IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AUGUST CABRERA, *et al.*,

Plaintiffs,

v.

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

Defendants.

Case No. 19-cv-03833-EGS-GMH

MEMORANDUM OF LAW IN SUPPORT OF THE MTN DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT FOR LACK OF PERSONAL JURISDICTION AND FOR FAILURE TO STATE A CLAIM

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PRELIMINARY STATEMENT

The MTN Defendants are three foreign telecommunications companies with wholly foreign operations, accused by Plaintiffs of conduct that allegedly occurred entirely outside the United States.[1] Plaintiffs, service members and contractors injured in Afghanistan, or their family members, claim that the Taliban ran a "cell phone tower extortion racket" that targeted one of those companies, MTN Afghanistan, in Taliban-controlled parts of Afghanistan. AC ¶ 123. Plaintiffs allege that the Taliban threatened MTN Afghanistan with violence unless it paid the Taliban's "taxes" or shut down cell towers at night on demand, *see, e.g.*, *id.* ¶ 138, and that alleged compliance with these threats subjects the MTN Defendants to liability under the Anti-Terrorism Act ("ATA"), *see id.* ¶¶ 2570-2615.

This claim suffers from two overarching and irredeemable flaws. *First*, Plaintiffs are attempting to sue *foreign* defendants in the United States over conduct that allegedly occurred *in Afghanistan*. Under settled constitutional principles, the Court lacks jurisdiction over the MTN Defendants. *Second*, Plaintiffs' factual allegations do not support the notion that three leading telecommunications companies committed acts of international terrorism, or knowingly assumed a role in the Taliban's acts of international terrorism. Plaintiffs' theory of liability therefore does not state a claim against the MTN Defendants under the ATA.

The threshold defect in the Amended Complaint is that the Court lacks personal jurisdiction over the MTN Defendants. The Amended Complaint does not, and could not, contend that the MTN Defendants, all of which are foreign companies without U.S. operations, are subject to general jurisdiction in the United States. Plaintiffs also fail to plead any basis for specific

[1] The MTN Defendants are MTN Group Limited ("MTN Group"), MTN (Dubai) Limited ("MTN Dubai"), and MTN Afghanistan.

jurisdiction. The conduct that forms the basis of Plaintiffs' claims—MTN Afghanistan's alleged compliance with the Taliban's extortionate demands—allegedly occurred entirely outside the United States. Plaintiffs obviously cannot establish that U.S. courts have jurisdiction over a foreign company on the basis that the Taliban shook it down in Afghanistan—an experience they contend was shared by innumerable individuals and businesses in that country, *see, e.g.*, *id.* ¶¶ 86, 122-123. So they devote a section of their Amended Complaint to irrelevant financing and political risk contracts with international organizations that are part of the World Bank Group and happen to be headquartered in Washington, D.C., in an unsuccessful ploy to establish personal jurisdiction based on alleged acts bearing no connection to the United States.

These allegations fail to support jurisdiction over any MTN Defendant for a simple reason: the Constitution requires that a plaintiff's claim arise from the defendant's contacts with the forum, but the World Bank's support for the expansion of mobile-telephone service in Afghanistan has nothing to do with this lawsuit. Plaintiffs' claims thus do not arise from World Bank financing, and, even if they did, merely contracting with World Bank entities is not purposeful availment of the privilege of conducting business in the United States. The logical endpoint of Plaintiffs' strained theory of jurisdiction is that *any* foreign entity that receives World Bank financing would subject itself to U.S. jurisdiction for *any* claim, by *any* party, that later arises in *any* country where this financing is used to spur development. That startling outcome is plainly incorrect.

Tacitly recognizing this flaw, Plaintiffs' Amended Complaint adds pages of inconsequential jurisdictional discussion. Rather than add anything of substance, they have simply peppered their pleading with 72 irrelevant references to "Washington, D.C.," "the United States," and "America." Plaintiffs also mount a new theory of intentional targeting of this forum. Deleting most of their uses of the word "extortion," Plaintiffs added a baseless and conclusory assertion that

the MTN Defendants "intended to harm Americans in Afghanistan." *Id.* ¶ 337. That suggestion is as implausible as it sounds. Plaintiffs base it on speculation, unreasonable inferences, contradiction of their own factual allegations, and non-sequiturs—going so far as to cite MTN's business in Ghana, a U.S.-allied democracy, as support for their hypothesis that the MTN Defendants must harbor anti-American motives. *See id.* ¶ 339. MTN Group and its affiliates are proud of their work entering challenging, emerging markets and helping people in the world's most underserved areas connect to one another and the world, a mission that international organizations have lauded. In leveling the outrageous charge that this "business model" implies hostility to the United States, *id.*, Plaintiffs demean the vital objective of providing connectivity and sparking opportunity in developing nations. Plaintiffs' offensive new theory only confirms how untenable their bid for jurisdiction is.

Even if this Court had jurisdiction to hear Plaintiffs' claims against the MTN Defendants, all of those claims would still have to be dismissed for failure to state an ATA claim. Counts 1-4 are based on the remarkable and spurious assertion that the MTN Defendants themselves perpetrated acts of international terrorism. But under the ATA, a defendant is responsible for committing "international terrorism" only if it appears to act with the motives of a terrorist, such as intimidating a civilian population. Here, Plaintiffs' own allegations show the opposite: MTN Afghanistan was the *target* of terrorist attacks and threats, and it allegedly complied with the Taliban's demands to protect its employees and network from violent reprisal. Counts 5 and 6, which claim the MTN Defendants aided and abetted terrorism, are equally baseless. Plaintiffs would have to allege that the MTN Defendants knowingly "assum[ed] a role in terrorist activities." *Linde v. Arab Bank, PLC*, 882 F.3d 314, 329 (2d Cir. 2018). Again, Plaintiffs' own factual allegations—that MTN Afghanistan allegedly acted to protect its staff and network from violent

threats—refute their insinuation that the MTN Defendants willingly assumed a role in terrorism. Ultimately, Plaintiffs do no more than allege that MTN Afghanistan faced a difficult choice in an impossible situation. As a matter of law, those allegations do not support an ATA claim.

Plaintiffs and their family members made tremendous sacrifices on behalf of the United States and the people of Afghanistan. They are entitled to deep sympathy. But the MTN Defendants are not the extremists that caused Plaintiffs' tragic losses and injuries. To the contrary, MTN Afghanistan has been praised by the World Bank for expanding telecommunications services to the impoverished people of Afghanistan. MTN Afghanistan has been a *target* of violence in the devastating conflict in that war-torn country. Put simply, Plaintiffs have sued the wrong defendants in the wrong court based on insufficient allegations.

BACKGROUND

The background recited below is based on the non-conclusory factual allegations in the Amended Complaint, which must be treated as true only for purposes of this motion to dismiss.[2]

A. The MTN Defendants Are Foreign Telecommunications Companies That Operate Exclusively Outside the United States.

Founded at the dawn of South African democracy in 1994, MTN Group is a South African company listed on the Johannesburg Stock Exchange. It is one of the largest companies in Africa and has become one of the world's leading providers of mobile telecommunications and network services, with more than 250 million subscribers in Africa and the Middle East, and more

[2] The background recitation disregards all unsupported inferences, legal conclusions, and allegations contradicted by documents the Amended Complaint incorporates by reference. *See Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 272-73 (D.C. Cir. 2018). In treating the Amended Complaint's factual allegations as true at this stage as required by the Federal Rules of Civil Procedure, the MTN Defendants do not "admit[]" them. *Clay v. Yates*, 809 F. Supp. 417, 426 (E.D. Va. 1992). Unless otherwise noted, internal quotation marks have been omitted from all citations in this memorandum of law.

subscribers than any other operator in Africa. MTN Group has never had operations in the United States. *See* AC ¶ 28. It serves a diverse range of countries, including underserved populations in the developing world who have historically lacked access to reliable and affordable connectivity, and the economic, educational, and health services opportunities that connectivity brings. MTN Group believes that everyone deserves the benefits of a modern, connected life, and seeks to make the digital world accessible to people wherever they are located. As part of that mission, MTN Group and its affiliates have "wad[ed] into nations dealing with war, sanctions and strife," *id.* ¶ 291, to bring connectivity to nations where "no one else [will] go[]," Alexandra Wexler, *Telecom Giant Pushes into Dangerous Areas*, Wall St. J. (Aug. 10, 2019) ("*Telecom Giant Pushes into Dangerous Areas*") (Ex. A), *cited at* AC ¶ 291 n.352.

Afghanistan is one such country. MTN Afghanistan, a company incorporated and headquartered in Afghanistan, was acquired in 2006. AC ¶¶ 30, 292, 331. MTN Afghanistan has also never had operations in the United States. According to the World Bank, MTN Afghanistan's operations helped "expan[d]" the "telecommunications infrastructure in a conflict-affected country, increasing the availability and affordability of communications services in Afghanistan." World Bank Grp., *Afghanistan Country Snapshot* 53 (2015) ("World Bank Snapshot") (Ex. B), *cited at* AC ¶ 373 n.442. The International Financial Corporation ("IFC"), an arm of the World Bank Group, lauded an MTN Afghanistan expansion that was "aimed in particular at low-income populations," touting its role in promoting "economic development and growth in Afghanistan." Int'l Fin. Corp., *IFC Invests $75 Million To Expand Mobile Communications Access in Afghanistan* (2009) (Ex. C), *cited at* AC ¶ 373 n.441. And in 2011, the U.S. Agency for International Development ("USAID") "partner[ed]" with MTN Afghanistan to "expand[]its mobile money services [allowing funds transfers through cell phones] into rural areas and promote

teacher salary payments using mobile money." USAID, *USAID Grants Will Enable More Than 100,000 Afghans to Use Mobile Money Services* (Nov. 30, 2011), https://tinyurl.com/y64pnhkh.[3] Indeed, the U.S. Government views mobile technology in Afghanistan as an "imperative to restoring stability, expanding the economy and forging cohesion among a society torn apart by decades of volatility." USAID, *Connecting to Opportunity* 5 (2013), https://tinyurl.com/y5fnja62.

B. This Suit Is Based on MTN Afghanistan's Alleged Actions in Afghanistan in Response to Extortion by the Taliban.

As one report incorporated into the Amended Complaint explains, "[w]orking in some of the world's most dangerous countries" poses tremendous challenges for telecommunications providers. *Telecom Giant Pushes into Dangerous Areas*. MTN Group's affiliates in these regions face threats of violence, theft, and property damage. *See id.* Afghanistan is no exception. As Plaintiffs admit, Afghanistan's "political instability" has made "operating conditions challenging." AC ¶ 332.

Plaintiffs identify the Taliban as MTN Afghanistan's toughest challenge. The Taliban is a Sunni Islamist group, composed of former mujahedin (holy warriors), that effectively controlled Afghanistan as its "de facto" government from 1996 to 2001. *See id.* ¶¶ 39-40, 417. The Amended Complaint describes that after a U.S.-led coalition overthrew the Taliban-led government following the attacks of September 11, 2001, the Taliban "regenerated" as an insurgent militia "intent on expelling the United States from Afghanistan . . . and re-establishing Islamic rule." *Id.* ¶¶ 2, 47. Over the next two decades, the Taliban waged a deadly insurgency against Coalition and Afghan national forces. *Id.* ¶¶ 47, 50-51.

[3] The Court may take judicial notice of government documents. *See Democracy Forward Found. v. White House Off. of Am. Innovation*, 356 F.Supp. 3d 61, 69 n.6 (D.D.C. 2019); *see also Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 545 (2013) (taking judicial notice of information on World Bank website).

