18-1031

IN THE

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
CIVIL DIVISION
NO. 3:16-CV-00497-MJR-SCW
HONORABLE MICHAEL J. REAGAN

BRIEF FOR PLAINTIFF-APPELLANT

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-1031

Short Caption: Kemper v. Deutsche Bank AG

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Rhonda Kemper

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

OSEN LLC

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TURNER & ASSOCIATES, P.A.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Peter Raven-Hansen Date: 1/22/18

Attorney's Printed Name: Peter Raven-Hansen

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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N/A

Attorney's Signature: s/ Gary M. Osen Date: 1/22/18

Attorney's Printed Name: Gary M. Osen

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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JURISDICTIONAL STATEMENT

The District Court had exclusive jurisdiction over this action under 28 U.S.C. §2338. It entered final judgment on its grant of appellee Deutsche Bank AG's ("the Bank") motion to dismiss on December 7, 2017. Appellant Rhonda Kemper filed a timely notice of appeal on January 3, 2018. This Court has jurisdiction over this appeal under 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

Citing extensive U.S. government findings and two consent orders agreed to by Deutsche Bank, the Complaint (JA1-58)[1] alleged that Iran organized and orchestrated a massive criminal conspiracy to provide and conceal material support for terrorism in violation of 18 U.S.C. §§2339A(a) and 2339B(a)(1). That support included transferring at least $100 million to Iran's Islamic Revolutionary Guard Corps ("IRGC") and at least $50 million to Foreign Terrorist Organization ("FTO") Hezbollah. The IRGC and Hezbollah financed, trained and supplied local Iraqi agents in order to launch terrorist attacks against American service members in Iraq. The U.S. government has found that Iran successfully funded the IRGC and Hezbollah by conspiring with its state-controlled banks (including the Central Bank of Iran, Bank Saderat, and Bank Melli) and Deutsche Bank and other non-Iranian banks to shield dollar-denominated transactions from U.S. counter-terrorism financing ("CTF")

[1] The District Court's Judgment and Memorandum & Order are attached in the "Circuit Rule 30(a) Appendix" (A1-13). The Complaint and its Exhibit are attached in the "Joint Appendix" (JA1-77); "Consent Order" and "Complaint" are included to clarify where necessary. Certain additional public records referenced herein are attached in the "Supplemental Appendix" (SA1-59).

oversight by "stripping" payment messages of information that would identify the Iranian counterparties when Iran sought to clear U.S. dollar transfers through the United States, and by structuring other Iranian dollar-denominated transactions to look like bank-to-bank "cover" transfers which did not identify such counterparties.

Deutsche Bank has admitted that it conspired with these Iranian banks to "strip," "cover," and otherwise conceal and disguise over 27,000 dollar-denominated transactions through the United States, worth over $10 billion, including more than 600 transactions (worth more than $38 million) directly for entities that the U.S. government has designated Specially Designated Global Terrorists ("SDGTs") or Specially Designated Nationals ("SDNs"). Nevertheless, the District Court determined, as a matter of law, that Deutsche Bank joined a *different* conspiracy merely to "complet[e] the dollar-clearing transactions" and "evade economic sanctions," A11, which it held did not violate the Anti-Terrorism Act ("ATA").

The issues on this appeal are:

1. Whether the District Court erred by holding that Deutsche Bank's admitted conspiracy "to evade economic sanctions" by disguising transactions with U.S.-designated Iranian counterparties did not violate the ATA, when these sanctions were explicitly intended "to disrupt terror financing"; the admitted conduct was an integral part of Iran's documented conspiracy to provide material support for terrorism; and the ATA expressly prohibits conspiring to conceal or disguise the nature or source of material support for terrorist crimes and organizations.

2. Whether the District Court erred by holding that the Complaint was required to allege that Deutsche Bank itself intended to provide material support for terrorism, when the Bank has admitted intending to conceal transactions involving U.S.-designated customers from U.S. regulators and law enforcement agencies; the Bank knew that Iran and the Bank's sanctioned customers intended to provide such support; and the

incorporated conspiracy statutes expressly require only knowledge and agreement to act in furtherance of the conspiracy, not intent.

3. Whether the District Court erred by deciding, as a matter of law, that Plaintiff's injuries were not a foreseeable consequence of concealing thousands of Iranian transactions including more than $38 million for the Bank's sanctioned customers (including U.S.-designated SDGTs), thereby evading U.S. counter-terrorism financing safeguards and enabling Iran to support the terrorist entities that designed, manufactured, distributed, transported, and trained terrorists in the use of the signature weapon that killed Plaintiff's decedent David Schaefer.

STATEMENT OF THE CASE

A. Iran's Terror Campaign in Iraq and Worldwide

Since the Iranian Revolution in 1979, Iran has been a principal source of worldwide terrorism, particularly in the Middle East, responsible for numerous bombings, kidnappings and assassinations throughout the region, including Iraq after the U.S. invasion in 2003. JA7, ¶46; JA8, ¶51; JA30, ¶150. The United States therefore designated Iran a State Sponsor of Terrorism on January 19, 1984. JA7, ¶47. Iran commits hundreds of millions of dollars to international terrorism annually, distributed to and through its paramilitary force, the IRGC (in particular, the IRGC's foreign operations directorate, the Qods Force ("IRGC-QF")),[2] and its terrorist proxy in Lebanon and Iraq, Hezbollah, which the U.S. designated an FTO in 1997. JA8, ¶49. For instance, in 2007, the U.S. Department of State found that the IRGC-QF

[2] Congress has found that the IRGC-QF "is the primary arm of the Government of Iran for executing its policy of supporting terrorist and insurgent groups," that it "provides material, logistical assistance, training, and financial support to militants and terrorist operatives throughout the Middle East," and that "[t]he IRGC, not just the IRGC-QF, is responsible for implementing Iran's . . . support for acts of international terrorism . . . ." Countering America's Adversaries Through Sanctions Act, Pub. Law. No. 115-44, §105(a)(2) & (3) (Aug. 2, 2017).

provided $100-200 million to Hezbollah *every year* (JA8, ¶49 n.1; *see also* JA9, ¶59; JA11, ¶71; JA35, ¶174), and in 2007, the IRGC-QF provided a Hezbollah trainer in Iraq $3 million *every month* to finance attacks on American soldiers. JA11-12, ¶¶70, 72, 75.

This funding went specifically to fuel Iran's terror operations in Iraq, which targeted American soldiers like Plaintiff's son, David Schaefer. Thus, in designating the IRGC-QF an SDGT in 2007, the U.S. Department of the Treasury found that "the Qods Force provides lethal support in the form of weapons, training, funding, and guidance to select groups of Iraqi Shia militants who target and kill Coalition and Iraqi forces and innocent Iraqi civilians." JA11, ¶71.[3] Treasury also found that Iran developed terror networks in Iraq whose "first objective" was to "fight U.S. forces, attacking convoys and killing soldiers." JA12-13, ¶78.

Even when the insurgent's identity in a specific attack was uncertain, attacks could be traced to Iran because of the signature Iranian weapon employed: the Explosively Formed Penetrator ("EFP"), which the IRGC and Hezbollah designed and manufactured and then distributed and deployed in Iraq. JA14-16, ¶¶85-97. EFPs were designed to pierce American armored vehicles and are weapons of mass destruction under U.S. law. *See* 18 U.S.C. §2332a(c)(2)(A), JA14, ¶¶85-90. The EFP's armor-piercing force comes from its precisely crafted copper lining, which is manufactured using large hydraulic presses and is most effectively fired using military-grade explosives, which were not generally available to Iraqi militias. JA14-

[3] "Coalition forces" refers to the soldiers serving in the Multi-National Force-Iraq, the vast majority of whom were U.S. service members.

16, ¶¶87-89; JA15-16, ¶¶93-94; JA21, ¶113. The U.S. State Department reported that "[t]he IRGC-QF, in concert with Lebanese Hizballah, provided training outside of Iraq as well as advisors inside Iraq for Shia militants in the construction and use of sophisticated improvised explosive device technology and other advanced weaponry." JA18, ¶101. According to U.S. Army Brigadier General Kevin J. Bergner, Iraqi Shi'a terrorist groups "receive arms—including explosively formed penetrators, the most deadly form of improvised explosive device—and funding from Iran. They also have received planning help and orders from Iran." JA16, ¶96.

B. U.S. Sanctions Against Iran for Its Terrorist and Other Illegitimate Activities

Pursuant to the International Emergency Economic Powers Act ("IEEPA"), on May 6, 1995, President Clinton signed Executive Order No. 12,959, 60 Fed. Reg. 24,757 (May 9, 1995), which expanded U.S. sanctions against Iran. Following a June 25, 1996 IRGC-sponsored bombing of a complex in Saudi Arabia housing American military personnel, Congress enacted the 1996 Iran-Libya Sanctions Act ("ILSA"), SA1-11, which formed the backbone of nearly all subsequent Iran sanctions legislation. Congress specifically found that:

> (1) The efforts of the Government of Iran to acquire weapons of mass destruction and the means to deliver them *and its support of acts of international terrorism* endanger the national security and foreign policy interests of the United States and those countries with which the United States shares common strategic and foreign policy objectives.
>
> (2) The objective of preventing the proliferation of weapons of mass destruction and *acts of international terrorism* through existing multilateral and bilateral initiatives *requires additional efforts to deny Iran the financial means* to sustain its nuclear, chemical, biological, and missile weapons programs.

JA21, ¶¶114-15 (emphasis added). Thus, a bedrock of U.S. sanctions against Iran was denying Iran the "financial means" to support and weaponize its international terrorism campaign.

The ILSA was followed by a series of other statutes and executive orders that implemented and expanded these sanctions. Recognizing the importance of dollar-denominated transactions to Iran's terrorism and WMD campaigns, including those it later orchestrated in Iraq, U.S. authorities targeted, among other entities, key Iranian financial institutions, entities, and individuals under Executive Orders 13,382 (proliferation), 13,224 (terrorism), and 13,438 (Iranian influence in Iraq). JA24, ¶125.

Executive Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001), was promulgated immediately after the 9/11 attacks specifically to give the United States "a powerful tool to impede terrorist funding . . . ." Press Release, Office of the Coordinator for Counterterrorism, Dept. of State, *Executive Order No. 13224* at 1 (Sept. 23, 2001) ("13,224 Press Release," SA12-18).[4] The Order authorized economic sanctions, in the form of asset-blocking orders, against entities that provide financial

[4] This Order was not the first executive order targeting material support for terrorism. *See* Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 1995), blocking assets of listed entities, including Hezbollah, which was subsequently also designated an FTO, and then an SDGT, pursuant to Exec. Order No. 13,224. JA9, ¶¶52-54. These executive orders, agency determinations, and agency press releases are all judicially noticeable on this appeal. *See Fornalik v. Perryman*, 223 F.3d 523, 529 (7th Cir. 2000) ("it is well-established that executive and agency determinations are subject to judicial notice."). *See also McLoughlin v. People's United Bank, Inc.*, 586 F. Supp. 2d 70, 73 (D. Conn. 2008) ("The Court may take judicial notice of the press releases of government agencies.").

or other services in support of acts of terrorism or for individuals or entities designated by the government pursuant to the Order.[5] Such entities are designated as SDGTs on the basis of formal U.S. investigations of historical facts.[6] The sanctions provided "a means by which to disrupt the financial support network for terrorists and terrorist organizations . . . ." *Id.* Executive Order No. 13,224 also expressly prohibited "any transaction . . . within the United States that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate," as well as "[a]ny conspiracy formed to violate," any of its prohibitions.

Executive Order No. 13,438, 72 Fed. Reg. 39,719 (July 19, 2007), which designated entities as SDNs, specifically targeted financial support for persons who committed (or posed a significant risk of committing) acts of violence, threatening the peace or stability of Iraq, or undermining efforts to assist the Iraqi people. Like Executive Order No. 13,224, Executive Order No. 13,438 extended its prohibitions to transactions that attempt to evade or avoid, and conspiracies that violate, its prohibitions. The resulting framework of U.S. CTF and counter-WMD-financing sanctions against Iran is administered in part by the Office of Foreign Assets Control

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[5] Among those entities was Deutsche Bank's sanctioned customer, Bank Saderat, designated an SDGT in 2007 in part for transferring $50 million to FTO and SDGT Hezbollah and for its acts in concealing and disguising financial transactions for SDGTs and SDNs. JA42-43, ¶¶209-218.

