IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

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INTRODUCTION

Louis Berger Group, Inc. and Louis Berger International, Inc. (collectively "LBG") have the greatest respect for the U.S. servicemen and women who served in Afghanistan, particularly those who were killed or injured and made the ultimate sacrifice for our country. This lawsuit, however, is not the appropriate way to address the Taliban insurgency that has ravaged Afghanistan for almost 20 years. Plaintiffs' amended complaint fails to cure the fatal problems of their original complaint and does not state a claim upon which relief can be granted.

After the invasion of Afghanistan in 2001, when the country's infrastructure was destroyed and its residents were suffering, LBG was one of the first companies to answer the U.S. Government's call for private contractors to help rebuild the country. Over nearly a decade, LBG worked on vital infrastructure projects throughout Afghanistan, building roads, highways, bridges, schools, and health facilities. Those projects frequently were undertaken in remote and highly dangerous areas, and to protect its workers on the ground, LBG engaged third-party security contractors—as was understood and expected by the U.S. Government. The gravamen of plaintiffs' allegations is that LBG retained security subcontractors who were making "protection payments" to the Taliban, and even supposedly paid the Taliban itself, in order to protect its personnel from attack. LBG vigorously denies ever paying the Taliban directly or knowingly allowing its subcontractors to pay the Taliban. But even accepting those implausible allegations as true, plaintiffs have not stated a viable primary or secondary liability claim under the Anti-Terrorism Act ("ATA"), 18 U.S.C. § 2331 *et seq*.

Plaintiffs' primary-liability claims (Counts 1, 3–4) fail on the pleadings for two reasons.[1] ***First***, plaintiffs have not alleged that LBG engaged in an "act of international terrorism." That term is statutorily limited to acts that (1) "appear to be intended [ ] to intimidate or coerce a civilian population" or influence governmental policy, and (2) are violent or dangerous to human life. *See* 18 U.S.C. §§ 2331, 2333. Plaintiffs' allegations satisfy neither element. Even assuming LBG facilitated payments to the Taliban (which it strongly denies and will dispute at the appropriate time), the amended complaint alleges that those supposed payments were made to protect company employees from Taliban attack—not to coerce a civilian population or change governmental policy. *See, e.g.*, Am. Compl. ¶¶ 3, 12, 53, 62, 65, 68, 96, 144, 249, 268. Additionally, facilitating payments is not itself a violent or dangerous activity actionable as a primary violation of the ATA; such payments (if they occurred) would be covered by other statutes. At bottom, the amended complaint conflates the attacks that injured plaintiffs with the payments they claim facilitated them: While the ***attacks*** identified in the amended complaint may well constitute acts of "international terrorism," the ***alleged payments*** do not, and that is what matters for purposes of assessing the primary-liability theory.

Second, the amended complaint fails to satisfy the ATA's rigorous proximate-cause requirement. Plaintiffs' theory is that alleged payments made in certain localized areas of Afghanistan caused roughly 200 armed attacks perpetrated by four separate groups over the course of eight years throughout the entirety of Afghanistan. That theory of causation is far too tenuous to be actionable as a primary violation of the ATA. It also has no limiting principle: If accepted, plaintiffs' theory could create a causal link between any single payment and every attack

[1] Plaintiffs' original complaint asserted Count 2, a primary-liability claim with an 18 U.S.C. § 2339B predicate, against LBG. Plaintiffs have dropped Count 2 as to LBG, but continue to assert it as to certain other defendants.

perpetrated in Afghanistan at any location at any time. Needless to say, that sweeping view cannot be squared with common sense or the law of proximate causation. For these reasons, the Court should dismiss the primary liability claims, just as other courts have done. *See, e.g.*, *Kemper v. Deutsche Bank AG*, 911 F.3d 383, 390 (7th Cir. 2018) (affirming dismissal); *Zapata v. HSBC Holdings PLC*, 414 F. Supp. 3d. 342, 358 (E.D.N.Y. 2019) (granting motion to dismiss); *Stansell v. BGP, Inc.*, 2011 WL 1296881, at *9 (M.D. Fla. Mar. 31, 2011) (same); *O'Sullivan v. Deutsche Bank AG*, 2019 WL 1409446, at *8 (S.D.N.Y. Mar. 28, 2019) (same); *Kaplan v. Lebanese Canadian Bank, SAL*, 405 F. Supp. 3d 525, 532 (S.D.N.Y. 2019) (same).

Plaintiffs' secondary-liability claims (Counts 5–6) fare no better. In authorizing secondary liability under the ATA in 2016, Congress limited that cause of action to persons who substantially assisted attacks perpetrated by a designated foreign terrorist organization ("FTO"). Plaintiffs do not plausibly allege (nor could they allege) that LBG "substantially" assisted any of the attacks at issue in this case. No allegations show, for example, that LBG encouraged or was present for the attacks, had advanced knowledge of the attacks or any of the individual perpetrators, or that the alleged payments were "integral" to allowing the Taliban to carry out the attacks. And even if plaintiffs could sufficiently allege those facts, their claims would fail for a different reason: The Secretary of State has never designated the Taliban as an FTO, and the other terrorist entities alleged to have committed attacks either were never designated or were not designated at the relevant time. Plaintiffs transparently attempt to evade that statutory limitation by arguing that the Taliban had ties to al Qaeda (an entirely separate organization that ***has*** been designated as an FTO). But that attempt falls well short of pleading al Qaeda's actual involvement in any of the attacks at issue, and another court in this District recently rejected a similar attempt to evade the statutory limitations on secondary liability by invoking the name of an FTO that had loose and unspecified

ties to the actual perpetrator. Count 6, meanwhile, is flawed for all these reasons and more: Plaintiffs allege secondary liability on the basis of a purported "RICO predicate," but in doing so ignore statutory text that forecloses their attempt to apply RICO to ATA claims. *See Atchley v. AstraZeneca UK Ltd.*, 2020 WL 4040345, at *11 (D.D.C. July 17, 2020).

In short, the amended complaint is one more example of creative lawyers attempting to stretch the ATA far beyond its limited scope to embrace claims and theories that are not supported by the statute. The Court should dismiss all claims against LBG.

FACTUAL BACKGROUND

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

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

This case arises from LBG's participation in the U.S. Government's efforts to rebuild Afghanistan following Operation Enduring Freedom. After the collapse of the Taliban government, the United States began a concerted effort to rebuild the Afghan economy and infrastructure, as part of a broader foreign policy initiative to eliminate Afghanistan as a safe haven for terrorists. These efforts were meant to "develop[ ] the economic capacity of the region" and

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

Civilian contractors, including LBG, were instrumental in the Afghan reconstruction effort. As a result of two decades of fighting and years of Taliban rule, the country faced serious developmental problems: "only 51 kilometers of intact roads served the entire nation," electricity was available in only limited areas "for just a few hours a day," and "[h]alf of the Afghan population under age 25 had never attended school."[4] Recognizing the enormous effort that would be required to remedy these problems and stabilize the country, the U.S. Government called on civilian contractors, including LBG, to assist it in achieving ambitious reconstruction goals. Civilian contractors worked under contracts with the United States Agency for International Development ("USAID") to perform a variety of reconstruction efforts across Afghanistan, including: repairing roads; repairing or constructing schools and health clinics; restoring, developing, and expanding energy and electricity operations; and reconstructing additional critical infrastructure. Am. Compl. ¶ 247. The efforts of these contractors, undertaken in exceptionally challenging and dangerous circumstances, yielded significant benefits for the people of Afghanistan. Between 2002 and 2008, development efforts resulted in radically increasing

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[2] Moshe Schwartz, *Wartime Contracting in Afghanistan*, Congressional Research Service (Nov. 14, 2011) at 1, https://fas.org/sgp/crs/natsec/R42084.pdf (cited at Am. Compl. ¶ 72 n.38).

[3] U.S. Senate Committee on Foreign Relations, Majority Staff Report, *Evaluating U.S. Foreign Assistance to Afghanistan* (June 8, 2011) at 8 (cited at Am. Compl. ¶ 60 n.19).

[4] USAID, *USAID in Afghanistan: Partnership, Progress, Perseverance* (2012) at 7, https://2012-2017.usaid.gov/sites/default/files/documents/1871/USAID%20Afghanistan%20Report%20270312.pdf.

literacy, doubling the country's electrical capacity, and constructing over 12,000 kilometers of highways and roads.[5]

LBG is one of the world's leading infrastructure and development firms, and it was one of the first private companies to answer the U.S. Government's call and engage in reconstruction efforts in Afghanistan. As relevant to this case, USAID awarded LBG two umbrella contracts, each of which would come to include a variety of project-specific task orders: (1) the Afghanistan Rehabilitation of Economic Facilities and Services ("REFS") program, which was awarded to LBG in 2002; and (2) the Afghanistan Infrastructure and Rehabilitation Program ("AIRP"), which was awarded in 2006 to a joint venture between LBG and co-defendant Black & Veatch Special Projects Corporation. Am. Compl. ¶ 247.

