IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AUGUST CABRERA, et al., Plaintiffs, v. BLACK & VEATCH SPECIAL PROJECTS CORPORATION, et al., Defendants.	Case No. 1:19-cv-03833 (EGS)

MEMORANDUM IN SUPPORT OF DEFENDANTS LOUIS BERGER GROUP, INC. AND LOUIS BERGER INTERNATIONAL, INC.'S MOTION TO DISMISS

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INTRODUCTION

Louis Berger Group, Inc. and Louis Berger International, Inc. (collectively "LBG") have the greatest respect for those U.S. servicemen and women who served in Afghanistan, particularly for those who were killed or injured by the Taliban and made the ultimate sacrifice for our country. This lawsuit, however, is not the appropriate way to address the Taliban insurgency that has ravaged Afghanistan for almost 20 years. Plaintiffs' limited allegations against LBG fail to state a claim upon which relief can be granted, and the Court should dismiss LBG from this case.

In the wake of the invasion of Afghanistan in 2001, when the infrastructure of the country was destroyed and its residents suffering, LBG was one of the first companies to answer the U.S. Government's call for private contractors to help rebuild the country. Over nearly a decade, LBG worked on vital infrastructure projects throughout Afghanistan, building roads, highways, bridges, schools, and health facilities. Those projects frequently were undertaken in remote and highly dangerous areas, and to protect its workers on the ground, LBG engaged third-party security contractors—as was understood and expected by the U.S. Government. Plaintiffs' theory is that some of those third-party security contractors made protection payments to the Taliban, and that money, in turn, was dispersed to various parts of Afghanistan and used by the Taliban to orchestrate more than 100 armed attacks over an eight-year period. On that basis, making vague, non-specific allegations, plaintiffs seek to hold LBG liable under the Anti-Terrorism Act ("ATA"), 18 U.S.C. § 2331 *et seq*.

Plaintiffs' theory stretches the ATA much too far, and applying it here would upend the careful limitations that Congress built into the statute. Indeed, much of plaintiffs' complaint is spent unsuccessfully trying to plead around those very limitations, which courts have broadly held foreclose attempts to impose civil liability for conduct—like LBG's contracting choices—that is far removed from the terrorist attacks that injured plaintiffs.

Plaintiffs' primary-liability claims (Counts 1–4) fail for numerous reasons. Plaintiffs have not alleged that LBG engaged in an "act of international terrorism," which is statutorily limited to violent or dangerous acts that are intended to "intimidate or coerce a civilian population" or influence governmental policy. 18 U.S.C. §§ 2331, 2333. Regardless of whether the ***Taliban's*** attacks on plaintiffs meet that definition, ***LBG's*** retention of security contractors as a matter of law does not, and that is the question that matters for determining whether LBG can be held primarily liable under the ATA. Moreover, plaintiffs' allegations fail to satisfy the ATA's rigorous proximate cause requirement: there is no substantial connection pled between LBG's contracting practices and dozens of disparate attacks that occurred over the course of eight years throughout the entirety of Afghanistan and which were undertaken by four separate groups. Indeed, plaintiffs' theory, if accepted, would extend to any attack, at any time, anywhere in Afghanistan—a sweeping view which cannot be squared with the law of proximate causation. And finally, plaintiffs also fail to plausibly allege that LBG acted with the scienter required for a primary violation of the ATA or, for Count 2, that LBG provided material support or resources to a designated foreign terrorist organization ("FTO"), as the predicate statute requires.

Plaintiffs' secondary-liability claims (Counts 5–6) fare no better. In authorizing secondary liability under the ATA in 2016, Congress specifically limited that cause of action to ***only attacks perpetrated by an FTO***. That limitation is fatal to most of plaintiffs' claims, since the ***Taliban has never been designated as an FTO*** by the Secretary of State, and the other terrorist entities alleged in the complaint either were never designated or were not designated during the relevant time period. Plaintiffs also do not plausibly or sufficiently allege that LBG's selection of security contractors "substantially" assisted the attacks at issue in this case, as that term has been interpreted by the courts, or that LBG acted with the scienter necessary for liability.

In short, plaintiffs' claims are one more example of creative lawyers attempting to stretch the ATA far beyond its limited scope to embrace claims and theories that simply are not supported by the statute. Other courts have not hesitated to grant motions to dismiss when presented with ATA theories that seek to impose liability on downstream actors with no direct connection to the attacks at issue.[1] This Court should likewise dismiss plaintiffs' claims against LBG.

FACTUAL BACKGROUND

For purposes of this motion to dismiss, LBG treats as true the factual allegations that are well-pleaded, non-conclusory, and not contradicted by matters subject to judicial notice. *Kaempe v. Myers*, 367 F.3d 958, 963 (D.C. Cir. 2004). In support of its arguments, LBG relies only on the complaint, materials it incorporates by reference, and documents subject to judicial notice. *See Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006) (in deciding a motion to dismiss, "[t]he court may consider the facts alleged in the complaint, documents attached thereto or incorporated therein, and matters of which it may take judicial notice.").

A. LBG Was On The Vanguard Of United States-Led Efforts To Reconstruct Afghanistan

This case arises from LBG's participation in U.S.-government led efforts to rebuild Afghanistan following Operation Enduring Freedom. After the collapse of the Taliban government, the United States began a concerted effort to rebuild the Afghan economy and infrastructure, as part of a broader foreign policy initiative to eliminate Afghanistan as a safe haven

[1] *See, e.g.*, *Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 273–76 (D.C. Cir. 2018) (affirming dismissal); *Brill v. Chevron Corp.*, 2020 WL 1200695, at *1 (9th Cir. Mar. 12, 2020) (same); *Crosby v. Twitter, Inc.*, 921 F.3d 617, 623 (6th Cir. 2019) (same); *Kemper v. Deutsche Bank AG*, 911 F.3d 383, 396 (7th Cir. 2018) (same); *Rothstein v. UBS AG*, 708 F.3d 82, 97–98 (2d Cir. 2013) (same); *Kaplan v. Lebanese Canadian Bank, SAL*, 405 F. Supp. 3d 525, 532–33 (S.D.N.Y. 2019) (granting motion to dismiss); *Retana v. Twitter, Inc.*, 419 F. Supp. 3d 989, 995–97 (N.D. Tex. 2019) (same); *Adams v. Alcolac, Inc.*, 2019 WL 4774006, at *6 (S.D. Tex. Sept. 6, 2019) (same).

for terrorists. These efforts were meant to "develop[ ] the economic capacity of the region" and formed a "key component of the current counterinsurgency [ ] effort."[2] As described by a Senate Majority Report cited in the complaint, "[t]he goal [wa]s to provide security, strengthen local government institutions, and build critical infrastructure" in order to "improve lives and weaken popular support for the insurgency."[3]

Civilian contractors, including LBG, were instrumental to the Afghan reconstruction effort. As a result of two decades of fighting and years of Taliban rule, Afghanistan had very few in-country private construction companies or pieces of construction equipment.[4] Thus, the U.S. Government had to rely on U.S.-based civilian contractors to achieve its reconstruction goals. Civilian contractors worked under contracts with the United States Agency for International Development ("USAID") to perform a variety of reconstruction efforts across Afghanistan, including: repairing roads; repairing or constructing schools and health clinics; improving the provision of water and sanitation services; restoring, developing, and expanding energy and electricity supply options; and repairing or reconstructing irrigation systems, dams, and canals.[5] The efforts of these contractors, undertaken in exceptionally challenging and dangerous circumstances, yielded significant benefits for the people of Afghanistan. Between 2002 and 2008,

[2] Moshe Schwartz, *Wartime Contracting in Afghanistan*, Congressional Research Service (Nov. 14, 2011) at 1, https://fas.org/sgp/crs/natsec/R42084.pdf (cited at Compl. ¶ 65 n.37).

[3] U.S. Senate Committee on Foreign Relations, Majority Staff Report, *Evaluating U.S. Foreign Assistance to Afghanistan* (June 8, 2011) at 8 (cited at Compl. ¶ 54 n.18).

[4] Rehabilitation of Economic Facilities ("REFS") Contract ("USAID-LBG REFS Contract") at C-2 (cited at Compl. ¶ 190).

[5] *Id.*; Afghanistan Infrastructure and Rehabilitation Program ("AIRP") ("USAID-JV Contract"), Section C (cited at Compl.¶ 190).

development efforts resulted in radically increasing literacy, doubling the country's electrical capacity, and constructing over 12,000 kilometers of highways and roads.[6]

LBG is one of the world's leading infrastructure and development firms, and it was one of the first private companies to answer the U.S. Government's call and engage in reconstruction efforts in Afghanistan. As relevant to this case, USAID awarded LBG two umbrella contracts, each of which would come to include a variety of project-specific task orders: (1) the Afghanistan Rehabilitation of Economic Facilities and Services ("REFS") program, which was awarded to LBG in 2002; and (2) the Afghanistan Infrastructure and Rehabilitation Program ("AIRP"), which was awarded in 2006 to a joint venture between LBG and co-defendant Black & Veatch Special Projects Corporation. Compl. ¶ 190.

As part of the REFS program, LBG agreed to provide engineering, construction, construction-management, and related services in Afghanistan. Compl. ¶ 190. The contract with USAID recognized the enormity of the work that LBG was to perform: "After nearly three decades of political instability—including years of savage warfare and wholesale destruction of political and physical infrastructure as well as inflaming ethnic divisions, the task of rebuilding is immense."[7] In particular, as of September 2002, "[e]very road badly need[ed] repair or reconstruction," "[m]any bridges [were] destroyed," and the country was suffering from food shortages and severe drought. *Id*. Among other things, the work LBG performed "included the construction of 715 km of the Northern Ring Road (Kabul-Kandahar-Herat, completed in Dec. 2005)" and "architecture and engineering [ ] services for the rehabilitation of 6 provincial roads

[6] Islamic Republic of Afghanistan, *Afghanistan National Development Strategy 1387–1391* (2008–2013) (June 2008) at 1–3 (cited at Compl. ¶ 50 n.9).

[7] *See* USAID-LBG REFS Contract at C-1 (cited at Compl. ¶ 190).

under a grant to the United Nations."[8] USAID reported that "[t]he Northern Ring Road alone will benefit some 5.3 million people within its catchment area by improving access to economic opportunities and social services. The road will also facilitate trade within Afghanistan and with Central Asian countries." *Id*. LBG also performed critical work on certain segments of the Kabul to Kandahar highway, providing the U.S. military with a "primary road to shuttle troops and supplies from one region to another" which "had political significance in both Afghanistan and the United States."[9] And LBG built or repaired numerous health facilities and schools, improving access to healthcare and education.[10]

In 2006, LBG and defendant Black & Veatch Special Projects Corporation established a Joint Venture (the "Joint Venture") for the purpose of performing certain energy and transportation services under the AIRP. AIRP included "more than 25 projects in the transport, energy, and construction sectors."[11] Among other things, the Joint Venture worked to rehabilitate and refurbish the Kajaki Dam and Hydropower Plant, a major source of power for Kandahar, Compl. ¶ 190; built the 101 km Gardez-Khost Highway, a major project linking Kabul to Khost province near the border with Pakistan, *id.* ¶¶ 190, 206; and built roads and bridges located primarily in the central and northeastern regions of Afghanistan, including the 103 km Keshim-Faizabad Road,

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[8] USAID, *Rehabilitation of Economic Facilities & Services (REFS) - Roads*, *available at* https://www.usaid.gov/node/51671. The Court may take judicial notice of information on government websites. *See Cannon v. D.C.*, 717 F.3d 200, 205 n.2 (D.C. Cir. 2013).

