IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AUGUST CABRERA *et al.*,

Plaintiffs,

v.

BLACK & VEATCH SPECIAL PRODUCTS CORPORATION, *et al.*,

Defendants.

Case No. 1:19-CV-03833 (EGS)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT DAI GLOBAL, LLC'S MOTION TO DISMISS

NICHOLS LIU LLP

Robert Nichols*
700 Sixth Street, N.W.
Suite 430
Washington, DC 20001
Tel. (202) 846-9801
Email RNichols@nicholsliu.com

* *petition for D.D.C. admission pending*

WILLIAMS & CONNOLLY LLP

Kevin M. Downey (D.C. Bar. # 438547)
Christopher N. Manning (D.C. Bar # 464069)
John M. McNichols (D.C. Bar # 490479)
Brian T. Gilmore (D.C. Bar # 1030601)
725 Twelfth Street, N.W.
Washington, DC 20005
Tel. (202) 434-5000
Fax. (202) 434-5029
Email KDowney@wc.com
CManning@wc.com
JMcNichols@wc.com
BGilmore@wc.com

Counsel for Defendant DAI Global, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, RULES, AND REGULATIONS

OTHER AUTHORITIES

DAI Global, LLC ("DAI") does not belong in this litigation. DAI is an international development company that has performed economic, social, and humanitarian projects in over 150 countries on behalf of the U.S. Agency for International Development ("USAID"), the European Union, the U.K. Government, the United Nations, the World Bank, and others. USAID contracted with DAI to help stabilize and rebuild Afghanistan to further U.S. foreign policy interests. These included development projects to *counteract* the influence of insurgent groups, and DAI continues to work with USAID on such projects today. DAI would not support attacks against U.S. service members and civilian contractors—the same people who have protected and rescued DAI personnel from those insurgents. That allegation is implausible and, indeed, deeply offensive.[1]

DAI empathizes with Plaintiffs' losses, but their claims distort the Anti-Terrorism Act ("ATA"), 18 U.S.C. §§ 2331 *et seq.*, beyond recognition. The Complaint mischaracterizes U.S. Government reports as suggesting that DAI supported the insurgency in Afghanistan, but the Government made no such findings. Rather, those reports found that DAI responded to insurgent threats by reporting concerns to U.S. authorities, working with U.S. officials to mitigate these risks, and suspending or canceling subprojects. Stripped of its contrary, group-pleaded, and conclusory allegations, the Complaint fails to state a plausible ATA claim against DAI. Instead, it amounts to a challenge to the U.S. Government's foreign policy choices and DAI's implementation of those choices—matters over which the Court lacks subject matter jurisdiction under Rule 12(b)(1). Even if the claims were justiciable, they fail to meet the elements of ATA liability and, thus, require dismissal under Rule 12(b)(6). DAI should be dismissed from this lawsuit.

---

[1] In 2010, Linda Norgrove, a young DAI development worker, was kidnapped by an insurgent group, held hostage, and tragically killed during a rescue attempt by U.S. forces. *See* BBC News, *Aid Worker Linda Norgrove Was Killed by US Grenade* (Dec. 2, 2010). She is one of several DAI colleagues killed or injured by insurgents in Afghanistan. *See* Richard A. Oppel Jr., *Afghan Bombers Storm U.S. Aid Office*, N.Y. Times (July 2, 2010).

FACTUAL BACKGROUND[2]

A. DAI and the Stabilization of Afghanistan

DAI is an employee-owned international development company headquartered in Bethesda, Maryland, that partners with governments on economic, social, and humanitarian development projects. Compl. ¶¶ 22, 160–61. Founded in 1970, DAI's mission is "to make a lasting difference in the world by helping people improve their lives. . . , envision[ing] a world in which communities and societies become more prosperous, fairer and better governed, safer, healthier, and environmentally more sustainable." DAI, Who We Are: Mission & Values, https://www.dai.com/who-we-are/mission-and-values (last visited Apr. 29, 2020). DAI works across the spectrum of international development. For example:

- DAI provides innovative post-disaster and post-conflict assistance to governments and community organizations to ensure short-term stability, support local ownership of initiatives, prevent violent extremism, and lay the foundation for long-term development in fragile, crisis-stricken states.
- DAI provides technical advice, strategic guidance, and support to public institutions, elected bodies, and citizens to strengthen government performance.
- DAI's economic growth work drives trade, technology, agriculture, business, and financial services to create jobs, reduce poverty, and enhance food security.

DAI, Solutions, https://www.dai.com/our-work/the-solutions (last visited Apr. 29, 2020).

DAI has implemented development projects in Afghanistan since 1976, interrupted only by the decade of Taliban rule in the 1990s. Answering USAID's call following the 9/11 terror attacks on the United States and the U.S. invasion of Afghanistan, DAI has since 2002 implemented more than 30 short- and long-term development activities in Afghanistan for USAID and other clients, including the World Bank, the European Commission, and the United Nations.

[2] DAI disputes many allegations in the Complaint. For purposes of this Motion, DAI accepts as true well-pleaded, non-conclusory factual allegations and relies on materials that Plaintiffs incorporate by reference or are subject to judicial notice. *See Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006).

DAI's work is entirely development focused. Unlike other Defendants, DAI is not a private-security contractor or a telecommunications operator. Compl. ¶ 3.

The Complaint discusses the Local Governance and Community Development ("LGCD") program, in which USAID tasked DAI with implementing projects in four areas: "1) support to local public administration and governance; 2) community mobilization and development; 3) local stability initiatives; and 4) the provision of [local Afghan] specialists" to work with USAID staff. Task Order No. 2, Local Governance and Community Development (LGCD) Project in Southern and Eastern Regions of Afghanistan at 4 (Oct. 2, 2006) ("LGCD Task Order No. 2") (Ex. 1), *cited at* Compl. ¶ 161(a). LGCD's primary focus was to "implement small-scale infrastructure and other projects that accelerate, extend, and complement government efforts. . . . help[ing] Afghan communities . . . to take responsibility for and contribute to their own future." *Id.* at 7. This effort to win the hearts and minds of the Afghan people was focused on those living in "remote, unstable areas," where "generalized instability and lawlessness [make] it . . . easy for insurgent and criminal activity to take root and flourish." *See id.* at 7, 9. USAID expressly tasked DAI with engaging possible Taliban recruits, "former combatants," and "groups who support the Taliban." *Id.* at 9. DAI's mission—in furtherance of U.S. policy—was to strengthen local governments "to turn [their] communities away from the insurgency and towards the Government of the Islamic Republic of Afghanistan (GIRoA) . . . in unstable areas where GIRoA authority is contested and the populace has yet to decide 'en masse' whether or not to support the GIRoA." *Review of Security Costs Charged to USAID's Projects in Afghanistan* (Review Rep. No. 5-306-10-002-S), at 14 (Sept. 29, 2010) ("2010 USAID OIG Report" or "Report") (Ex. 2), *cited at* Compl. ¶¶ 166–174.

DAI's work has, at all times, been subject to extensive oversight by U.S. Government agencies and inspectors general. *See* Compl. ¶¶ 163, 166; USAID, OIG Oversight: Afghanistan

& Pakistan, https://oig.usaid.gov/afghanistan (last visited Apr. 29, 2020). DAI has engaged constructively with these oversight bodies to report concerns and address and resolve audit findings. *See* 2010 USAID OIG Report at 7-8. USAID continues to partner with DAI on major development projects in Afghanistan, consistent with the U.S. Government's foreign policy view that these "[i]nvestments in infrastructure and human capital are making the country less vulnerable to insurgents and illicit business." USAID, Afghanistan, https://www.usaid.gov/afghanistan (last visited Apr. 29, 2020); *see* Contract No. 72030618C00011, Afghanistan Value Chains – Livestock (June 9, 2018), *available at* https://www.usaid.gov/sites/default/files/documents/1871/72030618C00011_-_Afghanistan_Value_Chains-Livestock.pdf ("Afghanistan Value Chains Contract").

B. Plaintiffs' Allegations

Plaintiffs are American service members and civilians who served in Afghanistan, and their families. They allege that they, or their family members, were injured or killed as a result of attacks committed by different insurgent groups in Afghanistan between 2009 and 2017. Compl. ¶¶ 1, 273. The vast majority of these attacks were committed by the Taliban; others were committed by the Haqqani Network or the Kabul Attack Network, or, in one case, by a group that included al Qaeda, the Haqqani Network, and the Pakistani Taliban. *Id.* at ¶¶ 344–1261.

1. The Allegations Against Unnamed "Companies"

Plaintiffs' blunderbuss theory is that unnamed "companies" and "contractors" working in Afghanistan all followed a "standard practice" of paying protection money to the Taliban. The Complaint devotes pages to allegations regarding these companies, stating that these allegations are intended to "lay the groundwork" for Defendant-specific allegations by "describ[ing] the post-invasion Afghanistan contracting environment" and alleging that other unnamed "large Western contractors" made protection payments to the Taliban. Compl. ¶¶ 47–83.

Plaintiffs allege that post-invasion Afghanistan was prone to corruption generally, and that "Western contractors operating in Afghanistan often structured their transactions to exploit that corrupt business environment." *Id.* ¶ 50–51. Specifically, the contractors engaged subcontractors, which engaged sub-subcontractors (and so on), for the purpose of allowing the contractors to "launder[] aid money" and enable the "final subcontractor to make corrupt payments with virtually no accountability." *Id.* ¶ 51. This caused "[v]ast sums of money" to "disappear[]." *Id.* ¶ 53.

In addition to facilitating corruption, Plaintiffs allege that companies used this subcontractor structure "to funnel money to the Taliban." *Id.* ¶ 56. The Taliban used threats of violence against "international companies doing business in Afghanistan" to extract protection payments, which companies generally "routed . . . to the Taliban through their subcontractor[s]." *Id.* ¶¶ 57, 61. Plaintiffs allege that "the Taliban takes as much as 20 percent of development aid awarded to contractors." *Id.* ¶ 65 (internal quotation marks omitted). The unnamed companies acquiesced to "maximize profits," because it was cheaper to make the protection payments than to "invest in legitimate security to protect their projects against attack." *Id.* ¶ 58.[3] The protection payments typically caused the Taliban not to attack the paying companies, but they "strengthened the Taliban's ability to commit attacks against others," including Plaintiffs. *Id.* ¶ 60.

2. The Allegations Against DAI

The Complaint devotes only 23 of its 1,309 paragraphs to DAI. *Id.* ¶¶ 14, 22, 110, 159–76, 183, 193. Plaintiffs identify six DAI contracts with USAID for projects in Afghanistan or the Federal Administered Tribal Areas ("FATA") of Pakistan. *See id.* ¶ 161. As to four of the contracts, Plaintiffs merely list the contract, *id.*, and make the conclusory assertion that DAI followed the "standard practice" of making protection payments to the Taliban in connection with

[3] This profit-maximization theory falls apart as to DAI because USAID reimbursed it for security costs and, thus, DAI's profits were not reduced by such costs. *See infra* Argument, Part I.B.2.

these contracts, *id.* ¶ 162. This is based on the same boilerplate alleged as to other Defendants, namely that each contract "required work in geographic areas under Taliban control or influence," and protection payments were made by other "contractors working in comparable factual circumstances: on (i) Western-backed and (ii) financially lucrative projects, with (iii) a track record of hiring unscrupulous subcontractors to (iv) perform work in insecure, insurgent-influenced areas." *Id.*; *compare id.* ¶¶ 131, 179, 192. DAI is not alleged to have worked with other Defendants, or the "companies" or "contractors" that followed this "standard practice."