[6] *See, e.g.*, *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 162 (D.C. Cir. 2010) ("[I]t was clearly rational for Treasury to consider [Holy Land Foundation's] genesis and history, which closely connect it with Hamas."); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 69-75 (D.D.C. 2002) (discussing pre-designation history of entity designated under Executive Order 13,224); *Kadi v. Geithner*, 42 F. Supp. 3d 1, 11-20 (D.D.C. 2012) (same).

("OFAC"), which is part of the Terrorism and Financial Intelligence unit of the Department of Treasury and pursues "national security goals against . . . terrorists."[7] OFAC promulgates and maintains lists of designated entities and distributes the lists to banks like Deutsche Bank.

C. The U-Turn Exemption – A Safe Harbor for Iran's Legitimate Governmental Activities

Because oil is generally transacted in dollars, the vast majority of Iran's assets are held in off-shore, dollar-denominated assets called "Eurodollars."[8] Since Eurodollars must generally be cleared through the Federal Reserve Bank in New York, U.S. authorities are at least theoretically able to monitor many such transactions. To prevent Iran from spending its Eurodollars on terrorism and WMD development – but without cutting Iran off from its assets entirely – the U.S. implemented the so-called "U-Turn exemption." *See* former 31 C.F.R. § 560.516.[9]

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[7] *See* https://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx, last updated Feb. 6, 2018.

[8] "Eurodollar" refers to a time deposit denominated in U.S. dollars that is maintained by a bank outside the United States. Payment transactions in the Eurodollar market are not typically settled by the physical transfer of USD-denominated banknotes from one counterparty to another. Instead, Eurodollar transactions are settled electronically in New York through a bank-owned clearinghouse, and then maintained by book entries of credits and debits in the respective counterparties' accounting systems (based on the Society for Worldwide Interbank Financial Telecommunication network – "SWIFT-NET" – messages sent between the counterparties and their correspondent banks).

[9] The U-Turn exemption predated ILSA and was added to the Iranian Trade Regulations in June 1995, remaining in force until its repeal in November 2008. *See* Iranian Transactions Regulations: *Implementation of Executive Orders 12,957 & 12,959*, 60 Fed. Reg. 47061 (Sept. 11, 1995); *Implementation of Executive Order 12,959 With Respect to Iran*, 60 Fed. Reg. 40881 (Aug. 10, 1995).

Broadly speaking, the U-Turn exemption permitted Iran to transfer its dollar-denominated oil revenues through the U.S. only if it (1) used non-Iranian banks that had correspondent accounts in the U.S. (the Iranian Trade Regulations prohibited Iranian banks from directly processing dollar-denominated transactions through the United States), (2) did not transfer funds to or from SDNs, and (3) transmitted all funds in U.S. dollars *transparently* by identifying the counterparties to the transactions, so that the correspondent banks could properly screen the transfers against OFAC's lists. JA23-24, ¶¶121-23. The key to the U-Turn exemption was transparency, to prevent it from being used to evade the sanctions regime and therefore to support terrorism and WMD development.[10]

In theory, the exemption thus allowed Iran to access its Eurodollar accounts for its *legitimate* purposes, agencies, operations, and programs. JA23, ¶¶121-22. Thus, to use an example described in the Complaint, Iran could sell oil through the state-owned National Iranian Oil Company ("NIOC")[11] to a European refining company in Eurodollars. JA41, ¶202. To transfer the USD value of that purchase to NIOC's account at its Iranian bank, that bank would have to work with non-Iranian banks to clear the transfers through the latter banks' USD correspondent accounts with U.S. banks. Because Iranian banks could not generally hold correspondent

[10] Deutsche Bank claims that the U-Turn exemption did not require transparency (Bank Reply Mem. in Support of Mot. to Dismiss at 1 n.2), but its admitted conduct clearly violated 50 U.S.C. §1705, which makes it a crime to willfully violate or attempt to violate *any* regulation issued under IEEPA.

[11] NIOC was subsequently designated an SDN pursuant to Executive Order No. 13,382 and identified as an agent or affiliate of the IRGC. JA24, ¶127.

accounts with U.S. banks, NIOC's Iranian banks held Eurodollar accounts with non-Iranian banks, often located in Europe, which in turn had U.S. dollar correspondent accounts at one or more U.S. banks with an account at the Federal Reserve. JA2-3, ¶8; JA19, ¶¶105-06; JA25, ¶130.

These types of "clearing" transactions are executed through a series of messages generated through the SWIFT, CHIPS, and Fedwire messaging systems. Central to these messages are "payment order" messages, particularly the "MT 103" and "MT 202" messages generated through the SWIFT system. MT 103 messages are the primary message type for international wire transfers, and identify *all of the parties to the transaction*, including the originating and beneficiary banks and parties. MT 202 messages describe bank-to-bank "cover transactions" that do not identify all of the parties to the transaction. JA28, ¶143 n.5.

D. Iran's Conspiracy to Fund Terrorism by Bypassing the U-Turn Exemption and Evading Sanctions

Iran faced a significant operational challenge because its terrorism campaigns had to be largely financed in U.S. dollars inasmuch as its domestic currency, the rial, was among the world's lowest valued currencies during the relevant period and could not be effectively used in international trade. JA2, ¶6. Hezbollah, its terror proxy, could not be financed with rials because Lebanon, where Hezbollah is based, is a dollarized economy. JA24, ¶123; JA25, ¶129. Further, as noted previously, the overwhelming majority of Iran's hard currency was held in the form of Eurodollars derived from oil and gas sales. JA22, ¶117. Because Eurodollars cannot be transacted in large volume without clearing through the United States, Iran needed a way to

circumvent the U-Turn exemption's transparency requirements in order to finance terrorism and WMD development.

Iran, through its government-controlled banks, therefore conspired with Deutsche Bank and other non-Iranian banks to conceal vast flows of Eurodollars through the U.S. by "stripping" the names of Iranian entities from the transfer requests or "covering" them by illegally replacing MT 103 messages with MT 202 bank-to-bank transactions messages. JA28, ¶143; JA36, ¶178; JA37-39, ¶¶186-97. These methods were an integral part of Iran's scheme to fund terrorism.

E. Deutsche Bank's Role in the Conspiracy

The Complaint alleged that Deutsche Bank knowingly joined Iran's criminal conspiracy, the objectives of which were to:

a. Conceal Iran's financial activities and transactions from detection, scrutiny, or monitoring by U.S. regulators, law enforcement, and/or depository institutions;

b. Facilitate illicit transactions totaling at least 50 million USD for the benefit of Hezbollah;

c. Facilitate illicit transactions totaling at least 100 million USD for the benefit of the IRGC;

d. Facilitate at least hundreds of illicit transactions on behalf of Islamic Republic of Iran Shipping Lines ("IRISL") totaling more than $60 million USD, including over 150 "stripped" transactions after IRISL was designated an SDN; and

e. Enable Iran, the IRGC, Hezbollah, and Shi'a militia groups in Iraq (referred to as Special Groups) to plan for, conspire to, and perpetrate acts of international terrorism within the meaning of 18 U.S.C. §§2331(1), 2332(a)-(c), 2332a, 2332f, 8 U.S.C. §1189(a)(3)(B)(iii)-(iv) and/or 22 U.S.C. §2656f.

JA27-28, ¶141.

In a consent order that Deutsche Bank entered with the New York State Department of Financial Services ("DFS") in 2015 ("Consent Order," JA59-77), the Bank admitted that, "[s]tarting at least in 1999," Bank employees "developed and employed several processes to handle dollar payments in non-transparent ways that circumvented the controls designed to detect potentially-problematic payments" – i.e., the stripping and covering methods central to the conspiracy. JA61.[12] Deutsche Bank thus adopted the same methods used by the other members of Iran's conspiracy – what a Deutsche Bank officer overseeing these payments called "the tricks and cunning of MT103 and MT202." JA63, ¶4. Deutsche Bank even actively marketed its concealment and disguising of illegal Iranian transactions as "OFAC-safe." JA65, ¶13; JA66, ¶16; JA68, ¶23.

Leaving nothing to chance, the Bank also prepared training manuals for newly-hired payments staff in an overseas office directing that "[s]pecial attention has to be given to orders in which countries/institutes with embargos are involved. Banks under embargo of the US (*e.g., Iranian banks*) must not be displayed in any order to [Deutsche Bank New York] or any other bank with American origin as the danger exists that the amount will be frozen in the USA." Consent Order, JA66-67, ¶19 (emphasis added, alteration original to Consent Order). A revised version of the manual warned that improperly repaired transfers may "be frozen by the Federal Reserve thereby causing financial and reputation loss for the Bank." JA67, ¶20. One

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[12] The DFS Consent Order was incorporated by reference into and attached as Exhibit A to the Complaint. See Complaint, JA39-41, ¶201. A separate consent order was issued by the Federal Reserve Bank, *see* https://www.federalreserve.gov/newsevents/pressreleases/files/enf20151104a1.pdf. *See also* Complaint, JA39, ¶200.

Bank relationship manager who asked for advice about U.S. dollar processing was told by its compliance department, "[p]lease be informed that any info on OFAC-safe business patterns (THAT DB does it and HOW DB does it) is strictly confidential information. Compliance does not want us to distribute such info to third parties and forbids us explicitly to do so in any written or electronic form." JA68, ¶23.

Deutsche Bank worked closely with several government-owned Iranian banks (its "sanctioned customers") to conceal and disguise unlawful transactions. Consent Order, JA64 ("Bank Staff Coordinated With Sanctioned Customers to Conceal True Details About Payments"). The Bank admitted, for example, that:

> During site visits, in emails, and during phone calls, [Iranian government-controlled] clients were instructed to include special notes or code words in their payment messages that would trigger special handling by the bank before the payment was sent to the United States. Sanctioned customers were told "it is essential for you to continue to include [the note]. 'Do not mention our bank's name…' in MT103 payments that may involve the USA. [That note] ensures that the payments are reviewed prior to sending. Otherwise it is possible that the [payment] instruction would be sent immediately to the USA with your full details. . . . [This process] is a direct result of the US sanctions."

Consent Order, JA64, ¶11 (quoting Bank communications, alterations original to Consent Order). Notably, Bank employees not only "recognized that U.S. sanctions rules . . . applied to Iranian . . . customers," they also understood that they were working on behalf of "customers who were listed on OFAC's SDN list" and that this "would pose problems for U.S. dollar payments sent to or cleared through the U.S." *Id.* at JA61, ¶1. Bank Saderat, Bank Melli, and Central Bank of Iran were among the specifically identified Iranian "customers" whose SWIFT messages Deutsche Bank stripped. *See* Complaint, JA37-38, ¶188.

By Spring 2006, New York and federal authorities had discovered the broad outlines of the conspiracy and identified these very banks – Deutsche Bank's Iranian counterparties and co-conspirators (though not yet Deutsche Bank) – as instruments of Iran's "sanctions evasion" techniques to provide material support to terrorism. For example, according to the U.S. Treasury Department, Bank Melli transferred at least $100 million to the IRGC-QF from 2002 to 2006. JA34, ¶171. Bank Saderat "facilitate[d] Iran's transfer of hundreds of millions of dollars to Hezbollah and other terrorist organizations each year" through the conspiracy, including transferring $50 million "directly from Iran" to "a Hezbollah-controlled organization." JA42, ¶¶211-12.

As a result, on September 8, 2006, OFAC cut Bank Saderat off from the U-Turn exemption, explaining that "Bank Saderat has been a significant facilitator of Hezbollah's financial activities and has served as a conduit between the Government of Iran and Hezbollah…." *Id.* The following year, the U.S. government designated Bank Saderat an SDGT, JA43, ¶215, and Bank Melli an SDN, JA44, ¶223. A State Department diplomatic cable from March 2008 reported that:

> Bank Melli and the Central Bank of Iran also provide crucial banking services to the Qods Force, the IRGC's terrorist supporting arm . . . . Entities owned or controlled by the IRGC or the Qods Force use Bank Melli for a variety of financial services. From 2002 to 2006, Bank Melli was used to send at least $100 million to the Qods Force.
>
> *Bank Melli use of Deceptive Banking Practices*[:] . . . . When handling financial transactions on behalf of the IRGC, Bank Melli has employed deceptive banking practices to obscure its involvement from the international banking system. For example, Bank Melli *has requested that its name be removed from payment instructions for US dollar denominated transactions*.

JA34, ¶171 (emphasis added).