[9] *See* F. Nawa, *Afghanistan, Inc.* at 10 (cited at Compl. ¶ 197 n.253).

[10] *See* USAID-LBG REFS Contract at F-2 (calling for "Up to 50 schools and 50 health facilities completed" by the end of 2005) (cited at Compl. ¶ 190).

[11] USAID, *Infrastructure & Rehabilitation Program (IRP)* (March 2009–August 2011), *available at* https://www.usaid.gov/node/51551; USAID, *Infrastructure & Rehabilitation Program (IRP)* (August 2006–2001), *available at* https://www.usaid.gov/node/51556.

and the Southern Strategy Road in Kandahar province, the reconstruction of portions of the Bamyan-Dushi Roadway, and the design and construction of two bridges in Uruzgon province.[12]

These projects were exceptionally dangerous, occurring as they did in remote areas of a country facing an active insurgency. In a February 2020 report, the Special Inspector General for Afghanistan Reconstruction ("SIGAR") conservatively identified 5,135 casualties associated with Afghanistan reconstruction projects from 2003 to 2018.[13] An additional 1,182 individuals connected with reconstruction programs were kidnapped or reported missing. *Id*. Of the total casualties, almost 30% were linked to road construction projects, the sector in which LBG primarily worked. *Id*. at 8. Another 16% were linked to general construction projects, which includes the schools and clinics that LBG built. Together, these two categories were the deadliest of any SIGAR identified. LBG personnel working on Afghanistan construction projects put their lives on the line every day.

B. Subcontractors Engaged By LBG

LBG retained subcontractors to facilitate its work on the REFS and AIRP projects. As part of those contracts, LBG was required to use local Afghan contractors to the greatest extent possible. *See* USAID-LBG-REFS Contract at C-2, C-5, C-7 (cited at Compl. ¶ 190) (directing LBG to use "private local subcontractors to the maximum extent possible" and stating that "[l]ocal private sector firms/organizations are clearly preferred as subcontractors"); USAID-JV Contract,

[12] *See* Contract No: 306-I-00-06-00517-00, Task Order No. 04, §§ B.1, C.2 (cited at Compl. ¶ 190); Contract No: 306-I-00-06-00517-00, Task Order No. 26, §§ C.1, C.3 (cited at Compl. ¶ 190); Contract No: 306-I-00-06-00517-00, Task Order No. 21, § C.2 (cited at Compl. ¶ 190).

[13] SIGAR: *The Human Cost of Reconstruction in Afghanistan*, SIGAR-20-25-SP (Feb. 2020) at 1, *available at* https://www.sigar.mil/pdf/special%20projects/SIGAR-20-25-SP.pdf. The SIGAR report, which appears on the official government website https://sigar.mil/allreports, is judicially noticeable. *See Cannon*, 717 F.3d at 205 n.2.

C.7.4, C.7.1, H.26 (cited at Compl. ¶ 190) (noting that the LBG-BV JV was "strongly encouraged" to subcontract with local Afghan entities). In addition to local Afghan subcontractors, LBG retained international or U.S.-based firms as subcontractors—including for security—when necessary and appropriate, and with USAID's consent.[14]

In July 2010, the U.S. Department of Defense ("DOD") created a "vendor vetting process" for contractors operating in Afghanistan.[15] Named "Task Force 2010," this was an initiative created to help DOD personnel and civilian contractors implement best contracting practices. Task Force 2010 coordinated with various governmental entities "to review high-risk contracts to ensure they [did] not benefit insurgents or criminal networks."[16] To achieve its goals, Task Force 2010 would vet potential subcontractors that prime contractors like LBG intended to use. Between its creation in July 2010 and December 2012, Task Force 2010 reviewed more than 2,050 contracts, which involved more than 3,500 companies and over 165 total vendors. *Id*.

LBG participated in Task Force 2010 by submitting the names of proposed subcontractors to be vetted and approved. *See* Compl. ¶ 122 (describing how General Petraeus in September 2010 issued formal guidance concerning contracting practices in Afghanistan, and "took a number of steps to implement that guidance, including by ramping up its vetting efforts."). LBG also

[14] *See, e.g.*, Contract No: 306-I-00-06-00517-00, Task Order No. 02, §§ E.1(f), E.3(b), E.4 (noting that "[s]ecurity is the single greatest risk factor affecting this task order" and that LBG should "subcontract security services via competitive bid process with a best value-based subcontract award," then providing that "[s]ecurity services [will] be subcontracted initially to USPI, the current provider at Kajakai under REFS.") (cited at Compl. ¶ 190).

[15] DOD, *Report on Progress Toward Security & Stability in Afghanistan* (Dec. 2012) (cited at Compl. ¶ 45 n.5) at 119; M. Schwartz, *Wartime Contracting in Afghanistan: Analysis & Issues For Congress*, Congressional Research Service (Nov. 14, 2011) at 10, *available at* https://fas.org/sgp/crs/natsec/R42084.pdf (cited at Compl. ¶ 65 n.37).

[16] DOD, *Report on Progress Toward Security & Stability in Afghanistan* (Dec. 2012) at 119 (cited at Compl. ¶ 45 n.5).

followed U.S. Counterinsurgency Contracting Guidance, which recommended that contractors use fewer levels of sub-contractors where possible and encouraged commanders to "[h]ire Afghans first."[17] The Contracting Guidance acknowledged the importance of contractors' roles in Afghanistan, stating: "[W]e must also recognize what our contracting has accomplished. Our contracting efforts have sustained widely dispersed and high tempo operations and . . . improved the lives of many Afghans, enhanced infrastructure, delivered essential services, supported local businesses, increased employment, and fostered economic development." *Id.*

C. This Lawsuit

Plaintiffs' claims arise from attacks that occurred in Afghanistan between December 30, 2009 and June 2017.[18] Compl. ¶ 17. Plaintiffs are 143 victims of these attacks and their relatives. *Id.* ¶¶ 343–1261. The attacks differ significantly in location, timing, method of attack, and alleged perpetrator. They occurred over the course of a decade and in 18 provinces across Afghanistan. The methods used to carry out the attacks varied, but included suicide bombs, snipers, IEDs, small arms, and rocket-propelled grenades. *Id.* The complaint alleges that four separate terrorist groups were involved in the attacks: the Taliban, the Haqqani Network, al Qaeda (in only one instance), and the Kabul Attack Network. *Id.* ¶¶ 273–342.

Defendants are a diverse set of U.S. and international companies who performed a variety of contractual services in post-invasion Afghanistan. They are comprised of: (1) infrastructure

[17] Sept. 8, 2010 Memo For The Commanders, et al. from Gen. David Petraeus, re COMISAF's Counterinsurgency (COIN) Contracting Guidance ("COMISAF's Contracting Guidance") at 1 (cited at Compl. ¶ 122 n.155).

[18] The complaint alleges that plaintiff Erich Ellis was injured in an attack that took place on June 12, 2019. Compl. ¶ 652. This date appears to be incorrect, and should be June 2012, rather than 2019. *See* http://texassentinels.org/our-heroes/erich-ellis/. According to allegations elsewhere in the complaint, the alleged attacks took place "between 2009 and 2017." Compl. ¶ 1.

and development contractors; (2) security subcontractors; and (3) a telecommunications service provider. The alleged facts differ significantly among the defendants, and the disparate services they provided spanned a diverse set of industries, time periods, and locations. *See* Compl. ¶¶ 128–272. For example, defendant ECC is a construction and engineering contractor that worked on design and construction projects in Afghanistan from 2007 and 2014. *Id.* ¶¶ 128, 130. Defendant DAI was USAID's second-largest development contractor in Afghanistan between 2006 and 2012 and worked on six separate USAID projects during that time. *Id.* ¶¶ 160–161. Defendants ArmorGroup and EODT are security subcontractors who provided security for embassies, mine clearance, and infrastructure projects in Herat, Kabul, Kandahar, and Kunduz from 2007 through 2015. *Id.* ¶¶ 128–130, 177. Defendant MTN is a telecommunications provider that has been operating cell towers in Afghanistan since 2006, and by late 2010 was the largest cellular-phone provider in the country with a "presence in every province." *Id.* ¶¶ 219–221.[19]

Plaintiffs' allegations against LBG revolve around its engagement of well-known and widely used subcontractors to provide security for its USAID projects. Compl. ¶¶ 188–212. In various places and at various times, plaintiffs allege that LBG's security subcontractors made protection payments to the Taliban and/or the Haqqani Network to prevent them from attacking

[19] Given plaintiffs' significantly different allegations against each defendant, LBG believes that the defendants have been misjoined and that severance will be required at some future point, if plaintiffs' claims against LBG are not dismissed. Although "[m]isjoinder of parties is not a ground for dismissing an action," the Court may "on just terms . . . sever any claim against a party." Fed. R. Civ. P. 21. Importantly, misjoinder exists where claims do not "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences." Fed. R. Civ. P. 20(a)(2)(A). That is the case here, where the defendants all carried out different activities in Afghanistan, and where those activities were not coordinated or part of the same series. As courts in this district have held, plaintiffs "cannot join defendants who simply engaged in similar types of behavior, but who are otherwise unrelated; *some allegation of concerted action between defendants is required*." *Spaeth v. Mich. State Univ. Coll. of Law*, 845 F. Supp. 2d 48, 53–54 (D.D.C. 2012) (emphasis in original); *Malibu Media, LLC v. Does 1–11*, 286 F.R.D. 113, 115 (D.D.C. 2012) (same); *U.S. ex rel. Grynberg v. Alaska Pipeline Co.*, 1997 WL 33763820, at *1 (D.D.C. Mar. 27, 1997) (same).

LBG projects. *Id.* The complaint alleges that those payments were economically motivated: it was purportedly "cheaper" for LBG's subcontractors to "buy off the Taliban" than it would have been to provide the necessary security. *Id.* ¶ 3. In six counts, the complaint alleges that, because its subcontractors purportedly made those payments, LBG itself is liable under the ATA.

LEGAL STANDARD

To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain "enough facts to state a claim to relief that is plausible on its face," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and must state these facts with enough specificity "to raise a right to relief above the speculative level," *id.* at 555. The Court need not accept "a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Nor must it credit allegations that are contradicted by documents the complaint incorporates by reference or by matters subject to judicial notice. *Kaempe v. Myers*, 367 F.3d 958, 963 (D.C. Cir. 2004).

ARGUMENT

The Court should dismiss the claims against LBG because, even assuming the truth of all of the complaint's properly pleaded allegations, plaintiffs fail to state a claim as a matter of law. The ATA creates two different causes of action for U.S. nationals injured abroad by acts of terrorism: primary-liability claims and secondary-liability claims. Primary-liability claims are those asserted against a person or entity that itself committed an "act of international terrorism" that injured the U.S. national. 18 U.S.C. § 2333(a). Secondary-liability claims include those brought under 2016 statutory amendments, which allow liability only when an entity—although it did not itself commit the terrorist act itself—nonetheless substantially assisted the act in a manner satisfying the statute's requirements. 18 U.S.C. § 2333(d)(2).

The complaint fails to allege a viable primary or secondary-liability claim against LBG. The thrust of the complaint is that LBG, in seeking to provide adequate security for its various

construction projects around the country, purportedly violated the ATA by entering into contracts with various third-party security companies who LBG knew were making protection payments to the Taliban. *See* Compl. ¶¶ 195, 198, 208. No Court has ever held that the engagement of widely used security subcontractors to protect U.S.-government-sponsored projects in a warzone constitutes a violation of the ATA. For reasons explained below, this Court should not be the first.

