**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

## REPLY BRIEF FOR PLAINTIFF-APPELLANT

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## INTRODUCTION

Relying almost entirely on Defendant-Appellee Deutsche Bank's admissions and U.S. government findings, Plaintiff-Appellant Rhonda Kemper alleged that:

- Iran and its state-controlled banks conspired to fund Iran's terror campaign in Iraq by evading U.S. counter-terror financing sanctions and clearing hundreds of millions of dollars through the United States for the Islamic Revolutionary Guard Corps ("IRGC") and its Lebanese terror proxy, Hezbollah;
- Deutsche Bank conspired with Iran, its state-controlled banks, and others to evade those sanctions using the precise techniques identified by the Treasury Department as instrumental to Iran's conspiracy;
- Given the purposes of the sanctions Iran violated and the actors involved, Deutsche Bank knew the scope of Iran's conspiracy but still actively participated in the conspiracy for years; and
- As a reasonably foreseeable result of the conspiracy, Ms. Kemper's son was killed in an Iranian-sponsored terrorist attack in Iraq.

The Bank and amicus curiae U.S. Chamber of Commerce urge this Court to conclude that in Anti-Terrorism Act ("ATA") cases traditional tort law principles should be restricted to lawsuits against terrorist organizations and their operatives. Deutsche Bank asserts that "[p]leading that Deutsche Bank joined a criminal conspiracy satisfies at most one part of one element of her claim" and that Plaintiff must also plead that "*Deutsche Bank* (not someone else) directly caused her injuries." Appellee Brief ("Bank br.") at 36 (emphasis in original). The Bank's central argument contravenes *Boim v. Holy Land Found. for Relief and Dev.*, 549 F.3d 685 (7th Cir. 2008) (en banc) ("*Boim III*"), the controlling precedent in this Circuit, and would make §2333(a) a dead letter, relegating terror victims to filing symbolic suits against foreign terrorist operatives because "to *collect* a damages judgment against [a terrorist] organization, let alone a judgment against the terrorists themselves (if they

can even be identified and thus sued), is . . . well-nigh impossible." *Id.* at 690-91 (citation omitted). On the contrary, the conspiracy principles enunciated in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), and *Pinkerton v. United States*, 328 U.S. 640 (1946), point to the District Court's error and require reversal and remand.

As for Ms. Kemper's conspiracy claim, the Bank's description of the evidence is wildly implausible. First, it describes its active assistance to Iran and its agents to avoid disclosure of thousands of transactions worth billions of dollars as "helping customers avoid the added regulatory scrutiny that could delay even legal dollar transactions," Bank br. at 17. No doubt black market arms dealers describe their business in similar ways, but a less flattering – although more accurate – description is that the Bank's conduct was part of an intentional, top-down, bank-wide, and systematic practice beginning at least in 1999 and lasting at least a decade[1] to conceal Iran's transactions (including with U.S.-designated Iranian counterparties) from U.S. regulators.

Second, there is no genuine dispute that Iran intended to use the conspiracy to facilitate terror financing. The Complaint plausibly pleads, and a jury could

[1] Deutsche Bank artfully points to language in the New York State Department of Financial Services ("DFS") Consent Order that in 2006 it "instituted a series of policies" to end this practice and to "wind down business with U.S.-sanctioned entities." Bank br. at 31. Of course, as a litany of consent orders and deferred prosecution agreements have underscored, policies and practice are not always synonymous. The Complaint alleges that the Bank continued "resubmitting rejected payments or processing sanctions-related payments through New York . . . even after the formal policies were instituted." JA64, ¶9, citing the Consent Order.

reasonably infer, that the Bank knew and intended, within the meaning of *Boim III*, that its role in the conspiracy would help Iran accomplish that objective, even if it did not share Iran's motives. The Complaint also plausibly pleads, and a jury could reasonably infer, that the Bank intended to conceal and disguise the source of material support it knew would be used to finance terrorism. Deutsche Bank's repeated response to these well-pleaded allegations is that its conspiracy with Iran to evade sanctions — aimed at preventing Iran from financing its terrorism and weapons of mass destruction ("WMD") programs — was "separate" from Iran's terror-financing conspiracy to provide material support to its terror proxies, the IRGC and Foreign Terrorist Organization ("FTO") Hezbollah, despite admitting it used the exact same methods, channels and Iranian agents that the U.S. Treasury Department identified as central to Iran's conspiracy. In fact, the Bank injects the word "separately" over 10 times in its brief, hoping that this quintessential and disputed fact question will simply be resolved in its favor. Bank br. at 1, 3, 15, 23, 27 (twice), 29, 32 (twice), 36, 47.

Third, directly contrary to the Bank's assertion, this Court has already held in *Boim III* that *Halberstam*, and the principles of tort law it delineates, apply to primary liability with the character of conspiracy. By those principles, the Bank is liable for its co-conspirator Iran's foreseeable acts in furtherance of its conspiracy to fund terrorism, including the attack that killed Ms. Kemper's son.

