IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AUGUST CABRERA, et al.,

Plaintiffs,

v.

BLACK & VEATCH SPECIAL PROJECTS CORPORATION, et al.,

Defendants.

No. 1:19-cv-03833 (EGS)

ORAL ARGUMENT REQUESTED

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT BLACK & VEATCH SPECIAL PROJECTS CORPORATION'S MOTION TO DISMISS THE COMPLAINT

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INTRODUCTION

The war in Afghanistan is the longest in our nation's history. Thousands of Americans have been killed or wounded. These include contractors who responded to the U.S. government's call to rebuild Afghanistan, thus alleviating the crippling poverty and lack of infrastructure that led to the Taliban's rise to power. Such contractors have risked their lives to bring power, water, and other essentials to a country devastated by years of war.

One of the contractors that performed this critical development work was Black & Veatch Special Projects Corporation ("BVSPC").

Nothing in BVSPC's motion is intended to impugn the service members that were injured or killed during the war in Afghanistan or deny the suffering of their loved ones. At the same time, BVSPC denies any involvement in causing the tragic injuries and deaths alleged in the Complaint. The 275-page Complaint is almost entirely devoid of allegations specific to BVSPC. It contains no factual allegations that anyone from BVSPC ever met with any Taliban representative, made any "protection" payment to the Taliban, or, much less, participated in an attack by the Taliban, the Haqqani Network, or any other organization. Instead, it rests on generalized allegations that companies "like" BVSPC made payments to the Taliban to protect their employees. These allegations cannot survive on a motion to dismiss.

The gravamen of the Complaint is not that civilian contractors like BVSPC actually committed terrorist attacks, but that they paid protection money that funded attacks by the Taliban and the Haqqani Network, in violation of the Anti-Terrorism Act ("ATA"). Thus, one would expect this to be framed primarily as an aiding and abetting case. But the ATA's aiding and abetting provisions specifically require a terrorist act by a designated Foreign Terrorist Organization ("FTO"). And, despite the 19-year war against the Taliban, the U.S. Government has

intentionally never designated it an FTO. Nor did it designate the Haqqani Network until after BVSPC's alleged misconduct.

The Complaint tries to work around this fatal problem by shoehorning its aiding and abetting claims into a *primary* liability case against BVSPC—as if BVSPC *itself* had committed terrorist attacks. This effort fails. The Complaint fails to plead that BVSPC committed acts of terrorism, that it intended to support terrorist acts, or that it committed the necessary predicate violations of U.S. law. It also lacks more than conclusory allegations that BVSPC caused the plaintiffs' injuries.

Finally, even if the Complaint could clear these hurdles, its claims would still be barred by the ATA's Act of War exception, because the Taliban attacks at issue occurred during the course of a war between the United States and Afghanistan.

BACKGROUND

I. The Taliban, al-Qaeda, and the U.S. Government's Effort to Rebuild Afghanistan

A. The Taliban Is Not al-Qaeda or the Haqqani Network, and Has Never Been Designated as a Foreign Terrorist Organization

In an effort to overcome the fatal deficiencies of the Complaint, the Plaintiffs attempt to fuse together together the Taliban, al-Qaeda, and the Haqqani Network into what they call a "terrorist superstructure" or "syndicate."[1] But to the U.S. government, they are separate organizations with separate legal status—a distinction important under the ATA.

In 1996, following a series of civil wars, the Taliban became the ruling government of Afghanistan.[2] After al-Qaeda's attacks on New York and Washington on September 11, 2001, and

[1] Compl. ¶ 273.

[2] Central Intelligence Agency, *World Factbook, Afghanistan*, ("A series of . . . civil wars saw Kabul finally fall in 1996 to the Taliban."), *https://www.cia.gov/library/publications/the-world-*

after the Taliban government refused to turn over al-Qaeda leaders based in Afghanistan, the United States invaded Afghanistan.[3]

From the beginning of this campaign, the United States distinguished between the Taliban and al-Qaeda. President Bush applied the Geneva Conventions to Taliban detainees—but not al-Qaeda detainees—because Geneva applies only to "states."[4] Subsequent U.S. administrations, of both parties, continued to emphasize the "importan[ce]" of "draw[ing] a distinction between the Taliban and al-Qaeda."[5] This strategically important distinction was reflected in law: although the Secretary of State designated al-Qaeda as a "foreign terrorist organization" in 1999, and although it designated the Haqqani Network as an FTO on September 19, 2012 (after many of the claims asserted in the Complaint), the U.S. has never designated the Taliban as an FTO.[6]

Confirming that the Taliban is different in-kind than al-Qaeda, for years, the U.S. government has engaged in formal, diplomatic-style negotiations with the Taliban—recently resulting in a tentative peace agreement.[7] And even the Complaint treats the Taliban differently, alleging that the Taliban has administered a parallel governmental system in much of Afghanistan for the last 18 years.[8]

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factbook/geos/af.html ("CIA World Factbook, Afghanistan"); *see also* Compl. ¶ 36 (describing the Taliban as the "de-facto government" of Afghanistan before 9/11).

[3] *See e.g.*, CIA World Factbook, Afghanistan.

[4] Armed Forces Press Service, *Geneva Convention Applies to Taliban, not Al Qaeda* (Feb. 7, 2002), https://archive.defense.gov/news/newsarticle.aspx?id=43960.

[5] Press Briefing by Press Secretary Josh Earnest, Jan. 29, 2015, https://obamawhitehouse.archives.gov/the-press-office/2015/01/29/press-briefing-press-secretary-josh-earnest-12915 ("Earnest Briefing").

[6] *See* U.S. Dep't of State, *Foreign Terrorist Organizations*, https://www.state.gov/foreign-terrorist-organizations/ ("FTO Listing") (last visited April 25, 2020).

[7] CIA World Factbook, Afghanistan; *see* Mujib Mashal, *Taliban and U.S. Strike Deal to Withdraw American Troops from Afghanistan*, N.Y. Times, Feb. 29, 2020, https://www.nytimes.com/2020/02/29/world/asia/us-taliban-deal.html.

[8] *See* Compl. ¶¶ 43, 44, 78.

B. BVSPC Played a Key Role in the U.S. Government's Rebuilding Effort

Since invading Afghanistan, the U.S. government has worked to rebuild and improve infrastructure in Afghanistan. As one of the Complaint's primary sources explains, when the U.S. arrived in 2001, "[t]he few paved roads that existed hadn't been maintained since they were built in the 1960s. There was virtually no power generation capacity."[9] In a major speech on April 17, 2002, President Bush spoke of the need for a Marshall-like Plan for Afghanistan: "By helping to build an Afghanistan that is free from this evil and is a better place in which to live, we are working in the best traditions of George Marshall." In the same speech, he specifically noted the importance of "rebuilding roads" and "improving medical care."[10] The U.S. Agency for International Development ("USAID") oversaw much of this work.[11]

Part of USAID's aim was to train and employ native Afghans. As a USAID administrator told Congress: "[o]ne of the fundamental tenets of USAID's program [was], wherever possible, to train and transfer skills to Afghans. This will allow Afghans to participate in their country's development and will lead to greater sustainability."[12] In addition to Afghan labor, USAID needed the expertise and resources of companies capable of large-scale infrastructure projects.

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[9] Douglas Wissing, *Funding the Enemy* 52 (2012). The Complaint's allegations are, in large measure, based on books and news reports. Where, as here, a document is referred to in the Complaint and is central to a plaintiff's claim, the court may consider the document on a motion to dismiss. *Vanover v. Hantman*, 77 F. Supp. 2d 91, 98 (D.D.C. 1999).

[10] President George W. Bush, Remarks to the George C. Marshall ROTC Award Seminar on National Security (Apr. 17, 2002), https://2001-2009.state.gov/s/ct/rls/rm/9505.htm.

[11] *See* USAID, *Our Commitment to Transparency*, https://www.usaid.gov/results-and-data/progress-data/transparency.

[12] *See* James Kunder, USAID Assistant Administrator for Asia and the Near East, Statement Before the House Committee on International Relations Sub-committees on Middle East and Central Asia and Oversight & Investigations (Mar. 9, 2006), https://2001-2009.state.gov/p/sca/rls/rm/2006/62971.htm.

As a result, USAID solicited major U.S. and international contractors to work on certain projects. BVSPC was one of these companies. BVSPC worked primarily on two major USAID-led reconstruction projects in Afghanistan: (i) the Afghan Infrastructure Rehabilitation Project ("AIRP"), which began in late 2006 and on which BVSPC worked as part of a joint venture (the "JV") with the Louis Berger Group ("LBG"), and (ii) the Kandahar-Helmand Power Project ("KHPP"), which BVSPC began working on in 2010. BVSPC was not involved in the 2002 USAID Rehabilitation of Economic Facilities Program ("REFS").

II. The Complaint's Allegations Against BVSPC

The Complaint alleges, in conclusory fashion, that BVSPC, through the Taliban, committed or aided and abetted dozens of terrorist attacks. Yet it does not allege that anyone from BVSPC ever met with the Taliban, paid the Taliban, or participated in any Taliban attack. Rather, it relies primarily on the assertion that "companies like Defendants" committed such acts.[13] As to BVSPC, the Complaint employs the same faulty and conclusory inference it draws against each defendant: BVSPC's contracts required work in regions under Taliban control; it was standard practice for contractors to pay protection money to the Taliban in those regions; the "LBG/BV Defendants followed that standard practice[.]"[14] These allegations against BVSPC boil down to: "BVSPC must have been doing it" because "everyone working in Afghanistan was doing it."

The Complaint also conflates BVSPC with other defendants. In the section focused on BVSPC, for instance, the Complaint devotes substantial space to projects that LBG alone—and not BVSPC—undertook during the REFS program (which BVPSC was not a part of), in particular the Kandahar-Kabul highway.[15] Similarly, the Complaint references an overbilling scheme by a

[13] *See*, *e.g.*, Compl. ¶¶ 54, 64, 65, 66, 72, 74, 78, 81, 88, 92, 98.
[14] Compl. ¶ 192.
[15] Compl. ¶¶ 194-203.

security company, USPI, during the REFS program.[16] But it does not allege that BVSPC had any involvement with LBG or USPI in the REFS program, which began in 2002, before the formation of the JV.[17] Regardless of the joint venture that LBG and BVSPC *later* formed to work on the different AIRP program, these allegations against LBG are not relevant to BVSPC.[18]

The Complaint's only specific allegations against the JV relate to the Kajaki Dam and the Gardez-Khost Road, two USAID projects. But stripped of conclusory verbiage, these allegations, and the sources they rely on, do not support any inference that BVSPC or the JV paid protection money to the Taliban or any other group. Rather, they demonstrate that BVSPC and the JV worked with, and followed the lead of, U.S. government officials in their dealing with Afghans and in their work on these projects as a whole.

With respect to Kajaki Dam, the Complaint relies almost exclusively on a single 2011 article from *GlobalPost*, an online journalism site. Claimants assert the article proves that BVSPC "paid the Taliban to refrain from attacking [its] business interests."[19] But the article does no such thing. Most of the article is about the peril facing contractors and U.S. forces working on the dam, and the importance to USAID of "[g]etting power to Helmand and Kandahar" while keeping

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[16] Compl. ¶¶ 196-203; *see also* Indictment, *United States v. United States Protection and Investigations, LLC, et al.*, No. 08 cr. 306, ECF No. 3 (D.D.C. Sept. 30, 2008) ("USPI Indictment"), ¶ 27 ("It was the purpose of the conspiracy for the defendants to unlawfully enrich themselves by fraudulently inflating USPI's incurred expenses and profits under REFS subcontracts."), cited in Compl. ¶ 199 n.259.