Before turning to the flaws in plaintiffs' theories, however, it must be emphasized up front that the complaint includes no plausible allegations that LBG ***itself*** committed any violent acts against U.S. nationals or that LBG ***itself*** made direct payments to the Taliban or any other terrorist organization. Only a small handful of paragraphs even attempt to allege direct payments by LBG, and those paragraphs easily fail federal pleading requirements. *See* Compl. ¶¶ 192, 204, 206. For example, paragraph 192 of the complaint alleges "[o]n information and belief" that LBG "paid protection money to the Taliban," but does not allege who at LBG made those payments, when they were made, where they were made, or any other relevant details. Instead, the complaint's short discussion of direct payments relies entirely on information-and-belief allegations and generalized assertions about what purportedly was "standard practice" among contractors working in Afghanistan. *Id.* ¶ 192. These allegations are repeated almost verbatim with respect to all the defendants in the case, showing that they are not supported by any facts specific to LBG. *Id.* ¶¶ 131, 162, 179. Such "naked assertion[s] devoid of further factual enhancement" are insufficient, *Iqbal*, 556 U.S. at 678 (brackets in original), and do not "indicate clearly . . . the basis upon which the relief is sought against the particular defendants." *Martin v. N.Y.C.*, 2008 WL 1826483, at *1 (S.D.N.Y. Apr. 23, 2008). Plaintiffs have thus failed to allege facts supporting a reasonable inference that LBG made payments directly to the Taliban.

To the contrary, and as explained above, plaintiffs' theory of liability against LBG is that the company somehow violated the ATA by engaging various third-party security companies who were well-known in Afghanistan and widely used by other entities. For the following reasons, plaintiffs' allegations concerning LBG's engagement of third-party subcontractors fail to state a claim under the ATA.

I. THE COURT SHOULD DISMISS THE PRIMARY-LIABILITY CLAIMS (COUNTS 1–4)

The Court should dismiss the primary-liability claims asserted against LBG for three independent reasons: *First*, LBG's retention of third-party security contractors does not constitute an act of "international terrorism," as that term is specifically defined in the statute. *Second*, plaintiffs' allegations do not satisfy the ATA's rigorous proximate-cause requirement. *Third*, plaintiffs have failed to plead that LBG acted with the requisite scienter. The Court should dismiss Count 2 for the additional reason that none of the entities to which LBG's subcontractors are alleged to have provided funds were designated FTOs during the relevant period.

A. LBG Did Not Commit An "International Terrorism" Act

To be subject to primary liability under the ATA, a defendant must have committed an act of "international terrorism." *See* 18 U.S.C. § 2333(a); *Kemper v. Deutsche Bank AG*, 911 F.3d 383, 389 (7th Cir. 2018). The statute specifically defines "international terrorism" as activities that (1) "involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;" (2) "appear to be intended" to "intimidate or coerce a civilian population;" to "influence the policy of a government by intimidation or coercion; or" to "affect the conduct of a government by mass destruction, assassination, or kidnapping;" and (3) "occur primarily outside the territorial jurisdiction of the United States." 18 U.S.C. § 2331(1). LBG's engagement of security contractors to protect its workers from violence on its USAID

projects in Afghanistan does not satisfy the first or second elements of that statutory definition. Although the Taliban (and other) ***attacks*** alleged in the complaint may constitute acts of "international terrorism," LBG's ***engagement of security subcontractors*** does not, and that is what matters for purposes of assessing whether a primary-liability claim lies against LBG. *See Kaplan*, 405 F. Supp. 3d at 532 (plaintiffs must allege that the defendant's "***own actions*** 'also involve[d] violence or endanger[ed] human life'") (emphasis added); *Kemper*, 911 F.3d at 390 ("Kemper's complaint fails plausibly to allege that ***Deutsche Bank's actions*** satisfy the statutory definition of international terrorism and thus fall within the ambit of the ATA.") (emphasis added).

1. LBG's Engagement Of Security Subcontractors Did Not Involve "Violent Acts Or Acts Dangerous To Human Life"

To begin, plaintiffs have not alleged that LBG itself engaged in any "violent acts or acts dangerous to human life." 18 U.S.C. § 2331(1)(A). "Violence" means conduct involving "physical force . . . exerted for the purpose of causing damage or injury."[20] The only "violent acts" or acts "dangerous to human life" alleged in the complaint are the sniper, IED, suicide-bomb, and small-arms attacks perpetrated by the Taliban (and others) that killed or injured plaintiffs. *See* Compl. ¶¶ 343–1261. But those attacks were not LBG's ***own*** actions. Plaintiffs might very well have primary-liability claims against the Taliban, but they do not have such a claim against LBG.

Unlike the Taliban attacks described in the complaint, the allegations concerning LBG's own actions[21] are limited to LBG's alleged retention of three well-known, third-party security

[20] American Heritage Dictionary (5th ed. 2011).

[21] The complaint cites criminal and civil charges brought against LBG that were resolved through Deferred Prosecution Agreements ("DPAs") with the U.S. Department of Justice in 2010 and 2015. *See* Compl. ¶¶ 213–217. The charges at issue in those cases are entirely irrelevant to the ATA claims asserted here. The 2010 DPA resolved charges that LBG submitted inflated invoices for overhead costs to USAID and other federal agencies between 1999 and 2007. *See* Nov. 5, 2010 LBG DPA (cited at Compl. ¶ 213 & n.282). The 2015 DPA resolved charges that LBG bribed foreign officials in India, Indonesia, Vietnam, and Kuwait to secure government contracts between

contractors to protect workers in some of the most volatile locations in Afghanistan—places that remain extremely dangerous to this day. *See* Compl. ¶ 196 (retention of U.S. Protection and Investigation ("USPI")); *id*. ¶ 195 (retention of Watan Risk Management ("Watan")); *id*. ¶ 208 (retention of ISS-Safenet). Even if one assumes that those subcontractors were in fact making protection payments to the Taliban (something LBG denies having any knowledge of), it stretches the statutory text much too far to say that LBG's retention of those private companies was itself a "violent" or "dangerous" act.

Proving the point, courts have recognized that "doing business with companies and countries that have significant legitimate operations" does not constitute an act of international terrorism, even if those same companies have alleged ties to terrorist organizations. *See Kemper*, 911 F.3d at 390; *see also O'Sullivan v. Deutsche Bank AG*, 2019 WL 1409446, at *8 (S.D.N.Y. Mar. 28, 2019) ("The Complaint does not allege plausibly that the provision of banking services, which are not inherently violent or dangerous, can be considered as acts dangerous to human life."); *Kaplan*, 405 F. Supp. 3d at 532 (determining plaintiffs had failed to plausibly allege that defendants' conduct "involve[d] violence or endanger[ed] human life") (alterations in original); *Strauss v. Crédit Lyonnais, S.A.*, 379 F. Supp. 3d 148, 159 (E.D.N.Y. 2019) (granting summary judgment where the plaintiffs had not demonstrated that "Defendant's banking services directly involved peril or hazard or were likely to cause serious bodily harm"). Here, it is clear from the face of the complaint that LBG's alleged subcontractors had significant legitimate operations. Plaintiffs identify three security subcontractors allegedly used by LBG in Afghanistan: USPI, Watan, and ISS-Safenet. USPI was a private security contractor that worked for global leaders

1998 and 2010. *See* July 7, 2015 LBG DPA (cited at Compl. ¶¶ 26, 215 & n.1). LBG's alleged wrongdoing in those cases has nothing to do with the retention of security subcontractors for its USAID projects in Afghanistan, much less any purported protection payments to the Taliban.

such as the United Nations and World Bank, and was "employed by several donors and USAID contractors" in Afghanistan during the relevant time.[22] Similarly, Watan was "one of the largest private-security companies in Afghanistan, and made its money on subcontracts to protect convoys ferrying goods and fuel around the country." Compl. ¶ 62. And ISS-Safenet was one of the top five USAID subcontractors in Afghanistan with over $42 million in subcontracts.[23] It is implausible to label the retention of such widely used companies as "violent" acts giving rise to primary liability under the ATA.

Any attempt by plaintiffs to satisfy this element of the ATA by relying on Seventh Circuit case law that concludes donating money directly to a terrorist organization may be "dangerous to human life" falls short. *See Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 690 (7th Cir. 2008). As an initial matter, the D.C. Circuit has not embraced that holding, and, correctly so, other courts have cast doubt on it. *See, e.g.*, *Linde v. Arab Bank, PLC*, 882 F.3d 314, 327 (2d Cir. 2018) (reserving judgment on whether "direct monetary donations to a known terrorist organization satisfy § 2331(1)'s definitional requirements for an act of terrorism"). But even assuming *Boim* was correctly decided—which it was not—that case is distinguishable. As explained, *see supra* at 12, here, unlike *Boim*, plaintiffs do not plausibly allege that LBG made ***direct*** payments to the Taliban, but instead rest their case on LBG's retention of third-party security subcontractors who in turn allegedly either made protection payments to the Taliban or engaged

[22] USAID-JV Contract, Attachment J-2, at 119 (cited at Compl. ¶ 190); F. Nawa, *Afghanistan, Inc.* at 15 (cited at Compl. ¶ 197 n.253); Daniel Schulman, *The Cowboys Of Kabul*, Mother Jones (July 27, 2009) ("*The Cowboys of Kabul*") at 3 (cited at Compl. ¶¶ 196–197 n.252).

[23] SIGAR: *USAID Assistance to Afghanistan Reconstruction: $13.3 Billion Obligated Between 2002 and 2013*, SIGAR-14-27-SP (Jan. 2014), *available at https://www.sigar.mil/pdf/special%20projects/14-27-SP.pdf*. The SIGAR report, which appears on the official government website https://sigar.mil/allreports, is judicially noticeable. *Cannon*, 717 F.3d at 205 n.2.

other third parties who made such payments.[24] Compl. ¶¶ 196–208. As the Seventh Circuit later clarified, the retention of such companies with "significant legitimate operations" does not, without more, constitute an act "dangerous to human life" actionable as a primary violation of the ATA. *See Kemper*, 911 F.3d at 390. Here, plaintiffs do not allege that LBG's security subcontractors lacked "significant legitimate operations" during the relevant time period. Nor could they: any such allegations would be inconsistent with the complaint's description of the many legitimate services LBG's security subcontractors provided for other clients, such as the World Bank, the United Nations, and the Government of Japan. *See supra* at 15–16.

2. The Complaint Does Not Allege That LBG's Acts Were Intended To Intimidate A Civilian Population Or Influence Governmental Policy By Coercion

Plaintiffs also fail to plead the second element necessary for an act to constitute "international terrorism"—namely, that the act "appear to be intended … to intimidate or coerce a civilian population;" to "influence the policy of a government by intimidation or coercion;" or to "affect the conduct of a government by mass destruction, assassination, or kidnapping." 18 U.S.C. § 2331(1)(B). The complaint does not, nor could it, plausibly allege that an objective observer would conclude that LBG—in engaging security subcontractors to protect workers at its USAID project sites—desired to "intimidate or coerce" a civilian population or government, or affect governmental conduct through "mass destruction, assassination, or kidnapping." That notion is

[24] As noted above, the complaint contains no well-pleaded allegations that LBG made direct payments to the Taliban. Although plaintiffs state in conclusory fashion that "the LBG/BV Defendants paid protection money to the Taliban in connection with . . . contracts," Compl. ¶ 192, plaintiffs do not support that allegation with any specific facts, and they make the exact same allegation with respect to all defendants in the case, without differentiating between them. *See id.* ¶¶ 131, 162, 179. Such allegations accordingly do not plead any direct link between LBG and the Taliban. *See Rothstein v. UBS AG*, 708 F.3d 82, 97 (2d Cir. 2013) (holding that similar "conclusory allegations … d[id] not meet *Twombly*'s plausibility standard"); *Toumazou v. Turkish Republic of N. Cyprus*, 71 F. Supp. 3d 7 (D.D.C. 2014).

absurd on its face, and the clear disconnect between that statutory requirement and LBG's conduct only further confirms that plaintiffs' primary-liability theory is entirely misplaced.

