

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 OF GENERAL JAMES D. THURMAN, UNITED STATES ARMY, RETIRED; LIEUTENANT GENERAL DANIEL P. BOLGER, UNITED STATES ARMY, RETIRED; LIEUTENANT GENERAL KEITH WALKER, UNITED STATES ARMY, RETIRED; MAJOR GENERAL ANTHONY A. CUCOLO, UNITED STATES ARMY, RETIRED; BRIGADIER GENERAL WILLIAM H. FORRESTER JR., UNITED STATES ARMY, RETIRED; COLONEL KEVIN LUTZ, UNITED STATES ARMY, RETIRED, AND COMMAND SERGEANT MAJOR TODD M. BURNETT, UNITED STATES ARMY *AMICI CURIAE* IN SUPPORT OF PLAINTIFF- APPELLANT AND REVERSAL

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Appellate Court No: 18-1031

Short Caption: Kemper v. Deutsche Bank AG

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STATEMENT OF INTEREST OF AMICI CURIAE

The *amici curiae* (“Amici”) identified in Exhibit A served the United States military in various leadership capacities in Iraq between 2003 and 2011.¹ During Amici’s service, they observed widespread Iranian sponsorship of terrorist attacks against American service members stationed in Iraq. Those attacks killed and injured hundreds of American service members and severely undermined the United States’ ability to achieve its military, political, and policy objectives in Iraq and throughout the Middle East.

This case presents important issues regarding the interpretation of the Anti-Terrorism Act (“ATA”), 18 U.S.C. §2331 *et seq.*, including the aiding and abetting or conspiracy claim that Congress added to the ATA by means of 2016’s Justice Against Sponsors of Terrorism Act (“JASTA”). Congress designed the ATA to deter terrorism, in large part by shaping the actions of entities that collaborate with terrorists. Particularly because terrorists have consistently targeted American service members, Amici believe that the courts should provide the ATA and JASTA with the robust, flexible interpretation that Congress intended. Amici therefore write to urge the Court to hold that neither the law nor sound public

¹ No party or counsel for a party authored or paid for this brief in whole or in part, or made a monetary contribution to fund the brief’s preparation or submission. No one other than Amici or their counsel made a monetary contribution to the brief. This brief is filed with the consent of all parties.

policy permits Iran's conspirators and collaborators to escape ATA liability for their misconduct simply because Iran elects to employ proxies to carry out bombings and other terrorist attacks.

INTRODUCTION

Plaintiff-Appellant Rhonda Kemper ("Plaintiff") is the mother of David Schaefer, who was killed in 2009 by a powerful Iranian-manufactured explosively formed penetrator ("EFP") while serving as part of the U.S. military's peacekeeping mission in Iraq. JA2 (¶3); JA5 (¶¶27-31).² The Complaint in this action links the conduct of defendant-appellee Deutsche Bank AG ("Deutsche Bank") to that terrorist attack, as well as numerous other bombings that killed and injured hundreds of American service members in Iraq. JA27-41 (¶¶139-204).³

Specifically, Plaintiff alleges that Deutsche Bank entered a conspiracy with Iran and its banking agents (including Bank Saderat, Bank Melli, and the Central Bank of Iran) that allowed Iran to conceal its illicit use of the American financial system to access U.S. dollars. *See, e.g.*, JA27-28 (¶¶139-41). Iran and its co-conspirators employed the dollars they secured by means of that illegal activity to

² Citations in this format are to the pages of the Joint Appendix.

³ While Amici summarize certain relevant allegations from Plaintiff's Complaint, they take no position concerning Deutsche Bank's conduct or Plaintiff's ultimate ability to prove her claims against Deutsche Bank. Rather, Amici write to inform the Court of their personal experience analyzing and counteracting Iran's use of EFPs in Iraq and the impact of the ATA on the safety of American service members.

fund terrorist attacks against, among others, American service members stationed in Iraq. *See, e.g.*, JA27-28 (¶141.e); JA30 (¶¶150-51). Iran carried out those attacks through: its Islamic Revolutionary Guard Corps (“IRGC”), an official Iranian government entity charged with spearheading Iran’s international terrorism; the IRGC’s Qods Force; Hezbollah, a U.S. government-designated terrorist organization with extensive ties to Iran, the IRGC and the Qods Force; and Iraqi Shi’a militia forces (the “Special Groups”) that Iran, the IRGC, the Qods Force and Hezbollah financed, trained, and directed to use EFPs against American service members. *See, e.g.*, JA1-2 (¶2); JA5 (¶¶28-29); JA9-13 (¶¶55-64, 68-82); JA14-18 (¶¶ 85-102).