[17] *Cf.* Compl. ¶ 190(a) ("In September 2002, USAID awarded LBG Contract No. . . . under its Rehabilitation of Economic Facilities and Services ("REFS") program. . . .").

[18] *See* USPI Indictment, ¶¶ 14, 26, 45, 48 (identifying relevant REFs contract work as awarded to USPI in June 2003 and completed by July 2007); Compl. ¶ 190(b) (identifying AIRP contract as awarded to the LBG-BVSPC joint venture in August 2006).

[19] *See* Compl. ¶¶ 1, 204 n.266 (citing Jean MacKenzie, *Watershed of Waste: Afghanistan's Kajaki Dam & USAID*, GlobalPost, Oct. 11, 2011, https://www.pri.org/stories/2011-10-11/watershed-waste-afghanistan-s-kajaki-dam-and-usaid ("MacKenzie Article")).

contractors safe in a dangerous region.[20] In only one place does the article talk about payments to insurgents, and it only speaks them in the future tense, as the potential, speculative price for a ceasefire between the Taliban and the U.S.-led coalition: "[E]ven *if* some sort of deal is struck, it *will* almost certainly involve massive payments to the insurgents" and that contractors "working in the area *will* be forced to pay some sort of premium for protection, which *will likely* go to the Taliban."[21] A journalist's speculation that something might happen, and only if a cease-fire is reached, is not a basis to allege that it actually happened.

The Complaint's allegations regarding the JV's work in the "P2K" region, especially the Gardez-Khost Road, fare no better. Beyond conclusory allegations about "local custom and practice" and "protection payments" being the "norm," the Complaint relies almost entirely on a New York Times article about the road (which the article explains was a complex and dangerous project considered vital by the U.S. Government) and a "Mr. Arafat."[22] The Complaint describes Arafat as a "Haqqani cutout" [23]—implying he was a member of the Haqqani Network—and alleges that the JV used him despite the U.S. Government's decision to bar him from USAID contracts.

The article, however, paints a different picture. According to the article, a subcontractor of the JV, at the behest of local Afghan government officials, hired Arafat to provide security forces

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[20] MacKenzie Article.

[21] *Id.* (emphasis added).

[22] Compl. nn.269-272, 274, 279 (citing Alissa J. Rubin and James Risen, *Costly Afghanistan Road Project is Marred by Unsavory Alliances*, N.Y. Times, May 1, 2011, https://www.nytimes.com/2011/05/01/world/asia/01road.html ("Rubin Article")). Plaintiffs also quote the following statement from an Indian news article: "it should come as no surprise that . . . Commander Arafat, who was hired to provide security for the project, ended up being a conduit for payoffs to the Haqqanis." *See* Compl. ¶ 210. But the author of that article is not relying on any independent reporting. He is simply attempting to summarize what was reported in the New York Times article. As demonstrated above in Background Section II, his summary is wholly inaccurate. The New York Times article never concludes that Mr. Arafat was a conduit for payments to the Haqqani Network.

[23] Compl. ¶ 207.

for the project. In 2009, USAID and the U.S. military investigated Arafat, but found insufficient evidence of ties to the insurgency to support removing Arafat from USAID projects or taking other action. Two years later, the U.S. government, after apparent re-investigation, "finally moved to cut Arafat off" and removed him from USAID projects. Importantly, Arafat (the alleged "Haqqani cut-out") was thus removed from USAID projects—including those of the JV—more than a year and a half before the Haqqani Network was designated as an FTO. There are no allegations that the JV's subcontractor paid Arafat after that designation.[24]

The Complaint attempts to buttress its allegations regarding the P2K region by relying on misleading quotations from a June 2012 letter from the JV's country security manager to the country manager for ISS-Safenet ("ISSS"), a security subcontractor. In the letter, the JV's security manager thanks ISSS for its work on the AIRP project, in particular on the Gardez-Khost Road:

> The area . . . had many challenges . . . . The alignment bisects the strategically important "Zadran Arc", where many people have felt neglected for years by the central government and were reluctant to support the project . . . . One of the most notorious groups, *the Haqqani Network, was particularly well-embedded due to many family ties in villages occupying key terrain.*
>
> Your management team adapted quickly to the situation and developed a new concept of operations that employed a mix of mobile groups and static forces with a robust command and control system. That *plan* also *emphasized the criticality of good relations with local communities* and was executed in concert with AIRP's own community development efforts. There were many trying days. Your mobile teams were an enormous support . . . . your people literally bled with us, and it will not be forgotten.[25]

The Complaint cites only the italicized portions above, asserting that "the criticality of good relations with the local communities" is a "euphemism" for paying protection money to

[24] *See* Compl. ¶ 207 n.269 (citing Rubin Article (payments to Mr. Arafat occurred primarily in 2009 and Arafat was disqualified as subcontractor prior to article publication on May 1, 2011)); FTO Listing (Haqqani Network designated as FTO on September 19, 2012).

[25] Exhibit 1, Letter from R. Rademeyer to M. Le Roux, June 25, 2012, cited in Compl. ¶ 208 n.273.

insurgents.[26] But when the letter is read without omitting critical words, the meaning is clear: security forces, acting "in concert with AIRP's own community development efforts," sought to maintain good relations with the local populace, in keeping with official U.S. military counterinsurgency doctrine. And the statement that "your people literally bled with us"—which of course does not make it into the Complaint—refutes any notion that the JV or its security subcontractors obtained their security by paying off insurgent groups.

Finally, the Complaint attempts to smear BVSPC for supposedly "related misconduct" that is neither related nor misconduct by BVSPC.[27] First, the Complaint cites two criminal cases involving LBG. But these cases do not involve BVSPC or the JV, and do not involve the AIRP project.[28] Second, the Complaint cites the prosecution of the JV's security manager, Scott "Max" Walker.[29] But the Statement of Facts in that case, cited in the Complaint, shows those charges were not "similar" or "related" to the allegations here. Instead, Walker schemed "to pass along inside information" regarding the bidding for security contracts to U.S. and other Western-based vendors who paid him kickbacks.[30] This conduct victimized the JV, whose confidential information Walker misappropriated. When it learned of Walker's activity, the JV fired Walker, and reported his conduct to USAID's Inspector General, which then investigated and prosecuted him.[31] To be clear, the government has never brought any actions—civil or criminal—against BVSPC for its work in Afghanistan, despite rigorous auditing and oversight.

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[26] Compl. ¶ 208.

[27] Compl. ¶¶ 213, 218.

[28] Compl. ¶¶ 213-216.

[29] Compl. ¶ 218 n.287 (citing Statement of Facts ¶ 7, *United States v. Walker*, No. 09 cr. 00478, ECF No. 27 (E.D. Va. Nov. 16, 2009) ("Walker Statement of Facts")).

[30] Walker Statement of Facts ¶ 8.

[31] See Affidavit in Support of Criminal Complaint and Search Warrant, *United States v. Walker*, No. 09 cr. 00478, ECF No. 2 (E.D. Va. Aug. 4, 2009).

APPLICABLE LAW

I. Statutory Background

A. The Anti-Terrorism Act

Under the ATA, a U.S. national may seek recovery—in the form of treble damages—for an injury to his person or property "by reason of an act of international terrorism."[32]

The term "international terrorism" is defined as an activity that (A) is either "violent" or "dangerous to human life" and which is in violation of state or federal criminal law, or would be if it occurred in the United States; (B) appears to be intended to coerce or intimidate civilians, to influence government policy by coercion, or to affect government conduct through mass destruction, assassination, or kidnapping; and (C) occurs largely outside the United States.[33]

Before 2016, ATA claims could be pursued only on primary liability theory: no one apart from the "principals perpetrating acts of international terrorism" was subject to such a claim.[34]

In September 2016, Congress amended the ATA by enacting the Justice of Against Sponsors of Terrorism Act ("JASTA"), to allow for secondary liability in narrow circumstances: where a person "knowingly" (1) "aids and abets, by . . . provid[ing] substantial assistance" to "or . . . conspires with" a person who (2) committed an "act of international terrorism" that was "committed, planned, or authorized by" designated foreign terrorist organization.[35]

Merely pleading the elements of 18 U.S.C. §§ 2339A, 2339B, or 2339C is insufficient to state a claim for either primary or secondary liability.[36]

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[32] 18 U.S.C. § 2333(a).
[33] 18 U.S.C. § 2331(1).
[34] *Linde v. Arab Bank, PLC*, 882 F.3d 314, 319-20 (2d Cir. 2018).
[35] 18 U.S.C. § 2333(d).
[36] *Linde*, 882 F.3d at 326.

B. Designated Foreign Terrorist Organizations

Secondary liability under the ATA arises only for "an act of international terrorism committed, planned, or authorized by" a designated FTO. *See* 18 U.S.C § 2333. Likewise, primary liability based on a violation of 18 U.S.C. § 2339B, the predicate for Count Two of the Complaint, can occur only when a defendant provides "material support" to a designated FTO.

The U.S. Secretary of State designates FTOs. To do so, the Secretary must find that a (i) foreign organization; (ii) engages in terrorist activity, or terrorism, or retains the capability and intent to engage in terrorist activity or terrorism; and (iii) that terrorist activity or terrorism must threaten the security of U.S. nationals or the national security (national defense, foreign relations, or the economic interests) of the United States. *See* 8 U.S.C. § 1189.

The Secretary of State has designated over 65 organizations as FTOs.[37] Some are obscure, like the "Continuity Irish Republican Army" and the "Communist Party of the Philippines,"[38] while others, like ISIS, are more well-known.[39] The Taliban, however, has never been designated an FTO. And the Haqqani Network was designated an FTO only on September 19, 2012, months *after* the JV's work ended on the Gardez-Khost Highway—the only work for which the JV or BVSPC are alleged to have paid the Haqqani Network.[40]

II. Standards on a Motion to Dismiss

To survive a motion to dismiss, the Complaint must set forth a claim that is "plausible on its face."[41] A claim is "plausible" if the complaint "sets forth factual content that allows the court

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[37] FTO Listing.

[38] *See id.* The Continuity IRA, for example, is estimated to have "[f]ewer than 50 hard-core activists." Federation of American Scientists, *Continuity Irish Republican Army (CIRA)*, https://fas.org/irp/world/para/cira.htm (last visited Apr. 24, 2020).

[39] FTO Listing.

[40] *Id.*; Compl. ¶ 206.

