IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AUGUST CABRERA, et al.,

Plaintiffs,

v.

BLACK & VEATCH SPECIAL PROJECTS CORPORATION, et al.,

Defendants.

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

ORAL ARGUMENT REQUESTED

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

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INTRODUCTION

The war in Afghanistan is the longest in our nation's history. Thousands of Americans have been killed or wounded. These include employees of contractors who responded to the U.S. government's call to rebuild Afghanistan and alleviate the crippling poverty and lack of infrastructure that led to the Taliban's rise. Black & Veatch Special Projects Corporation ("BVSPC") was one of the contractors that responded to the government's call. Its employees risked their lives to bring power, water, transportation, and other essentials to a country devastated by years of war. Nothing in this motion is intended to impugn the service members that were injured or killed during the war in Afghanistan or to deny the suffering of their loved ones. But BVSPC did not cause the tragic injuries and deaths alleged in the Amended Complaint.

The gravamen of the Amended Complaint is not that civilian contractors like BVSPC committed terrorist attacks, but that they paid protection money that funded attacks by the Taliban and the Haqqani Network, in violation of the Anti-Terrorism Act ("ATA"). Thus, one would expect the Amended Complaint to primarily allege an aiding and abetting case. But the ATA's aiding and abetting provisions specifically require a terrorist act by a designated Foreign Terrorist Organization ("FTO"). And the U.S. Government has intentionally never designated the Taliban an FTO. Nor did it so designate the Haqqani Network until after BVSPC's alleged misconduct. And although al-Qaeda *was* a designated FTO, BVSPC is not alleged to have paid al-Qaeda, let alone joined in a common cause with it.

The Amended Complaint tries to work around this fatal problem by shoehorning its aiding and abetting claims into a *primary* liability case against BVSPC—as if BVSPC *itself* had committed terrorist attacks. This effort fails. The Amended Complaint fails to plead that BVSPC or the Joint Venture in which it participated committed acts of terrorism, that they intended to support terrorist acts, or that they committed the necessary predicate violations of U.S. law. It also

fails to satisfy the ATA's rigorous proximate cause standard, presenting no more than conclusory allegations that BVSPC or the Joint Venture caused the plaintiffs' injuries. The Amended Complaint contains no factual allegations that anyone from BVSPC ever met with any Taliban representative, made any "protection" payment to the Taliban, or, of course, participated in any attack by the Taliban, the Haqqani Network, or any other organization.

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

BACKGROUND

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

A. The Taliban Is Not al-Qaeda nor the Haqqani Network, and Has Never Been Designated as a Foreign Terrorist Organization

The Amended Complaint attempts to fuse together the Taliban, al-Qaeda, and the Haqqani Network into what they call a "terrorist superstructure" or "syndicate."[1] But to the U.S. government, they are separate organizations with separate legal statuses.

In 1996, following a series of civil wars, the Taliban became the ruling government of Afghanistan.[2] After al-Qaeda's attacks on New York and Washington on September 11, 2001, and after the Taliban government refused to turn over al-Qaeda leaders based in Afghanistan, the United States invaded Afghanistan.[3]

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[1] Am. Compl. ¶¶ 412-63.

[2] Central Intelligence Agency, *World Factbook, Afghanistan*, ("A series of . . . civil wars saw Kabul finally fall in 1996 to the Taliban."), *https://www.cia.gov/library/publications/the-world-factbook/geos/af.html* ("CIA World Factbook, Afghanistan"); *see also* Am. Compl. ¶ 40 (describing the Taliban as the "interim government" of Afghanistan before 9/11).

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

From the beginning of this campaign, the United States distinguished between the Taliban and al-Qaeda. President Bush applied the Geneva Conventions to Taliban detainees—but not al-Qaeda detainees—because Geneva applies only to "states."[4] Subsequent U.S. administrations of both parties continued to emphasize the "importan[ce]" of "draw[ing] a distinction between the Taliban and al-Qaeda."[5] This strategically important distinction was reflected in law: Although the Secretary of State designated al-Qaeda as a "foreign terrorist organization" in 1999 (and the Haqqani Network on September 19, 2012), the U.S. has never designated the Taliban as an FTO.[6] Instead, the U.S. government has engaged in formal, diplomatic-style negotiations with the Taliban—recently resulting in a tentative peace agreement.[7]

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

Since invading Afghanistan, the U.S. government has worked to rebuild and improve infrastructure in Afghanistan. As one of the Amended Complaint's primary sources explains, when the U.S. arrived in 2001, "[t]he few paved roads that existed hadn't been maintained since they were built in the 1960s. There was virtually no power generation capacity."[8] In a speech on April

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

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

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

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

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

17, 2002, President Bush spoke of the need for a Marshall-like Plan for Afghanistan: "By helping to build an Afghanistan that is free from this evil and is a better place in which to live, we are working in the best traditions of George Marshall."[9] In the same speech, he specifically noted the importance of "rebuilding roads" and "improving medical care." The U.S. Agency for International Development ("USAID") oversaw much of this work.[10]

Part of USAID's aim was to train and employ native Afghans. As a USAID administrator told Congress: "[o]ne of the fundamental tenets of USAID's program [was], wherever possible, to train and transfer skills to Afghans. This will allow Afghans to participate in their country's development and will lead to greater sustainability."[11] In addition to Afghan labor, USAID needed the expertise and resources of companies capable of large-scale infrastructure projects. As discussed below, to obtain the needed expertise and resources while "tranfer[ing] skills to Afghans," USAID required as BVSPC to subcontract to Afghan labor.

BVSPC worked primarily on two USAID-led reconstruction projects in Afghanistan: (i) the Afghan Infrastructure Rehabilitation Project ("AIRP"), which began in late 2006 and on which BVSPC worked as part of a joint venture (the "Joint Venture") with the Louis Berger Group

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

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

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

("Louis Berger"), and (ii) the Kandahar-Helmand Power Project ("KHPP"), which BVSPC began working on in 2010.[12]

II. The Amended Complaint's Allegations Against BVSPC

The Amended Complaint does not allege that anyone from BVSPC ever met with the Taliban, made any specific payment to the Taliban, or participated in any Taliban attack. At best, it alleges that "protection" payments were extorted from the Joint Venture and its subcontractors, at unspecified times, and that certain unnamed Joint Venture officials believed some of these funds were "going to the Taliban."[13] As explained in greater detail below, these allegations are insufficient, for multiple reasons, to survive a motion to dismiss.

The allegations as to *BVSPC*, specifically, are thin at best.

First, the Amended Complaint conflates BVSPC with other defendants. It claims, for example, that the Louis Berger Group's and BVSPC's "payments were consistent with USAID implementers' standard operating practice on projects with comparable funding profiles, security risks, and geographical coverage."[14] But the Amended Complaint makes an almost identical,

[12] Although the BVSPC-specific section of the Amended Complaint also discusses the USAID Rehabilitation of Economic Facilities Program ("REFS"), a close reading of the Amended Complaint shows (correctly) that BVSPC was *not* involved in that project, which took place between 2002 and 2007. *See* Am. Compl. ¶ 247(a) (noting that "USAID awarded *Louis Berger*" a REFS Program contract in 2002 (emphasis added)).

[13] *See, e.g.*, Am. Compl. ¶ 262 (alleging that the "Taliban was demanding money as the price of allowing projects to move forward"), ¶ 277 (alleging ties between a Joint Venture subcontractor and the Haqqani Network")).

[14] Am. Compl. ¶ 249.

boiler-plate style allegations against the Armor Group,[15] DAI,[16] ECC,[17] EDOT,[18] IRD,[19] and Chemonics defendants.[20] Moreover, the Amended Complaint says little about how all these entities had "comparable funding profiles, security risks, [or] geographical coverage,"—other than the mere fact they worked in Afghanistan at times between roughly 2002 and 2017. In fact, elsewhere, the 520-page amended Complaint admits that the "details varied" among the different contractors' work and that certain defendants "worked on development projects, others provided private-security services, while another operated a cellular-telephone network"—to say nothing of the geographical and temporal differences among the different projects.[21]

The Amended Complaint also claims to rely on "confidential sources" for general propositions about BVSPC's supposed "standard operating practices." But these sources include "former U.S. government officials, academic and other experts, and industry participants," not BVSPC insiders. The Amended Complaint neither explains why these sources would need to be "confidential," nor why they would know anything about *BVSPC's* activity.

Even in the section of the Amended Complaint supposedly focused on BVSPC, Plaintiffs' counsel devotes substantial space to projects that Louis Berger alone—and not BVSPC or the Joint Venture—undertook. As the Amended Complaint acknowledges, BVSPC worked in Afghanistan for only a portion of the time Louis Berger did and did not participate in the USAID REFS

[15] Am. Compl. ¶ 149.

[16] Am. Compl. ¶ 184.

[17] Am. Compl. ¶ 219

[18] Am. Compl. ¶ 232.

[19] Am. Compl. ¶ 382.

[20] Am. Compl. ¶ 404.