As to a fifth contract, the FATA Contract, Plaintiffs' allegations consist of a single paragraph in which they quote an article stating that "[l]ocal sources report large and rising security payments made by [unnamed] contractors for USAID-funded projects in the FATA appearing in Haqqani [Network] coffers," and speculate that as "one of the two largest USAID contractors operating in the FATA," DAI must have "followed the same pattern" and "made particularly large payments" to that group. Compl. ¶ 165 (quoting Gretchen Peters, *Haqqani Network Financing: The Evolution of an Industry* at 44 (July 2012) ("*Haqqani Network Financing*") (Ex. 3)).

The only contract as to which Plaintiffs offer specific allegations is the LGCD contract, awarded on October 1, 2006 and concluded on April 30, 2011. Compl. ¶ 161(a). The principal source of those allegations is the 2010 USAID OIG Report. *Id.* ¶¶ 166–174. Because the Report is quoted extensively and incorporated by reference, the Court need not accept the characterizations of it as true. *Stewart*, 471 F.3d at 173. In fact, the Report squarely contradicts Plaintiffs' allegations. *See infra* Argument, Part I.B.2. As do other documents cited by Plaintiffs. *See infra id.*, Part I.B.3. As does the fact that USAID continues to work with DAI in Afghanistan. *See* Afghanistan: Implementing Partners, https://www.usaid.gov/afghanistan/implementing-partners (last visited Apr. 29, 2020); Afghanistan Value Chains Contract.

STATUTORY FRAMEWORK

The ATA provides a private right of action to U.S. nationals injured by an "act of international terrorism." 18 U.S.C. § 2333(a). When it was enacted in 1992, the ATA initially provided for civil claims only against defendants who had committed a terrorist act (primary liability). 18 U.S.C. § 2333(a). This changed in 2016, when the Justice Against Sponsors of Terrorism Act ("JASTA"), Pub. L. No. 114–222, amended the ATA to add aiding-and-abetting (secondary) liability for those who "aid[] and abet[], by knowingly providing substantial assistance" to a person who commits an act of international terrorism that was committed, planned, or authorized by a designated FTO. 18 U.S.C. § 2333(d)(2). To establish primary or secondary ATA liability, the underlying injury must be caused by an "act of international terrorism," *id.* § 2333(a), (d)(2), which the statute defines as activities that (a) "involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be if committed within the jurisdiction of the United States;" (b) appear to be intended "to intimidate or coerce a civilian population," or "influence government policy through intimidation or coercion," or "affect the conduct of a government by mass destruction, assassination, or kidnapping;" and (c) "occur primarily outside the territorial jurisdiction of the United States," *id.* § 2331(1).

LEGAL STANDARD

This motion seeks dismissal under Rule 12(b)(1) and 12(b)(6). On a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), Plaintiffs bear the burden of establishing jurisdiction, as "[i]t is to be presumed that a cause lies outside [the Court's] limited jurisdiction." *Kokkonen v. Guardian Life Ins.*, 511 U.S. 375, 377 (1994). Dismissal on the basis that a plaintiff's claim implicates a political question or derivative sovereign immunity constitutes a dismissal for lack of subject matter jurisdiction. *See Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S.

208, 215, 216 n.5 (1974); *Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640, 650 (4th Cir.), *cert. denied*, 139 S. Ct. 417 (2018). Because DAI challenges the factual basis of the Court's jurisdiction to adjudicate Plaintiffs' allegations, the Court "must go beyond the pleadings and resolve any disputed issues of fact." *Lillard & Lillard v. Blue Cross & Blue Shield Ass'n*, 971 F. Supp. 2d 116, 118 (D.D.C. 2013) (internal quotation marks omitted).

On a Rule 12(b)(6) motion, the Court may consider the pleadings, documents incorporated by reference, or materials subject to judicial notice. *See Stewart*, 471 F.3d at 173; *Kaempe v. Myers*, 367 F.3d 958, 963 (D.C. Cir. 2004). Although the Court accepts as true all well-pleaded facts, the Court need not accept "a legal conclusion couched as a factual allegation," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), nor credit allegations contradicted by referenced documents, s*ee Kaempe*, 367 F.3d at 963. To survive a Rule 12(b)(6) motion, Plaintiffs must plead sufficient facts to state a claim that is "'plausible on its face.'" *Ashcroft*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Claims resting on mere "possibility," or allegations "merely consistent with" liability, are insufficient to survive a Rule 12(b)(6) motion. *Id.*

SUMMARY OF ARGUMENT

As recent decisions make clear, lawsuits seeking to use the ATA to hold companies liable for attacks far removed from their alleged conduct are routinely dismissed at the pleading stage.[4] This case should be no exception. At the threshold, Plaintiffs fail to plausibly plead that DAI made protection payments or supported terror attacks, instead relying on group pleading, conclusory allegations, and assertions contradicted by referenced U.S. Government records.

[4] *E.g.*, *Owens v. BNP Paribas, SA*, 897 F.3d 266 (D.C. Cir. 2018); *Siegel v. HSBC N. Am. Holdings, Inc.*, 933 F.3d 217 (2d Cir. 2019); *Crosby v. Twitter, Inc.*, 921 F.3d 617 (6th Cir. 2019); *Kemper v. Deutsche Bank AG*, 911 F.3d 383 (7th Cir. 2018); *Fields v. Twitter, Inc.*, 881 F.3d 739 (9th Cir. 2018); *Weiss v. Nat'l Westminster Bank PLC*, 381 F. Supp. 3d 223 (E.D.N.Y. 2019); *Kaplan v. Lebanese Canadian Bank, SAL*, 405 F. Supp. 3d 525, 530 (S.D.N.Y. 2019).

Stripped of those allegations, the claims against DAI require the Court to second-guess the U.S. Government's foreign policy decisions and DAI's performance in furtherance of U.S. policy. These types of arguments are non-justiciable under the doctrines of political question and derivative sovereign immunity and, thus, should be dismissed under Rule 12(b)(1).

Even if the claims against DAI were justiciable, they would be subject to dismissal under Rule 12(b)(6). The claims seeking to impose ATA primary liability—i.e., that DAI itself committed "acts of international terrorism"—are defective in several respects. DAI's alleged conduct does not fit the definition of international terrorism because (1) Plaintiffs plead that protection payments were made for commercial purposes, thus defeating the express statutory requirement of conduct that objectively appears motivated by a terroristic intent; and (2) Plaintiffs fail to plead elements of the criminal offenses they cite as the predicates for their ATA claims. Plaintiffs also cannot satisfy the ATA's rigorous proximate cause requirement because their theoretical chain of causation is far too attenuated.

The ATA secondary liability claims, alleging that DAI substantially assisted the attacks committed by the Taliban, fail for similar reasons. Where, as here, there are no plausible allegations of a direct relationship between the defendant and a FTO, courts routinely find that ATA claims fail to satisfy the elements of substantial assistance and knowledge. The ATA also cabins aiding-and-abetting liability to circumstances in which an act of international terrorism is "committed, planned, or authorized" by a designated FTO, but the Taliban has never been so designated. Plaintiffs employ several pleading devices in an attempt to circumvent this defect, but each fails as a matter of law and common sense.

ARGUMENT

I. THE COMPLAINT FAILS TO PLEAD FACTS PLAUSIBLY SUPPORTING AN ATA VIOLATION BY DAI.

The crux of the *Iqbal/Twombly* pleading standard is that the threshold sufficiency of a claim depends on well-pleaded facts, rather than speculation, mischaracterization, and far-fetched inferences of possible wrongdoing. The Complaint falls short of this standard as to DAI.

A. The Court Should Disregard Plaintiffs' Group Pleading Allegations.

Most of the Complaint does not address DAI at all, instead making generic group pleading allegations against unnamed companies or Defendants generally. But DAI is not alleged to have worked with either the unnamed companies or the other Defendants, which did different things, at different times, and in different parts of Afghanistan. Compl. ¶ 3 (noting that some Defendants "worked on development projects, others provided private-security services, while another operated a cellular-telephone network"); *id.* ¶¶ 130, 161 (discussing different locations); *id.* ¶¶ 130, 178, 190 (discussing different time periods). Plaintiffs' only attempt to connect the unnamed companies to DAI is the boilerplate assertion, repeated verbatim against other Defendants, that "on information and belief," DAI followed the "standard practice" of the unnamed companies. Compl. ¶ 162; *accord id.* ¶ 131 (making same allegation against ArmorGroup Defendants), ¶ 179 (EODT Defendant), ¶ 192 (LBG/BV Defendants). There is no well-pleaded allegation that DAI associated with any of the unnamed "companies," or was aware of any "standard practice." Rather, Plaintiffs' theory amounts to "guilt by region," i.e., that DAI worked in regions where, according to Plaintiffs, purported Taliban protection payments were common. *See id.* ¶¶ 164–65.

Nor is there a factual basis to attribute common conduct to all "Defendants." Some are alleged to have had direct contact with the Taliban, *id.* ¶ 186, while DAI and others are not. Plaintiffs also allege that (i) "Defendants" violated federal contracting requirements, when not all

of them are federal contractors, *id.* ¶ 13; (ii) "Defendants" agreed to pay Taliban officials at in-person meetings, when DAI and others are not alleged to have had such meetings, *id.* ¶ 73; and (iii) a Taliban official purportedly announced that "Defendants" would have to make protection payments, *id.* ¶ 75, when the cited source shows that the official did not identify a single Defendant, *see* Interview with Mawlawi Ahmad Bilal, Al-Emera (Mar. 20, 2014) (published in *The Taliban Reader: War, Islam and Politics* at 461–65 (2018)) (Ex. 4).

In sum, there is no factual basis to attribute other companies' alleged practices to DAI, nor to attribute purported activities or practices to "Defendants" as a group. Accordingly, such group-pleaded allegations are properly disregarded. *See Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001) (per curiam) (allegations about "defendants" deficient where realities of time and place "make plain that all of the defendants could not have participated in every act complained of"); *Toumazou v. Turkish Republic of N. Cyprus*, 71 F. Supp. 3d 7, 21 (D.D.C. 2014) ("[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.'" (quoting *Atuahene v. City of Hartford*, 10 Fed. App'x 33, 34 (2d Cir. 2001)); *cf. Feld Entm't Inc. v. ASPCA*, 873 F. Supp. 2d 288, 327 (D.D.C. 2012); *Bates v. Nw. Human Servs., Inc.*, 466 F. Supp. 2d 69, 85 (D.D.C. 2006) (dismissing RICO claim where plaintiffs "generally neglect to distinguish between the defendants when describing the factual underpinnings of the complaint").