The Bank asserts that Plaintiff cannot invoke civil conspiracy principles through her primary liability claim because "she lost her § 2333(d) conspiracy claim

below and abandoned it on appeal." *Id.* at 34. But the addition of §2333(d) did not *sub silentio* overrule the vicarious liability set forth in *Boim III*, which expressly held that "there is no impropriety in discussing [*Halberstam* and the Restatement (Second) of Torts] in reference to the liability of donors to terrorism under section 2333[(a)] just because that liability is primary." 549 F.3d at 691.

Finally, the Bank urges this Court to decide that its longstanding criminal activity on behalf of the world's foremost State Sponsor of Terrorism cannot, as a matter of law, have the apparent terrorist intent required for primary liability. But, unlike the more mundane commercial activity described in the cases the Bank cites, its extraordinary and elaborate program of conspiring with Iran to transfer billions of U.S. dollars through highly deceptive and complex practices creates a triable issue of fact as to whether that conduct had apparent terrorist intent.

## I. Deutsche Bank's Unlawful Acts Were Not Mere Bookkeeping Errors That Reduced Transparency.

The Bank repeatedly minimizes its unlawful acts by describing them as "not maintaining accurate books and records," "process[ing] in a non-transparent manner," or, incredibly, merely "helping customers avoid the added regulatory scrutiny that could delay even legal dollar transactions." *See, e.g.,* Bank br. at 2, 3, 6, 15, 17, 32, 45, 46. But Deutsche Bank "avoided regulatory scrutiny" by *actively* misleading the U.S. government,[2] and the DFS Consent Order to which the Bank

[2] *See, e.g.*, Ltr. from Deutsche Bank to the SEC (Oct. 31, 2005) (falsely claiming its policies and procedures were designed to ensure "that group members comply with applicable U.S. law … including that no U.S.-person group member, including the New York branch …

agreed in 2015 does not describe episodic bookkeeping errors or innocuous circumvention of trivial regulations. Instead, it details the Bank's active role in an intentional, carefully structured, multi-prong, and multi-year conspiracy to conceal Iran's material support for terrorism, which included its role in concealing illicit Iranian dollar-clearing "*with the intent to deceive* the Superintendent and the examiners of [DFS] and representatives of other U.S. regulatory agencies…." JA70, ¶27 (emphasis added). The Bank admitted that its "employees recognized that these handling processes were necessary in order to evade sanctions-related protections . . . ." JA62, ¶4. The practices were "not isolated or limited to a specific relationship manager or small group of staff, . . . various levels of seniority were actively involved or knew about it." JA65-66, ¶14.

Moreover, this unlawful conduct required active coordination with sanctioned customers, who both received instructions from the Bank about concealing their names and instructed the Bank on how to do so. *See, e.g.*, JA64-65, ¶11 ("PLS DON'T MENTION THE NAME OF BANK SADERAT OF IRAN [a Specially Designated Global Terrorist ("SDGT")] OR IRAN IN USA") (capitalization in original). The Bank seeks to downplay its wrongdoing by repeatedly noting that it evaded not only Iranian sanctions, but also concealed transactions for Burmese, Sudanese, Libyan and Syrian entities. Bank br. at 6, 9, 17, 33, 43, 45. But only Iran was provided with a U-Turn

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has any role … in any transaction involving a[n] … entity or person subject to U.S. economic sanctions.") *available at* https://www.sec.gov/Archives/edgar/data/1159508/000095012305012802/0000950123-05-012802.txt. This Court may take judicial notice of public records. *See* Kemper br. at 6 n.4.

mechanism that provided a legal, transparent method for U.S. dollar clearing[3] – yet Deutsche Bank conspired with Iran to help it evade this process. Moreover, the majority of the examples the Consent Order cites identify Iran or Iranian sanctioned customers.[4] This is hardly surprising – in 2003, Iran's GDP was more than *double* the *combined* GDPs of the other countries on whose behalf the Bank violated U.S. sanctions. Central Intelligence Agency, *World Fact Book* (2004), *available at* https://www.cia.gov/library/publications/download/download-2004/index.html.

The Bank goes further, arguing that that its illegal sanctions evasion program was in fact almost legal, as it occurred "at a time when U.S. law permitted them to benefit from such transactions." Bank br. at 17. But the Bank's explanation for why it deliberately violated those laws to process the transactions, including at least 600[5] valued at $38 million that it admits were illegal under U.S. sanctions, is that it wanted to save the world's foremost State Sponsor of Terrorism from needless "delays" caused by U.S. sanctions. *Id.* In fact, the Bank's and its sanctioned Iranian customers' deliberate choice *not* to use lawful means of transferring funds for

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[3] *See* Kemper br. at 9 (describing the U-Turn process); *see also* JA23-24, ¶¶121-23.

[4] The Consent Order gives a single Burmese example and no Sudanese examples. The examples involving Iran's vassal state, Syria, are largely referenced *with* Iran. *See, e.g.*, JA65, ¶13; JA68, ¶23.