[21] Am. Compl. ¶ 3.

Project—the subject of many of the factual allegations in this section of the Amended Complaint. Thus, the Amended Complaint's allegations regarding the Kabul-Kandahar Highway (a "REFS" Program project) have nothing to do with BVSPC.[22] Similarly, the 11 paragraphs the Amended Complaint devotes to malfeasance by a security company, USPI, in overbilling the REFS program, do not apply to BVSPC.[23] The one paragraph that references USPI in connection with the Joint Venture simply alleges that, in 2007, a local Taliban commander induced a Louis Berger security subcontractor to make a payment, via a hawala broker, by firing a rocket propelled grenade "at a [Louis Berger] construction site."[24] In any event, there is no tie between this supposed payment and any attack on American troops. Moreover, the alleged payment occurred in 2007, at least two years before any attack referenced in the Amended Complaint (and hundreds of miles away from many of the attacks).

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

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[22] Am. Compl. ¶¶ 253. As discussed above, the REFS Program involved only Louis Berger and took place between 2002 and 2007.

[23] Am. Compl. ¶¶ 254-64; *see also* Indictment, *United States v. United States Protection and Investigations, LLC, et al.*, No. 08 cr. 306, ECF No. 3 (D.D.C. Sept. 30, 2008) ("USPI Indictment"), ¶ 27 ("It was the purpose of the conspiracy for the defendants to unlawfully enrich themselves by fraudulently inflating USPI's incurred expenses and profits under REFS subcontracts."), cited in Am. Compl. ¶ 258 n.321.

[24] Am. Compl. ¶ 257.

With respect to Kajaki Dam, the Amended Complaint relies largely on a 2011 article from *GlobalPost*, an online journalism site. Plaintiffs assert the article proves that BVSPC "paid the Taliban to refrain from attacking [its] business interests."[25] It does no such thing. Most of the article concerns the peril facing contractors and U.S. forces working on the dam, and the importance to USAID of "[g]etting power to Helmand and Kandahar" while keeping contractors safe in a dangerous region.[26] Only once does the article talk about payments to insurgents, and it does so in the future tense, as a potential, speculative price for a ceasefire between the Taliban and the U.S.-led coalition: "[E]ven *if* some sort of deal is struck, it *will* almost certainly involve massive payments to the insurgents" and that contractors "working in the area will be forced to pay some sort of premium for protection, which *will likely* go to the Taliban."[27] A journalist's speculation that something might happen is not a basis to allege that it actually happened.

The Amended Complaint's allegations regarding the Joint Venture's work in the "P2K" region, especially the Gardez-Khost Road project, fare no better. As alleged, the Joint Venture worked on the Gardez-Khost Road between May 2007 and March 2012, meaning its work ended six months before the U.S. government designated the Haqqani Network as a foreign terrorist organization. The Amended Complaint alleges that, at a pre-project meeting with tribal elders—years before the vast number of the attacks referenced in the Amended Complaint—"100"

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[25] *See* Am. Compl. ¶¶ 1, 269 n.329 (citing Jean MacKenzie, *Watershed of Waste: Afghanistan's Kajaki Dam & USAID*, GlobalPost, Oct. 11, 2011, https://www.pri.org/stories/2011-10-11/watershed-waste-afghanistan-s-kajaki-dam-and-usaid ("MacKenzie Article")).

[26] MacKenzie Article.

[27] *Id.* (emphasis added). The other article cited by plaintiffs in this section similarly reports that insurgent violence *prevented* the reconstruction of Kajaki Dam—undercutting any argument that BVSPC somehow "bought the peace" to further its business interests. *See* Megan Rose, *Afghanistan Waste Exhibit A: Kajaki Dam, More Than $300M Spent & Still Not Done*, Pro Publica (Jan. 19, 2016) ("By then it was clear Kajaki Dam was smack in the middle of the Taliban resurgence.")

individuals arrived and that one "shaken" American contractor believed the individuals were "Taliban [and] they're going to kill us."[28] According to the Amended Complaint, the Joint Venture "promis[ed] to hire" these individuals to work on the road project. As noted above, as part of the overall U.S. government strategy for Afghanistan, USAID's contracts with BVSPC required maximum use of Afghan local labor (and even ex-combatants).[29] In any event, this allegation at most shows that the Joint Venture made a promise under duress to hire these local Afghans to help build a road, not to conduct terrorism.

The Amended Complaint also references a purported Joint Venture subcontractor on the road project, Haji Khalil Zadran Construction Company ("HZKCC") and findings—without citation—by the U.S. government that HZKCC was a "front" for the Haqqani Network.[30] The Amended Complaint does not allege, however, when these findings were made, whether they were made known to the Joint Venture, or whether they were otherwise published. The Federal Register indicates that HZKCC was "determined by the U.S. Government to be acting contrary to the

[28] Am. Compl. ¶ 272.

[29] *See, e.g.*, USAID Contract, AID-306-I-00-06-00517-00 (cited in Am. Compl. ¶ 247(b)) ¶ C.7.4. ("[T]he contractor is strongly encouraged to sub-contract with local NGOs, local offerors, and other Afghan entities in the implementation of the program . . . [i]t is essential that attempts are made to give priority to employing local entities – particularly those former Soldiers (ex-combatants) who participated in the DDR program."); USAID Contract KHPP 306-C-11-0506 (cited in Am. Compl. ¶ 247(d)) ¶ C.4.2. ("The Contract shall accomplish construction work by subcontracting with Afghan subcontractors to the maximum extent possible . . . . Contractor shall use its best efforts to subcontract a minimum of ten percent . . .with a desirable target of thirty percent . . of first tier subcontracts, by monetary value, to Afghan-owned subcontractors.")

[30] Am. Compl. ¶ 277.

national security" only on April 27, 2012,[31] *after* the Joint Venture's work on the Gardez-Khost Road ended.[32]

Beyond this, the Amended Complaint relies largely on a New York Times article about the road (which the article explains was a complex and dangerous project that the U.S. Government considered vital) and a "Mr. Arafat."[33] The Amended Complaint describes Arafat as a "Haqqani cutout" [34]—implying he was associated with the Haqqani Network—and alleges that the Joint Venture used him despite the U.S. Government's decision to bar him from USAID contracts.

The article paints a different picture. According to the article, a Joint Venture subcontractor, at the behest of local Afghan government officials, hired Arafat to provide security forces for the project. In 2009, USAID and the U.S. military investigated Arafat but found insufficient evidence of ties to the insurgency to support removing him from USAID projects or taking other action. Two years later, the U.S. government, after apparent re-investigation, "finally moved to cut Arafat off" and remove him from USAID projects. Importantly, even this was more

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[31] *See* Addition of Certain Persons to the Entity List, 77 FR 25055, *available at https://www.federalregister.gov/documents/2012/04/27/2012-10104/addition-of-certain-persons-to-the-entity-list* (Apr. 27, 2012).

[32] *Cf.* Am. Compl. ¶ 271 (indicating that the Joint Venture's work on the road project ended in March 2012).

[33] Am. Compl. ¶¶ 273-275 (citing Alissa J. Rubin and James Risen, *Costly Afghanistan Road Project is Marred by Unsavory Alliances*, N.Y. Times, May 1, 2011, https://www.nytimes.com/2011/05/01/world/asia/01road.html ("Rubin Article")). Plaintiffs also quote the following statement from an Indian news article: "'it should come as no surprise that . . . Commander Arafat, who was hired to provide security for the project, ended up being a conduit for payoffs to the Haqqanis.'" *See* Am. Compl. ¶ 276. But the author of that article is not relying on any independent reporting. He is simply attempting to summarize what was reported in the New York Times article. As demonstrated above in Background Section II, his summary is wholly inaccurate. The New York Times article never concludes that Mr. Arafat was a conduit for payments to the Haqqani Network.

[34] Am. Compl. ¶ 273.

than a year and a half before the Haqqani Network was designated as an FTO. There are no allegations that the Joint Venture's subcontractor paid Arafat after that designation.[35]

Indeed, the Amended Complaint's own sources make clear that the Joint Venture did not "buy the peace" on the Gardez-Khost Road, or anywhere else. To buttress their allegations, Plaintiffs' counsel rely on misleading quotations from a June 2012 letter from the Joint Venture's country security manager to the country manager for ISS-Safenet ("ISSS"), a security subcontractor. In the letter, the Joint Venture's security manager thanks ISSS for its work on the AIRP project, in particular on the Gardez-Khost Road:

> The area . . . had many challenges . . . . The alignment bisects the strategically important "Zadran Arc", where many people have felt neglected for years by the central government and were reluctant to support the project . . . . One of the most notorious groups, *the Haqqani Network, was particularly well-embedded due to many family ties in villages occupying key terrain.*
>
> Your management team adapted quickly to the situation and developed a new concept of operations that employed a mix of mobile groups and static forces with a robust command and control system. That *plan* also *emphasized the criticality of good relations with local communities* and was executed in concert with AIRP's own community development efforts. There were many trying days. Your mobile teams were an enormous support . . . . your people literally bled with us, and it will not be forgotten.[36]

The Amended Complaint cites only the italicized portions above, offering attorney say-so that "the criticality of good relations with the local communities" is a "euphemism" for paying protection money to insurgents.[37] But when the letter is read without omitting critical words, the

[35] *See* Am. Compl. ¶ 273 n.333 (citing Rubin Article (payments to Mr. Arafat occurred primarily in 2009 and Arafat was disqualified as subcontractor prior to article publication on May 1, 2011)); FTO Listing (Haqqani Network designated as FTO on September 19, 2012).