Another U.S. diplomatic cable reported that:

> Iran's Islamic Revolutionary Guards Corps (IRGC) and IRGC-Qods Force, who channel funds to militant groups that target and kill Coalition and Iraqi forces and innocent Iraqi civilians, have used Bank Melli and other Iranian banks to move funds internationally. Bank Melli used deceptive banking practices to obscure its involvement from the international banking system by requesting that its name be removed from financial transactions when handling financial transactions on behalf of the IRGC.

JA29, ¶146.

In short, Deutsche Bank has admitted in a Consent Order that it agreed and worked directly with Iranian Banks, including Bank Saderat, Bank Melli, the Central Bank of Iran and others to conceal and disguise financial transactions for them, with the knowledge and intent that such "OFAC-safe" transactions would escape the oversight of U.S. regulators and evade CTF sanctions.

F. Revocation of the U-Turn Exemption – A "Glaring Hole" for Iran's Material Support for Terrorism Is Closed

On November 10, 2008, the U.S. Treasury Department revoked the U-Turn exemption altogether, prohibiting U.S. depository institutions from processing *any* Iranian dollar-denominated transfers. The Treasury explained:

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

JA26-27, ¶138 (emphasis added). *See also* JA25, ¶132 (DFS explained that the Treasury eliminated the U-Turn exemption because "[t]he U.S. also suspected that

Iran was using its banks to finance terrorist groups, including Hezbollah," and "assisting OFAC-sanctioned weapons dealers."); JA26, ¶136.

Former Manhattan District Attorney Robert M. Morgenthau told Congress in 2009 that "the U-Turn Exemption constituted a glaring hole that undermined both the enforcement of, and the rationale behind, the Iranian sanctions program." *Id.* Ultimately, both Congress and the Executive Branch concluded that then-existing safeguards that allowed Iran to clear Eurodollars or even to utilize the SWIFT messaging system were ineffective and had to be discontinued.[13]

G. Deutsche Bank Continued Its Unlawful Financial Support for Iranian Terrorism Even After Claiming to Wind Down the Practice

Deutsche Bank publicly claimed that it had wound down its business dealings with Iran starting in 2006, but the DFS found that "instances of resubmitting rejected payments or processing sanctions-related payments through New York persisted even after the formal policies were instituted." Consent Order, JA64, ¶9. In fact, the conspiracy continued for years, as did the Bank's active role in it. For instance, Deutsche Bank is named in a New York indictment, along with other members of the conspiracy, for performing at least 150 transactions for IRISL *after* its 2008 designation by the U.S. Treasury Department.[14] JA31, ¶155. In announcing the

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[13] The Joint Comprehensive Plan of Action ("JCPOA"), implemented on January 16, 2016, removed many Iran-related sanctions as part of an agreement to delay Iran's development of nuclear weapons, but did not restore the U-Turn exemption.

[14] IRISL was designated pursuant to Executive Order No. 13,382, which pertains to Iranian entities involved in proliferation of weapons of mass destruction. As noted above, the EFP is classified as a weapon of mass destruction.

designation, Treasury explained that IRISL was responsible for, *inter alia*, "facilitating shipments of military cargo destined for the (Iranian) Ministry of Defense and Armed Forces Logistics (MODAFL)." *Id.* Raids on IRISL ships by U.S. and allied forces have uncovered significant military equipment destined for Hezbollah, *including components of EFPs* such as the one that killed Plaintiff's son. JA31-32, ¶¶156-162. Even as late as September 5, 2013, one of Deutsche Bank's U.S. entities settled with OFAC for illegally processing an October 2008 transaction for Bank Melli and failing to block a March 2009 transaction for another Iranian bank.[15]

Finally, on November 3, 2015, Deutsche Bank entered into consent orders with DFS and the Board of Governors of the Federal Reserve, admitting to the conduct alleged above and agreeing to pay $258 million in fines.

H. Iran's Murder of David Schaefer

On May 16, 2009, Plaintiff's son, David Schaefer, was killed by an EFP while serving with U.S. peacekeeping forces in Iraq. JA5, ¶¶27-29. Iran's IRGC designed, manufactured, and smuggled the EFP into Iraq with Hezbollah's assistance and with specific intent that it be used to kill Americans. JA14-18, ¶¶85-102. Iran, acting through its agents, the IRGC and Hezbollah, provided the EFP to its local operatives, trained and authorized them to target armored American vehicles, including David Schaefer's vehicle. *Id.*

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[15] *See* Release, U.S. Dep't Treasury, Enforcement Information for September 5, 2013, *available at* https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20130905_DBTCA.pdf.

STANDARD OF REVIEW

This Court reviews *de novo* the grant of a motion to dismiss for failure to state a claim. *Reger Dev. LLC v. Nat'l City Bank,* 592 F.3d 759, 763 (7th Cir. 2010). It construes the complaint "in the light most favorable to the nonmoving party, accept[s] well-pleaded facts as true, and draw[s] all inferences in her favor." *Id.* The "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" but it need not plead "detailed factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)). "[A] complaint with enough factual matter (taken as true) to suggest that an agreement was made . . . does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (internal quotation marks and citation omitted). *See also Reynolds v. CB Sports Bar, Inc.*, 623 F.3d 1143, 1146 (7th Cir. 2010).

SUMMARY OF ARGUMENT

This case began with a documented Iranian-designed conspiracy to evade terrorism controls that Deutsche Bank has admitted joining, and it ended in the tragic but eminently foreseeable murder of the Plaintiff's son, David Schaefer. Deutsche Bank admitted in the Consent Order that it actively worked with Iranian Banks, including Bank Saderat, Bank Melli and the Central Bank of Iran, to conceal and disguise thousands of transactions, worth billions of dollars, from U.S. law

enforcement and intelligence agencies. It admitted that as part of that conspiracy it processed more than 600 transactions totaling at least $38 million to entities that the U.S. government has designated as SDGTs or SDNs. Deutsche Bank knew that its role was to help Iranian banks and sanctioned customers circumvent sanctions designed specifically to stop Iran from providing material support to terrorism. The U.S. government found that these co-conspirators circumvented the same sanctions by the same methods, and by doing so, channeled at least $150 million to U.S.-designated FTO Hezbollah and U.S.-designated SDGTs, including the IRGC-QF. Finally, the U.S. government has found that Iran and Hezbollah were responsible for attacks on U.S. forces in Iraq using Iran's signature EFPs, one of which killed David Schaefer.

Yet the District Court held, as a matter of law, that the pleaded conspiracy did not state a claim under the ATA. It correctly recognized that 18 U.S.C. §2333(a), via a chain of incorporations by reference to the ATA's sections criminalizing provision of material support to terrorism (18 U.S.C. §§2339A and 2339B), establishes civil liability for conspiring to provide material support for terrorism. The District Court also accepted the Complaint's allegations that Deutsche Bank intentionally participated in a conspiracy knowing that its role was to circumvent counter-terrorism sanctions. But, in barely six pages of analysis citing just two of the 274 paragraphs of the Complaint, and without holding any hearing, the District Court then held that a conspiracy "to evade economic sanctions" was not a conspiracy to provide material support for terrorism, and that Plaintiff had to plead that Deutsche

Bank itself "intended" to provide material support to terrorism. A11. Having thus dispensed with conspiracy (and with it, the causation principles of conspiracy law), the Court then held, as matter of law, that it was not reasonably foreseeable that bypassing U.S. CTF sanctions for Iranian entities and sending at least $38 million directly to U.S.-designated entities would help Iran and its proxies conduct attacks of the kind that killed David Schaefer.

The District Court misinterpreted both the ATA and applicable conspiracy law and, as a matter of law, decided issues concerning the conspiracy's scope and the foreseeability of Iran's use of concealed funds that are quintessentially fact issues for a jury.

First, what the District Court dismissed as a mere "conspiracy to evade economic sanctions" *is* a conspiracy to provide material support to terrorism in violation of the ATA. The District Court's anodyne label, "economic sanctions," obscures their particular purpose. As described above, the U.S. sanctions against Iran that Deutsche Bank conspired to violate were imposed from their inception chiefly to disrupt or prevent Iran's funding of acts of international terrorism. In particular, Executive Order No. 13,224 is intended as "a means by which to disrupt the financial network for terrorists and terrorist organizations . . . ," in part by blocking SDGTs like Deutsche Bank's co-conspirator Bank Saderat from clearing Eurodollars that fund Iran's illegitimate activities. Evading sanctions that are expressly intended "to disrupt Iran's financial network for supporting terrorism" is *necessarily* an integral

part of a conspiracy whose object is to use that financial network, as the Complaint plausibly alleged.

A conspiracy to evade counter-terrorism sanctions by concealing the identity of parties to illegal transactions for SDGTs and SDNs is also, independently, *definitionally* a conspiracy to "conceal[] or disguise[] the nature, location, source, or ownership of material support" for terrorism, prohibited by §2339A(a). The Complaint plausibly alleged that Deutsche Bank joined Iran's conspiracy to conceal and disguise material support, in part because the Bank *admitted* participating in that scheme. The District Court erred by never recognizing, let alone applying, this alternative statutory standard for conspiracy to the Complaint – which fits its well-pleaded allegations precisely.

Second, the District Court compounded its error by holding that, "for a claim to be viable under the ATA, the object of the participants' conspiracy must be to provide material support for terrorism, and Plaintiffs have not plausibly pleaded that Deutsche Bank intended to do so." This was error for multiple reasons. To start, the Bank *admitted* in the Consent Order that it acted "with the intent to deceive" U.S. law enforcement and intelligence agencies, JA69-70, ¶27, by its "OFAC-safe" scheme with its sanctioned customers, JA68, ¶23. Under this Circuit's well-established conspiracy law, when Deutsche Bank agreed to join that conspiracy – whether it is characterized as Iran's conspiracy to provide material support for terrorism or as a conspiracy to conceal and disguise the source and nature of material support for Iran's illegitimate activities, including terrorism – Deutsche Bank did not have to

share all of its co-conspirators' *motivations*, as long as it had "some knowledge" of the conspiracy's scope. Furthermore, the District Court's insistence that Plaintiff plead specific intent to support terrorism is flatly inconsistent with the incorporated material support statutes. Neither requires that a defendant itself intend to support terrorism. Finally, the District Court's erroneous conclusions that Plaintiff pleaded the wrong conspiracy raise factual issues concerning the scope of an admitted conspiracy that a court should not resolve on a motion to dismiss.

Third, the District Court also erred in deciding the fact question of whether Deutsche Bank could reasonably have foreseen that the billions of dollars it admitted helped Iranian banks and other counterparties transfer in evasion of sanctions imposed to disrupt terror financing (including transactions directly on behalf of sanctioned customers) would be used to support Iran's terrorist activity, including the murder of Americans, a longstanding target of Iranian terrorism. The Court found the Plaintiff's causation allegations indistinguishable from the aiding-and-abetting allegations in *Rothstein v. UBS AG*, 708 F.3d 82 (2d Cir. 2013). But the *Rothstein* plaintiffs never asserted a conspiracy claim, so the Second Circuit did not apply the principle that a conspirator is liable for injuries foreseeably caused by all acts performed in furtherance, or as a consequence, of the conspiracy.

The *Rothstein* plaintiffs alleged merely that UBS provided U.S. bank notes to Iran, for which it had legitimate uses, and generally that Iran separately provided funding to certain terrorist groups. Here, in contrast, Plaintiff expressly alleged that (1) Deutsche Bank acted in concert with its sanctioned customers, including Bank

Melli and Bank Saderat, to bypass the U-Turn exemption intended for funding legitimate activities in order to conceal transfers of billions of Eurodollars that could be used for *illegitimate* activities like supporting terrorism, and (2) those same sanctioned customers transferred at least 150 million USD *through the conspiracy* directly to the IRGC-QF and Hezbollah, which played a direct role in the terrorist attack that killed Mr. Schaefer. The District Court concluded as a matter of law that Iran's documented transfers to the IRGC and Hezbollah through the *same* "customers who were listed on OFAC's SDN list" (Consent Order, JA61, ¶1) – i.e., Bank Melli and Bank Saderat – using the *same* deceptive practices to evade detection of U.S. dollar payments cleared through the U.S. were unrelated to Deutsche Bank's conduct. Ignoring these allegations in the Complaint, never made in *Rothstein*, the District Court usurped the jury's role by finding, as a matter of law, that the death of Plaintiff's son in an EFP attack could not be a reasonably foreseeable natural consequence of the pleaded conspiracy.

For these reasons, this Court should reverse the District Court's judgment, and remand for further proceedings to permit the Plaintiff to take discovery and to prove the well-pleaded factual allegations that the District Court erroneously rejected as a matter of law.