B. Plaintiffs' DAI-Specific Allegations Fail to State a Plausible ATA Claim.

1. The Allegations Regarding Five of the Contracts Are Conclusory.

Plaintiffs plead no specific facts concerning protection payments in connection with five of the six DAI contracts at issue, let alone ones that satisfy the elements of an ATA claim. As to four contracts (ASMED, ASI, RAMP UP East, and RAISE), Plaintiffs simply list them, Compl. ¶ 161, and then rely on the conclusory boilerplate that DAI must have followed other companies'

"standard practice" of making protection payments, *id.* ¶ 162. As to the fifth (FATA), Plaintiffs quote a 2012 report that "'[l]ocal sources report large and rising security payments made by [unnamed] contractors for USAID-funded projects in the FATA appearing in Haqqani coffers,'" and then speculate that as "one of the two largest USAID contractors operating in the FATA," DAI must have "followed the same pattern" and "made particularly large payments." *Id.* ¶ 165 (quoting *Haqqani Network Financing* at 44). By the same flawed logic, a report that unnamed athletes on unspecified teams are taking PEDs to obtain a competitive advantage means that the top two teams in the league are guilty of doping. This conclusory and illogical pleading is insufficient to support a plausible allegation of a payment by DAI.

Because the Complaint lacks non-conclusory factual allegations as to payments made in connection with these five contracts, the claims based on those contracts must be dismissed. *See RSM Prod. Corp. v. Freshfields Bruckhaus Deringer U.S. LLP*, 682 F.3d 1043, 1052 (D.C. Cir. 2012) ("unsupported conclusory allegations are 'not entitled to be assumed true'") (quoting *Iqbal*, 556 U.S. at 681); *see also In re Elevator Antitrust Litig.*, 502 F.3d 47, 52 (2d Cir. 2007) (rejecting theory that "if it happened there, it could have happened here"); *Doe v. Von Eschenbach*, 2007 WL 1848013, at *2 (D.D.C. June 27, 2007) (rejecting speculation that "it has happened before, therefore it might happen here" (internal quotation marks omitted)).

2. The 2010 USAID OIG Report Contradicts Plaintiffs' Claims Regarding the LGCD Contract.

The thrust of Plaintiffs' claims regarding the LGCD contract is that DAI knew or recklessly disregarded that its local Afghan subcontractors "were paying protection money to the Taliban" and "helped reimburse [subcontractors] for payments made to the Taliban." *Id.* ¶¶ 169–70. Those claims are principally based on Plaintiffs' characterizations of the referenced 2010 USAID OIG Report, which Plaintiffs characterize as an "audit of DAI's performance" that purportedly found

that DAI engaged in a scheme to route protection payments through local Afghan subcontractors and "recoup[] the payments" from USAID. Compl. ¶¶ 166, 169; *see generally id.* ¶¶ 166–174. The actual Report belies these allegations. Accordingly, the Court may disregard these allegations and instead consider the Report itself. *Kaempe*, 367 F.3d at 963.

The Report describes a review of security costs charged by Edinburgh International ("Edinburgh"), DAI's principal security subcontractor, "to determine whether there has been any indication that Edinburgh [] misused USAID funds to pay the Taliban or others in exchange for protection." 2010 USAID OIG Report at 2. This review was initiated after news reports that "U.S. Government funds paid to contractors for reconstruction projects were being siphoned off to Taliban insurgents in exchange for 'protection' to prevent attacks." *Id.* Edinburgh was not named in these news reports; rather, it was selected for review based on the extent of its work in Afghanistan. *Id.* at 10. The OIG's review focused on the 2009 period and entailed interviews of "43 key personnel from USAID, DAI, and Edinburgh," interviews of U.S. intelligence officials, and a review of Edinburgh's financial records and invoices. *Id.* at 10–11.

The OIG found "*no indication* that Edinburgh International had misused USAID funds to pay the Taliban or others in exchange for protection," and its review of accounting and financial records "*revealed no unusual or suspicious payments*." *Id.* at 3 (emphases added). To the contrary, the OIG noted that Edinburgh "had employed a strong system of internal controls over cash transactions," and that "[t]hese controls reduced the risk of illicit payments, since such payments are often made in cash." *Id.* The Report also noted that "field staff's authority to make payments was strictly limited, reducing the possibility that the staff could make extortion payments to the Taliban or other insurgent groups without the knowledge of supervisory staff in Kabul." *Id.*

The OIG also did not identify *any* misconduct by DAI. Rather, the Report explains that during the interviews regarding Edinburgh, DAI personnel and others expressed "concerns that insurgents may have extorted protection payments" from local Afghan subcontractors working on LGCD activities. 2010 USAID OIG Report at 3. The OIG did not suggest, let alone find, that DAI made such payments. But it was this concern—that local subcontractors may have been extorted into making protection payments and attempted to recoup those costs from DAI—that Plaintiffs now blatantly mischaracterize as "the OIG's specific findings . . . that protection money was likely paid" and that "DAI enabled its subcontractors to obtain U.S. government money and helped reimburse them for payments made to the Taliban." Compl. ¶¶ 169, 171.

The OIG made no such findings. Rather, the Report explains that "[b]y its very design and approach, [USAID's] LGCD project may have contributed to the risk that USAID funds might fall into the hands of insurgents" because of USAID policy that local communities guarantee security:

> The LGCD project looks for communities in insecure areas who are willing to work with local government authorities to implement small-scale infrastructure and community development activities. The contract states that one important responsibility of the communities is to guarantee security during the implementation phase of development activities. *Yet some individuals told us that the local communities who were supposed to guarantee security very likely included the Taliban or groups who support the Taliban. The original contract itself stated that dispute mediation and community security are "services" that the Taliban is providing.*

Id. at 3–4 (emphasis added). USAID had expressly tasked DAI with "engaging populations that are vulnerable to recruitment into militant groups, such as . . . former combatants[] and groups who support the Taliban," and required those communities to guarantee security for development activities. LGCD Task Order No. 2 at 9; *see also id.* at 25 ("[I]n maximizing the benefits and sustainability of the Demobilization, Disarmament and Reintegration (DDR) program in Afghanistan, it is essential that attempts are made to give priority to employing local entities –

particularly those former Soldiers (ex-combatants) who participated in the DDR program."). This created a risk that a subcontractor would be negotiating with local community leaders seeking to include current or former insurgents as guards to guarantee security, and also that insurgents would try to extort protection payments directly from a subcontractor. 2010 USAID OIG Report at 4.

The Report contradicts the allegations that DAI was complicit in, or "recklessly disregarded" the risk of, protection payments by subcontractors. Compl. ¶¶ 169–70. Instead, the OIG found that during the period under review (2009), DAI responded to "Taliban insurgent threats and violence around the [LGCD] subproject construction sites" by ***suspending or cancelling*** "27 LGCD subprojects totaling about $1.4 million," 2010 USAID OIG Report at 4 (emphasis added). The Report details one such incident, in which the Taliban sought payment from a subcontractor on a road construction project, and even set fire to a bulldozer. *See id.* The OIG found that DAI responded by informing USAID, suspending the project, and ultimately cancelling it. *Id.*

Plaintiffs also selectively, and misleadingly, quote the Report to suggest that DAI was reckless because "most of the 'DAI personnel' the OIG interviewed admitted that DAI could not 'provide reasonable assurance of preventing USAID funds from going to the Taliban or others in exchange for protection' of the LGCD project," and that DAI's CEO was forced to admit this. Compl. ¶¶ 170–71 (quoting 2010 USAID OIG Report at 6). As the full quote from the Report explains, however, the reason both DAI—*and USAID*—could not prove the negative was because LGCD activities were being conducted in areas that were too dangerous for them to monitor:

> Most USAID officials and DAI personnel we interviewed believed that neither USAID nor DAI could provide reasonable assurance of preventing USAID funds from going to the Taliban or others in exchange for protection *while trying to implement community development projects in a war zone and in insurgency stronghold areas where little or no monitoring can be conducted*.

2010 USAID OIG Report at 6 (emphasis added). As one USAID official explained, the "high security risk" in these areas "prevented proper monitoring of subprojects and activities in the field," noting that "DAI's international expatriate staff . . . could not go into these areas to monitor, and in many cases Afghan project staff could not enter these areas either." *Id.* at 5. Another USAID official added that "LGCD works in the most insecure areas" of Afghanistan. *Id.*

The Report also includes USAID's discussion of the measures employed by DAI to safeguard against these inherent risks in USAID's LGCD program. *Id.* at 14–15. These included "risk and impact assessments of the security situation of current and proposed locations that are targeted for LGCD subprojects"; ongoing "due diligence on the part of DAI"; "[m]ethods such as geographically defined 'targeting boards' . . . implemented by DAI down to the sub-district level to allow for proper civilian implementation, monitoring, and evaluations regarding program activities." *Id.* at 14. DAI participated in weekly meetings with USAID to discuss the security dynamic and notified USAID of "every security incident affecting DAI projects, which then triggers a review of whether or not implementation should continue . . . and whether or not wider USAID programming is even possible for that district." *Id.* at 15.[5]

Ultimately, USAID concluded that DAI "conduct[s] risk and impact assessments as appropriate to the complex environment and in accordance with contractual obligations." *Id.* at 15. USAID also concluded that while LGCD activities "can become at-risk," those critical stabilization activities needed to continue, with DAI "continu[ing] to conduct appropriate and cost-effective risk and impact assessments and continu[ing] to be vigilant in proposing additional and cost-effective assessment means." *Id.*

[5] USAID also reviewed and pre-approved DAI's retention of LGCD subcontractors, pursuant to the master agreement governing LGCD Task Order No. 2. *See* Contract DFD-I-OO-OS-002S0-00, Part II, § 1.1 ("LGCD Master Agreement") (Ex. 5) (incorporating 48 C.F.R. § 52.244-2).

It is telling that Plaintiffs felt compelled to omit or mischaracterize these and other portions of the Report. At the most basic level, Plaintiffs mischaracterize the Report as "an audit of DAI's performance," Compl. ¶ 166, when the Report expressly begins by stating that it is "not an audit," and that it was a review of Edinburgh's costs—not an investigation of DAI or its performance. 2010 USAID OIG Report at 1–2. More fundamentally, Plaintiffs cite the Report to claim that "U.S. intelligence officials confirmed[] the Taliban's extraction of protection money from DAI's project 'fit the pattern' evident throughout Afghanistan," Compl. ¶ 168 & n.217 (citing 2010 USAID OIG Report at 4), when the Report's "fit the pattern" quote instead describes the project in which the Taliban ***attempted*** to extort money from DAI, destroying a bulldozer in the process, and DAI responded by ***cancelling*** the project. 2010 USAID OIG Report at 4.[6]

In sum, the Report does not find, or even suggest, that DAI made protection payments or was complicit in payments made by subcontractors. Instead, the Report shows that DAI responded to insurgent threats by cancelling projects, raising concerns to both USAID and the OIG, and conducting due diligence that USAID found "appropriate to the complex environment and in accordance with contractual obligations." 2010 USAID OIG Report at 3–4, 15. Moreover, because the LGCD master agreement required USAID to reimburse DAI for local security costs, *see* LGCD Master Agreement §§ B.2, B.5(b), there was no motivation for DAI to avoid incurring "legitimate security" costs to "maximize profits," Compl. ¶ 58, as those costs had no impact whatsoever on DAI's profits. This is an outright refutation of Plaintiffs' theory of the case, i.e., that DAI reimbursed protection payments because doing so ultimately "saved [it] money." *Id.* ¶ 3.