Plaintiffs are U.S. service members or contractors, or family members of service members or contractors, who were injured or killed in Afghanistan between 2009 and 2017. *Id.* ¶¶ 1, 17. The Amended Complaint attributes these attacks to the Taliban and the Haqqani Network. *See, e.g.*, *id.* ¶¶ 1, 17, 438, 442-451, 519, 522.[4]

Plaintiffs allege that when the Taliban reemerged in 2005, it began "systematically" targeting "international businesses operating in Afghanistan," *id.* ¶ 2, in a scheme to "extort money," Jon Boone, *Telecom Chief Says Rivals Pay Taliban Protection*, Fin. Times (June 9, 2008) (Ex. D), *cited at* AC ¶ 295 n.363. The Taliban allegedly presented companies, like MTN Afghanistan, with a choice: pay "protection fees" or face having their equipment and personnel "attacked." AC ¶ 294. Taliban officials allegedly termed this extortion racket a "tax" for operating in regions they claimed as their territory—a tax they enforced through threats and violence against persons and property alike. *See id.* ¶¶ 115, 293.

According to Plaintiffs, "[b]y 2006," the Taliban had "achieved control of wide swaths of southern and eastern Afghanistan," *id.* ¶ 63, establishing "de facto control of key provinces," *id.* ¶ 47. Everywhere it went, the Taliban allegedly erected the trappings of a bureaucracy, "set[ting] up . . . 'shadow' local government[s] in each key province and district." *Id.* ¶ 49. "[B]y 2009[,] it had installed 'shadow' governments in 33 of Afghanistan's 34 provinces." *Id.* ¶ 63.

According to the Amended Complaint, the Afghan telecommunications industry was a particular target of the Taliban's violence. Plaintiffs allege that the Taliban operated a "cell phone tower extortion racket," *id.* ¶ 123, through which it began to levy "taxes" and extort "big telecom companies," *id.* ¶ 293; *see* Yaroslav Trofimov, *Cell Carriers Bow to Taliban Threat*, Wall St. J.

[4] The United States designated the Haqqani Network as a Foreign Terrorist Organization ("FTO") under 8 U.S.C. § 1189 in September 2012. AC ¶ 439. The Secretary of State has never designated the Taliban as an FTO.

(Mar. 22, 2010) (Ex. E), *cited at* AC ¶ 293 n.354 ("*Cell Carriers Bow*"); AC ¶ 63 (alleging the Taliban's "long-standing business practice" was "to extort payment from those who want to operate within [their] space," including firms "construct[ing] . . . cellphone tower[s]"). The Taliban allegedly warned "MTN to pay monthly protection fees in each province, or face having their transmission towers attacked." AC ¶ 294. In addition to threatening MTN Afghanistan's property, the Taliban threatened that "people [would be] kidnapped" unless regular protection payments were made, Gretchen Peters, *Crime & Insurgency in the Tribal Areas of Afghanistan & Pakistan* 32, Combatting Terrorism Ctr. (Oct. 15, 2010) (Ex. F), *cited at* AC ¶ 49 n.5 ("*Crime & Insurgency*"). And it made good on those threats: cell towers became a "key battleground," and carriers faced an "onslaught" of "crippling attacks," which "bl[e]w towers completely out of the ground." Jon Boone, *Taliban Target Mobile Phone Masts to Prevent Tipoffs from Afghan Civilians*, The Guardian (Nov. 11, 2011) (Ex. G), *cited at* AC ¶ 311 n.378 ("*Taliban Target Mobile Phone Masts*"). The message was that companies operating "cell phone tower[s] anywhere in Afghanistan" must buy their safety or else answer to "whoever . . . has the power to blow [them] up." AC ¶ 295.

Plaintiffs also claim that "[i]n or about 2008, the Taliban began demanding that Afghanistan's major cellular-phone providers switch off their towers at night." *Id.* ¶ 308. Plaintiffs allege that "the Taliban believed that shutting down nighttime service would impede Coalition intelligence efforts," so it threatened to "target the costly cell towers with explosives" if providers did not switch them off on demand. *Id.* ¶¶ 308, 318. According to reporting cited in the Amended Complaint, "[w]hen carriers tried to defy the edict," the Taliban "killed staff in response" and destroyed "some 40 base towers—costing as much as $400,000 each." *Cell Carriers Bow*. Afghanistan's Communications Minister is quoted in 2010 as recognizing that "[w]e don't have security to protect the towers." *Id.* The same report states that with "people's lives . . . at stake,"

"all of Afghanistan's national cellphone carriers . . . made a joint decision to shut down their networks at night in areas where the insurgents [were] active." *Id.* As with their alleged response to the Taliban's other threats, the companies' alleged aim was to "reduce the risk" that the Taliban would "target the costly cell towers with explosives." AC ¶¶ 311, 318.

Plaintiffs appear to understand that their legal theories are incompatible with their factual allegations of extortion by the Taliban. *See, e.g.*, *infra* at 17. Reflecting this recognition, they made semantic changes to their complaint; for instance, "the fruits of successful *extortion*" by the Taliban, Compl. ¶ 74 (emphasis added), has become "the fruits of successful *negotiations*" with the Taliban, AC ¶ 86.[5] Plaintiffs have even added a shocking and unsupported claim that the MTN Defendants "intended to harm Americans in Afghanistan." *Id.* ¶ 337. Yet selective and self-serving word choice and conclusory assertions cannot create jurisdiction or a viable claim. At the end of the day, Plaintiffs' fundamental theory remains a "cell phone tower extortion racket," *id.* ¶ 123, according to which the Taliban allegedly made "demands," *e.g.*, *id.* ¶¶ 295, 312, backed up with "threats" and "attacks," *e.g.*, *id.* ¶¶ 300, 304.

Based on these allegations, Plaintiffs bring ATA claims against the MTN Defendants. Plaintiffs allege that, by acceding to the Taliban's threats to protect their employees and property, MTN Afghanistan provided the group with "material support," *id.* ¶ 286—the theory being that the protection payments and cell-tower deactivations "strengthen[ed] the Taliban" by supplying it with "fungible U.S. dollars" and hindering Coalition intelligence-gathering activities, *id.* ¶¶ 10,

[5] *Compare, e.g.*, Compl. ¶ 7 (MTN Afghanistan deactivated towers "because the Taliban told it to") *with* AC ¶ 7 (MTN Afghanistan deactivated towers "because the Taliban asked it to"); Compl. ¶ 94 (Taliban "funding sources" included fruits of "extortion of smaller Afghan businesses") *with* AC ¶ 110 (Taliban "funding" sources included "smaller businesses"); Compl. ¶ 228 (MTN Defendants "paid protection money to the Taliban to head off attacks on its business infrastructure") *with* AC ¶ 110 (Taliban "funding from other sources (such as smaller businesses)"), *and* AC ¶ 304 ("paid protection money to the Taliban").

110, 315. Plaintiffs claim that MTN Afghanistan directly committed "act[s] of international terrorism" that injured the Plaintiffs (Counts 1-4), *see* 18 U.S.C. § 2333(a); AC ¶¶ 2570-2596, and that it "aided and abetted" acts of international terrorism that were "committed" by the Taliban or Haqqani Network and were allegedly "planned" or "authorized" by al-Qaeda (Counts 5-6), *see* 18 U.S.C. § 2333(d)(2); AC ¶¶ 2597-2615. Plaintiffs also claim that MTN Group "oversaw and authorized MTN Afghanistan's practice of providing support to the Taliban." AC ¶ 288. Plaintiffs advance the same claims against MTN Dubai, "a Dubai company" that (like MTN Group and MTN Afghanistan) has never had U.S. operations, *id.* ¶ 29, but the Amended Complaint makes no specific allegations of any participation by MTN Dubai in any alleged wrongdoing.

C. Separate from the Subject Matter of This Lawsuit, Plaintiffs Allege That MTN Group Transacted with International Development Agencies.

Years after MTN Afghanistan began providing mobile telecommunications services in Afghanistan, the World Bank Group provided MTN Group with financing from the IFC, and issued political-risk guarantees from the Multilateral Investment Guarantee Agency ("MIGA") to MTN Group and MTN Dubai. AC ¶¶ 348, 358.

The IFC, an arm of the World Bank Group headquartered in Washington, D.C., *id.* ¶ 348, is an "international development bank," designated as an international organization by Executive Order and entitled to the same immunities in the United States as foreign sovereigns. *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 766 (2019). Its members are 184 countries which finance the bank's operations by buying IFC shares. *See id.*; Arts. of Agreement of the Int'l Fin. Corp., Art. II, § 2, May 25, 1955, 264 U.N.T.S. 117, 120. The IFC's mission is "to further economic development by encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas." *In re Kaiser Grp. Int'l, Inc.*, 730 F.Supp. 2d 247, 250 (D.D.C. 2010), *aff'd sub nom. Kaiser Grp., Int'l, Inc. v. World Bank*, 420 F. App'x 2 (D.C. Cir. 2011).

The Amended Complaint alleges that MTN Group secured $75 million in IFC financing in June 2009. AC ¶ 349. The "IFC's $75 million facility consisted of $65 million of debt and $10 million in equity—the latter of which bought IFC a 9.1% stake in MTN Afghanistan." *Id.* Although the contract was signed in 2009, *id.*, the IFC did not disburse the $65 million loan until 2011, *see World Bank Snapshot* 53.

MIGA, another arm of the World Bank Group headquartered in Washington, D.C., "supplement[s]" the work of the IFC by providing political-risk insurance ("guarantees") for companies operating in the developing world. Convention Establishing the Multilateral Inv. Guarantee Agency ("MIGA Convention"), Art. 2(a), Oct. 11, 1985, 1508 U.N.T.S. 99, 102. Like the IFC, MIGA is established by treaty, designated an international organization by Executive Order, and entitled to the same immunities as a foreign sovereign. *See* Exec. Order No. 12,647 (Aug. 2, 1988). MIGA's guarantees "encourage the flow of investments for productive purposes among member countries, and in particular to developing member countries." MIGA Convention, Art. 2(a), 1508 U.N.T.S. at 102.

Consistent with this mission, MIGA issued two guarantees that provided coverage related to MTN Afghanistan. Plaintiffs allege that MTN Group obtained the first guarantee in 2007 and served as the "guarantee holder." AC ¶¶ 358-359. MTN Group allegedly replaced this first guarantee in 2011 and later financed MTN Afghanistan's expansion "through a shareholder loan and an equity investment." *Id.* ¶ 359. Plaintiffs further allege that MTN Group obtained a second guarantee that same year, for which MTN Dubai served as the guarantee holder. *Id.* ¶ 360. According to the Amended Complaint, these guarantees insured the respective holder's investment in MTN Afghanistan "against the risks of transfer restriction, expropriation, and war and civil disturbance." *Id.* ¶¶ 359-360.

The Amended Complaint does not allege that any MTN Defendant negotiated the IFC financing agreement or the MIGA contracts in the United States, that any contracts were signed by MTN in the United States, that any of the contracts are governed by U.S. law, or that they suggest any intent by the MTN Defendants to target the United States with terrorism. After the MTN Defendants highlighted the shortcomings of Plaintiffs' jurisdiction-by-financing allegations in the original Complaint, Plaintiffs responded by adding length and words—their jurisdictional allegations now repeat the phrases "United States," "America," and "Washington, D.C." 72 times—but not substance. *See, e.g.*, *id.* ¶¶ 347, 350, 353, 361, 371, 374, 375, 376. These additions fail to cure the original Complaint's jurisdictional defects or its failure to plead an ATA violation.