[5] The Bank tries to minimize the estimated 600 transactions it facilitated to designated persons and entities on OFAC's SDN List by arguing that they represent only 2% of the transactions they processed "non-transparently." Bank br. at 8, 41. But *all* the clandestine transactions Deutsche Bank processed for Iran, whether made directly to terrorist entities or not, served Iran's objective of masking the flow of payments to the IRGC and Hezbollah within the larger stream of its concealed dollar-denominated transactions. Moreover, the 600 figure was a *self-reported* figure based on the Bank's own extrapolation methodology, JA60 n.2, apparently unverified by DFS.

legitimate purposes inevitably raises a reasonable inference that the transactions were concealed to provide funds for illegitimate purposes, including, chiefly, terror financing. By co-mingling its so-called "legal" and illegal transactions outside of the U-Turn exemption, Iran was able to "flood the zone," secretly channeling hundreds of billions of dollars through the U.S. and thereby turning co-conspirators like Deutsche Bank – at an *absolute minimum* – into willing decoys, thereby concealing and disguising the illegal transactions. *See, e.g.*, *United States v. Ulbricht*, 31 F. Supp. 3d 540, 561 (S.D.N.Y. 2014) ("a decoy . . . may nonetheless be found to be part of the conspiratorial enterprise").

## II. The Complaint Credibly Alleged That Iran's Conspiracy, in Which Deutsche Bank Actively Participated, Facilitated the Terrorism Financing That the Sanctions Prohibited.

The Bank persists in arguing that the conspiracy "to evade sanctions" it admitted joining in the DFS Consent Order and that the District Court found well-pleaded in the Complaint, A5, is *different* from Iran's conspiracy to provide or to conceal the provision of material support for terrorism. Bank br. at 13-14. As noted above, the Bank used the word "separately" over 10 times in characterizing the conspiracy at issue.

Whether there is one conspiracy or several is a question of fact for the jury. *United States v. Richardson*, 130 F.3d 765, 773 (7th Cir. 1997), *vacated on other grounds*, 526 U.S. 813 (1999). The Bank simply asserts that it "is not alleged to have had any involvement in" Iran's transfers to Hezbollah, and that it had no involvement "in the transfer of the remaining $100 million from Bank Melli to the Quds Force." Bank br. at 12 (citations omitted).

This is a straw man argument framed through the prism of aiding and abetting, not conspiracy, law. Under conspiracy principles, it is irrelevant whether the Bank itself processed a single transaction for the benefit of Hezbollah or the IRGC, provided the Bank intentionally joined Iran's conspiracy to do so, agreed to act in furtherance of the conspiracy, and possessed *some* knowledge of the conspiracy's scope. *See, e.g.*, *United States v. Kehm*, 799 F.2d 354, 366 (7th Cir. 1986) (defendant arranged rental of airplane for others under suspicious circumstances properly convicted for conspiracy to smuggle drugs). While it is *conceivable* that Deutsche Bank engaged in the same deceptive conduct,[6] with the same sanctioned Iranian banks, during the same period of time, but was involved in a *separate* unlawful agreement with Iran, unrelated to Iran's conspiracy to support terrorism through clandestine dollar-clearing utilizing those same sanctioned entities and methods, the District Court erred by deciding this fact question for itself on a motion to dismiss.

The Bank's alternative argument, that it conspired to violate *all* U.S. sanctions and therefore did not necessarily conspire to violate counter-terror financing sanctions, is untenable. Even the one Executive Order it cherry-picks to characterize the sanctions, No. 13,059, 62 Fed. Reg. 44,531 (*see* Bank br. at 40), was part of a counter-terror financing regime. President Clinton told Congress that this Order was intended to clarify prior sanctions orders issued "in response to actions and policies of the Government of Iran, *including support for international terrorism*" and

[6] *Compare* JA61-64 (Consent Order's description of the Bank's methods to omit the name of sanctioned entities) *with* JA25-27, ¶¶132-38; JA29, ¶146; JA34, ¶171; JA44, ¶223 (DFS and Treasury descriptions of Bank Melli's techniques for terror financing).

"underscore[d] the Government's opposition to the actions and policies of the Government of Iran, *particularly its support of international terrorism* . . . . Executive Orders 12957, 12959, and 13059 continue to advance important objectives in promoting the nonproliferation and *anti-terrorism policies* of the United States." *Message to the Congress Reporting on the National Emergency With Respect to Iran*, September 16, 1998 (emphasis added), *available at* http://www.presidency.ucsb.edu/ws/?pid=54920. *See also* Brief of Amicus Curiae United Against a Nuclear Iran, at 7 (ECF No. 26) (noting that President Clinton explained that he issued the prior sanctions order because "Iran has broadened its role as an inspiration and paymaster to terrorists."); Brief by Senator Richard Blumenthal as Amicus Curiae ("Blumenthal br."), at 8 (ECF No. 28).

Forced to acknowledge that "one 'purpose' of this regime" was "to punish Iran for its support of terrorism," Bank br. at 40, the Bank falls back on the argument that the transactions it processed for sanctioned customers *could* have had no connection to terrorist entities, *id.* at 16, and that nothing in the Complaint or the DFS Consent Order "provides any reason to infer that the limited number of transactions that violated sanctions regulations were unlawful because they involved a designated Iranian entity." *Id.* at 41. But the Consent Order mentions Iranian customers 12 times in 11 pages and specifically references Bank communications with "[s]anctioned customers," including notes directing the Bank not to "mention the name of Iranian Bank Saderat," and that "the name [of Iranian] Bank Melli or Markazi should not be mentioned…."). JA64-65, ¶11.