[36] Exhibit 1, Letter from R. Rademeyer to M. Le Roux, June 25, 2012, cited in Am. Compl. ¶ 274 n.337.

[37] Am. Compl. ¶ 274.

meaning is clear: security forces, acting "in concert with AIRP's own community development efforts," sought to maintain good relations with the local populace, in keeping with official U.S. military counterinsurgency doctrine. And the notably unquoted statement that "your people literally bled with us" refutes any notion that the Joint Venture or its security subcontractors obtained their security by paying off insurgent groups.

Finally, the Amended Complaint attempts to smear BVSPC for supposedly "related misconduct" that is neither related nor misconduct by BVSPC.[38] First, the Amended Complaint cites two criminal cases involving Louis Berger. These cases do not involve BVSPC or the Joint Venture, and do not involve the AIRP project.[39] Second, the Amended Complaint cites the prosecution of the Joint Venture's security manager, Scott "Max" Walker.[40] But the Statement of Facts in that case, cited in the Amended Complaint, shows those charges were not "similar" or "related" to the allegations here. Instead, Walker schemed "to pass along inside information" regarding the bidding for security contracts to U.S. and other Western-based vendors who paid him kickbacks.[41] This conduct victimized the Joint Venture, whose confidential information Walker misappropriated. When it learned of Walker's activity, the Joint Venture fired Walker, and self-reported his conduct to USAID's Inspector General.[42] And while the Amended Complaint makes allegations about a various accounting irregularities uncovered in an audit, there were no

[38] Am. Compl. ¶ 280.

[39] Am. Compl. ¶¶ 280-84

[40] Am. Compl. ¶ 285 n.351 (citing Statement of Facts ¶ 7, *United States v. Walker*, No. 09 cr. 00478, ECF No. 27 (E.D. Va. Nov. 16, 2009) ("Walker Statement of Facts")).

[41] Walker Statement of Facts ¶ 8.

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

findings that BVSPC or the Joint Venture were funding terrorists.[43] To be clear, the government has never brought any actions—civil or criminal—against BVSPC for its work in Afghanistan, despite rigorous auditing and oversight as well as political and media scrutiny.

APPLICABLE LAW

I. Statutory Background

A. The Anti-Terrorism Act

Under the ATA, a U.S. national may seek recovery—in the form of treble damages—for an injury to his person or property "by reason of an act of international terrorism."[44]

The term "international terrorism" is defined as an activity that (A) is either "violent" or "dangerous to human life" and which is in violation of state or federal criminal law, or would be if it occurred in the United States; (B) appears to be intended to coerce or intimidate civilians, to influence government policy by coercion, or to affect government conduct through mass destruction, assassination, or kidnapping; and (C) occurs largely outside the United States.[45]

Before 2016, ATA claims could be pursued only on primary liability theory: no one apart from the "principals perpetrating acts of international terrorism" was subject to such a claim.[46]

In September 2016, Congress amended the ATA by enacting the Justice of Against Sponsors of Terrorism Act ("JASTA"), to allow for secondary liability in narrow circumstances: where a person "knowingly" (1) "aids and abets, by . . . provid[ing] substantial assistance" to "or

[43] Am. Compl. ¶ 265-66.

[44] 18 U.S.C. § 2333(a).

[45] 18 U.S.C. § 2331(1).

[46] *Linde v. Arab Bank, PLC*, 882 F.3d 314, 319-20 (2d Cir. 2018).

. . . conspires with" a person who (2) committed an "act of international terrorism" that was "committed, planned, or authorized by" designated foreign terrorist organization.[47]

Merely pleading the elements of 18 U.S.C. §§ 2339A or 2339C is insufficient to state a claim for either primary or secondary liability.[48]

B. Designated Foreign Terrorist Organizations

Secondary liability under the ATA arises only for "an act of international terrorism committed, planned, or authorized by" a designated FTO. *See* 18 U.S.C § 2333.

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

The Secretary of State has designated over 65 organizations as FTOs.[49] Some are obscure, like the "Continuity Irish Republican Army" and the "Communist Party of the Philippines,"[50] while others, like ISIS, are more well-known.[51] The Taliban, however, has never been designated an FTO. And the Haqqani Network was designated an FTO only on September 19, 2012, months *after* the Joint Venture's work ended on the Gardez-Khost Highway.[52]

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[47] 18 U.S.C. § 2333(d).

[48] *Linde*, 882 F.3d at 326.

[49] FTO Listing.

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

[51] FTO Listing.

[52] *Id.*; Am. Compl. ¶ 271.

II. Standards on a Motion to Dismiss

To survive a motion to dismiss, the Amended Complaint must set forth a claim that is "plausible on its face."[53] A claim is "plausible" if the Amended Complaint "sets forth factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[54] Although the Court must accept as true the plaintiff's factual allegations and draw all reasonable inferences in favor of the plaintiff, the Court "need not accept inferences unsupported by facts or legal conclusions cast in the form of factual allegations," nor must it accept any allegations insofar as they contradict either exhibits to the Amended Complaint or materials incorporated by reference through quotation and citation.[55]

A federal court may take judicial notice of "a fact that is not subject to reasonable dispute" if it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."[56] Courts frequently take judicial notice of U.S. government officials' statements, particularly where they reflect a position of the U.S. government.[57]

Where a complaint asserts claims against multiple defendants, Rule 8(a) requires that the Amended Complaint plainly delineate which claims and allegations apply to which defendant, so each party is placed on fair notice of the specific claims against it and the grounds on which they

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

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

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

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

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

rest.[58] "[A] plaintiff cannot rely upon a generalized term like 'defendants' to obfuscate each defendant's role in the alleged conduct or the legal theory of liability on which [it] is relying."[59] A complaint's "use of either the collective term 'Defendants' or a list of the defendants named individually but with no distinction as to what acts are attributable to whom" makes it "impossible for any of these individuals to ascertain what particular . . . acts they are alleged to have committed" and cannot support a claim against the individual defendant.[60]

Finally, while a court may consider confidential source allegations in assessing the sufficiency of a complaint, "the witnesses must be 'described in the complaint with sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged.'"[61]

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[58] *Brett v. Attorney Gen. of U.S.*, No. 08 Civ. A. 1436, 2008 WL 3851555, at *1 (D.D.C. Aug. 19, 2008) (dismissing complaint where factual allegations did not allow the court to "discern what claim or claims [plaintiff] brings against each defendant"); *see also Toumazou* v. *Turkish Republic of N. Cyprus*, 71 F. Supp. 3d 7, 21 (D.D.C. 2014) ("[A] plaintiff cannot satisfy the minimum pleading requirements . . . by 'lumping all the defendants together in each claim and providing no factual basis to distinguish their conduct.'" (quoting *Atuahene v. City of Hartford*, 10 Fed. App'x 33, 34 (2d Cir. 2001)).

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

[60] *Robbins v. Okla.*, 519 F.3d 1242, 1250 (10th Cir. 2008). *See also Martin v. City of New York*, No. 07 Civ. 7384, 2008 WL 1826483, at *1 (S.D.N.Y. Apr. 23, 2008); *Toumazou*, 71 F. Supp. 3d at 21 (quoting *Atuahene*, 10 F. App'x at 34); *Bates v. Nw. Human Servs., Inc.*, 466 F. Supp. 2d 69, 85 (D.D.C. 2006) (dismissing RICO claim where plaintiffs "generally neglect to distinguish between the defendants when describing the factual underpinnings of the complaint"); *Embree v. Wyndham Worldwide Corp.*, 779 F. App'x 658, 661 (11th Cir. 2019) (affirming dismissal of "shotgun pleading" complaint that "pervasively lumped separate companies together in a conclusory fashion, treated separate companies as a single entity without explanation, and failed to differentiate the allegations against each defendant so that each could identify its allegedly improper conduct").

[61] *Schiro v. Cemex, S.A.B. de C.V.*, 396 F. Supp. 3d 283, 305 (S.D.N.Y. 2019) (quoting *Novak* v. *Kasaks*, 216 F.3d 300, 314 (2d Cir. 2000)).

ARGUMENT

The reality of ATA cases is that the perpetrators and their actual supporters are typically outside of U.S. jurisdiction and effectively judgment proof. This has resulted in an array of cases against deeper pocketed, domestic companies for allegedly supporting those perpetrators, typically in attacks that those companies do not condone. Companies such as Twitter, HSBC, Deutsche Bank, National Westminster Bank and, most recently in this Court, General Electric, Johnson & Johnson, and Pfizer, among others, have all been the subjects of ATA lawsuits accusing them of supporting terrorism. In response, courts have not shied from dismissing ATA cases at the pleading stage, especially where they allege in conclusory fashion that defendants indirectly supported groups that committed terrorist attacks.[62] This is such a case.