As part of the REFS program, LBG agreed to provide engineering, construction, construction-management, and related services in Afghanistan. Am. Compl. ¶ 247. These services aimed to significantly improve the country's long-neglected and war-torn infrastructure. LBG's work "included the construction of 715 km of the Northern Ring Road (Kabul-Kandahar-Herat, completed in Dec. 2005)" and the provision of "architecture and engineering [ ] services for the rehabilitation of 6 provincial roads under a grant to the United Nations."[6] USAID reported that "[t]he Northern Ring Road alone will benefit some 5.3 million people within its catchment area by improving access to economic opportunities and social services. The road will also facilitate trade

[5] Islamic Republic of Afghanistan, *Afghanistan National Development Strategy 1387–1391* (2008–2013) (June 2008) at 1–3 (cited at Am. Compl. ¶ 56 n.11).

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

within Afghanistan and with Central Asian countries."[7] LBG also performed critical work on certain segments of the Kabul-to-Kandahar highway, providing the U.S. military with a "primary road to shuttle troops and supplies from one region to another" which "had political significance in both Afghanistan and the United States."[8] And LBG built or repaired numerous health facilities and schools, improving access to healthcare and education. Am. Compl. ¶ 247.

In 2006, LBG and defendant Black & Veatch Special Projects Corporation established a Joint Venture to perform certain energy and transportation services under the AIRP. AIRP included "more than 25 projects in the transport, energy, and construction sectors."[9] Among other things, the Joint Venture worked to rehabilitate and refurbish the Kajaki Dam and Hydropower Plant, an important source of power for Kandahar, Am. Compl. ¶ 247; built the 101 km Gardez-Khost Highway, a major project linking Kabul to Khost province near the border with Pakistan, *id.* ¶¶ 247, 271; and built roads and bridges located primarily in the central and northeastern regions of Afghanistan, including the 103 km Keshim-Faizabad Road and the Southern Strategy Road in Kandahar province. *Id.* ¶ 247.

These projects were exceptionally dangerous, occurring as they did in remote areas of a country facing an active insurgency. In a February 2020 report, the Special Inspector General for Afghanistan Reconstruction ("SIGAR") conservatively identified 5,135 casualties associated with Afghanistan reconstruction projects from 2003 to 2018.[10] An additional 1,182 individuals

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[7] *Id.*

[8] *See* F. Nawa, *Afghanistan, Inc.* at 10 (cited at Am. Compl. ¶ 255 n.315).

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

[10] SIGAR: *The Human Cost of Reconstruction in Afghanistan*, SIGAR-20-25-SP (Feb. 2020) at 1, *available at* https://www.sigar.mil/pdf/special%20projects/SIGAR-20-25-SP.pdf. The SIGAR

connected with reconstruction programs were kidnapped or reported missing.[11] Of the total casualties, almost 30% were linked to road construction projects, the sector in which LBG primarily worked.[12] Another 16% were linked to general construction projects, which includes the schools and clinics that LBG built. Together, these two categories were the deadliest of any SIGAR identified. LBG personnel working on Afghanistan construction projects put their lives on the line every single day.

B. Subcontractors Engaged By LBG

LBG retained subcontractors to facilitate its work on the REFS and AIRP projects. This was in keeping with the U.S. Government's recommendation that contractors like LBG "[h]ire Afghans first" and use local Afghan subcontractors to the greatest extent possible in order to "build Afghan skills and create long-term employment."[13] In addition to local Afghan subcontractors, LBG retained international or U.S.-based firms as subcontractors—including for security—when necessary and appropriate, and with USAID's consent.[14]

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report, which appears on the official government website https://sigar.mil/allreports, is judicially noticeable. *See Cannon*, 717 F.3d at 205 n.2.

[11] *Id*.

[12] *Id*. at 8.

[13] Sept. 8, 2010 Memo For The Commanders, et al. from Gen. David Petraeus, re COMISAF's Counterinsurgency (COIN) Contracting Guidance ("COMISAF's Contracting Guidance") at 1 (cited at Am. Compl. ¶ 139 n.179) ("Hire Afghans first, buy Afghan products, and build Afghan capacity. Use contracting to hire Afghan workers and Afghan-owned companies. . . . Look for opportunities to incorporate maintenance and repair training in existing contracts to build Afghan skills and create long-term employment.").

[14] *See, e.g.*, Ex. 1, USAID-JV Contract, Attachment J-2 (discussed at Am. Compl. ¶ 247b) (recommending that "implementing partners establish and maintain regular contact" with various security partners).

In July 2010, the U.S. Department of Defense ("DOD") created a "vendor vetting process" for contractors operating in Afghanistan.[15] Named "Task Force 2010," this was an initiative created to help DOD personnel and civilian contractors implement best contracting practices. Task Force 2010 coordinated with various governmental entities "to review high-risk contracts to ensure they [did] not benefit insurgents or criminal networks."[16] To achieve its goals, Task Force 2010 would vet potential subcontractors that prime contractors like LBG intended to use. Between its creation in July 2010 and December 2012, Task Force 2010 reviewed more than 2,050 contracts, which involved more than 3,500 companies and over 165 total vendors.[17]

LBG participated in Task Force 2010 by submitting the names of proposed subcontractors to be vetted and approved. *See* Am. Compl. ¶¶ 136–139 (describing how General Petraeus in September 2010 issued formal guidance concerning contracting practices in Afghanistan, and "took a number of steps to implement that guidance, including by ramping up its vetting efforts."). LBG also followed U.S. Counterinsurgency Contracting Guidance, which recommended that contractors use fewer levels of sub-contractors where possible and encouraged commanders to "[h]ire Afghans first."[18] The Contracting Guidance acknowledged the importance of contractors' roles in Afghanistan, stating: "[W]e must also recognize what our contracting has accomplished. Our contracting efforts have sustained widely dispersed and high tempo operations and . . .

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[15] DOD, *Report on Progress Toward Security & Stability in Afghanistan* (Dec. 2012) at 119 (cited at Am. Compl. ¶ 51 n.7); M. Schwartz, *Wartime Contracting in Afghanistan: Analysis & Issues For Congress*, Congressional Research Service (Nov. 14, 2011) at 10, *available at* https://fas.org/sgp/crs/natsec/R42084.pdf (cited at Am. Compl. ¶ 72 n.38).

[16] DOD, *Report on Progress Toward Security & Stability in Afghanistan* (Dec. 2012) at 119 (cited at Am. Compl. ¶ 51 n.7).

[17] *Id*.

[18] COMISAF's Contracting Guidance at 1 (cited at Am. Compl. ¶ 139 n.179).

improved the lives of many Afghans, enhanced infrastructure, delivered essential services, supported local businesses, increased employment, and fostered economic development."[19]

C. This Lawsuit

The claims in this case arise from attacks that occurred in Afghanistan between December 30, 2009 and June 2017. Am. Compl. ¶ 17. Plaintiffs are 238 victims of these attacks and their relatives. *Id.* ¶¶ 522–2569. The attacks differ significantly in location, timing, method of attack, and alleged perpetrator. They occurred over the course of seven years and in 18 provinces across Afghanistan. The methods used to carry out the attacks varied, but included suicide bombs, snipers, improvised explosive devices (IEDs), small arms, and rocket-propelled grenades. *Id.* The amended complaint alleges that four separate groups carried out the attacks: the Taliban, the Haqqani Network, al Qaeda, and the Kabul Attack Network. *Id.* ¶¶ 412–521.

Defendants are a diverse set of U.S. and international companies who performed a variety of contractual services in post-invasion Afghanistan. They are comprised of: (1) infrastructure and development contractors; (2) security subcontractors; and (3) a telecommunications service provider. The alleged facts differ significantly among the defendants, and the disparate services they provided spanned a diverse set of industries, time periods, and locations. *See* Am. Compl. ¶¶ 145–411. For example, defendant ECC is a construction and engineering contractor that worked on design and construction projects in Afghanistan. *Id.* ¶ 217. Defendant DAI was USAID's second-largest development contractor in Afghanistan between 2006 and 2012 and worked on nine separate USAID projects during that time. *Id.* ¶¶ 181–182. Defendants ArmorGroup and EODT are security subcontractors who provided security for embassies, mine clearance, and infrastructure projects in Herat, Kabul, and Kandahar provinces. *Id.* ¶¶ 145–147,

[19] *Id.*

229-230. Defendant MTN is a telecommunications provider that operated cell towers in Afghanistan, and eventually became the largest cellular-phone provider in the country with a "presence in virtually every province." *Id.* ¶¶ 286–292. Defendants IRD—now Blumont—and Chemonics are also contractors who received USAID contracts in Afghanistan. *Id.* ¶¶ 377, 401.[20]

Plaintiffs allege that LBG facilitated protection payments to the Taliban, either directly, through the Joint Venture, or through its security subcontractors. Am. Compl. ¶¶ 244–279. Plaintiffs focus primarily on the subcontractor payments, alleging that at various times and in various places, three security subcontractors made protection payments to the Taliban to prevent extremists from attacking LBG or Joint Venture projects. *Id.* Plaintiffs also allege that Joint Venture employees paid the Taliban, vaguely citing discussions among "employees at the Joint Venture's Kabul headquarters" that took place "[i]n or around 2010," as well as a "shura with tribal elders in Zadran" in "late 2008 or early 2009." *Id.* ¶¶ 248, 272. In either case, plaintiffs allege that the protection payments were economically motivated: It was purportedly "cheaper" to "buy off the Taliban" than it would have been to provide the necessary security. *Id.* ¶ 3.