Far from alleging the required objective intent, the complaint ascribes an entirely different motivation to LBG: a desire to make and/or save money. The complaint repeatedly alleges that LBG and the other defendants retained certain security subcontractors because it was "the cheapest way to shield [its] projects from the risk of attack." Compl. ¶ 56. According to the complaint, "[i]t was cheaper to buy off the Taliban than it would have been to invest in the security necessary to mitigate the terrorists' threats." *Id.* ¶ 3; *see also id.* ¶¶ 14, 50, 56, 58–60. Of course, LBG denies that its contracting choices were driven by a desire to select the "cheapest" solution, as opposed to a good-faith effort to provide the best security for its workers as possible. But the key point for present purposes is that, according to ***plaintiffs' own allegations***, an objective observer would perceive LBG's alleged actions as being driven by commercial motives, not by a desire to intimidate a civilian population or change government policy through coercion.

Courts have consistently dismissed primary-liability claims where the conduct at issue allegedly was motivated by economic interests. *See, e.g.*, *Kemper*, 911 F.3d at 390 (finding no plausible allegations that Deutsche Bank's sanctions-evading business "appear[ed] intended" to further terrorist goals where Deutsche Bank allegedly pursued the business because it was "lucrative"); *Zapata v. HSBC Holdings PLC*, 414 F. Supp. 3d. 342, 358 (E.D.N.Y. 2019) (granting motion to dismiss ATA claim where "greed" was a "plausible alternative explanation for [defendant's] conduct"). This Court should follow suit. Even assuming the truth of the allegations in the complaint, an objective observer would conclude that LBG's actions "were motivated by economics, not by a desire to 'intimidate or coerce.'" *Kemper*, 911 F.3d at 390.

B. Plaintiffs' Allegations Do Not Satisfy The ATA's Rigorous Proximate Causation Requirement

Even if plaintiffs could show that LBG's retention of security subcontractors amounted to acts of "international terrorism," their complaint would still fail because it does not plausibly allege that such conduct proximately caused the many and differing attacks giving rise to plaintiffs' injuries. The ATA provides that plaintiffs must have been injured "by reason of" the defendant's conduct, 18 U.S.C. § 2333(a), a statutory requirement that courts have interpreted to impose both a "but-for" and a proximate causation requirement. *Owens v. BNP Paribas S.A.*, 235 F. Supp. 3d 85, 95–96 (D.D.C. 2017), *aff'd*, 897 F.3d 266 (D.C. Cir. 2018). Proximate causation is rigorous: "[t]o survive a motion to dismiss for failure to state a claim, Plaintiffs must … plausibly allege (1) that [the defendants'] acts were a substantial factor in the sequence of events that led to their injuries and (2) that [their] injuries [were] reasonably foreseeable or anticipated as a natural consequence of [the defendants'] conduct." *Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 273 (D.C. Cir. 2018) (internal quotations omitted). Courts repeatedly affirm dismissals or grant motions to dismiss in ATA cases when plaintiffs fail to plead facts showing how defendants caused their injuries. *See, e.g.*, *id.* at 273–76 (affirming dismissal); *see also Brill v. Chevron Corp.*, 2020 WL 1200695, at *1 (9th Cir. Mar. 12, 2020) (same); *Crosby v. Twitter, Inc.*, 921 F.3d 617, 623 (6th Cir. 2019) (same); *Kaplan v. Lebanese Canadian Bank, SAL*, 405 F. Supp. 3d 525, 532–33 (S.D.N.Y. 2019) (granting motion to dismiss); *Retana v. Twitter, Inc.*, 419 F. Supp. 3d 989, 995–97 (N.D. Tex. 2019) (same); *Adams v. Alcolac, Inc.*, 2019 WL 4774006, at *6 (S.D. Tex. Sept. 6, 2019) (same).

Plaintiffs here allege no substantial or foreseeable connection between LBG's conduct and any of the attacks that caused their injuries. For example, they do not plausibly allege that LBG made direct payments to terrorist organizations, provided any services to terrorist organizations,

or participated in any terrorist attacks. Instead, plaintiffs' allegations against LBG are centered around the subcontractors that LBG engaged. In plaintiffs' view, LBG worked with "unprofessional" security providers who lacked "apparent accountability" in order to secure its development projects at certain sites in Afghanistan. *Id.* ¶¶ 196–97. These allegedly unprofessional contractors in turn worked with unnamed "local warlords," who purportedly "fuel[ed] a Taliban-led insurgency." *Id.* ¶ 197. LBG purportedly began engaging these subcontractors by 2003, who in turn allegedly began making payments to unnamed warlords as "early as 2005," with the "fuel[ing]" of the insurgency occurring by 2006. *Id*. Plaintiffs claim that in this way LBG "proximately caused" a string of attacks that occurred throughout the entirety of Afghanistan from 2009 to 2017. *Id.* ¶ 1267.

Plaintiffs' causation theory is not plausible. Even if plaintiffs establish some attenuated, indirect thread connecting LBG, subcontractors, local warlords, and Taliban insurgents, that is not enough to plead that LBG ***proximately*** caused a decade-long series of attacks in various far-flung provinces of Afghanistan. Proximate causation operates to limit liability even where there might exist some lesser causal relationship—"[c]entral to the notion of proximate cause is the idea that a person is ***not*** liable to all those who may have been injured by his conduct." *Kaplan*, 405 F. Supp. 3d at 532–33 (emphasis added); *Rothstein*, 708 F.3d at 91 (same). Even showing that an injury might in some way may be "fairly traceable" to a defendant's conduct is not enough to establish proximate cause. *Rothstein*, 708 F.3d at 91–92. Rather, plaintiffs have the burden of pleading that LBG's acts were a "***substantial*** factor in the sequence of responsible causation," a burden which "requires sufficient ***directness***." *Owens*, 897 F.3d at 273 n.8 (emphases added); *Crosby*, 921 F.3d at 624 (same). Indeed, courts "routinely dismiss ATA claims when the plaintiffs fail to allege a direct link between the defendants and the individual perpetrator." *Id*. at 627 n.6 (collecting cases).

Given the attenuated chain of causation pled in plaintiffs' complaint, it cannot fairly be said that they have alleged any such "substantial connection" between LBG's conduct and their injuries in this case. That is true for several reasons.

First, plaintiffs' alleged chain of causation relies on numerous intervening acts and actors, each breaking the causal chain. Most obvious are the Taliban and insurgent groups themselves, which allegedly began plotting their campaign of violence almost immediately after the U.S. invasion, Compl. ¶ 41, and which remain potent enemies even today, *id.* ¶ 46. But apart from the Taliban, plaintiffs' allegations rely entirely on the conduct of the numerous third-party subcontractors alleged to have worked with LBG, including USPI, Watan, and ISS-Safenet. *Id.* at ¶¶ 164, 183, 195–203, 207–210. Each of these entities was a widely known, independent, third-party entity standing between LBG and the Taliban:

- USPI: Documents cited in the complaint show that this U.S. firm provided security not just for LBG, but also for numerous other legitimate entities operating in Afghanistan, including the World Bank, the Japan International Cooperation Agency, the United Nations, and "a range of private businesses, including local banks and hotels."[25] USAID even recommended USPI as a security subcontractor. *See* USAID-JV Contract, Attachment J-2 (discussed at Compl. ¶ 190b) (recommending that "implementing partners establish and maintain regular contact with organizations such as . . . USPI").[26]

- Watan: Plaintiffs plead that Watan was "one of the largest private-security companies in Afghanistan," which "worked for many of the largest Western contractors in Afghanistan. …" Compl. ¶ 62. Although plaintiffs allege that "the U.S. military debarred Watan from government contracting" in December 2010, *id.* ¶ 64, plaintiffs do not allege that LBG or the Joint Venture subcontracted with Watan after that point or that the alleged debarment related to the services provided to LBG.

- ISS-Safenet: Plaintiffs cite a "Letter of Commendation for ISS-Safenet," Compl. ¶ 208 n.273, for the proposition that ISS-Safenet "emphasized the criticality of good relations

[25] *The Cowboys of Kabul* (cited at Compl. ¶¶ 196 n.252, 197 n.257).

[26] Plaintiffs allege that after USAID debarred USPI in 2009, LBG hired USPI's re-branded company, Servcor, as a second-level contractor. Comp. ¶ 200. The complaint includes no allegations, however, that Servcor was involved in any protection payments to the Taliban.

> with the local communities"—a statement plaintiffs assert "was a euphemism for ISS-Safenet's payment of protection money to insurgents." *Id.* This assertion is not plausible in light of USAID policy requiring engagement and employment of local communities, *see* USAID-JV Contract, C.7.4; H.26 (cited in Compl.¶ 190), and is also a straight mischaracterization of the cited "Letter of Commendation." That letter in fact details numerous legitimate security services provided by ISS-Safenet, including 69,493 "Mobile [Security] Missions completed" and 156,333 "Clients Escorted." *See* June 25, 2012 Letter from R. Rademeyer, Country Security Manager for the LBG/BV JV (discussed at Compl. ¶ 208 n.273); *see also id.* ("[Y]our people literally bled for us . . . . The progress made on all the projects would not have been possible without you").

Moreover, even these subcontractors are not the last step in plaintiffs' causal chain. Instead of alleging that payments flowed directly from security subcontractors to insurgents, the complaint indicates that in many cases there were yet more intermediaries between LBG, the security subcontractor, and the insurgents. USPI, for example, made payments only to unidentified "local militia commanders" or Afghan "warlords," and is not alleged to have paid the Taliban directly. Compl. ¶ 197. ISS-Safenet likewise made alleged payments to a "Mr. Arafat," who the complaint describes as a "conduit" for alleged payments to the Haqqani Network. *Id.* at ¶¶ 208–210.