The primary liability claims (Counts One, Three, and Four) fail because the Amended Complaint fails to plead that BVSPC committed an "act of international terrorism" by paying subcontractors that, along with providing legitimate services, allegedly made protection payments to the Taliban to prevent fatal attacks on their own personnel. These claims also fail for the additional, independent reason that they do not meet the ATA's rigorous proximate causation requirement.

The secondary-liability claims (Counts Five and Six) fail too. First, secondary liability under the ATA applies only where the entity being aided and abetted is an FTO. But the Taliban is not an FTO. The Amended Complaint's attempts to merge the Taliban with al-Qaeda (an FTO, but not one that BVSPC is alleged to have paid) and the Haqqani Network (eventually designated

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

an FTO, but after BVSPC's alleged indirect dealings) impermissibly blur the distinctions between these groups established by the Executive Branch and incorporated into the ATA by Congress. The Amended Complaint also fails to plead that BVSPC knowingly "substantially" assisted the underlying conduct. Lastly, the RICO claim in Count Six fails because RICO applies only to domestic injuries and is incompatible with the Amended Complaint's ATA theories.

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

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

Counts One, Three, and Four allege direct liability under the ATA. To state such a claim, the Amended Complaint must allege, among other things, that: (A) BVSPC's conduct constituted acts of "international terrorism," and (B) BVSPC's actions were the proximate cause of Plaintiffs' injuries. The Amended Complaint fails on both points, either of which would require dismissal.

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

To be primarily liable under the ATA, a defendant must have committed an act of international terrorism, defined as an act that:

> involves violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; ***and***
>
> Appears to be intended to (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government.[63]

[63] 18 U.S.C. § 2331(1) (emphasis added). The definition also requires that the violent acts occur primarily outside the territorial jurisdiction of the United States or transcend national boundaries.

BVSPC's alleged payments do not qualify as acts of terrorism because (1) they were not objectively intended to intimidate or coerce, (2) they were not violent acts, and (3) they were not crimes that could support primary ATA liability.

1. The Amended Complaint Fails to Plead Objective Terrorist Intent

The Amended Complaint must show that BVSPC's actions objectively "appear to be intended" to intimidate or coerce civilians, influence government policy through intimidation or coercion, or affect government conduct by mass destruction, assassination, or kidnapping.[64] For primary liability, a defendant's *own actions* must meet that standard as judged by an "objective observer."[65] There are no allegations that BVSPC actually intended to influence government policy through intimidation or coercion or affect government conduct by mass destruction, assassination, or kidnapping. Rather, the gravamen of the Amended Complaint is that BVSPC or the JV paid subcontractors for security, who provided security in part by paying protection money. This cannot satisfy the objective terroristic intent element as a matter of law.

The Seventh Circuit dealt with a similar situation in *Kemper*.[66] There, the court held that Deutsche Bank's alleged knowing facilitation of Iranian banking transactions would appear to an objective observer to have been "motivated by economics," and not by a desire to intimidate or

[64] 18 U.S.C. § 2331(1)(B); *see also Weiss v. Nat'l Westminster Bank PLC*, 768 F.3d 202, 207 n.6 (2d Cir. 2014).

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

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

coerce."[67] Thus, Deutsche Bank's alleged conduct did not meet the ATA's definition of international terrorism as required for primary liability under the ATA.[68]

The same is true here. The Amended Complaint does not and cannot allege that the purpose behind BVSPC's conduct was, for example, to "intimidate and coerce the civilian population of Afghanistan to abide by a severe form of Islamic Sharia law," or to "intimidate and coerce the U.S. government . . . to withdraw Coalition personnel from Afghanistan[.]"[69] Rather, the Amended Complaint alleges BVSPC or the Joint Venture (through unspecified payments to subcontractors) "paid the Taliban to refrain from attacking their business interests" and "[t]o protect those businesses and grow their profits."[70] It also repeatedly alleges that the Taliban obtained "protection" payments from the defendants through "extortion," like a shopkeeper targeted in a mafia protection racket, forced to pay money that may be used for illegal operations that the

[67] 911 F.3d at 390; *see also Zapata v. HSBC Holdings, PLC*, 414 F. Supp. 3d 342, 358 (E.D.N.Y. 2019) (rejecting allegation that defendant acted with apparent intent to intimidate because "Plaintiffs' complaint unmistakably sets forth . . . a plausible alternative explanation for HSBC's conduct: greed").

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

[69] Am. Compl. ¶ 414 (describing goals of the Taliban). Indeed, even accepting the Amended Complaint's theories, it would be non-sensical for U.S. contractors to want the U.S. to withdraw from Afghanistan, as it would mean an end of their "lucrative businesses." Am. Compl. ¶ 1.

[70] Am. Compl. ¶¶ 1, 3; *accord* ¶ 268 ("The LBG/BV Defendants made those payments *because they viewed them as a necessary cost of doing business efficiently*."); ¶ 270 (alleging, in conclusory fashion, that the Joint Venture and BVSPC "paid 'hefty fees' to the Haqqanis *to secure their projects* throughout the region." (emphasis added)).

shopkeeper does not support or condone.[71] In either case, as in *Kemper*, "to the objective observer," any purported protection payments "were [allegedly] motivated by economics" (or by fear), not by a desire to "intimidate or coerce" the governments or people of the United States or Afghanistan.[72]

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

The Amended Complaint also fails to allege that BVSPC's conduct involved "violent acts or acts dangerous to human life. . . ."[73] There is nothing inherently "violent" or "dangerous" about BVSPC's alleged conduct of paying money to security subcontractors.[74]

As explained in *Kemper*, a significant difference exists between direct donations to a terrorist organization,[75] and "doing business with companies and countries that have significant

[71] Am. Compl. ¶¶ 63, 81, 86, 106, 123, 205, 252, 278. Extortion is "the practice or instance of obtaining something by illegal means, as by force or coercion." Black's Law Dictionary (11th ed. 2019).

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

[73] 18 U.S.C. § 2331(1)(A).

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

[75] *See, e.g.*, *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 687-88 (7th Cir. 2008) (en banc). In *Boim*, the Seventh Circuit held that donating money to a terrorist organization could give rise to primary liability under the ATA. *Id.* at 690. But this non-binding decision came before JASTA's enactment (creating secondary liability), the D.C. Circuit has questioned it, *Linde*, 882 F.3d at 327, and courts in the Seventh Circuit appear to consider it to have been "clarified by *Kemper*." *Retana v. Twitter, Inc.*, 419 F. Supp. 3d 989, 995 (N.D. Tex. 2019).

legitimate operations."[76] The latter is not inherently dangerous to human life.[77] Thus, the Seventh Circuit rejected an argument that Deutsche Bank's provision of financial services to Iran was a violent act despite Iran's well-known support for Hezbollah.[78] Likewise, here, payments to legitimate subcontractors are not an inherently "violent act."

Further, the Amended Complaint fails to allege non-conclusory facts to support its allegations against Black & Veach SPC and the Joint Venture. A careful review of the section entitled "LBG/BV defendants" reveals few specifics regarding the activities of BVSPC or the Joint Venture. There is no evidence of any specific payment made by BVSPC, ever, let alone any payment to the Taliban. Rather, it alleges a general practice among contractors in Afghanistan and a suspicion by some Joint Venture personnel that security contractors must be making payments to insurgents. Beyond that:

- The allegations at paragraphs 253 to 264 are directed at Louis Berger, not at the Joint Venture or BVSPC, other than by making conclusory references concerning the Joint Venture
- The allegations at paragraphs 265, 266 and 280 to 285 do not appear to have anything to do with funding insurgents, but rather unrelated charges of embezzlement and solicitation of kickbacks against individual employees;
- The allegations at paragraph 269 are based on a journalist's theory that the Kajaki Dam would only get built if BVSPC or its subcontractors *were to* pay off insurgents—not that they actually did;
- The allegations at paragraphs 271 and 272, though described vividly, are simply that the Joint Venture told a group that included Taliban fighters, in a situation in

[76] *Kemper*, 911 F.3d at 390. For example, USAID even recommended USPI in its contract with the JV. 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").

[77] *Id.*

[78] *Id.* at 389.

which one attendee feared being killed, that money and jobs would be coming to them, on a legitimate, vital infrastructure project;

- The allegations at paragraphs 273 to 278 attempt to tar the joint venture by association with a construction sub-contractor, the Haji Khalil Zadran Construction Company, and a sub-subcontractor, Mr. Arafat. But there is no indication from the Amended Complaint that the Joint Venture was committing any "violent act" by retaining (or indirectly retaining) these contractors, and retaining local contractors to the maximum extent possible was required by both the AIRP contract and by the KHPP contract. Moreover, as discussed above, the U.S. government concluded in 2009 that there was insufficient evidence of Arafat's ties to any insurgent group to take action against him; it was not until April 2011 that the U.S. government "finally moved to cut Arafat off," and he no longer provided security for any USAID projects, including for those of the Joint Venture. Likewise, the U.S. Government did not condemn the Haji Khalil Zadran Construction Company until after the completion of the project. Hiring contractors or sub-contractors that are *later* determined to be acting against the United States is not an inherently violent act.

