the prohibition on providing material support for terrorism under 18 U.S.C. § 2339A.

Plaintiff here, by contrast, does not claim that Deutsche Bank provided material support for terrorism. Nor could she. *See, e.g.*, *supra* pp. 28–30. Instead Plaintiff claims that Deutsche Bank violated the "conspiracy" prong of the material support statutes. *See* JA47 ¶ 240; JA53 ¶ 260. Under 18 U.S.C. §§ 2339A and 2339B, it is a criminal offense to "conspire to do" an act proscribed by those statutes, including "provid[ing] material support or resources" to terrorists. Section 2339A further prohibits "conceal[ing] or disguis[ing] the nature, location, source, or ownership of material support or resources" for terrorists or conspiring to do the same. To meet the "act of international terrorism" element of her primary liability claim, Plaintiff therefore must establish that Deutsche Bank conspired to violate § 2339A or § 2339B.[16]

[16] Plaintiff incorrectly suggests *Halberstam* "inform[s]" the interpretation of these statutes. Appellant's Br. 27. *Halberstam* instead provides the framework for "*civil* aiding and abetting and conspiracy liability." JASTA § 2(a)(5), 13 Stat. 852 (emphasis added). As explained above, there is no claim of civil conspiracy liability under § 2333(a), *Boim*, 549 F.3d at 689, and Plaintiff has abandoned her civil conspiracy claim under § 2333(d), *supra* pp. 13–

"[C]onspiracy is a specific intent crime[.]" *United States v. Ross*, 510 F.3d 702, 713 (7th Cir. 2007). To be guilty of a conspiracy, a defendant must "reach an agreement with the 'specific intent that the underlying crime be committed.'" *Ocasio v. United States*, 136 S. Ct. 1423, 1429 (2016) (emphasis omitted). Put differently, "each conspirator must have specifically intended that some conspirator commit each element of the substantive offense." *Id.* at 1432 (emphasis omitted). Thus, when courts have considered the conspiracy prong of § 2339A, they have required proof the defendant "entered into a conspiracy," and that "the objective thereof was to provide material support" for terrorism. *United States v. Hassan*, 742 F.3d 104, 140 (4th Cir. 2014).

There is no factual content in the Complaint that could support the claim that Deutsche Bank agreed to enter a conspiracy that had as its *objective* providing material support for terrorism. As the district court recognized, the objective of the conspiracy alleged in the Complaint was, at most, "to evade economic sanctions." A11-12. Plaintiff does not resist this characterization. *See* JA3 ¶ 8; JA27 ¶ 141; JA50 ¶ 251 (describing the conspiracy the same way). Her view is that a conspiracy to evade sanctions against Iran is *per se* a conspiracy to support terrorism, or at least to conceal the provision of such support. Appellant's Br. 29–33. This argument mischaracterizes both the governing sanctions regime and Deutsche Bank's alleged conduct.

In the 1990s, President Clinton imposed an embargo on Iran: with limited exceptions, it was unlawful to export goods or services from the United States to Iran, or

14. This is a primary liability case, with Plaintiff invoking a criminal conspiracy offense only to help establish the "act of international terrorism" element of her claim. *See supra* Part I.D.

to import goods or services from Iran to the United States. *See, e.g.*, Exec. Order No. 13,059, 62 Fed. Reg. 44,531. Under this regime, virtually any transaction with Iran was a sanctions violation, unless subject to some exception (*e.g.*, the U-Turn License). As a tool of foreign policy, sanctions can be used to punish or deter a country, and one "purpose" of this regime was to punish Iran for its support for terrorism. Appellant's Br. 30. But a transaction involving Iran did not need to have any connection to terrorism, or to any entity designated for terrorism-related reasons, to be illegal. If an American company agreed to smuggle a shipment of toothpaste to an Iranian company, that would literally be a "conspiracy to evade sanctions." So too if a bank agreed to facilitate a wire transfer from Iranian parents to their child studying in the United States. Obviously, neither conspiracy has as its objective supporting terrorism.