Plaintiffs cannot show proximate causation in light of these many intermediaries. The D.C. Circuit's decision in *Owens* is instructive in this regard. In *Owens*, plaintiffs sued a bank, "alleging the bank provided financial assistance to Sudan, which in turn funded and otherwise supported al Qaeda's attack[s]." 897 F.3d at 269. The D.C. Circuit explained that, "when a defendant is more than one step removed from a terrorist act or organization, plaintiffs suing under the ATA must allege some facts demonstrating a substantial connection between the defendant and terrorism." *Id.* at 275. This is because the presence of an intermediary "create[s] a more attenuated chain of causation." *Id.* Moreover, "when an intermediary is a sovereign state with many legitimate . . . operations, and programs to fund, the need for additional allegations supporting substantiality is all the more acute." *Id.* at 276 (quotations omitted). This is true even if the intermediary "is a state sponsor of terrorism." *Id.* The court therefore held that, "in order to satisfy proximate

causation under the ATA, Plaintiffs' complaint needs to adequately plead facts alleging that [defendant bank] *substantially* contributed to Plaintiffs' injuries because the funds to Sudan actually [were] transferred to al Qaeda . . . and aided in the embassy bombings." *Id.* (emphasis in original). Because the plaintiff made only "conclusory allegations" that the funds were actually transferred or "necessary for al Qaeda to carry out the embassy bombings," the D.C. Circuit affirmed the district court's order dismissing the plaintiffs' complaint. *Id.*

The same result should apply here. As in *Owens*, LBG is "more than one step removed from a terrorist act or organization," and is alleged to have worked only with several "independent intermediar[ies]," all of whom had at least some "legitimate . . . operations" to fund. *Owens*, 897 F.3d at 275. Indeed, plaintiffs' claims against LBG pertain to widely-used, third-party subcontractors who maintained many legitimate operations and large client bases, and who even then were often only one link in a much longer causal chain between LBG and terrorist actors. That causal theory is far too attenuated to support an ATA claim. Lacking further facts showing a substantial connection between LBG and terrorism, plaintiffs' claims should be dismissed. *Id.*; *see also O'Sullivan v. Deutsche Bank AG*, 2019 WL 1409446, at *8 (S.D.N.Y. Mar. 28, 2019) (granting motion to dismiss where "the factual allegations delineating relationships between those services and the terrorist attacks at issue are so attenuated").

Second, plaintiffs provide no plausible allegations explaining the amount of monetary support allegedly provided through LBG's subcontractors. Instead, plaintiffs only generally allege that "one of the major sources of funding for the Taliban is the protection money," and that extortion of funds was at some point "the insurgents' second-largest funding source." Compl. ¶¶ 11, 90. But they fail to explain how much of that protection money derived from LBG, or whether any of LBG's funds were used to commit any of the attacks at issue. To the contrary,

plaintiffs instead make clear that the attacks may well have been financed via ***other*** funding streams, such as from protection payments paid by other contractors or even, according to plaintiffs' cited materials, domestic and Pakistani businesses.[27] Plaintiffs also plead that the Taliban derived even more money from "the illegal drug trade" or "drug trafficking," which plaintiffs concede was the Taliban's single largest source of funding. Compl. ¶¶ 90, 107.

That again is fatal to plaintiffs' proximate cause arguments. ATA claimants alleging that a defendant provided illicit funds must, at minimum, plausibly allege that the terrorists "would have been unable to fund the attacks . . . without the cash provided by [the Defendant]." *Rothstein*, 708 F.3d at 97. Plaintiffs make no such plausible allegation here, a failing which underscores why the complaint does not plausibly allege proximate cause and should be dismissed. *See, e.g.*, *Kaplan*, 405 F. Supp. 3d at 533 (granting motion to dismiss where, *inter alia*, plaintiff did not show that "Hizbollah would not have been able to carry out the attacks absent those specific funds"); *Owens*, 235 F. Supp. 3d at 99 (same where plaintiff did not plead that "Sudan would have been unable to assist Al Qaeda without the that funds BNPP processed").

Indeed, insurgents' separate funding streams mean that plaintiffs fail to allege even but-for (much less proximate) causation. The ATA requires that an injury be caused "by reason of" the defendants' activity. 18 U.S.C. § 2333(a). That statutory phrase ordinarily "requires at least a showing of 'but for' causation," *Burrage v. United States*, 571 U.S. 204, 213 (2014), at the same time as it often requires "proximate cause as well." *Owens*, 235 F. Supp. 3d at 96. Here, plaintiffs can show neither proximate nor but-for causation, where no facts suggest that terrorists would have been unable to fund their injuries without money somehow traceable to LBG.

[27] Gretchen Peters, *Haqqani Network Financing: The Evolution of an Industry*, The Combating Terrorism Center at West Point (July 2012) at 40–41 (cited at Compl. ¶ 91 n.94).

Third, plaintiffs also fail to allege proximate causation for geographic and temporal reasons, given that in most cases their injuries occurred hundreds of miles away from projects undertaken by LBG and many months or years after the alleged payments were made. Most of plaintiffs' allegations regarding LBG pertain to 2010 and earlier: For example, plaintiffs allege that USAID awarded contracts to LBG from 2002 to 2010, that LBG made payments to unreliable subcontractors "[a]s early as 2005," and that LBG used USPI's services "[a]s late as November 2008." Compl. ¶¶ 190, 197, 200. Yet plaintiffs ground their ATA claims in attacks that occurred over a different eight-year period, running from December 2009 to as late as 2017. *Id.* ¶¶ 17, 306. Plaintiffs also do not limit their claims to attacks that occurred near LBG projects, but instead purport to hold LBG liable for attacks occurring anywhere and everywhere in the country, including the Badghis, Baghlan, Ghazni, Faryab, Helmand, Kandahar, Kabul, Khost, Laghman, Logar, Nangarhar, Paktia, Uruzgan, Wardak, Parwan, and Zabul provinces. *Id.* ¶¶ 344–1261. Some of these provinces are large in size and stretch across vast deserts and mountain ranges. For example, Paktia province alone is the size of Delaware, and almost 400 miles separate the cities of Kandahar in the south and Kunduz in the north.[28] Plaintiffs nonetheless seek to hold LBG liable for attacks that occurred across the entirety of Afghanistan, rather than trying to limit their claims to attacks that occurred in close proximity to LBG projects.

The significant time and distance between LBG's alleged conduct and the attacks that injured plaintiffs underscores the fatally attenuated nature of plaintiffs' causal allegations. Plaintiffs bear the burden of establishing the direct causal link. *See Owens*, 897 F.3d at 273. Plaintiffs have failed to meet that burden. It is simply not plausible for plaintiffs to allege, as they do, that payments allegedly made by LBG subcontractors in, say, 2005 in Kandahar province could

[28] *See* 160 Cong. Rec. S387 (daily ed. Jan. 9, 2014) (statement of Senator Leahy).

have ***proximately caused*** a Taliban attack that occurred in Faryab province, more than 300 miles away and seven years later in 2012.[29] A similar statement could be made about nearly every attack alleged in the complaint, and that confirms the fatal causation deficiencies with plaintiffs' theory: the temporal and geographic connection between the subcontractor's alleged payments and the disparate attacks identified in the complaint are simply too attenuated to support plaintiffs' ATA claim. *See, e.g.*, *Siegel v. HSBC N. Am. Holdings, Inc.*, 933 F.3d 217, 225 (2d Cir. 2019) (affirming dismissal where, *inter alia*, bank ended business "ten months before the [ ] Attacks"); *Adams*, 2019 WL 4774006, at *6 (same) (granting motion to dismiss where "years long" causal chain was "insufficient to demonstrate proximate cause").

Indeed, accepting plaintiffs' theory here seemingly would justify liability for literally any Taliban victim anywhere at any time in Afghanistan—a sweeping view that cannot be squared with the law of proximate causation, the limiting language of the ATA, or even with the allegations of plaintiffs' own complaint, which repeatedly alleges that "Defendants . . . paid protection money to *local* Taliban commanders," Compl. ¶¶ 78, 86, 97 (emphasis added), and likewise emphasizes "tribal connections" and family structures—things that are inherently local in nature. *Id.* ¶¶ 289–291; *see also id.* ¶ 180 ("In the scope of Afghanistan, there's a lot of tribal lines, commander lines"). Perhaps recognizing the extraordinary breadth of their theory, plaintiffs attempt to equate money in one part of Afghanistan to money in another, alleging that "money flowed both ways—from local commanders up to . . . the Taliban's central leadership, and conversely from the leadership back down to local commanders for use in the field." *Id.* ¶ 86. But such many-layered "flows" only underscore the extraordinary number of steps needed to connect a protection payment

[29] *Compare* Compl. ¶¶ 195–197 (discussing REFS 03-02-GG451-RD-0010 Kandahar-to-Kabul highway contract) *with* Compl. ¶ 1104 (attack in Faryab Province in April, 2012).

supposedly made by a security contractor and an attack that occurred years later in an entirely different part of the country. Simply put, accepting plaintiffs' theory would make the ATA's well-recognized proximate cause requirement a nullity.

C. The Complaint Does Not Establish That LBG Acted With The Knowledge Required To Violate The Predicate Offenses

Plaintiffs also fail to plead the scienter necessary to sustain a primary-liability claim under the ATA. To plead an ATA violation, plaintiffs needed to plausibly allege that LBG committed an act that constitutes "a violation of the criminal laws of the United States or of any State." 18 U.S.C. § 2331(1). Plaintiffs allege, in Counts 1–4, that LBG violated four federal statutes: 18 U.S.C. § 2339A, 18 U.S.C. § 2339B, 18 U.S.C. § 2339C, and 50 U.S.C. § 1705. Each of those statutes, however, requires plaintiffs to establish that LBG at the very least ***knew*** that its security subcontractors were making protection payments to the Taliban, and that is where plaintiffs' allegations fall short. *See* 18 U.S.C. §§ 2339A ("knowing or intending"); 2339B ("knowingly"); 2339C ("willfully . . . . with the intention that such funds be used, or with the knowledge that such funds are to be used"); 50 U.S.C. § 1705(c) ("willfully"); *see also*; *Fields v. Twitter, Inc.*, 881 F.3d 739, 743 (9th Cir. 2018) (requiring knowledge under §§ 2339A and 2339B); *Hussein v. Dahabshiil Transfer Servs. Ltd.*, 705 F. App'x 40, 41 (2d Cir. 2017) ("Each of the ATA material support provisions requires that a defendant act with a specified degree of scienter, ranging from 'knowingly' to the arguably higher standard of 'unlawfully and willfully.'"); *United States v. Mousavi*, 604 F.3d 1084, 1094 (9th Cir. 2010) (requiring plaintiffs to allege that defendants knew their conduct was unlawful under § 1705).

To satisfy the predicate statutes, it is not enough to allege that LBG was recklessly indifferent to the possibility that its subcontractors may have been paying terrorist organizations. The federal criminal statutes at issue do not define "knowingly" or "willfully" to include lesser

state-of-mind requirements such as deliberate indifference or recklessness. And it is well-established that where "knowingly" is not otherwise defined in a criminal statute, actual knowledge is required. *See Bryan v. United States*, 524 U.S. 184, 193 (1998) ("Unless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense.") (footnote omitted); *see also Backpage.com, LLC v. Lynch*, 216 F. Supp. 3d 96, 109 (D.D.C. 2016) (finding that "reckless disregard" is not sufficient to establish a "knowing" state-of-mind requirement in a federal criminal statute); *Brill v. Chevron Corp.*, 2018 WL 3861659, at *3 (N.D. Cal. Aug. 14, 2018) (holding that "knowingly" in the ATA's secondary-liability provision means more than recklessness).