[41] *Rothstein v. UBS AG*, 708 F.3d 82, 94 (2d Cir. 2013).

to draw the reasonable inference that the defendant is liable for the misconduct alleged."[42] Although the Court must accept as true the plaintiff's factual allegations and draw all reasonable inferences in favor of the plaintiff, the Court "need not accept inferences unsupported by facts or legal conclusions cast in the form of factual allegations," nor must it accept any allegations insofar as they contradict either exhibits to the complaint or materials incorporated by reference.[43]

A federal court may take judicial notice of "a fact that is not subject to reasonable dispute" if it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."[44] Courts frequently take judicial notice of statements of U.S. government officials, particularly where they reflect a position of the U.S. government.[45]

Where a complaint asserts claims against multiple defendants, Rule 8(a) requires that the complaint plainly delineate which claims and allegations apply to which defendant, so each party is placed on fair notice of the specific claims against it and the grounds on which they rest.[46] "[A] plaintiff cannot rely upon a generalized term like 'defendants' to obfuscate each defendant's role in the alleged conduct or the legal theory of liability on which [it] is relying."[47] A complaint's "use of either the collective term 'Defendants' or a list of the defendants named individually but with

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[42] *Owens v. BNP Paribas*, 897 F.3d 266, 273 (D.C. Cir. 2018) (internal quotation omitted).

[43] *Id*. at 272–73 (internal quotations omitted); *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006).

[44] *Hurd* v. *D.C. Gov't*, 864 F.3d 671, 686 (D.C. Cir. 2017) (citing Fed. R. Evid. 201(b)).

[45] *See, e.g.*, *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 362 F. Supp. 2d 168, 178 n.5 (D.D.C. 2005) (taking judicial notice of State Department's annual publication, Patterns of Global Terrorism, as a reflection of the formal and official position of U.S. Government).

[46] *Brett v. Attorney Gen. of U.S.*, No. 08 Civ. A. 1436, 2008 WL 3851555, at *1 (D.D.C. Aug. 19, 2008) (dismissing complaint where factual allegations did not allow the court to "discern what claim or claims [plaintiff] brings against each defendant").

[47] *Danaher Corp. v. Travelers Indem. Co.*, No. 10 Civ. 121, 2014 WL 1133472, at *3 (S.D.N.Y. Mar. 21, 2014) (quoting *Watkins v. Smith*, No. 12 Civ. 4635, 2013 WL 655085, at *9 (S.D.N.Y. Feb. 22, 2013) (internal quotation omitted)).

no distinction as to what acts are attributable to whom" makes it "impossible for any of these individuals to ascertain what particular . . . acts they are alleged to have committed"[48] and cannot support a claim against the individual defendant.

ARGUMENT

The reality of ATA cases is that the actual *perpetrators* are typically outside of U.S. jurisdiction and effectively judgment proof. This has resulted in an array of cases against deeper pocketed, domestic companies for allegedly supporting those perpetrators, typically in attacks that those companies do not condone. In response, courts have not shied from dismissing ATA cases at the pleading stage, especially where they allege in conclusory fashion that defendants indirectly supported groups that committed terrorist attacks.[49] That is the case here.

The Complaint does not state a claim against BVSPC under the ATA. The primary liability claims (Counts One through Four) fail because the Complaint fails to plead that BVSPC committed an "act of international terrorism" by paying security subcontractors that, along with providing security services, allegedly made protection payments to the Taliban. Further, the non-conclusory

[48] *Robbins v. Okla.*, 519 F.3d 1242, 1250 (10th Cir. 2008). *See also Martin v. City of New York*, No. 07 Civ. 7384, 2008 WL 1826483, at *1 (S.D.N.Y. Apr. 23, 2008); *Toumazou v. Turkish Republic of N. Cyprus*, 71 F. Supp. 3d 7, 21 (D.D.C. 2014) (quoting *Atuahene v. City of Hartford*, 10 F. App'x 33, 34 (2d Cir. 2001)); *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"); *Embree v. Wyndham Worldwide Corp.*, 779 F. App'x 658, 661 (11th Cir. 2019) (affirming dismissal of "shotgun pleading" complaint that "pervasively lumped separate companies together in a conclusory fashion, treated separate companies as a single entity without explanation, and failed to differentiate the allegations against each defendant so that each could identify its allegedly improper conduct").

[49] *E.g.*, *Owens*, 897 F.3d at 269; *Siegel v. HSBC N. Am. Holdings, Inc.*, 933 F.3d 217, 219 (2d Cir. 2019); *Crosby v. Twitter, Inc.*, 921 F.3d 617 (6th Cir. 2019); *Kemper v. Deutsche Bank AG*, 911 F.3d 383, 386 (7th Cir. 2018); *Fields v. Twitter, Inc.*, 881 F.3d 739, 741 (9th Cir. 2018); *Weiss v. Nat'l Westminster Bank PLC*, 381 F. Supp. 3d 223, 226 (E.D.N.Y. 2019); *Kaplan v. Lebanese Canadian Bank, SAL*, 405 F. Supp. 3d 525, 530 (S.D.N.Y. 2019).

facts pleaded in the complaint in support of that theory are contradicted by the articles cited in the Complaint. These claims also fail because they do not meet the ATA's scienter requirement, supported only by conclusory assumptions that BVSPC must have been aware of alleged conduct by its subcontractors working in Afghanistan. And the direct liability claims also fail to meet the ATA's proximate causation requirement, asserting only a "guilt-by-location" theory that is wholly insufficient to show causation.

The secondary-liability claims (Counts Five and Six) also fail. First, secondary liability under the ATA applies only where the entity being aided and abetted is an FTO, and the Taliban is not an FTO. The Complaint's stretched attempts to merge the Taliban with al-Qaeda (an FTO, but not one that BVSPC is alleged to have paid) and the Haqqani Network (eventually designated an FTO, but after BVSPC's alleged indirect support) impermissibly blur the distinctions between these groups laid out by the U.S. Government. The Complaint also fails to plead that BVSPC knowingly "assum[ed] a role in terrorist activities" or "substantially" assisted the underlying conduct. And the RICO claim in Count Six fails on its face because RICO applies only to domestic injuries and is incompatible with the Complaint's ATA theories.

Finally, and independently, all the Complaint's claims are barred by the ATA's act-of-war exemption, which bars claims for injuries incurred during international conflicts. Operation Enduring Freedom was an international conflict that lasted throughout the period of BVSPC's alleged conduct.

I. The Complaint Fails to Plead a Direct-Liability Claim Under the ATA

Counts One through Four rest on a direct liability theory under the ATA. To state such a claim, the Complaint must allege: (A) that BVSPC's conduct constituted acts of "international

terrorism," (B) that BVSPC knowingly caused Plaintiffs' injuries, and (C) that BVSPC's actions were the proximate cause of Plaintiffs' injuries. The Complaint fails on all three points.

A. The Complaint Fails to Plead an Act of International Terrorism

Even taking the Complaint's conclusory allegations as true, BVSPC's alleged payments do not qualify as acts of terrorism because they were not intended to intimidate or coerce, they were not violent acts, and they were not crimes that could support ATA direct liability.

Under the statute, act of "international terrorism" is defined as an act that:

> involves 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; *and*
>
> Appears to be intended to (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.[50]

The Complaint fails to allege that BVSPC committed an "act of international terrorism" for three reasons. First, the Complaint does not allege that BVSPC's acts objectively appeared to be intended to "intimidate or coerce a civilian population, influence government policy by intimidation or coercion, or affect the conduct of a government." Second, the Complaint does not allege conduct by BVSPC that "involves violent acts or acts dangerous to human life." Third, the Complaint fails to plead predicate violations of U.S. law.

1. The Complaint Fails to Plead Objective Terrorist Intent

The Complaint must show that BVSPC's actions objectively "appear to be intended" to intimidate or coerce civilians, influence government policy through intimidation or coercion, or

[50] 18 U.S.C. § 2331(1). The definition also requires that the violent acts occur primarily outside the territorial jurisdiction of the United States or transcend national boundaries.

affect government conduct by mass destruction, assassination, or kidnapping.[51] For primary liability, a defendant's *own actions* must meet that standard as judged by an "objective observer."[52]

The Complaint's theory—that BVSPC paid security subcontractors, who provided security in part by paying protection money—cannot satisfy this objective terroristic intent element. The Seventh Circuit dealt with a similar situation in *Kemper*.[53] There, the court held that Deutsche Bank's alleged facilitation of Iranian banking transactions would appear to an objective observer to have been "motivated by economics," and not by a desire to intimidate or coerce."[54] Thus, Deutsche Bank's alleged conduct did not meet the ATA's definition of international terrorism.[55]

The same is true here. The Complaint does not and cannot allege that the purpose behind BVSPC's conduct was, for example, to "intimidate and coerce the civilian population of Afghanistan to abide by a severe form of Islamic Sharia law," or to "intimidate and coerce the U.S.

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[51] 18 U.S.C. § 2331(1)(B); *see also Weiss v. Nat'l Westminster Bank PLC*, 768 F.3d 202, 207 n.6 (2d Cir. 2014).

[52] *Kemper*, 911 F.3d at 390.

[53] *Id.*; *see also Stansell v. BGP, Inc.*, No. 09 Civ. 2501, 2011 WL 1296881, at *9 (M.D. Fla. Mar. 31, 2011) (ATA requires allegations that would "lead an objective observer to conclude Defendants intended to achieve" the intimidation or coercion objectives in the ATA); *see also Nat'l Westminster Bank*, 768 F.3d at 207 n.6 (stating that Section 2331(1)(B) creates "an objective standard to recognize the apparent intentions of actions.").

[54] 911 F.3d at 390; *see also Zapata v. HSBC Holdings, PLC*, 414 F. Supp. 3d 342, 358 (E.D.N.Y. 2019) (rejecting allegation that defendant acted with apparent intent to intimidate because "Plaintiffs' complaint unmistakably sets forth . . . a plausible alternative explanation for HSBC's conduct: greed").

[55] *Kemper*, 911 F.3d at 390. *See also Mastafa v. Chevron Corp.*, 770 F.3d 170, 194 (2d Cir. 2014) (holding that it was implausible to conclude that corrupt oil-for-food dealings with Saddam Hussein's regime in Iraq were "intending—and taking deliberate steps with the purpose of assisting—the Saddam Hussein regime's torture and abuse of Iraqi persons"); *Brill v. Chevron Corp.*, No. 15 Civ. 04916, 2017 WL 76894, at *1, *4 (N.D. Cal. Jan. 9, 2017) (dismissing ATA claims because allegedly corrupt oil-for-food transactions, which allegedly helped Saddam Hussein finance terrorism, did not appear to be intended to intimidate or coerce).

government . . . to withdraw Coalition personnel from Afghanistan[.]"[56] Rather, the Complaint alleges Defendants "paid the Taliban to refrain from attacking their business interests" and "[t]o protect those businesses and grow their profits."[57] It also repeatedly alleges that the Taliban obtained "protection" payments from the defendants through "extortion," like a shopkeeper that the mafia shakes down for payments to support illegal operations that the shopkeeper does not support or condone.[58] In either case, as in *Kemper*, "to the objective observer," any purported protection payments "were [allegedly] motivated by economics," not by a desire *by BVSPC* to "intimidate or coerce" the governments or people of the United States or Afghanistan.[59]

2. The Complaint Fails to Plead Conduct by BVSPC that "Involves Violent Acts or Acts Dangerous to Human Life"

The Complaint also fails to allege that BVSPC's conduct involved "violent acts or acts dangerous to human life. . . ."[60] There is nothing inherently "violent" or "dangerous" about BVSPC's alleged conduct of paying money to security subcontractors.[61]

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[56] Compl. ¶ 275 (describing goals of the Taliban). Indeed, even accepting the Complaint's theories *arguendo*, it would be non-sensical for U.S. contractors to want the U.S. to withdraw from Afghanistan, as it would mean an end of their "lucrative businesses." Compl. ¶ 1.