Plaintiff's brief repeatedly blurs the line between the Iran embargo and OFAC's more tailored sanctions on entities connected to terrorism. The brief goes so far as to state that "Deutsche Bank's admitted objective" was "evading CTF [counter-terrorism financing] sanctions." Appellant's Br. 31. That is simply false. The Consent Order portrays Deutsche Bank's non-transparent banking practices as a response to the concern that *any* "Iranian . . . customers" could face problems with U.S. dollar-clearing transactions. JA61. Just as misleadingly, the brief states that Deutsche Bank "admitted to" 600 transactions with "entities that the U.S. government has designated as SDGTs or SDNs." Appellant's Br. 19. Presumably Plaintiff is referring to Bank Saderat and Bank Melli, but these entities were not designated until *2007*, a

year after Deutsche Bank instituted policies to end its nontransparent banking practices. *See supra* pp. 7–9. And those 600 transactions involved not just Iran, but four other countries as well. Neither the Consent Order nor the Complaint therefore provides any reason to infer that the limited number of transactions that violated sanctions regulations were unlawful because they involved a designated Iranian entity. Moreover, because of the U-Turn License, 99% of the transactions covered by the Consent Order *were not found to have violated sanctions at all*. *See* JA60 & n.2. If this was a conspiracy to "evade sanctions" (albeit not an efficient one), Plaintiff alleges no facts supporting the inference that it was also a conspiracy to support terrorism.

Plaintiff fares no better in emphasizing an alleged conspiracy to "conceal or disguise" material support for terrorism. Appellant's Br. 32. She states that Deutsche Bank "'conceal[ed]' and 'disguis[ed]' the financing support it processed for sanctioned customers." *Id.* But the relevant offense under § 2339A is not concealing or disguising *something*, but transactions that provide material support to terrorists. The customers whose details Deutsche Bank concealed were "sanctioned" (or "potentially sanctioned") in the sense they were Iranian, and so subject to the general embargo. But again, nothing in the Consent Order or the Complaint supports the notion that any Iranian transaction Deutsche Bank concealed had any ties to terrorism. A conspiracy to conceal the involvement of Iranian nationals in financial transactions comes nowhere near pleading a conspiracy to conceal the transfer of funds to terrorists.[17]

[17] Plaintiff further argues that Deutsche Bank's acts of "concealment" "manifest guilty knowledge that the funds it processed would be used for supporting terrorism." Appellant's Br. 39. Perhaps one could infer knowledge that there was something improper about these

Plaintiff has thus not made any plausible claim that Deutsche Bank "entered into a conspiracy" where the "objective thereof was to provide material support or resources" for terrorism. *Hassan*, 742 F.3d at 140. At most, Plaintiff suggests that Iran exploited a service that Deutsche Bank made available to customers in several countries, and that Deutsche Bank "knew, or was at least aware of the substantial probability," that this would help Iran support terrorism. Appellant's Br. 43. This Court has rejected exactly such a theory of participation in a conspiracy:

> A person who is indifferent to the goals of an ongoing conspiracy does not become a party to [the] conspiracy *merely because that person knows that his or her actions might somehow be furthering that conspiracy*. Rather, a person becomes a member of the conspiracy when the person intends to join an agreement to carry out the criminal purposes underlying the conspiracy.

United States v. Collins, 966 F.2d 1214, 1219–20 (7th Cir. 1992) (emphasis added; citation omitted).

There are no well-pleaded factual allegations showing that Deutsche Bank "intend[ed] to join an agreement to carry out" violations of 18 U.S.C. §§ 2339A or 2339B. Plaintiff has thus not pled a predicate crime for her claim that Deutsche Bank committed an "act of international terrorism."[18]

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transactions, but it is a bridge too far to suggest that these transactions had anything at all to do with terrorism.

[18] Because there is no allegation Deutsche Bank actually joined a conspiracy whose objective was to materially support terrorism (or conceal such support), Plaintiff's extended *scienter* discussion (Appellant's Br. 33–44) is beside the point. The issue is not Deutsche Bank's "personal desire" (Appellant's Br. 35), but whether it "reach[ed] an agreement with the 'specific intent that the underlying crime be committed.'" *Ocasio*, 136 S. Ct. at 1429.

III. Deutsche Bank's Processing of Transactions for Iranian Banks Did Not "Appear to be Intended" to Intimidate a Civilian Population or Coerce Government Policy.

The Complaint falls short of plausibly alleging yet another element of Plaintiff's § 2333(a) claims: the objective appearance of terroristic intent. One element of "international terrorism" is that the defendant's actions must constitute a violent or dangerous crime. 18 U.S.C. § 2331(1)(A). But establishing a predicate crime is not enough. A plaintiff must also plausibly allege that the defendant's *own* actions "appear[ed] to be intended" to "intimidate or coerce a civilian population," "influence the policy of a government by intimidation or coercion," or "affect the conduct of a government by mass destruction, assassination, or kidnapping." *Id.* § 2331(1)(B). As this Court has said, "without such appearance[,] there is no international terrorist act within the meaning of [§] 2331(1) and hence no violation of [§] 2333." *Boim*, 549 F.3d at 699; *see also Linde*, 882 F.3d at 326 (holding that "all of § 2331(1)'s definitional requirements" must be met, including that the defendant's actions exhibited the terroristic purpose envisioned by § 2331(1)(B)).[19]