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

In addition, an "act of terrorism" must constitute "a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States . . . ."[79] Here, too, the Amended Complaint falls short. It relies on three predicate criminal violations: 18 U.S.C. § 2339A (Count One), 18 U.S.C. § 2339C (Count Three), and 50 U.S.C. § 1705(a) (Count Four)18 U.S.C. § 2339B but fails to adequately plead a violation of any of them [80]

[79] 18 U.S.C. § 2331(1)(A).

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

(a) Applicable Law

Section 2339A penalizes providing "material support" with the knowledge or intent that it will be used to carry out certain specified terrorist crimes enumerated in the statute.[81] Significantly, "the defendant must have 'provide[d] support or resources *with the knowledge or intent* that such resources be used to commit [one of the] specific violent crimes' listed in the statute.[82] Put another way, the statute "criminalizes only provision of material support 'knowing or intending that [it] be used in preparation for, or in carrying out' certain *specific* crimes," and not merely generalized "material support" to terrorists.[83]

Section 2339C penalizes "willfully" providing or collecting funds knowing or intending that the funds will be used for: (1) "an act which constitutes an offense within the scope of a treaty specified in subsection (e)(7), as implemented by the United States" or (2) "any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act[.]" 18 U.S.C. § 2339C(a)(1)(A) & (B).

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[81] *United States v. Awan*, 459 F. Supp. 2d 167, 179 (E.D.N.Y. 2006). Notably, the Amended Complaint has *dropped* the count against BVSPC, for predicate violations of 18 U.S.C. § 2339B which criminalizes material support to an FTO. This is unsurprising as the Taliban is not an FTO; but it is also important for another reason. Section 2339B is the only provision of the ATA that criminalizes mere provision of funds to a terrorist organization, without regard to whether those funds are used in an attack or intended to be used in an attack. The counter-balance to Section 2339B is that it requires the donations go to a specified list of designated foreign terrorist organizations. On the other hand, as discussed herein, Sections 2339A and 2339C require that the material support or financing be intended to further specific crimes, not a group generally.

[82] *United States v. Mehanna*, 735 F.3d 32, 43 (1st Cir. 2013 (quoting *United States v. Stewart*, 590 F.3d 93, 113 (2d Cir. 2009)).

[82] *Id.* (quoting *United States v. Stewart*, 590 F.3d 93, 113 (2d Cir. 2009) (emphasis in *Stewart*)).

[83] *Awan*, 459 F. Supp. 2d at 179 (emphasis added) (quoting § 2339A).

Finally, Section 1705(a) requires Plaintiffs to show that BVSPC "willfully violate[d], attempt[ed] to violate, conspire[d] to violate, or cause[d] a violation of regulations issued pursuant to" the International Emergency Economic Powers Act ("IEEPA").[84] The relevant regulations prohibit U.S. persons from (1) "transfer[ing], pa[ying], export[ing], withdraw[ing] or otherwise deal[ing] in" property that belongs to the Taliban or (2) "engag[ing] in any transaction" with the Taliban.[85]

(b) Discussion

First, as to Sections 2339A and 2339C, the Amended Complaint does not allege that BVSPC made any specific payments at all to the Taliban, and as to Section 1705(a), the Amended Complaint contains no non-conclusory allegation that BVSPC "engaged in [a] transaction" with the Taliban or dealt in Taliban "property."

Second, for each count, the Amended Complaint fails to allege that any payments were made with the requisite state of mind. As to Sections 2339A and 2339C, the Amended Complaint contains no non-conclusory allegations that any such payments were made knowing or intending that the money would go towards a *specific* crime.[86] Indeed, even the statutory allegations section of the Amended Complaint asserts that the Defendants made payments "to the Taliban *that* financed the Taliban's terrorist attacks[,]"[87] not that the intent behind such payments was *to finance* any such attacks. Similarly, for Section 1705(a), the Amended Complaint must adequately allege

[84] *See* Owens *v. BNP Paribas, S.A.*, 235 F. Supp. 3d 85, 88 n.3 (D.D.C. 2017).

[85] 31 C.F.R. §§ 594.201, 594.204

[86] *See Linde*, 384 F. Supp. 2d at 586 n. 9 (observing that § 2339A and § 2339C "require knowledge or intent that the resources given to terrorists are to be used in the commission of terrorist acts")*; accord Mehanna*, 735 F.3d at 43; *Awan*, 459 F. Supp. 2d at 179

[87] Am. Compl. ¶ 2571 (Count One); ¶ 2585 (Count Three)(emphasis added).

"willfulness," meaning conduct undertaken with "knowledge of illegality" but alleges no transaction between BVPSC and known Taliban members or involving Taliban property[88]

Third, as to Section 2339C specifically, that statute applies only to acts either (i) constituting an offense within the scope of certain treaties or (ii) "intended to cause death or serious bodily injury to a *civilian*, or to any other person *not* taking an active part in the hostilities in a situation of armed conflict."[89] With respect to (ii), here the injuries here occurred almost entirely to military service members, not civilians. Further, the injuries clearly occurred during the course of an "armed conflict" in Afghanistan.[90] And while sub-category (i) is not, on its face, limited to civilians, the Amended Complaint alleges the relevant treaty is "the International Convention on Terrorist Bombings, as implemented by . . . 18 U.S.C. § 2332f." Even setting aside that many of the plaintiffs' injuries were *not* caused by bombings, Section 2332f explicitly excludes "the activities of armed forces during an armed conflict" and "activities undertaken by military forces of a state in the exercise of their official duties."[91] And, again, almost all of the injuries alleged in the Amended Complaint were undertaken in an armed conflict or by military forces.

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[88] *United States* v. *Quinn*, 401 F. Supp. 2d 80, 101 (D.D.C. 2005); *see also United States v. Quinn*, 403 F. Supp. 2d 57, 60 (D.D.C. 2005) (explaining that "IEEPA's criminal provision 'demands proof that a defendant acted with knowledge of the illegality of his actions'" or in other words the "voluntary, intentional violation of a known legal duty").

[89] 18 U.S.C. § 2339C(a)(1)(A)-(B) (emphasis added).

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

[91] 18 U.S.C. 2332f(d)(1)-(2).

In short, the Amended Complaint fails, on multiple bases, to plead that BVSPC committed an act of international terrorism.

B. The Amended Complaint Fails to Plead the ATA's Rigorous Causation Standard

The allegations against BVSPC in Amended Complaint also fail to meet the ATA's "rigorous"[92] causation requirement.

1. Applicable Law

The ATA's plain text requires that a plaintiff's injury be "by reason of" the defendant's "act of international terrorism."[93] This "by reason of" language means that a plaintiff must show the defendant's actions were the proximate cause of his injury, meaning that (1) the defendant's conduct was a "substantial factor in the sequence of events that led to [a plaintiff's] injuries" and (2) plaintiff's injury was "reasonably foreseeable or anticipated as a natural consequence" of the defendant's conduct.[94] As Judge Leon noted in recently dismissing an ATA case against American companies operating in Iraq, this standard demands that a defendant's "alleged wrongful conduct must have 'led directly' to the plaintiffs' injuries."[95] Otherwise, the ATA would "allow recovery for even remote causes" of a terrorist attack and impose liability that "go[es] forward to eternity."[96]

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

[93] *See* 18 U.S.C. § 2333(a) ("Any national of the United States injured in his or her person, property, or business *by reason of* an act of international terrorism . . . may sue therefor in any appropriate district court of the United States . . . ." (emphasis added)).

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

[95] *Atchley* v. *AstraZeneca UK Limited*, No. 17 Civ. 2136 (RJL), 2020 WL 4040345, at *8(D.D.C. July 17, 2020); *accord Crosby*, 921 F.3d at 627 n.6; *see also, e.g.*, *Owens*, 897 F.3d at 276; *Brill*, 2020 WL 1200695, at *1; *Kemper*, 911 F.3d at 392; *Rothstein*, 708 F.3d at 97; *O'Sullivan*, 2019 WL 1409446, at *6.