LEGAL STANDARD

Because the MTN Defendants move to dismiss for lack of personal jurisdiction on the pleadings, the same general standard of review governs their motions to dismiss under Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6). "To survive a motion to dismiss under [Rule] 12(b)(6), a plaintiff bears the burden to plead 'enough facts to state a claim to relief that is plausible on its face.'" *Wiedmaier v. OpenTable, Inc.*, 2020 WL 2838594, at *2 (D.D.C. June 1, 2020) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plaintiffs also bear the burden of "mak[ing] a *prima facie* showing of the pertinent jurisdictional facts." *Livnat v. Palestinian Auth.*, 851 F.3d 45, 56-57 (D.C. Cir. 2017). In both contexts, the Court considers only Plaintiffs' well-pleaded factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). While the Court must "accept as true all of the complaint's factual allegations and draw all reasonable inferences in favor of the plaintiffs," *Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 272 (D.C. Cir. 2018), it "will not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint or legal conclusions cast in the form of factual allegations," *Kaempe v. Myers*, 367 F.3d 958, 963 (D.C. Cir. 2004).

"Facial plausibility requires that 'the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Williams v. Donovan*, 219 F.Supp. 3d 167, 172 (D.D.C. 2016) (Sullivan, J.) (citations omitted). Plaintiffs "must plead enough facts to raise a right to relief above the speculative level." *Id.* Plaintiffs fail to state a claim when they "offer[] labels and conclusions or a formulaic recitation of the elements of a cause of action," *Levi v. Brown & Williamson Tobacco Corp.*, 851 F.Supp. 2d 8, 10 (D.D.C. 2012) (Sullivan, J.), *aff'd*, 528 F. App'x 4 (D.C. Cir. 2013); "merely tender[] naked assertion[s] devoid of further factual enhancement," *id.*; or rely upon allegations that are "directly contradicted by the" sources "attached to their Amended Complaint," *United States ex rel. Keaveney v. SRA Int'l, Inc.*, 219 F.Supp. 3d 129, 144 (D.D.C. 2016) (Sullivan, J.). "[I]n spite of the requirement that the Court draw all reasonable inferences in the plaintiff's favor, some factual allegations will render certain inferences unreasonable," and "the Court cannot draw an inference that stands in direct conflict with the facts as alleged in the Complaint," *Badwal v. Bd. of Trustees of Univ. of D.C.*, 139 F.Supp. 3d 295, 311 (D.D.C. 2015) (quoting report and recommendation of Harvey, M.J.). Courts have repeatedly rejected attempts "to file a facially implausible complaint and discover their way into a plausible claim" as "exactly the type of pleading that *Twombly* and *Iqbal* are designed to address," *Levi*, 851 F.Supp. 2d at 11 (collecting cases), especially when there is an "obvious alternative explanation" for the events alleged, *Twombly*, 550 U.S. at 567.

Because Plaintiffs still have not met their burden to plead personal jurisdiction or any plausible claim, the Court should dismiss all claims against the MTN Defendants.

ARGUMENT

I. The Court Should Dismiss the Claims Against the MTN Defendants for Lack of Personal Jurisdiction.

The Amended Complaint fails to establish personal jurisdiction over the MTN Defendants

under Federal Rule of Civil Procedure 4(k)(2), the sole basis for jurisdiction it invokes. Rule 4(k)(2) acts as a federal long-arm statute, *Livnat*, 851 F.3d at 47, and requires that "exercising jurisdiction [be] consistent with the United States Constitution and laws." Fed. R. Civ. P. 4(k)(2)(B). To be consistent with the Constitution, the exercise of jurisdiction must "comport[] with the limits imposed by federal due process," *Walden v. Fiore*, 571 U.S. 277, 283 (2014), given the defendant's "contacts with the United States" as a whole, *Livnat*, 851 F.3d at 54-56. To satisfy due process, Plaintiffs must establish either general or specific jurisdiction over each defendant. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). They cannot establish either.

The MTN Defendants are not subject to general jurisdiction. Each is incorporated and has its principal place of business outside the United States, AC ¶¶ 28-30, and none has ever operated in the United States, much less is "at home" here. *See Goodyear*, 564 U.S. at 924.

That leaves only specific jurisdiction, which Plaintiffs again fail to establish or support. Specific jurisdiction "focuses on the relationship among the defendant, the forum, and the litigation." *Walden*, 571 U.S. at 283-84. A plaintiff must plead (1) that the defendant has "minimum contacts" with the forum, (2) that those contacts are suit-related (meaning plaintiff's claims arise from or relate to those contacts), and (3) that the exercise of jurisdiction would "not offend traditional notions of fair play and substantial justice." *Goodyear*, 564 U.S. at 923.

The harms that Plaintiffs and their family members suffered at the hands of the Taliban are tragic. But even as alleged, their claims do not arise out of conduct that occurred in the United States or out of any "minimum contacts" that the MTN Defendants themselves purposefully created with the United States. Faced with "the narrow question of where those claims should be litigated," the Court should conclude that the MTN Defendants cannot be sued in this forum. *Shatsky v. Palestine Liberation Org.*, 955 F.3d 1016, 1022 (D.C. Cir. 2020) (dismissing claims of

American terror victims for lack of personal jurisdiction).

A. The MTN Defendants' Alleged Suit-Related Conduct Occurred Outside the United States and Was Not Purposefully Directed at the United States.

The most striking aspect of the Amended Complaint from a jurisdictional perspective is what Plaintiffs do not allege—a single misdeed by any MTN Defendant in the United States. Nor could they, as the MTN Defendants operate wholly outside the United States. Unsurprisingly, then, the only wrongdoing Plaintiffs even allege purportedly occurred outside the United States. The Amended Complaint contends that the MTN Defendants violated the ATA by "paying protection money" to the Taliban and "switching off its transmission masts at night to comply with Taliban demands." AC ¶¶ 298, 312. All of this allegedly took place *in Afghanistan*—not the United States.

The Amended Complaint also fails to plead that the MTN Defendants directed their conduct at the United States. As the Supreme Court has emphasized, due process requires specific jurisdiction to rest on "contacts that the 'defendant *himself*' creates with the forum." *Walden*, 571 U.S. at 284 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). Contradicting this principle, Plaintiffs focus on "the *Taliban['s]* . . . specific intent" to harm Americans. AC ¶ 334 (emphasis added). That might be relevant if Plaintiffs sued the Taliban, because terrorists who "purposefully direct their terror at the United States" expose themselves to suit here. *Mwani v. Bin Laden*, 417 F.3d 1, 14 (D.C. Cir. 2005). But the MTN Defendants are not the Taliban.

Plaintiffs' theory defies *Walden*, which establishes that a defendant's "knowledge" of someone else's "strong forum connections" does not create personal jurisdiction. 571 U.S. at 289; *see also Nuevos Destinos, LLC v. Peck*, 2019 WL 78780, at *8 (D.D.C. Jan. 2, 2019) (Sullivan, J.) (holding that "[t]he Court cannot assert personal jurisdiction over the nine defendants based on [other defendants'] alleged connection to the United States," despite allegations that the nine defendants had "fair warning" of the other entities' U.S.-targeted activities). It is not enough for

Plaintiffs to allege that the MTN Defendants "made direct payments to the Taliban knowing that the Taliban would use MTN's payments to target U.S. citizens in terrorist attacks." AC ¶ 335. Even if *the Taliban* was targeting the United States, knowledge that *someone else* has a connection to the forum is an unlawful basis for exercising jurisdiction over the MTN Defendants.

In prior ATA cases, courts have recognized that they lacked jurisdiction even where a defendant allegedly "intended to fund al Qaeda," and attacks on Americans "were a foreseeable consequence," because "foreseeability is not the standard for recognizing personal jurisdiction." *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 95 (2d Cir. 2008), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305 (2010). In *Ofisi v. Al Shamal Islamic Bank*, a court in this District refused "[t]o impute al Qaeda's purposeful contacts with the United States to [the defendant] Al Shamal [Bank]." 2019 WL 1255096, at *8 (D.D.C. Mar. 19, 2019). Al Shamal was allegedly "affiliated with, and invested in by[,] Osama bin Laden and al Qaeda" and "provided services to an organization openly hostile to the United States"; terrorists even "withdrew funds from Al Shamal accounts to coordinate al Qaeda's efforts in preparation for the 1998 Embassy bombings." *Id.* at *6, *8 (alterations omitted). Yet these allegations did not establish what was necessary for jurisdiction: "specific, non-conclusory allegations tantamount to the assertion of direct participation in the bombings or related attacks." *Id.* Similarly, in *Atchley v. AstraZeneca UK Ltd.*, a court in this District held that allegations that "defendants 'knowingly financed terrorist attacks that targeted' Americans and thereby 'aligned themselves' with conduct that was 'purposefully directed at the United States'" failed to plead personal jurisdiction absent allegations that defendants were "'primary participants' in the attacks." 2020 WL 4040345, at *4-5 (D.D.C. June 17, 2020), *appeal filed*; *see also Burnett v. Al Baraka Inv. & Dev. Corp.*, 292 F.Supp. 2d 9, 22-23 (D.D.C. 2003) (allegations that Saudi prince donated to charities "knowing that those

foundations funded terrorist organizations including Al Qaeda . . . stop[] well short of alleging" purposeful direction).

Plaintiffs' claims here are even more tenuous: they allege that the Taliban was *extorting* MTN Afghanistan under threats of violence if it did not comply. *See supra* at 7-9. Plaintiffs state that "MTN's primary motivation for assisting the Taliban was financial." AC ¶ 337. This characterization unfairly trivializes the MTN Defendants' commitment to their employees and to maintaining service for the Afghan people, but even a "financial" decision to bow to violent threats is not intentional targeting of the United States.

After the MTN Defendants first moved to dismiss, Plaintiffs appeared to have recognized the need to allege more than the Taliban extorting MTN Afghanistan, so they added an extraordinary assertion: that the MTN Defendants "also intended to harm Americans in Afghanistan." AC ¶ 337. Plaintiffs' case falls short again, because jurisdiction cannot be based on such "conclusory" assertions that "merely state the plaintiffs' theory of specific jurisdiction." *Livnat*, 851 F.3d at 56-57 (rejecting conclusory assertion that attacks were "intended, through intimidation and coercion, to influence the Israeli and United States government's policies"). Plaintiffs' new contentions about an intent to harm Americans fare no better than the "conclusory assertions" rejected in *Ofisi* that "Al Shamal 'directed' the attacks." 2019 WL 1255096, at *6. In fact, Plaintiffs' conclusory assertion is *contradicted* by the Amended Complaint's own allegations and sources, according to which MTN sought to "maintain its 'neutrality'" in response to violent threats, AC ¶ 311—not align itself with the Taliban's objectives. *See supra* at 7-9.

To adequately plead the far-fetched notion that a leading telecommunications company listed on the Johannesburg Stock Exchange intended to harm Americans, Plaintiffs had to supply "[f]actual enhancement." *Levi*, 851 F.Supp. 2d at 10. Unable to provide that, Plaintiffs purport to

identify "three distinct but related reasons" the MTN Defendants had "for desiring" to "drive Americans out of the country." AC ¶ 337. Plaintiffs' three arguments, however, depend entirely on unreasonable inferences that do not raise Plaintiffs' theory "above the speculative level," *Williams*, 219 F.Supp. 3d at 172.

First, Plaintiffs assert that the MTN Defendants "decided that [complying with Taliban demands] was the necessary price of maintaining a good relationship with the Taliban," AC ¶ 338, but that is just another way of describing the alleged extortion. Indeed, Plaintiffs stress that "*the Taliban* was explicit" about its objectives and its "threat[]" to take "actions . . . against" companies that "resist[ed]" its demands, *id.* (emphasis added), which says nothing about *the MTN Defendants* supposedly targeting Americans. *See Walden*, 571 U.S. at 283-84.