The Treasury's Office of Foreign Assets Control ("OFAC") excluded Bank Saderat from the U-Turn exemption in 2006 because it "has been a significant facilitator of Hezbollah's financial activities and has served as a conduit between the Government of Iran and Hezbollah," abusing the U.S. financial system, including the U-Turn exemption, to transfer millions of *dollar-denominated assets* to Hezbollah and Hezbollah-controlled entities. JA42, ¶¶210-13. Bank Saderat was designated an SDGT the following year for channeling funds to terrorist organizations, including $50 million for the benefit of Hezbollah fronts. JA43, ¶215. Bank Melli was designated a Specially Designated National ("SDN") in 2007 for sending at least $100 million through the U.S. financial system to the Islamic Revolutionary Guard Corps-Qods Force ("IRGC-QF"), including by using "deceptive banking practices to obscure its involvement from the international banking system," such as "request[ing] that its name be removed from financial transactions." JA44, ¶223.

This is *exactly* what the Bank in the DFS Consent Order admitted doing for its Iranian counterparties. JA39-40, ¶201; JA64-65, ¶11. It is highly plausible that by stripping both otherwise "legal" and illegal transactions for Iran outside of the U-Turn exemption, the Bank played a vital role in helping Iran "conceal[]" and "disguise[]" its material support to terrorism, 18 U.S.C. §2339A(a), regardless of whether the Bank was a conduit or a decoy for the most lethal transactions.[7] Despite

[7] The Bank's claim that it stopped its unlawful activities after 2006 does not immunize it from liability for what it did beforehand. Regardless, the Consent Order expressly noted that the Bank continued processing some "sanctions-related payments" after 2006. JA64, ¶9. How many and for how long are questions of disputed fact which cannot be resolved on a motion to dismiss. The Bank's claim that post-2006 transactions with SDN Islamic Republic

the Bank's treatment of a conspiracy to "provide[] material support" and a conspiracy to "conceal[] and disguise[]" as one and the same, *see, e.g.*, Bank br. at 41, Congress criminalized them in the alternative. *See United States v. Berkos*, 543 F.3d 392, 396 (7th Cir. 2008) ("We avoid interpreting a statute in a way that renders a word or phrase redundant or meaningless.").

The Bank argues that primary liability predicated on violations of 18 U.S.C. §§ 2339A and 2339B has been displaced by Congress's broadening of ATA civil liability to include §2333(d). But Congress was presumptively aware of this Court's landmark decision interpreting §2333(a) when it added §2333(d), and by leaving §2333(a) undisturbed, it must also be presumed to have incorporated settled judicial interpretations. *See, e.g., United States v. Martin*, 128 F.3d 1188, 1192 (7th Cir. 1997); *United States v. Alvarez-Hernandez*, 478 F.3d 1060, 1065-66 (9th Cir. 2007). *See also* Blumenthal br. at 3. Rather than narrowing ATA civil liability, JASTA expressly expanded the ATA's reach to add common law civil conspiracy and aiding and abetting liability in certain defined circumstances. If this Court accepts Ms. Kemper's conspiracy allegations, then those allegations would properly plead liability under both §2333(a) and §2333(d).

Moreover, Ms. Kemper did not "lose" her §2333(d) claim below. She timely asserted the alternative legal theory of liability provided by §2333(d) as applicable to

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of Iran Shipping Lines ("IRISL") were by some "distinct corporate entity" and that IRISL was designated for proliferation, not terrorism, also raise fact issues. Bank br. at 10, 31 n.11. That "distinct" entity is the Bank's subsidiary and was specifically described in the Consent Order as instrumental to the Bank's sanctions evasion. JA59-60. IRISL shipped components for terror weapons, which Congress has defined as WMDs. JA14, ¶86; JA31-32, ¶¶155-62.

her existing allegations. Appellant's Brief, ECF No. 13 ("Kemper br.") at 27 n.17. The District Court dismissed her §2333(a) claim without granting leave to amend. A3 n.1, A12-13. In the District Court's view, §2333(d) was inapplicable to the allegations in the Complaint because it reasoned that the "*person*" with whom the Bank conspired must be the same as the "foreign terrorist *organization*" that "committed, planned, or authorized" the attack, 18 U.S.C. §2333(d)(2). It therefore not only again mis-defined the alleged conspiracy and ignored the conspiracy principle that a conspirator joins the agreement, not the group, it also overlooked the broad definition of "person" in 1 U.S.C. §1, which is incorporated by reference in §2333(d)(1).[8] For the reasons stated in her opening brief, Mrs. Kemper asserts that her allegations sufficiently state a conspiracy for both primary liability through §2333(a) and secondary liability under §2333(d), but should this Court find Ms. Kemper's conspiracy allegations insufficient under *Boim III*, she concedes that they would also be insufficient under a §2333(d) theory of liability.