Here, plaintiffs' primary-liability claims fail because they have not plausibly alleged that LBG ***knew*** that its subcontractors would make, or were making, payments to the Taliban, Haqqani Network, or any other terrorist organization. Plaintiffs principally rely on allegations referring to "Defendants" generally, but which do not specifically mention LBG, *see* Compl. ¶¶ 95–110, news media reports that are not specific to LBG, *see, e.g.*, *id.* ¶¶ 105–107, and unverified claims of custom and practice among Afghanistan contractors, *see, e.g.*, *id.* ¶¶ 98–99, 205. Those types of generalized, one-size-fits-all assertions do nothing to establish that LBG specifically had knowledge that its own security subcontractors were making protection payments, and they cannot substitute for well-pleaded allegations pertaining to LBG's state of mind. The defendants in this case each were involved in different projects, in different industries, in different parts of the country, at different times. Generalized allegations pertaining to all of them collectively do not suffice to show the requisite state of mind for any one of them. *See Toumazou v. Turkish Republic of N. Cyprus*, 71 F. Supp. 3d 7, 21 (D.D.C. 2014) ("Generally, a plaintiff cannot satisfy the minimum pleading requirements . . . by lumping all the defendants together in each claim and

providing no factual basis to distinguish their conduct." (quotations omitted)); *Martin v. N.Y.C.*, 2008 WL 1826483, at *1 (S.D.N.Y. Apr. 23, 2008) ("a complaint against multiple defendants [must] 'indicate clearly the defendants against whom relief is sought and the basis upon which the relief is sought against the particular defendants'").

The few paragraphs in the complaint that do try to allege facts specific to LBG are no more helpful to plaintiffs. For example, plaintiffs allege in paragraph 202 that "LBG's subcontractors regularly informed LBG at in-person meetings" that the Taliban was "demanding money as the price of allowing projects to move forward" and that LBG purportedly "conveyed to its subcontractors that they should pay the money if necessary." Compl. ¶ 202. But those unfounded allegations clearly fail federal pleading requirements. Plaintiffs never identify any specific facts regarding these supposed "in-person meetings," including where and when these meetings allegedly occurred, how frequently they occurred, who from LBG was present, which of LBG's many projects were being discussed, which exact "subcontractors" were involved, or the amount of the payments that were being "demand[ed]" by the Taliban. The allegations in paragraph 202 are thus a clear example of the type of "naked assertion[s] devoid of further factual enhancement" that cannot satisfy federal pleading standards. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation marks omitted).

The complaint also alleges that an "LBG official" described the "Watan-sourced anti-Coalition fighters whom LBG agreed to pay" as a "catch 22," noting that if "you don't pay them off, they kill your security staff and your contractors." Compl. ¶ 195. The source of this quote is a July 27, 2009 Mother Jones article, which quotes an unidentified "former Berger official" who was describing the deployment of "Afghan guards." *Id.* ¶ 195 n.252. Contrary to the complaint's allegation, however, the anonymous official quoted in the article made no mention of Watan, anti-

Coalition fighters, or LBG making any payments to the Taliban, the Haqqani Network, or any other terrorist organization. Instead, the anonymous official spoke generally about security subcontractors like USPI having to "pay off the warlord or whoever controlled that region."[30] Such vague statements about unidentified "warlord[s]" do not show actual knowledge by LBG that its subcontractors were making payments to the Taliban, nor do such statements establish that the warlords in question ***were*** Taliban. To the contrary, many Afghan warlords, who commanded private militias, "had been fighting the Taliban for years."[31] Thus, at the outset of Operation Enduring Freedom, the United States military formed alliances with warlords and "worked closely with the militias to kill and drive out al-Qaeda and the Taliban." *Id*.

Plaintiffs similarly misstate the source material when they allege falsely that an LBG official "effectively admitted" to paying the Taliban. Compl. ¶ 203. To support that allegation, plaintiffs cite a September 27, 2009 news article from the Sydney Morning Herald, which quotes an LBG employee, Steve Yahn, who worked on the Kabul-Kandahar road project. *Id*. ¶ 203 n.262. In the article, Mr. Yahn discussed the need to "play[ ] by the Taliban rules"—for example, rules insisting on "maximum local employment and, among other things, that all road-construction vehicles fly the white flag of the Taliban."[32] Nowhere in the cited article does Mr. Yahn "admit,"

[30] *The Cowboys of Kabul* at 3.

[31] *See* SIGAR: *Corruption in Conflict, Lessons from the U.S. Experience in Afghanistan*, SIGAR-16-58-LL (Sept. 14, 2016) at 16, *available at* https://www.sigar.mil/pdf/lessonslearned/SIGAR-16-58-LL.pdf. The SIGAR report, which appears on the official government website https://www.sigar.mil/, is judicially noticeable. *See Cannon*, 717 F.3d at 205 n.2.

[32] *See* Paul McGeough & David Brill, *Insurgents Play A Perilous Mountain Game*, Sydney Morning Herald (Sept. 27, 2009) ("*Insurgents Play A Perilous Mountain Game*") at 2, *available at* https://www.smh.com.au/world/insurgents-play-a-perilous-mountain-game-20090926-g73f.html.

as plaintiffs' contend, or even suggest, that LBG either directly paid the Taliban or knowingly funneled protection payments to the Taliban through its security subcontractors.

There are similar problems with plaintiffs' allegations pertaining to LBG's work, through the Joint Venture, on the Gardez-Khost Highway. Plaintiffs allege that, to obtain security for that project, the Joint Venture routed protection payments to the Haqqani Network through an alleged "Haqqani cutout known as 'Mr. Arafat.'" Compl. ¶ 207. The complaint cites a May 2011 New York Times article reporting that Mr. Arafat's "insurgent connections appear to have been known to virtually everyone." *Id.* ¶ 207 n.269. But this same article also states that USAID investigated Mr. Arafat in 2009—during the period of LBG's alleged conduct—and concluded that there was "insufficient evidence" linking Mr. Arafat to insurgents. Indeed, according to the complaint, Mr. Arafat was not disqualified as a contractor until 2011, *id.* ¶ 209, and plaintiffs never allege that LBG made payments to him after his disqualification.

In short, the complaint's generalized allegations pertaining to all defendants as a group cannot stand-in for specific allegations about LBG's actual knowledge. And the handful of allegations that do try to attribute culpable knowledge to LBG cannot withstand even passing scrutiny. Plaintiffs have therefore failed to plausibly allege that LBG had actual knowledge that any of its subcontractors were making protection payments, and have therefore failed to plausibly allege a violation of any of the predicate criminal statutes, requiring dismissal of Counts 1–4.

D. Count 2 Must Be Dismissed For The Additional Reason That LBG Is Not Alleged To Have Provided Resources To A Foreign Terrorist Organization

In addition to the deficiencies described above, there is a more fundamental problem with Count 2 of the complaint. Count 2 alleges a violation of 18 U.S.C. § 2339B, which makes it unlawful to "knowingly provide[ ] material support or resources to a foreign terrorist organization." A "foreign terrorist organization" is one of a discrete list of entities that are

specifically designated as such by the Secretary of State. *See* 8 U.S.C. § 1189(a); *see Nat'l Council of Resistance of Iran v. Dep't of State*, 373 F.3d 152, 154 (D.C. Cir. 2004) (explaining that the "FTO designation visits serious consequences on the affected organization," including by exposing "anyone who knowingly provides 'material support or resources' to the FTO" to criminal penalties under § 2339B). If an organization has not been designated as an FTO by the Secretary of State, providing it with material support does not violate § 2339B.

The fundamental problem with Count 2 is that the entities LBG's subcontractors are alleged to have supported are not designated FTOs, or at least were not designated FTOs at the time plaintiffs allege LBG's subcontractors made protection payments. Plaintiffs allege that certain LBG subcontractors were making payments to the Taliban and the Haqqani Network. *See* Compl. ¶¶ 196, 206. Some plaintiffs also allege that they were injured in attacks by the Kabul Attack Network, though the complaint does not allege that LBG's subcontractors ever made payments to the Kabul Attack Network. Critically, however, the ***Taliban and Kabul Attack Network are not—and never have been—designated FTOs***. Thus, the 98 plaintiffs who allege that they were injured in attacks by the Taliban, and the 10 plaintiffs who allege that they were injured in attacks by the Kabul Attack Network, clearly cannot state a claim against LBG under Count 2.

Those plaintiffs with claims based on attacks by the Haqqani Network fare no better. Although the Haqqani Network ***now*** is a designated FTO, it was not designated as an FTO until September 19, 2012,[33] and plaintiffs make no plausible allegation that LBG paid or materially supported the Haqqani Network ***after*** September 2012. To the contrary, plaintiffs' own allegations undercut that theory because every LBG project to which plaintiffs refer concluded prior to

[33] U.S. Dep't of State, Bureau of Counterterrorism, *Foreign Terrorist Organizations*, *available at* https://www.state.gov/foreign-terrorist-organizations/ (last visited Apr. 25, 2020).

September 2012.[34] For example, plaintiffs allege that "USAID terminated LBG's work on the Kajaki Dam" in December 2010, Compl. ¶ 190, and that LBG performed work on the Gardez-Khost Highway only up to "March 2012." *Id*. ¶ 206. Plaintiffs also concede that the alleged "Haqqani cutout," Mr. Arafat, was disqualified as a contractor in 2011, *id*. ¶¶ 207, 209—nearly 18 months prior to the Haqqani Network's FTO designation—and do not allege that LBG interacted with Mr. Arafat ***after*** this time. Having failed to allege that LBG or its subcontractors directed any payments to the Haqqani Network after that group's designation as an FTO in September 2012, plaintiffs have necessarily failed to allege a critical element of their claim and Count 2 must be dismissed.[35]

II. THE COURT SHOULD DISMISS THE SECONDARY-LIABILITY CLAIMS (COUNTS 5–6)

Plaintiffs' claims for "[a]iding-and-[a]betting" (Counts 5 and 6) also fail on the pleadings, for several reasons. The ATA permits secondary liability only when (1) a defendant aids or abets acts "committed, planned, or authorized" by "an organization that had been designated as a foreign terrorist organization"; (2) the aid or assistance is "substantial"; and (3) that substantial assistance was given "knowingly." 18 U.S.C. § 2333(d)(2). Plaintiffs fail to allege each of these three requirements as to LBG. Additionally, Count 6, which is based on a purported "RICO predicate," Compl. ¶¶ 1298–1307, fails because plaintiffs cannot use RICO to plead around the deficiencies

[34] *See* USAID, *REFS – Roads*, Sept. 2002–June 2007, *available at* https://www.usaid.gov/node/51671; USAID, *REFS – Power*, Sept. 2002–June 2007, *available at* https://www.usaid.gov/node/51666; USAID, *AIRP – Quick Response General Services*, Aug. 2006–Dec. 2011, *available at* https://www.usaid.gov/node/51431.

[35] To the extent plaintiffs ground Count 2 in alleged payments to al Qaeda, which has been designated as an FTO since 1999, that argument fails for reasons stated below in connection with plaintiffs' secondary-liability claims. Most fundamentally, the complaint includes no plausible allegation that LBG or its subcontractors made any payments to al Qaeda.

in their aiding-and-abetting liability theory. Both of plaintiffs' aiding-and-abetting counts should therefore be dismissed.

A. Plaintiffs Have Not Satisfied Section 2333(d)'s Requirement That An FTO "Committed, Planned, or Authorized" The Attacks That Injured Them

Until recently, the ATA was "silent as to the permissibility of aiding and abetting liability," and courts had therefore concluded that such liability was not permissible under the statute. *Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 278 (D.C. Cir. 2018). That changed in 2016, when Congress amended the ATA to recognize a limited cause of action for aiding and abetting terrorist acts. *See id.* at 277 (discussing the Justice Against Sponsors of Terrorism Act, or "JASTA"). Most significantly, Congress required plaintiffs to establish that their injuries arose 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." 18 U.S.C. § 2333(d)(2) (emphasis added). In other words: an aiding-and-abetting cause of action is not available for all terrorist acts. It is available only for those terrorist acts committed, planned, or authorized by an organization already designated as an FTO by the Secretary of State.