The District Court held that Plaintiff’s allegations concerning this alleged conspiracy failed to state a cause of action under the ATA, including JASTA’s newly adopted aiding and abetting or conspiracy provision (18 U.S.C. §2333(d)). In part, that decision rested upon the District Court’s finding that the Complaint did not allege “which group, if any, actually planned or orchestrated the attack[]” that killed David Schaefer. A4.⁴

Amici address two issues that this element of the District Court’s opinion raises. First, Amici’s experience and the publicly available evidence concerning the EFP bombings directed at the American military in Iraq confirm the veracity of

⁴ Citations in this format are to the Circuit Rule 30(a) Appendix.

Plaintiff's allegations that Iran and its terror proxies planned, authorized, and orchestrated those attacks. Second, in light of those facts, the District Court's narrow focus upon Plaintiff's inability to identify the specific Special Group that actually planted the EFP that killed David Schaefer is misguided from a legal and policy perspective. Given the indispensable roles that Iran and its terror proxies played in directing the EFP attacks against American service members in Iraq, the ATA can exert the full deterrent effect that Congress intended only if ATA liability attaches when entities conspire to finance terrorist activities in the circumstances the Complaint alleges.

ARGUMENT

I.

IRAN'S USE OF HEZBOLLAH AND OTHER PROXY GROUPS TO CARRY OUT ITS TERRORIST ATTACKS UPON AMERICAN SERVICE MEMBERS DURING OPERATIONS IRAQI FREEDOM AND NEW DAWN

This case – like many other Iranian-sponsored terrorist attacks against American troops in Iraq – involves Iran's alleged use of proxy groups to carry out its military and political objectives. *See, e.g.*, JA1-2 (¶¶2-3); JA5 (¶¶27-29); JA9-13 (¶¶55-64, 68-82); JA14-18 (¶¶ 85-102). Iran has long perpetrated its terrorist plots in that manner, often through U.S. government-designated Foreign Terrorist Organizations (“FTOs”) like Hezbollah. *See, e.g.*, JA7-9 (¶¶46-55).

Between 2004 and 2011, which spanned nearly all of the American military involvement in Operations Iraqi Freedom and New Dawn, Iran worked cohesively with Hezbollah to carry out attacks against American service members. *See, e.g.*, JA9-10 (¶¶56-63); JA11 (¶¶69-71); JA13 (¶79); JA 15 (¶91); JA16-18 (¶¶95-102). Iran and Hezbollah facilitated and directed those attacks by providing local Special Group members with sophisticated EFPs designed to pierce the armor of U.S. military vehicles, training the Special Groups in the use of those deadly devices, and directing the Special Groups to attack American military personnel with the EFPs. JA14-18 (¶¶85-102).⁵ As Plaintiff’s Complaint notes, Iran engaged in that misconduct in an effort “to expand its influence in Iraq and throughout the region.” JA9 (¶57).

Extensive investigatory work undertaken by the U.S. military and various government agencies confirmed the Iranian provenance of the EFPs that killed or injured hundreds of American service members, including David Schaefer. *See, e.g.*, JA10-11 (¶¶64, 68); JA11-13 (¶¶71-79); JA15-18 (¶¶85-102). Much of that investigatory work was performed at the direction of Combined Joint Task Force

⁵ Amici’s experience confirms the Complaint’s allegations that the Iraqi Special Groups lacked the technical expertise and machinery necessary to manufacture EFPs. *See, e.g.*, JA14-15 (¶¶85-92). Nevertheless, coalition forces regularly captured EFPs and their component parts – including copper liners precisely machined with industrial hydraulic presses, military-grade explosives (often made to look like American C-4), and passive infrared sensors – in the hands of local Shi’a Special Groups. *See, e.g.*, JA15-19 (¶¶93-94, 97-102).