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

The ATA's causation requirements are particularly stringent when the defendant did not directly pay terrorist groups to conduct an attack. In *Owens* v. *BNP Paribas,* the D.C. Circuit explained that the ATA's "substantial factor" element requires a showing of "sufficient directness" between a defendant's actions and a plaintiff's injuries.[97] That means, when, as here, a defendant is "more than one step removed from a terrorist act or organization," a plaintiff claiming direct liability under the ATA "must allege some facts demonstrating a *substantial connection between the defendant and terrorism*."[98]

For instance, in *Owens*, the plaintiffs alleged that BNP Paribas ("BNPP") provided financial services to Sudan in violation of U.S. sanctions; that Sudan aided al-Qaeda by providing a base of operations, financing, and intelligence gathering services; and that al-Qaeda injured plaintiffs, by bombing two U.S. embassies in East Africa, close to Sudan.[99] The D.C. Circuit affirmed dismissal of the compliant, because there was "no nonconclusory allegation in the Amended Complaint that plausibly shows that the moneys BNPP transferred to Sudan were in fact sent to al-Qaeda or that Sudan would have been unable to fund the attacks without the cash provided by BNPP."[100] Notably, the D.C. Circuit rejected the plaintiffs' attempt to satisfy the ATA's proximate causation standard by using a "money is fungible" theory. It explained that "to satisfy proximate causation under the ATA, Plaintiffs' complaint needs to adequately plead facts alleging that BNPP *substantially* contributed to Plaintiffs' injuries because the funds to Sudan *actually* [were] *transferred* to al Qaeda . . . and aided in the embassy bombings."[101]

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

[98] *Id.* at 275 (emphasis added).

[99] *Id.* at 273–74.

[100] *Id*. at 276 (internal quotation omitted).

[101] *Id.* (internal quotation omitted; emphasis and alteration in original).

Other federal courts of appeals have also rejected ATA claims where intermediaries stood between the defendants and the injuries suffered by plaintiffs. In *Rothstein v. UBS AG*, for example, the plaintiffs claimed that, by providing banking services to Iran (a designated state sponsor of terrorism), a bank was responsible for attacks carried out by Hizbollah and Hamas, both of which Iran supported. The Second Circuit rejected this causal chain. It noted the Amended Complaint did not allege (i) that the bank itself participated in any attacks or provided money directly to a terrorist organization, (ii) that money "transferred" by the bank "to Iran was given to Hizbollah or Hamas," or (iii) that if the bank not transferred money to Iran, "Iran . . . would not have funded the attacks in which plaintiffs were injured."[102]

2. The Amended Complaint Fails to Show a "Direct[]" "Substantial Connection" Between BVSPC or the Joint Venture's Actions and Any Plaintiff's Injuries

Like the complaints dismissed in *Owens*, *Rothstein*, and *Atchley* (among other cases), the Amended Complaint here fails to show a sufficiently "substantial," "direct[]" connection between any action of (i) BVSPC or the Joint Venture and (ii) any plaintiff's injuries, much less each plaintiff's injuries.

First, there is no non-conclusory allegation that BVSPC ever made a direct payment to the Taliban. This fact alone—which means any BVSPC funds that reached the Taliban went through one or more intermediaries—weighs heavily towards dismissal.[103]

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

[103] *Atchley*, 2020 WL 4040345, at *8 ("[A]s our Circuit Court and others have recognized, because 'the presence of an independent intermediary' makes a defendant 'more than one step removed from a terrorist act or organization,' it 'create[s] a more attenuated chain of causation ... than one in which a supporter of terrorism provides funds directly to a terrorist organization.'" (quoting *Owens*, 897 F.3d at 275)).

Second, Plaintiffs' theory involves not one, but multiple intermediaries between BVSPC, the Joint Venture, and any Taliban attack. These intermediaries (allegedly) included the security or construction subcontractors who were extorted, apparently by "cutout[s]" or front[s][104] of insurgent groups; local Taliban officials behind the alleged cutouts; and money brokers or others who brought any such funds to the Taliban's central coffers. Plaintiffs do not allege that all of these intermediaries "exist solely to perform terrorist acts."[105] Indeed, Plaintiffs' theory is that Defendants made these payments via subcontractors who were working on otherwise legitimate (and necessary) infrastructure projects. Even the Taliban "itself is involved in substantial non-terrorist activities."[106] Plaintiffs allege, for example, that the Taliban ran "shadow" governments in 33 of Afghanistan's 34 provinces.[107] The presence of multiple intermediaries, and the fact that these intermediaries had multiple uses for any funds received, further eliminates any direct, substantial connection between BVSPC and the Taliban.

Third, *Owens* requires that the "Complaint plausibly show[] . . ." that the Taliban "would have been unable to fund the attacks . . . . without the cash provided" by BVSPC.[108] The Amended Complaint comes nowhere near showing this. While the Amended Complaint makes allegations about amounts the Taliban received from contractors *generally*, this is not a conspiracy case. The issue is not whether contractor funds *generally* were necessary to support attacks in the Amended Complaint, but whether the specific BVSPC or Joint Venture funds were necessary. And the

[104] Am. Compl. ¶ 273 (describing "Mr. Arafat"); Am.Compl. ¶ 277 (describing HKZCC).

[105] *Kemper*, 911 F.3d at 392

[106] *Kemper*, 911 F.3d at 393.

[107] *See, e.g.*, Am. Compl. ¶¶ 49, 63, 89, 90 (discussing Taliban "shadow" governments); ¶ 111 (discussing the Taliban's top-down organizational structure).

[108] *Owens*, 897 F.3d at 266.

Taliban's other sources of income dwarfed any funds derived from BVSPC or the Joint Venture. These other sources of income included $155 million in a single year from the narcotics trade, $360 million from the extortion of a single Afghan trucking company, extortion of other contractors, harvest and wealth taxes on local Afghans, and funds received from allies and donors in foreign countries, including (according to Plaintiffs in another action they filed in this court) Iran.[109] Similarly, one of Plaintiffs' primary sources regarding the Haqqani Network describes that entity as receiving funds from (i) "donations" from Afghan and foreign supporters; (ii) Pakistani military and intelligence organizations; (iii) "illicit activity," including extortion, robbery, narcotics trafficking, and kidnap for ransom; and (iv) "licit activity," including an Islamic-school network, import-export businesses, transport and smuggling operations, construction and real estate, and the chromite trade.[110] In short, given these other sources of income, the Amended Complaint cannot show that BVSPC derived-funds were necessary to fund any of the attacks in the Complaint, much less all of them.

Fourth, the Amended Complaint asserts a principle of limitless liability that would hold any entity that paid any amount, through any other entity, liable for any Taliban attack, anywhere, anytime. It lumps BVSPC and the Joint Venture together with over a dozen defendants (among whom there is no alleged conspiracy) and 200-plus attacks occurring over an almost ten-year period. The Court should reject this effort. For one, it simply highlights lack of a "substantial connection" between BVSPC and any particular incident in the Amended Complaint, much less all of them.

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[109] *See* U.N. Security Council, First Report of the Analytical Support and Sanctions Monitoring Team, Sept. 5, 2012 ¶¶ 36-40, *cited in Am. Compl. at fns.* 75, 87, 96, 116; *Cabrera* v. *Iran*, No. 19 Civ. 3835 (JDB) (D.D.C.. Dec. 27, 2019).

[110] *See* Gretchen Peters, Haqqani Network Financing: The Evolution of an Industry, *cited in* Am. Compl. at *fns* 92, 103, 114, 237, 332 (describing the Haqqani Network's sources of income as

Moreover, each Defendant's work is not "comparable."[111] Defendants performed different kinds of work, on different projects, at different times, in different geographies.[112] The Amended Complaint's apparent definition of "comparable" would seemingly hold anyone working anywhere in Afghanistan—including presumably the U.S. military itself—liable for any and every attack committed by the Taliban. And even if the circumstances were "comparable," a plaintiff cannot avoid Rule 12(b)(6)'s requirements through guilt-by-association allegations.[113] The Amended Complaint must allege facts specific to BVSPC to state a claim against BVSPC.[114]

In short, plaintiffs fail to allege, and cannot allege, a direct, substantial connection between BVSPC or the Joint Venture and any Taliban attack, much less each of the 200-plus attacks listed in the Amended Complaint. Accordingly, the allegations in the Amended Complaint fails to meet the ATA's rigorous proximate cause standard.

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[111] Am. Compl. ¶ 249.

[112] For example, even with respect to BVSPC and the Joint Venture, Khost, the terminus location of the Gardez-Khost Road is almost 450 miles from Kajaki, site of the Kajaki Dam. While BVSPC worked on energy and infrastructure contracts, defendant DAI is alleged to have worked largely on governance contracts. Am. Compl. ¶ 182, and defendant Janus Global is alleged to have worked on explosive ordinance disposal contracts, Am. Compl. ¶ 230. The ArmorGroup Defendants are alleged to have worked on a series of security and infrastructure contracts, including a contract in Shindad, in Herat Province in western Afghanistan, Am. Compl. ¶ 147, approximately 500 miles from Gardez in eastern Afghanistan.

[113] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement." (internal citation and quotation omitted)); *accord Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001) (per curiam) (allegations about "defendants" deficient where realities of time and place "make plain that all of the defendants could not have participated in every act complained of"); *Toumazou*, 71 F. Supp. 3d at 21 ("[A] plaintiff cannot satisfy the minimum pleading requirements . . . by 'lumping all the defendants together in each claim and providing no factual basis to distinguish their conduct.'" (quoting *Atuahene*, 10 Fed. App'x at 34).