ARGUMENT

I. THE ANTI-TERRORISM ACT PROVIDES CIVIL LIABILITY FOR A CONSPIRACY THAT VIOLATES THE MATERIAL SUPPORT STATUTES.

The District Court recognized that under the civil remedy provision of the Anti-Terrorism Act ("ATA"), 18 U.S.C. §2333(a), "conspiracy principles can inform the

determination of whether a defendant is liable under a theory of primary liability," A9, citing *Boim v. Holy Land Found. for Relief and Dev.*, 549 F.3d 685, 691 (7th Cir. 2008) (en banc) ("*Boim III*"), and that a "conspiracy . . . to provide material support for terrorism" can constitute a "viable" claim under the ATA." A11. In *Boim III*, this Court held that "the rubrics of 'conspiracy' and 'aiding and abetting' . . . can be used to establish tort liability," and therefore "there is no impropriety in discussing them in reference to the liability of donors to terrorism under section 2333 just because that liability is primary." 549 F.3d at 691.[16] *Boim III* then held that "[p]rimary liability in the form of material support to terrorism has the character of secondary liability . . . [t]hrough a chain of incorporations by reference." *Id.* at 691-92. This Court recognized that a defendant may be primarily liable under §2333(a) for an act of terrorism, defined by §2331(1) as activities that (A) "*involve* [and therefore are not necessarily themselves] violent acts or acts dangerous to human life and that violate U.S. criminal laws, (B) that objectively appear to be intended to accomplish the purposes there listed, and (C) that occur primarily outside the territorial jurisdiction of the United States. *See, e.g.*, *Linde v. Arab Bank, PLC*, 882 F.3d 314 (2d Cir. 2018) (holding that these questions are for the jury).

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[16] The Bank argued below that this Court's holding in *Boim III* was limited to donors. But material support includes the provision of "financial services,"18 U.S.C. §2339A(b)(1), and nothing in *Boim III*'s reasoning limits it to donations. *See Linde v. Arab Bank, PLC*, 97 F. Supp. 3d 287, 323 (E.D.N.Y. 2015), *vacated on other grounds*, 882 F.3d 314 (2d Cir. 2018) ("Defendant's suggestion that knowingly providing financial services should be treated differently than knowingly donating money is unpersuasive; such financial services increase Hamas' ability to carry out attacks in the same way, and Congress made no distinction between these different forms of material support in criminalizing them.").

This Court traced the chain of incorporation in *Boim III* from §2333(a) to §2331(1) to one of the statutes criminalizing the provision of material support for use in terrorism, §2339A(a), to §2332, to find primary liability with the character of aiding and abetting. Here the chain of incorporation for the §2339A(a) claim follows the same path to §2332 (killing or physical violence against an American national outside the United States), §2332f (use of a bomb or mine against an American national outside the United States), and §1114 (killing of a U.S. employee or officer). JA50, ¶250. Similarly, the chain for the §2339B(a)(1) claims follows a path to that provision.

There is no dispute that the terrorist attack at issue in this case occurred abroad and that the acts of the conspiracy occurred outside the United States. Nor can there be a genuine dispute in this Circuit that providing or concealing and disguising the source of material support to terrorism at least "involves" the violent acts by the terrorists or terrorist organizations that receive such support, and doing so is thus "dangerous to human life." *Boim III*, 549 F.3d at 694 (quoting 18 U.S.C. §2331(1)(A)). Deutsche Bank previously disputed whether it had the aims listed in §2331(1)(B), but the issue this provision raises is not what the Bank *subjectively* intended, but whether its acts of providing or concealing millions of dollars in material support *objectively* appear to have had any of those aims. *Id.* When a defendant systematically provides concealed access to the U.S. financial system for a State Sponsor of Terrorism in intentional violation of U.S. sanctions intended to deny that access as a CTF measure, its acts plausibly have that appearance as a matter of law. *See Boim III*, 549 F.3d at 694. *Compare Wultz v. Islamic Republic of Iran,* 755

F. Supp. 2d 1, 49 (D.D.C. 2010) (allegations that defendant continued to provide material support after being warned of the consequences are sufficient to create the required "objective 'external appearance'" on a motion to dismiss), *with* Complaint JA41, ¶¶202-03 (alleging that the Bank continued to facilitate transactions after public U.S. designations of counterparties). In any case, the objective appearance of that systematic, intentional conduct at least raises a question for the jury. *Linde*, 882 F.3d 314 at 327.

A. The Incorporated Material Support Statutes Prohibit Three Related Conspiracies.

As stated above, in broad terms the District Court was correct in finding that "[f]or a claim to be viable under the ATA, the object of the participants' conspiracy must be to provide material support for terrorism." A11. But three separate though related conspiracies violate the criminal material support statutes at issue and are thus incorporated by reference into §2333(a) for purposes of primary liability:

(1) §2339A(a) makes it a crime to "conspire[]" to "provide[] material support or resources . . . ." to be used for murdering American nationals or other terrorist crimes listed in §2339A(a), including §§2332, 2332f, and 1114.

(2) §2339A(a) also makes it a crime to "conspire[]" "to conceal[] or disguise[] the nature, location, source, or ownership of material support or resources" to be used for the same listed crimes.

(3) §2339B(a)(1) makes it a crime to "conspire[]" to provide material support or resources, as defined in §2339A, to an organization that has been formally designated as an FTO by the Secretary of State.

The District Court did not distinguish among them and addressed only the first.

B. The Elements of Each Conspiracy Are Established by the Material Support Statutes, Under the Legal Framework Provided by *Halberstam v. Welch*.

The elements of each conspiracy are established by the material support statutes, informed by *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), which Congress has found "provides the proper legal framework for how [conspiracy] liability should function in the context of chapter 113B of title 18 United States Code." Justice Against Sponsors of Terrorism Act, Pub. L. 114-222, 130 Stat. 852 ("JASTA"), §2(a)(5) (2016), SA19-24.[17] Chapter 113B, entitled "Terrorism," constitutes the entire ATA, including §§2331, 2333, 2332, 2332f, 2339A, and 2339B. *Halberstam* states the elements of a civil conspiracy as: "(1) an agreement between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; (4) which overt act was done pursuant to and in furtherance of the common scheme." *Halberstam*, 705 F.2d at 477.

For both types of §2339A(a) conspiracy, the statutory scienter requirement is agreement "knowing *or* intending that [the material support or resources] are to be used in preparation for, or in carrying out" one of the listed crimes. 18 U.S.C.

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[17] After this lawsuit was filed, Congress enacted JASTA "to provide civil litigants with the broadest possible basis" for relief against those "that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States." JASTA §2(b). To this end, JASTA added §2333(d) to the ATA, establishing civil liability for conspiring with the person (explicitly defined by reference to 1 U.S.C. § 1, which includes entities) who committed an act of terrorism committed, planned, or authorized by an FTO. Section 2333(d) is expressly made retroactive. JASTA §7 (*see* SA23). Plaintiff has not amended to add a claim under JASTA but advised the District Court that it confirms the proper legal framework for assessing those claims. Notice of New Authority, ECF No. 51 (Sept. 30, 2016).

§2339A(a) (emphasis added). The legislative debate concerning §2339A shows that it was intended to reach those who provide material support for terrorism but lack specific intent to commit violent acts of terrorism.[18] As the United States summarized that history, "Congress intended to cast a broad net to more easily prosecute individuals who materially support an enumerated offense, but who otherwise might not be liable under traditional conspiracy or aiding and abetting law." Brief for the United States at 18 n.11, *United States v. Hassoun*, No. 06-1584-BB, 2006 WL 4126883, (11th Cir. 2007). For a §2339B conspiracy, the scienter requirement is agreement with the "knowledge that the [supported] organization is a designated [FTO] . . . , [or] that the organization has engaged or engages in terrorist activity . . . or terrorism," as defined by the statutes incorporated in §2339B(a)(1).

Neither the common law embodied in *Halberstam* nor the incorporated statutory conspiracies require that the conspirator *intend* that material support is to be used for terrorist crimes or a terrorist organization. *See, e.g.*, *United States v. Reiswitz*, 941 F.2d 488, 494–95 (7th Cir. 1991) (holding that specific intent is not necessary to convict for conspiracy to commit a general intent crime, because "it is enough if a conspirator has the same mental state as the underlying crime

[18] *See* H.R. Conf. Rep. No. 103-482 (1994), *reprinted in* 1994 U.S.C.C.A.N. 398, 475 (April 25, 1994) (explaining that §2339A was intended to "provide a cause of action against those who knowingly provide assistance" but who would not be liable under general aiding and abetting principles because they do not possess the requisite specific intent). *See also* Statement of Rep. Hastings, 142 Cong. Rec. H2178 (daily ed. March 13, 1996) ("[W]e must somehow or another get at the roots of terrorism by giving our law enforcement authorities the ability to prosecute those persons who, while they may not actually carry out the activities themselves, enable the terrorists to operate here in the United States as well as elsewhere.").

requires."). Deutsche Bank's agreement to further the conspiracy with knowledge of its aim is sufficient. *See infra*, Part III.

II. THE DISTRICT COURT ERRED BY FINDING THAT THE CONSPIRACY THAT DEUTSCHE BANK HAS ADMITTED JOINING DID NOT VIOLATE THE ATA.

The District Court erred by finding that a conspiracy "to evade economic sanctions" is not an ATA violation. A11-12. When the sanctions are intended to *disrupt* terror financing, a conspiracy to evade them is more than plausibly a conspiracy to *facilitate* terror financing in violation of §2339A(a) and, when that financing is in part for the FTO Hezbollah, of §2339B(a)(1). Moreover, even if it were not, a conspiracy to evade counterterrorism sanctions by stripping or covering financial transactions to conceal them from CTF oversight is independently an express violation of §2339A(a). The District Court failed to apply this straightforward alternative statutory standard.

A. The Admitted Unlawful Agreement Was Necessarily Integral to Iran's Conspiracy to Provide Material Support for Terrorism.

As shown above, Iran designed and orchestrated a conspiracy to provide material support for terrorism by unlawfully concealing transactions involving billions of Eurodollars through the United States to avoid sanctions *intended to prevent terror financing* and transferred more than $150 million Eurodollars to support terrorism through that modus operandi. Iran and its co-conspirators designed the mechanism of the conspiracy: making unlawful international wire transfers "OFAC-safe" by stripping or covering them to conceal the involvement of U.S.-designated Iranian counterparties, such as SDGT Bank Saderat. Deutsche Bank

admitted in the Consent Orders to participating in that conspiracy by agreeing to perform these precise functions for "sanctioned customers," concealing details and using codes in order to make unlawful transactions "OFAC-safe." The District Court itself noted that Plaintiff had at least pleaded "*that Deutsche Bank conspired with Iranian banks*, and therefore with Iran, to evade sanctions and to disguise financial payments." A5 (emphasis added). But the Court then dismissed this pleaded conspiracy as nothing more than a conspiracy "perhaps to evade economic sanctions," which it held was "not an ATA violation." A11-12.

In doing so, it erred by ignoring the purpose of those sanctions. In 1995, President Clinton imposed sanctions on Iran, Executive Order No. 12,959, 60 Fed. Reg. 24,757 (May 9, 1995), that he subsequently told Congress were "in response to actions and policies of the Government of Iran, *including support for international terrorism* …" William J. Clinton, Transmittal Letter to Congress on Iran, 1997 WL 575415, at *1 (Sept. 17, 1997). In 1996, the ILSA expressly declared that the "objective of preventing … acts of international terrorism [by Iran] … requires additional efforts *to deny Iran the financial means* to sustain" its weapons programs. Pub. L. 104-172, §2(2), 110 Stat. 1541, 1541 (1996) (emphasis added). Subsequently, Executive Order No. 13,224 established the heart of the CTF sanctions regime as "a means by which *to disrupt the financial support network for terrorists and terrorist organizations*" and "a powerful tool *to impede terrorist funding*," 13,224 Press Release, SA12 (emphasis added), chiefly by blocking transactions by SDGTs like Deutsche Bank's sanctioned customer and co-conspirator Bank Saderat. JA43, ¶215.

Given these clear, repeated, and publicly declared purposes of the sanctions regime that Deutsche Bank helped Iran and its U.S.-designated banks evade, the conspiracy to evade those sanctions necessarily facilitated the "financial network for terrorists and terrorist organizations" and "terrorist funding" that the sanctions were expressly intended to impede. The Treasury Department left no doubt of this conclusion when explaining why it revoked the U-Turn exemption in 2008, noting that "Iran's access to the international financial system enables the Iranian regime to facilitate its support for terrorism and proliferation." JA26-27, ¶138.