[57] Compl. ¶¶ 1, 3.

[58] Compl. ¶¶ 57, 70, 74, 90, 107, 132, 168, 194, 211, 231. Extortion is "the practice or instance of obtaining something by illegal means, as by force or coercion." Black's Law Dictionary (11th ed. 2019).

[59] *Kemper*, 911 F.3d at 382.

[60] 18 U.S.C. § 2331(1)(A).

[61] *See O'Sullivan v. Deutsche Bank*, No. 17 Civ. 8709, 2019 WL 1409446, at * 8 (S.D.N.Y. Mar. 28, 2019) ("The Complaint does not allege plausibly that the provision of banking services, which are not inherently violent or dangerous, can be considered as acts dangerous to human life, particularly because the factual allegations delineating relationships between those services and the terrorist attacks at issue are so attenuated."); *Brill v. Chevron Corp.*, No. 18 Civ. 16862, 2020 WL 1200695, at *1 (9th Cir. Mar. 12, 2020) ("Chevron's purchases of crude oil from a third-party seller, as alleged, do not constitute acts of international terrorism as defined by 18 U.S.C. § 2333(a). The mere fact that oil purchases allegedly included kickbacks that violated United Nations-imposed sanctions did not make the purchases terrorist acts.").

As explained in *Kemper*, a significant difference exists between, on one hand, direct donations to a terrorist organization,[62] and, on the other hand, "doing business with companies and countries that have significant legitimate operations."[63] The court explained, "While giving fungible dollars to a terrorist organization may be 'dangerous to human life,' doing business with companies and countries that have significant legitimate operations is not necessarily so."[64] Thus, the Seventh Circuit rejected an argument that Deutsche Bank's provision of financial services to Iran was a violent act.

Here, as in *Kemper*, the Complaint fails to plead the "violent act" element of an act of international terrorism. The Complaint alleges that BVSPC hired subcontractors (or sub-subcontractors) that paid protection money to the Taliban. But it does not deny that BVSPC's security subcontractors performed significant, legitimate security operations, like Iran's legitimate state functions in *Kemper*. Payments to such subcontractors are not a "violent act" even if the subcontractors, like Iran, later made payments to insurgent groups.

Further, the Complaint fails to allege non-conclusory facts to support its allegations. Rather, it relies on secondary sources that do not support, and often refute, the conclusions for which they are cited.

For example, Paragraph 204 alleges that "[t]he LBG/BV Joint Venture and [BVSPC] also paid protection money to the Taliban to secure their work on the Kajaki Dam." Yet the Complaint supports this seemingly damning claim only by citing a State Department cable stating that "the Taliban threatened one Chinese subcontractor with kidnapping, causing the subcontractor to

[62] *See, e.g., Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 687-88 (7th Cir. 2008) (en banc).
[63] *Kemper*, 911 F.3d at 390.
[64] *Id.*

withdraw its personnel."[65] The Complaint thus appears to be suggesting that because there purportedly was a threat against one of BVSPC's subcontractors, the Court should infer that BVSPC must have paid protection money to the Taliban.

Setting aside that the inference is insufficient to sustain its claims, the Complaint also misreads the cable. In fact, when the relevant portion of the cable is read in its entirety, it contradicts the Complaint's theory:

> In late October, China Machine-Building International Corp (CICI), the partially state owned Chinese company performing the rehabilitation work under the sub contract to LBG was reportedly directed by the Chinese government to evacuate its five personnel from the Kajaki jobsite because the Chinese government had information regarding a Taliban threat to kidnap them. Despite LBG/[BVSPC] JV assurances to CMIC that all Kajaki site personnel are protected by a security force of some 150 private security and 250 British military personnel, CMIC personnel left the site on November 4, 2008. The site has not recently come under attack, and security experts consider the kidnapping threat to be virtually nil.

Nothing in this cable even remotely supports an inference that the JV or its subcontractor made payments to the Taliban, much less participated in any "violent act" as required under the ATA.[66]

Similarly, in making allegations about the Gardez-Khost Road, the Complaint alleges that "the Joint Venture and [BVSPC] paid 'hefty fees' to the Haqqanis to secure their projects throughout the region."[67] Once again, the Complaint misleadingly suggests that it is citing to a source regarding BVSPC's payment—in the past tense—of "hefty fees" to the Haqqanis. But the

[65] Compl. ¶ 204.

[66] As discussed above, in Background Section II, this portion of the Complaint also cites a 2011 newspaper article regarding the Kajaki Dam. But, as noted above, the entire thrust of the article is that the situation over Kajaki Dam has been violent for years, not that anyone has bought the peace, or even attempted to do so. The quoted portion of the article reflects the author's musings on what she thinks will happen *in the future*, not an action, violent or otherwise, involving BVSPC.

[67] Compl. ¶ 205.

research piece cited says nothing at all about or even mentions BVSPC, much less claims that BVSPC was involved in "violent acts."

The Complaint also cites a letter *from the JV* to ISSS.[68] In that letter, the JV used the words "good relations with the local communities," which the Complaint implies was a euphemism for protection money payments to the Taliban. Again, payments to ISSS, a security subcontractor, are not violent acts. And at any rate, it is hardly a reasonable inference that the JV's reference to "good relations with the local communities" in a letter of commendation was a coded reference to protection money, rather than a reference to actual good relations with local communities.

The Complaint's only other allegation as to BVSPC and the JV stems from the New York Times article about the Gardez-Khost Road and "Mr. Arafat," whom the JV's subcontractor hired to provide security forces.[69] But as discussed above,[70] when read in context, the New York Times article hardly supports a *reasonable* inference that BVSPC or the JV knowingly contributed to, much less took part in, to any attack on Plaintiffs.[71] Even crediting the Complaint's allegations that Arafat had "ties" to the Haqqani Network (which, again, was not a designated FTO until well after Arafat's relationship with USAID security subcontractors ended), multiple layers of

[68] *See* Compl. ¶ 208.

[69] Compl. ¶ 207.

[70] *See* Background Section II, *supra*.

[71] Nor do the Complaint's claims find support in cases where courts have denied a motion to dismiss an ATA claim. In those cases, the plaintiffs alleged a *direct* connection between the defendants and the terrorist group. *See, e.g.*, *Weiss v. Nat'l Westminster Bank PLC*, 278 F. Supp. 3d 636, 643 (E.D.N.Y. 2017) ("Plaintiffs sufficiently allege that Defendant provided funds to Hamas front-groups and Hamas carried out the attacks during the same period of time within which the money was transferred."); *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 50 (D.D.C. 2010) ("In this case, plaintiffs have pled facts alleging that [Bank of China] actually knew it was providing financial services to an agent of the [Palestinian Islamic Jihad], thus risking the use of those funds in the furtherance of the PIJ's terrorist attacks. . . . Plaintiffs have adequately pled facts alleging that provision of financial services to Mr. Al–Shurafa constitutes the provision of financial services to the PIJ.").

intermediaries stood between BVSPC and any attack, including BVSPC's subcontractor and an untold number of levels between Arafat and any insurgents who actually carried out attacks. Moreover, as discussed in Background Section II, the U.S. government concluded in 2009 that there was insufficient evidence of Arafat's ties to any insurgent group to take action against him. It was not until April 2011 that the U.S. government "finally moved to cut Arafat off," and he no longer provided security for any USAID projects, including for those of the JV. If the U.S. government could not conclude Arafat had ties to the insurgent groups before April 2011, it is not reasonable to infer that BVSPC had such ties either.

3. The Complaint Fails to Plead the Requisite Predicate Violations of U.S. Law

In addition, an "act of terrorism" must constitute "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 . . . ."[72] Here, too, the Complaint falls short. It relies on four predicate criminal violations: 18 U.S.C. § 2339A, 18 U.S.C. § 2339C, 18 U.S.C. § 2339B, and 50 U.S.C. § 1705(a).[73] All fail, for reasons explained below.

(a) All Counts: The Complaint Fails to Plead the Necessary *Mens Rea*

The Complaint fails to plead that BVSPC "knew" or "intended" that its funds be used for terrorist purposes, as required by each of the alleged predicate acts.[74] As discussed in greater detail

[72] 18 U.S.C. § 2331(1)(A).

[73] Unlike Counts One through Three, Count Four is predicated not on the statutes criminalizing support to terrorist acts or FTOs, but on 50 U.S.C. § 1705(a). It is subject to the same analysis as Plaintiffs' ATA claims. *Taamneh v. Twitter, Inc.*, 343 F. Supp. 3d 904, 916 (N.D. Cal. 2018). And it fails for the same reasons as those claims.

[74] 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

in Section II.B, below, there are no well-pleaded allegations that BVSPC knew of or intended to provide support for any terrorist attacks. Plaintiffs cite media reports and supposed "common knowledge" of Taliban extortion practices in Afghanistan, but these do not meet the standards for proving actual knowledge required for the predicate criminal violations—there must be plausible, non-conclusory allegations that the defendant was *actually* aware of the relevant information.[75]

(b) Count One: The Complaint Fails to Plead the Heightened *Mens Rea* for a Violation of Section 2339A

Section 2339A, which penalizes providing "material support" to terrorists, also requires a "heightened *mens rea*."[76] The defendant must have provided support with the knowledge or intent that it would be used in preparation for, or in carrying out, a list of specific terror-related crimes, all of which generally involve acts of violence or the use of weapons of mass destruction.[77] This

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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.").

[75] *Kaplan*, 405 F. Supp. 3d at 535; *Averbach v. Cairo Amman Bank*, No. 19 Civ. 0004, 2020 WL 486860, at *12 (S.D.N.Y. Jan. 21, 2020).

[76] *In re Chiquita Brands Int'l, Inc.*, 284 F. Supp. 3d 1284, 1309 (S.D. Fla. 2018).

[77] *United States v. Mehanna*, 735 F.3d 32, 43 (1st Cir. 2013) (citing *United States v. Stewart*, 590 F.3d 93, 113 (2d Cir. 2009)). *See* 18 U.S.C. § 2339A (""Whoever provides material support … knowing or intending that [it is] to be used … in carrying out a violation of section 32 [destruction of aircraft and aircraft facilities], 37 [violence at international airports], 81 [arson within the special maritime and territorial jurisdiction of the United States, 175 [biological weapons offenses], 229 [chemical weapons offenses], 351 [assassination, kidnapping, or assaulting Members of Congress, the Supreme Court, or the Cabinet], 831 [transactions involving nuclear material], 844(m) [importing or exporting plastic explosives without a detection agent], 842(n) [possession of a plastic explosive without a detection agent], 844(f) [bombing federal property], 844(i) [bombing property used in, or affecting, interstate or foreign commerce], 930(c) [killing a person in the course of an attack on a federal facility with a firearm or dangerous weapon], 956 [conspiracy to kill, kidnap, maim, or injure individuals, or to damage property, in a foreign country], 1091 [genocide], 1114 [killing a federal officer, employee, or member of the armed forces], 1116 [killing internationally protected individuals], 1203 [hostage taking], 1361 [destruction of federal property], 1362 [destruction of communication lines, stations or systems], 1363 [destruction of property in the special maritime and territorial jurisdiction of the United States], 1366 [destruction

required mental state "extends both to the support itself, and to the underlying purposes for which the support is given."[78] Thus, "an ATA plaintiff proceeding on a Section 2339A predicate must show evidence of the defendant's specific knowledge of, or intent to further, the specified underlying crime."[79] Section 2339A "raises the scienter requirement" and criminalizes material support only where the defendant acts with actual knowledge or intent that the support will be used to prepare for, or carry out, a specific terrorist attack.[80]

For the reasons discussed above, the Complaint does not come anywhere close to alleging such knowledge. It does not allege that BVSPC made any specific payments at all, let alone that such payments were made knowing that the money would go to specific attacks.