Second, Plaintiffs argue that the MTN Defendants' "business model" depends on "dangerous or unstable markets without a major U.S. presence." AC ¶ 339. From this premise, they speculate that the MTN Defendants stood to "benefit[] from attacks on American forces insofar as those attacks encouraged U.S. policymakers to withdraw from Afghanistan." *Id.* This is nonsensical, given that the MTN Defendants entered Afghanistan in 2006 and "grew quickly," all amid a major U.S. presence. *Id.* ¶ 292. Equally fanciful is the notion that the MTN Defendants cannot compete in "U.S.-allied democracies." *Id.* ¶ 339. Plaintiffs base this theory, implausibly, on the fact that the MTN Defendants' largest markets include "Nigeria[] and Ghana," *id.* (not to mention South Africa)—all U.S.-allied democracies.[6] In fact, the IFC (which Plaintiffs say shares "U.S. values," *id.* ¶ 375) has investment projects in each of the 21 countries in which MTN Group and its subsidiaries and affiliates currently operate. *See* Int'l Fin. Corp., *IFC Financials 2019* at

[6] *See* U.S. Dep't of State, *U.S. Relations with Ghana* (Mar. 6, 2019), https://tinyurl.com/yyznq38y (last visited Sept. 10, 2020); U.S. Dep't of State, *U.S. Relations With Nigeria* (Dec. 19, 2019), https://tinyurl.com/y4ty9yem (last visited Sept. 10, 2020).

129-30, 132 (2019), https://tinyurl.com/y3bolk7q. Inferring *a desire to drive the U.S. from Afghanistan* from the fact that an African company does extensive business in Africa is, frankly, offensive. And it is equally outrageous to accuse a company *with no U.S. operations* of having a "penchant for disregarding American law" and acting "against the U.S. national interest." AC ¶ 340. This suggestion smacks of "legal imperialism," *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004), defying the principle that "United States law governs domestically but does not rule the world," *Microsoft v. AT&T Corp.*, 550 U.S. 437, 454 (2007). It is also unsupported by the Amended Complaint and plainly wrong. As noted above, the expansion of connectivity into challenging, underserved countries is *consistent with* longstanding U.S. policies; in fact, USAID "partnered" with MTN Afghanistan to help advance those development objectives in 2011. *See supra* at 5-6.[7]

Third, Plaintiffs present a strained theory of guilt-by-association, according to which a non-controlling, minority stake in a joint venture in Iran, *see* AC ¶ 322, means the MTN Defendants must have been doing the Iranian regime's bidding in Afghanistan. *Id.* ¶¶ 342-346. Despite attempting to tar MTN Irancell as "fully owned by the IRGC," *id.* ¶ 342, Plaintiffs do not and could not allege that MTN Irancell—or any MTN entity—has ever been sanctioned by the United States.[8] They do not allege that the Iranian Government ever asked any MTN entity to do anything

[7] In attempting to back up the charge that the MTN Defendants act contrary to U.S. interests, the Amended Complaint is downright misleading. For example, Plaintiffs contend that the MTN Defendants "supported Boko Haram," a designated terrorist group. AC ¶ 340. But the basis for that claim is just that MTN Nigeria "miss[ed] a deadline to deactivate" 5.1 million SIM cards that a Nigerian regulator alleged were not properly registered. Alexandra Wexler, *Nigeria Reduces MTN Group Fine By $1.8 Billion*, Wall St. J. (Dec. 3, 2015) (Ex. H), *cited at* AC ¶ 329 n.397.

[8] Plaintiffs claim that this is the "purported" position of "the U.S. State Department," apparently based on an unauthenticated (and presumably still classified) diplomatic cable leaked by Wikileaks. AC ¶ 342 & n.409. But the U.S. Government's *official* actions belie Plaintiffs' assertions. Not only is MTN Irancell not sanctioned, but of the two indirect Iranian shareholders mentioned in the Amended Complaint, one is not sanctioned at all, and the other is sanctioned on the basis of

vis-á-vis the Taliban. Nor does the Amended Complaint ever specify how complying with Taliban demands in Afghanistan would have "benefited MTN's business" in Iran, *id.* ¶ 346, which was established before MTN Group acquired MTN Afghanistan's predecessor, *see id.* ¶ 323. No such inference is plausible. Courts refuse to infer that business dealings even with sanctioned Iranian entities shows an intent to support terrorism. *See, e.g.*, *Kemper v. Deutsche Bank AG*, 911 F.3d 383, 390 (7th Cir. 2018). Since that is settled law in ATA cases *about Iranian terrorism*, the Court should follow the same principle here, and conclude that a non-controlling stake in a telecommunications venture in Iran is an even less plausible basis for inferring anti-American animus behind activities *in Afghanistan*.

Ultimately, Plaintiffs' about-face accusation that the MTN Defendants "intended to harm Americans in Afghanistan," AC ¶ 337, lacks support. Wild speculation about events in Nigeria, Ghana, and Iran cannot compensate for the lack of factual allegations supporting an intent to target Americans *in Afghanistan*. It certainly cannot do so when the complaint itself pleads the "obvious alternative explanation," *Twombly*, 550 U.S. at 567: that the MTN Defendants faced threats, violence, and intimidation from the Taliban. *See supra* at 7-9. In fact, in a quote that Plaintiffs claim "summed up MTN's" position, AC ¶ 311, an unidentified telecommunications executive stated: "I'm not going to switch on my sites *because* my towers are being attacked, my people are being attacked and the government is not doing anything to help me"—not "because" the Taliban winning the civil war would have somehow been good for business. *Taliban Target Mobile Phone Masts* (emphasis added). Plaintiffs' dubious inferences make this a classic case in which "some factual allegations will render certain inferences unreasonable," *Badwal*, 139 F.Supp. 3d 295 at

affiliation with Iran's Ministry of Defense without any reference to the IRGC. *See* AC ¶ 342; Press Release, U.S. Dep't of Treasury, Treasury Designates Iranian Military Firms (Sep. 17, 2008) (Ex. I), *cited at id.* ¶ 342 n.408.

311—although here, those inferences were unreasonable already. In short, the Amended Complaint comes nowhere close to pleading that the MTN Defendants' alleged response to the Taliban's intimidation was purposefully directed at the United States.

B. The IFC and MIGA Contracts Are Not a Basis for Asserting Personal Jurisdiction over the MTN Defendants for Plaintiffs' Unrelated Claims.

Even though Plaintiffs recognize that the MTN Defendants do not do business in the United States, and do not allege any ATA violation by the MTN Defendants in the United States, they insist that "MTN's conduct had a substantial nexus to the United States." AC at 150 (capitalization altered). This purportedly "substantial nexus" turns out to be one loan and two insurance policies that MTN Group or MTN Dubai obtained from organs of the World Bank Group that happen to be headquartered in the United States. *See id.* ¶¶ 347-373. Plaintiffs' theory is that Plaintiffs can sue each of the MTN Defendants in the United States for injuries that the Taliban allegedly caused in Afghanistan because the IFC and MIGA are headquartered in the United States, and that MTN transactions with the World Bank supported investments in MTN Afghanistan generally.[9]

Plaintiffs' "World Bank as jurisdictional hook" theory is legally untenable for a host of reasons. The most basic problem is that Plaintiffs' terrorism claims do not arise from the procurement of development financing and political-risk insurance from the World Bank. Because the IFC and MIGA transactions are not "suit-related conduct," they count for nothing in the jurisdictional calculus. But even if considered, entering into financing and insurance agreements with international organizations that happen to be headquartered in the United States is not "purposeful availment" of the U.S. forum. To hold otherwise would subject a random collection

[9] Plaintiffs do not allege that MTN Afghanistan entered into these contracts. *See supra* at 10. Jurisdictional requirements "must be met as to each defendant," *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1783 (2017), so Plaintiffs cannot impute other MTN Defendants' alleged jurisdictional contacts to MTN Afghanistan.

of foreign entities to U.S. jurisdiction based upon wholly foreign conduct simply because they receive World Bank financing.

1. *Plaintiffs' claims do not arise out of the IFC or MIGA contracts.*

This Court may exercise specific jurisdiction over the MTN Defendants only if the conduct that allegedly gives rise to liability "arise[s] out of or relate[s] to" the MTN Defendants' U.S. contacts. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). The suit-related-conduct inquiry asks what a plaintiff's claims are "really about." *Sharp Corp. v. Hisense USA Corp.*, 292 F.Supp. 3d 157, 171 (D.D.C. 2017). Personal jurisdiction cannot be founded on contacts that are "tangential, at best, to [Plaintiffs'] injuries." *Monge v. RG Petro-Mach. (Grp.) Co.*, 701 F.3d 598, 618 (10th Cir. 2012); *accord Foster v. Arletty 3 Sarl*, 278 F.3d 409, 415-16 (4th Cir. 2002). Thus, "[t]he relevant suit-related conduct" in an ATA case "[i]s the conduct that could have subjected [defendants] to liability under the ATA." *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 335 (2d Cir. 2016).

This suit is really about MTN Afghanistan's alleged deactivation of cell towers after they were built, and alleged extortion payments made to prevent their destruction—the conduct Plaintiffs maintain "subject[s] the [MTN Defendants] to liability under the ATA," *id.* It is not about the financing or insurance of cell towers or their construction—actions that brought much-needed connectivity to millions of impoverished Afghans and had nothing to do with Plaintiffs' injuries. Nowhere in the description of Plaintiffs' six counts does the Amended Complaint even mention the World Bank entities that provided this financing and insurance. *See* AC ¶¶ 2570-2615.[10]

It is especially untenable for Plaintiffs to invoke *contracts* with U.S.-headquartered

[10] The Amended Complaint also fails to allege that MTN Dubai played any role in MTN Afghanistan's alleged conduct in Afghanistan. *See supra* at 10. So MTN Dubai engaged in no suit-related conduct at all, and any U.S. contacts are beside the point.

organizations as a jurisdictional nexus for *torts* in *Afghanistan*.[11] "[F]or the purpose of specific jurisdiction," "an injury sounding in tort does not arise from a contract"—let alone a contract between a defendant and "a third party" unrelated to the plaintiff. *Okolie v. Future Servs. Gen. Trading & Contracting Co.*, 102 F.Supp. 3d 172, 177 (D.D.C. 2015) (Sullivan, J.).

Plaintiffs' failure to trace their injuries to the MTN Defendants' World Bank contacts is irrefutable and dispositive. As courts in this District have repeatedly held, a plaintiff must "show some sort of causal relationship between a defendant's U.S. contacts and the episode in suit" to justify personal jurisdiction. *E.g.*, *Triple Up Ltd. v. Youku Tudou Inc.*, 235 F.Supp. 3d 15, 27 (D.D.C. 2017), *aff'd on other grounds*, 2018 WL 4440459 (D.C. Cir. 2018). The recent decision in *Atchley* reinforces this point. The plaintiffs there alleged that the defendants violated the ATA by financing an anti-American militia through corrupt dealings in Iraq. The court rejected the plaintiffs' effort to base jurisdiction on defendants' alleged use of U.S. banks to finance those allegedly corrupt transactions. 2020 WL 4040345, at *5-6. Despite the plaintiffs' allegation that the U.S. financing was "instrumental to facilitating the corrupt payments," the court held that it was not suit-related, given the plaintiffs' failure to "connect[]" the financing "to any allegedly unlawful [activity]." *Id.* at *6.