## III. Deutsche Bank Intended to Join Iran's Conspiracy to Fund Terrorism and to Conceal the Sources of Funding.

If the conspiracy's objective *was* to provide or conceal the provision of material support for terrorism, then the Bank argues it did not mean to join it. It reads the Complaint to suggest that Iran merely "exploited a service that Deutsche Bank made available to customers" (that innocuous service being sanctions evasion), and that the Bank's objective was not "to put money in the hands of terrorists," but only to evade

[8] These arguments are fully set forth in Appellant's reply brief in support of her notice of new authority to the District Court (Oct. 18, 2016), No. 16-cv-497-MJR-SCW, ECF No. 54.

sanctions and conceal something else. Bank br. at 2, 42. The Bank argues that evidence of its knowledge of Iran's objectives is not enough – Ms. Kemper must also show that the Bank inwardly desired to provide that support. Bank br. 38-39. It misstates both conspiracy and ATA law.

The Bank relies on *Ocasio v. United* States, 136 S. Ct. 1423 (2016), to argue that Ms. Kemper must allege that the Bank specifically intended to support terrorism to be part of this conspiracy. But *Ocasio* explains that "'[A] specific intent to distribute drugs oneself is not required to secure a conviction for participating in a drug-trafficking conspiracy.' Agreeing to store drugs at one's house in support of the conspiracy may be sufficient." 136 S. Ct. at 1430 (quoting *United States v. Piper*, 35 F.3d 611, 614 (1st Cir. 1994)). *Piper* explained that:

> This conclusion is neither new nor original. In *United States v. Rivera–Santiago,* 872 F.2d 1073 (1st Cir. [1989]) . . . , we upheld a conviction for conspiracy to distribute marijuana based on evidence that the defendant had agreed to store a large quantity of the drug in his house, **even though no evidence had been adduced that he intended to play a role in its distribution**. *See id.* at 1081. In the process, we explained that:
>
> > an individual could be found to be part of a conspiracy to possess and distribute [marijuana] even though he neither directly participated in interstate trafficking nor knew the precise extent of the enterprise. The fact that he participated in one ... link of the distribution chain, *knowing that it extended beyond his individual role,* was sufficient. *Id.* at 1079 (emphasis supplied).

*Piper*, 35 F.3d at 614–15 (bold added). So too, here, the Bank processed unlawful financial transactions to afford Iran and its banks clandestine access to the U.S. financial system, knowing that Iran intended to use the funds for illegitimate

purposes, including supporting terrorism. The fact that the Bank agreed to do so with that knowledge is sufficient.

Agreeing to commit illegal acts (particularly doing so repeatedly over *years*) knowing that a crime will result, is sufficient evidence of intent that someone will commit that crime. "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." *Boim III*, 549 F.3d at 693 (quoting Restatement (Second) of Torts §8A (1979)). The Bank cites *United States v. Collins*, 966 F.2d 1214, 1219-20 (7th Cir. 1992) for the proposition that it is not enough that an alleged conspirator "*knows that his or her actions might* ***somehow*** be furthering the conspiracy." Bank br. at 42 (italics by the Bank; bold here).[9]

Plaintiff does not disagree. The *Boim III* standard of intent requires knowing that the consequences are certain or substantially certain to result, not that they might just "somehow" result. *See also Kehm*, 799 F.2d at 362 (evidence of agreement to join a conspiracy plus knowledge or conscious avoidance of knowledge of its scope is sufficient). But given (1) the notorious counter-terror/WMD financing purposes of the sanctions regime the Bank willingly and knowingly helped Iran evade, (2) Iran's notorious sponsorship of terrorism during the period in question, and (3) Iran's request to circumvent the process meant to facilitate its "legitimate" transactions, it

[9] In *Collins*, the defendant argued that "he was [merely] around during some of the discussions regarding" the alleged drug distribution, but the court found sufficient evidence that he was an active participant (like the Bank, he had an intermediate financial role) and that the government met the conspiracy standard. 966 F.2d at 1219-20.

was *at least* substantially certain that Iran would support terrorism by concealing its flow of dollars through the U.S. financial system. Whether Deutsche Bank served solely as a decoy (thereby concealing material support) or transferred funds to Hezbollah and the IRGC (or both), material support for terrorism was not a remote possibility that "somehow" might result; it was the inexorable end state.

Moreover, the District Court never considered §2339A's alternative concealment conspiracy. Therefore, even crediting the Bank's argument that "the Complaint at most suggests Deutsche Bank conspired to evade sanctions" by stripping names of Iranian entities (i.e., the sources) off of transactions, but "not to put money in the hands of terrorists," Bank br. at 2, the Bank *at least* conspired to conceal and disguise the source of funds to be used for terrorist acts. Such a conspiracy just as foreseeably enabled Iran's terror apparatus to attack its targets, including U.S. soldiers like Ms. Kemper's son.

## IV. Iran Directly Caused Ms. Kemper's Injuries, and They Were a Foreseeable Consequence of Its Conspiracy With Deutsche Bank.

Relying on cases construing RICO and antitrust laws, the Bank asserts Ms. Kemper must plausibly allege that it directly caused her injuries for her "primary liability claims under §2333(a), to which *Halberstam* has no application." Bank br. at 36. This contradicts this Court's controlling precedent. In *Boim III*, this Court stated:

> The parties have discussed both issues mainly under the rubrics of "conspiracy" and "aiding and abetting." Although those labels are significant primarily in criminal cases, they can be used to establish tort liability, *see, e.g., Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir.1983); *Restatement (Second) of Torts* §§ 876(a), (b) (1979), and 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.