Plaintiffs claim that LBG was aware of the payments, but support that claim with only limited factual allegations. For example, plaintiffs do not identify any specific payment, the LBG

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

employee who authorized the payment, the individual to whom the payment was made, or the amount. Instead, plaintiffs state their allegations in general terms: According to plaintiffs, "the LBG/BV Defendants maintained a general policy of paying the Taliban to secure their projects in Taliban-controlled or -influenced regions." Am. Compl. ¶ 248. Plaintiffs also claim to quote certain anonymous, unidentified former employees of the Joint Venture, who purportedly believed that "LBG, Black & Veatch, and the Joint Venture had to pay the Taliban to proceed with their work." *Id.*; *see also id.* at ¶ 267 (similar). Plaintiffs also allege that LBG and the Joint Venture "approv[ed]" subcontractor payments to the Taliban and "authoriz[ed] their reimbursement," Am. Compl. ¶ 250, but they identify no specific approvals or reimbursements. Plaintiffs make nearly the same allegation as to several other defendants, *e.g.*, *id.* ¶¶ 195, 220, 383, 405, underscoring its generality. Indeed, the amended complaint relies extensively on rote allegations applicable to all defendants, claiming to describe "standard practice[s]" amongst contractors in Afghanistan. *Id.* ¶¶ 79, 95, 148, 184, 219, 249, 382, 404, 406, 407.

LEGAL STANDARD

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

ARGUMENT

The Court should dismiss the claims against LBG because, even assuming the truth of all of the amended complaint's properly pleaded allegations, plaintiffs fail to state a claim as a matter

of law. The ATA creates two different causes of action for U.S. nationals injured abroad by acts of terrorism. Primary-liability claims are those asserted against a person or entity that itself committed an "act of international terrorism" that injured a U.S. national. 18 U.S.C. § 2333(a). Secondary-liability claims (which Congress created in 2016) are available only for injuries caused by FTOs and only when a third party substantially assisted the FTO in committing the terrorist act. 18 U.S.C. § 2333(d)(2). For reasons explained below, the amended complaint fails to allege a viable primary- or secondary-liability claim against LBG.

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

The Court should dismiss the primary-liability claims for two reasons: *First*, the alleged payments do not constitute acts of "international terrorism," as that term is defined in the statute. *Second*, plaintiffs' allegations do not satisfy the ATA's rigorous proximate-cause requirement.

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

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

The payments alleged in the amended complaint do not satisfy either element. Although the ***attacks*** identified in the amended complaint may well constitute acts of "international

terrorism," the ***alleged payments*** do not, and that is what matters for purposes of assessing whether a primary-liability claim lies against LBG.

1. Plaintiffs Do Not Allege That The Purported Payments Were Intended To Intimidate A Civilian Population Or Influence Governmental Policy

The principal problem with plaintiffs' primary-liability theory is that they have failed to allege that the purported payments to the Taliban were made with the requisite intent. Conduct constitutes an act of international terrorism only if an objective observer would conclude that the conduct was intended to intimidate or coerce a civilian population or government. *See, e.g.*, 18 U.S.C. § 2331(1)(B); *Kemper v. Deutsche Bank AG*, 911 F.3d at 390 (dismissing ATA claim where defendant's actions were alleged to be "motivated by economics, not by a desire to 'intimidate or coerce'"). Here, plaintiffs do not plausibly allege that, by allegedly facilitating protection payments to the Taliban, LBG had the subjective or objective desire to "intimidate or coerce" a civilian population or government, or affect governmental conduct through "mass destruction, assassination, or kidnapping." *See* 18 U.S.C. § 2331(1)(B). Nor could plaintiffs plausibly make any such allegation: That notion is absurd on its face, and the clear disconnect between § 2331(1)(B)'s statutory requirement and LBG's alleged conduct only confirms that plaintiffs are trying to stretch the ATA far beyond its proper scope.

Indeed, far from alleging the required objective intent, the amended complaint ascribes an entirely different motivation to LBG: a desire to save money and protect its projects and personnel from attack. The amended complaint repeatedly alleges that LBG and the other defendants made protection payments because it was "the cheapest way to shield [its] projects from attack." Am. Compl. ¶ 62. According to the amended complaint, the payments were allegedly motivated by "profit incentives." *Id.* ¶¶ 3, 249; *see also id.* ¶ 53 ("To increase their profit margins by redirecting attacks away from their business interests . . . Defendants knowingly paid protection money to the

Taliban."); ¶ 62 ("Defendants paid the money as protection: they decided that the cheapest way to shield their projects from attack was to pay the Taliban to leave them alone."); ¶ 96 ("Indeed, the core purpose of the payments was to benefit the Defendants by shielding their projects from Taliban attack at an affordable price."); ¶ 268 ("The LBG/BV Defendants made those payments because they viewed them as a necessary cost of doing business efficiently.").

Of course, LBG denies that it ever made any such payments or had any intent other than to lawfully provide the best security for its workers possible. But the key point for present purposes is that, ***according to plaintiffs' own allegations***, an objective observer would perceive the alleged "protection payments" as being driven by commercial motives and the desire to safeguard personnel—not by a desire to intimidate a civilian population or change government policy through coercion, as the statute requires. *See, e.g., id.* ¶¶ 244, 248, 268. Plaintiffs' fanciful allegations thus fail on their own terms.

When an ATA plaintiff alleges that conduct was motivated by economic interests (or interests that otherwise fall outside the narrow scope of the statute), courts consistently grant motions to dismiss primary-liability claims. *See, e.g.*, *Kemper*, 911 F.3d at 390 (affirming dismissal because the defendant's actions were alleged to be "motivated by economics, not by a desire to 'intimidate or coerce'"); *Zapata v. HSBC Holdings PLC*, 414 F. Supp. 3d. 342, 358 (E.D.N.Y. 2019) (granting motion to dismiss ATA claim where "greed" was a "plausible alternative explanation for [defendant's] conduct"); *Stansell v. BGP, Inc.*, 2011 WL 1296881, at *9 (M.D. Fla. Mar. 31, 2011) (dismissing ATA claim where the "allegation would not lead an objective observer to conclude Defendants intended to achieve any one of the results listed in § 2331(1)(B)"). This Court should do the same.

2. The Alleged Payments Did Not Involve "Violent Acts Or Acts Dangerous To Human Life"

Plaintiffs also have not alleged that LBG engaged in any "violent acts or acts dangerous to human life." 18 U.S.C. § 2331(1)(A). The only "violent acts" or "acts dangerous to human life" alleged in the amended complaint are the sniper, IED, suicide-bomb, and small-arms attacks that killed or injured plaintiffs. *See* Am. Compl. ¶¶ 524–2569. But those attacks were not LBG's ***own*** actions; they were the actions of the Taliban. Plaintiffs might well have primary-liability claims against the Taliban, but they do not have such a claim against LBG.

Plaintiffs primarily rest their amended complaint on allegations that LBG and the Joint Venture retained well-known, third-party security contractors who they purportedly knew would make protection payments to the Taliban. *See* Am. Compl. ¶ 254 (retention of U.S. Protection and Investigation ("USPI")); *id.* ¶ 253 (retention of Watan Risk Management ("Watan")); *id.* ¶ 274 (retention of ISS-Safenet). But even if one assumes that those subcontractors were in fact making protection payments to the Taliban (something LBG denies having any knowledge of), it stretches the statutory text much too far to say that the retention of those private companies was itself a "violent" or "dangerous" act.

Courts have recognized that "doing business with companies and countries that have significant legitimate operations" does not constitute an act of international terrorism, even if those same companies have alleged ties to terrorist organizations. *See Kemper*, 911 F.3d at 390; *see also O'Sullivan v. Deutsche Bank AG*, 2019 WL 1409446, at *8 (S.D.N.Y. Mar. 28, 2019) ("The Complaint does not allege plausibly that the provision of banking services, which are not inherently violent or dangerous, can be considered as acts dangerous to human life."); *Kaplan v. Lebanese Canadian Bank, SAL*, 405 F. Supp. 3d 525, 532 (S.D.N.Y. 2019) (determining plaintiffs had failed to plausibly allege that defendants' conduct "involve[d] violence or endanger[ed] human

life") (alterations in original). As those cases have recognized, retaining well-known companies with significant legitimate operations is too far removed from the violent conduct of an extremist organization to itself be labeled as a terrorist act. Any other rule would risk making entirely legitimate transactions actionable as primary violations of the ATA—something that goes far beyond the cause of action that Congress created, which focuses on recovery from the actual perpetrators of violent activities.