[6] Plaintiffs even falsely suggest that DAI updated its website "in the wake of the OIG investigation" to "belatedly acknowledge[] . . . illegal and corrupt contracting practices." Compl. ¶ 172. But, the language Plaintiffs quote from DAI's website (*see id.*) simply describes DAI's robust compliance program and contains no such "acknowledge[ment]." *See* Ethics & Compliance at DAI, https://www.dai.com/who-we-are/ethics-integrity (last visited Apr. 29, 2020).

And, Plaintiffs concede, USAID continued to work with DAI in Afghanistan for years after the Report. *See* Compl. ¶ 160; 2010 USAID OIG Report at 3, 15. Indeed, DAI does so to this day. *See* USAID, Afghanistan: Implementing Partners, https://www.usaid.gov/afghanistan/implementing-partners (last visited Apr. 29, 2020); Afghanistan Value Chains Contract.

3. The Remaining Allegations Are Insufficient and Contradicted by the Referenced Documents.

Plaintiffs also resort to guilt-by-association allegations in attempting to connect DAI "[o]n information and belief" to USPI, a "discredited and now-debarred private-security company." Compl. ¶ 164. Plaintiffs tacitly acknowledge that these allegations lack grounding by glossing over whether DAI actually contracted with USPI, or with "successors," or "USPI-type security subcontractors," or "personnel" that had worked with USPI. *Id.* Nor do Plaintiffs connect any particular "USPI-type" subcontractor to any particular contract, allege that protection payments were made by whomever DAI retained, or allege that DAI was aware of any prior misconduct or reputational issues when it retained them. The Court should not credit such allegations, which are many steps removed from alleging a plausible ATA claim against DAI.

The remaining allegations claim that protection payments were facilitated by "fraud" or "deficient internal controls." *Id.* ¶¶ 163, 173–76. Plaintiffs do not connect these allegations to a protection payment. Nor do the documents cited in support of these allegations. Plaintiffs' conclusory speculation about these matters is a textbook example of allegations that are "merely consistent with" misconduct, but do not cross the line into plausibility. *Twombly*, 550 U.S. at 557.

For example, Plaintiffs again mischaracterize the 2010 USAID OIG Report to suggest that the OIG found "indications of pervasive fraud concerning DAI's LGCD office in Jalalabad" that purportedly "reinforced" the supposed "DAI[] protection payment scheme." Compl. ¶¶ 173, 176. The Report makes clear that Plaintiffs are conflating two different and unrelated sections of the

Report: the OIG's discussion of fraud concerns an unrelated kickback scheme by corrupt Afghan employees and never once suggests that it had any connection to the Taliban or the protection payment issue discussed earlier in the Report. *Compare* 2010 USAID OIG Report at 6–8 (discussing fraud issue), *with id.* at 3–6 (discussing protection payment issue). The Report further explains that: (1) the scheme involved payments by a subcontractor "back to the [corrupt] DAI employees," i.e., not Taliban insurgents; (2) the employees concealed their misconduct from DAI; (3) "USAID personnel and others stated that such schemes are intentionally carried out in areas where [DAI's] expatriate or U.S. Government personnel could not visit because of security restrictions"; and (4) after DAI learned of this, it "terminated ten LGCD employees who were involved in the fraud scheme." *Id.* at 6–8. Plaintiffs also invoke a reference in the Report to an earlier fraud scheme in a different office, Compl. ¶ 174 & nn.231–32 (citing 2010 USAID OIG Report at 7), but the Report did not claim that this incident related to protection payments either, *see* 2010 USAID OIG Report at 7–8. The Report also explained that DAI's chief of party uncovered the fraud and reported it to both USAID and the OIG, and DAI then closed the office involved, terminated the responsible employees, hired an auditing firm to conduct an internal audit, provided the audit results to USAID, and implemented additional financial controls. *See id.*

Plaintiffs also cite a 2012 USAID OIG report to allege that DAI hid protection payments because it could not provide documentation for certain fuel purchases and directed certain rental payments to a project cashier rather than the lessor. Compl. ¶ 163 (citing USAID OIG Afghanistan & Pakistan Oversight Rep., at 66 (Jan.–Mar. 2012) ("2012 Report") (Ex. 6)). While Plaintiffs assert that these bookkeeping issues are "an indication of protection payments," *id.*, the OIG plainly did not agree, as the 2012 Report does not suggest, let alone find, that they were in any way related to protection payments or the Taliban. Plaintiffs also cite a 2014 USAID press release

regarding a former employee who embezzled funds from a project, *id.* ¶ 175, but again the referenced document does not mention protection payments and also makes clear that DAI had "fully cooperated with the investigation." USAID Press Release, *USAID Contractor Ex-Employee Arrested On Embezzlement Charges* (Apr. 14, 2014), *available at* https://oig.usaid.gov/node/62 (cited at Compl. ¶ 175 n.233). Ultimately, missing receipts, misdirected payments, and employee embezzlement are indicia of a variety of behaviors that do not support an ATA claim—*e.g.*, accounting issues, or even a rogue employee's attempt to conceal their theft. Characterizing such matters as evidence of "deficient internal controls" does not give rise to a plausible inference that DAI knowingly or intentionally made protection payments used to kill Americans.

II. PLAINTIFFS' CLAIMS AGAINT DAI ARE BARRED BY THE POLITICAL QUESTION AND DERIVATIVE SOVEREIGN IMMUNITY DOCTRINES.

Stripped of its contradicted, group-pleaded, and conclusory allegations that DAI knowingly and intentionally made protection payments, the Complaint boils down to a challenge to DAI's implementation of U.S. foreign policy. This is made clear by the 2010 OIG Report on which Plaintiffs rely so heavily. That report describes: (1) U.S. Government policy regarding how best to engage local Afghan communities to try to win them over from Taliban influence, including by requiring "local communities that likely include Taliban insurgents or supporters to provide security during the implementation phase" of development activities, 2010 USAID OIG Report at 3; (2) DAI's performance of its contractual obligations in furtherance of that policy, including due diligence that USAID found was "appropriate to the complex environment and in accordance with contractual obligations," *id.* at 15; and (3) USAID's determination to continue its policy, and DAI's implementation of it, even after the OIG noted that it "may have contributed to the risk that USAID funds might fall into the hands of insurgents," *id.* at 3, 15. Such claims are non-justiciable under the political question and derivative sovereign immunity doctrines.

A. The Political Question Doctrine Bars Claims That Call into Question Foreign Policy Decisions of the Executive and Legislative Branches.

The political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986); *see also Harbury v. Hayden*, 522 F.3d 413, 418-21 (D.C. Cir. 2008); *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005). In *Baker v. Carr*, the Supreme Court explained that a claim presents a non-justiciable political question if any one of the following six factors is present:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly fit for non-judicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. 186, 217 (1962); *Schneider*, 412 F.3d at 194 ("To find a political question, we need only conclude that one factor is present, not all."). Here, Plaintiffs' claims implicate, at a minimum, the first, third, and fourth *Baker* factors, because they call into question USAID's foreign policy of providing financial support to vulnerable Afghan communities despite the inherent "risk" that by "its very design and approach," the LGCD program could cause funds to fall into insurgent hands. 2010 USAID OIG Report at 3, 11.

The Supreme Court has cautioned that "[m]atters relating to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Regan v. Wald*, 468 U.S. 222, 242 (1984) (internal

quotation omitted); *see also Haig v. Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."). DAI's performance of its USAID contracts was in furtherance of the U.S. foreign assistance program authorized by Congress in the Afghanistan Freedom Support Act of 2002 (P.L. 107-327). *See generally* Congressional Research Service, R40699, *Afghanistan: U.S. Foreign Assistance* (Aug. 12, 2010), *available at* https://fas.org/sgp/crs/row/R40699.pdf (describing USAID's programs in Afghanistan). As DAI's contracts make plain, these programs are the very essence of foreign policy decisions that "are constitutionally committed to the political branches." *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010) (en banc) (first *Baker* factor).

The major focus of LGCD, and DAI's USAID contracts more generally, was to counteract the influence of the Taliban. In the LGCD program, USAID expressly tasked DAI with engaging possible Taliban recruits, "former combatants," and "groups who support the Taliban," by

> identifying and engaging populations that are vulnerable to recruitment into militant groups, such as alienated, uneducated, and unemployed youth; those engaged in the grey or black economy (smuggling); former combatants; and groups who support the Taliban either because of coercion, or a desperate need for the services that the Taliban is providing, such as dispute mediation and community security.

LGCD Task Order No. 2 at 9. In short, USAID hired DAI to engage persons formerly- or currently-affiliated with the Taliban to win them over to the U.S. and Afghan governments.

To that end, USAID mandated that "one important responsibility of [local Afghan] communities is to guarantee security during the implementation phase of development activities." *Id.* at 7. As the OIG later recognized, this reliance "on local communities that likely include Taliban insurgents or supporters to provide security" may have "contributed to the risk that USAID funds might fall into the hands of insurgents." 2010 USAID OIG Report at 3. Even so, USAID concluded that the need to press forward with these stabilization initiatives outweighed these

"inherent risks," *id.* at 13–14, and that DAI's due diligence measures were "appropriate to the complex environment and in accordance with [its] contractual obligations," *id.* at 15.[7]

A finding that DAI's performance violated the ATA would surely express a "lack of the respect due" to the political branches, given that the U.S. Government was well aware that DAI's activities risked funds falling into the hands of the Taliban. *Baker*, 369 U.S. at 217 (fourth factor). USAID also was intimately involved with DAI in assessing the potential risks in pursuing the political branches' objectives, and determining whether and how to carry them out. 2010 USAID OIG Report at 13–15. Plaintiffs' claims thus would impermissibly require the Court to re-evaluate USAID's determinations, at both the macro and micro level, that the need to press forward with these stabilization initiatives outweighed their inherent risks. *Schneider*, 412 F.3d at 197 (third factor implicated because court "would be forced to pass judgment on the policy-based decision of the executive" to achieve a foreign policy objective).

While Plaintiffs may weigh the risks differently in hindsight, these judgments were committed to the Executive and Legislative Branches, where they remain under debate today. *See, e.g.*, USAID, Measuring Impacts of Stabilization Initiatives (MISTI), https://www.usaid.gov/afghanistan/fact-sheets/measuring-impacts-stabilization-initiatives-misti (last visited Apr. 29, 2020). Thus, these are policy decisions that remain committed to those branches under the political question doctrine. *See Bancoult v. McNamara*, 445 F.3d 427, 438 (D.C. Cir. 2006) (claims barred

[7] Similarly, USAID recognized that the 2008 FATA Development Program, aimed at improving economic and social conditions in the FATA, must be "performed in an environment characterized by profound constraints," most notably the instability caused by extremist groups. Task Order No. DFD-I-05-05-00220-00, FATA Capacity Building Development Program at 7 (Dec. 20, 2007) (Ex. 7); Compl. ¶ 161(c). USAID determined that the work must proceed because the "urgency to improve the standard of living and economic opportunities cannot wait." *Id.* at 8. Like the LGCD program, USAID mandated that DAI work with "local stakeholders in both design and implementation" of its development projects, to improve relations between local communities, the United States, and the government of Pakistan. *See id.* at 15.

where they "require the court to judge the validity and wisdom of the executive's foreign policy decisions, as Appellees' acts were inextricably part of those policy decisions").