Thus, Deutsche Bank's admitted objective – evading CTF sanctions – served as an integral part of Iran's objective of providing material support to terrorism. "[A] conspiracy with multiple objects and multiple parties can also be held to constitute a single conspiracy *as long as the objects are integrally related*, such that 'the success of that part with which [the defendant] was immediately concerned, was dependent upon the success of the whole.'" *United States v. Greer*, 467 F.2d 1064, 1071 (7th Cir. 1972). *See also Halberstam*, 705 F.2d at 487 (even if co-conspirators did not commit burglaries together, "their activities were symbiotic"). Iran required the deceptive services offered by Deutsche Bank and other non-Iranian bank co-conspirators "to facilitate its support for terrorism," as the Treasury Department found, and Iran's campaign of terror financing created a market for Deutsche Bank's evasion of counterterrorism sanctions with the "lucrative fees" that it offered.[19]

[19] *See* Consent Order, JA61, ¶1 ("In order to facilitate what it saw as 'lucrative' U.S. dollar business for sanctioned customers, Bank employees developed and employed several processes to handle dollar payments in non-transparent ways that circumvented the controls

The conspiracy "to evade economic sanctions" thus violated both §2339A(a), and, by helping fund FTO Hezbollah, §2339B(a)(1). The District Court's divorce of the sanctions from their declared CTF purposes, and of the admitted conspiracy to evade them from Iran's conspiracy to access the U.S. financial system to support terrorism, was plain error.

B. The Admitted Conspiracy to Evade Counter-Terrorism Sanctions Also Independently Violated §2339A(a).

Even if the Bank's admitted objective "to evade U.S. sanctions" by "disguis[ing] financial payments" (Mem. & Order, A5) was somehow, as a matter of law, *not* an integral part of Iran's conspiracy to provide material support for terrorism and terrorist organizations, the Bank's conduct *independently* violated §2339A(a). Using the disjunctive "or," §2339A(a) also prohibits conspiring "to conceal[] or disguise[] the nature, location, source, or ownership of material support." A conspiracy to evade counter-terrorism sanctions by disguising the prohibited transactions is, indisputably, precisely this prohibited conspiracy.

Indeed, "concealing" and disguising" the financial support it processed for sanctioned customers is literally what the Bank has admitted doing in the Consent Order:

- "[T]he Bank effectively *concealed* the relationship of a sanctioned or possibly sanctioned party to the transactions [it processed] . . . ." JA60 (emphasis added).

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designed to detect potentially-problematic payments.") (emphasis added); *id.*, JA69, ¶25 (while some managers expressed concern that Deutsche Bank's acts of concealment were a "breach of law," the relationship manager saw this merely as "a need to better train the non-U.S. staff who handle the 'very lucrative' Syrian and Iranian business to ensure such disclosures do not occur in the future."). *See also* Complaint, JA37, ¶185.

- "[The Bank used] . . . Wirestripping and Non-Transparent Cover Payments to *Disguise* Transactions." JA61 (emphasis added).

- "Bank Staff Coordinated With Sanctioned Customers to *Conceal* True Details About the Payments" JA64 (emphasis added).

- "Bank relationship managers and other employees worked with the Bank's sanctioned customers in the process of *concealing* the details about their payments from U.S. correspondents." JA64, ¶10 (emphasis added).

This conspiracy violated the ATA, and the District Court committed clear error by failing even to apply this alternative statutory standard to the Complaint's multiple and detailed allegations tracking the Consent Order.

III. THE DISTRICT COURT ERRED BY FINDING THAT THE COMPLAINT FAILED TO ALLEGE THAT DEUTSCHE BANK HAD THE NECESSARY SCIENTER TO PARTICIPATE IN A CONSPIRACY THAT VIOLATED THE ATA.

Deutsche Bank admitted in the Consent Order that it worked with its sanctioned customers to make false entries and material omissions from transaction documents "*with the intent to deceive*" U.S. law enforcement and intelligence agencies enforcing CTF sanctions and oversight. Consent Order, JA69-70, ¶27 (emphasis added). It acknowledged multiple internal emails and requests from those same customers spelling out the methods of making unlawful transactions "OFAC-safe" in order to prevent Iranian funding for terrorism and WMD development from being "frozen by the Federal Reserve," as the Bank put it. *Id.*, JA67, ¶20. The Bank's explanation that it had only "violated some other law" (Bank. Mem. in Support of Mot. to Dismiss, ECF No. 36, at 17), was a classic misdirection, making the common conspiracy defense that although it agreed to do something, it did not intend to conduct any underlying crime or know the full scope of the agreement it made. *See,*

e.g., United States v. Kehm, 799 F.2d 354, 362 (7th Cir. 1986) ("Often the defendant will say that he agreed with someone else to do something but did not know the scope of the agreement."). The District Court followed that misdirection, finding that "Plaintiffs have not plausibly pleaded that Deutsche Bank *intended* . . . to provide material support for terrorism." A11 (emphasis added).

As discussed above, the District Court erred, first, in failing altogether to apply the alternative §2339A(a) standard of intent to conceal and disguise material support to the Bank's admission of its intent to deceive and of its participation in the "OFAC-safe" scheme. This alone was an error that necessitates reversal of the dismissal of the §2339A(a) claim.

But the District Court also erred for at least three additional reasons. First, once the Bank admitted its participation in a conspiracy to conceal and disguise, providing Iran clandestine access to the U.S. financial system to provide support for terrorism, the Plaintiff did not have to plead that the Bank *itself* intended to provide material support for terrorism. Under well-established conspiracy law, it is enough that she plausibly pleaded that the Bank joined this conspiracy knowing that its co-conspirators, including Iran, the SDGT Bank Saderat, and the SDN Bank Melli, among others, had that intent, and that the Bank provided Iran concealed access to the financial system knowing that it would further its illegitimate activities, i.e., terrorism and the development of WMDs (including EFPs like the one used to kill David Schaefer).

Second, the Court's insistence that Plaintiff had to plead that the Bank itself intended to provide material support for terrorism was also inconsistent with both §2339A(a) and §2339B(a)(1). Congress deliberately chose not to require proof of specific intent to provide material support. Knowledge that support is to be used in preparation for or in carrying out terrorism or that it is for an FTO or an organization that engages in terrorist activities is sufficient. The Complaint plausibly alleged both.

Finally, Deutsche Bank's defense that it engaged in the wrong conspiracy to sustain an ATA claim raises a question of fact that the Court should not have decided as a matter of law on a motion to dismiss.

A. The ATA Does Not Require Plaintiff to Plead That Deutsche Bank Itself Had the Intent to Provide Material Support for Terrorism.

After first correctly noting that this Circuit has held that "the intent necessary for civil liability [is] recklessness and wantonness" and that the proper determination is whether an "actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead," A9 (citing *Boim III* at 693), the District Court then held that, "the object of the participants' conspiracy must be to provide material support for terrorism, and Plaintiffs have not plausibly pleaded that Deutsche Bank *intended* to do so." A11 (emphasis added).

In so doing, the District Court erroneously conflated the "intent" required to plausibly plead *purposeful* agreement to join a conspiracy, knowing its scope (the correct legal standard), with a defendant's personal desire or motive to accomplish an ultimate result. Here, Plaintiff plausibly pleaded that Deutsche Bank knowingly and purposefully joined a criminal conspiracy, took affirmative (unlawful) actions in

furtherance of the conspiracy and knew (or consciously avoiding knowing) that its scope included Iran's objective of providing material support for terrorism. Conspiracy law does *not* require Plaintiff to plead that Deutsche Bank *itself* desired to provide material support to terrorism or that it joined the conspiracy *motivated* to provide that support. *See, e.g.*, *Kehm*, 799 F.2d at 363 (maintaining conviction where "there was no dispute at trial that *someone* in the . . . organization intended to import drugs").[20]

"Intent" in the conspiracy context is defined only by agreement to participate in and to take affirmative steps to further a scheme, *knowing* that the scheme's aim is committing the underlying crime. "[I]f a defendant, with knowledge that the object of attempted drug possession is distribution, thereafter joins in and attempts to further that drug *possession* [not the distribution], *a jury may reasonably find from that combination of knowledge and action that the defendant adopted the underlying intent to distribute as his own*." *United States v. Heras*, 609 F.3d 101, 108 (2d Cir. 2010) (emphasis added) (citing *Salinas v. United States*, 522 U.S. 52, 65 (1997)).[21] *See also United States v. Hickey*, 360 F.2d 127, 138–39 (7th Cir. 1966) (upholding conspiracy conviction for defendant who "continued co-operation with the others in spite of" "increasing awareness of the circumstances" as "[i]t is only necessary that

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[20] *See also Ocasio v. United States*, 136 S. Ct. 1423, 1430, 1434 (2016) (relying on "well-established rules of" conspiracy law in holding that "'[a] specific intent to distribute drugs oneself is not required . . . .' Agreeing to store drugs at one's house in support of the conspiracy may be sufficient.").

[21] This is all the truer in the context of a general intent crime like violations of §§2339A and B. *See* section I.B, *supra.*

he knowingly contribute his efforts in furtherance of it"); *Kehm*, 799 F.2d at 362 ("[i]f [defendant] knew, he is a conspirator").

Deutsche Bank, knowing that Iran's objective in evading CTF sanctions was to provide material support for terrorism, joined with Iran and its agents and committed multiple overt acts to further that evasion. Further, Deutsche Bank understood that Iran's objective did not just indirectly or incidentally benefit from the unlawful services Deutsche Bank and the other non-Iranian banks provided – that objective *depended* on them. *See United States v. Townsend*, 924 F.2d 1385, 1391-92 (7th Cir. 1991).

That Deutsche Bank's subjective motive was greed (Bank Mem. in Supp. of Mot. to Dismiss, ECF No. 36, at 7, 19) is irrelevant. "One can join a conspiracy to make money, even though others join it for different reasons. The question is whether the parties have agreed to advance a common goal." *United States v. Duff*, 76 F.3d 122, 127 (7th Cir. 1996). *United States v. Martin*, 618 F.3d 705, 736–37 (7th Cir. 2010), *as amended* (Sept. 1, 2010) ("each co-conspirator's financial motivation for joining the conspiracy is essentially irrelevant."); *United States v. Maldonado-Rivera*, 922 F.2d 934, 963 (2d Cir. 1990) ("The goals of all the participants need not be congruent for a single conspiracy to exist, so long as their goals are not at cross-purposes."). Advancing a goal is a question of knowing contribution, not motivation. *See, e.g.*, *Boim III*, 549 F.3d at 693 ("If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result . . . not only in a

tort case but in a criminal case.") (internal quotation marks and citations omitted). Here the "common goal" of the conspiracy, as designed by Iran, was "to facilitate its support for terrorism," in the Treasury Department's words, JA26-27, ¶138, in which Deutsche Bank's role was to provide Iran with the clandestine access to the U.S. financial system it needed to execute that goal.

Finally, conspiracy law does not require Plaintiff to plead that Deutsche Bank had complete knowledge of *all* aims, details, and participants in the conspiracy. It is sufficient to plead Deutsche Bank's "1) knowing participation or membership in the scheme charged and [that it had] 2) *some knowledge* of the unlawful aims and objectives of the scheme." *United States v. Lanza*, 790 F.2d 1015, 1022 (2d Cir. 1986). *See also United States v. Consol. Packaging Corp.*, 575 F.2d 117, 127 (7th Cir. 1978) ("[Defendant] did not need full knowledge to participate in the benefits of the conspiracy and therefore proof that [it] was fully informed was not required."). An "awareness of a high probability of something, coupled with avoidance of further knowledge for fear of what you will learn," qualifies as knowledge. *Kehm*, 799 F.2d at 362.