> Primary liability in the form of material support to terrorism has the character of secondary liability.

549 F.3d at 691. *See also Ocasio*, 136 S. Ct. at 1429 (a statute's "use of the term 'conspire' incorporates long-recognized principles of conspiracy law"). This Court therefore looked to ordinary principles of tort law collected in the Restatement and *Halberstam* to define the elements of primary liability with the character of aiding and abetting (i.e., vicarious liability), including causation.[10] Congress also found that *Halberstam* "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 ("JASTA"), Pub. L. 114-222, §2(a)(5), 130 Stat. 851, 852 (2016). In adding §2333(d), Congress reaffirmed its purpose for the ATA: to "provide civil litigants with the broadest possible basis ... to seek relief against persons, entities, and foreign countries … 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) (emphasis added). *See supra* at 4.

*Halberstam* states the truism that conspiracy "is a means for establishing vicarious liability for the underlying tort," 705 F.2d at 479, and conspirators are "liable for injuries caused by acts pursuant to or in furtherance of the conspiracy," even though they did not directly cause those injuries, *id.* at 481. Thus, the finding that a homeowner's murder by a burglar "was a reasonably foreseeable consequence"

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[10] *Accord*, *Wultz v. Islamic Republic of Iran,* 755 F. Supp. 2d 1, 55 (D.D.C. 2010) (Congress "intended to incorporate common principles of tort law" into §2333(a)); *Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 474, 493-94 (E.D.N.Y. 2012).

of the conspiracy to participate in an unlawful course of action was "a sufficient basis for imposing tort liability" on the burglar's "banker, bookkeeper, recordkeeper, and secretary," *id.* at 487, even though she did not directly cause (or even *know about*) the murder. "[V]iolence and killing is a foreseeable risk" of what she knew to be "some type of personal property crime at night." *Id.* at 488.

Violence and killing are even more foreseeable results of a conspiracy to provide material support for terrorism or to conceal and disguise the source of that support. There is no dispute that Iran directly caused Ms. Kemper's injuries, as even the Bank acknowledges that "[a] government that chooses to fund terrorist proxies thus can be said to proximately cause the acts those groups carry out"). Bank br. at 15. Here the U.S. government has found that the Bank's Iranian counterparties processed transactions directly for Hezbollah and the IRGC, and the Complaint sufficiently pleads that they directly injured Ms. Kemper.[11]

Thus, the Bank is wrong in arguing that vicarious liability under conspiracy law "is a criminal law doctrine." Bank br. at 35. *See Halberstam*, 705 F.2d at 479. *See also Boim III*, 549 F.3d at 691-92 (noting that primary liability for "an aider and abettor or other secondary actor" must be evaluated "under general principles of tort

[11] The Bank's effort to extend the chain of causation by distinguishing among Iran, Hezbollah, Shi'a militias, and the person who emplaced the Explosively Formed Penetrator ("EFP") that killed Ms. Kemper's son, Bank br. at 32, is contrived and misleading. As the Generals' Amicus brief amply shows, all were Iranian agents. Brief of General James D. Thurman, *et al.*, at 9 (ECF No. 19) ("overwhelming evidence … establishes that Iran and its terrorist proxies provided the Special Groups with EFPs, trained the militia members in the use of those deadly devices, and directed the Special Groups to target American service members with EFPs.").

law" and further noting that "knowledge and intent have lesser roles in tort law than in criminal law."). Moreover, directness is the antithesis of conspiracy liability. The ATA opinions the Bank cites for its invented "directness" requirement either did not involve conspiracy claims or they actually used the foreseeability standard. In *Fields v. Twitter*, 881 F.3d 739 (9th Cir. 2018), plaintiffs did not identify their precise theory of primary liability, but it most closely reads as a claim that Twitter aided and abetted ISIS. In *Rothstein v. UBS AG*, plaintiffs asserted aiding and abetting claims. 708 F.3d 82, 88 (2d Cir. 2013). In *In re Terrorist Attacks on September 11, 2001 (al Rajhi Bank, et al.)*, 714 F.3d 118, 127 (2d Cir. 2013), the court only discussed aiding and abetting claims, but it affirmed the lower court opinion which applied a foreseeability standard to conspiracy claims (349 F. Supp. 2d 765, 829 (S.D.N.Y. 2005)), as did the court in the Bank's other cited conspiracy case, *Stutts v. De Dietrich Grp.*, No. 03-cv-4058, 2006 WL 1867060, at *3-4 (E.D.N.Y. June 30, 2006). In *Owens v. BNP Paribas S.A.*, 235 F. Supp. 3d 85 (D.D.C. 2017) plaintiffs *mentioned* conspiracy, but they only pleaded claims for assault and battery, intentional infliction of emotional distress, and loss of consortium. Noting that the "complaint is not a model of clarity," the court generously assumed that they had stated an aiding and abetting claim, and therefore never discussed causation under the principles of conspiracy law. *Id.* at 91-95 & n.5. Whether or not directness is implicated by the "substantial assistance" prong of

aiding and abetting in other circuits,[12] it is not part of causation under the principles of conspiracy law in any circuit.[13]