This requirement poses a fundamental problem for plaintiffs' secondary-liability claims. Plaintiffs allege that their injuries arose from attacks committed by the Taliban, the Haqqani Network, the Kabul Attack Network, and in one instance, al Qaeda. Compl. ¶¶ 343, 1295; *see also* ¶¶ 472–473 (alleging single al Qaeda attack on December 30, 2009). But as discussed in Part I.D., *supra*, neither the Taliban (allegedly responsible for attacks on 98 plaintiffs), nor the Kabul Attack Network (allegedly responsible for attacks on 10 plaintiffs), has ever been designated by the Secretary of State as an FTO. And although the Haqqani Network (allegedly responsible for attacks on 32 plaintiffs) ***has*** been designated as an FTO, that designation occurred only in

September 2012, *id.* ¶ 288—after 24 of those 32 attacks had already been committed. As a matter of law, 132 plaintiffs' claims accordingly fail under just this first pleading requirement. Only the remaining eight plaintiffs alleged to have been killed or injured in an attack committed by the Haqqani Network after September 2012, as well as those three alleged to have been injured in an attack committed by al Qaeda, *id.* § 2333(d), pass this first step—and even those 11 plaintiffs' claims fail for the other reasons given in this section.

Aware of this flaw in their complaint, plaintiffs transparently try to plead around it by attempting to tie the Taliban to al Qaeda. Unlike the Taliban, the Secretary of State has in fact designated al Qaeda as an FTO. Compl. ¶ 16. Leveraging that designation, plaintiffs try to allege that "Al-Qaeda jointly committed, planned, or authorized each of the Taliban attacks that killed or injured plaintiffs or their family members." *Id*. ¶ 312. That effort fails. Apart from a single attack injuring three plaintiffs, *see id.* ¶ 338 (describing a "December 30, 2009 attack on Camp Chapman"), there are no allegations explaining how exactly al Qaeda involved itself in the particular attacks perpetrated by the Taliban in this case. Moreover, simply invoking the name of a separate FTO is not enough to plead around the statute's limitations, for several reasons.

To begin, al Qaeda is separate and distinct from the Taliban. The best evidence of that is the fact that the U.S. Government treats them separately: the Secretary of State has designated al Qaeda as an FTO, but has not so designated the Taliban. The United States has reached an "Agreement for Bringing Peace to Afghanistan" with the Taliban, but not with al Qaeda.[36] And although plaintiffs claim that the Taliban and al Qaeda had a "close relationship," were "allie[s]," or at times had "blurred" lines, Compl. ¶¶ 16, 46, 273, plaintiffs do not show that these

[36] U.S. Dep't of State, "Agreement for Bringing Peace to Afghanistan," (Feb. 29, 2020), *available at* https://www.state.gov/wp-content/uploads/2020/02/Agreement-For-Bringing-Peace-to-Afghanistan- 02.29.20.pdf.

organizations lost their distinct identities. Nor could they: the Taliban is an organization concerned with reasserting its "shadow government" over Afghan territory, and refers to itself as "the Islamic Emirate of Afghanistan." *Id*. ¶¶ 78, 98 (quotations and brackets omitted). Al Qaeda, by contrast, is an international "Sunni Islamic terrorist organization intent on destroying the United States." *Id.* ¶ 312.

Moreover, with the one exception noted above, plaintiffs do not plausibly allege facts showing that al Qaeda "committed, planned, or authorized" any of the specific attacks identified in the Complaint. 18 U.S.C. § 2333(d)(2).

Committed: Plaintiffs do not plausibly allege that al Qaeda "committed" each of the attacks identified in the complaint. Rather, in describing the specific attacks at issue, the complaint identifies al Qaeda as participating in only one attack, *see* Compl. ¶ 473 (alleged Dec. 30, 2009 Camp Chapman Attack)—and even with respect to that single attack, plaintiffs do not plausibly allege that, or explain how, LBG's contracting payments aided and abetted either the attack or al Qaeda. For all of the other attacks identified in the complaint, plaintiffs rely only on generalized allegations unconnected to the specific attacks at issue in this case, *e.g.*, allegations of al Qaeda's general "support" of or "close ties" with the Taliban. *Id.* ¶¶ 314, 341. But such allegations fail to actually connect al Qaeda to any of the specific attacks at issue, much less show that those attacks were committed by what plaintiffs term a "dual-hatted" terrorist. *Id.* ¶ 341. Plaintiffs' generic allegations of a relationship between al Qaeda and the Taliban thus are not enough to support an inference that al Qaeda also jointly committed the hundreds of attacks at issue here. *See Crosby v. Twitter, Inc.*, 921 F.3d 617, 626 (6th Cir. 2019) (affirming dismissal, where "[p]laintiffs make no allegations that ISIS played this role with [the shooter]").

Authorized: Plaintiffs also allege that al Qaeda provided "critical religious authorization" for suicide attacks in Afghanistan and Iraq, citing Osama bin Laden's 2003 open "encouragement" of suicide attacks against Americans. Compl. ¶¶ 324–325. But such general, high-level "encouragement" does not constitute the type of real-world "authorization" necessary to give rise to a secondary-liability claim. *See, e.g.*, *Crosby*, 921 F.3d at 620, 626 (rejecting argument that ISIS authorized attack, where although ISIS encouraged followers to "kill Americans wherever you are," ISIS did not "give official permission for" the attack); *Copeland v. Twitter, Inc.*, 352 F. Supp. 3d 965, 974–75 (N.D. Cal. 2018) (granting motion to dismiss, where "facts that ISIS sought to 'generally radicalize' individuals and promoted terrorists attacks similar to the one [at issue] are insufficient"). For example, the complaint does not (and could not plausibly) allege that the attacks would not have occurred but for al Qaeda's alleged "authorization" or that al Qaeda gave "official permission" for the attacks to go forward. *Crosby*, 921 F.3d at 626. Moreover, plaintiffs' broad view of "authorize"—which encompasses general ideological "encouragement" from other extremists—has no limiting principle, and would presumably extend to any and all attacks perpetrated by Islamic terrorist organizations anywhere in the world.

Plaintiffs' general allegations that the Taliban and al Qaeda "colluded" at unidentified points in time also do not show that al Qaeda "authorized" each of the specific attacks at issue. Plaintiffs allege that al Qaeda and the Taliban were members of an "al Qaeda-Taliban syndicate" that "involved periodic mafia-style meetings" during which members would "confer about geographies and targets to attack." Compl. ¶ 326. But plaintiffs allege no facts showing that the "syndicate" authorized the attacks in question. Plaintiffs instead offer only a vague, conclusory allegation that the syndicate "jointly authorized particular types of terrorist attacks in particular

geographies," *id.*—and beyond that, do not allege that any of the attacks at issue were actually among those particular types or located in those particular geographies.

Planned: Finally, plaintiffs do not plausibly allege that al Qaeda "planned" the attacks identified in the complaint. To "plan" means to "design" or "decide on and arrange in advance."[37] Plaintiffs' weightiest allegations on this score concern training conducted in "the mid-2000s" and "[b]y 2005 at the latest," Compl. ¶¶ 280, 330—years before the attacks identified in the complaint. Otherwise, plaintiffs plead only that al Qaeda "planned" the Taliban's terrorist attacks by generally "encouraging" and "financing" the Taliban. Compl. ¶ 332. Such general allegations of al Qaeda's support for the Taliban fail to show that al Qaeda "designed" or "arranged in advance" any specific attack. *See Crosby v. Twitter, Inc.*, 303 F. Supp. 3d 564, 579 (E.D. Mich. 2018) (granting motion to dismiss, where "nothing in the amended complaint even alludes to any contacts or communications between anyone—let alone between ISIS and Mateen—that directly concerned the attack beforehand"); *Crosby*, 921 F.3d at 621 (affirming same, where ISIS did not guide perpetrator through attack, or "ha[ve] anything at all directly to do" with it).

B. Plaintiffs Do Not Allege That LBG "Substantially" Assisted The Taliban Or Any FTO In Carrying Out The Attacks Identified In The Complaint

Plaintiffs also fail to plausibly allege that LBG gave "substantial assistance" to "the person who committed such an act of international terrorism." 18 U.S.C. § 2333(d)(2). Courts have recognized that "substantial assistance" requires more than simply providing fungible dollars to a terrorist organization. As the Second Circuit has explained, "aiding and abetting an act of international terrorism requires more than the provision of material support to a designated terrorist *organization*." *Linde v. Arab Bank, PLC*, 882 F.3d 314, 329–30 (2d Cir. 2018) (emphasis in

[37] Oxford English Dictionary, "Plan," (3d ed. 2010).

original); *Averbach v. Cairo Amman Bank*, 2020 WL 486860, at *13 (S.D.N.Y. Jan. 21, 2020) (same); *Taamneh*, 343 F. Supp. 3d at 917 (same). Rather, to be secondarily liable under the ATA, a defendant must have actually "assum[ed] a 'role' in the terrorist activities" themselves. *Linde*, 882 F.3d at 329-30. Plaintiffs cannot meet that standard from the outset, since all of their allegations are grounded in alleged protection payments made by LBG subcontractors, and they never allege (nor could they plausibly allege) that LBG did anything to assume a "role" in the attacks identified in the complaint.

To determine whether assistance is "substantial," courts consider a six-factor test outlined in *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983), which Congress specifically referenced when it amended the statute to create an aiding-and-abetting cause of action. *See Linde*, 882 F.3d at 329 (citing 18 U.S.C. § 2333 Statutory Note). Those six factors are: "(1) the nature of the act encouraged, (2) the amount of assistance given by defendant, (3) defendant's presence or absence at the time of the tort, (4) defendant's relation to the principal, (5) defendant's state of mind, and (6) the period of defendant's assistance." *Id.* (citing *Halberstam*, 705 F.2d at 483–84); *see also Kaplan v. Lebanese Canadian Bank. SAL*, 405 F. Supp. 3d 525, 536 (S.D.N.Y. 2019) (granting motion to dismiss). Courts affirming or granting motions to dismiss have often justified those decisions by noting that only one or a few of these factors were lacking. *See, e.g.*, *Crosby*, 921 F.3d at 626 (affirming dismissal where relation to principal was not direct); *Brill v. Chevron Corp.*, 2018 WL 3861659, at *1 (N.D. Cal. Aug. 14, 2018) (focusing on first and fourth factors); *Taamneh v. Twitter*, 343 F. Supp. 3d 904, 917 (N.D. Cal. 2018). Here, plaintiffs fail to sufficiently allege facts showing that ***any*** of the factors are met.

***Nature of the Act Encouraged*:** Plaintiffs do not plausibly allege that LBG "encouraged" the Taliban or the Haqqani Network to attack U.S. military personnel. Nor could they, as any such

allegation would be outlandish on its face. LBG for years acted as an important partner in implementing United States foreign policy objectives in Afghanistan, and routinely worked cooperatively with U.S. military personnel. There is simply no basis at all for the absurd assertion that LBG wished to "encourage" terrorist attacks against plaintiffs or anyone else. *See, e.g.*, *Brill*, 2020 WL 1200695, at *1 (affirming dismissal, where "there [wa]s no allegation that Chevron encouraged the acts"); *Crosby*, 303 F. Supp. 3d at 574 (granting motion to dismiss, where plaintiff alleged "no facts that suggest that the defendants 'encouraged' [the terrorist] to commit his crimes"); *Copeland*, 352 F. Supp. 3d at 976 (same where "there is no evidence that defendants encouraged terrorist attacks" or "had advance knowledge of any attacks").