Troy (“CJTF Troy”), which the American military established with its allies in 2005 to serve as the first operational counter-improvised explosive device (“IED”) task force in U.S. military history. *See generally* Press Release, U.S. Navy, “EOD School Dedicates Joint Task Force Troy Memorial” (Apr. 11, 2013).⁶ To determine the origin of the EFPs, CJTF Troy relied heavily upon material and forensic science experts at the Combined Explosive Exploitation Cell (“CEXC”), which served as the coalition’s in-theater IED laboratory, and the FBI’s U.S.-based Terrorist Explosive Device Analytical Center.⁷

The Complaint highlights a number of pronouncements by American military personnel and official U.S. government publications, largely based upon the work of CJTF Troy, that describe the extensive efforts that Iran undertook in coordination with Hezbollah and Iraqi Special Groups to advance Iran’s military and political objectives in Iraq. For example, as early as 2006, then-Brigadier Gen. Michael Barbero⁸ stated: “Iran is definitely a destabilizing force in Iraq. I think it’s

⁶ Amicus Colonel Kevin Lutz, United States Army, Retired, established and commanded CJTF Troy. *See* Exhibit A.

⁷ *See generally* U.S. House of Representatives, Committee on Armed Services, Subcommittee on Oversight & Investigations, “The Joint Improvised Explosive Device Defeat Organization: DOD’s Fight Against IEDs Today and Tomorrow,” at 21, 23 (Nov. 2008).

⁸ Lieutenant General Michael D. Barbero, United States Army, later served as the Head of the Joint Improvised Explosive Device Defeat Organization (“JIEDDO”), a combat support organization of the U.S. Department of Defense that studied and developed plans to counteract improvised threats such as the IEDs commonly

irrefutable that Iran is responsible for training, funding and equipping some of these Shi'a extremist groups and also providing advanced IED technology to them, and there's clear evidence of that." JA15 (¶92); *see also, e.g.*, John D. Negroponte, Dir. of Nat'l Intelligence, "Annual Threat Assessment of the Dir. of Nat'l Intelligence for the Senate Select Comm. on Intelligence," at 12 (Feb. 2, 2006), *available at* https://fas.org/irp/congress/2006_hr/020206negroponte.pdf (noting that "Iran provides guidance and training to select Iraqi Shia political groups and weapons and training to Shia militant groups" to establish "a Shia-dominated and unified Iraq" and to cause "the US to experience continued setbacks in our efforts to promote democracy and stability").

Numerous official U.S. government publications demonstrate that Iran employed the IRGC, the IRGC's Qods Force, and Hezbollah to carry out these efforts to arm the Special Groups with EFPs and other deadly explosives.⁹ Indeed,

utilized by the Shi'a Special Groups in Iraq. Amicus Command Sergeant Major Todd M. Burnett, United States Army, served both in Iraq and in JIEDDO as a leading expert on IED clearance. *See* Exhibit A.

⁹ *See, e.g.*, JA16 (¶95) (then-Brigadier Gen. Kevin J. Bergner, a U.S. Army spokesman, noted in a briefing that the Qods Force had been "training, funding and arming" terrorist groups within Iraq and that "Iranian operatives are using Lebanese surrogates to create Hezbollah-like capabilities"); JA11 (¶71) (U.S. Department of the Treasury press release concerning the designation of the Qods Force as a Specially Designated Global Terrorist stated that the "Qods Force provides lethal support in the form of weapons, training, funding, and guidance to select groups of Iraqi Shi'a militants who target and kill Coalition and Iraqi forces and innocent Iraqi civilians"); General David H. Petraeus, "Report to Congress on the Situation in Iraq," at 4 (Sept. 11, 2007), *available at* <https://www.foreign>.

the U.S. government has repeatedly linked Iran and its terrorist proxies to the use of EFPs by the Iraqi Special Groups. For example, a March 2007 Department of Defense Report to Congress stated:

Consistent with the National Intelligence Estimate, Iranian support to Shi'a militias, such as JAM and the Badr Organization, includes providing lethal weapons, training, financing, and technical support. This includes supplying some Shi'a extremist groups with explosively formed projectiles (EFPs), the most effective of the roadside bombs. Shi'a extremist groups have been implicated in direct attacks against Coalition forces, including with EFP technology. EFPs require advanced manufacturing processes and training for employment that clearly place them outside the category of "improvised explosive devices."