Here, it is clear from the face of the amended complaint that the security subcontractors at issue had significant legitimate operations, and thus the mere act of retaining them does not make LBG primarily liable under the ATA. Plaintiffs identify three security subcontractors allegedly used by LBG or the Joint Venture in Afghanistan: USPI, Watan, and ISS-Safenet. USPI was a private security contractor that worked for global leaders such as the United Nations and World Bank, and was "employed by several donors and USAID contractors" in Afghanistan during the relevant time.[21] Similarly, Watan was "one of the largest private-security companies in Afghanistan, and made its money on subcontracts to protect convoys ferrying goods and fuel around the country." Am. Compl. ¶ 69. And ISS-Safenet was one of the top five USAID subcontractors in Afghanistan with over $42 million in subcontracts.[22] It is implausible to label

[21] Ex. 1, USAID-JV Contract, Attachment J-2, at 119 (cited at Am. Compl. ¶ 247); F. Nawa, *Afghanistan, Inc.* at 15 (cited at Am. Compl. ¶ 255 n.315); Daniel Schulman, *The Cowboys Of Kabul*, Mother Jones (July 27, 2009) ("*The Cowboys of Kabul*") at 3 (cited at Am. Compl. ¶ 253 n.314).

[22] SIGAR: *USAID Assistance to Afghanistan Reconstruction: $13.3 Billion Obligated Between 2002 and 2013*, SIGAR-14-27-SP (Jan. 2014), *available at https://www.sigar.mil/pdf/special%20projects/14-27-SP.pdf*. The SIGAR report, which appears on the official government website https://sigar.mil/allreports, is judicially noticeable. *Cannon*, 717 F.3d at 205 n.2. Plaintiffs also allege that LBG worked with one construction company, Haji Khalil Zadran Construction Company ("HKZCC"), Am. Compl. ¶ 277, but do not specify when LBG was engaged with that company or how it relates to any of the attacks at issue. Moreover, public documents show that HKZCC was no longer permitted to work in Afghanistan by 2011. *See infra* at 24.

the retention of such widely used companies as "violent" or "dangerous" acts giving rise to primary liability under the ATA.

The amended complaint also includes limited allegations, based on statements purportedly obtained from anonymous witnesses, that LBG or Joint Venture employees directly paid the Taliban. But these allegations are highly generalized and refer only vaguely to discussions a decade ago between employees at the Joint Venture's Kabul office, alleged accounting improprieties, and a "shura with tribal elders in Zadran." *See id.* ¶¶ 248, 250, 267, 272. None contain sufficient facts to plausibly establish that LBG paid the Taliban directly. And even assuming plaintiffs had sufficiently alleged such conduct, merely paying money—for the alleged purpose of protecting LBG's projects and personnel—is not itself a "violent act[] or act[] dangerous to human life" and is therefore not a primary violation of the ATA. 18 U.S.C. § 2331(1). *See Kaplan*, 405 F. Supp. 3d at 532 (provision of direct financial services to Hezbollah did not qualify as an act of international terrorism); *Linde v. Arab Bank, PLC*, 882 F.3d 314, 326–27 (2d Cir. 2018) (questioning whether "direct monetary donations to a known terrorist organization satisfy § 2331(1)'s definitional requirements for an act of terrorism"). To be sure, under certain circumstances, it is conceivable that making such monetary payments could give rise to a ***secondary***-liability claim under the ATA—if the injuries in question were caused by an FTO, if the assistance was substantial, and if the other statutory requirements were met (which they are not in this case). But as a matter of law, such extortion payments are not a ***primary*** violation of the ATA, which is statutorily limited to violent conduct such as the IED and sniper attacks perpetrated by the Taliban and the other extremist organizations identified in the amended complaint.

In arguing to the contrary, plaintiffs likely will rely on *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685 (7th Cir. 2008), but that non-binding precedent is not persuasive. In *Boim*, the Seventh Circuit held that donating money to terrorist organizations could, in certain circumstances, constitute a primary violation of the ATA. *Id.* at 690. The D.C. Circuit has not embraced that holding, and other courts have correctly cast doubt on it. *See, e.g.*, *Linde*, 882 F.3d at 327 (discussing *Boim* and questioning whether "direct monetary donations to a known terrorist organization satisfy § 2331(1)'s definitional requirements for an act of terrorism"); *Retana v. Twitter, Inc.*, 419 F. Supp. 3d 989, 995–96 (N.D. Tex. 2019) (noting that some of the "expansive language" in *Boim* was later "clarified in *Kemper v. Deutsche Bank AG*"). And correctly so: *Boim*'s holding conflicts with the plain language of § 2331(1). *Boim* also was decided well before Congress amended the ATA to allow for secondary-liability claims, which likely explains why the *Boim* court felt compelled to stretch the text of the statute to cover conduct that did not fit § 2331(1)'s limited definition.

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

Even if plaintiffs could show that LBG committed an act of "international terrorism," their primarily-liability claims would still fail because they do not plausibly allege that the payments at issue proximately caused the many and differing attacks giving rise to plaintiffs' injuries.

The ATA states that plaintiffs must have been injured "by reason of" the defendant's conduct, 18 U.S.C. § 2333(a), a statutory requirement that courts have interpreted to impose both a "but-for" and a proximate-causation requirement. *Owens v. BNP Paribas S.A.*, 235 F. Supp. 3d 85, 95–96 (D.D.C. 2017), *aff'd*, 897 F.3d 266 (D.C. Cir. 2018). Proximate causation is rigorous: "[t]o survive a motion to dismiss for failure to state a claim, Plaintiffs must … plausibly allege (1) that [the defendants'] acts were a substantial factor in the sequence of events that led to their

injuries and (2) that [their] injuries [were] reasonably foreseeable or anticipated as a natural consequence of [the defendants'] conduct." *Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 273 (D.C. Cir. 2018) (internal quotations omitted). Courts frequently affirm dismissals or grant motions to dismiss in ATA cases when plaintiffs fail to plead facts showing how defendants caused their injuries. *See, e.g., id.* at 273–76 (affirming dismissal); *see also Brill v. Chevron Corp.*, 804 F. App'x 630, 632 (9th Cir. 2020) (same); *Crosby v. Twitter, Inc.*, 921 F.3d 617, 623 (6th Cir. 2019) (same); *Atchley v. AstraZeneca UK Ltd.*, 2020 WL 4040345, at *8 (D.D.C. July 17, 2020) (granting motion to dismiss); *Kaplan*, 405 F. Supp. 3d at 532–33 (same); *Retana v. Twitter, Inc.*, 419 F. Supp. 3d 989, 995–97 (N.D. Tex. 2019) (same).

For several reasons, plaintiffs have failed to allege that the purported payments had a substantial or foreseeable connection to their injuries. ***First***, plaintiffs fail to allege proximate causation for geographic and temporal reasons, given that in most cases their injuries occurred hundreds of miles away from LBG/Joint Venture projects and many months or years after the alleged payments were made. Most of plaintiffs' allegations regarding LBG pertain to 2010 and earlier: For example, plaintiffs allege that USAID awarded contracts to LBG from 2002 to 2010, that LBG made payments to unreliable subcontractors "[a]s early as 2005," and that LBG used USPI's services "[a]s late as November 2008." Am. Compl. ¶¶ 255, 259. Yet plaintiffs ground their ATA claims in attacks that occurred over a different eight-year period, running from December 2009 to as late as 2017. *Id.* ¶¶ 17, 458. Plaintiffs also do not limit their claims to attacks that occurred geographically close to LBG/Joint Venture projects, but instead purport to hold LBG liable for attacks occurring anywhere and everywhere in the country, including the Badghis, Baghlan, Ghazni, Farah, Faryab, Helmand, Herat, Kandahar, Kabul, Khost, Kunar, Kunduz, Laghman, Logar, Nangarhar, Paktia, Uruzgan, Wardak, Parwan, and Zabul provinces. *Id.* ¶¶ 524–

2569. Some of these provinces are large in size and stretch across vast deserts and mountain ranges. For example, Paktia province alone is the size of Delaware, and almost 400 miles separate the cities of Kandahar in the south and Kunduz in the north.[23] Plaintiffs nonetheless seek to hold LBG liable for attacks that occurred across the entirety of Afghanistan, rather than trying to limit their claims to attacks that occurred in close proximity to LBG/Joint Venture projects.

The significant time and distance between LBG's alleged conduct and the attacks that injured plaintiffs highlights the fatally attenuated nature of plaintiffs' causal allegations. It is simply not plausible for plaintiffs to allege, as they do, that payments allegedly made by LBG subcontractors in, say, 2005 in Kandahar province could have proximately caused a Taliban attack that occurred in Faryab province, more than 300 miles away and seven years later in 2012.[24] A similar statement could be made about nearly every attack alleged in the amended complaint, and that confirms the fatal causation deficiencies with plaintiffs' theory: The temporal and geographic connections between the alleged payments and the disparate attacks are simply too attenuated to support plaintiffs' ATA claims. *See, e.g.*, *Siegel v. HSBC N. Am. Holdings, Inc.*, 933 F.3d 217, 224 (2d Cir. 2019) (affirming dismissal where, *inter alia*, bank ended business "ten months before the [ ] Attacks"); *Adams v. Alcolac, Inc.*, 2019 WL 4774006, at *6 (S.D. Tex. Sept. 6, 2019) (finding that "years long" causal chain was "insufficient to demonstrate proximate cause").