Amount of Assistance Given: Plaintiffs fail to plausibly allege what "amount" of assistance reached the Taliban, much less how any such amounts related to any of the attacks at issue.[38] Plaintiffs also do not plausibly plead that funding allegedly trickling down from LBG's subcontractors was necessary or even important to the relevant attacks, especially where the complaint identifies drug dealing and other alleged extortion victims as equal or greater sources of insurgent funding. *See* Part I.B, *supra*. This factor accordingly favors dismissal as well. *C.f. Copeland*, 352 F. Supp. 3d at 976 (holding that to be substantial, "the defendant should play a major part in prompting the tort or be integral to the tort") (quotation omitted).[39]

[38] Plaintiffs allege that "companies commonly paid protection money to the Taliban in amounts worth between 20 and 40 percent of the value of the project," Compl. ¶¶ 4, 80, 192, but plead no factual basis for extending that allegation to LBG.

[39] Plaintiffs' allegations on this score are also undermined by their repeated attempts to plead al Qaeda's involvement in the attacks at issue. Plaintiffs theorize that funds from LBG somehow ended up funding terrorist activities. Yet in maneuvering to satisfy the FTO requirement for aiding-and-abetting liability, plaintiffs also plead that al Qaeda was already "provid[ing] the Taliban with the financing needed to carry out those attacks." Compl. ¶ 332. This allegation underscores the paucity of allegations supporting proximate cause or substantially connecting LBG to designated foreign terrorist activity.

Absence: Plaintiffs do not allege (nor could they) that LBG or any of its employees were "present" at any of the attacks identified in the complaint. This factor thus also weighs against plaintiffs. *See Crosby*, 303 F. Supp. 3d at 574 (affirming dismissal where "no one suggests that any of the defendants' representatives were present at the scene" of a terrorist attack).

No Direct Relationship To The Principal: "Courts now routinely dismiss ATA claims when the plaintiffs fail to allege a direct link between the defendants and the individual perpetrator." *Crosby*, 921 F.3d at 627 n.6 (collecting cases). That is the case here. As explained, plaintiffs do not plausibly allege that LBG had any ***direct*** relationship with the Taliban or the Haqqani Network. Instead, the theory of plaintiffs' complaint is that LBG engaged subcontractors, and that those subcontractors paid other individuals, who may have had ties to insurgents. *See*, *e.g.*, Compl. ¶¶ 207–210 (alleging that LBG paid ISS-Safenet, which "paid Mr. Arafat," who in turn "ended up being a conduit for payoffs to the Haqqanis"); *id.* ¶ 198 (alleging that LBG engaged USPI, which routed money through Afghanistan's complex "*hawala* system"). There were thus multiple degrees of separation between insurgents and LBG, a fact which favors dismissal. *See Crosby*, 921 F.3d at 626–27 (affirming dismissal where "[p]laintiffs do not allege that Defendants directly helped [the terrorist]"); *Averbach*, 2020 WL 486860, at *12 (noting "trend in JASTA case law toward disallowing claims against defendants who did not deal directly with a terrorist organization or its proxy").

State of Mind: This factor turns on whether the defendant shared the principal's objective, or actually intended to help the principal succeed. *See Taamneh*, 343 F. Supp. 3d at 918 (holding that this factor weighs in favor of substantial assistance only if "Defendants ha[d] any intent to further . . . terrorism"); *Halberstam*, 705 F.2d at 484 (considering whether defendant was "one in spirit" with the primary actor). Here, plaintiffs make no allegation that LBG was "one in spirit"

with terrorists, *Taamneh*, 343 F. Supp. 3d at 918; *Halberstam*, 705 F.2d at 484, or that LBG actually intended that terrorists succeed or harm coalition personnel. Nor could they, as any such allegation would be absurd on its face. State of mind thus weighs against substantial assistance in cases like this one, where there is nothing to "suggest[ ] that Defendant supported [the terrorists'] . . . agenda." *Kaplan*, 405 F. Supp. 3d at 536 (granting motion to dismiss).

Period of Assistance: This final factor also weighs in LBG's favor because the period of LBG's alleged assistance bears little relation to the attacks alleged in the complaint. Plaintiffs allege that LBG was awarded numerous contracts between 2002 and 2010, *see* Compl. ¶ 190, and additionally allege that LBG's subcontractors made payments to "local warlords" beginning "[a]s early as 2005," *id.* ¶ 197. Yet despite relying significantly on aged allegations, plaintiffs seek to impose liability for attacks which occurred as late as 2017, and which bear no apparent relationship to any particular earlier subcontractor payment. Compl. ¶ 17, 306. This temporal mismatch again underscores why LBG did not "substantially assist" the attacks at issue. *Siegel v. HSBC N. Am. Holdings, Inc.*, 933 F.3d 217, 225 (2d Cir. 2019) (affirming dismissal, where bank's purported assistance ended "ten months before" the relevant attacks).

In sum, none of the six *Halberstam* factors suggest that the purported assistance pled here—uncertain in amount, unconnected to any particular attack, indirect, unintended, and often years old—was "substantial" as that term is used in the statute. Because plaintiffs do not plead that LBG's indirect contractor payments substantially assisted the attacks, *Copeland*, 352 F. Supp. 3d at 976, the aiding-and-abetting claims against LBG should be dismissed.

C. Plaintiffs Do Not Allege That LBG Aided Or Abetted With Scienter

Plaintiffs also have failed to allege the scienter required to support a secondary-liability claim. To state a claim for aiding and abetting under the ATA, plaintiffs must plausibly allege that LBG acted "knowingly." *See* 18 U.S.C. § 2333(d)(2). Importantly, this scienter element "requires

more" than mere knowledge that a defendant's activities might provide material support to an organization as a whole—instead, aiding and abetting requires the secondary actor to be "'aware' that, by assisting the principal, it is itself assuming a '***role***' in terrorist activities." *Linde*, 882 F.3d at 329 (quoting *Halberstam*, 705 F.2d at 477) (emphasis added). Courts thus routinely grant motions to dismiss where plaintiffs allege nothing more than generic support for a terrorist organization and fail to allege precisely how the defendant assumed "a role" in the terrorist act at issue. *See, e.g.*, *Copeland*, 352 F. Supp. 3d at 975 (granting motion to dismiss, where "there are only allegations that defendants were 'generally aware' that their services were used by ISIS, but no allegations that with that knowledge defendants were playing or assuming a role in ISIS's terrorist activities"); *Siegel v. HSBC Bank USA, N.A.*, 2018 WL 3611967, at *5 (S.D.N.Y. July 27, 2018) (same where "The [third amended complaint] does not allege that the defendants were generally aware that they were playing a role in the November 9 attack."); *Taamneh*, 343 F. Supp. 3d at 917 ("Defendants' purported knowledge . . . is more akin to providing material support to a foreign terrorist organization than assuming a role in terrorist activities.").

The same result should obtain here. None of plaintiffs' allegations show that LBG knew or was "generally aware" that it had "assumed a role in terrorist activities," or had any knowledge of, or intent to support, any of the attacks. Plaintiffs' allegations that LBG purportedly engaged unaccountable contractors establish, at most, only the kind of awareness of general material support insufficient to plead secondary liability, especially where mere failures to "perform due diligence . . . or even failure[s] to adhere to . . . counter-terrorism laws" are not enough to survive a motion to dismiss on a secondary-liability claim. *Averbach*, 2020 WL 486860, at *12; *see also Kaplan*, 405 F. Supp. 3d at 535 (similar).

D. Count 6 Fails To Allege Secondary Liability Based On A RICO Predicate

As explained above, plaintiffs have failed to plausibly allege that a designated FTO "committed, planned, or authorized" any of the specific attacks alleged in the complaint. In an attempt to plead around this statutory requirement, plaintiffs allege in Count 6 that defendants aided and abetted a "Taliban-al Qaeda Campaign," which consisted of a nine-year-long pattern of racketeering activity involving Mullah Omar and "other terrorists" associated with the Taliban and al Qaeda. Compl. ¶ 1300. But this purported "RICO predicate" provides no basis for evading the statute's FTO requirement. Indeed, no court has ever previously endorsed a "RICO predicate" theory under the ATA, and for several reasons this Court should not be the first.

First, RICO is not an appropriate "predicate" for liability under the ATA. The plain text of the ATA imposes liability for a singular act ("***an act*** of international terrorism"). *See* 18 U.S.C. § 2331. As a matter of law, a violation of the federal RICO statutes—which require "a pattern" of "at least two acts" of criminal activity (18 U.S.C. § 1961 *et. seq.*)—cannot constitute "an act" of international terrorism. The alleged RICO predicate offense here is far more than "an act"—it is a nine-year pattern of criminal activity including murder, kidnapping, arson, use of weapons of mass destruction, and bombing places of public use. *See* Compl. ¶¶ 1299–1301. This general course of conduct cannot be deemed "an act" under any reasonable reading of the ATA statute.

Second, even if plaintiffs could plausibly allege that a Taliban-al Qaeda Campaign actually existed and constituted a RICO violation, plaintiffs fail to plead the remaining elements of an aiding-and-abetting claim. Plaintiffs have not plausibly alleged that al Qaeda (an FTO) "committed, planned, or authorized" any of the various crimes that allegedly comprised the Taliban-al Qaeda Campaign. *See supra* Part II.A. Plaintiffs offer only the conclusory allegation that "Mullah Omar and other terrorists employed by or associated with the Taliban and al Qaeda conducted and participated in the conduct of the Taliban's affairs . . . through a pattern of

racketeering activity." Compl. ¶ 1301. The complaint fails to plead any facts showing that al Qaeda was in any way involved in the laundry list of alleged RICO crimes, much less that al Qaeda "committed, planned or authorized" any one of them. *See supra* Part II.A.

Third, plaintiffs have not adequately alleged the existence of any RICO enterprise. To establish liability under RICO, "one must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Feld Entm't Inc. v. Am. Soc'y for the Prevention of Cruelty to Animals*, 873 F. Supp. 2d 288, 313 (D.D.C. 2012). Plaintiffs must plausibly allege that LBG "conducted or participated in the enterprise's affairs, not just [its] *own* affairs." *See id.* at 314. The RICO conduct alleged by plaintiffs is nothing more than "the affairs of the Taliban." Compl. ¶ 1300. Plaintiffs do not plausibly allege that any specific defendant, let alone LBG, assisted in any particular RICO offense, and thus have not distinguished any RICO defendant from any RICO enterprise. *See United States v. Philip Morris U.S.A. Inc.*, 566 F.3d 1019, 1113 (D.C. Cir. 2009). Even if plaintiffs could allege a RICO enterprise that al Qaeda "committed, planned or authorized," they have not alleged that LBG "substantially assisted" that enterprise, as required to plead aiding-and-abetting liability under the ATA. *See supra* Part II.A. There is no basis for plaintiffs' suggestion that LBG, in retaining security subcontractors, "substantially assisted" or "knowingly assumed a role" in the RICO crimes such as "hostage taking," "murder" or "use of weapons of mass destruction." Compl. ¶ 1301; *Siegel*, 933 F.3d at 224–225. Count 6 therefore fails as a matter of law.

CONCLUSION

For the foregoing reasons, plaintiffs' claims against LBG should be dismissed with prejudice for failure to state a claim.

Dated: April 29, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29th day of April 2020, the foregoing was electronically transmitted to the Clerk of Court using the CM/ECF system, which will transmit notification of such filing to all registered participants.

/s/ *K. Winn Allen, P.C.*
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