Thus, conspiracy case law includes numerous examples of conspirators whose requisite intent was proven by their agreement to participate in a scheme of which they had *some* knowledge of the conspiracy's scope but did not share its co-conspirators' motives in achieving those goals. For instance, in several cases, the co-conspirators charged had no stake in the success of the conspiracy's ultimate goals. *See, e.g.*, *Kehm*, 799 F.2d at 362 (defendant arranged rental of airplane for others

under suspicious circumstances properly convicted for conspiracy to smuggle drugs). *See also United States v. Morse*, 851 F.2d 1317, 1319-20 (11th Cir. 1988) (defendant's only role was to sell a small, unregistered plane "particularly suited for smuggling" under suspicious circumstances to others who used it for drug smuggling); *United States v. Frink*, 912 F.2d 1413, 1417 (11th Cir. 1990) (defendant car dealer "[d]eliberately falsified paperwork" when selling cars under suspicious circumstances, which was "even more indicative of guilty knowledge than the omission of paperwork in *Morse*, which we held *supported an inference of intent*.") (emphasis added); *United States v. Garcia*, 509 F. App'x 40, 42 (2d Cir. 2013) ("[I]t is not necessary to charge the jury that each conspirator must be found to have a 'stake in the success' of the conspiracy for the use of such an expression would be misleading as it might infer that there must be a showing of some personal financial interest in the outcome of the conspiracy.") (citation omitted). Not only did Deutsche Bank's concerted efforts to falsify transactional records by concealment and omission themselves plausibly manifest guilty knowledge that the funds it processed would be used for supporting terrorism, but so too did the unusually "lucrative fees" it earned by offering these unlawful services to Iran to help conceal those funds. *See supra* at 31 & n.19.

Specifically, the Complaint plausibly alleged that the Bank's Iranian co-conspirators intended to (and did) provide material support to the IRGC and Hezbollah, and that the Bank knew, or at best recklessly disregarded knowing, this fact. The Complaint describes in detail (1) that the publicly declared purpose of the

sanctions was to deny Iran access to the financial system for funding terrorism and WMD development, JA11, ¶71; JA21-27, ¶¶115-16, 121, 132, 138; JA42, ¶210, (2) that the Bank's Iranian counterparties were publicly designated as SDGTs and SDNs, JA24, ¶127; JA31, ¶155; JA43, ¶215; JA44, 223, (3) their express requests to Deutsche Bank to conceal their involvement in unlawful transactions, JA37 ¶188; JA39-41, ¶201, (4) the repeated references in Deutsche Bank's internal communications to the risk that the United States would freeze the transactions if they were not concealed, JA36 ¶179; JA38, 193-94, (5) its self-description of its conspiracy as "OFAC-safe," JA38, ¶190; JA39, 197, and (6) its admission in the Consent Order that it concealed the provision of *at least* 600 transactions valued at over $38 million to U.S.-designated entities. JA60 n.2.

In short, Plaintiff alleged that Iran designed a conspiracy to provide material support for terrorism, Deutsche Bank admitted to joining *that* conspiracy with Iran to perform the precise functions described by the U.S. government as integral to Iran's provision of material support to Hezbollah and the IRGC, and Deutsche Bank knew that Iran – a State Sponsor of Terrorism seeking to evade CTF authorities and laws – intended to use that conspiracy to provide material support for terrorism. Requiring Plaintiff to plead more – that Deutsche Bank itself intended (i.e., desired) to support terrorism – was clear error.

B. Requiring Plaintiff to Plead that Deutsche Bank Specifically Intended to Provide Material Support for Terrorism Is Also Inconsistent With 18 U.S.C. §§2339A and 2339B.

Requiring Plaintiff to plead that Deutsche Bank specifically intended to provide material support for terrorism is not only at odds with conspiracy law, but

also with the express scienter requirements of the material support statutes. *See Reiswitz*, 941 F.2d at 494–95, *supra* at 28.

As noted above, §2339A(a) expressly provides that it is sufficient for criminal liability that a defendant conspires to provide material support or resources or to conceal and disguise such support or resources "knowing *or* intending that they are to be used in preparation for, or in carrying out" murdering of American nationals or other listed terrorist crimes. 18 U.S.C. §2339A(a) (emphasis added). Section 2339B, for its part, does not even list "intending" in the alternative; it exclusively requires knowledge that the organization was designated an FTO or engages in terrorist activity. *See, e.g., United States v. Marzook*, 383 F. Supp. 2d 1056, 1069–71 (N.D. Ill. 2005) (rejecting the very conclusion on which the District Court in this case in part rested its dismissal: "[T]he Court does not agree with . . . [the] contention that Section 2339B further requires proof that a donor specifically intended to further an FTO's terrorist activities."). *Id.*[22] By requiring at least knowledge, on the other hand, §§2339A and 2339B conspiracies also preclude strict or simple negligence liability, satisfying the §2333(a) scienter standard that this Court identified in *Boim III*: that

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[22] *See also Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d 1134, 1147 (C.D. Cal. 2005), *aff'd sub nom. Humanitarian Law Project v. Mukasey*, 509 F.3d 1122 (9th Cir. 2007), and 552 F.3d 916 (9th Cir. 2009) ("an imposition of specific intent to further terrorist activities [into §2339B] cannot be reconciled with Congress's clear intent in passing the AEDPA and the IRTPA."). As the Supreme Court recognized in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 17 (2010), "Congress did not import the intent language of [§2339A's and §2339C's alternative – knowledge *or* intent – formulations of scienter] into §2339B, either when it enacted §2339B in 1996, or when it clarified §2339B's knowledge requirement in 2004." "Congress plainly spoke to the necessary mental state for a violation of § 2339B, and it chose knowledge about the organization's connection to terrorism, not specific intent to further the organization's terrorist activities." *Id.* at 16-17.

a defendant "either knows that the . . . [supported entity engages in terrorist crimes] or is deliberately indifferent to whether it does or not, meaning that one knows there is a substantial probability that the organization engages in terrorism but one does not care." *Boim III,* 549 F.3d at 693.[23]

Congress recognized that financing terrorists (whether directly or through conduits), and concealing or disguising such financing, causes the same harm to national security regardless of the motive for doing so. Reading a requirement to plead an intent to support acts of terrorism into these statutes, as the District Court did, not only ignores their plain language, but negates Congress's considered policy choice. *See Marzook*, 383 F. Supp. 2d at 1070 (defendant's argument for "the additional requirement [of intent to further terrorist activities of the FTO] finds no basis in [§2339B's] language. Moreover, such a reading clashes with Congress's intent.").

Given Deutsche Bank's admitted and intentional bypassing of the CTF sanctions regime (i.e., the lawful-but-transparent U-Turn exemption) to process concealed USD funds for Iran, the world's foremost State Sponsor of Terrorism, the

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[23] The statutory knowledge standard can be satisfied by actual knowledge or deliberate indifference:

> To give money to an organization that commits terrorist acts is not intentional misconduct unless one either knows that the organization engages in such acts or is deliberately indifferent to whether it does or not, meaning that one knows there is a substantial probability that the organization engages in terrorism but one does not care. "When the facts known to a person place him on notice of a risk, he cannot ignore the facts and plead ignorance of the risk." *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 704 (7th Cir. 2008).

Boim III, 549 F.3d at 693.

Complaint plausibly alleged that the Bank knew, or was at least aware of the substantial probability, that Iran was using funds the Bank concealed for preparing for or carrying out terrorist acts through the IRGC and Hezbollah. JA42-43, ¶¶210-18.

C. Whether the Bank Joined a Distinct and Limited Conspiracy to "Evade Sanctions" or Was Part of Iran's Conspiracy to Provide Material Support to Terrorism Presents a Fact Question that the District Court Should Not Have Decided for Itself as a Matter of Law on a Motion to Dismiss.

Finally, the Bank's successful "wrong conspiracy" defense – that it may have only violated "some other law" by conspiring to evade sanctions, (Bank Mem. in Supp. of Mot. to Dismiss, ECF No. 49, at 2) – raises at best a question of fact that is unsuited for disposition as a matter of law. *See United States v. Richardson*, 130 F.3d 765, 773 (7th Cir. 1997) ("The question whether there is one conspiracy or several is a question of fact, which is 'something especially within the jury's realm of expertise,' and for that reason the jury 'gets first crack' at deciding the issue."), *vacated on other grounds*, 526 U.S. 813 (1999), (quoting *United States v. Paiz*, 905 F.2d 1014, 1019 (7th Cir. 1990)); *Hampton v. Hanrahan*, 600 F.2d 600, 621 (7th Cir. 1979) ("[t]he existence or nonexistence of a conspiracy is essentially a factual issue that the jury, not the trial judge, should decide.") (quoting *Adickes v. Kress & Co.*, 398 U.S. 144, 176 (1970) (Black, J., concurring)), *cert. granted in part, judgment rev'd in part on other grounds*, 446 U.S. 754 (1980).

As noted above, the Treasury Department found that Iran consistently used several deceptive methods to evade CTF sanctions in order "*to facilitate its support*

for terrorism." JA25-27, ¶¶132, 138.[24] Even if it was *plausible* that Deutsche Bank engaged in the same unlawful conduct with the same Iranian banks during the same period, but that this was nonetheless some wholly separate conspiracy with Iran, the District Court erred by deciding for itself the fact question this extraordinary coincidence poses on a motion to dismiss.

IV. THE DISTRICT COURT ERRED BY DECIDING, AS A MATTER OF LAW, THAT PLAINTIFF'S INJURIES WERE NOT A FORESEEABLE CONSEQUENCE OF THE CONSPIRACY.

The District Court found that the Complaint alleged a "pattern strikingly similar" to that alleged in *Rothstein v. UBS AG* (without citing or comparing allegations in either complaint), and then held that the Complaint failed for the same reason that the *Rothstein* complaint failed: it did not plausibly allege that Deutsche Bank's actions caused Plaintiff's injuries. A7, A12. The Second Circuit considered and rejected the *Rothstein* plaintiffs' novel theory of *per se* liability as an overreaching "*post hoc, ergo propter hoc* proposition" that would make *any* material support to a state sponsor of terrorism a proximate cause of terrorism backed by that state (thus, for example, making even funds lawfully transferred through the U-Turn exemption the proximate cause of injuries that Iran caused). *Rothstein*, 706 F.3d at 96. Quoting this reasoning about *per se* liability, *see* A8, and erroneously finding that the Complaint pleaded the wrong conspiracy, *supra* Parts II-III, the District Court here failed to apply the *Pinkerton* principle or consider Plaintiff's allegations that funds

[24] *See also* Notice, Dep't of Treasury, Finding That the Islamic Republic of Iran Is a Jurisdiction of Primary Money Laundering Concern, 76 Fed. Reg. 72756-01, 2011 WL 5882012 (Nov. 25, 2011), SA25-38.

actually transferred by Iranian banks through the conspiracy funded the entities and weapons used to attack and murder U.S. soldiers in Iraq, including Plaintiff's son.

A. The *Pinkerton* Principle of Causation Applies to the Conspiracy Plausibly Alleged in the Complaint.

The *Rothstein* plaintiffs asserted liability for common law aiding and abetting, not for conspiracy. 708 F.3d at 88, 94. *Rothstein* therefore never considered the implications of the *Pinkerton* causation principle for a conspiracy claim. *See Pinkerton v. United States*, 328 U.S. 640 (1946); *United States v. Diaz*, 864 F.2d 544, 549 (7th Cir. 1988) ("This circuit has interpreted *Pinkerton* to mean that each conspirator may be liable for acts of every other conspirator done in furtherance of the conspiracy.") (internal quotation marks and citations omitted).

Halberstam, the governing legal framework for ATA civil liability, articulates that principle as "all . . . [of a conspiracy's] members are liable for injuries caused by acts pursuant to or in furtherance of the conspiracy." *Halberstam*, 705 F.2d at 481. A conspirator need neither participate in nor even know of the act that ultimately caused the injury, as long as the act's purpose was to advance the conspiracy. *Id.* In *Halberstam*, the court applied this principle to hold a burglar's partner liable for the burglar's murder of a homeowner during the course of a burglary, *even though she never intended to commit, participated in, or even knew beforehand of the murder,*

because the murder was "a reasonably foreseeable consequence of the scheme . . . ." *Id.* at 487.[25]

B. 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.

The District Court claimed that it found it "difficult to separate Plaintiffs' claims" from those made in *Rothstein*. A8. But aside from the superficial fact that both cases involve banks and Iran, the difference between the two cases is stark. First, the *Rothstein* complaint included no non-conclusory allegations that the bank notes UBSs supplied to Iran (*Rothstein* did not deal with electronic funds transfers through the U.S.) were ever provided to terrorists. *See* SA40-59.[26] In contrast, the Complaint alleged that Deutsche Bank engaged in a criminal conspiracy that resulted in (1) more than $150 million Eurodollars cleared through the U.S. being transferred to Hezbollah and the IRGC, JA42-44, ¶¶212, 215, 223; (2) numerous transactions directly with Bank Saderat (an SDGT and a "significant facilitator of Hezbollah's financial activities," JA46-47, ¶236) and Bank Melli (an SDN that transferred at least $100 million to the IRGC-QF, JA44, ¶223, the latter of which the U.S. government

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[25] *Halberstam* thus does not require strict but-for causation in fact, contrary to the Bank's arguments in support of its motion to dismiss. *See, e.g.*, *In re Chiquita Brands Int'l, Inc.,* No. 08-MD-01916-KAM, 2018 WL 502781, at *18-22, (S.D. Fla. Jan. 3, 2018).