(c) Count Two: The Complaint Fails to Plead a Violation of Section 2339B for Payments to the Taliban

The Complaint also fails to allege a violation of 18 U.S.C. § 2339B, which penalizes providing material support or resources to a designated FTO. The Taliban is not an FTO, and the

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of an energy facility], 1751 [assassination, kidnapping, or assaulting of the President, Vice President, or senior White House staff members], 1992 [terrorist on mass transit), 2155 [destruction of national defense material], 2156 [production of defective national defense material), 2280 [violence against maritime navigation], 2281 [violence against maritime fixed platforms], 2332 [killing or assaulting a United States national outside the United States], 2332a [use of weapons of mass destruction], 2332b [multinational acts of terrorism], 2332f [bombing public places or infrastructure facilities], 2340A [torture abroad], or 2442 [recruiting or using child soldiers] of this title; section 236 of the Atomic Energy Act of 1954 (42 U.S.C. § 2284) [sabotage of nuclear facilities or fuel]; section 46502 [aircraft piracy] or 60123(b) [destruction of gas pipelines] of title 49 . . . .").

[78] *Mehanna*, 735 F.3d at 43.

[79] *In re Chiquita*, 284 F. Supp. 3d at 1309.

[80] *United States v. Awan*, 459 F. Supp. 2d 167, 179 (E.D.N.Y. 2006); *see also* 114 Cong. Rec. Vol. 162, No. 136 (2016), https://www.congress.gov/congressional-record/2016/09/09/house-section/article/H5239-3 ("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. JASTA, as revised in the Senate Judiciary Committee, ensures that aiding and abetting liability is limited in this manner.").

Haqqani Network was not designated an FTO before September 19, 2012. The Complaint's allegations with respect to "Mr. Arafat" deal with activities that occurred prior to Arafat's termination by USAID in April 2011, and seventeen months before the Haqqani Network was designated as an FTO. There is no other allegation in the Complaint of any interactions between BVSPC and anyone alleged even to have ties to the Haqqani Network, let alone after its FTO designation. Section 2339B is inapplicable to BVSPC by its own terms.

(d) Count Three: The Complaint Fails to Plead a Violation of Section 2339C

Section 2339C applies where someone "provides or collects funds with the intention that such funds be used, or with the knowledge that such funds are to be used, in full or in part," to carry out a terrorist act.[81] Here, the Complaint does not even identify any payments originating from BVSPC that made their way to the Taliban.

Moreover, like Section 2339A (the predicate offense for Count One), liability under Section 2339C requires a high degree of scienter: a defendant must "know" or "inten[d]" that the funds "provide[d]" are to be used in a terrorist act.[82] Knowledge requires at least a showing of "criminal recklessness," in which "a person disregards a risk of harm of which he is aware."[83] Yet here, the Complaint merely lists news reports about Taliban protection rackets,[84] alleges BVSPC executives had access to intelligence reporting services like Stratfor,[85] and relies on public statements by the U.S. government and enforcement actions against companies that are not

[81] 18 U.S.C. § 2339C(a)(1).
[82] *See* 18 U.S.C. § 2339C.
[83] *Boim*, 549 F.3d at 693-94 (internal quotation omitted).
[84] Compl. ¶¶ 107–108.
[85] Compl. ¶¶ 109–110.

BVSPC.[86] Such claims that information about Taliban protection rackets was generally "out there" do not plausibly allege that BVSPC, specifically, knew (let alone intended) that any payment it made to a subcontractor would be used by the Taliban to carry out an act of terrorism.[87]

Further, while attacks on U.S. soldiers in armed conflict are tragic, Congress did not intend Section 2339C to apply broadly to injuries suffered by military service members taking part in hostilities. Rather, Congress explicitly limited it to acts either (i) constituting an offense within the scope of certain treaties or (ii) "intended to cause death or serious bodily injury to a *civilian*, or to any other person *not* taking an active part in the hostilities in a situation of armed conflict."[88]

With respect to (ii), here the injuries here occurred almost entirely to military service members, not civilians. Further, the injuries clearly occurred during the course of an "armed conflict" in Afghanistan.[89]

And while sub-category (i) is not, on its face, limited to civilians, Section 2339C was passed to implement the International Convention for the Suppression of Financing of Terrorism.[90] In submitting that Treaty to the Senate, the Executive Branch explained it was intended to encompass only attacks on civilians and "off-duty military personnel," such as personnel living in

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[86] Compl. ¶¶ 111–127.

[87] *Danaher*, 2014 WL 1133472, at *3 (S.D.N.Y. Mar. 21, 2014); *see also Backpage.com, LLC v. Lynch*, 216 F. Supp. 3d 96, 109 (D.D.C. 2016) (distinguishing between knowledge and "reckless disregard" of a fact).

[88] 18 U.S.C. § 2339C(a)(1)(A)-(B) (emphasis added).

[89] As President Obama explained in June 2015, "[t]he United States currently remains in an armed conflict against al-Qa'ida, the Taliban, and associated forces, and active hostilities against those groups remain ongoing." Letter from the President, War Powers Resolution (June 13, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/06/13/letter-president-war-powers-resolution.

[90] *See Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 277 (E.D.N.Y. 2007) ("The United States implemented the Financing Convention via the Suppression of the Financing of Terrorism Convention Implementation Act of 2002. *See* 18 U.S.C. § 2339C.").

a military housing complex but not actively engaged in operations.[91] In short, Congress did not intend for Section 2339C to apply to injuries sustained during active hostilities. Injuries sustained during active hostilities are matters for the Executive Branch in its execution of foreign policy and the national defense.

B. The Complaint Fails to Plead the Required Scienter

To plead a claim under the ATA's civil provisions, the Complaint must also plausibly allege that BVSPC engaged in "intentional misconduct."[92] Conduct is intentional where a person "desires to cause consequences of his act, or . . . believes that the consequences are substantially certain to result from it."[93] Here, the Complaint's generic allegations about "companies like Defendants" making protection payments do not come close to plausibly alleging that *BVSPC* desired to support acts of terrorism or believed that acts of terrorism were substantially certain to result from any action it took.

As to the handful of more specific allegations against BVSPC, none of them (or their underlying sources) supports a claim that BVSPC acted with intention or substantial certainty. Absent pleaded facts showing BVSPC wanted to support terrorism or believed terrorism was substantially certain to result from its hiring of subcontractors, the Complaint fails to state a claim for direct liability.

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[91] Letter of Submittal from Deputy Secretary Strobe Talbott, Oct. 3, 2000, S. Treaty Doc. No. 106-49 at VII, https://www.govinfo.gov/content/pkg/CDOC-106tdoc49/html/CDOC-106tdoc49.htm.

[92] *Kemper*, 911 F.3d at 390.

[93] Restatement (Second) of Torts § 8A. *See also Strauss v. Credit Lyonnais, S.A.*, 925 F. Supp. 2d 414, 428–29 (E.D.N.Y. 2013) ("Whether it is labelled willful blindness or recklessness, Plaintiffs must show that Defendant knew or was deliberately indifferent to the fact that [Committee for Palestinian Welfare ("CBSP")] was financially supporting terrorist organizations, meaning that Defendant knew there was a substantial probability that Defendant was supporting terrorists by hosting the CBSP accounts and sending money at the behest of CBSP to the 13 Charities.").

C. The Complaint Fails to Plead the ATA's Rigorous Proximate Causation Standard

The Complaint must also plausibly allege that a defendant's conduct "proximately caused" each alleged injury, such that the "alleged [ATA] violation led directly to the plaintiff's injuries."[94] This "rigorous"[95] requirement demands that: (1) the defendant's conduct was a "substantial factor in the sequence of events that led to [a plaintiff's] injuries" and (2) plaintiff's injury was "reasonably foreseeable or anticipated as a natural consequence" of the defendant's conduct.[96] "Courts now 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 a terrorist attack.[97] Otherwise, the ATA would "allow recovery for even remote causes" of a terrorist attack and impose liability that "go[es] forward to eternity."[98]

1. The Complaint Must Plead A Substantial Connection Between BVSPC's Actions and a Terrorist Attack

In *Owens* v. *BNP Paribas*, the D.C. Circuit explained that the ATA's "substantial factor" element requires a showing of "sufficient directness" between a defendant's actions and a plaintiff's injuries.[99] That means, when, as here, a defendant is "more than one step removed from

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[94] *Owens*, 897 F.3d at 273 n.8 (internal citation omitted); *Rothstein*, 708 F.3d at 91-92.

[95] *Shatsky v. Palestine Liberation Org.*, No. 02 Civ. 2280, 2017 WL 2666111, at *7 (D.D.C. June 20, 2017), *vacated on other grounds*, No. 17 Civ. 7168, 2020 WL 1856490, at *1 (D.C. Cir. Apr. 14, 2020) (remanding for dismissal as to foreign defendants over whom the court lacked personal jurisdiction).

[96] *Owens*, 897 F.3d at 273.

[97] *Crosby*, 921 F.3d at 627 n.6; *see also, e.g.*, *Owens*, 897 F.3d at 276; *Brill*, 2020 WL 1200695, at *1; *Kemper*, 911 F.3d at 392; *Rothstein*, 708 F.3d at 97; *O'Sullivan*, 2019 WL 1409446, at *6.

[98] *Crosby*, 921 F.3d at 624.

[99] *Owens*, 897 F.3d at 273 n.8

a terrorist act or organization," a plaintiff claiming direct liability under the ATA "must allege some facts demonstrating a *substantial connection between the defendant and terrorism*."[100]

For instance, in *Owens*, the plaintiffs alleged that BNP Paribas ("BNPP") provided financial services to Sudan in violation of U.S. sanctions; that Sudan aided al-Qaeda by providing a base of operations, financing, and intelligence gathering services; and that al-Qaeda injured plaintiffs, by bombing two U.S. embassies in East Africa, close to Sudan.[101] The D.C. Circuit affirmed dismissal of the compliant, because there was "no nonconclusory allegation in the Complaint that plausibly shows that the moneys BNPP transferred to Sudan were in fact sent to al-Qaeda or that Sudan would have been unable to fund the attacks without the cash provided by BNPP."[102] Notably, the D.C. Circuit rejected the plaintiffs' attempt to satisfy the ATA's proximate causation standard by using a "money is fungible" theory. It explained that "to satisfy proximate causation under the ATA, Plaintiffs' complaint needs to adequately plead facts alleging that BNPP *substantially* contributed to Plaintiffs' injuries because the funds to Sudan *actually* [were] *transferred* to al Qaeda . . . and aided in the embassy bombings."[103] Multiple other federal courts of appeals have also rejected ATA claims where intermediaries stood between the defendants and the injuries suffered by plaintiffs. In *Rothstein v. UBS AG*, the plaintiffs claimed that, by providing banking services to Iran (a designated state sponsor of terrorism), a bank was responsible for attacks carried out by Hizbollah and Hamas, both of which Iran supported. The Second Circuit rejected this causal chain. It noted the complaint did not allege (i) that the bank itself participated in any attacks or provided money directly to a terrorist organization, (ii) that money "transferred"

[100] *Id.* at 275 (emphasis added).
[101] *Id.* at 273–74.
[102] *Id*. at 276 (internal quotation omitted).
[103] *Id.* (internal quotation omitted; emphasis and alteration in original).

by the bank "to Iran was given to Hizbollah or Hamas," or (iii) that if the bank not transferred money to Iran, "Iran . . . would not have funded the attacks in which plaintiffs were injured."[104]

2. The Complaint Fails to Plead a Substantial Connection Between BVSPC and Any Injury to any Plaintiff

Applying these established legal standards, the Complaint fails to allege a substantial connection between BVSPC's actions and Plaintiffs' injuries.