The question under § 2333(1)(B) is thus not what appeared to motivate Iran, Hezbollah, or whichever Special Group planted the roadside bomb in Iraq. It is whether *Deutsche Bank*, in processing dollar-clearing transactions for the benefit of Iranian banks (and banks in Burma and other countries), appeared to act with the specific

[19] Showing the defendant's objective terroristic intent is a requirement only of a primary liability claim. In a secondary liability claim authorized by § 2333(d), the relevant act of international terrorism is committed by someone else. It is that terrorist, not the defendant charged with secondary liability, who must appear to have intended to intimidate or coerce.

desire to terrorize civilians or coerce governments. No objective observer would believe that to be true based on the facts alleged. *See Boim*, 549 F.3d at 694 (§ 2331(1)(B) presents "a matter of external appearance rather than subjective intent"); *Weiss v. Nat'l Westminster Bank PLC*, 768 F.3d 202, 207 n.6 (2d Cir. 2014) (§ 2331(1)(B) creates "an objective standard to recognize the apparent intentions of actions").[20]

To any objective observer, Deutsche Bank's practices were motivated by business concerns, not a desire to intimidate civilians or coerce governments. At most, the Complaint alleges that Deutsche Bank non-transparently processed dollar-clearing transactions for public banks in Iran (and other countries)—99% (by dollar volume) of which were not sanctions violations, and not one of which is alleged to have involved or benefitted a terror group. *See* JA60; *supra* p. 8. Deutsche Bank also moved to end these banking practices and wind down its sanctioned-entity business in 2006, JA 64 ¶ 9, three years before the attack on Spc. Schaefer, JA5 ¶ 28.

Other allegations in the Complaint only confirm that, to an objective observer, Deutsche Bank's actions would appear to be for the purpose of increasing banking revenue, not furthering a terroristic agenda. The Consent Order notes that the employees who in 1999 developed methods for processing dollar payments "in non-transparent ways," did so "[i]n order to facilitate what [they] saw as 'lucrative' U.S. dollar business for sanctioned customers." JA61 ¶ 1. The Complaint also describes efforts by Deutsche Bank employees that appeared to be concerned with monetizing this

[20] Though the district court did not reach this issue, this Court may affirm on any ground preserved by Deutsche Bank and fairly supported by the record. *See Martinez v. UAW*, 772 F.2d 348, 353 (7th Cir. 1985).

business opportunity, not with funding terrorism: Deutsche Bank allegedly marketed the procedures, "touted" its experience to customers, and charged extra fees for the manual processing these payments required, JA37–38 ¶¶ 185, 190. And when a company manual instructed Deutsche Bank employees to treat these payments with caution, it did not suggest Deutsche Bank was worried about ensuring a flow of money to Hezbollah. After all, Deutsche Bank did business with Iranian banks, not any terror group. Rather, the manual exhibited a concern that the Bank might lose large, state customers, and "caus[e] financial and reputation loss for the Bank." JA38 ¶ 194.

These allegations contradict Plaintiff's conclusory allegations of objective intent. *See* JA51 ¶ 255; JA56 ¶ 271. They demonstrate that to any objective observer (indeed, even to Plaintiff), Deutsche Bank processed financial transactions for customers from Iran, Burma, and other countries not because it desired to intimidate civilians or coerce government policy, but because the fees they brought were seen by some employees as a business opportunity. *See Iqbal*, 556 U.S. at 678 (court need not accept conclusory allegations contradicted by other factual content in the complaint); *Harris v. Hanks*, 151 F.3d 1032 (7th Cir. 1998) (same); *Stansell v. BGP, Inc.*, No. 8:09-cv-2501, 2011 WL 1296881, at *9 (M.D. Fla. Mar. 31, 2011) (rejecting "conclusory" allegation that defendants' actions "appear to be intended to achieve" terroristic objectives, because it was "contradict[ed]" by allegations they made payments "in exchange for the [terrorists'] agreement to allow Defendants to conduct . . . oil exploration activities").

That is not to excuse this business practice. U.S. banking authorities have determined that Deutsche Bank's banking practices were not transparent, and that a

small proportion of the payments it processed violated OFAC regulations. Deutsche Bank has paid fines for its regulatory infractions, and long ago instituted policies to rectify them. *Supra* pp. 6–7. But processing transactions for Iranian banks in a non-transparent fashion is a far cry from planting a roadside bomb in Iraq or donating money directly to Hezbollah or Hamas. To be *liable as a terrorist*, a defendant must do more than violate a regulation or even a criminal statute, but must (among other things) appear to intend to intimidate or coerce. On the facts alleged here, Deutsche Bank's undertaking a non-transparent U.S. dollar-clearing business with a number of countries subject to sanctions does not objectively appear to be motivated by a desire to intimidate civilians, coerce governments, or pursue other terrorist objectives.