Dep't of Defense Report to Congress, "Measuring Stability and Security in Iraq," at 17 (Mar. 2007), *available at* http://archive.defense.gov/home/pdf/9010_March_2007_Final_Signed.pdf.¹⁰

Official U.S. government publications also emphasized that Iran and Hezbollah worked jointly to train Shi'a militants in the use and construction of

senate.gov/imo/media/doc/PetraeusTestimony070911a.pdf (in a September 2007 report to Congress, General David H. Petraeus, the then Commander of Multi-National Force-Iraq, noted that Hezbollah worked with the IRGC's Qods Force to "support the training, arming, funding, and, in some cases, direction of" Iraqi Special Groups).

¹⁰ *Accord, e.g.*, General David H. Petraeus, *supra*, at 4 (noting the coordinated efforts of the IRGC Qods Force and Hezbollah to target "our soldiers with advanced explosive devices provided by Iran"); John D. Negroponte, *supra*, at 12 (noting that Iran has provided "Shia militants with the capability to build IEDs with explosively formed projectiles similar to those developed by Iran and Lebanese Hizballah").

IEDs and EFPs. For example, the 2006 State Department Country Report on Terrorism emphasized that “[t]he Revolutionary Guard, along with Lebanese Hizballah, implemented training programs for Iraqi militants in the construction and use of sophisticated IED technology.” JA15 (¶91). Treasury Department designations of Iraqi terrorists closely echoed that finding.¹¹

In short, therefore, overwhelming evidence that the U.S. military, civilian experts, and America’s allies gathered in Iraq 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. Accordingly, to the extent that the District Court’s analysis rested upon the supposition that neither Iran’s terrorism apparatus nor

¹¹ See, e.g., Press Release, Dep’t of the Treasury, “Treasury Designates Individual, Entity Posing Threat to Stability in Iraq” (July 2, 2009), *available at* <https://www.treasury.gov/press-center/press-releases/Pages/tg195.aspx> (Treasury Department press release announcing the designation of the Iranian-supported Iraqi terrorist Abu Mahdi al-Muhandis states that “instructors from Hizballah” trained al-Muhandis’ militia group to utilize explosives to attack Coalition forces and that Al-Muhandis’ militia moved EFPs from Iran to Iraq for the purpose of targeting Coalition forces); Press Release, Dep’t of the Treasury, “Treasury Designates Individuals and Entities Fueling Violence in Iraq” (June 16, 2008), *available at* <https://www.treasury.gov/press-center/press-releases/Pages/hp1141.aspx> (Treasury Department designation of Abdul Reza Shahlai, a deputy commander of the IRGC Qods Force, as a terrorist states that, “[a]s of May 2007, Shahlai served as the final approving and coordinating authority for all Iran-based Lebanese Hizballah training for JAM Special Groups to fight Coalition Forces in Iraq”).

Hezbollah committed the attack that killed David Schaefer, the opinion ignored the realities of the Special Groups' acquisition and use of EFPs in Iraq.

II.

CONGRESS HAS DESIGNED THE ATA TO APPLY FLEXIBLY TO THE EVER-CHANGING METHODS THAT TERRORISTS UTILIZE TO KILL AND INJURE AMERICANS

The text, legislative history and official statements of multiple executive branch officials establish that Congress designed the ATA both to compensate victims of terrorism and to supplement governmental efforts to suppress and deter terrorism against Americans. Congress accomplished the first of those objectives by providing terrorism victims with a flexible new cause of action that allowed for the recovery of treble damages and attorneys' fees. 18 U.S.C. §2333(a). Indeed, the Senate Report issued in connection with the passage of the ATA's civil liability provision (18 U.S.C. § 2333(a)) noted that: "The substance of such an action is not defined by the statute, because the fact patterns giving rise to such suits will be as varied and numerous as those found in the law of torts. This bill opens the courthouse door to victims of international terrorism." S. Rep. No. 102-342, at 44 (1992). Congress then expanded victims' ability to impose liability upon entities other than the final links in terrorist attacks by adopting multiple ATA sections that penalize the provision of material support for terrorism. *See* 18 U.S.C. §§ 2339A, 2339B and 2339C.