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

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

The Amended Complaint's secondary liability claims, Counts Five and Six, also fail. Nowhere does the Amended Complaint allege attacks by a foreign terrorist organization or "FTO," as the ATA requires. More fundamentally, the allegations lack the most basic requirement of aider-and-abettor liability: the Amended Complaint does not and cannot allege that BVSPC or the JV provided substantial assistance to a qualifying FTO, in the hopes of making that FTO succeed in its terrorist mission.[115]

A. The Secondary Liability Claims Fail Because The Taliban Is Not An FTO

Aiding and abetting liability under the ATA exists only for injuries from terrorist acts "committed, planned, or authorized by an organization that had been designated by the United States as a foreign terrorist organization" or FTO.[116] Yet, the Taliban has never been an FTO. And the Haqqani Network only became an FTO on September 19, 2012, six months *after* any relevant factual allegation in the Amended Complaint relating to BVSPC or the Joint Venture.[117]

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[115] *See United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938) (Aider-and-abettor liability "demand[s] that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used — even the most colorless, 'abet' — carry an implication of purposive attitude towards it.") (Hand, J.).

[116] 18 U.S.C. § 2333(d)(2).

[117] Specifically, the Amended Complaint alleges that the Joint Venture made payments to the Haqqani Network and Arafat in connection with its work on the Gardez-Khost Highway. Am. Compl. ¶ 270. As the Complaint acknowledges, however, work on the Gardez-Khost highway ended in March 2012. Am. Compl. ¶ 271. The ATA limits aiding and abetting liability to attacks by an organization "that *had been designated as a foreign terrorist organization . . . as of the date* on which" the attack was committed, planned, or authorized. 18 U.S.C § 2333(d)(2) (emphasis added).

The Amended Complaint attempts to cure this flaw by blending the Taliban with al-Qaeda, which is an FTO, "and other allied FTOs."[118] This effort, a self-serving fiction unique to this Amended Complaint, does not work for several reasons.

First, Congress committed FTO designations to the Executive Branch, and the Executive Branch has chosen not to designate the Taliban as an FTO.[119] It would be inappropriate for this Court to nonetheless treat any Taliban attack as an attack by an FTO.

Second, as in the recent *Atchley* decision in this District, most of the claimed attacks in this case are not alleged to have involved an FTO like al-Qaeda. In *Atchley*, "[t]he best plaintiffs [could] muster is that Hezbollah-affiliated individuals were involved in 22 out of the 300-plus attacks at issue, injuring 35 of 395 individuals."[120] Here, the best Plaintiffs' counsel can muster is that al-Qaeda or the Kabul Attack Network was involved in 67 out of 238 attacks at issue.[121] "For the remaining attacks—which constitute the vast majority—[Plaintiffs' counsel] offer[s] no concrete factual allegations that [al-Qaeda or the Kabul Attack Network] 'planned' or 'authorized' them."[122] They instead offer broad claims about a "terrorist syndicate"[123] in which al-Qaeda "Committed, Planned, and Authorized" the claimed attacks.[124] As in *Atchley*, this "threadbare recital" is not enough to attribute all Taliban attacks to an FTO.[125]

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[118] Am. Compl. ¶¶ 412-512.

[119] Background Section I.A.

[120] *Atchley* at 23.

[121] Am. Compl. ¶¶ 516, 518, 520. As in *Atchley*, while these 67 claims adequately plead the FTO requirement, they fail to establish other statutory elements. *Atchley* at 24 n.6.

[122] *Atchley* at 23.

[123] *See, e.g.*, Am. Compl. ¶ 412.

[124] Am. Compl. ¶¶ 464-512.

[125] *Atchley* at 24 (quoting *Iqbal*).

Third, again as in *Atchley*, Plaintiffs' counsel allege that al-Qaeda provided general support to the Taliban by authorizing its tactics and recruiting and training its members.[126] But, as in *Atchley*, "those allegations do not establish that [al-Qaeda] 'planned' or 'authorized' the attacks *at issue*."[127] As Judge Leon explained, "[t]hat dog won't hunt! 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."[128] "Unfortunately for plaintiffs," Judge Leon added, "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."[129]

B. The Amended Complaint Fails to Plead Substantial Assistance

Even if the Amended Complaint "established that an FTO committed, planned, or authorized some of the attacks, [it] fail[s] to plead that [BVSPC or the Joint Venture] substantially assisted" *the FTO* in carrying out that attack.[130] Aiding and abetting liability requires that "the defendant must knowingly and substantially assist the principal violation."[131] The "substantial assist[ance]" element is analyzed under the factors set out in *Halberstam v. Welch.*[132] These factors are (1) the nature of the act encouraged, (2) the amount of assistance given by defendant, (3) defendant's presence or absence at the time of the tort, (4) defendant's relation to the principal, (5)

[126] Am. Compl. ¶¶ 464-512.

[127] *Atchley* at 24 (emphasis added).

[128] *Atchley* at 25 (internal quotation marks omitted).

[129] *Id.* (first emphasis in original, second added).

[130] *Atchley*, 2020 WL 4040435 at *11.

[131] *Siegel*, 933 F.3d at 223 ((quoting *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983)).

[132] 705 F.2d 472 (D.C. Cir. 1983).

defendant's state of mind, and (6) the period of defendant's assistance.[133] And, as Judge Leon explained in *Atchley,* such substantial assistance must be provided *to the FTO*.[134]

Here, the Amended Complaint fails to show any relationship—much less substantial assistance—between (i) BVSPC or the Joint Venture on the one hand and (ii) Al Qaeda or the post-FTO designation Haqqani Network on the other.

As to the first and fifth factors, the "nature of the act encouraged" factor "dictates what aid might matter, i.e., be substantial," and the "state of mind" factor examines whether the defendant was "one in spirit" with the principal tortfeasor.[135] To illustrate both of these factors, the *Halberstam* court cited a case involving an aider and abettor's "war cry for more blood," specifically his shouts of "kill him" and "hit him more," during an assault.[136] The court stated this act that "may well have contributed to the [primary tortfeasor's] assault,"[137] and also provided evidence of "one[ness] in spirit" between the defendant and the principal.[138] Here, the Amended Complaint does not and could not plausibly allege that BVSPC or the Joint Venture encouraged or desired any attacks on Americans or were "one in spirit" with al Qaeda, or anyone else seeking to commit such attacks. To the contrary, the Amended Complaint contains no allegations about any interaction between BVSPC and al-Qaeda, and repeatedly uses the words "extort" and

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[133] *Id.* at 484-85.

[134] *Atchley*, 2020 WL 4040435 at *11 ("But plaintiffs allege that defendants provided medical goods and devices to the Ministry, not JAM [the FTO in that case]."). And even if the *Halberstam* factors are analyzed as to whether BVSPC or the Joint Venture substantially assisted the non-FTO Taliban, the Amended Complaint still does not establish substantial assistance for the reasons stated herein.

[135] *Id.* at 484.

[136] *Id.* at 481 (citing *Rael v. Cadena*, 93 N.M. 684, 604 P.2d 822 (1979))

[137] *Id.* at 484.

[138] *Id.*

"extortion" to describe the alleged payments to the Taliban,[139] meaning that any payments were "induced by wrongful use of force, fear, or threats."[140]

As to the second and third factors—the "amount of assistance given" and the "defendant's presence at the scene"—there is no allegation that BVSPC or the Joint Venture was present at any attack or that either provided, for example, weapons or personnel for any attack.[141]

Similarly for the fourth factor—the defendant's relation to the principal—the Amended Complaint does not contain any non-conclusory factual allegation about *any* relationship between BVSPC or the Joint Venture and al-Qaeda or even the Taliban. While *Halberstam* indicated that "a relationship where the defendant had a position of authority could weigh in favor of substantial assistance,"[142] here, again, the Amended Complaint's theory is that the Taliban "extorted" BVSPC and the Joint Venture, not that either had a "position of authority" over al Qaeda or the Haqqani Network.

Finally, the "length of the relationship" factor can be seen as evidence of the "quality and extent of the[] relationship" and "it may afford evidence of the defendant's state of mind."[143] For instance, in *Halberstam*, the appellant, Hamilton, was held liable for a death during a burglary committed by her five-year live-in boyfriend, because she did the secretarial and bookkeeping work for his burglary business and enjoyed the obvious proceeds of that business.[144] Here, again,

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[139] Am. Compl. ¶¶ 63, 123, 278.

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

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

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

[143] *Halberstam*, 705 F.2d at 484.

[144] *Id.* at 475-76, 486.

the Amended Complaint alleges no relationship between BVSPC and al Qaeda. While the Amended Complaint alleges a lengthy relationship of extortion by the non-FTO Taliban,[145] it does not and could not allege that BVSPC or the Joint Venture acceded to the Taliban's goals during that time, or ever.

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

Unable to plead the Taliban into an FTO to which BVSPC or the Joint Venture substantially assisted, the Amended Complaint's last resort is a RICO theory that fails for two reasons.