Accepting plaintiffs' theory seemingly would justify liability for literally any Taliban victim anywhere at any time in Afghanistan—a sweeping view that cannot be squared with the law of proximate causation, the limiting language of the ATA, or even with the allegations of

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

[24] *Compare* Am. Compl. ¶ 254 (discussing REFS 03-02-GG451-RD-0010 Kandahar-to-Kabul highway contract) *with* Am. Compl. ¶ 1604 (attack in Faryab Province in April 2012).

plaintiffs' own complaint, which repeatedly alleges that "Defendants . . . paid protection money to ***local*** Taliban commanders," Am. Compl. ¶¶ 90, 105, 113 (emphasis added), and likewise emphasizes "tribal connections" and family structures—things that are inherently local in nature. *Id.* ¶¶ 440–442; *see also id.* ¶ 233 ("In the scope of Afghanistan, there's a lot of tribal lines, commander lines"). Perhaps recognizing the extraordinary breadth of their theory, plaintiffs attempt to equate money in one part of Afghanistan to money in another, alleging that "money flowed both ways—from local commanders up to . . . the Taliban's central leadership, and conversely from the leadership back down to local commanders for use in the field." *Id.* ¶ 100. But such many-layered "flows" only underscore the extraordinary number of steps needed to connect a payment supposedly made by a security subcontractor and an attack that occurred years later in an entirely different part of the country. Simply put, accepting plaintiffs' theory would make the ATA's well-recognized proximate cause requirement a nullity.

Second, plaintiffs' alleged chain of causation relies on numerous intervening acts and actors, each breaking the causal chain. Most obvious are the Taliban and other insurgent groups, which allegedly began plotting their campaign of violence almost immediately after the U.S. invasion, Am. Compl. ¶ 47, and which remain potent enemies even today, *id.* ¶ 52. But apart from the Taliban, plaintiffs' allegations also rely extensively on the conduct of numerous third-party subcontractors alleged to have worked with LBG or the Joint Venture, including USPI, Watan, and ISS-Safenet. *Id.* at ¶¶ 236, 253-263, 273-276. Each of these entities was a widely known, independent, third-party entity standing between LBG and the Taliban:

- USPI: Documents cited in the complaint show that this U.S. firm provided security not just for LBG, but also for numerous other legitimate entities operating in Afghanistan, including the World Bank, the Japan International Cooperation Agency, the United Nations, and "a range of private businesses, including local banks and hotels."[25]

[25] *The Cowboys of Kabul* at 3 (cited at Am. Compl. ¶¶ 253 n.314, 255 n.319).

USAID even recommended USPI as a security subcontractor. *See* Ex. 1, USAID-JV Contract, Attachment J-2 (discussed at Am. Compl. ¶ 247b) (recommending that "implementing partners establish and maintain regular contact with organizations such as . . . USPI").

- Watan: Plaintiffs plead that Watan was "one of the largest private-security companies in Afghanistan," which "worked for many of the largest Western contractors in Afghanistan. …" Am. Compl. ¶ 69. Although plaintiffs allege that "the U.S. military debarred Watan from government contracting" in December 2010, *id.* ¶ 71, plaintiffs do not allege that LBG or the Joint Venture subcontracted with Watan after that point or that the alleged debarment related to the services provided to LBG.

- ISS-Safenet: Plaintiffs cite a "Letter of Commendation for ISS-Safenet," Am. Compl. ¶ 274 n.337, for the proposition that ISS-Safenet "emphasized the criticality of good relations with the local communities"—a statement plaintiffs assert "was a euphemism for ISS-Safenet's payment of protection money to insurgents." *Id.* This assertion is implausible and mischaracterizes the cited "Letter of Commendation." That letter in fact details numerous legitimate security services provided by ISS-Safenet, including 69,493 "Mobile [Security] Missions completed" and 156,333 "Clients Escorted." *See* Ex. 1 in Supp. of Black & Veatch Special Projects Corp.'s Mot. to Dismiss (ECF No. 75-2), June 25, 2012 Letter from R. Rademeyer, Country Security Manager for the LBG/BV JV (discussed at Am. Compl. ¶ 274 n.337); *see also id.* ("[Y]our people literally bled for us . . . . The progress made on all the projects would not have been possible without you").

- Haji Khalil Zadran Construction Company ("HKZCC"): Plaintiffs allege that this entity, which LBG purportedly hired to work on the Gardez-Khost highway, was a "front company" for the Haqqani Network. *See* Am. Compl. ¶ 277. But plaintiffs reference this entity only once in the amended complaint, and do not specify when the purported subcontract occurred. Public documents showed that HKZCC, in all events, was no longer permitted to work in Afghanistan by 2012.[26]

As the D.C. Circuit has recognized, the presence of these intermediaries—some of whom are alleged to have hired only various local "warlords," rather than the Taliban itself, Am. Compl. ¶ 255—"create[s] a more attenuated chain of causation," especially where they also had at least some "legitimate . . . operations" to fund. *Owens*, 897 F.3d at 275–76; *see also Atchley*, 2020 WL

[26] Bureau of Industry and Security, https://www.bis.doc.gov/index.php/all-articles/66-about-bis/newsroom/press-releases/342-bis-adds-sixteen-parties-to-entity-list-for-providing-support-to-persons-engaged-against-u-s-and-coalition-forces-in-afghanistan (April 12, 2012).

4040345, at *9 (similar). To the extent that many of the facts in plaintiffs' complaint show only that LBG worked with various contractors, those facts are insufficient to support causation.

Third, the amended complaint contains insufficient facts about the alleged payments to establish the necessary causal connection. Plaintiffs allege no facts about any given payment. There are no allegations, for example, about any payment's time, place, recipient, or amount, much less facts showing how any specific payment was substantially connected to the attacks at issue. All of plaintiffs' allegations are general: Plaintiffs allege, for example, that "one of the major sources of funding for the Taliban is the protection money," and that extortion of funds was at some point "the insurgents' second-largest funding source"—again without explaining what funds or proportion of funds were derived from LBG. Am. Compl. ¶¶ 11, 106. At best, plaintiffs allege only "on information and belief" that LBG's subcontractor payments were "worth at least several million dollars"—a conclusory allegation that does not explain how any payments were substantially connected to the roughly 200 attacks pled in the Amended Complaint. *Id*. ¶ 249.[27]

Indeed, far from establishing the necessary causal connection, the Amended Complaint is candid that the attacks may well have been financed via ***other*** funding streams, such as from protection payments paid by other contractors or, according to plaintiffs' cited materials, domestic and Pakistani businesses.[28] Many of the same plaintiffs even allege, in another lawsuit pending in this District that does not mention LBG, that it was actually the Government of Iran that funded

[27] Indeed, plaintiffs make this same conclusory "several million dollars" allegation as to every defendant in the case, underscoring its group and conclusory nature. *See* Am. Compl. ¶¶ 149, 184, 219, 249, 382, 404; *see also Toumazou v. Turkish Republic of N. Cyprus*, 71 F. Supp. 3d 7, 21 (D.D.C. 2014) (noting that plaintiffs "cannot satisfy the minimum pleading requirements . . . by 'lumping all the defendants together in each claim and providing no factual basis to distinguish their conduct'").

[28] Gretchen Peters, *Haqqani Network Financing: The Evolution of an Industry*, The Combating Terrorism Center at West Point (July 2012) at 40–41 (cited at Am. Compl. ¶ 101 n.103).

and proximately caused their injuries. *See* Feb. 18, 2020 Am. Compl. (ECF No. 8) ¶¶ 9, 143–147, *Cabrera, et al. v. Islamic Republic of Iran*, Case No. 1:19-cv-03835-JDB (D.D.C.). And most significantly, plaintiffs in this case plead that the Taliban derived even more money from "the illegal drug trade" or "drug trafficking," which plaintiffs concede was the Taliban's single largest source of funding. Am. Compl. ¶¶ 106, 123. All of this is again is fatal to plaintiffs' proximate cause arguments: ATA claimants alleging that a defendant provided illicit funds must, at minimum, plausibly allege that the terrorists "would have been unable to fund the attacks . . . without the cash provided by [the Defendant]." *Rothstein*, 708 F.3d at 97. Plaintiffs make no such plausible allegation here, providing another basis for dismissal. *See, e.g.*, *Kaplan*, 405 F. Supp. 3d at 533 (granting motion to dismiss where, *inter alia*, plaintiff did not show that "Hizbollah would not have been able to carry out the attacks absent those specific funds"); *Owens*, 235 F. Supp. 3d at 99 (same where plaintiff did not plead that "Sudan would have been unable to assist Al Qaeda without the funds that BNPP processed"); *see also Owens*, 235 F. Supp. 3d at 96 (noting that plaintiffs must plead "but-for" as well as proximate causation).

In sum, plaintiffs' causal theory is far too attenuated to support their hundreds of ATA claims. Lacking further factual allegations showing a substantial connection between LBG and the specific attacks at issue, plaintiffs' claims should be dismissed. *Id.*; *Atchley*, 2020 WL 4040345, at *9; *see also O'Sullivan v. Deutsche Bank AG*, 2019 WL 1409446, at *8 (S.D.N.Y. Mar. 28, 2019) (granting motion to dismiss where "the factual allegations delineating relationships between those services and the terrorist attacks at issue are so attenuated").