The statements of the ATA's sponsors, executive branch officials, and the experts who testified regarding the legislation demonstrate that Congress also intended the ATA to disrupt the financial networks that have long fueled international terrorism. For example, during the Senate's consideration of Senate Bill 2465, a previous version of what Congress ultimately adopted as the ATA, the Senate Judiciary Committee's Subcommittee on Courts and Administrative Practice heard testimony regarding the bill's counter-terrorism effects from Alan J. Kreczko (then-Deputy Legal Adviser, Department of State) and Steven R. Valentine (then-Deputy Assistant Attorney General, Civil Division, Department of Justice). Kreczko's Senate testimony drew an explicit link between the bill's proposed civil cause of action and the larger goals of U.S. counterterrorism policy, describing the legislation as adding "to the arsenal of legal tools that can be used against those who commit acts of terrorism against U.S. citizens abroad." S. Hrg. 101-1193, at 11 (July 25, 1990); *accord, e.g., id.* at 25 (Valentine testimony noting that the Department of Justice "strongly supports the fundamental objectives of Senate bill 2465," which "are of great importance to the United States" and that the bill "would bring to bear a significant new weapon against terrorists").

Kreczko's Senate testimony also described a number of specific ways in which civil cases brought under §2333(a) would further U.S. anti-terrorism policy:

The existence of such a cause of action may deter terrorist groups from maintaining assets in the United States, from benefiting from investments in the United States, and from soliciting funds from within the United States. In addition, other countries may follow our lead and implement complementary national measures, thereby increasing obstacles to terrorist operations.

Id. at 12; *see also id.* at 79 (noting that “anything that could be done to deter money-raising in the United States, money laundering in the United States, the repose of assets in the United States, and so on, would not only help benefit victims, but would also help deter terrorism”) (testimony of Joseph A. Morris, a former senior Department of Justice attorney and General Counsel of the United States Information Agency).

Since Congress enacted the ATA, courts have consistently interpreted the statute broadly in order to advance its legislative purposes. In this Circuit, the leading authority interpreting the ATA in that manner is *Boim v. Holy Land Found. for Relief & Dev.* (“*Boim III*”), 549 F.3d 685 (7th Cir. 2008). As the Court recognized in *Boim III*, the ATA does not restrict liability to the person or entity that actually planted an explosive device or otherwise committed a terrorist attack. Rather, “[t]hrough a chain of incorporations by reference” to the ATA’s material support provisions (18 U.S.C. §§ 2339A, 2339B, and 2339C), “Congress has expressly imposed liability on a class of aiders and abettors” under §2333(a). 549 F.3d at 692. In the *Boim III* Court’s words, “Primary liability in the form of material support to terrorism has the character of secondary liability” and “there is

no impropriety in discussing [conspiracy and aiding and abetting concepts] in reference” to providers of material support. *Id.* at 691. The entities subject to liability under §2333(a) therefore include defendants that provide or conceal the provision of material support to terrorists, or who conspire to commit such an act. *See* 18 U.S.C. § 2339A.

Congress reinforced the liability of secondary actors under the ATA by enacting JASTA’s new aiding and abetting and conspiracy claim in 2016. That new ATA provision, 18 U.S.C. §2333(d), imposes liability for aiding and abetting or conspiring with a person who commits an “act of international terrorism” that injures the plaintiff in circumstances where that act is “committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization under section 219 of the Immigration and Nationality Act (8 U.S.C. 1189).” 18 U.S.C. §2333(d)(2).

In adopting JASTA, Congress emphasized that “[t]he purpose of this Act is to provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against persons, entities, and foreign countries, wherever acting and wherever they may be found, that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States.” Pub. L. 114-222, § 2(b) (2016). Thus, the District Court’s unduly formulaic approach to ATA

liability in this case undermines Congress's efforts to ensure that the ATA imposes liability upon entities that provide material support for terrorism, in whatever form that support takes.