B. Derivative Sovereign Immunity Bars Claims Arising from DAI's Performance of Delegated Government Functions.

As sovereign, the Government is immune from claims except under the limited circumstances in which it has waived immunity. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980). If Plaintiffs had brought their ATA claims against the sovereign, they would fail for lack of subject matter jurisdiction. 18 U.S.C. § 2337; *Joiner v. United States*, 2020 WL 1482380, at *5 (5th Cir. Mar. 27, 2020). For the same reasons, this Court should decline to hear any claim that DAI violated the ATA by performing its contracts on behalf of that sovereign.

For over 70 years, federal courts have found that, where the Government enjoys sovereign immunity, contractors working on behalf of the Government and within the scope of their delegated authority are entitled to derivative sovereign immunity. *See Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 19, 20–21 (1940). The Fourth Circuit has described the policy justifying derivative sovereign immunity as follows:

> This public interest remains intact when the government delegates that function down the chain of command. As a result, courts define the scope of sovereign immunity by the nature of the function being performed—not by the office or the position of the particular employee involved. Imposing liability on private agents of the government would directly impede the significant governmental interest in the completion of its work. As a result, courts have extended derivative immunity to private contractors, "particularly in light of the government's unquestioned need to delegate government functions."

Butters v. Vance Int'l, Inc., 225 F.3d 462, 466 (4th Cir. 2000) (emphasis added) (citations omitted). In other words, if a contractor is performing "the act[s] of the government," it rightly has the immunity of the government as well. *Yearsley*, 309 U.S. at 20-21; *Butters*, 225 F.3d at 466. In this regard, courts do not delve into how the contractor performed the contract, so long as the

contractor was acting within the scope of authority "delegate[d] . . . down the chain of command" to the contractor. *Butters*, 225 F.3d at 466; *see also Yearsley*, 309 U.S. at 20-21.[8]

DAI is entitled to derivative sovereign immunity here. Plaintiffs' claims against DAI (stripped of their contrary, conclusory and group-pleaded allegations) amount to a challenge to DAI's performance of its contractual obligations under the LGCD contract: i.e., the fact that DAI engaged Afghan subcontractors to implement LGCD activities, conducted development activities "in insecure areas," and "relie[d] on local communities that likely include[d] Taliban insurgents or supporters to provide security during the implementation phase." 2010 USAID OIG Report at 3. As the USAID OIG found, however, this was the "very design and approach" of USAID's LGCD project that contributed to the risk of protection payments by subcontractors, not DAI's actions. *Id.* Plaintiffs allege that DAI "recklessly disregarded" this risk, Compl. ¶ 170, but USAID was well aware of this risk, found that DAI's due diligence measures were "appropriate to the complex environment and in accordance with [its] contractual obligations," and concluded that DAI's implementation of the LGCD stabilization activities would continue in order to implement the U.S. Government's foreign policy objectives and "contribute to ultimate victory over the insurgency," 2010 USAID OIG Report at 14–15. In short, USAID explicitly tasked DAI with infusing local communities with funds *despite* the risk of insurgent diversion. Derivative sovereign immunity precludes claims based on DAI's performance of those obligations. *Butters*, 225 F.3d at 466.

[8] In a related line of cases, courts have extended to private contractors the Supreme Court's decision in *Westfall v. Erwin*, 484 U.S. 292, 295–98, 296 n.3 (1988), which recognized that officials exercising discretion within their official duties are immune from tort liability if the benefits of the immunity outweigh the costs. *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1447–50 (4th Cir. 1996); *see In re Series 7 Broker Qual. Exam Scoring Litig.*, 510 F. Supp. 2d 35, 45 (D.D.C. 2007), *aff'd*, 548 F.3d 110 (D.C. Cir. 2008); *see also Beebe v. Wash. Metro. Area Transit Auth.*, 129 F.3d 1283, 1289 (D.C. Cir. 1997). For the same reasons that DAI is entitled to derivative sovereign immunity for acts performed within the scope of its USAID contracts, *see infra*, it is entitled to absolute official immunity under *Westfall*.

III. THE PRIMARY LIABILITY CLAIMS SHOULD BE DISMISSED.

A. The DAI Allegations Do Not Constitute "Act[s] of International Terrorism."

Counts One through Four allege primary liability—i.e., that each Defendant itself committed "act[s] of international terrorism" by making protection payments to the Taliban (or, for Count Two, the Haqqani Network). The ATA defines "international terrorism" as "activities that (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or **(**iii**)** to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial boundaries of the United States[.]" 18 U.S.C. § 2331(1). The allegations against DAI fall outside this statutory definition.

1. The Allegations Defeat the ATA's Objective Intent Requirement.

To be liable for committing an "act of international terrorism," a defendant's actions must objectively appear directed to a terrorist purpose, e.g., to "intimidate or coerce a civilian population," or "influence the policy of a government by intimidation or coercion." 18 U.S.C. § 2331(1)(B); *Kemper v. Deutsche Bank*, 911 F.3d 383, 390 (7th Cir. 2018) (facts must lead an "objective observer" to conclude that Defendants intended to achieve coercion or intimidation); *Weiss v. Nat'l Westminster Bank*, 768 F.3d 202, 207 n.6 (2d Cir. 2014) (ATA creates "an objective standard to recognize the apparent intentions of actions"). Here, however, Plaintiffs allege that each Defendant acted with commercial motives: "to discourage the Taliban from attacking their projects" and "grow their profits" by reducing their overall security costs. Compl. ¶¶ 2–3, 162; *accord id.* ¶ 5 (payments were "the most efficient way to operate their businesses while managing their own security risks"), ¶ 8 ("Defendants paid the Taliban not to attack them"). The Complaint

also incorporates the 2010 USAID OIG Report, which contradicts the notion that DAI engaged in any wrongdoing at all, let alone with an objective terrorist intent, and instead found that DAI responded to Taliban threats by suspending or cancelling 27 LGCD subprojects in 2009 alone. 2010 USAID OIG Report at 3–4; *see supra* Argument, I.B.2.

The Complaint thus does not nearly meet the ATA's objective terrorist intent requirement. The Seventh Circuit's 2018 decision in *Kemper*, 911 F.3d 383, is on point. There, the plaintiff brought ATA claims against a major bank for helping Iranian state-owned banks evade U.S. sanctions, which—similar to the allegations here—ostensibly helped Iran to fund violent militia attacks in Iraq. *Id.* at 390, 393. The Seventh Circuit rejected such allegations as a premise for ATA liability, observing that the bank's actions "were motivated by economics, not by a desire to 'intimidate or coerce.'" *Id.* at 390; *see also id.* (the bank "built its sanctions-evading business because it was 'lucrative.'"). As the court reasoned, even if wrongful and ultimately helpful to terrorists, such self-interested actions are not motivated by any terrorist purpose and therefore do not give rise to liability as terrorist acts under the ATA. *Id.* at 394 ("Deutsche Bank's sanctions-avoiding actions, while wrongful, were designed to increase its profits," not to fund terrorism). *See also Stansell v. BGP, Inc.*, 2011 WL 1296881, at *9 (M.D. Fla. Mar. 31, 2011) (terrorist intent element "contradict[ed]" by fact that payments were "in exchange for the [terrorists'] agreement to allow [defendants] to conduct [their] oil exploration activities").

Numerous courts have reached the same conclusion on materially indistinguishable facts. *See Freeman v. HSBC Holdings PLC*, 413 F. Supp. 3d 67, 92 (E.D.N.Y. 2019) (defendant banks "'appear' to have been purely motivated by the opportunity to make money" where they assisted Iran to evade sanctions); *Zapata v. HSBC Holdings*, 414 F. Supp. 3d 342, 359 (E.D.N.Y. 2019) ("[T]o an objective observer, HSBC's [alleged laundering of funds for drug cartels] appeared to

be 'motivated by economics, not by a desire to 'intimidate or coerce.'" (quoting *Kemper*, 911 F.3d at 390)); *Kaplan v. Lebanese Canadian Bank*, 405 F. Supp. 3d 525, 532 (S.D.N.Y. 2019) (alleged provision of financial services to Hezbollah-affiliated individuals does not allege terrorist intent); *Stutts v. De Dietrich Grp.*, 2006 WL 1867060, at *2 (E.D.N.Y. June 30, 2006) ("engaging in commercial banking activity" with suppliers of chemicals to Iraq was not "designed to coerce civilians or government entities as required under § 2331"). *See also Mastafa v. Chevron Corp.*, 770 F.3d 170, 194 (2d Cir. 2014) (implausible that corporation "intend[ed]" corrupt transactions to "assist[]" Saddam's "torture and abuse of Iraqi persons"); *Brill v. Chevron Corp.*, 2017 WL 76894, at *1, *4 (N.D. Cal. Jan. 9, 2017) (oil-for-food deals not intended to intimidate or coerce).

2. The Complaint Does Not Allege Acts by DAI That Were "Violent" or "Dangerous to Human Life."

Plaintiffs' allegations also fail to establish that DAI's actions were "violent" or "dangerous to human life." 18 U.S.C. § 2331(1)(A). Although courts outside this circuit have suggested that "giving fungible dollars to a terrorist organization may be 'dangerous to human life,'" they have specified that "doing business with companies and countries that have significant legitimate operations" does not generally constitute an act dangerous to human life. *Kemper*, 911 F.3d at 390. Thus, *Kemper* held that providing "sanctions-avoidance services" to Iran was not "dangerous to human life," because Iran, although a designated state sponsor of terrorism, was still a sovereign with "legitimate operations" to fund. *Id.* at 387, 390; *see also O'Sullivan v. Deutsche Bank*, 2019 WL 1409446, at *8 (S.D.N.Y. Mar. 28, 2019) ("the provision of banking services" to Iran cannot be "considered as acts dangerous to human life, particularly [where the alleged causal chain is] so attenuated"); *Kaplan*, 405 F. Supp. 3d at 532 (plaintiffs did not adequately allege that provision of financial services to Hezbollah-affiliated individuals was violent or dangerous to human life). The challenged conduct arises from DAI's work with local subcontractors on development activities;

there is no question that these subcontractors performed legitimate services—USAID approved their selection, *see supra* n.5, and even mandated that it was "essential" that DAI prioritize the hiring of ex-insurgents, LGCD Task Order No. 2 at 7, 25. As such, DAI's work with, and reimbursement of, these subcontractors cannot be considered inherently dangerous to human life.

3. The Allegations Fail to Establish the Knowledge Element Required for Each of the Alleged Criminal Predicate Offenses.

The ATA defines acts of "international terrorism" as activities that "are" or "would be" a crime under U.S. law. 18 U.S.C. § 2331(1). While Plaintiffs cite four different criminal statutes—three under the ATA, 18 U.S.C. § 2339A (Count One); § 2339B (Count Two); and § 2339C (Count Three); and one under the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1705(a) (Count Four)—they fail to establish the knowledge element of each predicate offense.