The same flaw sinks Plaintiffs' World Bank theory. Like the *Atchley* plaintiffs, Plaintiffs here fail to tie the alleged financing to the alleged ATA violations. To begin, the Amended Complaint fails to link the IFC funds and MIGA guarantees to the alleged deactivation of cell towers. It alleges generically that the funds and guarantees "supplied needed credibility" allowing MTN Afghanistan to "build and maintain its infrastructure." AC ¶ 371. But the alleged wrongdoing in this case—the "suit-related conduct"—is not building and maintaining

[11] "[T]he ATA ultimately is a tort statute." *Kemper*, 911 F.3d at 390.

infrastructure to provide cell service to the Afghan people. It is that MTN Afghanistan allegedly deactivated cell towers in response to Taliban demands. The IFC and MIGA arrangements are "at best tangential to [those] claims." *Atchley*, 2020 WL 4040345, at *5.

The Amended Complaint likewise fails to connect its allegations about protection payments to the World Bank arrangements. Plaintiffs allege no facts tracing the IFC funds to any payment to the Taliban, and they offer no other facts suggesting that they are so linked. All they do is make a blanket assertion that MTN Afghanistan used the money the "IFC disbursed" to "fund its protection payments." AC ¶ 353. This "bare," "conclusory" assertion is inadequate and cannot support jurisdiction. *Livnat*, 851 F.3d at 57.

Plaintiffs' theory appears to be that because money is fungible, they can assume a link between any money MTN Afghanistan ever received and the alleged payments to the Taliban. But the Supreme Court in *Bristol-Myers* said the opposite: California plaintiffs tried to sue a non-California company over the drug Plavix, and pointed out that some Plavix was distributed by a California distributor, but that was not enough because plaintiffs could not "trace" any "particular pill" to that distributor. 137 S. Ct. at 1783. Here, the absence of jurisdiction is even clearer than in *Bristol-Myers*, where at least the plaintiffs had alleged that they were injured by Plavix. Plaintiffs here do not allege that they were injured by IFC loans, MIGA guarantees, or even by MTN Afghanistan's provision of cell service, but rather by the Taliban's violent attacks.

The problems in Plaintiffs' theory run deeper still. A claim cannot arise out of forum contacts that *post-date* the challenged acts. *See SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 344-45 (2d Cir. 2018) (rejecting specific jurisdiction and observing that the suit-related injury "began" before defendants' contacts); *Cockrum v. Donald J. Trump for President, Inc.*, 319 F.Supp. 3d 158, 183-84 (D.D.C. 2018) (same). Yet Plaintiffs' conjecture that the IFC financing was necessary to

build cell towers or make the alleged protection payments is flatly and substantively contradicted by a document Plaintiffs incorporate by reference into the Amended Complaint, which shows that funds from the IFC loan were not disbursed to MTN Afghanistan *until 2011*. *World Bank Snapshot* 53. The Taliban's alleged demands that providers shut down cell towers began long before 2011, *see, e.g.*, AC ¶ 309 (describing incidents in 2008 and 2010); *id.* ¶ 318 (relying on 2010 report in describing tower deactivation); *id.* ¶ 320 (relying on 2009 report), as did the alleged protection payments, *see, e.g.*, *id.* ¶ 293 (basing allegations of protection payments on 2009 and 2010 sources); *id.* ¶ 304 (basing allegation of protection payments on reports describing "attacks between 2004 and 2010"); *id.* ¶ 305 (describing incidents in 2008 in which MTN's towers were allegedly spared).

In another attempt to manufacture jurisdiction, the Amended Complaint adds allegations, "[o]n information and belief," that MTN Group "inaccurate[ly]" "certifi[ed]" that MTN Afghanistan did not provide "material support to terrorists." *Id.* ¶¶ 351, 357. But again, this case is not "really about" certifications to the IFC or MIGA, false or otherwise; Plaintiffs' claims are not for breach of contract or fraud, and the recipients of these purported false certifications are not even parties. Put differently, any certifications MTN Group allegedly made to the IFC or MIGA are not what Plaintiffs claim "subjected [the MTN Defendants] to liability under the ATA." *Waldman*, 835 F.3d at 335.

The breathtaking implications of Plaintiffs' boundless theory underscore why this Court should reject it out of hand. It would mean that any party that accepts IFC funding or MIGA guarantees could be sued in the United States for *any* claims related to actions that the party took after receiving the funding, no matter what the allegations concern, on the supposition that the party could not have continued operating and so could not have committed the alleged wrongdoing without the funding. Personal jurisdiction must rest on more than such "attenuated contacts."

Walden, 571 U.S. at 286. Due process demands more than a "tenuous" connection between the forum contacts and the subject of the suit, even if the contacts "can be viewed as a 'but for' cause" of Plaintiffs' harm. *SongByrd, Inc. v. Estate of Grossman*, 206 F.3d 172, 181 (2d Cir. 2000); *see Okolie*, 102 F.Supp. 3d at 177 (rejecting argument that vehicle crash in Kuwait arose from contract with U.S. government to supply the vehicle to Kuwait, which plaintiff alleged was a "but for" cause of the crash). Plaintiffs must directly link the forum contacts to *the alleged misconduct*—not to a defendant's operations generally. *See Md. Digital Copier v. Litig. Logistics, Inc.*, 394 F.Supp. 3d 80, 94 (D.D.C. 2019) (refusing to exercise personal jurisdiction where the contract allegedly providing minimum contacts with D.C. "was a separate agreement, negotiated and formed apart" from the contract defendant supposedly breached); *Cockrum*, 319 F.Supp. 3d at 177-83 (refusing to exercise personal jurisdiction where the defendant's claimed contacts with the forum "d[id] not constitute activities related to the conspiracies alleged in the complaint"). They have not done so.

2. *The MTN Defendants did not purposefully avail themselves of the privilege of conducting business in the United States.*

Even if Plaintiffs could somehow establish that receipt of development financing was "suit-related conduct" in a case about coerced support for the Taliban, personal jurisdiction would still be lacking for the critical and independent reason that Plaintiffs fail to show that the MTN Defendants purposefully availed themselves of the U.S. forum. A defendant purposefully avails itself of a forum only when it seeks "the privilege of conducting activities within the forum, thus invoking [the forum's] benefits and protections." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *accord Thompson Hine, LLP v. Taieb*, 734 F.3d 1187, 1189 (D.C. Cir. 2013). The basic premise of purposeful availment is that a party should not be held to answer in a forum unless that party can "reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *accord Creighton Ltd. v. Gov't of State of Qatar*, 181 F.3d

118, 127-28 (D.C. Cir. 1999).

Plaintiffs' purposeful-availment theory rests entirely on the fact that the IFC and MIGA, two international organizations and arms of the World Bank, happen to be headquartered in Washington, D.C. That theory is as sweeping as it is unprecedented. It would mean that U.S. courts have jurisdiction to hear any case, by any plaintiff, that relates even tangentially to any foreign project supported by the IFC or MIGA. The volume of such potential cases is staggering—in the last decade alone, the IFC issued nearly 1,500 loans funding projects in over 100 countries. World Bank Grp., *World Bank Group Finances: IFC Investment Services Projects*, https://tinyurl.com/y3vthm55 (last visited Sept. 10, 2020).

Fortunately, this theory is not the law. Absent clear notice that it may be sued in a jurisdiction, a defendant cannot fairly be subjected to a forum's "coercive power" by being forced to defend itself in the forum's courts. *Bristol-Myers*, 137 S. Ct. at 1779. Here, Plaintiffs allege that MTN Group and MTN Dubai contracted with *international organizations* to spur development in *Afghanistan*, AC ¶¶ 348-349, 358-360, not to avail themselves of the U.S. forum. The Amended Complaint's myopic focus on irrelevant contractual terms cannot cure this basic defect.

a) Entry into the forum to negotiate or form a contract is not purposeful availment.

"[E]ntry into a[] jurisdiction for the purpose of securing a loan or an insurance guaranty, with accompanying negotiations among the parties," does not "confer jurisdiction on" the courts in that forum. *Siam Kraft Paper Co. v. Parsons & Whittemore, Inc.*, 400 F.Supp. 810, 812 (D.D.C. 1975), *aff'd without op.*, 521 F.2d 324 (D.C. Cir. 1975). Plaintiffs' theory of jurisdiction-by-receipt-of-financing flouts that principle. The most Plaintiffs allege is that the MTN Defendants negotiated with the IFC and MIGA, sent negotiation-related communications to their offices, and then entered into the IFC and MIGA agreements. *See* AC ¶¶ 350, 361. Such allegations fall far

short of establishing purposeful availment. *See World Wide Travel Inc. v. Travelmate US, Inc.*, 6 F.Supp. 3d 1, 8 (D.D.C. 2013) ("[N]o decision of which the Court is aware has found personal jurisdiction here based *solely* on the fact that a defendant initiated contract negotiations (and subsequently entered into a contract) with a D.C. counterparty."); *Cellutech, Inc. v. Centennial Cellular Corp.*, 871 F.Supp. 46, 50 (D.D.C. 1994) ("long-distance contract negotiations" with "attorney who happened to have offices in the District" does not suffice).

In their Amended Complaint, Plaintiffs seek to bolster their bid for jurisdiction by adding cumulative references to IFC and MIGA's "employees in the United States," "U.S. based . . . officer(s)," "U.S.-based staff," "personnel in Washington, D.C.," and "Washington, D.C. headquarters." AC ¶¶ 350, 361; *supra* at 12. Merely repeating these words cannot transmute these "random, fortuitous, [and] attenuated" touchpoints, *Burger King*, 471 U.S. at 475, into the "continuing and wide-reaching [forum] contacts" required to demonstrate purposeful availment, *Thompson Hine*, 734 F.3d 1192. That these communications were sent to Washington, D.C., was "necessitated by" each organization's "decision to base itself there." *Creighton*, 181 F.3d at 128. Moreover, the exchange with IFC and MIGA of "telephone calls, emails, facsimiles[,] mailings," and other such "communications . . . incidental to nearly every business relationship" are not "indicative of any desire to do business in D.C. and do not suffice to show purposeful availment or minimum contacts." *Exponential Biotherapies, Inc. v. Houthoff Buruma N.V.*, 638 F.Supp. 2d 1, 9 (D.D.C. 2009).

b) Plaintiffs fail to show that the MTN Defendants' performance of the World Bank contracts constituted minimum U.S. contacts.

Personal jurisdiction over the MTN Defendants is improper given that Plaintiffs allege nothing more than mere contracting with a counterparty located in the United States. *See World Wide Travel Inc.*, 6 F.Supp. 3d at 8. Neither the nature of the IFC and MIGA contracts nor their

performance demonstrate that the MTN Defendants sought the privilege of conducting activities within the forum. *See Hanson*, 357 U.S. at 253. To start with, these contracts concerned MTN Group's investment in Afghanistan—not seeking any U.S. benefit. Plaintiffs do not allege that the contracts were governed by U.S. law. Nor do they allege that any MTN Defendant sought any other U.S. benefit, such as a loan from a *U.S.* financial institution or effort to access *U.S.* capital markets. *See, e.g.*, *Health Commc'ns, Inc. v. Mariner Corp*, 860 F.2d 460, 464-65 (D.C. Cir. 1988) (defendant did not purposefully avail itself of the forum because it did not seek to benefit from a relationship with the forum). Instead, the Amended Complaint seizes on inconsequential aspects of the World Bank contracts, which only underscore the defect in their theory.