[26] The closest the *Rothstein* complaint came was an entirely conclusory allegation that "Iran provided Hizbollah, Hamas, and the PIJ with … cash dollar payments, both directly and via various organs . . . and instrumentalities of the government of Iran (including without limitation the Central Bank of Iran, Bank Saderat Iran, Bank Melli Iran and Bank Sepah Iran)." *Rothstein* FAC ¶ 53, SA43. But it alleged no specific transactions by defendant with these "instrumentalities," let alone any amount of transfers from them to terrorist organizations.

found "provides lethal support in the form of weapons, training, funding, and guidance to select groups of Iraq's Shi'a militants who target and kill Coalition and Iraqi forces," JA11, ¶71);[27] and (3) *at least* 600 admitted transactions valued at over $38 million for entities on the OFAC lists, Consent Order, JA60 n.2. *All* of these allegations are based on government findings, most of which the Bank acknowledged in the DFS Consent Order that was attached to the Complaint.

Moreover, the *Rothstein* court observed that Iran has "many legitimate agencies, operations, and programs," 708 F.3d at 97, and the *Rothstein* plaintiffs made no non-conclusory allegation that the bank notes the defendant delivered to Iran were not for these legitimate uses. But in the instant case, the U-Turn exemption provided a transparent process for Iran to transfer Eurodollars for its legitimate uses. The fact that Deutsche Bank conspired with Banks Saderat and Melli and the Central Bank of Iran to bypass the U-Turn exemption, instead concealing and disguising its transactions with them with the admitted intent of evading U.S. CTF sanctions and oversight, belies any claims that the funds Deutsche Bank thereby transferred were for Iran's "legitimate" uses. So, of course, does the Bank's admission that more than $38 million of transactions it processed were "illegal" under the sanctions program, and that it worked secretly to process Iranian transactions "involving sanctioned customers." Consent Order, JA60 & n.2.

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[27] The District Court observed that the Complaint does not allege which specific person or Iraqi group emplaced the EFP that killed Mr. Schaefer, A11, but it ignored the detailed allegations that identify the bomb itself (an Iranian EFP) as one designed, manufactured and deployed by the IRGC and Hezbollah with the specific intent of killing U.S. soldiers. The weapon alone ties the attack to participants in the conspiracy.

Furthermore, the District Court accepted as true Deutsche Bank's assertion that it could not reasonably foresee all of the links along the causal chain, when in fact the Bank was conspiring directly with Iran, which, unsurprisingly for a State Sponsor of Terrorism, *itself* manufactured, financed and distributed EFPs in Iraq, JA16, ¶¶95-97 (including the EFP that killed David Schaefer) and (together with Hezbollah) trained local terrorist agents to emplace them. The Complaint does not assert a "trickle-down" theory by which Iran funded terrorist groups that then independently proceeded to harm the Plaintiff. Rather, Iran itself was *directly* responsible for Mr. Schaefer's death.

If, however, the foregoing allegations – which had no non-conclusory counterpart in *Rothstein* – raise a question about the reasonable foreseeability of terrorist injury from the unlawful scheme, it is quintessentially a fact question. "The question whether the actions of others were reasonably foreseeable to the particular defendants (or, as . . . [the jury] instruction put it, a natural consequence of the conspiracy they joined) is a factual one." *United States v. Smith*, 223 F.3d 554, 567 (7th Cir. 2000). The Complaint's non-conclusory allegations, resting on U.S. government findings and Deutsche Bank's own admissions, are sufficient to make that question inappropriate for decision as a matter of law. By its extensive and continued dealings with its sanctioned customers, the Bank is one of "the people who can predict what their counterparts are doing, even if they have no direct knowledge." *Id.* For that reason, this Court in *Smith* held that it was "not prepared to hold that

Pinkerton liability is unavailable as a matter of law in this kind of case." Nor should the District Court have done so in this case.

Finally, contrary to the District Court's concern that Deutsche Bank might be liable "for any Iran-related terrorist act during or after the period during which they were processing transactions for Iranian banks," A11, traditional tort principles and the language of the ATA (1) limit the Bank's liability by the doctrines of substantiality and foreseeability,[28] (2) extend only to the Bank's *illegal* transactions for Iranian banks within the scope of the conspiracy alleged and (3) encompass only attacks Iran foreseeably committed or supported, not all conceivable attacks characterizable as "Iran-related."

CONCLUSION

There is no dispute that the Bank entered into a conspiracy to conceal and disguise its financial transactions with its Iranian co-conspirators, as it agreed when it signed the DFS Consent Order. The object of that conspiracy was to give Iran, a State Sponsor of Terrorism, concealed access to the U.S. financial system, enabling it to provide material support for terrorism. Neither the applicable conspiracy law nor the underlying ATA material support statutes require Plaintiff to allege that Deutsche Bank *itself* intended to support terrorism. Therefore, what the Bank disputes is its knowledge of the full scope of the conspiracy and whether the Plaintiff's injuries were a reasonably foreseeable consequence of systematically concealing

[28] *See In re Chiquita Brands Int'l*, 2018 WL 502781, at *21 ("[T]he material factors attend the amount and timing of the defendant's payments relative to the terror attacks which caused the injury.") (citation omitted).

transactions for Iran which, in turn, was directly responsible for David Schaefer's death.

Plaintiff plausibly alleged that Deutsche Bank knew that Iran's objective and intent was to provide material support for terrorism by moving billions of Eurodollars clandestinely through the United States because the sanctions regime it violated was a robust, highly publicized and aggressive combination of legislation, executive orders, U.S. government findings, and OFAC designations, all directed at containing the world's leading state sponsor of terrorism. Plaintiff also plausibly alleged that the material support provided by the conspiracy proximately caused Mr. Schaefer's death, as he was killed by a signature Iranian weapon deployed by Iran through its agents, the IRGC and Hezbollah, with the specific intent to kill American service members.

By declaring the admitted conspiracy to be the wrong conspiracy, ignoring the statutory scienter standard and the *Halberstam* legal framework specified by Congress, and deciding fact questions that were unsuited for determination as a matter of law, the District Court erred in dismissing the Complaint. Consequently, Plaintiff respectfully requests that this Court reverse the District Court judgment dismissing the Complaint and remand for further proceedings.

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REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellant respectfully requests oral argument.

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the paper size, line spacing and margin requirements of Fed. R. App. P. 32(a)(4), typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), as modified by Circuit Rule 32(b), because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 12-point Century font, with footnotes in 11-point Century font. I hereby further certify that this document complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(c) because it contains a total of 13,991 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

/s/ Peter Raven-Hansen
Peter Raven-Hansen

CIRCUIT RULE 30(d) STATEMENT

The undersigned, counsel for Plaintiff-Appellant, certifies that all materials required by Circuit Rule 30(a) and (b) are included in the "Circuit Rule 30(a) Appendix," attached hereto, and the "Joint Appendix," filed separately.

/s/ Peter Raven-Hansen
Peter Raven-Hansen

CERTIFICATE OF SERVICE & CM/ECF FILING

I hereby certify that on the 21st day of March, 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 will be served by the CM/ECF system.

Dated: March 21, 2018
New York, New York

/s/ Peter Raven-Hansen
Peter Raven-Hansen

18-1031

IN THE

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
CIVIL DIVISION
NO. 3:16-CV-00497-MJR-SCW
HONORABLE MICHAEL J. REAGAN

CIRCUIT RULE 30(a) APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CHARLES JAMES SHAFFER, CHARLES L. SHAFFER, JR., and RHONDA KEMPER,	)	
Plaintiffs,	)	**Case Number: 16-cv-0497-MJR-SCW**
v.	)	
DEUTSCHE BANK AG,	)	
Defendant.	)	

JUDGMENT IN A CIVIL ACTION

By Order, on December 7, 2017, the Court dismissed with prejudice Plaintiff's claims against Defendant DEUTSCHE BANK AG for failure to state a claim upon which relief can be granted. Judgment entered in favor of Defendant and against Plaintiffs.

Dated: December 7, 2017

Justine Flanagan, Acting Clerk of Court
s/ *Reid Hermann*
Deputy Clerk

Approved: s/ *Michael J. Reagan*
Michael J. Reagan, U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CHARLES JAMES SHAFFER, CHARLES J. SHAFFER, JR. and RHONDA KEMPER	)	
Plaintiffs,	)	**Case No. 16-CR-497-MJR-SCW**
vs.	)	
DEUTSCHE BANK AG,	)	
Defendant.	)	

MEMORANDUM & ORDER

REAGAN, Chief Judge:

Plaintiffs Charles James Shaffer, Charles J. Shaffer, Jr., and Rhonda Kemper filed suit against Defendant Deutsche Bank AG alleging that Deutsche Bank conspired with Iranian financial institutions to transfer U.S. currency to Iranian banks in violation of U.S. economic sanctions, giving the Iranian government access to currency necessary to fund terrorist activities in Iraq. By doing so, Plaintiffs assert that Deutsche Bank engaged in a conspiracy to provide material support for international terrorism and to a foreign terrorist organization in violation of the Anti-Terrorism Act (ATA), specifically 18 U.S.C. §§ 2333(a), 2339A, and 2339B. Charles James Shaffer, David Schaefer (son of Rhonda Kemper), and other United States citizens were severely injured and killed as a result of terrorist attacks in Iraq orchestrated by groups like those funded by Iran.

Deutsche Bank filed a motion to dismiss (Doc. 35), arguing, among other things, that the complaint fails to state a claim because it does not plausibly plead proximate cause. Plaintiffs filed a response in opposition (Doc. 44) to which Deutsche Bank replied

(Doc. 49). The parties also submitted several briefs and responses addressing supplemental authority that arose after the completion of briefing on the motion to dismiss.[1]

As a preliminary note, Defendant cites Federal Rule of Civil Procedure 12(b)(1) in passing in its motion to dismiss. Rule 12(b)(1) applies to motions for lack of subject matter jurisdiction, but Defendant raises no subject matter jurisdiction argument. Federal courts enjoy exclusive subject matter jurisdiction under 18 U.S.C. § 2333(a). To the extent that Defendant is arguing otherwise, the argument is undeveloped. Defendant also raise an alleged lack of personal jurisdiction in a single-paragraph footnote, presumably also seeking to bring its motion to dismiss under Rule 12(b)(2). This argument is undeveloped, but it is worth note that courts have found personal jurisdiction exists in Anti-Terrorism Act claims against foreign banks that engage in correspondent banking in the United States, as Deutsche Bank does. ***See, e.g., Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 172 (2d. Cir. 2013).** The remainder of Defendant's arguments fall within the reach of Rule 12(b)(6). For the reasons delineated below, the Rule 12(b)(6) motion to dismiss is **GRANTED**.

I. Factual Allegations

Charles James Shaffer and David Schaefer were members of the United States

[1] Following the passage of the Justice Against Sponsors of Terrorism Act (JASTA) in 2016, the parties briefed whether the Act affected Plaintiffs' claims. (Docs. 51, 53). JASTA added conspiracy liability for parties who conspire with a Foreign Terrorist Organization (FTO). 18 U.S.C. § 2333(d). Plaintiffs' claims, however, allege a conspiracy with Iran, a State Sponsor of Terrorism (SST), not with an FTO, so this provision of JASTA does not apply to this action. If Congress intended to include similar liability for conspiracy with an SST, it would have included a provision in the amendment doing so.

military and served in Iraq as part of the U.S. peacekeeping mission. While on routine patrol in Mosul in 2008, Shaffer's vehicle was struck by a type of improvised explosive device (IED) known as an explosively-formed penetrator (EFP). Plaintiffs allege that EFPs like the one used in the attack were Iranian-made and were provided to Iranian-funded and trained terror operatives in Iraq. Shaffer was seriously injured in the attack. In May 2009, David Schaefer, son of Plaintiff Rhonda Kemper, was killed in Iraq, also by the explosion of an Iranian-manufactured EFP that allegedly was provided to Iranian-funded and trained terror operatives in Iraq.