JASTA's declaration of Congressional "Findings" also reinforces the *Boim III* Court's recognition that the ATA's material support provisions impose primary liability in the "character of secondary liability." *Boim III*, 549 F.3d at 691. In that regard, JASTA emphasizes that "*Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), which has been widely recognized as the leading case regarding Federal civil aiding and abetting and conspiracy liability, including by the Supreme Court of the United States, provides the proper legal framework for how such liability should function in the context of chapter 113B of title 18, United States Code." Pub. L. 114-222, §2(a)(5) (2016). The reference to Chapter 113B of title 18 encompasses the entire ATA, not just the newly enacted §2333(d).

III.

IN DISMISSING PLAINTIFF'S CLAIMS, THE DISTRICT COURT FAILED TO GIVE THE COMPLAINT AND THE ATA LIABILITY PROVISIONS THE REQUIRED LIBERAL CONSTRUCTION

In dismissing Plaintiff's claims, the District Court impermissibly read the Complaint and the relevant ATA provisions in a restrictive manner. The court's limited analysis suggests that only the entity that actually plants an explosive

device incurs primary liability under the ATA, but the statute actually provides terrorism victims with claims against a far broader array of wrongdoers.

Fairly interpreted, the Complaint outlines the same deadly scheme to target American service members with EFPs and other explosive devices that Amici discuss above. Specifically, as Amici's experience shows, prior to the intervention of Iran and Hezbollah in Iraq, the Shi'a Special Groups did not possess EFPs. *See* JA14-15 (¶¶85-91); JA16-18 (¶¶96-101). Indeed, because EFPs required sophisticated manufacturing techniques, the Special Groups could not independently build those deadly, armor-piercing explosives. *See* JA14-15 (¶¶85-90). Nor could the Special Groups have effectively deployed those weapons without the training and financial assistance that the IRGC, the Qods Force and Hezbollah provided. *See* JA9-10 (¶¶57-64); JA15 (¶¶91-92); JA1618 (¶¶95-102).

The District Court erred by failing to credit those allegations, which establish the direct role that the misconduct of Iran and Hezbollah played in causing David Schaefer's death and Plaintiff's resulting injuries. The District Court did acknowledge Plaintiff's allegations that "David Schaefer ... 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." A4. Nevertheless, the court faulted Plaintiff for failing to "specify which group, if any, orchestrated the attack[] that ... killed Schaefer" and erroneously interpreted the

Complaint as asserting only that “that Iranian funding was behind groups *like* the groups that orchestrated the types of attacks at issue.” *Id.* (emphasis added).

In fact, however, the Complaint alleges far more. Specifically, Plaintiff alleges that Iran, the IRGC, the Qods Force, and Hezbollah *all* played indispensable roles in causing David Schaefer’s death by manufacturing the EFPs that killed him, training the Special Groups to deploy those explosive devices, and directing the Special Groups to target American forces with the EFPs. JA14-18 (¶¶85-102). The ATA requires nothing more to support the conclusion that the IRGC, the Qods Force, and Hezbollah all committed the terrorist attack that claimed David Schaefer’s life, particularly when the relevant allegations are viewed through the prism of the liberal standards that Congress and the courts have adopted for ATA claims. *See* Point II, *supra*.¹²

Furthermore, the District Court’s misguided focus upon the identity of the specific group or individual who planted the EFP that killed David Schaefer

¹² In this respect, the bombing that killed David Schaefer closely parallels the 1983 Marine Barracks bombing in Beirut, Lebanon that has spurred a number of successful lawsuits against Iran. *See, e.g., Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 57 (D.D.C. 2003) (“Based on the evidence presented by the expert witnesses at trial, the Court finds that it is beyond question that Hezbollah and its agents received massive material and technical support from the Iranian government. The sophistication demonstrated in the placement of an explosive charge in the center of the Marine barracks building and the devastating effect of the detonation of the charge indicates that it is highly unlikely that this attack could have resulted in such loss of life without the assistance of regular military forces, such as those of Iran.”).

severely undermines the ATA's deterrent effect. Amici's experience demonstrates that the conduct of Iran and Hezbollah – not the actions of the particular militia members who ultimately planted EFPs in Iraq – presented the greatest threat to U.S. service members there. As the work of CJTF Troy established, Iran, the IRGC, the Qods Force, and Hezbollah created the EFP problem in Iraq by supplying EFPs to the Special Groups, training the Special Groups to utilize those deadly devices, and directing the Special Groups to target American service members. JA14-18 (¶¶85-102). Thus, the circumstances surrounding the EFP attacks upon American military personnel show that the ATA can have the deterrent effect that Congress intended only if courts interpret the statute to capture all of the entities that facilitate Iranian terrorism by providing the financing that serves as the life blood of terrorist organizations.