To begin with, there is no allegation of any payment from BVSPC to the Taliban. This fact alone weighs heavily towards dismissal. The Court should reject the Complaint's attempt to allege such payments based on purported "standard practice[s]" among "contractors working in [purportedly] comparable factual circumstances."[105] For one, the "factual circumstances" of each Defendant's work were not "comparable." Defendants worked on different projects, at different times, in different geographies.[106] The Complaint's apparent definition of "comparable" would seemingly hold anyone working anywhere in Afghanistan liable for every attack committed by the Taliban. And even if the circumstances were "comparable," a plaintiff cannot avoid Rule 12(b)(6)'s requirements through guilt-by-association allegations.[107] The Complaint must allege

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[104] *Rothstein*, 708 F.3d at 97; *accord Kemper v. Deutsche Bank*, 911 F.3d 383, 392 (7th Cir. 2018) (dismissing similar claims against Deutsche Bank for providing services to Iranian businesses noting that "Kemper does not allege that [the bank] ever serviced a terrorist group directly" or that the Iranian businesses "exist solely to perform terrorist acts").

[105] Compl. ¶ 192.

[106] For example, even with respect to BVSPC and the JV, Khost, the terminus location of the Gardez-Khost Road, is almost 450 miles from Kajaki, site of the Kajaki Dam. While BVSPC worked on energy and infrastructure contracts, defendant DAI is alleged to have worked largely on governance contracts. Compl. ¶ 161, and defendant Janus Global is alleged to have worked on explosive ordinance disposal contracts, Compl. ¶ 178. The ArmorGroup Defendants are alleged to have worked on a series of security and infrastructure contracts, including a contract in Shindad, in Herat Province in western Afghanistan, Compl. ¶ 130, approximately 500 miles from Gardez in eastern Afghanistan. In short, other than working in Afghanistan, the Defendants worked in a variety of different regions of the country and on significantly different types of projects.

[107] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice

facts specific to BVSPC, and accordingly it fails to even begin to show facts showing a "direct" or "substantial connection" between anything BVSPC did and the injuries plaintiffs sustained.[108]

Other factors reinforce the conclusion that any connection between any money paid by BVSPC and any attack referenced in the Complaint is tenuous to non-existent, and certainly not "substantial."[109] First, the money would have had to flow through numerous intermediaries—including subcontractors and local Afghans—before being used. Second, the Complaint itself acknowledges that the Taliban had numerous sources of funding, including, primarily, the sale of hundreds of millions of dollars of narcotics.[110] Third, the Taliban had numerous uses for any funds received, including running the "shadow" governments alleged in the Complaint.[111] Fourth, the attacks on plaintiffs happened at dozens of locations throughout Afghanistan over an eight-year period. Simply put, the Complaint does not plausibly allege that any funds paid by BVSPC "*substantially* contributed to [any] Plaintiffs' injures because the funds . . . 'actually [were] transferred to [the Taliban] . . . and aided in" any of the attacks alleged in the Complaint.[112]

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if it tenders naked assertion[s] devoid of further factual enhancement." (internal citation and quotation omitted)).

[108] *Brett*, 2008 WL 3851555, at *1. *See also Atuahene v. City of Hartford*, 10 F. App'x 33, 34 (2d Cir. 2001) (affirming dismissal where complaint "lump[ed] all the defendants together in each claim and provid[ed] no factual basis to distinguish their conduct").

[109] *Kaplan*, 405 F. Supp. 3d at 532–33 ("'Central to the notion of proximate cause is the idea that a person is not liable to all those who may have been injured by his conduct, but only to those with respect to whom his acts were a substantial factor in the sequence of responsible causation and whose injury was reasonably foreseeable or anticipated as a natural consequence.'" (quoting *Rothstein*, 708 F.3d at 91)). !

[110] *See, e.g.*, Compl. ¶¶ 90 (acknowledging that drug trafficking was the Taliban's largest source of funding), 107.

[111] *See, e.g.*, Compl. ¶ 43 (alleging that "Taliban leadership established procedures governing both how much should be raised and how it should be spent" and also administrated "shadow" governments "in each key province and district").

[112] *Owens*, 897 F.3d at 276 ("In sum, in order to satisfy proximate causation under the ATA, Plaintiffs' complaint needs to adequately plead facts alleging that BNPP *substantially* contributed to Plaintiffs' injuries because the funds to Sudan 'actually [were] transferred to al Qaeda . . . and

3. The Complaint Fails to Plead Foreseeability

Counts One through Four also fail to meet the second prong of the proximate cause analysis, which asks whether Plaintiffs' injuries were "reasonably foreseeable or anticipated as a natural consequence" of the defendant's actions.[113]

The Complaint cannot meet this requirement by simply equating work in dangerous areas of Afghanistan under U.S. government contracts, or payments to local Afghan workers through layers of subcontractors (whose employment was encouraged by the U.S. government), with attacks on U.S. forces.

* * *

In summary, the Complaint wholly fails to adequately plead primary liability under the ATA. Thus, the Court should dismiss Counts One through Four.

II. The Complaint Fails to Plead Secondary Liability Under the ATA

The Complaint's claims for secondary liability, Counts Five and Six, also fail. They allege attacks by the Taliban—not an FTO, as the ATA requires—and they fail to adequately plead the other elements of aiding and abetting liability under the ATA.

A. The Complaint Fails to Allege BVSPC Assisted Attacks by an FTO

A fundamental flaw of the aiding and abetting counts of the Complaint is that aiding and abetting liability under the ATA exists only for injuries from terrorist acts "committed, planned, or authorized by an organization that had been designated by the United States as a foreign terrorist organization."[114] According to the Complaint, all but one of the attacks that injured a Plaintiff or

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aided in' the embassy bombings." (quoting *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 118, 124 (2d Cir. 2013)) (emphasis in original)).

[113] *Rothstein*, 708 F.3d at 91 (internal quotation omitted).

[114] 18 U.S.C. § 2333(d)(2).

killed a Plaintiff's relative were carried out by the Taliban, or by the Haqqani Network or its alleged affiliate the "Kabul Attack Network."[115] Further, all non-conclusory allegations of payments either by BVSPC or by its joint venture with defendant LBG were to the Taliban or the Haqqani Network and its alleged "cutout," Mr. Arafat. The Taliban is not and has never been an FTO. Nor was the Haqqani Network an FTO until September 19, 2012, six months *after* either BVSPC or its joint venture with LBG allegedly made payments to Haqqani.[116] Accordingly, the aiding and abetting counts of the Complaint must be dismissed as to BVSPC.

The Complaint nevertheless attempts to cure this flaw by the conclusory allegation that al-Qaeda, which is a designated FTO, "jointly committed, planned, or authorized each of the Taliban attacks that killed or injured Plaintiffs or their family members."[117] That allegation, which merely parrots the statutory language, is a contrivance unsupported by the specific allegations of the Complaint, and contrary to decisions made by the United States government in determining which organizations to designate as FTOs.[118] As such, it fails to meet the plausibility test of *Twombly* and *Iqbal*.[119]

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[115] Three of the deceased were killed in the "Camp Chapman" attack, in which a Jordanian doctor being recruited by the CIA ignited a suicide bomb in 2009. Compl. ¶¶ 472, 1011, 1239. The Complaint alleges that the attack was "jointly" committed by al-Qaeda, the Taliban and the Haqqani Network. Compl. ¶ 473. That is the only allegation in the Complaint of a role by al-Qaeda in committing any specific attack.

[116] The Complaint alleges that the JV made payments to the Haqqani Network and Arafat in connection with its work on the Gardez-Khost Highway. Compl. ¶¶ 206-208. As the Complaint acknowledges, however, work on the Gardez-Khost highway ended in March 2012. Compl. ¶ 206.

[117] Compl. ¶ 312; *see also* Compl. ¶ 1295 (Count Five).

[118] The only attack alleged to have been jointly committed with al-Qaeda is the Camp Chapman Attack. Otherwise, the Complaint's discussion of specific attacks (Compl. ¶¶ 344-1261) does not allege al-Qaeda's involvement in the planning or authorization of any attack, but merely that al-Qaeda provided general inspiration and support for the Taliban. The ATA requires that planning or authorization relate to a specific "act of terrorism," not generalized support.

[119] *See Iqbal*, 556 U.S. at 680-81 (holding that allegation that government officials "knew of, condoned, and willfully and maliciously agreed to subject [plaintiff] to harsh conditions of confinement" are assertions that "amount to nothing more than a 'formulaic recitation of the

Three successive U.S. administrations—despite widely differing policy approaches to a variety of issues, including the war in Afghanistan—have distinguished between the Taliban and al-Qaeda. As discussed in Background Section I.A, *supra*, the Bush administration treated Taliban detainees and al-Qaeda detainees differently under the Geneva Conventions. President Obama's spokesman emphasized the "importan[ce]" of "drawing a distinction between the Taliban and al-Qaeda."[120] President Trump actively and publicly engaged in negotiations with the Taliban. None of these Administrations designated the Taliban as an FTO. It is bootless for the Complaint to assert as a fact the reported statement by the Taliban that "[We] and al-Qaeda are as one."[121] Plaintiffs' counsel cannot rewrite Congress's FTO requirement or revisit designations committed to the Executive Branch.

Further, the ATA's aiding and abetting provision requires that the designated FTO committed, authorized, or planned "*an act* of international terrorism." The Complaint's allegations that al-Qaeda provided general religious authorization for Taliban attacks on U.S. forces,[122] or that it "encouraged" Taliban attacks and provided general financial assistance to the Taliban,[123] do not satisfy this requirement of the ATA because the alleged conduct must amount to authorizing or planning "an act" of terrorism. Apart from the allegations concerning the Camp Chapman attack,[124] al-Qaeda is not mentioned in the allegations concerning any specific attack, nor is any information given elsewhere in the Complaint about any al-Qaeda role in a specific attack. The bare conclusory

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elements'" and were "conclusory and not entitled to be assumed true" (quoting Bell Atlantic Corp. v. *Twombly*, 550 U.S. 544, 556 (2007))).

[120] Earnest Briefing.

[121] Compl. ¶¶ 318, 339.

[122] Compl. ¶ 324.

[123] Compl. ¶ 332.