Plaintiff appears to adhere to the position, advanced below, that "criminal violations of the material support statutes are acts that *inherently* 'appear to be intended'" to intimidate or coerce. Plaintiffs' Opp., Dkt. 44, p. 19 (emphasis added); *see also* Appellant's Br. 25. That is wrong. As the Second Circuit recently held, proof that a bank violated the material support statute does not "necessarily prove[] the bank's commission of an act of international terrorism." *Linde*, 882 F.3d at 325–26. Because one component of the ATA's definition of "international terrorism" is that the act must violate a criminal law, "[t]he provision of material support to a designated terrorist organization in violation of § 2339B can certainly satisfy *that part* of the statutory definition," but "the defendant's act must *also* . . . appear to be intended to intimidate or coerce a civilian population or to influence or affect a government." *Id.* at 326.

To be sure, depending on the circumstances of a case, the fact of *direct* provision of material support to a designated terrorist organization may well permit a factfinder to infer the defendant appeared to act with the requisite terroristic intent. *See id.* at 321, 326–27 (provision of banking services to Hamas, including "bank transfers [which] were explicitly identified as payments for suicide bombings," raised jury question as to whether this element was satisfied); *Wultz*, 755 F. Supp. 2d at 18–19, 48–49 (bank processed transactions for a designated FTO despite warning these transactions directly aided its attacks). That is particularly true where, as in *Boim*, the defendant is a "knowing donor" to a designated FTO, 549 F.3d at 693–95, since it will generally be reasonable for a factfinder to conclude that one who donates directly to a designated terrorist group appears to share the terrorist's illicit objectives.

But it is quite another thing to say that engaging in a commercial banking relationship with Iranian banks, even in a nontransparent manner, shows the same objective purpose. The fact that these transfers allegedly increased Iran's dollar reserves, or that Iran *separately* and *indirectly* funded attacks in Iraq, does not mean *Deutsche Bank* appeared to act with the necessary terroristic intent. And engaging in a commercial banking relationship with Iranian banks is neither a sufficient cause of, nor an indication that the bank endorsed, acts of terrorism that Iran might later fund. *See, e.g.*, *Stutts v. De Dietrich Grp.*, No. 03-cv-4058, 2006 WL 1867060, at *2 (E.D.N.Y. June 30, 2006) ("engaging in commercial banking activity" with suppliers of chemicals to Saddam Hussein's regime did not appear to be "designed to coerce

civilians or government entities," despite Saddam's use of chemicals against civilians); *Brill v. Chevron Corp.*, No. 15-cv-04916, 2017 WL 76894, at *1, *4 (N.D. Cal. Jan. 9, 2017) (allegations Chevron should have known its oil-for-food kickbacks were indirectly aiding Saddam Hussein's funding of terror attacks in Israel did not demonstrate the objective terroristic intent required by § 2331(1)(B)).

By creating the U-Turn License, the U.S. government recognized that Iranian banks, like the Government of Iran, had legitimate operations that required access to global financial markets. *See* JA23 ¶ 121. From 1999 to 2006, Deutsche Bank provided correspondent banking services to Bank Saderat and Bank Melli, among others. Not one of those transactions is alleged to have directly involved or benefitted a terror group. And Deutsche Bank wound this business down before either bank was designated and excluded from the U-Turn license. On top of all of this, Plaintiff *herself* stipulates that Deutsche Bank's motives were financial, and repeatedly disclaims the need to show that the bank "desired to provide material support to terrorism." *E.g.*, Appellant's Br. 36–37. On these facts, an objective observer could not conclude that Deutsche Bank intended to promote attacks on U.S. forces in Iraq, intimidate civilians, or coerce the U.S. or Iraqi governments. *Cf. Mastafa v. Chevron Corp.*, 770 F.3d 170, 194 (2d Cir. 2014) (on a motion to dismiss, finding it implausible that a major, multinational corporation "intend[ed]" its allegedly corrupt oil-for-food dealings to "assist[]" Saddam's "torture and abuse of Iraqi persons").

CONCLUSION

For the foregoing reasons, the district court's ruling should be affirmed.