First, Plaintiffs allege that the IFC and MIGA required MTN Group and MTN Dubai to send written notices to the IFC and MIGA, each at a Washington, D.C., address, and to send repayments and premium payments to U.S. banks. AC ¶¶ 351, 363-364. Yet such requirements would impose obligations on MTN Group and MTN Dubai in their South Africa and Dubai headquarters—not in the United States. *See id.* ¶¶ 28-29. The Amended Complaint expands on these allegations, *id.* ¶¶ 351, 356-357, 363, 367-368; *supra* at 10-12, but still fails to allege that any MTN Defendant performed or declined to perform any part of its notice obligation in the United States. Regardless, a mere contractual notice requirement is not enough to trigger jurisdiction, because it shows only an agreement to provide notice wherever the counterparty may be located, rather than a "desire . . . to do business . . . in Washington, D.C." *COMSAT Corp. v. Finshipyards S.A.M.*, 900 F.Supp. 515, 523 (D.D.C. 1995); *see World Wide Travel*, 6 F.Supp. 3d at 7 (defendants' mailing of invoices to D.C. and charging the credit card of a D.C. resident were "trifling contacts" that could not constitute purposeful availment); *Bank of Cape Verde v. Bronson*, 869 F.Supp. 21, 23 (D.D.C. 1994) (mailing of materials to D.C. "solely because [a third party]

requested that the materials be sent here" does not show "a deliberate and voluntary association with the District").

Second, the Amended Complaint's allegations that the IFC wired payments to MTN Afghanistan through New York and oversaw the contractual arrangements from Washington are equally irrelevant. AC ¶¶ 350, 351, 353, 361. These entities' decisions about where to conduct their affairs are "precisely the sort of unilateral activity of a third party that cannot satisfy the requirement of contact with the forum." *Walden*, 571 U.S. at 291; *see World Wide Travel*, 6 F.Supp. 3d at 7 (mailing of invoices to plaintiff in the forum is not purposeful availment). Again, "it is the *defendant* . . . who must create contacts with the forum." *Walden*, 571 U.S. at 291 (emphasis added). And Plaintiffs have not alleged that any *MTN Defendant* created these contacts, or that they reflected a "desire . . . to do business" in the United States. *COMSAT*, 900 F.Supp. at 523.

Third, Plaintiffs fail to tie MTN Group and MTN Dubai to the United States by alleging that their contracts with IFC and MIGA included forum-selection clauses. AC ¶ 352 (any legal proceeding with IFC to be brought in S.D.N.Y.); *id.* ¶ 362 (arbitration of any dispute with MIGA to be held in Washington, D.C.). Such proceedings would only be more "trifling contacts," *World Wide Travel*, 6 F.Supp. 3d at 7, and hypothetical future ones at that. Just as a choice-of-law "provision, standing alone, would be insufficient to confer jurisdiction," *Burger King*, 471 U.S. at 482, so is a choice-of-forum provision, *see, e.g.*, *Ariel Mar. Grp., Inc. v. Pellerin Milnor Corp.*, 1989 WL 31665, at *5 (S.D.N.Y. Mar. 29, 1989), which if anything shows less intent to "invok[e] the benefits and protections of [the forum's] laws." *Thompson Hine*, 734 F.3d at 1189.

In fact, there is even less to Plaintiffs' forum-selection allegations than meets the eye. Plaintiffs base their IFC forum-selection allegation on "information and belief"—despite quoting language allegedly from other parts of the IFC agreement—and base their MIGA forum-selection

allegations on a template contract. AC ¶¶ 352, 362 n.427. Although that template calls for proceedings to be physically held in Washington, D.C., it specifies that the "seat of arbitration" would be The Hague,[12] which makes the "legal domicile" of such an arbitration the Netherlands. Gary Born, *International Commercial Arbitration* § 11.03, at 1536 (2014). The template contract also provides that such an arbitration would be governed by "general law" and the treaty establishing MIGA. To put it mildly, an agreement to resolve future disputes with MIGA in a Dutch-seated arbitration according to international and general law does not seek any "protections of [U.S.] law[]." *Thompson Hine*, 734 F.3d at 1189.

In sum, the motley assortment of meaningless U.S. "contacts" Plaintiffs allege—which boil down to the mere receipt of financing and insurance from U.S.-headquartered international organizations—come nowhere close to establishing the "substantial connection" between the MTN Defendants and this forum that is required for personal jurisdiction. *Walden*, 571 U.S. at 284.

c) MTN's contacts with the World Bank do not—and should not—create a substantial connection with the United States.

Yet another problem with Plaintiffs' theory is that the IFC and MIGA are not commercial U.S. entities—they are international organizations that are part of the World Bank, a global financial institution created after World War II by the member states of the United Nations to support capital projects in developing countries. Contacts with *international organizations* that happen to have headquarters in this country are particularly ill-suited to create the required "substantial connection with the forum." *Burger King*, 471 U.S. at 475.

As a matter of U.S. law, the IFC and MIGA are international organizations, immune from U.S. jurisdiction on the same terms as foreign sovereigns. *See Jam*, 139 S. Ct. at 772. Plaintiffs

[12] *See* MIGA, Template Contract of Guarantee for Non-Shareholder Loans pt. II, art. 14.2 (Nov. 2016) (Ex. J), *cited at* AC ¶ 362 n.425.

cannot escape this legal status by portraying the IFC and MIGA as "closely tied to the United States," based on such facts as a 75-year-old decision by the international community to headquarter the World Bank in Washington, D.C., or an abstract suggestion that IFC and MIGA support "U.S. values." AC ¶¶ 374-376. By the same logic that Plaintiffs call MTN Group's investments "U.S.-backed," *id.* ¶ 374, any action of the United Nations would be "U.S.-backed." In no meaningful respect can the MTN Defendants' contacts with these entities be deemed U.S. jurisdictional contacts. Unlike a "relationship" with "a Florida corporation"—which, after all, exists by the grace of Florida's laws—and thus enjoys the "manifold benefits" of Florida law, *Burger King*, 471 U.S. at 479-80, 482, the MTN Defendants did not enjoy the benefits of U.S. law merely by transacting with World Bank entities that happen to be headquartered here. Put differently, contacts with the IFC and MIGA do not show that any MTN Defendant "followed a course of conduct directed at the society or economy existing within the [United States], so that the [United States] has the power to subject the defendant to judgment concerning that conduct." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality op.).

The novelty of Plaintiffs' theory reflects this fact. Although the IFC has existed for more than half a century and now loans out more than $7 billion per year,[13] there does not appear to be a single case to which the IFC was not a party and in which receipt of IFC financing has been used to support personal jurisdiction in U.S. courts. One court in this District has specifically rejected such an argument, holding that an exercise of personal jurisdiction "would not comport with due process because non-forum companies who have contacts with the IFC in the District to secure loans for non-District projects cannot reasonably foresee being haled into this jurisdiction's courts as a result of such activity." *AGS Int'l Servs. S.A. v. Newmont USA Ltd.*, 346 F.Supp. 2d 64, 82

[13] *See* Int'l Fin. Corp., *Loans*, https://tinyurl.com/vmay85h (last visited Sept. 10, 2020).

(D.D.C. 2004), *abrogated on other grounds by Daimler AG v. Bauman*, 571 U.S. 117 (2014).

AGS is part of a long line of cases reflecting "the Judiciary's reluctance to interfere with the smooth functioning of other governmental entities." *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 51 (2d Cir. 1991). In *Klinghoffer*, for example, the Second Circuit rejected "basing jurisdiction over the PLO on its UN-related activities." *Id.* D.C. courts, federal and local, disregard contacts with the government and similar entities, *Inv. Co. Inst. v. United States*, 550 F.Supp. 1213, 1216-17 (D.D.C. 1982), so as not to chill government contacts that are "desirable in the public interest," *Mueller Brass Co. v. Alexander Milburn Co.*, 152 F.2d 142, 143-44 (D.C. Cir. 1945); *see also Shaheen v. Smith*, 994 F.Supp. 2d 77, 87 (D.D.C. 2013); *World Wide Minerals Ltd. v. Republic of Kazakhstan*, 116 F.Supp. 2d 98, 106 (D.D.C. 2000), *aff'd in part, vacated in part on other grounds*, 296 F.3d 1154 (D.C. Cir. 2002); *Cellutech*, 871 F.Supp. at 50.[14]

Just as "contact with the Government" is "desirable in the public interest," *Mueller Brass Co.*, 152 F.2d at 143-44, so too is contact with the World Bank Group. The World Bank Group and its constituent entities are international organizations comprising most of the world's sovereign states. As explained above, they support vital investment in conflict-ridden and underserved countries. *Supra* at 10-11. And as Plaintiffs note, IFC and MIGA support is sometimes the only option for private-sector investment in the developing world. *See* AC ¶¶ 371, 373. If obtaining such support were enough to expose the recipient to all manner of suits in the United States (and the unique burdens and costs of U.S.-style discovery and litigation), some prospective

[14] In rejecting jurisdiction based on contacts with the IFC, the court in *AGS* relied on both constitutional due process, 346 F.Supp. 2d at 82, and what is referred to as the "government contacts exception" to the D.C. long-arm statute, *id.* at 79-82. The precise nature of the government contacts exception is debated, with some courts considering it simply "a gloss on due process." *Hayes v. FM Broad. Station WETT*, 930 F.Supp. 2d 145, 149 n.1 (D.D.C. 2013). At a minimum, the long line of cases recognizing the practical dangers of basing jurisdiction in D.C. on governmental contacts presents an instructive analogy here.

recipients might shun World Bank financing for fear of being forced to litigate here, harming the valuable development work these international organizations support. U.S. courts, meanwhile, could become a hotbed of litigation related to the billions of dollars in World Bank financing wholly unrelated to this country. To draw from real-world IFC projects, courts in the United States could be called on to resolve disputes between an Indian villager and the owner of a coal-fired power plant in the Indian state of Gujarat, *cf. Jam*, 139 S. Ct. at 767, between a Dutch engineering company and a Czech steel manufacturer regarding mini-mills in the Czech Republic, *cf. Int'l Fin. Corp. v. Kaiser Grp. Int'l Inc. (In re Kaiser Grp. Int'l Inc.)*, 399 F.3d 558, 561-62 (3d Cir. 2005), or between Honduran farmers and a local millionaire in the palm oil business, *cf.* Compl., *Doe v. IFC Asset Mgmt. Co.*, No. 1:17-cv-01494-UNA (D. Del. Oct. 24, 2017)—merely because the IFC helped finance these projects.

In short, such contacts do not create the "substantial connection" between a defendant and a proposed forum that due process requires. *Burger King*, 471 U.S. at 475. For this further reason, the Court should reject Plaintiffs' reliance on receipt of World Bank financing and guarantees for an investment in Afghanistan as a basis for exercising personal jurisdiction in the United States.

C. Exercising Jurisdiction over the MTN Defendants Would Be Unreasonable.

Even if Plaintiffs could plead that their claims arise out of contacts creating a substantial connection with the United States (which they have failed to do), they still could not show that it would be just and reasonable to exercise personal jurisdiction in the United States over three foreign companies—who have never had any presence in the United States—concerning conduct that allegedly occurred in Afghanistan. *See Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102, 113 (1987); *Midland v. F. Hoffman-Laroche, Ltd. (In re Vitamins Antitrust Litig.)*, 270 F.Supp. 2d 15, 34 (D.D.C. 2003). The five factors that courts consider in determining whether a particular exercise of personal jurisdiction meets this additional hurdle are (1) the burden on the

defendant, (2) interstate or international interests in judicial efficiency, (3) interstate or international interests in "furthering fundamental substantive social policies," (4) the interests of the forum, and (5) the plaintiff's interest in obtaining relief. *Asahi*, 480 U.S. at 113 (quoting *World-Wide Volkswagen*, 444 U.S. at 292). The MTN Defendants certainly respect Plaintiffs' interest in litigating in the United States, but all four other fairness factors weigh strongly against the exercise of jurisdiction. That is an independent reason why jurisdiction is lacking.