Each of the ATA predicates invoked by Plaintiffs requires that an accused "know[]" or "intend[]" that the money or support provided is to be used for terrorist purposes. 18 U.S.C. § 2339A (providing "material support or resources … knowing or intending that they are to be used in preparation for, or in carrying out" certain federal terrorism offenses); *id.* § 2339B (knowingly giving material support to a designated FTO); *id.* § 2339C ("unlawfully and willfully provid[ing] or collect[ing] funds" with the intent or knowledge that the funds will be used to carry out terrorist acts against civilians). IEEPA similarly requires a knowing and willful violation of an enumerated regulation. 50 U.S.C. § 1705(a) (prohibiting "willfully commit[ing], willfully attempt[ing] to commit, or willfully conspir[ing] to commit, or aid[ing] or abet[ting] in the commission of," a sanctions violation); *United States v. Reyes*, 270 F.3d 1158, 1170 (7th Cir. 2001) ("The government was required to establish that Reyes willfully attempted to export goods to another country, knowing the ultimate destination was an embargoed country, without a license.").

The allegations do not meet this standard. There is no well-pleaded allegation that DAI

knew of or intended to provide support for terrorist acts, and the 2010 USAID OIG Report rebuts such conclusions. Plaintiffs try to circumvent these defects by invoking media reports of purported "prevailing practices, known to virtually everyone in Afghanistan." Compl. ¶ 170 (alleging DAI knowledge by referencing ¶¶ 96–110). But, allegations of "common knowledge" do not meet the statutory standard of actual knowledge required for criminal liability. There must be plausible allegations that a defendant was *actually* aware of the relevant information, not merely should have been, for criminal liability to attach. *Kaplan*, 405 F. Supp. 3d at 535; *Averbach v. Cairo Amman Bank*, 2020 WL 486860, at *12 (S.D.N.Y. Jan. 21, 2020), *report and recommendation adopted*, 2020 WL 1130733 (S.D.N.Y. Mar. 9, 2020). Similarly, IEEPA requires knowledge that a defendant's actions violate certain sanctions regulations, but even that is absent here given the lack of well-pleaded factual allegations and the contrary findings of the 2010 USAID OIG Report.

4. Count Two Fails to State a Claim Concerning the Haqqani Network.

Count Two alleges that Defendants committed an "act of international terrorism" by knowingly providing material support to a designated FTO, the Haqqani Network, in violation of 18 U.S.C. § 2339B. Compl. ¶¶ 1269–75. There is no well-pleaded allegation of a payment to that group, let alone one satisfying the other elements of liability. *See supra* Argument, I.B.1.

In addition, Count Two requires a predicate violation of 18 U.S.C. § 2339B—i.e., that a payment was made *after* the Haqqani Network was designated as a FTO on September 19, 2012,[9] and that DAI had "knowledge that the organization is a designated [FTO]." 18 U.S.C. § 2339B(a)(1). But, the only DAI-specific allegations involve the FATA contract, Compl. ¶ 165, which the Complaint alleges ended *before* September 2012, *id.* ¶ 161(c) (FATA contract was awarded in January 2008 and had a three-year duration). Moreover, Plaintiffs' allegations are

[9] Count Two incorrectly alleges that this occurred on September 7, 2012, but the correct date (September 19, 2012) is pleaded elsewhere in the Complaint. *See* Compl. ¶¶ 288, 1271.

based on a quote from a July 2012 report that, in turn, is based on an unnamed "Local researcher, Peshawar, June 2010"—i.e., long before the FTO designation. *Haqqani Network Financing* at 44 nn.206–07 (cited at Compl. ¶ 165). There is no well-pleaded allegation of any payments after the FTO designation, or that DAI had knowledge of the FTO designation. Count Two thus fails to state a predicate violation of 18 U.S.C. § 2339B, and therefore should be dismissed as to DAI.

B. The Allegations Fail the ATA's Rigorous Proximate Causation Test.

Because 18 U.S.C. § 2333(a) requires a plaintiff's injuries to arise "by reason of" a terrorist act, an ATA plaintiff must establish proximate causation, i.e., that "the alleged [ATA] violation led directly to the plaintiff's injuries." *Rothstein v. UBS AG*, 708 F.3d 82, 91-92 (2d Cir. 2013); *accord Owens v. BNP Paribas*, 897 F.3d 266, 273 n.8 (D.C. Cir. 2018) ("some direct relation between the injury asserted and the injurious conduct alleged" (quoting *Fields v. Twitter, Inc.*, 881 F.3d 739, 745 (9th Cir. 2018)). This is a rigorous requirement. *See Owens*, 897 F.3d at 273–76. "Courts routinely dismiss ATA claims when the plaintiffs fail to allege a direct link between the defendants and the individual perpetrator," for instance where a defendant is alleged to have made payments that, after winding their way through one or more intermediary steps, ended up allegedly contributing to an attack. *Crosby v. Twitter, Inc.*, 921 F.3d 617, 627 n.6 (6th Cir. 2019); *see also, e.g.*, *Owens*, 897 F.3d at 276; *Brill v. Chevron Corp.*, 2020 WL 1200695, at *1 (9th Cir. Mar. 12, 2020); *Kemper*, 911 F.3d at 392; *Rothstein*, 708 F.3d at 97; *O'Sullivan*, 2019 WL 1409446, at *6. As courts have reasoned, any other rule would effectively "allow recovery for even remote causes" of a terrorist attack and impose liability that "goes forward to eternity." *Crosby*, 921 F.3d at 623.

Here, the allegations against DAI fail to establish proximate cause in multiple respects:

First, DAI did not participate in the attacks that injured Plaintiffs, nor do Plaintiffs allege a direct relationship between DAI and the groups that did. Instead, they allege that subcontractors made protection payments to the Taliban, which they purportedly recouped through contract and

reimbursement payments. *E.g.*, Compl. ¶¶ 169–170. There is no well-pleaded allegation that DAI directed any such payments to be made, and the 2010 USAID OIG Report contradicts such a suggestion. *See supra* Argument, I.A–B. This falls well short of the requisite "direct relation between the injury asserted and the injurious conduct alleged." *Owens*, 897 F.3d at 273 n.8.

The absence of a direct relationship is further highlighted by the allegations in *Cabrera v. Iran*, filed in this Court on the same day as this lawsuit by many of the same Plaintiffs and counsel. Case No. 19-cv-03835-JDB (D.D.C., filed Dec. 27, 2019). There, the plaintiffs allege that it was ***the Government of Iran***—not DAI or other companies working in Afghanistan—that "caused Plaintiffs' injuries." Am. Compl. ¶ 9, ECF No. 8 ("*Cabrera v. Iran* Compl."). Indeed, the 273-page *Cabrera v. Iran* complaint does not mention DAI once.[10]

Second, the allegations make clear that any protection payments were not "necessary" to fund the alleged attacks. *Owens*, 897 F.3d at 276 ("Plaintiffs' complaint fails to plausibly allege that any currency processed by BNPP for Sudan was . . . in fact . . . necessary for Sudan to fund the embassy bombings."); *Rothstein*, 708 F.3d at 92 (even if defendant bank "had not transferred U.S. currency to Iran, Iran, with its billions of dollars in reserve, would . . . have funded the attacks"). Plaintiffs allege no well-pleaded facts of the amount of any payments. Plaintiffs' claim that DAI's "unscrupulous subcontractors" made payments "worth at least several million dollars" is based on the "standard practice" allegations about unnamed companies. Compl. ¶ 162 (citing *id.* ¶ 80). Plaintiffs also quote the OIG's statement that "an estimated $5.2 million of USAID funds

[10] The *Cabrera v. Iran* complaint alleges that Iran annually made "large cash payments to the Taliban," bounty payments to Taliban insurgents for "each U.S. soldier murdered" and "destroyed American military vehicle," and payments to individual Taliban commanders, and that Iran also recruited and funded individual terrorists and facilitated the Taliban's lucrative drug trade. *Cabrera v. Iran* Compl. ¶¶ 143–47. It also alleges that Iran supplied the same EFPs and suicide bombs that caused many Plaintiffs' injuries here, explaining that the Taliban "could not have obtained or deployed [the EFPs] effectively" without Iranian support. *Id.* ¶ 115, 123.

were at risk of falling into the hands of insurgents if they demanded up to 20 percent of LGCD's award amounts for community development subprojects that were implemented in 2009," 2010 USAID OIG Report at 6 (quoted at Compl. ¶ 167), but this merely identified funds "at risk." The OIG identified no amounts paid and instead found that "[i]n 2009, DAI suspended or cancelled 27 LGCD subprojects totaling about $1.4 million" in response to insurgent threats. *Id.* at 4.

Even this "at risk" estimate is dwarfed by the staggering sums that the Taliban received from other sources during the same period. The U.N. Security Council report cited by Plaintiffs estimates that the Taliban earned roughly $155 million from heroin trafficking operations in 2009 alone, and another $100 million in 2011–12. *See* U.N. Security Council, *First Report of the Analytical Support & Sanctions Implementation Monitoring Team* (Sept. 5, 2012), *available at* https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2012_683.pdf ("U.N. Security Council Report" (cited at Compl. ¶¶ 72 n.61, 73 n.62, 77 n.73, 84 nn.81–82, 90 n.90, 92 nn.96–98); U.N. Security Council Report ¶ 37. The report states that the Taliban received another $360 million from an Afghan trucking company over a three-year period. U.N. Security Council Report ¶ 39. The Complaint alleges that the Taliban received between $20–32 million each year in protection money from telecommunications companies during the relevant period. *Compare* Compl. ¶ 224 (alleging that "every single one of the [33] shadow provincial governors set up by the Taliban leadership council receives $50,000 to $60,000 in protection money each month alone from the telecommunications sector"), *with id.* ¶ 57 (alleging 33 shadow provincial governments), *and id.* ¶ 233 (alleging payments of $2.6 million per month). Plaintiffs also allege that it was the "standard practice" of unnamed "companies" and "contractors" to make other substantial payments to the Taliban. *See, e.g.*, *id.* ¶¶ 69, 162. All of this is independent of the support received from the Government of Iran. *See supra* n.10

(discussing *Cabrera v. Iran* allegations).

Put in context, the Complaint alleges that the Taliban spent $100–$155 million funding its attacks in 2011, *see* Compl. ¶ 84, during which the cited U.N. Security Council Report estimates the Taliban received income of roughly $400 million, U.N. Security Council Report ¶ 34. All of this establishes that the Taliban is an enormous operation with multiple independent income streams that provided more than enough funding for its attacks and that had nothing to do with DAI. These facts are fatal to proximate cause. *Owens*, 897 F.3d at 276; *Rothstein*, 708 F.3d at 92.

Third, the Complaint fails to allege that alleged payments to the Taliban proximately caused attacks "committed by" other groups. Compl. ¶¶ 344–1261; *see infra* Argument, IV.A.1. While the Complaint attempts to conflate these groups, it lacks well-pleaded facts to directly link these non-Taliban attacks with alleged payments to the Taliban, thus defeating proximate cause. *Crosby*, 921 F.3d at 627 n.6; *Owens*, 897 F.3d at 273 n.8, 276; *Fields*, 881 F.3d at 745.