IV.

THE DISTRICT COURT MISINTERPRETED THE REQUIREMENTS FOR LIABILITY UNDER THE ATA'S NEWLY ADOPTED §2333(d)

In a brief footnote, the District Court dismissed the relevance of JASTA's newly enacted 18 U.S.C. § 2333(d) to this action. The court found that §2333(d)(2) supports no cause of action here because the Complaint merely "allege[s] a conspiracy with Iran, a State Sponsor of Terrorism (SST), not with an FTO." A3 n.1. According to the court, JASTA imposes liability only when a defendant conspires directly with an FTO. *Id.*

But §2333(d)'s text – which, of course, controls the statute's meaning – does not support the District Court's assumption that a defendant must conspire directly with an FTO to incur liability. *See, e.g., Matal v. Tam*, 137 S. Ct. 1744, 1756 (2017) (“As always, our inquiry into the meaning of the statute's text ceases when “the statutory language is unambiguous and the statutory scheme is coherent and consistent.”) (citation omitted). The statute provides:

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

18 U.S.C. §2333(d).

Thus, §2333(d) first specifies that an FTO must commit, plan or authorize the act of international terrorism. *Id.* That requirement is satisfied here. Hezbollah, a designated FTO, committed, planned or authorized acts of international terrorism by, together with the IRGC and its Qods Force: providing the EFPs that killed David Schaefer to the Iraqi Special Groups; training the militia members in the use of the EFPs; and directing the Special Groups to target American service members with those explosive devices. *See* JA14-18 (¶¶85-102).

The statute then identifies the potential defendants in a case arising from the specified misconduct, *i.e.*, “any person who aids and abets ... or who conspires with *the person* who committed such an act of international terrorism.” 18 U.S.C. §2333(d)(2) (emphasis added). Here, Iran’s IRGC and Qods Force are “persons” that committed an act of international terrorism by providing EFPs and training regarding the use of those devices to the militia members who killed David Schaefer.

The fact that §2333(d)(2) – a one-sentence statutory section – first narrowly refers to “foreign terrorist organization[s]” and then far more broadly to “*the person* who committed such an act of international terrorism” negates the District Court’s assumption that the two different terms necessarily reference the same entity. 18 U.S.C. §2333(d)(2) (emphasis added). Indeed, basic statutory construction principles dictate that the Court must assign some significance to Congress’s decision not to utilize the more restrictive term (*i.e.*, foreign terrorist organization) in the final portion of §2333(d)(2). *See, e.g., United States v. Gonzales*, 520 U.S. 1, 5 (1997) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (internal quotation omitted).

That conclusion is bolstered by 18 U.S.C. §2333(d)(1), which provides that, for the purposes of sub-section §2333(d), “the term ‘person’ has the meaning given the term in section 1 of title 1.” In turn, 1 U.S.C. §1 defines “person” to “include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” Given the breadth of that definition, no basis exists for the District Court’s conclusion that §2333(d)(2) requires that “*the person* who committed such an act of international terrorism” must be an FTO. On the contrary, interpreting §2333(d)(2) to apply only when a defendant directly aided and abetted or conspired with an FTO – as opposed to some other “person” (such as the IRGC) that committed an act of international terrorism – would impermissibly disregard the statutory definition of the term “person” that Congress incorporated into the same §2333(d) that establishes the new ATA aiding and abetting and conspiracy offense. *See, e.g., Corley v. United States*, 556 U.S. 303, 314 (2009) (“[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant”) (internal quotation marks and citation omitted).

CONCLUSION

The service members who protect our nation abroad are the greatest assets that our country possesses in the world-wide effort to counter terrorism. It has been Amici’s great honor to lead those men and women in Iraq and elsewhere.

The activities of Iran and its terrorist proxies in Iraq threaten the safety of those service members and greatly endanger the military and political objectives the U.S. has spent many years and billions of dollars to accomplish.