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

Plaintiffs' claims for "[a]iding-and-[a]betting" (Counts 5 and 6) also fail on the pleadings. The ATA permits secondary liability only when (1) a defendant aids or abets acts "committed,

planned, or authorized" by "an organization that had been designated as a foreign terrorist organization"; (2) the aid or assistance is "substantial"; and (3) that substantial assistance is given "knowingly." 18 U.S.C. § 2333(d)(2). Plaintiffs fail to allege these first two requirements as to LBG. Additionally, Count 6, which is based on a purported "RICO predicate," Am. Compl. ¶¶ 2606–2615, fails because plaintiffs cannot use RICO to plead around the deficiencies in their aiding-and-abetting theory.

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

Until recently, the ATA was "silent as to the permissibility of aiding and abetting liability," and courts had therefore concluded that such liability was not permissible under the statute. *Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 278 (D.C. Cir. 2018). That changed in 2016, when Congress amended the ATA to recognize a limited cause of action for aiding and abetting terrorist acts. *See id.* at 277 (discussing the Justice Against Sponsors of Terrorism Act, or "JASTA"). This statutory amendment, however, permitted secondary liability only in narrow circumstances. Most significantly, JASTA authorized secondary liability only where an entity gave "substantial assistance" to an FTO "who committed such an act of international terrorism." 18 U.S.C. § 2333(d)(2).

All of plaintiffs' secondary-liability claims must be dismissed because plaintiffs have not plausibly alleged that LBG provided substantial assistance to any terrorist. Courts have recognized that "substantial assistance" requires more than simply providing fungible dollars to a terrorist organization. *Linde v. Arab Bank, PLC*, 882 F.3d 314, 329–30 (2d Cir. 2018) (explaining that "aiding and abetting an act of international terrorism requires more than the provision of material support to a designated terrorist ***organization***") (emphasis added); *see also Averbach v. Cairo Amman Bank*, 2020 WL 486860, at *13 (S.D.N.Y. Jan. 21, 2020) (same); *Taamneh v. Twitter, Inc.*,

343 F. Supp. 3d 904, 917 (N.D. Cal. 2018) (same). Rather, to be secondarily liable under the ATA, a defendant must have actually "assum[ed] a 'role' in the terrorist ***activities***" themselves. *Linde*, 882 F.3d at 329–30 (emphasis added). Plaintiffs cannot meet that standard from the outset, since all of their allegations are confined to alleged protection payments to the Taliban, and plaintiffs never allege (nor could they plausibly allege) that LBG did anything to assume a "role" in the specific attacks identified in the complaint.

To determine whether assistance is "substantial," courts consider a six-factor test outlined in *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983), which Congress specifically referenced when it amended the statute to create an aiding-and-abetting cause of action. *See Linde*, 882 F.3d at 329 (citing 18 U.S.C. § 2333 Statutory Note). Those six factors are: "(1) the nature of the act encouraged, (2) the amount of assistance given by defendant, (3) defendant's presence or absence at the time of the tort, (4) defendant's relation to the principal, (5) defendant's state of mind, and (6) the period of defendant's assistance." *Id.* (citing *Halberstam*, 705 F.2d at 483–84); *see also Kaplan*, 405 F. Supp. 3d at 536 (granting motion to dismiss). Courts affirming or granting motions to dismiss have often justified those decisions by noting that only one or a few of these factors were lacking. *See, e.g.*, *Crosby v. Twitter, Inc.*, 921 F.3d 617, 626 (6th Cir. 2019); *Brill v. Chevron Corp.*, 2018 WL 3861659, at *1 (N.D. Cal. Aug. 14, 2018); *Taamneh*, 343 F. Supp. 3d at 917. Here, plaintiffs fail to sufficiently allege facts showing that any of the factors are met.

***Nature of the Act Encouraged*:** Plaintiffs do not plausibly allege that LBG "encouraged" the Taliban or the Haqqani Network to attack U.S. military personnel. Nor could they, as any such allegation would be outlandish on its face. LBG for years was an important partner in implementing United States foreign-policy objectives in Afghanistan, and routinely worked cooperatively with U.S. military personnel. Many of the LBG managers in Afghanistan were

former military officers, graduates of U.S. military academies, and/or had served in Afghanistan themselves. There is simply no basis at all for the absurd assertion that LBG wished to "encourage" terrorist attacks against plaintiffs or anyone else. *See, e.g.*, *Brill*, 804 F. App'x at 632 (affirming dismissal, where "there [wa]s no allegation that Chevron encouraged the acts"); *Crosby*, 303 F. Supp. 3d 564, 574 (E.D. Mich. 2018) (granting motion to dismiss, where plaintiff alleged "no facts that suggest that the defendants 'encouraged' [the terrorist] to commit his crimes"); *Copeland v. Twitter, Inc.*, 352 F. Supp. 3d 965, 976 (N.D. Cal. 2018) (same where "there is no evidence that defendants encouraged terrorist attacks" or "had advance knowledge of any attacks").

***Amount of Assistance Given*:** In evaluating the amount of assistance given, courts evaluate "whether the act was 'heavily dependent' on the assistance provided, or whether the assistance was 'indisputably important to,' or an 'essential part of' the act." *Atchley*, 2020 WL 4040345, at *12. Plaintiffs come nowhere close to these showings here—they fail to plausibly allege what "amount" of assistance reached the Taliban, much less how any such amounts related to any of the attacks at issue.[29] Plaintiffs also do not plausibly plead that funding purportedly authorized for reimbursement by LBG or allegedly trickling down from LBG's subcontractors was necessary or even important to the relevant attacks, especially where the complaint identifies drug trafficking and other alleged extortion victims as equal or greater sources of insurgent funding. *See* Part I.B, *supra*. This factor accordingly favors dismissal as well. *Cf. Copeland*, 352 F. Supp.

[29] Plaintiffs allege that companies commonly paid protection money to "the Taliban in amounts worth between 20 and 40 percent of the project," Am. Compl. ¶¶ 4, 92, 249, but plead no factual basis for extending that allegation to LBG. Their allegation that LBG's assistance amounted to "millions of dollars" likewise depends on the same conclusory allegation and is rotely made as to many defendants.

3d at 976 (holding that to be substantial, "the defendant should play a major part in prompting the tort or be integral to the tort") (quotation omitted).

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

***No Direct Relationship To The Principal*:** "Courts now routinely dismiss ATA claims when the plaintiffs fail to allege a direct link between the defendants and the individual perpetrator." *Crosby*, 921 F.3d at 627 n.6 (collecting cases); *see also Atchley*, 2020 WL 4040345, at *11 (citing *Crosby*). That is the case here. Even assuming the amended complaint adequately alleges payments to the Taliban generally (which LBG denies), *see* Am. Compl. ¶¶ 248, 250, plaintiffs have not plausibly alleged any "direct relationship" between LBG and the actual perpetrators of any of the terrorist attacks they identify. Much less do plaintiffs allege a direct relationship between LBG and al Qaeda—the actual designated FTO upon which plaintiffs hinge their secondary-liability claims. This factor, too, thus weighs in favor of dismissal. *See Crosby*, 921 F.3d at 626–27 (affirming dismissal where "[p]laintiffs do not allege that Defendants directly helped [the terrorist]"); H5240 Cong. Rec. Sept. 9, 2016 (Statement of Rep. Goodlatte) ("Secondary liability should only attach to persons who have actual knowledge that they are directly providing substantial assistance to a designated foreign terrorist organization.").

***State of Mind*:** This factor turns on whether the defendant shared the principal's objective—whether the defendant was "one in spirit" with or actually "desired to make the venture succeed." *Atchley*, 2020 WL 4040345, at *12; *see also Taamneh*, 343 F. Supp. 3d at 918 (holding that this factor weighs in favor of substantial assistance only if "Defendants ha[d] any intent to

further . . . terrorism"); *Halberstam*, 705 F.2d at 484 (considering whether defendant was "one in spirit" with the primary actor). Here, plaintiffs fail to allege that LBG was "one in spirit" with terrorists, *Atchley*, 2020 WL 4040345, at *12; *Taamneh*, 343 F. Supp. 3d at 918; *Halberstam*, 705 F.2d at 484, or that LBG actually intended that terrorists succeed or harm coalition personnel. Nor could they, as any such allegation would be absurd on its face. State of mind thus weighs against substantial assistance in cases like this one, where there is nothing to "suggest[ ] that Defendant supported [the terrorists'] . . . agenda." *Kaplan*, 405 F. Supp. 3d at 536.

***Period of Assistance*:** This final factor also weighs in LBG's favor because the period of LBG's alleged conduct bears little relation to the attacks alleged in the amended complaint. Plaintiffs allege that LBG was awarded numerous contracts between 2002 and 2010, *see* Am. Compl. ¶ 247, and additionally allege that LBG's subcontractors made payments to "local warlords" beginning "[a]s early as 2005," *id.* ¶ 255. Yet despite relying significantly on aged allegations, plaintiffs seek to impose liability for attacks which occurred as late as 2017, and which bear no apparent relationship to any particular earlier subcontractor payment. Am. Compl. ¶ 17, 1528. This temporal mismatch again underscores why LBG did not "substantially assist" the attacks at issue. *Siegel v. HSBC N. Am. Holdings, Inc.*, 933 F.3d 217, 224 (2d Cir. 2019) (affirming dismissal where bank's purported assistance ended "ten months before" the relevant attacks).