Dated: May 11, 2018

Respectfully submitted,

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STATUTORY ADDENDUM

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18 U.S.C. § 2331

§ 2331. Definitions

As used in this chapter—

(1) the term "international terrorism" means activities that—

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum;

* * *

18 U.S.C. § 2333

§ 2333. Civil remedies

(a) ACTION AND JURISDICTION.—Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

* * *

(d) LIABILITY.—

(1) DEFINITION.—In this subsection, the term "person" has the meaning given the term in section 1 of title 1.

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

18 U.S.C. § 2339A

§ 2339A. Providing material support to terrorists

(a) OFFENSE.—Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section 32, 37, 81, 175, 229, 351, 831, 842(m) or (n), 844(f) or (i), 930(c), 956, 1091, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332f, 2340A, or 2442 of this title, section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284), section 46502 or 60123(b) of title 49, or any offense listed in section 2332b(g)(5)(B) (except for sections 2339A and 2339B) or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.

(b) DEFINITIONS.—As used in this section—

(1) the term "material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials;

(2) the term "training" means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and

(3) the term "expert advice or assistance" means advice or assistance derived from scientific, technical or other specialized knowledge.

18 U.S.C. § 2339B

§ 2339B. Providing material support or resources to designated foreign terrorist organizations

(a) PROHIBITED ACTIVITIES.—

(1) UNLAWFUL CONDUCT.—Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 20 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

* * *

(g) DEFINITIONS.—As used in this section—

(1) the term "classified information" has the meaning given that term in section 1(a) of the Classified Information Procedures Act (18 U.S.C. App.);

(2) the term "financial institution" has the same meaning as in section 5312(a)(2) of title 31, United States Code;

(3) the term "funds" includes coin or currency of the United States or any other country, traveler's checks, personal checks, bank checks, money orders, stocks, bonds, debentures, drafts, letters of credit, any other negotiable instrument, and any electronic representation of any of the foregoing;

(4) the term "material support or resources" has the same meaning given that term in section 2339A (including the definitions of "training" and "expert advice or assistance" in that section);

(5) the term "Secretary" means the Secretary of the Treasury; and

(6) the term "terrorist organization" means an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act.

* * *

Justice Against Sponsors of Terrorism Act

Pub. L. No. 114-222, 130 Stat. 852 (2016)

* * *

SEC. 2. FINDINGS AND PURPOSE.

(a) FINDINGS.—Congress finds the following:

(1) International terrorism is a serious and deadly problem that threatens the vital interests of the United States.

(2) International terrorism affects the interstate and foreign commerce of the United States by harming international trade and market stability, and limiting international travel by United States citizens as well as foreign visitors to the United States.

(3) Some 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.

(4) It is necessary to recognize the substantive causes of action for aiding and abetting and conspiracy liability under chapter 113B of title 18, United States Code.

(5) The decision of the United States Court of Appeals for the District of Columbia in Halberstam v. Welch, 705 F.2d 472 (D.C. Cir. 1983), which has been widely recognized as the leading case regarding Federal civil aiding and abetting and conspiracy liability, including by the Supreme Court of the United States, provides the proper legal framework for how such liability should function in the context of chapter 113B of title 18, United States Code.

(6) Persons, 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 that threaten the security of nationals of the United States or the national security, foreign policy, or economy of the United States, necessarily direct their conduct at the United States, and should reasonably anticipate being brought to court in the United States to answer for such activities.

(7) The United States has a vital interest in providing persons and entities injured as a result of terrorist attacks committed within the United States with full access to the court system in order to pursue civil claims against persons,

entities, or countries that have knowingly or recklessly provided material support or resources, directly or indirectly, to the persons or organizations responsible for their injuries.

(b) PURPOSE.—The purpose of this Act is to provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against persons, entities, and foreign countries, wherever acting and wherever they may be found, that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States.

* * *

SEC. 4. AIDING AND ABETTING LIABILITY FOR CIVIL ACTIONS REGARDING TERRORIST ACTS.

(a) IN GENERAL.—Section 2333 of title 18, United States Code, is amended by adding at the end the following:

"(d) LIABILITY.—

"(1) DEFINITION.—In this subsection, the term 'person' has the meaning given the term in section 1 of title 1.

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

* * *

CERTIFICATE OF COMPLIANCE

1. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A), as modified by Cir. R. 32(b), because the Brief has been prepared in Microsoft Word 2016 using a proportionally spaced typeface, 12-point Century Schoolbook font, with footnotes in 11-point Century Schoolbook font.

2. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i), as modified by Cir. R. 32(c), because the Brief contains 13,983 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f). As permitted by Fed. R. App. P. 32(g)(1), the undersigned relied on the "word count" feature of Microsoft Word 2016 in preparing this certificate.

Dated: May 11, 2018

/s/ David M. Zionts
David M. Zionts

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ David M. Zionts
David M. Zionts