Properly interpreted, the ATA can serve as a powerful deterrent to those entities who aid and abet or conspire with Iran and its terrorist proxies. In contrast, focusing the ATA analysis narrowly upon the specific entity that planted an EFP ignores the indispensable role that Iran and its terrorist proxies played in training, financing, supplying, and directing the Special Groups that killed and injured hundreds of American service members in Iraq, including David Schaefer. Accordingly, the Court should reverse the dismissal of Plaintiff's claims to the extent that the District Court's ruling relied on the mistaken view that Plaintiff had to identify the particular Special Group responsible for planting the EFP that killed David Schaefer or the belief that §2333(d) imposes liability only upon entities that conspire with or aid and abet an FTO.

Dated: March 27, 2018

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type volume limitations of Rule 29 of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit Federal Rule of Appellate Procedure because it contains 4,974 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated this 28th day of March, 2018.

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EXHIBIT A

General James D. Thurman, United States Army, Retired: General Thurman commanded 4th Infantry Division from 2004 until January 2007. During this time, he deployed the Division to Iraq and in 2006 assumed Command of Multi Division Baghdad with responsibility for all coalition operations in Baghdad. He was also the Director of Operations for the Coalition Land Component Command for Operation Iraqi Freedom in 2003.

Lieutenant General Daniel P. Bolger, United States Army, Retired: In 2005, General Bolger served as the deputy commander of the Multi-National Corps-Iraq. From 2005 to 2006, he served as commanding General of the Coalition Military Assistance Training Team in Iraq, which was responsible for organizing, training and equipping the Iraqi Army. In 2006, General Bolger commanded the Joint Readiness Training Center at Fort Polk, Louisiana and afterwards, he served as the commander of 1st Cavalry Division in Iraq.

Lieutenant General Keith Walker, United States Army, Retired: General Walker served as the Chief of Staff, 1st Cavalry Division, III Corps, Fort Hood, Texas and Operation Iraqi Freedom in Iraq from July 2003 until May 2005. He later served as the commanding General, Iraq Assistance Group, Operation Iraqi Freedom, Iraq from June 2008 until June 2009.

Major General Anthony A. Cucolo, United States Army, Retired: Between July 2008 and April 2011, General Cucolo commanded the 3rd Infantry Division of the United States Army, during which time it was deployed from October 2009 through November 2010 to Iraq where General Cucolo commanded U.S. Division North/Task Force Marne, responsible for all US forces operating in the seven Iraqi provinces north of Baghdad. He later served as the 49th Commandant of the U.S. Army War College.

Brigadier General William H. Forrester Jr., United States Army, Retired: General Forrester commanded the 159 Aviation Brigade of the 101st Airborne Division of the United States Army in Iraq in March 2003 under then Major General David H. Petraeus. He became the commander of the Army Combat Readiness/Safety Center in 2007.

Colonel Kevin Lutz, United States Army, Retired: Colonel Lutz twice commanded Combined Joint Task Force Troy (C-IED Brigade) in support of Multi-National Corps Iraq; assisted in the creation of the U.S. Army Improvised

Explosive Device Task Force and assisted in the formation of the Weapons Analytic Team of the Joint Intelligence Task Force for Combating Terrorism at the Defense Intelligence Agency.

Command Sergeant Major Todd M. Burnett, United States Army: CSM Burnett served for three years as an army combat engineer in Iraq and later served as the senior enlisted advisor for the Joint Improvised Explosive Device Defeat Organization of the U.S. Department of Defense providing expertise on IED clearance.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 18-1031

RHONDA KEMPER,

Plaintiff-Appellant,

v.

DEUTSCHE BANK AG,

Defendants-Appellees.

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2018, I electronically filed the foregoing Brief of General James D. Thurman, United States Army, Retired; Lieutenant General Daniel P. Bolger, United States Army, Retired; Lieutenant General Keith Walker, United States Army, Retired; Major General Anthony A. Cucolo, United States Army, Retired; Brigadier General William H. Forrester Jr., United States Army, Retired; Colonel Kevin Lutz, United States Army, Retired, and Command Sergeant Major Todd M. Burnett, United States Army *Amici Curiae* in Support of Plaintiff-Appellant and Reversal with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated this 28th day of March, 2018.

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