The District Court did not apply the Bank's desired directness requirement either. But having held that Ms. Kemper pleaded a conspiracy merely "to evade sanctions," it dismissed as "conclusory" the allegations that her injury was a foreseeable consequence of that conspiracy, without further discussion. A11, A12. As shown above, however, the conspiracy was to evade sanctions expressly intended to prevent terror financing; it bypassed the lawful (but transparent) alternative U-Turn exemption for funding Iran's legitimate activities, giving rise to a reasonable inference that the concealed transactions with sanctioned Iranian customers were destined for the illegitimate activities of terror financing and proliferation; the techniques the Bank used to conceal and disguise the transactions and their sources were exactly the same ones that the Treasury Department has found Iran used to access the international financial system "to facilitate its support for terrorism," JA26-27, ¶138; JA29, ¶146; JA34, ¶171; and the same Iranian banks with which the

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[12] This Circuit, in *Boim III*, expressly rejected defendants' causation theory for aiding and abetting liability, citing, *inter alia*, *Keel v. Hainline*, 331 P.2d 397 (Okla.1958), and stating that "participation in a wrongful activity as a whole . . . . was enough to make [defendant] liable . . . . [H]e had helped to create a danger; it was immaterial that the effect of his help could not be determined." *Boim III*, 549 F.3d at 697.

[13] *Rothstein* asserted that proximate cause requires that defendant's acts be a "substantial factor in the sequence of responsible causation and [that] … the injury was reasonably foreseeable or anticipated as a natural consequence." 708 F.3d at 91 (internal citations omitted). Although the directness of the injury is one factor a jury may consider in deciding whether a defendant's acts were a substantial factor, directness is not an independent requirement under this formulation.

Bank conspired were found by the U.S. government to have sent $100 million to the IRGC-QF using those techniques, *id.*, and at least $50 million to Hezbollah-controlled organizations, JA42, ¶¶211-12. Even if the Iranian banks were viewed as intermediaries and not as instrumentalities of Iran,[14] the Bank cannot escape liability, *see Boim III,* 549 F.2d at 701-702 ("escap[ing] liability because terrorists and their supporters launder donations through a chain of intermediate organizations. . . . would be to invite money laundering"), especially when they were themselves U.S.-designated.

The Bank, however, argues that although *Boim III* recognizes that a conspiracy to provide or conceal the provision of material support to terrorism may be the predicate crime for an act of international terrorism, the ATA nonetheless requires Ms. Kemper to show that the Bank *directly* caused her son's death. Bank br. at 34. However, *Boim III* says the *opposite*, endorsing primary liability with "the character of secondary liability." 549 F.3d at 691.

The Bank's invented directness requirement also conflicts with the Supreme Court's recent observation that the ATA's civil provision "is part of a comprehensive statutory and regulatory regime that prohibits terrorism and *terrorism financing*[,] . . . reflect[ing] the careful deliberation of the political branches on when, and how, *banks* should be held liable for the financing of terrorism." *Jesner v. Arab Bank, PLC*,

[14] *But see Weinstein v. Islamic Republic of Iran*, 609 F.3d 43, 48 (2d Cir. 2010) ("Bank Melli concedes that it is an instrumentality of Iran."); *Shoham v. Islamic Republic of Iran*, No. 12-cv-508, 2017 WL 2399454, at *8 (D.D.C. June 1, 2017) ("In 2009, Iran announced a program to privatize Bank Saderat, but that process has been a sham because the bank is still controlled by the government.").

138 S. Ct. 1386, 1405 (2018) (emphasis added). *See also id.* at 1401 (giving §2333(a) as an example of the U.S. "fulfill[ing its] obligations under the Convention [for the Suppression of the Financing of Terrorism] by adopting detailed regulatory regimes governing financial institutions"). The Supreme Court did not contemplate banks being held liable only for *directly* causing acts of terrorism.

Finally, the Bank argues that Ms. Kemper did not allege that it "had any involvement" in the Iranian banks' transfer of $150 million to the terrorist groups at issue. Ms. Kemper did not need to do so – the purpose of the conspiracy was to provide Iran with dollars cleared clandestinely through the U.S. while blinding U.S. regulators, and all $150 million of those dollar-denominated assets were necessarily processed through the conspiracy. *See, e.g.*, JA44, ¶223. While discovery will shed further light on Deutsche Bank's specific transfers, such as the over 600 it admitted to processing for sanctioned entities, the conspiracy allegations are sufficient even if Iran used the Bank solely as a decoy and transferred all of its earmarked terrorism funds through other co-conspirators, *see, e.g.*, *Ulbricht*, 31 F. Supp. 3d at 561; *United States v. Gonzalez*, 394 F. App'x 570, 574 (11th Cir. 2010) (decoy not present at the scene of a crime is nonetheless a conspirator), given §2339A's prohibition on concealing or disguising material support for terrorism.

## V. Iran's Conspiracy to Provide Material Support to Terrorism and Deutsche Bank's Agreement to Participate in That Conspiracy Create a Plausible Inference of Apparent Intent.