In sum, none of the six *Halberstam* factors suggest that the purported assistance pled here—uncertain in amount, unconnected to any particular attack, indirect, unintended, and often years old—was "substantial" as that term is used in the statute. Because plaintiffs do not plead substantial assistance, the aiding-and-abetting claims against LBG should be dismissed. *See Atchley*, 2020 Wl 4040345, at *12; *Copeland*, 352 F. Supp. 3d at 976.

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

In authorizing secondary liability, Congress also required plaintiffs to show that their injuries resulted from an act of international terrorism "committed, planned, or authorized by an organization that had been ***designated as a foreign terrorist organization*** under section 219 of the Immigration and Nationality Act." 18 U.S.C. § 2333(d)(2) (emphasis added); *see also* H5240 Cong. Rec. Sept. 9, 2016 (Statement of Rep. Goodlatte) ("I have worked to make sure that JASTA's extension of secondary liability under the Anti-Terrorism Act . . . is limited to State Department-designated foreign terrorist organizations. Secondary liability should only attach to persons who have actual knowledge that they are directly providing substantial assistance to a designated foreign terrorist organization in connection with the commission of an act of international terrorism."). In other words: An aiding-and-abetting cause of action is not available for all terrorist acts. It is available only for those terrorist acts "committed, planned, or authorized" by an organization already designated as an FTO by the Secretary of State. *Atchley*, 2020 WL 4040345, at *10.

This requirement poses a fundamental problem for plaintiffs' secondary-liability claims. Plaintiffs allege that LBG had "a general policy of paying the Taliban," and that their injuries arose from attacks committed by the Taliban, the Haqqani Network, the Kabul Attack Network, and al Qaeda. Am. Compl. ¶¶ 248, 459, 522, 2603. But the Taliban (allegedly responsible, in whole or in part, for attacks on 177 of 238 victims) has never been designated by the Secretary of State as an FTO. Neither has the Kabul Attack Network. And although the Haqqani Network ***has*** been designated as an FTO, that designation occurred only in September 2012, *id.* ¶ 439—after the vast majority of the attacks had already been committed. As a matter of law, the secondary-liability claims brought by the 157 victims who allege that they were injured either in attacks committed

solely by the Taliban or attacks committed solely by the Haqqani Network prior to September 2012 must be dismissed under this threshold pleading requirement. Moreover, claims related to those attacks committed by the Haqqani Network ***after*** September 2012 should also be dismissed—plaintiffs allege no facts showing any payments (whether directly or through subcontractors) to the Haqqani Network after that date, and instead admit that one purported "conduit," a "Mr. Arafat," was disqualified by 2011. Am. Compl. ¶¶ 273–75. Plaintiffs thus do not allege any assistance (much less substantial assistance) to the Haqqani Network at the time it was actually designated an FTO.

The court should also dismiss the claims of those plaintiffs who allege al Qaeda's involvement in only cursory fashion. For example, 26 victims allege only conclusory al Qaeda-Taliban involvement in their attacks, *e.g.*, that an attack was carried out by a purported "joint al-Qaeda-Taliban cell." *Id*. ¶ 542; *see also* 615, 648, 693, 717, 736, 831, 865, 1287, 1306, 1551, 1605, 1643, 1647, 1712, 1798, 1876, 1905, 1955, 1998, 2048, 2149, 2153, 2269, 2399, 2414. Another 36 victims make similarly conclusory allegations as to al Qaeda and the other non-FTO groups who carried out attacks, like the Kabul Attack Network or the Haqqani Network before September 2012. *Id*. at ¶ 560; *see also id*. at 525, 684, 725, 761, 786, 859, 890, 961, 1021, 1082, 1092, 1122, 1147, 1174, 1211, 1230, 1373, 1449, 1563, 1582, 1684, 1728, 1740, 1751, 1887, 1896, 1923, 1930, 2041, 2139, 2249, 2304, 2315, 2373, 2392. The secondary-liability claims brought by these 62 victims and their families should also be dismissed at the threshold.

These dismissals, moreover, should occur notwithstanding plaintiffs' attempt to plead around the FTO requirement. Recognizing that the FTO requirement poses a serious obstacle to their claims, plaintiffs artfully try to tie the Taliban to al Qaeda, alleging that various attacks were "committed by the Taliban and al-Qaeda (a designated FTO at the time of the attack) acting

together in a joint al-Qaeda-Taliban cell." *See, e.g.*, *id*. ¶ 542. Unlike the Taliban, the Secretary of State has in fact designated al Qaeda as an FTO, Am. Compl. ¶ 16, and so plaintiffs allege that "Al-Qaeda jointly committed, planned, or authorized each of the Taliban attacks that killed or injured plaintiffs or their family members." *Id*. ¶ 464.

Yet in the recent *Atchley* case from this District, plaintiffs made the exact same argument with regard to other non-FTO entities, and the court expressly rejected it. *See Atchley*, 2020 WL 4040345, at *11. In *Atchley*, plaintiffs alleged that insurgent forces called "Jaysh al-Mahdi" had taken over a government ministry, and through their control of that ministry had contracted with and received support from various defendants. *Id.* at *1-2. The problem for plaintiffs, however, was that Jaysh al-Mahdi was not a designated FTO. *Id.* at *10. Plaintiffs thus attempted to tie Jaysh ah-Mahdi to a different group that ***was*** designated as an FTO—there, Hezbollah. *Id.* Yet even though plaintiffs alleged that Hezbollah had "co-found[ed]" Jaysh al-Mahdi "as its terrorist proxy," recruited its fighters, "instruct[ed] those fighters how to execute attacks," and provided religious authorization for those attacks, the court still granted the defendants' motion to dismiss. *Id.* at *11. As the court explained:

> Under plaintiffs' logic, "a plaintiff could bring an ATA aiding-and-abetting claim for any attack committed by a non-FTO merely because it had in the past received 'material support and resources' from a designated FTO." Defs.' Reply in Supp. Mot. ("Defs.' Reply") at 35 [Dkt. # 129]. Unfortunately for plaintiffs, Congress opted for a more limited statute, circumscribing aiding-and-abetting liability to situations where an FTO *itself* had a significant role in a particular attack. *See* 18 U.S.C. § 2333(d)(2). Plaintiffs would erase that limitation entirely and extend liability to circumstances not expressly contemplated by the statutory text.

Id. at *11 (emphasis in original).

So too here. As *Atchley* recognized, simply invoking the name of a separate FTO like al Qaeda is not enough to plead around the statute's limitations. To begin, al Qaeda is separate and distinct from the Taliban. The best evidence of that is the fact that the U.S. Government treats

them separately: The Secretary of State has designated al Qaeda as an FTO, but has not so designated the Taliban. The United States also has reached an "Agreement for Bringing Peace to Afghanistan" with the Taliban, but not with al Qaeda.[30] Although plaintiffs claim that the Taliban and al Qaeda had a "close relationship," were "allie[s]," or at times had "blurred" lines, Am. Compl. ¶¶ 16, 52, 412, 470, plaintiffs do not show that these organizations lost their distinct identities. Nor could they: The Taliban is an organization concerned with reasserting its "shadow government" over Afghan territory, and refers to itself as "the Islamic Emirate of Afghanistan." *Id*. ¶¶ 90, 114 (quotations and brackets omitted). Al Qaeda, by contrast, is an international "Sunni Islamic terrorist organization intent on destroying the United States." *Id.* ¶ 464.

Moreover, plaintiffs do not plausibly allege facts showing that al Qaeda "committed, planned, or authorized" any of the specific attacks identified in the amended complaint. 18 U.S.C. § 2333(d)(2). Instead, they rely principally on either generalized allegations concerning the connection between the Taliban and al Qaeda, or on cursory invocations of al Qaeda in connection with specific attacks, without plausibly alleging facts showing al Qaeda's role in committing, planning, or authorizing those attacks. Neither the general allegations nor the specific references to al Qaeda are sufficient to satisfy § 2333(d)'s FTO requirement.

Generalized Allegations. In a transparent effort at evading § 2333(d)'s FTO requirement, plaintiffs principally rely on generalized allegations that al Qaeda "committed" attacks. These include allegations of al Qaeda's general "support" of, or "close relationship" with, the Taliban. *Id.* ¶¶ 470, 504, 510. Other non-specific allegations suggest that al Qaeda provided support or training that later helped the Taliban carry out categories of attacks, *e.g.*, "Al-Qaeda exported its

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

suicide-bombing expertise to the Taliban through their joint syndicate." *Id.* at ¶ 498; *but see Atchley*, 2020 WL 4040345, at *11 (rejecting secondary liability merely whenever an organization "had in the past received material support and resources from a designated FTO" (quotations omitted)). These allegations fail to actually connect al Qaeda to any of the specific attacks at issue, much less show that those attacks were committed by what plaintiffs term a "dual-hatted" terrorist. Am. Compl. ¶¶ 503, 514. Plaintiffs' generic allegations of a relationship between al Qaeda and the Taliban thus are not enough to support an inference that al Qaeda also jointly committed the hundreds of attacks at issue here. *See Crosby*, 921 F.3d at 626 (affirming dismissal, where "[p]laintiffs make no allegations that ISIS played this role with [the shooter]").