Fourth, the majority of the attacks were committed after the LGCD contract ended in April 2011 (Compl. ¶161(a)), some as late as 2017. In *Siegel v. HSBC North America Holdings*, 933 F.3d 217, 224 (2d Cir. 2019), the Second Circuit held that the defendant's cessation of banking services to an alleged intermediary "for the ten months preceding the [attacks] makes it implausible under the circumstances that HSBC had knowingly assumed a role in the Attacks." Here, the Complaint lacks well-pleaded facts of payments under the LGCD contract creating a direct link to attacks committed in the months and years after that contract ended. This, too, is fatal to proximate cause. *Owens*, 897 F.3d at 273, 276; *Crosby*, 921 F.3d at 627 n.6; *Fields*, 881 F.3d at 745.[11]

[11] Similarly, while the allegation of payments to the Haqqani Network is not well pleaded, *see supra* Part I.B.2, even if one were to credit it, there are still no well-pleaded facts establishing proximate cause as to attacks committed after the FATA contract was completed in 2011. *See* Compl. ¶ 161(c) (FATA Contract was awarded in January 2008 and had a three-year duration).

IV. THE SECONDARY LIABILITY CLAIMS SHOULD BE DISMISSED.

Counts Five and Six allege claims for ATA secondary liability based on the attacks committed by the Taliban. 18 U.S.C. § 2333(d)(2); Compl. ¶¶ 1290, 1305. When Congress amended the ATA to provide for such claims, it carefully circumscribed the cases to which they would apply. As relevant here, Congress requires that (1) the "injury aris[e] from an act of international terrorism committed, planned, or authorized by an organization that had been designated as a [FTO]"; (2) the FTO must have been so designated "as of the date on which such act of international terrorism was committed, planned, or authorized"; and (3) the defendant's assistance must have been both "knowing[]" and "substantial." *Id.*[12] As the Chair of the House Judiciary Committee explained, "Secondary liability should only attach to persons who have actual knowledge that they are directly providing substantial assistance to a designated foreign terrorist organization in connection with the commission of an act of international terrorism." Statement of Rep. Goodlatte, 162 Cong. Rec. H5240 (daily ed. Sept. 9, 2016).

The Complaint fails to meet these statutory requirements. The Taliban is not, and has never been, designated as a FTO. Thus, Plaintiffs' allegations of purported protection payments to the Taliban are plainly insufficient to establish secondary liability. Plaintiffs attempt to plead around this obvious flaw in different ways, but their efforts fall short of the *Twombly* standard. And Plaintiffs fail to allege that any purported assistance by DAI was both "knowing" and "substantial."

[12] The full text of 18 U.S.C. § 2333(d)(2) provides that "In an action under subsection (a) for an injury arising from an act of international terrorism committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization under section 219 of the Immigration and Nationality Act (8 U.S.C. 1189), as of the date on which such act of international terrorism was committed, planned or authorized, liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism."

A. Plaintiffs' Fail to Plead That a Designated FTO Committed, Planned or Authorized the Attacks.

Because the Taliban is not a designated FTO, Plaintiffs attempt to allege the involvement of other entities that have been so designated—al-Qaeda and the Haqqani Network—in the attacks at issue. Plaintiffs attempt to do this in two ways. Both theories fail for lack of well-pleaded factual allegations, and the second also fails as a matter of law.

1. Count Five Lacks Well-Pleaded Allegations of FTO Involvement.

Count Five alleges that although the Taliban committed the attacks that injured them, Compl. ¶¶ 1290, 1296, they were also "committed, planned, and/or authorized" by al-Qaeda and the Haqqani Network, *id.* ¶ 1295. This is not supported by well-pleaded facts. With one exception, the Complaint (¶¶ 344–1261) instead pleads that each attack was committed by a single group:

- The majority were "committed by the Taliban," which is not a FTO.[13]
- Others were "committed by the Kabul Attack Network," which is not a FTO, and also is not mentioned in Counts Five or Six.[14]
- Others were "committed by the Haqqani Network," but the majority of these attacks occurred before its FTO designation on September 19, 2012.[15] Section 2333(d)(2) requires the FTO to have been so designated "as of the date on which such act of international terrorism was committed, planned, or authorized."

[13] Compl. ¶¶ 363, 370, 381, 386, 394, 400, 409, 415, 420, 433, 447, 452, 458, 481, 494, 499, 506, 513, 518, 523, 529, 536, 546, 552, 557, 570, 576, 584, 597, 604, 610, 616, 621, 637, 645, 652, 654, 662, 672, 677, 686, 691, 698, 710, 724, 737, 744, 751, 769, 774, 780, 786, 791, 793, 806, 812, 819, 830, 841, 845, 854, 865, 874, 880, 885, 902, 941, 946, 948, 953, 958, 964, 969, 976, 993, 1006, 1021, 1029, 1037, 1044, 1084, 1089, 1104, 1119, 1126, 1143, 1150, 1164, 1169, 1191, 1197, 1202, 1207, 1216, 1218, 1226, 1233, 1247.

[14] Compl. ¶¶ 344, 463, 630, 715, 801, 928, 981, 1096, 1155, 1181.

[15] Compl. ¶ 356 (8/31/2010), ¶ 441 (8/6/2011), ¶ 544 (5/6/2012), ¶ 565 (7/10/2010), ¶ 667 (7/29/2011), ¶ 703 (5/11/2010), ¶ 730 (2/27/2011), ¶ 756 (11/27/2010), ¶ 835 (5/14/2010), ¶ 891 (5/7/2012), ¶ 896 (8/7/2012), ¶ 910 (2/28/2011), ¶ 918 (3/19/2011), ¶ 936 (5/13/2012), ¶ 987 (8/6/2011), ¶ 1001 (8/27/2010), ¶ 1051 (8/6/2011), ¶ 1056 (7/14/2010), ¶ 1062 (7/13/2012), ¶ 1070 (6/26/2010), ¶ 1078 (6/11/2010), ¶ 1114 (5/7/2012), ¶ 1133 (5/6/2010), ¶ 1186 (12/2/2010).

- The remaining attack was the "Camp Chapman Attack," which was "committed by al-Qaeda, the Pakistani Taliban, and the Haqqani Network," and resulted in the deaths of three plaintiffs. Compl. ¶¶ 472–73, 1011, 1239.

Because the majority of the attacks were not committed by a FTO, Plaintiffs conclusorily allege that each of the attacks "was planned, authorized, and/or jointly committed by al-Qaeda," a FTO, in order to satisfy § 2333(d)(2). Compl. ¶ 343. But the only attack that al-Qaeda is alleged to have jointly committed is the Camp Chapman Attack. And the paragraphs describing the specific attacks (*id.* ¶¶ 344–1261) do not allege al-Qaeda's involvement in the planning or authorization of any specific attack. Instead, Plaintiffs allege elsewhere that al-Qaeda provided general support and inspiration to the Taliban, *e.g.*, that it recruited, trained, and provided weapons and general logistical support to Taliban fighters, *id.* ¶¶ 16, 312–338, 343, "often assumed a position of moral, religious, and tactical authority over Taliban members," *id.* ¶ 328, and conducted a propaganda campaign to incite its membership, *id.* ¶¶ 16, 318.

These general allegations are insufficient to satisfy the express statutory language of § 2333(d)(2), which requires a plaintiff's injury to arise from a specific "act of international terrorism" that was "committed, planned or authorized by" a FTO. Had Congress intended for Section 2333(d)(2) to cover generalized support and inspiration, it would have said so, instead of requiring the FTO's planning and authorization to relate to a specific "act of international terrorism." *See Taamneh v. Twitter, Inc.*, 343 F. Supp. 3d 904, 915 (N.D. Cal. 2018) (discussing 18 U.S.C. § 2339B). No court has endorsed such a generalized interpretation of FTO "plann[ing] or authoriz[ation]," and at least one court has expressed concern with such an approach. *Id.* (noting "concerns about Plaintiffs' JASTA [§ 2333(d)(2)] claims because Plaintiffs seem to take the position that, in the instant case, ISIS's 'act of international terrorism' encompasses *all* of ISIS's terrorist operations, and not the Reina attack specifically").

Similarly, Plaintiffs allege no well-pleaded facts to support their conclusory allegation that the Taliban attacks were planned or authorized by the Haqqani Network after its FTO designation in September 2012. Compl. ¶ 1295. Instead, Plaintiffs conclusorily allege that the Haqqani Network was "part of the Taliban," *e.g.*, *id*. ¶ 1263 n.428, but the U.S. Government treats the two groups as separate, most notably in its decision to designate the Haqqani Network as a FTO, but not the Taliban. U.S. Dep't of State, Foreign Terrorist Organizations, https://www.state.gov/foreign-terrorist-organizations/ (last visited Apr. 29, 2020). Plaintiffs cite U.S. Government documents describing the two as separate groups. *See id.* ¶ 67 (quoting the U.S.'s Task Force 2010 describing the two as separate "insurgent groups"), ¶ 292 (quoting a U.S. State Department publication referring to Haqqani as merely a "Taliban-affiliated group"). Plaintiffs also allege, and incorporate sources reflecting, that the Haqqani Network had its own funding sources and leadership, and carried out its own attacks. *See, e.g.*, *id.* ¶¶ 63, 81, 211, 293, 825; *Haqqani Network Financing* (cited at Compl. ¶¶ 91, 165, 205). Count Five thus fails to satisfy the FTO requirement as to the attacks committed by the Taliban.

While Plaintiffs plead nine attacks committed by a designated FTO—the Camp Chapman Attack (al-Qaeda), and the attacks committed by the Haqqani Network after its designation—those attacks fall outside of Count Five, which is based on attacks committed by the Taliban. Compl. ¶¶ 1290–96. Plaintiffs do not allege that the Taliban committed those specific attacks. *See id.* ¶¶ 428, 486, 825, 843, 1109, 1176, 1220, 1255. The attacks committed by the Kabul Attack Network also fall outside of Count Five, because that entity is not a FTO and the Taliban is not alleged to have committed them. *Id.* ¶¶ 344, 463, 630, 715, 801, 928, 981, 1096, 1155, 1181.

2. Count Six's RICO Artifice Fails to Satisfy the FTO Requirement.

Count Six attempts to circumvent § 2333(d)(2)'s FTO requirement through a pleading artifice: characterizing the "act of international terrorism" not as the specific attacks that caused each Plaintiff's respective injuries, but rather as a singular "Taliban-al-Qaeda Campaign," which Plaintiffs describe as a criminal conspiracy and pattern of racketeering activity punishable under RICO that was "committed, planned and/or authorized by al-Qaeda . . . and the Haqqani Network." Compl. ¶¶ 1300, 1306. Plaintiffs then characterize the various attacks that injured them as "part of the pattern of racketeering activity," as opposed to separate acts of international terrorism. *Id.* ¶ 1304. This pleading device fails for multiple reasons.