[124] *See*, *supra*, n.118.

allegation that al-Qaeda "committed, planned or authorized each of the Taliban attacks that killed or injured Plaintiffs or their family members"[125] is insufficient to overcome a motion to dismiss.

The same analysis applies to the aiding and abetting claim made in Count Six of the Complaint, which alleges that al-Qaeda conspired with Mullah Omar "and others" to conduct and maintain the Taliban as a "terrorist enterprise" that "functioned as a continuing unit."[126] The Complaint cannot escape the U.S. government's decision *not* to designate the Taliban as an FTO by redefining it as a RICO conspiracy that constituted a nine-year "act of terrorism" that was generally "committed, planned, or authorized" by al-Qaeda.[127]

That count alleges that the Haqqani Network "committed, planned, and/or authorized" what the Complaint terms a "Taliban-al-Qaeda Campaign,"[128] which allegedly constitutes a RICO enterprise,[129] and that the Plaintiffs were injured "by reason of" this Campaign.[130] As to BVSPC, the Haqqani designation is irrelevant because it occurred in September 2012, after the alleged payments to the Haqqanis by BVSPC or its joint venture with defendant LBG. The ATA limits aiding and abetting liability to attacks by an organization "that *had been designated as a foreign*

[125] Compl. ¶ 312.

[126] Compl. ¶ 1299.

[127] To the extent the Complaint suggests the Haqqani Network also "planned or authorized" the nine-year "act of terrorism" of the "Taliban-al-Qaeda Campaign," it fails for the same reasons. In addition, the Haqqani Network was not an FTO until September 2012. This further illustrates why Count Six makes no sense: it defines the "act of terrorism" as a nine-year enterprise beginning at the latest in 2007, and then alleges that the Haqqani Network "planned or authorized" that nine-year "act," five years after the "act" had begun. And even if the "act of terrorism" were redefined as individual attacks, (i) the Haqqani Network was not designated an FTO until well after the completion of the relevant JV project (*see* Compl. ¶¶ 205 et *seq.*), and (ii) the Complaint fails to allege any specific facts showing that the Haqqani Network "committed, planned, or authorized" any individual attack by the Taliban.

[128] Compl. ¶ 1306.

[129] Compl. ¶ 1300.

[130] Compl. ¶ 1304.

terrorist organization . . . as of the date on which" the attack was committed, planned, or authorized.[131] Paragraph 205 of the Complaint alleges generally that BVSPC and the joint venture paid fees "to secure their projects throughout" the "P2K" region, but Paragraph 206, beginning with the word "specifically," and the following paragraphs make clear that any alleged payments, both to the Haqqani Network and to Mr. Arafat, were "in connection with the Gardez-Khost Highway." As the Complaint itself alleges, the work of BVSPC and the joint venture on the Gardez-Khost Highway ended in March 2012.

Further, the Haqqani Network is not the Taliban, as evidenced by the U.S. designating (in 2012) one but not the other as an FTO. And nothing in the Complaint comes close to alleging that the Haqqani Network "committed, planned or authorized" any particular *act* that caused the injury to any Plaintiff or their family members.

B. The Complaint Fails to Plead the Elements of Aiding and Abetting Liability

In addition, the Complaint fails to adequately plead the remaining elements of aiding and abetting liability: (1) "'the party whom the defendant aids must perform a wrongful act that causes an injury;'" (2) "'the defendant . . . be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance;'" and (3) "the defendant must knowingly and substantially assist the principal violation.'"[132] The Complaint does not plausibly allege any of these elements.

To plead the "general awaren[ess] element, "a plaintiff must plausibly allege that the defendant was 'aware that, by assisting the principal, it is itself assuming a role in terrorist activities.'"[133] Here, there is no non-plausible allegation that BVSPC knew that it "it . . . itself

[131] 18 U.S.C § 2333(d)(2) (emphasis added).
[132] *Siegel*, 933 F.3d at 223 ((quoting *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983)).
[133] *Id.* at 224 (quoting *Linde*, 882 F.3d at 329).

[was] assuming a role in terrorist activities."[134] In *Siegel v. HSBC North America Holdings, Inc.*, plaintiffs alleged that a bank provided financial services to an entity alleged to have "links" to al-Qaeda. The Second Circuit held these allegations were insufficient to show the bank "played a role" in terrorist activities.[135] The allegations here fall short of those in *Siegel*. As discussed above, BVSPC is not alleged to have directly done business with anyone even with "links" to a then-designated FTO.[136]

The "substantial assist[ance]" element is analyzed under the factors set out in *Halberstam v. Welch.*[137] These factors are (1) the nature of the act encouraged, (2) the amount of assistance given by defendant, (3) defendant's presence or absence at the time of the tort, (4) defendant's relation to the principal, (5) defendant's state of mind, and (6) the period of defendant's assistance.[138]

As to the first and fifth factors, the "nature of the act encouraged" factor "dictates what aid might matter, i.e., be substantial" and the "state of mind" factor examines whether the defendant was "one in spirit" with the principal tortfeasor.[139] To illustrate both of these factors, the *Halberstam* court cited a case involving an aider and abettor's "war cry for more blood," specifically his shouts of "kill him" and "hit him more," during an assault.[140] The court stated this act that "may well have contributed to the [primary tortfeasor's] assault,"[141] and also provided

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[134] *Id.*
[135] *Id.*
[136] *See* Background Section II, *supra*.
[137] 705 F.2d 472 (D.C. Cir. 1983).
[138] *Id.* at 484-85.
[139] *Id.* at 484.
[140] *Id.* at 481 (citing *Rael v. Cadena*, 93 N.M. 684, 604 P.2d 822 (1979))
[141] *Id.* at 484.

evidence of "one[ness] in spirit" between the defendant and the principal.[142] Here, in stark contrast, the Complaint does not plausibly allege that BVSPC "encouraged" any attacks on Americans, by the Taliban, al-Qaeda, or anyone else. To the contrary, the Complaint repeatedly uses the words "extort" and "extortion" to describe the alleged payments, meaning that any payments were "induced by wrongful use of force, fear, or threats,"[143] and not the result of a desire to "encourage" acts of violence or to be "one in spirit" with anti-American forces.

As to the "amount of assistance given" and the "defendant's presence at the scene," there is no allegation that BVSPC was present at any attack or that it provided, for example, weapons or personnel for any attack.[144] And even assuming *arguendo* that funds originally paid by BVSPC at some point made their way into the hands of Taliban operatives, as discussed in Background Section I.C above, this occurred without BVSPC's knowledge, and only after the money moved through a web of intermediaries and was commingled with other Taliban funds, including hundreds of millions of dollars from narcotics trafficking. In short, BVSPC was far removed from any alleged attack.

As to the fourth and sixth factors, defendant's relation to the principal and the period of assistance, the Complaint does not contain any non-conclusory factual allegation about *any* relationship between BVSPC, on the one hand, and al-Qaeda or the Taliban on the other. Further, while *Halberstam* indicated that "a relationship where the defendant had a position of authority could weigh in favor of substantial assistance,"[145] here, again, the Complaint's theory is that the

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[142] *Id.*

[143] *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 409 (2003).

[144] *Cf. Crosby v. Twitter, Inc.*, 303 F. Supp. 3d 564, 573 (E.D. Mich. 2018) (finding Twitter did not provide assistance to ISIS supporter where it did not give him "instructions on how to build a bomb or obtain an assault rifle" for any attack).

[145] *Taamneh*, 343 F. Supp. 3d at 918 (citing *Halberstam*, 705 F.2d at 484).

Taliban "extorted" BVSPC, not that BVSPC had a "position of authority" over it. Moreover, the "length of the relationship" factor looks to length of the "assistance in terrorism," not to alleged episodic shakedowns.[146] In sum, the fact that the Complaint (i) relies on a theory that BVSPC paid funds because it was extorted, (ii) fails to allege any relationship of substance between the principal and the alleged aider and abettor, and (iii) fails to make any non-conclusory allegation that BVSPC funds were actually used in any attack, "compel[s] the conclusion that plaintiffs fail to plausibly allege" aiding and abetting.

C. Count Six Also Fails Because the Complaint Cannot Use RICO to Get Around the Fact that the Taliban Is Not an FTO

Unable to plead the Taliban into an FTO to which BVSPC provided substantial assistance, the Complaint's last resort is a RICO theory that fails for two principal reasons.

First, "[a] private RICO plaintiff . . . must allege and prove a *domestic* injury to its business or property."[147] This means the "initial injury" must have occurred in the United States, not abroad.[148] But every alleged injury in this case was initially suffered in Afghanistan.[149] This includes injuries to family members residing in the United States, as illustrated by an analogous case. In *Nino v. United States*, U.S. border patrol shot and killed a man attempting to cross into the United States, and he landed with his legs on U.S. soil and his upper body in Mexico.[150] His wife and children sued under the Federal Tort Claims Act, which, like RICO, bars all claims based on

[146] *Siegel*, 933 F.3d at 225.

[147] *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2106 (2016) (emphasis in original).

[148] *Exeed Indus., LLC v. Younis*, No. 15 Civ. 14, 2016 WL 6599949, at *3 (N.D. Ill. Nov. 8, 2016) ("The few cases to address the issue of domestic injury post-*RJR Nabsico* have interpreted it to mean that an injury arises where it was initially suffered by the plaintiff.") (citing cases).

[149] Compl. ¶¶ 344–1261.

[150] 334 F. Supp. 3d 1108, 1113 (S.D. Cal. 2018).

injuries suffered in a foreign country.[151] The court explained in *Nino* that, where the claimed injury was the loss of a relative, "the injury is 'suffered' . . . where the relative died."[152] Here, each of the attacks, injuries, and deaths occurred in Afghanistan.

Second, the ATA limits secondary liability to injuries arising from "*an act* of international terrorism," singular, *by an FTO*.[153] The Complaint attempts to collapse all the attacks of an alleged "Taliban-al-Qaeda Campaign," comprising many attacks in many locations over many years, into a single act.[154] Yet, at the same time, to satisfy RICO's requirement of "at least two acts of racketeering activity," the Complaint cites attacks on U.S. nationals and interests.[155] Simply put, the Complaint cannot assert that these attacks were a single "act" of terrorism under the ATA while at the same time claiming they count as multiple "acts" of racketeering activity under RICO.[156] No court has ever held that a RICO conspiracy can serve as a single act of "international terrorism" for purposes of § 2333(d)(2). Nor, again, is the alleged campaign "an act" by an FTO. The Secretary of State, again, has designated al-Qaeda, not the Taliban, as an FTO.

III. The ATA's Act of War Exemption Precludes Claims Based on Attacks by the Taliban in the Course of an International Armed Conflict

The ATA provides that "[n]o action shall be maintained under section 2333 of this title for injury or loss by reason of an act of war."[157] The ATA defines an "act of war" as "any act occurring in the course of . . . (B) armed conflict, whether or not war has been declared, between two or more

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[151] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

[152] 334 F. Supp. 3d at 1114.

[153] 18 U.S.C. § 2333(d)(2) (emphasis added).

[154] Compl. ¶¶ 1300–02 ("The Taliban-al-Qaeda Campaign was an act of international terrorism.").

[155] 18 U.S.C. § 1961(5) (emphasis added).