Plaintiffs also do not plausibly allege that al Qaeda "planned" any of the attacks identified in the amended complaint. "To 'plan' means to 'decide on and arrange [it] in advance;' to 'authorize' is to 'give official permission' or 'approval.'" *Atchley*, 2020 WL 4040345, at *10; *see also* Oxford New English Dictionary "Plan," (3d ed. 2010) ("decide on and arrange in advance"). Plaintiffs' allegations on this score are sorely lacking. Plaintiffs allege, for example, that al Qaeda assisted with training conducted in "the mid-2000s" and "[b]y 2005 at the latest," Am. Compl. ¶¶ 477, 489—years before the attacks identified in the amended complaint. Other allegations—*e.g.*, that al Qaeda, the Taliban, and others decided to increase attacks in certain provinces, *e.g.*, *id.* ¶ 494—likewise fail to show that al Qaeda "designed" or "arranged in advance" any specific attack. *See Crosby v. Twitter, Inc.*, 303 F. Supp. 3d 564, 579 (E.D. Mich. 2018) (granting motion to dismiss, where "nothing in the amended complaint even alludes to any contacts or communications between anyone—let alone between ISIS and Mateen—that directly concerned the attack beforehand"); *Crosby*, 921 F.3d at 621 (affirming same, where ISIS did not guide perpetrator through attack, or "ha[ve] anything at all directly to do" with it (citation omitted)).

Plaintiffs also allege that al Qaeda provided "critical religious authorization" for suicide attacks in Afghanistan and Iraq, citing Osama bin Laden's 2003 open "encouragement" of suicide attacks against Americans. Am. Compl. ¶¶ 478, 483. But such general, high-level "encouragement is not enough," *Atchley*, 2020 WL 4040345, at *10—it does not constitute the type of real-world "authorization" necessary to give rise to a secondary-liability claim. *See, e.g., id.* (granting motion to dismiss); *Crosby*, 921 F.3d at 620, 626 (rejecting argument that ISIS authorized attack, where although ISIS encouraged followers to "kill Americans wherever you are," ISIS did not "give official permission for" the attack); *Copeland*, 352 F. Supp. 3d at 974–75 (granting motion to dismiss, where "facts that ISIS sought to 'generally radicalize' individuals and promoted terrorists attacks similar to the one [at issue] are insufficient"). For example, the amended complaint does not (and could not plausibly) allege that the attacks would not have occurred but for al Qaeda's alleged "authorization" or that al Qaeda gave "official permission" for the attacks to go forward. *Crosby*, 921 F.3d at 626. Moreover, plaintiffs' sweeping view of "authorize"—which encompasses general ideological "encouragement" from other extremists—has no limiting principle, and would presumably extend to any and all attacks perpetrated by Islamic terrorist organizations anywhere in the world.

Specific Attacks. In a final attempt to artfully plead around the ATA's statutory limits, plaintiffs allege that numerous attacks were committed by the Taliban ***and*** al Qaeda. *See, e.g.*, Am. Compl. ¶¶ 1605, 2149, 2153, 2399. But, like plaintiffs' general allegations concerning the relationship between the two entities, plaintiffs' unsupported references to al Qaeda in connection with particular attacks are insufficient to plausibly allege that any attacks were in fact committed by al Qaeda. Plaintiffs allege that al Qaeda and the Taliban were members of an al Qaeda-Taliban "syndicate" that "involved periodic mafia-style meetings" during which members would "confer

about geographies and targets to attack," *Id.* ¶ 480, and then attribute numerous attacks to "a joint al-Qaeda-Taliban cell," *e.g.*, *id.* ¶¶ 1728, 1751, 1798, 1876. But plaintiffs allege no facts showing that any "syndicate" or "cell" committed, planned, or authorized the attacks in question. Plaintiffs instead offer only a vague, conclusory allegation that the syndicate "jointly authorized particular types of terrorist attacks in particular geographies." *Id.* ¶ 480. Simply stating, without more, that al Qaeda "provid[ed]" the suicide bomber, "indoctrinate[ed]" the suicide bomber, or "train[ed]" the suicide bomber, *e.g.*, Am. Compl. ¶ 1712—who then, as a member of the Taliban, actually committed the attack at issue—is not enough to transfer responsibility for the attack from one organization to the other. *See Atchley*, 2020 WL 4040345, at *11. Plaintiffs' transparent attempt to evade the statutory limits of the ATA by converting attacks by the Taliban into attacks by al Qaeda should be rejected.

Finally, plaintiffs' attempt to tie the Taliban to al Qaeda ignores that their allegations against LBG concern only the Taliban, and do not establish other secondary-liability prerequisites with respect to al Qaeda. For example, plaintiffs do not allege that LBG aided and abetted al Qaeda with scienter, and there are no allegations that LBG "knowingly provid[ed] substantial assistance" to al Qaeda. *See* 18 U.S.C. § 2333(d)(2); H5240 Cong. Rec. Sept. 9, 2016 (Statement of Rep. Goodlatte) ("Secondary liability should only attach to persons who have actual knowledge that they are directly providing substantial assistance to a designated foreign terrorist organization in connection with the commission of an act of international terrorism."). Thus, even if al Qaeda did commit some of the attacks at issue, LBG cannot be held secondarily liable for those attacks because it is not plausibly alleged to have "substantially assisted" al Qaeda.

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

As explained above, plaintiffs have failed to plausibly allege that a designated FTO "committed, planned, or authorized" any of the specific attacks alleged in the amended complaint.

In an attempt to plead around this statutory requirement, plaintiffs allege in Count 6 that defendants aided and abetted a "Taliban-al Qaeda Campaign," which consisted of a nine-year-long pattern of racketeering activity involving Mullah Omar and "other terrorists" associated with the Taliban and al Qaeda. Am. Compl. ¶ 2608. But this purported "RICO predicate" provides no basis for evading the statute's FTO requirement. Indeed, no court has ever previously endorsed a "RICO predicate" theory under the ATA, and a decision from this District rejected this very theory earlier this year. *See Atchley*, 2020 WL 4040345, at *11. Count 6 should be dismissed.

First, RICO is not an appropriate "predicate" for liability under the ATA. The plain text of the ATA imposes liability for a singular act ("***an act*** of international terrorism"). *See* 18 U.S.C. § 2331. As a matter of law, a violation of the federal RICO statutes—which require "a pattern" of "at least two acts" of criminal activity (18 U.S.C. § 1961 *et. seq.*)—cannot constitute "an act" of international terrorism. *Atchley* recognized as much, finding that "it would be quite unnatural to read [the ATA's] statutory language, as plaintiffs do, to mean that the 'act' causing injury was not the particular attack in which a plaintiff was injured, but instead a collection of hundreds of attacks spanning" many years. *See Atchley*, 2020 WL 4040345, at *11. Here, as in *Atchley*, the alleged RICO predicate offense is far more than "an act"—it is a nine-year pattern of criminal activity including murder, kidnapping, arson, use of weapons of mass destruction, and bombing places of public use. *See* Am. Compl. ¶¶ 2607–2609. This general course of conduct cannot be deemed "an act" under any reasonable reading of the ATA. *See Atchley*, 2020 WL 4040345, at *11.

Second, plaintiffs have not adequately alleged the existence of any RICO enterprise. To establish liability under RICO, "one must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Feld Entm't Inc. v. Am. Soc'y for the Prevention of Cruelty to Animals*, 873 F. Supp. 2d

288, 313 (D.D.C. 2012). Plaintiffs must plausibly allege that LBG "conducted or participated in the enterprise's affairs, not just [its] *own* affairs." *See id.* at 314. The RICO conduct alleged by plaintiffs is nothing more than "the affairs of the Taliban." Am. Compl. ¶ 2608. Plaintiffs do not plausibly allege that any specific defendant, let alone LBG, assisted in any particular RICO offense, and thus have not distinguished any RICO defendant from any RICO enterprise. *See United States v. Philip Morris U.S.A. Inc.*, 566 F.3d 1095, 1113 (D.C. Cir. 2009). Even if plaintiffs could allege a RICO enterprise that al Qaeda "committed, planned or authorized," they have not alleged that LBG "substantially assisted" that enterprise, as required to plead aiding-and-abetting liability under the ATA. *See supra* Part II.A. There is no basis for plaintiffs' suggestion that LBG "substantially assisted" or "knowingly assumed a role" in the RICO crimes such as "hostage taking," "murder," or "use of weapons of mass destruction." Am. Compl. ¶ 2609; *Siegel v. HSBC N. Am. Holdings, Inc.*, 933 F.3d 217, 224–25 (2d Cir. 2019).

Third, even if plaintiffs could plausibly allege that a Taliban-al Qaeda Campaign actually existed and constituted a RICO violation, plaintiffs fail to plead the remaining elements of an aiding-and-abetting claim. Plaintiffs have not plausibly alleged that al Qaeda "committed, planned, or authorized" any of the various crimes that allegedly comprised the Taliban-al Qaeda Campaign. *See supra* Part II.B. The amended complaint fails to plead any facts showing that al Qaeda was in any way involved in the laundry list of alleged RICO crimes, much less that al Qaeda "committed, planned or authorized" any one of them. *See supra* Part II.B. Count 6 therefore fails as a matter of law.

CONCLUSION

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

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 10th day of September 2020, the foregoing was electronically transmitted to the Clerk of Court using the CM/ECF system, which will transmit notification of such filing to all registered participants.

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