First, it is contrary to the plain language of the ATA. As noted above, the ATA imposes liability for injuries resulting from "*an act* of international terrorism." 18 U.S.C. § 2333(d)(2) (emphasis added). A multi-year campaign consisting of separate attacks occurring at different times and in different places over a nine-year period, each resulting in separate and distinct injuries to each Plaintiff, is not a single "act." It is far from the "most natural reading" of the statute, *Avco Corp. v. U.S. Dep't of Justice*, 884 F.2d 621, 627 (D.C. Cir. 1989), to say that the "act" that caused each Plaintiff's injury was not the attack in which he or she was actually injured, but rather a collection of dozens of attacks on other persons occurring over a decade. *See Taamneh*, 343 F. Supp. 3d at 916 (emphasizing that use of the singular "act" in § 2333(d)(2) requires a "connect[ion] with a specific crime," not a terrorist group's "general course of conduct").

Indeed, of all the crimes that could serve as a predicate terrorist "act," few fit the mold less readily than a RICO violation, which by definition consists of a "pattern" of activity and "at least two acts." 18 U.S.C. §§ 1961(5), 1962(a)–(d). In fact, Count Six uses "act" interchangeably to describe the individual Taliban attacks cited for purposes of their RICO predicate, *see* Compl. ¶ 1301 (pleading "a pattern of racketeering activity involving . . . commission of acts of terrorism

transcending national boundaries"), and then the purported singular campaign when attempting to plead the elements of their ATA claim, *see id.* ¶ 1302 ("The Taliban-al-Qaeda Campaign was an act of international terrorism."). Perhaps unsurprisingly, no court has ever held that a RICO conspiracy can thus serve as a singular "act of international terrorism" under § 2333(d)(2). This would ignore the plain language of the statute, as it would require the Court to construe the same word to mean both an individual attack and an overarching conspiracy at the same time.

Second, Count Six fails to allege a perpetrator "distinct from the RICO enterprise." *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1113 (D.C. Cir. 2009) (per curiam). Instead, they are one and the same: Plaintiffs plead that the purported RICO enterprise (the "Taliban-al-Qaeda Campaign") was simply "the affairs of the Taliban." Compl. ¶ 1300. Plaintiffs do not connect specific perpetrators with any particular offenses, nor allege that DAI "substantially assisted" any individual perpetrator with any particular offense. Instead, Plaintiffs conflate the perpetrator with the RICO enterprise, lump all Defendants together, and allege that "Defendants aided and abetted and knowingly provided substantial assistance to the Taliban, its members, and the Taliban-al-Qaeda Campaign." *Id.* ¶ 1305. Such allegations are inadequate. *See, e.g.*, *Philip Morris USA, Inc.*, 566 F.3d at 1113; *Feld Entm't, Inc.*, 873 F. Supp. 2d at 317.

Third, there are no well-pleaded facts to support the claim that al-Qaeda "committed, planned, or authorized" the purported "al-Qaeda-Taliban Campaign." Although Plaintiffs allege in conclusory fashion that al-Qaeda planned or directed the campaign, there are no well-pleaded allegations that al-Qaeda did more than provide general training or support, and certainly not that it planned or authorized an entire "campaign." *See supra* Argument, IV.A.1.

B. Plaintiffs Fail to Allege That DAI Knowingly and Substantially Assisted an Act of International Terrorism.

Counts Five and Six also lack well-pleaded allegations that DAI provided assistance that was both "knowing" and "substantial." 18 U.S.C. § 2333(d)(2).

First, the requirement that a defendant's assistance be "knowing" sets a high bar. Congress limited secondary liability, and its expansive treble damages, to persons who "knowingly" assisted "*such* an act of international terrorism," meaning "an act of international terrorism committed, planned, or authorized by [a FTO]." *Id.* (emphasis added); *see King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("such" refers to something that has "just been mentioned"); *Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009) (when the word "knowingly" is used as an element of an offense, it is most naturally read "as applying to all the subsequently listed elements"). Thus, Plaintiffs must plead that DAI knew that a FTO had the requisite involvement in the underlying attack. This element also "requires the secondary actor to be 'aware' that, by assisting the principal, it is itself assuming a 'role' in terrorist activities." *Linde v. Arab Bank*, 882 F.3d 314, 329 (2d Cir. 2018); *Weiss*, 381 F. Supp. 3d at 239 ("knowingly provid[ing] services to a terrorist organization, without more, is insufficient to satisfy JASTA's scienter requirement"). This entails a showing of *actual* knowledge. *Brill*, 2020 WL 1200695, at *1. Thus, "the trend in JASTA case law [is] toward disallowing claims against defendants who did not deal directly with a terrorist organization or its proxy." *Averbach*, 2020 WL 486860, at *12.[16]

[16] *Accord Siegel*, 933 F.3d at 224 (failure to allege that defendant "was aware that by providing banking services to [a third-party bank], it was supporting [al Qaeda], much less assuming a role in [al Qaeda's] violent activities"); *Brill*, 2020 WL 1200695, at *1 (allegations of kickbacks to Iraqi government failed to plead "actual knowledge by the alleged aider and abettor of [terrorist attacks in Israel] and of his or her role in furthering it"); *O'Sullivan*, 2019 WL 1409446, at *10 (no plausible allegation that defendants knew the financial services they provided to "various Iranian entities were destined to aid the FTOs responsible for the attacks that injured Plaintiffs").

The Complaint fails to meet this standard. It lacks well-pleaded allegations that DAI dealt directly with a terror group, let alone a FTO, or knew of a FTO's involvement in an act of international terrorism. *Siegel*, 933 F.3d at 224; *Honickman ex rel. Goldstein v. BLOM Bank*, 2020 WL 224552, at *9 (E.D.N.Y. Jan. 14, 2020) (no plausible allegation that bank was aware its customers were affiliated with Hamas, let alone that by serving customers it was "assuming a role in Hamas' violent or life-endangering activities"). The Taliban is not a FTO, and the allegations of payments to the Haqqani Network are based on speculation from a source that did not name DAI and predated that group's FTO designation by over two years. *See supra* Argument, III.B.

Second, Counts Five and Six fail to allege that DAI provided "substantial assistance" to the Taliban, "the person who committed such an act of international terrorism." 18 U.S.C. § 2333(d)(2). When Congress amended the ATA to provide for secondary liability, it directed courts to apply the factors set forth in *Halberstam v. Welch*, 705 F.2d 472, 483–84 (D.C. Cir. 1983), to distinguish "substantial" from mere incidental (i.e., non-actionable) assistance. *See* JASTA § 2(b), Pub. L. No. 114-222. These factors overwhelmingly weigh in DAI's favor.

The first and second *Halberstam* factors—the nature of the act allegedly encouraged, and the amount and kind of assistance given—"dictate[] what aid might matter, *i.e.*, be substantial." 705 F.2d at 484. Here, while Plaintiffs make group-pleading allegations that Defendants made protection payments to the Taliban, they specifically allege that Defendants did so to *prevent* attacks. *See supra* Part III.A.1 Moreover, Plaintiffs' allegations of DAI's purported role in such payments are based on a mischaracterization of the 2010 USAID OIG Report, which found no such involvement, identified no specific payments, found instead that DAI had suspended and terminated projects in response to insurgent threats, and included USAID's discussion of DAI's extensive due diligence efforts. *See supra* Part I.B.1.

The third and fourth factors—whether the defendant was present at the time of the principal violation, and the defendant's relationship to the principal wrongdoer, *Halberstam*, 705 F.2d at 478, 484—also weigh in DAI's favor. DAI was not present at any Taliban attack, nor did it have any relationship with the Taliban, let alone a "position of authority" or other special relationship. *See id.* at 484; *Taamneh*, 343 F. Supp. 3d at 917–18.

The fifth factor, state of mind, requires a showing that the defendant "was one in spirit with the [principal wrongdoer]." *Halberstam*, 705 F.2d at 484. Courts have held that this factor goes beyond simply knowing of the primary wrongdoer's illegal activities and turns on whether the defendant shared the primary wrongdoer's aim, intended to assist the principal tort, and desired to help those activities succeed. *See Linde*, 882 F.3d at 329 n.10.[17] It would be implausible, to say the least, to contend that an international development company like DAI was "one in spirit" with the Taliban, shared the Taliban's intent to kill American soldiers, and desired to help the Taliban's activities succeed. *See generally* 2010 USAID OIG Report.

The final *Halberstam* factor, the duration of the aid provided, also weighs in DAI's favor. There are no well-pleaded factual allegations regarding the date or other circumstances of any purported payments by DAI or a DAI subcontractor. Plaintiffs also acknowledge that the LGCD contract ended in April 2011. *Compl.* ¶ 161(a). Thus, there are no facts to plausibly allege that DAI substantially assisted any specific attack, let alone ones that continued as late as 2017.

[17] *See also Crosby*, 303 F. Supp. 3d at 574-75; *Taamneh*, 343 F. Supp. 3d at 917-18; *Copeland v. Twitter, Inc.*, 352 F. Supp. 3d 965, 975-76 (N.D. Cal. 2018). Even before JASTA added secondary liability in § 2333(d), courts interpreting § 2333(a) to permit such claims held that "'substantial assistance'" requires a showing of the defendant's "desire to help [the unlawful] activity succeed." *Goldberg v. UBS*, 660 F. Supp. 2d 410, 425 (E.D.N.Y. 2009); *see Rothstein v. UBS*, 647 F. Supp. 2d 292, 295 (S.D.N.Y. 2009) (noting that courts "have dismissed aiding and abetting claims under the [ATA] precisely for failure to allege knowledge and intent"), *aff'd*, 708 F.3d 82 (2d Cir. 2013).

In short, the Complaint fails to plausibly allege that DAI provided substantial assistance to the Taliban in connection with an act of international terrorism that DAI knew was committed, planned or authorized by a FTO, as required under 18 U.S.C. § 2333(d)(2). Accordingly, Counts Five and Six should be dismissed on this basis as well.

CONCLUSION

DAI recognizes the sacrifices of those service members and civilians who served the United States in Operation Enduring Freedom, condemns those who attacked U.S. forces and civilian personnel in Afghanistan, and understands the strong desire to hold the perpetrators responsible. But DAI does not belong in this lawsuit. For the aforementioned reasons, the Court should dismiss the claims against DAI with prejudice.

Dated: April 29, 2020

Respectfully submitted,

NICHOLS LIU LLP

Robert Nichols*
700 Sixth Street, N.W.
Suite 430
Washington, DC 20001
Tel. (202) 846-9801
Email RNichols@nicholsliu.com

* *petition for D.D.C. admission pending*

WILLIAMS & CONNOLLY LLP

By: /s/ Christopher N. Manning

Kevin M. Downey (D.C. Bar. # 438547)
Christopher N. Manning (D.C. Bar # 464069)
John M. McNichols (D.C. Bar # 490479)
Brian T. Gilmore (D.C. Bar # 1030601)
725 Twelfth Street, N.W.
Washington, DC 20005
Tel. (202) 434-5000
Fax. (202) 434-5029
Email KDowney@wc.com
CManning@wc.com
JMcNichols@wc.com
BGilmore@wc.com

Counsel for Defendant DAI Global, LLC