[156] *Cf. Taamneh*, 343 F. Supp. 3d at 916 (stating § 2333(d)'s text "indicates that the injury at issue must have arisen from "*an act* of international terrorism," not from "assisting a foreign terrorist organization generally or such an organization's general course of conduct").

[157] 18 U.S.C. § 2336(a).

nations; . . ."[158] As explained below, all claims based on Taliban attacks (as opposed to Haqqani attacks) are barred under Part (B) because they seek recompense for acts of war during the course of Operation Enduring Freedom—an armed conflict between the United States and Afghanistan.

A. Operation Enduring Freedom Began as a War Between Nations

Operation Enduring Freedom began as an armed conflict between nations: the United States and Afghanistan. In Plaintiffs' own words, "On October 7, 2001, the United States initiated Operation Enduring Freedom and *invaded Afghanistan.*"[159] "The operation's purpose," Plaintiffs write, "was to *depose the Taliban regime* . . . ."[160] Before this, Plaintiffs allege, "the Taliban . . . ruled Afghanistan *as its de-facto government*."[161]

Whether an armed conflict is between nations is a question for the Executive Branch as part of its constitutional role of conducting foreign policy.[162] Here, President Bush determined that Operation Enduring Freedom was a military conflict between nations when he explained that the Geneva Conventions applied to it. In a memorandum issued February 7, 2002, President Bush ordered that, while the Geneva Conventions did not apply to al-Qaeda, "the provisions of Geneva

[158] 18 U.S.C. § 2331(4). The ATA also defines an Act of War as an act "occurring in the course of armed conflict between military forces of any origin. . . ." 18 U.S.C. § 2331(4)(C). But a 2018 amendment to the ATA states, "the term 'military force' does not include any person that (A) has been designated as a . . . (ii) specially designated global terrorist . . . ." 18 U.S.C. § 2331(6). Because the term "military force" only appears in Part (C) of Section 2333(4), and not Part (B), the 2018 amendment does not modify Part (B).

[159] Compl. ¶ 38 (emphasis added).

[160] Compl. ¶ 38 (emphasis added).

[161] Compl. ¶ 36 (emphasis added); *see also* Compl. ¶¶ 290, 294 (both referring to "the Taliban government").

[162] *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.") (internal quotation omitted).

will apply to our present conflict with the Taliban."[163] "By its terms," President Bush explained, "Geneva applies to conflicts involving 'High Contracting Parties,' *which can only be states.*"[164] The Supreme Court recognized, in *Hamdan v. Rumsfeld*, that "[t]he President has stated that the conflict with the Taliban is a conflict to which the Geneva Conventions apply."[165]

As the D.C. Circuit explained in *Hamdan*, the construction and application of treaty provisions by the Executive Branch was entitled to "great weight"[166] "The President's decision to treat our conflict with the Taliban separately from our conflict with al Qaeda is the sort of political-military decision constitutionally committed to him."[167] Thus, "[t]o the extent there is ambiguity about the meaning of Common Article 3 as applied to al Qaeda and its members," the Court held that "the President's reasonable view of the provision must therefore prevail."[168]

This Court has similarly acknowledged the reality that, "Of course, the Taliban was the 'Afghani Government' in 2001."[169] It has described the "Taliban government" as having "overthr[own] the prior government" of Afghanistan.[170] In *Mousovi v. Obama*, this Court described its assumption of power: "In the fall of 1996, a Taliban force . . . seized control of Kabul

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[163] White House Memorandum, Humane Treatment of al Qaeda and Taliban Detainees 1-2 (Feb. 7, 2002) (emphasis added), https://www.dia.mil/FOIA/FOIA-Electronic-Reading-Room/FOIA-Reading-Room-Detainee-Abuse/FileId/39858/.

[164] *Id.* (emphasis added).

[165] 548 U.S. 557, 629 n.60 (2006).

[166] *Hamdan v. Rumsfeld*, 415 F.3d 33, 41–42 (D.C. Cir. 2005). The Supreme Court reversed on unrelated grounds, expressly not reaching this issue. *Hamdan*, 548 U.S. at 629 ("We need not decide the merits of this argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories."). *Hamdan*, 415 F.3d at 41 (citing *United States v. Stuart*, 489 U.S. 353, 369 (1989); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982); and *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961)).

[167] *Id.*

[168] *Id.* at 42.

[169] *Parhat v. Gates*, 532 F.3d 834, 845 (D.C. Cir. 2008)

[170] *Mousovi v. Obama*, No. 05 Civ. 1124, 2016 WL 3771240, at *1–2 (D.D.C. July 11, 2016).

and overthrew the prior government. Thereafter, the Taliban established the Islamic Emirate of Afghanistan and governed by a strict interpretation of Islamic Sharia law."[171] The Islamic Emirate of Afghanistan controlled about 90% of the country and, as of September 11, 2001, was recognized by Pakistan, Saudi Arabia, and the United Arab Emirates.[172]

In January 2006, the U.S. Defense Department's General Counsel wrote to U.S. Central Command, "for purposes of addressing this question [of contracting private security companies to protect U.S. personnel], it may be assumed that military operations both in Afghanistan and Iraq *began as international armed conflicts and continue to constitute international armed conflicts*." He continued, "Currently, operations both in Iraq and Afghanistan are in the transition, or stability operations, phase of *an international armed conflict*." [173]

In the view of the President, the Executive Branch, and this Court, Operation Enduring Freedom was an armed conflict between two nations and remained so even after the emergence of the Karzai government.

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[171] *Id.* at *1.

[172] Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 Cornell Int'l L.J. 533, 539 n.19 (2002) ("The Taliban government was the functioning *de facto* government of Afghanistan prior to October 7th, 2001 and a few states recognized it as the *de jure* government, including Pakistan and Saudi Arabia. The Taliban also had the status of a 'belligerent' within the meaning of the customary laws of war prior to October 7th, 2001 since it had control of significant portions of the territory of Afghanistan, a government, a population, and an armed force; had engaged in armed conflict with the Northern Alliance; and had outside recognition by some states as the *de jure* government of Afghanistan."); Restatement (Third) of Foreign Relations Law of the United States § 201 (1987) ("Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in . . . formal relations with other such entities."), https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1518&context=cilj.

[173] Exhibit 2, Memorandum from the U.S. Department of Defense Deputy General Counsel for International Affairs on Request to Contract for Private Security Companies in Iraq, to the Staff Judge Advocate, U.S. Central Command, 2 (Jan. 10, 2006) (emphasis added).

B. Operation Enduring Freedom Continued as an Armed Conflict Through at least December 28, 2014

Operation Enduring Freedom continued until December 28, 2014, when the United States marked the end of its combat mission in Afghanistan.[174] Thus, it covers all of Defendants' alleged conduct giving rise to Plaintiffs' claims.[175]

Plaintiffs will likely claim that, at some point during Operation Enduring Freedom, the situation changed from an armed conflict between nations to some lesser form of hostility. That is not an inquiry this Circuit entertains. As the D.C. Circuit explained in *Al-Alwi v. Trump*, it is not a court's role to parse changes in military hostilities during an ongoing conflict.[176]

Al-Alwi involved a habeas corpus suit by a Guantanamo Bay detainee captured fighting in Afghanistan.[177] Mr. Al-Alwi argued that the transition from Operation Enduring Freedom to Operation Freedom's Sentinel ended the conflict in Afghanistan and, in turn, the United States's authority to detain him under the 2001 Authorization for the Use of Military Force.[178]

The D.C. Circuit disagreed. It explained that "[t]he 'termination' of hostilities is 'a political act.'"[179] It went on, "[w]hether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled."[180] Thus, the Court declined to engage in that inquiry,

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[174] U.S. Dep't of Defense, *Obama, Hagel Mark End of Operation Enduring Freedom* (Dec. 28, 2014), https://www.defense.gov/Explore/News/Article/Article/603860/.

[175] Compl. ¶ 6 ("Defendants financed the Taliban through protection payments from at least 2006 until 2014.").

[176] 901 F.3d 294, 300 (D.C. Cir. 2018).

[177] *Id.* at 295.

[178] *Id.* at 296. Operation Freedom's Sentinel was a follow-on Mission advising and supporting Afghan security forces. *Id.*

[179] *Id.* at 299 (quoting *Ludecke v. Watkins*, 335 U.S. 160, 168–69 (1948)).

[180] *Id.* (quoting *Ludecke*, 335 U.S. at 169).

citing the Supreme Court's decision in *Ludecke v. Watkins* to defer to political branch determination whether "war with Germany" persisted despite Germany's surrender.[181]

Similarly, in *Al-Bihani v. Obama*, the D.C. Circuit affirmed denial of habeas corpus for another Guantanamo detainee who argued "that the conflict in which he was detained, an international war between the United States and Taliban-controlled Afghanistan, officially ended when the Taliban lost control of the Afghan government."[182] The D.C. Circuit again did not engage, writing, "The determination of when hostilities have ceased is a political decision, and we defer to the Executive's opinion on the matter, at least in the absence of an authoritative congressional declaration purporting to terminate the war."[183] Requiring a clear pronouncement that the war had ended, the Court wrote, would be "at odds with the wide deference the judiciary is obliged to give to the democratic branches with regard to questions concerning national security."[184]

The same principle dictates the outcome here. Indeed, it does so more strongly here than in *Al-Alwi*, where the question was whether the *transition* from Operation Enduring Freedom to Operation Freedom's Sentinel meant the nature of the War in Afghanistan had changed. Here, as in *Al-Bihani*, the alleged conduct occurred *during* Operation Enduring Freedom only.

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[181] *Id.* (citing *Ludecke*, 335 U.S. at 168-70). The Fourth Circuit's decision in *United States v. Hamidullin*, 888 F.3d 62, 70 (4th Cir. 2018), preceded and conflicts with *Al-Alwi*. In *Hamidullin*, the Fourth Circuit found that, while the war "began in 2001 as an international armed conflict . . . between the United States and its coalition partners on the one side, and the Taliban-controlled Afghan government on the other," it was no longer an international armed conflict as of 2009. *Id.* The Fourth Circuit relied on a commentary to the Geneva Convention in making this determination. *Id.* This Court should follow the law of this Circuit as set forth in *Al-Alwi*.

[182] 590 F.3d 866, 871 (D.C. Cir. 2010).

[183] *Id.* at 874 (citing *Ludecke*, 335 U.S. at 168-70 & n.13).

[184] *Id.* at 875.

Just as a court should not attempt to resolve the date on which hostilities changed *between* a series of military operations, a court should not attempt to resolve when, *during* a *single* military operation, the conflict may have changed from one between nations into something else. Because Operation Enduring Freedom began as a war between nations, and because Operation Enduring Freedom lasted through the end of 2014, any Taliban attacks on U.S. forces in Afghanistan during that operation are acts of war that cannot create a private right of action.

CONCLUSION

For all these reasons, the Court should dismiss the Complaint against BVSPC with prejudice.

Dated: April 29, 2020

Respectfully submitted,

/s/ Andrew M. Lankler
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Index of Exhibits

Exhibit 1	Letter from R. Rademeyer to M. Le Roux, dated June 25, 2012
Exhibit 2	Memorandum from the U.S. Department of Defense Deputy General Counsel for International Affairs on Request to Contract for Private Security Companies in Iraq, to the Staff Judge Advocate, U.S. Central Command, dated January 10, 2006