Ms. Kemper's §2333(a) claim requires her to plausibly allege that the Bank's actions appeared to have the intent required by §2331(1)(B). *Boim III*, 549 F.3d at 690, 694, 699. The Bank concedes that this is an objective standard, but then

emphasizes its subjective intent was to increase "banking revenue," Bank br. at 44, and, more importantly, urges this Court to find, as a matter of law, that merely "engaging in a commercial banking relationship with Iranian banks" does not suffice to show apparent intent. *Id.* at 47. The Bank cites *Stutts*, 2006 WL 1867060, in which banks *legally* issued letters of credit to third parties which supplied chemicals to Iraq that U.S. servicemen were later negligently exposed to during post-war disposal efforts. The plaintiffs in *Stutts*, however, did not allege that the banks knew of Saddam Hussein's illegal use of the chemicals, let alone that they could have foreseen that U.S. servicemen would incur injuries while disposing of them. *Id.* at *4-6.[15]

Here, the Bank did not engage with Iranian banks in ordinary commercial banking "business as usual." It admitted that "[t]he special processing that the Bank used to handle sanctioned payments *was anything but business as usual*…." JA63, ¶8 (emphasis added). Not only did it systematically and knowingly conceal and disguise transactions for sanctioned customers, both at their request and at its own initiative, but it did so with the admitted "intent to deceive" U.S. regulators enforcing the regulatory scheme to prohibit terror financing. JA70, ¶27. And the Bank continued concealing and disguising some unquantified number of transactions even after it was warned to stop its practices. *See Wultz*, 755 F. Supp. 2d at 18-19, 48-49

[15] The Bank also cites *Brill v. Chevron Corp.*, No. 15-cv-04916-JD, 2017 WL 76894 (N.D. Cal. Jan. 9, 2017) and *Mastafa v. Chevron Corp.*, 770 F.3d 170, 194 (2d Cir. 2014). But the *Brill* plaintiffs made "no allegations whatsoever" of apparent intent, unsuccessfully arguing that it is not an independent element of §2331(1)(B). *Id.* at *4. *Mastafa* construed the subjective intent requirement for a claim under the Alien Tort Statute for aiding and abetting human rights violations, not apparent intent under §2333(a).

(allegations that defendant bank continued processing transactions for designated entity after warning sufficiently pleaded apparent intent under §2331(1)(B)).

The Bank relies on *Linde v. Arab Bank, PLC*, 882 F.3d 314, 325-26 (2d Cir. 2018), where the Court of Appeals for the Second Circuit held that knowingly providing material support to an FTO did not, as a matter of law, establish apparent intent. But *Linde* did not hold the converse: that knowingly providing material support for such an organization or for terrorist activities *cannot*, as a matter of law, establish apparent intent. It merely held that it was a jury question. *Id.* at 326-27. Citing an example from *Boim III*, the Court observed that providing "routine financial services to members and associates of terrorist organizations is not so akin to providing a loaded gun to a child as to … *compel* a finding as a matter of law" that they satisfy §2331(1)(B). *Id.* at 327 (emphasis added). The *Linde* court also held that whether such financial services should even be viewed "as routine…. raises questions of fact for a jury to decide." *Id.*

This Court in *Boim III* held that "[g]iving money to Hamas, like giving a loaded gun to a child (which also is not a violent act), is an 'act dangerous to human life'" that may satisfy §2331's apparent intent requirement. 549 F.3d at 690. But even if facilitating billions of dollars in clandestine transactions for Iran is somehow viewed as less dangerous to human life than donating thousands of dollars to Hamas (as in *Boim III*), this Court should not decide this fact question as a matter of law. Given the foreseeable consequences of providing Iran concealed access to billions of dollars for its illegitimate activities of terrorism and proliferation, Ms. Kemper has plausibly

pleaded that the Bank's active participation in the conspiracy had the apparent intent required by §2331(1)(B).

## CONCLUSION

The District Court (1) held that a conspiracy to evade counter-terrorism sanctions cannot violate the ATA; (2) ignored the fact that Iran designed the conspiracy with the objective of providing material support to terrorism; (3) held that the Bank itself had to specifically intend to support terrorism without considering or applying this Court's definition of intent for primary liability; (4) altogether missed the alternative §2339A(a) conspiracy to conceal and disguise the source of material support and its scienter requirement; (5) never discussed the relationship of §2339A(a)'s and §2339B(1)'s scienter requirements to the unitary intent standard that it applied (*see* Kemper br. at 28-29, 40-41 (conspiracy does not require a higher scienter than does the underlying crime)); and then (6) decided, as a matter of law, that it was not foreseeable that giving Iran concealed access to the U.S. financial system through its OFAC-designated banks to support its illegitimate activities would result in terrorist acts by its proxies. Without citing more than two paragraphs of the detailed Complaint, without holding a hearing, and without granting leave to amend, the District Court dismissed Ms. Kemper's claims by applying wrong or incomplete legal standards and drawing inferences against her, before she had any opportunity for discovery. She respectfully requests that this Court reverse that dismissal and remand the case for further proceedings.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Peter Raven-Hansen

CERTIFICATE OF SERVICE & CM/ECF FILING

I hereby certify that on the 25th day of May, 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: May 25, 2018
New York, New York

/s/ Peter Raven-Hansen
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