First, "[a] private RICO plaintiff . . . must allege and prove a *domestic* injury to its business or property."[146] This means the "initial injury" must have occurred in the United States, not abroad.[147] But here every alleged injury was initially suffered in Afghanistan.[148] This includes injuries to family members residing in the United States, as illustrated by an analogous case. In *Nino v. United States*, U.S. border patrol shot and killed a man attempting to cross into the United States, and he landed with his legs on U.S. soil and his upper body in Mexico.[149] His wife and children sued under the Federal Tort Claims Act, which, like RICO, bars all claims based on injuries suffered in a foreign country.[150] The court explained in *Nino* that, where the claimed injury

[145] Am. Compl. ¶ 248 (alleging a policy of payments from 2006-14).

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

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

[148] Am. Compl. Part VI.

[149] 334 F. Supp. 3d 1108, 1113 (S.D. Cal. 2018).

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

was the loss of a relative, "the injury is 'suffered' . . . where the relative died."[151] Here, each of the attacks, injuries, and deaths occurred in Afghanistan.[152]

Second, the ATA limits secondary liability to injuries arising from "*an act* of international terrorism," singular, *by an FTO*.[153] The Amended Complaint attempts to collapse all the attacks of an alleged "Taliban-al-Qaeda Campaign," comprising many attacks in many locations over many years, into a single act by an FTO (which the Taliban is not).[154] Yet, at the same time, to satisfy RICO's requirement of "at least two acts of racketeering activity," the Amended Complaint cites attacks on U.S. nationals and interests.[155] Simply put, the Amended Complaint cannot assert that these attacks were a single "act" of terrorism under the ATA while at the same time claiming they count as multiple "acts" of racketeering activity under RICO.[156]

Indeed, Judge Leon specifically rejected this theory in *Atchley*, explaining: "To say the least, it would be quite unnatural to read that 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 16 years."[157] Supp. So too here. A RICO conspiracy involving hundreds or thousands of acts cannot be a single act of "international terrorism" for

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[151] 334 F. Supp. 3d at 1114.

[152] *See* Am. Compl. ¶ 2611.

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

[154] Am. Compl. ¶ 2610 ("The Taliban-al-Qaeda Campaign was an act of international terrorism.").

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

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

[157] *Atchley* at 25-26 (record citations omitted).

purposes of Section 2333(d)(2). Nor, again, is the alleged campaign "an act" by an FTO. The Secretary of State, again, has designated al-Qaeda, not the Taliban, as an FTO.

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

The ATA provides that "[n]o action shall be maintained under section 2333 of this title for injury or loss by reason of an act of war."[158] The ATA defines an "act of war" as "any act occurring in the course of . . . (B) armed conflict, whether or not war has been declared, between two or more nations; . . ."[159] As explained below, all claims based on Taliban attacks are barred under Part (B) because they seek recompense for acts of war during the course of Operation Enduring Freedom—an armed conflict between the United States and Afghanistan.

A. Operation Enduring Freedom Began as a War Between Nations

Operation Enduring Freedom began as a war between the United States and Afghanistan. President George W. Bush made that determination official in a February 7, 2002 memorandum ordering that, while the Geneva Conventions would not apply to al-Qaeda, "the provisions of Geneva *will apply to our present conflict with the Taliban*."[160] "By its terms," President Bush

[158] 18 U.S.C. § 2336(a).

[159] 18 U.S.C. § 2331(4). The ATA also defines an Act of War as an act "occurring in the course of armed conflict between military forces of any origin. . . ." 18 U.S.C. § 2331(4)(C). But a 2018 amendment to the ATA states, "the term 'military force' does not include any person that (A) has been designated as a . . . (ii) specially designated global terrorist . . . ." 18 U.S.C. § 2331(6). Because the term "military force" only appears in Part (C) of Section 2333(4), and not Part (B), the 2018 amendment does not modify Part (B).

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

explained, "Geneva applies to conflicts involving 'High Contracting Parties,' *which can only be states.*"[161]

The Supreme Court later recognized, in *Hamdan v. Rumsfeld*, that "[t]he President has stated that the conflict with the Taliban is a conflict to which the Geneva Conventions apply."[162] As the D.C. Circuit had explained in *Hamdan*, the construction and application of treaty provisions by the Executive Branch was entitled to "great weight"[163] "The President's decision to treat our conflict with the Taliban separately from our conflict with al Qaeda is the sort of political-military decision constitutionally committed to him."[164] Thus, "[t]o the extent there is ambiguity about the meaning of Common Article 3 as applied to al Qaeda and its members," the Court held that "the President's reasonable view of the provision must therefore prevail."[165]

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[161] *Id.* (emphasis added). Likewise, in January 2006, the U.S. Defense Department's General Counsel wrote to U.S. Central Command, "for purposes of addressing this question [of contracting private security companies to protect U.S. personnel], it may be assumed that military operations both in Afghanistan and Iraq *began as international armed conflicts and continue to constitute international armed conflicts*." Exhibit 2, Memorandum from the U.S. Department of Defense Deputy General Counsel for International Affairs on Request to Contract for Private Security Companies in Iraq, to the Staff Judge Advocate, U.S. Central Command, 2 (Jan. 10, 2006) (emphasis added). He continued, "Currently, operations both in Iraq and Afghanistan are in the transition, or stability operations, phase of *an international armed conflict*." (emphasis added).

[162] 548 U.S. 557, 629 n.60 (2006).

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

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

[165] *Id.* at 42.

This Court has similarly acknowledged the reality that, "Of course, the Taliban was the 'Afghani Government' in 2001."[166] It has described the "Taliban government" as having "overthr[own] the prior government" of Afghanistan.[167] In *Mousovi v. Obama*, this Court described its assumption of power: "In the fall of 1996, a Taliban force . . . seized control of Kabul and overthrew the prior government. Thereafter, the Taliban established the Islamic Emirate of Afghanistan and governed by a strict interpretation of Islamic Sharia law."[168] The Islamic Emirate of Afghanistan controlled about 90% of the country and, as of September 11, 2001, was recognized by Pakistan, Saudi Arabia, and the United Arab Emirates.[169]

Thus, the view of the Executive Branch, the Supreme Court, the D.C. Circuit, and this Court is that Operation Enduring Freedom began an armed conflict between two nations.

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

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

[168] *Id.* at *1.

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

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

Operation Enduring Freedom continued until December 28, 2014, when the United States marked the end of its combat mission in Afghanistan.[170] Thus, it covers all of Defendants' alleged conduct giving rise to Plaintiffs' claims.[171]

The Amended Complaint argues at length that, at some point during Operation Enduring Freedom, the situation changed from an armed conflict between nations to some lesser form of hostility.[172] That is not an inquiry this Circuit entertains. As the D.C. Circuit explained in *Al-Alwi v. Trump*, it is not a court's role to parse changes in military hostilities during an ongoing conflict.[173] *Al-Alwi* involved a habeas corpus suit by a Guantanamo Bay detainee captured fighting in Afghanistan.[174] Mr. Al-Alwi argued that the transition from Operation Enduring Freedom to Operation Freedom's Sentinel ended the conflict in Afghanistan and, in turn, the United States's authority to detain him under the 2001 Authorization for the Use of Military Force.[175] The D.C. Circuit disagreed. It explained that "[t]he 'termination' of hostilities is 'a political act.'"[176] "Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended," the Court said, "is a question too fraught with gravity even

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

[171] Am. Compl. ¶ 6 ("Each Defendant financed the Taliban through protection payments from at least 2008 until at least 2013.").

[172] Am. Compl. ¶¶ 419-29.

[173] 901 F.3d 294, 300 (D.C. Cir. 2018).

[174] *Id.* at 295.

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

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

to be adequately formulated when not compelled."[177] Thus, the Court declined to engage in that inquiry, citing the Supreme Court's decision in *Ludecke v. Watkins* to defer to political branch determination whether "war with Germany" persisted despite Germany's surrender.[178]

Similarly, in *Al-Bihani v. Obama*, the D.C. Circuit affirmed denial of habeas corpus for another Guantanamo detainee who argued "that the conflict in which he was detained, an international war between the United States and Taliban-controlled Afghanistan, officially ended when the Taliban lost control of the Afghan government."[179] The D.C. Circuit again did not engage, writing, "The determination of when hostilities have ceased is a political decision, and we defer to the Executive's opinion on the matter, at least in the absence of an authoritative congressional declaration purporting to terminate the war."[180] Requiring a clear pronouncement that the war had ended, the Court wrote, would be "at odds with the wide deference the judiciary is obliged to give to the democratic branches with regard to questions concerning national security."[181]

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

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

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

[179] 590 F.3d 866, 871 (D.C. Cir. 2010).

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

[181] *Id.* at 875.

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

CONCLUSION

The Court should dismiss the Amended Complaint against BVSPC with prejudice.

Dated: September 10, 2020

Respectfully submitted,

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Index of Exhibits

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