First, litigating in the United States would place a substantial burden on the MTN Defendants, all of which have no U.S. presence. And because all of the alleged conduct occurred outside the United States, the documents and witnesses that the MTN Defendants would likely have to produce in litigation would all be located thousands of miles and at least a continent away. *See id.* at 114 (recognizing burden on Japanese defendant in defending claims based on transaction that "took place in Taiwan" and involved "components . . . shipped from Japan to Taiwan").

Second, international interests in judicial efficiency weigh against subjecting the MTN Defendants to U.S. jurisdiction. It would be unfair to require the MTN Defendants to litigate in a U.S. court when they have made no effort to avail themselves of the privileges or benefits of doing business here, *see supra* at 26-28, and Plaintiffs' claims arise out of conduct that occurred outside the United States, *see supra* at 15; *see also AGS*, 346 F.Supp. 2d at 82 (unfair to make foreign defendant litigate in U.S. court based on IFC funding for foreign project). Especially given the "[g]reat care and reserve" courts must "exercise[] when extending our notions of personal jurisdiction into the international field," *Asahi*, 480 U.S. at 115, this Court should hesitate to conclude that South Africa, the United Arab Emirates, and Afghanistan could reasonably expect their citizens to be subjected to a U.S. suit based on such remote contacts with the United States.

Third, exercising personal jurisdiction over the MTN Defendants would harm "substantive

social policies." *Id.* If the Court were to accept Plaintiffs' jurisdictional theory, it would set a novel precedent that any foreign entity that contracts with the IFC or MIGA to finance a project outside the United States could be haled into a U.S. court on any future claim that relates to that project. Many entities might choose to avoid that risk by forgoing World Bank financing and declining to invest in developing countries, an undesirable outcome by any measure. *See supra* at 33-34.

Fourth, although the United States has an interest in adjudicating Americans' claims under the ATA, it also has an interest in ensuring that this country does not become an international "judicial forum whose courts would rapidly be inundated with lawsuits" relating to any foreign investment that happened to receive World Bank support. *AGS*, 346 F.Supp. 2d at 80; *see supra* at 34. Endorsing Plaintiffs' theory would open the floodgates to U.S. litigation and could even cause unnecessary friction with the international organizations this country hosts.

Taken together, these factors show that it would be unreasonable and unfair to subject the MTN Defendants to suit in the United States. For this reason and the independent reasons explained above, all claims against the MTN Defendants should be dismissed.

II. The Amended Complaint Fails to State a Claim Against the MTN Defendants.

A. Plaintiffs' Direct-Liability Claims Against the MTN Defendants Fail.

Judged against the unambiguous requirements of the ATA and relevant precedent, Plaintiffs do not come close to pleading the astounding assertion on which their direct-liability claims (Counts 1-4) depend: that a leading, publicly-listed African telecommunications company directly committed acts of international terrorism

To state a direct-liability ATA claim, Plaintiffs would have to plausibly plead that the MTN Defendants directly committed "acts of international terrorism" that injured the Plaintiffs. 18 U.S.C. § 2333(a). Under the plain statutory text, an act is not "international terrorism" unless it "appear[s] to be intended" to achieve one of three aims: "to intimidate or coerce a civilian

population," "to influence the policy of a government by intimidation or coercion," or "to affect the conduct of a government by mass destruction, assassination, or kidnapping." *Id.* § 2331(1)(B). Plaintiffs must therefore allege facts that would lead an "objective observer" to conclude that the MTN Defendants "desire[d] to intimidate or coerce" a civilian population or government. *Kemper*, 911 F.3d at 390; *see Weiss v. Nat'l Westminster Bank PLC*, 768 F.3d 202, 207 n.6 (2d Cir. 2014) (§ 2331(1)(B) imposes "an objective standard").

No objective observer could reasonably conclude that the MTN Defendants' alleged response to the Taliban's extortionate threats was intended to achieve any of these terroristic goals. Plaintiffs' own characterization of MTN Afghanistan's conduct forecloses such a conclusion. As Plaintiffs themselves allege, the Taliban demanded that MTN Afghanistan pay "taxes" and "obey the orders" to shut down cell towers, or else "face having [its] transmission towers attacked," AC ¶¶ 293-294, 309, and its personnel "kidnapped," *Crime & Insurgency* 32. An act done with an apparent intent of avoiding attacks, protecting employees, and preserving the ability to serve customers—or even to "save money" from having to rebuild destroyed cell towers, as Plaintiffs decided to characterize it when they amended their complaint, AC ¶ 312—lacks any "objective" indicia of a "desire to intimidate or coerce." *Kemper*, 911 F.3d at 390.

Consistent with this straightforward application of the statutory text, courts have repeatedly dismissed ATA claims when the defendant does not appear to harbor terroristic goals, and especially when the complaint itself suggests a different motivation. In *Kemper*, for example, the plaintiffs sued a bank for "wrongful[ly]" helping Iranian state-owned banks "evade" U.S. sanctions, acts that allegedly helped fund the violent activities of anti-American militias in Iraq. *Id.* at 390, 393. But the Seventh Circuit concluded that "[t]o the objective observer," this conduct was "motivated by economics, not by a desire to intimidate or coerce." *Id.* at 390. This holding was

"bolstered" by a consent decree that plaintiffs had incorporated into the complaint, which stated that the bank committed these acts "because it was lucrative." *Id.* Another court recently considered allegations that a bank laundered money for Mexican drug cartels and held that this did not give rise to an appearance that the bank shared the cartels' intent to intimidate or coerce a civilian population or government. *Zapata v. HSBC Holdings PLC*, 414 F.Supp. 3d 342, 358 (E.D.N.Y. 2019). As the court observed, "Plaintiffs' complaint unmistakably sets forth . . . a plausible alternative explanation for [the bank's] conduct: greed." *Id.*; *accord Freeman v. HSBC Holdings PLC*, 413 F.Supp. 3d 67, 92 (E.D.N.Y. 2019).

An earlier decision, which accords with the reasoning of *Kemper* and other recent precedent, is closely analogous to this case. In *Stansell v. BGP, Inc.*, the defendants allegedly "made payments to the FARC," a Colombian organization which (unlike the Taliban) was a designated FTO. 2011 WL 1296881, at *9 (M.D. Fla. Mar. 31, 2011). While the plaintiffs "simply state[d], in conclusory fashion, that Defendants['] actions appear[ed] to be intended" to intimidate or coerce, "Plaintiffs' factual allegations . . . contradict[ed] that assertion." *Id.* The plaintiffs alleged that "Defendants made payments to the FARC in exchange for the FARC's agreement to allow [Defendants] to conduct [their] oil exploration activities without fear of terrorist acts." *Id.* (alteration in original). "This allegation," the court held, "would not lead an objective observer to conclude Defendants intended to achieve any one of the results listed in § 2331(1)(B)." *Id.*[15]

[15] In 2010, a court in this District found the apparent intent requirement adequately pleaded where the Bank of China facilitated transactions that were specifically "used for . . . executing terrorist attacks." *Wultz v. Islamic Republic of Iran*, 755 F.Supp. 2d 1, 18, 48-49 (D.D.C. 2010). Despite recognizing that "mere financial support" of a terrorist organization does not establish the requisite apparent intent, the court ruled that plaintiffs met the pleading requirement by alleging the bank had been "expressly warned" that its actions were facilitating terrorist attacks. *Id.* at 49. Another decision held that alleged protection payments made to the FARC could satisfy the apparent intent requirement if it was "reasonably foreseeable" that the payments would enhance its terror capabilities. *In re Chiquita Brands Int'l, Inc.*, 284 F.Supp. 3d 1284, 1319 (S.D. Fla. 2018). If these

In their Amended Complaint, Plaintiffs attempt to avoid the natural inference that MTN Afghanistan was focused on preventing harm to its employees and network, and opine that "MTN's primary motivation" was "financial." AC ¶ 337. But either way, Plaintiffs have pleaded themselves out of court—actions "motivated by economics" do not satisfy the terroristic intent requirement. *Kemper*, 911 F.3d at 390.[16] The implausible claim that a telecommunications company perpetrated acts of international terrorism fails as a matter of law.[17]

B. Plaintiffs' Aiding-and-Abetting Claims Against the MTN Defendants Fail.

Plaintiffs' claims in Counts 5 and 6 that the MTN Defendants allegedly aided and abetted terrorist acts committed by the Taliban and the Haqqani Network, AC ¶¶ 2597-2615, are equally detached from the text and purpose of the ATA. When Congress amended the ATA in 2016, it limited the scope of aiding-and-abetting liability to only those acts of international terrorism that

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cases suggest that merely providing funds to a terrorist organization meets the apparent-intent requirement when it is foreseeable that doing so will help terrorists, they are inconsistent with § 2331(1)(B)'s text and two more recent court of appeals decisions. *See Linde*, 882 F.3d at 326 ("[T]he provision of material support to a terrorist organization does not invariably equate to an act of international terrorism," because it may not "manifest the apparent intent required by § 2331(1)(B)."); *Kemper*, 911 F.3d at 390 (focusing on the actual alleged motive of even "wrongful actions" by the defendant).

[16] As explained above, Plaintiffs' assertion that the MTN Defendants "also intended to harm Americans," AC ¶ 337, is based on speculation and patently unreasonable inferences, and must be ignored. *Supra* at 17-21.

[17] Because Plaintiffs fail to allege that the MTN Defendants committed any act of international terrorism, the analysis of their direct liability claims can end there. We note, however, that Plaintiffs' sweeping theory of liability also cannot be reconciled with the ATA's proximate-causation requirement. Plaintiffs "would effectively hold [the MTN Defendants] liable for all [Taliban] violence" in Afghanistan—"precisely the kind of unlimited, sprawling, and speculative liability that proximate cause forbids." *Zapata*, 414 F.Supp. 3d at 357. For example, Plaintiffs rely heavily on allegations that all telecommunications carriers in Afghanistan complied with Taliban shutdown orders, but they do not plead any details tying specific attacks, in specific areas, to shutdowns of *MTN Afghanistan* towers. *See id.* ¶ 309; *Cell Carriers Bow*. A claim that the MTN Defendants are causally responsible for attacks spanning ten years and twenty-one provinces, across a country roughly the size of Texas, in which all major cell carriers faced the same threats, is far from establishing the requisite "sufficient directness" between a defendant's alleged acts and a plaintiff's injuries. *Owens*, 897 F.3d at 273 & n.8.

are "committed, planned, or authorized" by a designated FTO. 18 U.S.C. § 2333(d)(2). But the Taliban is not a designated FTO, and for most of the attacks Plaintiffs fail to adequately plead this requirement, for the reasons set forth by the other Defendants and incorporated by reference here. *See, e.g.*, Mem. of Law in Support of DAI's Motion to Dismiss. Even when aiding-and-abetting liability is available, Congress strictly confined it to cases where the defendant "knowingly provid[ed] substantial assistance" to the "person who committed [the] act of international terrorism." 18 U.S.C. § 2333(d)(2). Plaintiffs do not remotely satisfy this fundamental requirement.