Plaintiffs claim that terrorists and terrorist organizations like Hezbollah, the Islamic Revolutionary Guard Corps. (IRGC), the Islamic Revolutionary Guard Corps-Qod Force (IRGC-QF), and other Iranian terrorist agents killed and injured Coalition Forces, including Shaffer and Schaefer, and civilians in Iraq. Plaintiffs do not specify which group, if any, orchestrated the attacks that injured Shaffer and killed Schaefer, instead noting that Iranian funding was behind groups like the groups that orchestrated the types of attacks at issue.

The EFPs deployed in Iraq by IRGC and Hezbollah were professionally manufactured and designed to target the armor used by U.S. and Coalition Forces. Plaintiffs' complaint documents the long history of financial support by Iran for terrorism throughout the Middle East and worldwide, culminating in Iran's designation as a State Sponsor of Terrorism (SST). Hezbollah, a Foreign Terrorist Organization (FTO), has deep ties to Iran, who uses the organization to "project extremist violence and terror throughout the Middle East and around the globe." (Doc. 1, ¶ 50). Iran funds

and equips Hezbollah with weapons through the IRGC and the IRGC-QF, and the IRGC has also attempted to bolster Iran's goals through political and ideological support, bolstered by investments in local television and radio stations.

In order to coordinate and fund its activities in Iraq, Iran needed substantial amounts of U.S. currency but could not easily access it due to economic sanctions put in place the United States government. To gather the necessary access to U.S. currency, Iran relied on what Plaintiffs describe as the "illicit assistance" of Western financial institutions, including Defendant Deutsche Bank. Deutsche Bank allegedly assisted Iran in "laundering" U.S. dollars and with access to financing in U.S. currency that it ordinarily would not have had, all while Iran's activities in Iraq were heavily reported and well-known.

There was a U-Turn exemption program in place that allowed Iranian parties indirect access to U.S. dollar transactions under limited and closely-monitored circumstances. Deutsche Bank processed financial transactions for Iranian banks outside the structure of the U-Turn exemption program, instead removing important information and data from transactions that it processed for Iranian banks, allegedly to defeat detection and the freezing of the assets at issue by the United States. By doing so, Plaintiffs allege that Deutsche Bank conspired with Iranian banks, and therefore with Iran, to evade U.S. sanctions and to disguise financial payments, all of which enabled Iran's involvement in the terrorist acts that injured Plaintiffs.

In 2015, Deutsche Bank entered into a consent order with the New York Department of Financial Services related to the transactions it processed for Iranian and

other foreign financial institutions. The consent order noted that the practices of deleting and altering information were widespread but that Deutsche Bank instituted policies beginning in 2006 to end the practices and to wind-down business with U.S.-sanctioned entities. Even after the policies were enacted, some prohibited transactions persisted. As a result of the consent order, Deutsche Bank was fined $200 million.

II. Legal Standard

A complaint must include enough factual content to give the opposing party notice of what the claim is and the grounds upon which it rests. ***Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 698 (2009)**. To satisfy the notice-pleading standard of Rule 8, a complaint must provide a "short and plain statement of the claim showing that the pleader is entitled to relief" in a manner that provides the defendant with "fair notice" of the claim and its basis. ***Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citing *Twombly*, 550 U.S. at 555 and quoting Fed. R. Civ. P. 8(a)(2)).** In ruling on a motion to dismiss for failure to state a claim, a court must "examine whether the allegations in the complaint state a 'plausible' claim for relief." ***Arnett v. Webster*, 658 F.3d 742, 751 (7th Cir. 2011) (citing *Iqbal*, 556 U.S. at 677-78).**

III. Analysis

The Anti-Terrorism Act, in 18 U.S.C. § 2333(a), provides that "[a]ny national of the United States injured in his or her person . . . 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 . . . damages." Plaintiffs

bring claims under 18 U.S.C. § 2339A and § 2339B, which address providing material support to terrorism. Section 2339A prohibits providing material support or resources, or concealing or disguising the nature of material support or resources, while knowing or intending that they are to be used in preparation for, or in carrying out, international terrorism. Section 2339B prohibits providing material support or resources to a foreign terrorist organization. Courts, in determining civil liability under the ATA, require proof of three elements: (1) an injury to a U.S. national, (2) an act of international terrorism, and (3) causation. The Seventh Circuit has held that proving some degree of intent is necessary, as well, but that establishing recklessness may be sufficient to pursue a claim. ***Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685, 692-93 (7th Cir. 2008)(en banc)("*Boim III*")**. This case hinges on whether Plaintiffs' plausibly pleaded causation.

In a fact pattern strikingly similar to Plaintiffs' complaint, the Second Circuit determined that a financial institution, UBS AG, was not liable under the ATA for providing U.S. currency to Iran in violation of economic sanctions. In *Rothstein v. UBS AG*, 708 F.3d 82 (2nd Cir. 2013), the plaintiffs were United States citizens who alleged they were injured in terrorist attacks in Israel. UBS AG was prohibited from engaging in financial transactions with any state sponsors of terrorism, yet allegedly engaged in "forbidden U.S. currency transactions with Iran," a state sponsor of terrorism. ***Rothstein*, 708 F.3d at 87**. The plaintiffs alleged that they were injured in attacks by Hamas and Hezbollah and that the terrorist organizations were able to purchase weapons and supplies, to pay to train operatives, and to carry out the attacks in large

part due to financial support from Iran. Iran, however, was subject to sanctions by the United States that made it difficult to obtain the U.S. dollars necessary for funding the Hamas and Hezbollah operations. UBS allegedly aided Iran by providing access to millions of dollars in U.S. currency.

The Second Circuit focused on the importance of a plaintiff establishing proximate cause in an action under this fact pattern and warned that the "plaintiffs' contention that proximate cause is established because they were injured after UBS violated federal law is a *post hoc, ergo propter hoc* proposition that would mean that any provider of U.S. currency to a state sponsor of terrorism would be strictly liable for injuries subsequently caused by a terrorist organization associated with that state." ***Id.* at 96.** The Second Circuit did not believe Congress intended to impose strict liability when drafting the ATA and found the plaintiffs' claims were properly dismissed for failing to plausibly plead proximate cause.

It is difficult to separate Plaintiffs' claims from this clear statement warning of the importance of separating illegal processing of financial transactions from civil liability for terrorist attacks. Unlike Plaintiffs' conspiracy claims, however, the claims in *Rothstein* were brought under a theory of aiding and abetting liability, and the Second Circuit found that § 2333(a) does not allow for recovery on such a theory. The Seventh Circuit agreed in *Boim III*, in which the Court analyzed a chain of statutory incorporations by reference to conclude that financial support to a terrorist group outside of the United States may violate § 2333. **549 F. 3d at 689-90**. The defendants in *Boim III* donated money to Hamas, and the Court found that giving money to a terrorist

organization is not intentional misconduct under the ATA, unless "one either knows that the organization engages in such acts or is deliberately indifferent to whether it does or not," equating the intent necessary for civil liability to recklessness and wantonness. ***Id.* at 693**. Important to the determination is whether an "actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead." ***Id.* at 693**.

While the ATA does not provide for secondary aiding and abetting liability, conspiracy principles can inform the determination of whether a defendant is liable under a theory of primary liability. ***Boim III*, 549 F.3d at 691**. *Boim III*, like *Rothstein*, focused on proximate cause, specifically the foreseeability of the donated money being put towards terrorist acts and the evidence as to whether the donor knows of the character of the organization to which money is given. ***Id.* at 694-96**. To the Seventh Circuit, the rule for donating to a terrorist organization was clear: "[a]nyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities." ***Id.* at 698**. This rule, however, was not without its limits, particularly in situations where a donor's money was laundered through intermediate organizations before reaching a terrorist organization. The longer the chain between a donor and a donee's connection to terrorism, the less likely it is that there is liability under the ATA. ***Id.* at 701-02**.

Rothstein and *Boim III* address money flowing into an organization that aids terrorist organizations differently, though that is explained by the different

circumstances of the defendants in each case. The Second Circuit, in discussing the actions of a financial institution, noted that "Iran is a government, and as such it has many legitimate agencies, operations, and programs to fund" and that there were no allegations that without the money from UBS "Iran would have been unable to fund the attacks by Hezbollah and Hamas." The Seventh Circuit, however, warned that the ATA does not require proof that a donor intended a contribution be used for terrorism and that if you give money to a terrorist organization, even if you earmark it for nonterrorist activities, you may still be liable under the ATA because money is fungible and more money for one type of activity frees up other money for other causes.

Plaintiffs attempt to plead around *Rothstein* by seizing on language in *Boim III* that opens the possibility for civil conspiracy liability under the ATA. The problem for Plaintiffs is that *Boim III* contemplates a co-conspirator who donates money to terrorist organizations, warning that distant links between donor and donee negate liability. Here, the temporal chain between Deutsche Bank and the attacks on Shaffer and Schaefer is lengthy, far greater than the chain in *Boim III*, and Deutsche Bank is not a donor to any organization. Accepting the allegations in the complaint as true, Deutsche Bank illegally stripped essential information from financial transactions involving Iranian financial institutions in order to assist the financial institutions in evading U.S. sanctions and oversight. The transactions helped Iran's government access U.S. currency, which Iran then used in part to manufacture EFPs and to fund terrorist organizations, like Hezbollah and the IRGC. Because of this access to currency, Iran could move money and weapons to terrorist groups in Iraq like the groups that could

have been involved in the attacks that injured Shaffer and killed Schaefer. The complaint does not allege which group, if any, actually planned or orchestrated the attacks, however, and the degree of separation between Deutsche Bank and the attacks cuts against liability.

In addition to the distance between the actions of Deutsche Bank and the terrorists responsible for attacks on Shaffer and Schaefer, the complaint does not establish that Deutsche Bank participated in any conspiracy other than perhaps to evade economic sanctions. In criminal law, a conspiracy exists if the "co-conspirators joined to effectuate a common design or purpose." *United States v. Ceballos*, 302 F.3d 679, 688 (7th Cir. 2002). A participant need not know all his co-conspirators or participate in every aspect of a scheme, but a single objective must be embraced by the participants. *See United States v. Green*, 648 F.3d 569, 579 (7th Cir. 2011). Here, the conspiracy allegations largely focus on a conspiracy to avoid U.S. economic sanctions to assist Iranian banks in securing U.S. currency. Plaintiffs add a conclusory allegation that it was foreseeable to the conspirators, including Deutsche Bank, that helping Iranian banks secure the currency would enable Iran to fund terrorism. But Plaintiffs, by their own allegations, describe the object of the conspiracy as completing the dollar-clearing transactions. (Doc. 1, ¶¶ 1, 141). For a claim to be viable under the ATA, the object of the participants' conspiracy must be to provide material support for terrorism, and Plaintiffs have not plausibly pleaded that Deutsche Bank intended to do so.

When looked at as a whole, Plaintiffs complaint does not adequately plead that the actions by Deutsche Bank rise to the level of conspiring to provide material support

to terrorism or that the actions by Deutsche Bank proximately caused Plaintiffs' injuries. Processing funds for Iranian financial institutions, even if done to evade U.S. sanctions, is not the same as processing funds for a terrorist organization, and a conclusory allegation that it was foreseeable that Iran might give some of the money to terrorist organizations if the transactions succeeded is insufficient to establish liability. Plaintiffs have not plausibly pleaded that Deutsche Bank conspired to provide financial services or assistance to terrorist organizations or to the perpetrators of the attacks on Shaffer and Schaefer.

The claims against Deutsche Bank fall closer to the Seventh Circuit's discussion of a lengthened temporal chain that diminishes an actor's likelihood of knowing that their actions were connected to terrorism and to the Second Circuit's clear statement against using a violation of federal law as a premise for civil liability for a provider of U.S. currency to a state sponsor of terrorism. Plaintiffs attempt to get around these issues by pleading conspiracy, but the object of the pleaded conspiracy is not an ATA violation. To allow Plaintiffs' theory of liability would lead to Deutsche Bank potentially being liable for any Iran-related terrorist act during or after the period during which they were processing transactions for Iranian banks, and that is too broad a reading of ATA civil liability. As Section 2333 does not impose liability for injuries to victims of terrorist attacks on providers of U.S. currency to state sponsors of terrorism, Plaintiffs' claims must be dismissed.

IV. Conclusion

For the above-state reasons, Defendant Deutsche Bank's Rule 12(b)(6) motion to dismiss is **GRANTED**. Plaintiffs' claims are **DISMISSED with prejudice** for failure to state a claim.

IT IS SO ORDERED.

DATED: December 7, 2017

s/ Michael J. Reagan
MICHAEL J. REAGAN
Chief Judge
United States District Court