Congress specified that *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), "provides the proper legal framework" for assessing aiding-and-abetting claims under the ATA. Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 2(a)(5), 130 Stat. 852, 852 (2016). *Halberstam* sets a high bar for liability. To state an aiding-and-abetting a claim, a plaintiff must plausibly allege that (1) the principal committed "a wrongful act" that injured the plaintiff, (2) the defendant was "generally aware" that he was playing a "role as part of an overall illegal or tortious activity," and (3) the defendant "knowingly and substantially assist[ed]" the principal's wrongful act. *Halberstam*, 705 F.2d at 477; *see also Siegel v. HSBC N. Am. Holdings, Inc.*, 933 F.3d 217, 223 (2d Cir. 2019) (applying these elements in the ATA context). While Plaintiffs plead that the Taliban engaged in terrorist acts causing injuries (the first element), they fall well short of pleading facts to support the second and third elements.

1. *Plaintiffs fail to plead that the MTN Defendants knowingly assumed a role in the terrorist acts that injured Plaintiffs.*

Applied to the ATA, the second element requires factual allegations that make it plausible that the defendant "knowingly assumed a role in the [a]ttacks" that injured the plaintiffs. *Siegel*, 933 F.3d at 224. While courts have not yet attempted to define what allegations suffice to plead that a defendant knowingly assumed a role in terrorist attacks, it is clear what does *not* suffice:

mere allegations that the defendant provided material support to a terrorist group. Courts have held that "aiding and abetting an *act* of international terrorism requires more than the provision of material support to a designated terrorist *organization*." *Linde*, 882 F.3d at 329; *accord Siegel*, 933 F.3d at 224; *Honickman ex rel. Estate of Goldstein v. BLOM Bank SAL*, 432 F.Supp. 3d 253, 264 (E.D.N.Y. 2020) ("it is not enough for [p]laintiffs to plausibly allege that [defendant] was generally aware of its role in terrorist activities from which terrorist attacks were a natural and foreseeable consequence" because doing so would "conflate the[] scienter requirements" of 18 U.S.C. § 2339B and an aiding-and-abetting claim (cleaned up)); *Taamneh v. Twitter, Inc.*, 343 F.Supp. 3d 904, 916 (N.D. Cal. 2018) ("playing a role in a foreign terrorist organization's activities is more than just providing material support"). Thus, whatever is necessary to plead an aiding-and-abetting claim under the ATA, the statute requires more than just material support for a terrorist organization.

Yet that is the most Plaintiffs allege: that the MTN Defendants "provided material support to the Taliban." AC ¶ 286. Their theory about the Taliban's "protection racket[]," *id.* ¶ 107, is just that the alleged payments were a source of "fungible U.S. dollars," *id.* ¶ 110, that "strengthen[ed]" the Taliban generally, *id.* ¶ 10—a generic assertion unsupported by any factual allegations. Plaintiffs' cell-tower allegations are also disconnected from any of the alleged attacks. Plaintiffs allege that the shutdowns "obstructed Coalition efforts to gather human intelligence," made Taliban insurgents "harder to track," and "degraded the Coalition's ability to interdict Taliban ongoing attacks." *Id.* ¶¶ 316-317, 319. But Plaintiffs fail to tie any of this support to the actual attacks that killed and injured Plaintiffs, or to allege that it "degraded" Coalition operations to interdict *those* attacks. *Id.* ¶ 319. Such allegations fall well short of pleading that the MTN Defendants knew they were assuming an affirmative role in the "[a]ttacks" that killed or injured Plaintiffs. *Siegel*, 933 F.3d at 224; *Honickman*, 432 F.Supp 3d at 264. Plaintiffs fail to plead this

core element of their aiding-and-abetting claim, and so cannot state a claim for violating the ATA.

Any suggestion that the MTN Defendants "knowingly assumed a role" in the Taliban's terrorist attacks is weaker still considering "the *context*" in which MTN Afghanistan allegedly made protection payments and shut down its cell towers. *Averbach v. Cairo Amman Bank*, 2020 WL 486860, at *13, *15 (S.D.N.Y. Jan. 21, 2020). In *Halberstam*, the D.C. Circuit could infer that the principal's live-in girlfriend was a tortious "joint venturer" who "knowingly and willingly assisted" in his "burglary enterprise," because she "not only" gave "her time and talents" to laundering the proceeds over several years, but "inten[ded] and desire[d] to make the venture succeed." 705 F.2d at 486, 488. Notwithstanding the preposterous assertion that the MTN Defendants shared the Taliban's anti-American objectives, *see supra* at 17-21, Plaintiffs' allegations and the sources they cite portray MTN Afghanistan as the target of a campaign of extortion and violence by the Taliban, not "willing[]" "joint venturer[s]" with the Taliban.

Indeed, the Amended Complaint and the sources it incorporates allege that MTN Afghanistan acceded to the Taliban's threats to avoid "having [its] transmission towers attacked." AC ¶ 294. MTN Afghanistan allegedly "bow[ed] to Taliban demands to pay protection money," *id.* ¶ 297, and deactivated cell towers rather than face "rebuild[ing] . . . towers" destroyed by Taliban attacks, *id.* ¶ 300. Cellphone companies faced an "onslaught" of "destructive" attacks from the Taliban and other insurgents who had "blown [towers] completely out of the ground," according to one source Plaintiffs cite. *Taliban Target Mobile Phone Masts*. Far from assuming a role in the Taliban attacks that injured Plaintiffs, *see Siegel*, 933 F.3d at 224, the MTN Defendants allegedly "went to great lengths" to appear "neutral[]" in the war in Afghanistan, and to "reduce the risk" the Taliban posed to MTN Afghanistan's network and personnel. AC ¶ 311. Whether or not this alleged neutrality was the correct way to navigate a violent civil war, standing down in the

face of terrorist violence is not the same as becoming a "joint venturer" with terrorists and knowingly assuming a role in their terrorism. *Halberstam*, 705 F.2d at 487-88.

2. *Plaintiffs fail to plead that the MTN Defendants provided substantial assistance to persons who committed acts of international terrorism.*

Plaintiffs also do not plausibly plead that the MTN Defendants knowingly provided "substantial assistance" to the Taliban. Plaintiffs claim that each Defendant should have known that its protection "payments . . . helped finance the Taliban's terrorist campaign" and would "strengthen the Taliban[]," including by "diversify[ing] its income," AC ¶¶ 10, 109, and they allege that turning off MTN Afghanistan's towers at night "strengthen[ed] the Taliban[]" by "imped[ing] Coalition intelligence efforts," *id.* ¶ 308.

But aiding-and-abetting liability under the ATA requires more than allegations that a defendant provided material support to a terrorist group—a claim that is all the weaker when that support was allegedly coerced. The statute "does not refer to assisting a foreign terrorist organization generally or such an organization's general course of conduct." *Taamneh*, 343 F.Supp. 3d at 916. Rather, a plaintiff must establish that the defendant substantially assisted the "principal tortfeasor in committing [the] act of international terrorism" that caused the plaintiff's injury. *Id.* Yet Plaintiffs cannot "connect[]" the MTN Defendants to any "specific crime" the Taliban committed in Afghanistan. *Id.* So Plaintiffs claim instead that, because *the Taliban* allegedly used threats and violence to force MTN Afghanistan to make protection payments and turn off its towers, *MTN Afghanistan* can be said to have substantially assisted the Taliban's "general course of conduct." *Id.* In Plaintiffs' book, that means that the MTN Defendants should be on the hook for aiding and abetting every attack the Taliban committed in Afghanistan over several years. That theory knows no limit and finds no support in the ATA or common sense.

Applying the factors that the D.C. Circuit used to assess whether the defendant in

Halberstam "substantially assisted" the principal's illegal activity confirms the inadequacy of Plaintiffs' allegations. The *Halberstam* "substantial assistance" factors include "(1) the nature of the act encouraged, (2) the amount of assistance given by the defendant, (3) defendant's presence or absence at the time of the tort, (4) defendant's relation to the principal, [and] (5) defendant's state of mind." *Linde*, 882 F.3d at 329 (citing *Halberstam*, 705 F.2d at 483-84).[18]

The first, third, and fourth *Halberstam* factors each favor dismissal. The notion that the MTN Defendants—by allegedly acting to protect their staff and property from Taliban violence—knowingly "encouraged" attacks on U.S. forces (first factor) is nonsensical, s*ee Averbach*, 2020 WL 486860, at *16; *Copeland v. Twitter, Inc.*, 352 F.Supp. 3d 965, 976 (N.D. Cal. 2018), and this Court should not credit Plaintiffs' unreasonable inferences that the MTN Defendants shared the Taliban's anti-American animus, let alone "encouraged" it. *Supra* at 17-21. Nor does the Amended Complaint allege that the MTN Defendants were present at any attack that injured any Plaintiff (third factor), or had a special relationship, such as a "position of authority," with the Taliban—the group that allegedly used violence to extort *them* (fourth factor). *See Halberstam*, 705 F.2d at 484; *Taamneh*, 343 F.Supp. 3d at 917-18; *Atchley*, 2020 WL 4040345, at *12 (rejecting substantial assistance claim where "[P]laintiffs concede defendants were not present at any of the attacks, nor did they have a special relationship" with the insurgents).

Halberstam's fifth factor, state of mind, also favors dismissal. This factor requires a showing that the defendant "was one in spirit with the [principal wrongdoer]." 705 F.2d at 484; *Atchley*, 2020 WL 4040345, at *12. It demands well-pleaded factual allegations that the defendant shared the principal's unlawful objective and "inten[ded] and desire[d] to make the venture

[18] A sixth factor, the duration of the aid provided, cannot override other factors. *Atchley*, 2020 WL 4040345, at *12 ("Although it is true, as plaintiffs point out, that defendants[']alleged aid [to insurgents] spanned over a decade, that *alone* is not enough to establish that aid was substantial").

succeed." *Halberstam*, 705 F.2d at 488; *see also Crosby v. Twitter, Inc.*, 303 F.Supp. 3d 564, 574 (E.D. Mich. 2018) (no allegation that defendant acted "in concert with" the attacker "pursuant to a common design"), *aff'd*, 921 F.3d 617 (6th Cir. 2019); *Taamneh*, 343 F.Supp. 3d at 918 ("[T]here is no allegation that Defendants have any intent to further . . . terrorism."); *Copeland*, 352 F.Supp. 3d at 976 (defendants did not "intend[] ISIS to carry out the attacks"); *Atchley*, 2020 WL 4040345, at *12 (allegations did not "suggest defendants were 'one in spirit' with [insurgents'] desire to kill American[s]"). Here, any suggestion the MTN Defendants were "one in spirit" with a terrorist militia that threatened MTN Afghanistan with violence is absurd. Plaintiffs postulate that the MTN Defendants paid protection money because "it was cheaper to pay the Taliban than it would been to rebuild" destroyed towers, AC ¶ 300, and "turn[ed] off [MTN Afghanistan's] towers to save money," *id.* ¶ 312. Even if true, those allegations refute the "state of mind" factor, because allegations that a defendant sought "economic gain" do not "suggest [the MTN Defendants] were 'one in spirt' with [the Taliban's] desire to kill American citizens in [Afghanistan] or that [the MTN Defendants] intended to help [the Taliban] succeed in doing so." *Atchley*, 2020 WL 4040345, at *12; *accord, e.g.*, *Freeman v. HSBC N. Am. Holdings PLC*, 2020 WL 3035067, at *10 (E.D.N.Y. June 5, 2020) ("non-conclusory allegations" showing "Defendants' intentions were to profit commercially" by transacting with sanctioned Iranian banks were inadequate).

Because the Amended Complaint does not plausibly allege that the MTN Defendants knowingly assumed a role in terrorist acts, or "substantially assisted" the Taliban's attacks on U.S. forces in Afghanistan, Plaintiffs' aiding-and-abetting claims (Counts 5-6) fail as a matter of law.

CONCLUSION

The Court should dismiss the claims against the MTN Defendants.

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Respectfully submitted,

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